

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

PHYLLIS BALL, et al., :  
 :  
 : Case No. 2:16-cv-282  
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 : Plaintiffs, :  
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 : Chief Judge Edmund A. Sargus, Jr.  
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 : v. :  
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 : Magistrate Judge Elizabeth P. Deavers  
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 : JOHN KASICH, et al., :  
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 : Defendants, :  
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 : and :  
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 : OHIO ASSOCIATION OF :  
 : COUNTY BOARDS :  
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 : Defendant-Intervenor, :  
 :  
 : and :  
 :  
 : GUARDIANS OF HENRY LAHRMANN, :  
 : et al., :  
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 :  
 : Defendants-Intervenors and :  
 : Third-Party Plaintiffs, :  
 :  
 : v. :  
 :  
 : OHIO DISABILITY RIGHTS LAW :  
 : AND POLICY CENTER, INC. d/b/a :  
 : DISABILITY RIGHTS OHIO, :  
 :  
 :  
 : Third-Party Defendant. :

**CROSSCLAIMS AND THIRD-PARTY COMPLAINT  
OF INTERVENOR-GUARDIANS**

For their Crossclaims against the Defendants – the term “Defendants” is used hereinafter to collectively include and refer to: (a) John Kasich, Governor of the State of Ohio, John Martin, Director of the Ohio Department of Developmental Disabilities (“DODD”), and Barbara Sears,

Director of the Ohio Department of Medicaid (“ODM”), (each being named in their official capacity and collectively referred to hereinafter as the “State Defendants”), and (b) the Ohio Association of County Boards Serving People with Disabilities (“OCB”), on behalf of all 88 of Ohio’s County Boards of Developmental Disabilities (“DD Boards”) – and their Third-Party Complaint against Ohio Disability Rights Law and Policy Center, Inc. d/b/a Disability Rights Ohio (“DRO”), the Intervenor-Guardians (hereinafter referred to as the “Guardians”), allege and state as follows:

## I. INTRODUCTION

1. Plaintiffs filed this lawsuit citing, and premised upon, the Supreme Court’s landmark decision – *Olmstead v. L.C.*, 527 U.S. 581 (1999) – which interpreted the Americans with Disabilities Act (“ADA”), 42 U.S.C. 12132 *et seq.* (*Complaint* at ¶ 1; ECF. No. 1).

2. But in *Olmstead*, Justice Ginsburg wrote: “We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. . . . Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it.” *Id.* at 601-02; *see also Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) (“For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all their needs is as much liberty as they ever will know.”).

3. Similarly, in his concurrence, Justice Kennedy warned that:

It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision. . . . In light of these concerns, if the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition.

*Id.* at 610; *see also* 28 C.F.R. pt. 35, App. A, p. 450 (1998) (“Persons with disabilities must be provided the option of declining to accept a particular accommodation.”).

4. Fast forward 20 years and the tragedy Justice Kennedy foretold is unfolding in Ohio. Today it is the so-called “institutional” living choice – not the “community” choice – that is systematically denied by the Defendants’ administration, management, and funding of Ohio’s service system for people with intellectual and developmental disabilities (“DD”).

5. But as this Court has noted, it is the institutional choice – meaning Intermediate Care Facilities for Individuals with Intellectual Disabilities (“ICFs”) – that is the “entitlement” for Medicaid eligible DD residents. *Opinion and Order*, March 30, 2018, fn. 1 at 5 (ECF No. 303).

6. By law, the “community” alternative to the ICF entitlement – called a “waiver” – is dependent on a state offering the ICF services. 42 U.S.C. § 1915(c). Waiver services are not an entitlement, meaning states are not required to offer waiver services. *Id.* As such, a state can provide ICF services without offering waiver services, but it cannot offer waiver services without offering ICF services. *Id.*

7. The Centers for Medicare and Medicaid Services (“CMS”), which is an agency of the United States Department of Health and Human Services (“HHS”), states on its website that:

States may not limit access to ICF/ID service, or make it subject to waiting lists, as they may for Home and Community Based Services (HCBS). Therefore, in some cases ICF/ID services may be more immediately available than other long-term care options. Many individuals who require this level of service have already established disability status and Medicaid eligibility.

<https://www.medicaid.gov/medicaid/ltss/institutional/icfid/index.html> (last visited September 4, 2018).

8. CMS continues by stating: “ICF/ID is the most comprehensive benefit in Medicaid” and concludes by stating: “There are few resources like an ICF/ID under any payment source.” *Id.*

9. But in Ohio, even though the ICF option is an entitlement, most Medicaid eligible DD residents (and their guardians) only learn of the ICF option – if they ever do – when they are selected for home and community based waiver services (“HCBS”), which are *not* an entitlement. This is because Defendants – working in conjunction with Disability Rights Ohio (“DRO”), Ohio’s “Protection & Advocacy” agency paid millions of taxpayer dollars to advocate for *all* disabled residents – actually thwart (and in some cases deny) the ICF choice.

10. As such, thousands of Medicaid eligible Ohioans are entitled to a service for years – the ICF setting – before they are informed of it. They are effectively denied “the most comprehensive benefit in Medicaid.” *Id.*

11. In fact, the main entity that interacts with eligible DD participants – DD Boards – claim they are not required to discuss or offer the ICF entitlement, and therefore routinely do not discuss or share the ICF entitlement option with eligible families.

12. OCB does not reference ICFs on its website, and few, if any, of the 88 DD Boards reference ICFs on their websites.

13. Likewise, although the Ohio Department of Medicaid (“ODM”) has much information on its website about waivers, it has no information about ICFs on its website. <http://medicaid.ohio.gov/> (visited Sept. 14, 2018).

14. The Guardians, like thousands of others, have placed their loved ones in ICFs – which are “homes” not “institutions” – not because the Defendants or DRO provided them necessary information about ICFs, but all too often in spite of them failing to do so.

15. As a result, today hundreds, perhaps thousands, of Medicaid eligible DD Ohioans would choose an ICF home, if only they were given – not kept ignorant of – the option.

16. Existing ICF residents are most threatened by Defendants’ unlawful practices and

policies because when ICF vacancies go unfilled, ICF providers are forced to close, thereby effectively denying the ICF entitlement to both prospective ICF residents and existing ICF residents, who often are forced to then find alternative (non-ICF) settings.

17. For those in ICFs, since at least 2012, Defendants – at the urging and threats of DRO – have engaged in an open and hostile campaign to limit and close ICFs, as detailed below.

18. The ICF “entitlement” is thus thwarted and threatened because the State of Ohio violates not just federal law, but also its own laws and regulations, in failing to properly and adequately communicate, administer, and fund the ICF “entitlement” – as Justice Kennedy presciently cautioned.

19. The irony is that Plaintiffs brought this case premised on the fiction that Defendants have an “overreliance on large ICFs” which they use to engage in “unnecessary institutionalization and segregation.” *Complaint* at ¶ 9. The truth is the opposite: Defendants fail to administer and adequately fund the ICF entitlement. As detailed below, Defendants and DRO are engaged in an active campaign to severely restrict, if not eliminate, the ICF entitlement.

20. The Guardians bring these claims for a simple reason: to ensure that the ICF right remains a right in practice, not theory. To do so, Defendants must actually offer it, properly administer it, and adequately fund it.

## **II. JURISDICTION AND VENUE**

21. This action is brought pursuant to: (i) Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132 *et seq.*, (ii) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, (iii) the Social Security Act, 42 U.S.C. § 1396n, (iv) the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (“DD Act”), 42 U.S.C. § 15041 *et seq.*, (v) the Fourteenth Amendment to the United States Constitution, and (vi) Ohio Revised Code (“O.R.C.”)

Chapters 5123, 5124, 5126, 5162-66.

22. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and to the extent necessary, 28 U.S.C. § 1367(a).

23. The Guardians' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201(a) and 2202, 42 U.S.C. § 12133, 29 U.S.C. § 794a, and 42 U.S.C. § 1983, and by Rules 57 and 65 of the Federal Rules of Civil Procedure.

24. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the acts and omissions giving rise to the claims occurred in the Southern District of Ohio.

### III. PARTIES

#### A. Guardians<sup>1</sup>

25. The Guardians – mostly mothers, fathers, brothers, and sisters – are the guardians of their loved ones (i.e., “wards”), each of whom is a Medicaid eligible DD resident receiving, or entitled to receive, ICF services in Ohio. Collectively, the Guardians (and their loved ones) are diverse individuals scattered throughout all parts of Ohio, who – as their stories below detail –

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<sup>1</sup> The “Guardians” are the guardians for ten DD residents. The Court granted their intervention on July 25, 2017. *See Opinion and Order* (ECF No. 261). In so doing, the Court also granted 99 other guardians’ (the “Additional Guardians”) motion to join in the Guardians’ motion to intervene, stating: “The Court finds well taken the Additional Guardians’ request to join the Guardians’ Motion to Intervene. The Additional Guardians’ interests align with the Guardians’ interests and their ability to intervene rises or falls with the Court’s ruling on the Guardians’ Motion to Intervene. Accordingly, the Court grants the Additional Guardians’ Motions to Join the Guardians’ Motion to Intervene.” *Id.* at 8. As such, the Guardians effectively represent a class of DD Medicaid-eligible individuals who: (a) already live in an ICF and want to remain there, or (b) lack sufficient information about their ICF entitlement, including its availability, to make an informed choice about it. Guardians reserve their right to seek class certification for their claims if necessary. *Cf. Cole v. City of Memphis*, 839 F.3d 530, 541-42 (6th Cir. 2016), *cert denied*, 137 S. Ct. 2220 (2017) (discussing how in Rule 23(b)(2) injunctive class actions, “a remedy obtained by one member will naturally affect the others”).

share a common characteristic: they desire the continued provision of ICF services for their loved ones, which entitlement has been systematically delayed, denied, or impeded by Defendants and DRO. Insofar as they have received ICF services, it is largely in spite of – not because of – the efforts and services provided by Defendants and DRO.

**Henry & Elizabeth Lahrmann**

26. Caroline and Bill Lahrmann are parents of Henry and Elizabeth Lahrmann, 18 year old twins who have been residents of a large ICF in Columbus, Ohio since August 2000. Caroline and Bill also have a 21 year-old non-disabled son, who is a college student.

27. Henry and Elizabeth were both born with a like condition consisting of profound mental retardation, quadriplegia, and intractable seizure conditions.

28. Henry functions at the level of a four to seven month old infant. Elizabeth functions at the level of a four month old infant. Henry and Elizabeth are non-verbal and receive all nutrition and medication through gastro-intestinal tubes and require various orthotic equipment to reduce deformity. They require total care in all aspects of daily living.

29. Henry and Elizabeth have thrived in their ICF, faring far better and achieving more than medical doctors had ever projected for them. This is attributed to the superior care they receive at their ICF, consisting of 24 hour nursing, physical and occupational therapy, and the oversight of a medical director, all whom have direct and significant experience in the care and treatment of individuals with profound intellectual and developmental disabilities.

30. Elizabeth and Henry each have Qualified Intellectual Disabilities Professionals (QIDP) assigned to them as direct service professionals who perform daily care. Each has been followed by behavioral specialists at different points in their lives for behaviors that could cause self-harm.

31. Despite their profound disabilities, Henry and Elizabeth are happy and well-adjusted. Henry enjoys propelling his chair, performing turns, and getting out of self-imposed impossible situations with a seeming desire to receive acclaim from onlookers. He loves “running” through the long halls of his ICF in his gait trainer and pedaling his adaptive tricycle. He relishes weekly swimming at his DD Board school for children with developmental disabilities.

32. Elizabeth enjoys the varied social interactions at her ICF home, hanging out with other residents, and engaging in conversations through her coos and giggles. She will laugh on cue at the punch line of any joke. She also loves her school and its many activities including weekly swimming.

33. Henry shares a four-bed room with three men of similar age. Elizabeth now shares only a three-bed room with two women of similar age, as one roommate recently moved to the 8-bed group home the ICF was required to build as a result of state-imposed downsizing efforts.

34. Caroline and Bill prefer their children sharing a room with three residents as opposed to a single room or even a room with only one other resident, as it ensures multiple staff are in the room overnight more frequently attending to residents, maximizing the safety of each resident. Given Henry and Elizabeth’s seizure conditions, need for repositioning, and other personal care needs, frequent staff attention overnight is critical.

35. Henry and Elizabeth are extremely social. They would feel isolated and “segregated” in a room alone or even with just one other resident as they seek and enjoy the company of their fellow residents and staff. Given their developmental age, Henry and Elizabeth have no concerns regarding privacy.

36. Caroline and Bill were given the option by the ICF to move Henry and Elizabeth into one of two new 8-bed ICF homes built near to the current facility. Henry and Elizabeth would



have had private bedrooms in this new home. Caroline and Bill declined this option due to the reasons noted above: namely, their quality of life would get worse in a smaller setting.

37. Though Caroline and Bill have no interest in Henry and Elizabeth receiving services in a waiver (or small ICF) setting, they remain on the Franklin County Board of Developmental Disabilities (FCBDD) "waiting list" for "waiver services," which list they have been on for 18 years.

38. In 2000, Henry and Elizabeth were placed on the FCBDD waiting list by Caroline and Bill signing a document for each infant at the urging of a FCBDD caseworker, who said there was "no downside to doing so." At the time, Caroline made clear that she did not want a small "community" group home placement for Henry and Elizabeth, but the caseworker indicated that she might need it when Henry and Elizabeth turned 18. Understanding that her infants' complex medical needs would be lifelong, Caroline knew a "community" group home placement would not provide the responsible on-site, 24-hour supervision, and expertise to safely care for her twins.

39. Caroline and Bill were not told of the ICF option when meeting with the FCBDD caseworker in 2000 when the family was seeking services – even though the ICF home was ten miles from Caroline and Bill's home and specialized in the care of children and adults with profound intellectual and developmental disabilities and medical needs.

40. Instead, Caroline and Bill only learned of the ICF from their phone book, not from any information provided by any of the Defendants.

41. At no time in over 18 years of interacting with FCBDD and in the four years of interacting with the State of Ohio has anyone advised or explained to Caroline or Bill that ICFs are a choice, let alone an entitlement. To the contrary, Caroline and Bill have received repeated messages from FCBDD, the State of Ohio, and DRO that the ICF option is being phased-out in

favor of community settings.

42. Even if Henry and Elizabeth can continue to reside in their current ICF home, Caroline & Bill are deeply concerned whether Henry and Elizabeth will maintain the same quality of life and supports that they currently receive and that have been in place at their ICF home for decades.

43. Because of laws and regulations passed since 2014, Henry and Elizabeth's ICF has been forced to downsize a portion of the setting to small 8 bed facilities. Future downsizing will require smaller ICF settings to be built in neighborhoods throughout Columbus away from the resources of the main campus. Even if Caroline and Bill can avoid Henry and Elizabeth's placement in an 8 bed, "isolated" setting, Henry and Elizabeth's care will suffer as the supports that they currently enjoy will be spread across multiple facilities throughout Columbus. Such a model threatens the ability of their ICF home to remain in business as costs increase dramatically. As a result, their ICF is forced to engage in private fundraising to support the ICF residents.

44. Specifically, the ICF provider spent more than \$2 million to build the two eight bed ICF facilities, money that could have been spent on updating the two 104 bed facilities for the benefit of 208 residents. One of the eight bed facilities was delayed in opening because the ICF could not maintain sufficient staff to open it. Such a circumstance causes great worry for Caroline and Bill because it threatens the sustainability of the economic model the State of Ohio is imposing on their children's ICF home.

45. The smaller ICF model – or a waiver setting – threatens the health, safety, quality of life, and social opportunities for Henry and Elizabeth. It would be impossible to duplicate the services Henry and Elizabeth receive in a small setting.

46. Alternatively, if the services Henry and Elizabeth receive in their current ICF could

be duplicated in a smaller setting, it would cost significantly more to do so because of the loss of economies of scale.

47. For Henry and Elizabeth, a so-called community (i.e., waiver) setting would be the most restrictive and segregated setting for them – as their quality of life would deteriorate – while an ICF is their least restrictive environment.

48. A large ICF is Bill and Caroline’s choice for their children.

**Elizabeth Colombo**

49. Robert and Susana Colombo are the parents and guardians of Elizabeth Colombo, a 26 year old woman with intellectual disabilities and behavioral concerns causing her to become physically aggressive at times. Since the age of 15, Elizabeth has resided in a 34-bed ICF in northern Ohio where she receives the supports necessary to manage her behaviors in an environment in which she could form relationships.

50. Prior to admission to the ICF, Robert and Susana cared for Elizabeth in their home. In Elizabeth’s early years, Susana provided care for her during the day. When Elizabeth became a teenager, the family reached out to the Medina County DD Board for assistance as Elizabeth’s aggressive behaviors were becoming increasingly difficult for the family to manage.

51. Elizabeth received a waiver for respite services so that caregivers could come in the family home 16 hours per week. Robert and Susana were not told of the ICF choice even though their daughter received a waiver.

52. Robert and Susana expressed concern to the DD Board caseworker regarding the reliability of caregivers. Rather than inform them of their ICF entitlement, the DD Board noted that if Robert and Susana did not live together, they would receive more hours.

53. Reaching out to Elizabeth’s neurologist’s office, a nurse informed Robert and

Susana about a facility that may be of assistance to them. Robert and Susana reached out to the facility to learn about its services, not understanding (or caring) that it was an ICF. After contacting and touring the ICF, Robert and Susana eventually sought admission for Elizabeth.

54. In the decade since her admission to the ICF, Elizabeth has learned to form relationships, which she was unable to do while living in her parent's "community" home.

55. For Elizabeth, a so-called community (i.e., waiver) setting would be the most restrictive setting for her – as her quality of life would deteriorate – while an ICF is her least restrictive environment.

56. A large ICF is Robert and Susana's choice for Elizabeth.

**Tim Collett**

57. Deborah Bixler is the guardian for Tim Collett, a 54 year-old-man with profound intellectual and developmental disabilities. Since 1980 Tim has lived at Brookside, a large ICF in Mason, Ohio. He shares a bedroom with three other men. Tim became a ward of the state after his aging mother was no longer able to care for him.

58. Until 2009, Tim was a ward of Advocacy and Protective Services, Inc. (APSI), the designated state agency that serves as guardian – the guardian of last resort – when someone lacks a family or friend guardian.

59. Deborah worked at Brookside caring for Tim – and many others – as a direct service professional (DSP) from approximately 1992 to 1995. She became motivated to be Tim's guardian because his medical problems worried her. She saw that he needed a caring person to support him during visits to the hospital, in the recovery process, and in making medical decisions, which APSI did not provide.

60. So in 2009, Deborah sought – and obtained – guardianship for Tim.

61. Tim is extremely happy and well cared for at Brookside. He is an active participant in holiday events and social outings. Deborah jokes that his social calendar is more active than hers.

62. In late 2015, Tim's ICF provider was planning to purchase property to build small ICFs away from the main campus. Residents from Tim's ICF were to be moved to these small settings. Deborah was opposed to the downsizing plans. She prefers Tim to have three roommates. Deborah also prefers the large setting with its long halls, wide doorways, and big activity room. Tim benefits from the increased socialization in this facility as well as the medical specialists and therapy supports.

63. Other guardians from Tim's ICFs shared Deborah's concerns. Deborah organized a meeting with guardians and invited Director John Martin of DODD to speak at the meeting and hear guardian concerns about the downsizing plans. Director Martin questioned why the facility was downsizing if the families were opposed to it.

64. Director Martin did not inform families that if the ICF provider did not downsize, the ICF would face financial penalties. Additionally, DODD can suspend new ICF admissions if the provider does not submit an approved downsizing plan and fulfill it in a manner satisfactory to DODD. O.R.C. §5124.70(F).

65. For Tim, a so-called community (i.e., waiver) setting would be the most restrictive setting for him – as his quality of life would deteriorate – while an ICF is the least restrictive environment.

66. A large ICF is Deborah's choice for Tim.

**Shawna Klein**

67. Richard Klein is the father and guardian of Shawna Klein, a 46 year old woman

with profound intellectual and developmental disabilities that lives at a 98 bed ICF in Dayton, Ohio operated by the Montgomery County Board of Developmental Disabilities.

68. Shawna resides in a 12-bed home with a roommate on the ICF's campus.

69. Shawna requires assistance in all aspects of daily living and is non-verbal.

70. Richard and Shawna's mother cared for her in their home until she was nine years old, accessing treatment with doctors and private local services for physical therapy and schooling/training.

71. When Shawna was six years old, Richard and Shawna's mother sought assistance with Shawna's schooling at the Greene County Board of DD. Shawna accessed various school programs with Green County and elsewhere until the age of nine but was unable to make significant strides.

72. In 1980, Richard and Shawna's mother looked for alternative placement for Shawna. Teachers at a private Dayton-area special needs school told them about the Springview Developmental Center. Shawna was admitted to Springview in 1981. Within two years of admission to Springview and the benefit of its active treatment, Shawna began to walk when assisted to a standing position and learned to feed herself with assistive prompts.

73. In 2003, the State of Ohio closed Springview. Shawna then moved to Montgomery Developmental Center for five years, and then to her present ICF residence.

74. At no time did Richard learn about the ICF option through interactions with his local DD Board, DRO, DODD, or ODM, none of which ever provided him information about this option that has served Shawna so well.

75. For Shawna, a so-called community (i.e., waiver) setting would be the most restrictive setting for her – as her quality of life would deteriorate – while an ICF is the least

restrictive environment.

76. A large ICF is Richard's choice for Shawna.

**Barbara Jean Meola and Mary Anne Meola**

77. Linda Wittman is one of three Meola sisters. Linda is the guardian for her sisters, Barbara Jean Meola and Mary Anne Meola, who have intellectual and developmental disabilities. Barbara is 67 years old and functions at the approximate level of a three-year old. Mary Anne is 61 years old and functions at the level of a nine month infant.

78. Barbara and Mary were cared for in their family home by their parents until they moved to Hartville Meadows (HM), a 32-bed ICF in Hartville, Ohio about 30 years ago. HM was created by a couple who had a daughter with developmental disabilities. Growing up, the sisters received school services, then sheltered workshop and transportation services, from their local DD Board.

79. Linda – who is a registered nurse – and her aging parents increasingly felt they needed to find care for Barbara and Mary outside of the family home. They knew that a group home placement would not safely address the separate, complex needs of Barbara and Mary. After years of searching for a home, Linda was fortuitously informed about HM from a patient of hers who was a volunteer at HM. Upon touring HM, the family was confident the setting was appropriate and placed their daughters on the waiting list for HM: Barbara for 6 years until an opening was available, and Mary for 13 years. When placed at HM, their father was 71 and had been living with Parkinson's disease for six years. Their mother was 68.

80. Barbara and Mary continued to attend the DD Board workshop after moving to HM. Approximately 10 years ago, the DD Board approached ICF providers that had residents who attended its workshop. The DD Board informed ICF providers that it was increasing the per

diem charge for ICF residents who attended its workshops. The charge was increased from approximately \$42 per day to approximately \$107 per day. The DD Board asserted that it was costlier for the county to provide services to ICF residents because of their intensive needs. The ICF residents of HM were forced to withdraw from the DD Board's sheltered workshop programs.

81. Medicaid regulations, however, require ICFs to provide a continuous plan of active treatment for each resident. Day habilitation provided by sheltered workshops is a major component of the active treatment regimen for many ICF residents.

82. HM's parent company opened a sheltered workshop to fill the void left by the DD Board's actions. Its workshop was open to ICF residents and waiver recipients. Barbara and Mary are clients of the new workshop and enjoy the opportunities it provides. The local community benefits from the work and creativity of the workshop employees. Community members frequent its gift shop, cafe, thrift store, and event center. Workshop clients help to operate these enterprises and supply them with their hand-made products.

83. For Barbara and Mary, a so-called community (i.e., waiver) setting would be the most restrictive setting for them – as their quality of life would deteriorate – while an ICF is the least restrictive environment.

84. A large ICF is Linda's choice for Barbara and Mary.

**Garry Wojciak**

85. Kathy Wojciak is the sister and guardian of Garry Wojciak, a 62 year old man with severe intellectual and developmental disabilities associated with Fragile X syndrome. He functions at about a two year old level.

86. Garry has lived at Mount Aloysius, a 78 bed ICF in Perry County, for 43 years.

87. Prior to living in the ICF, Garry was cared for by his parents and sister in their



family home. During this early period, services of any kind were very sparse.

88. Garry's parents were instrumental in founding the DD Boards in Ohio, and even started their own school program before DD Boards were operational. Garry received school services from DD Boards when they first came into existence until approximately 1973.

89. Kathy and Garry's mother continued to care for Garry in their home upon the death of Garry's father in 1973. It became increasingly difficult to care for Garry in this way, at which time Kathy and Garry's mother began contemplating an alternative placement for Garry.

90. Kathy and her parents learned about Mount Aloysius from the Catholic Diocese in Cleveland, Ohio.

91. When Garry was admitted to Mount Aloysius it was a privately run facility funded with private donations. Since that time, Mt. Aloysius applied for ICF designation and Medicaid funding.

92. In addition to serving as her brother's guardian for more than 20 years, Kathy worked at the Cuyahoga County Board of Developmental Disabilities for more than 35 years, serving as the Manager of the Early Childhood Department, where she supervised approximately 30 intervention specialists. During her career with the DD Board, Kathy also supervised two center-based programs for young children with DD, a home-based autism program, and "Part C" assessment teams for IDEA. Since retiring from the DD Board, Kathy has taught at a university preparing future special educators.

93. In Kathy's experience with DD Boards, families of eligible individuals are not told that their family member is entitled to an ICF placement or that a waiver "waives" this entitlement.

94. Garry likes to walk, which helps control his anxiety associated with fragile X syndrome. To do so, he needs a controlled, supervised environment, which Mt. Aloysius is great

for, as it has expansive grounds. For Garry, a so-called community (i.e., waiver) setting would be the most restrictive setting for him – as his quality of life would deteriorate – while an ICF is the least restrictive environment.

95. A large ICF is Kathy's choice for Garry.

**Kelly Jones**

96. Dan Jones is the father and guardian of Kelly Jones, a 33 year old woman with Cornelia de Lange syndrome who since 1997 has lived in a 34 bed ICF in northern Ohio.

97. The syndrome with which Kelly was born severely limits her intellectual functioning. Kelly is non-verbal and unable to live independently, nor can she be employed to perform simple tasks.

98. Kelly lives in a 6 bed-home with five other women on the ICF campus.

99. Dan and Kelly's step mother, Sherry, cared for Kelly in their home until she was 13 years old. Before that, for several years, Kelly received a waiver from the Cuyahoga County Board of DD that provided caregivers inside their home approximately 25-30 hours per week.

100. When Kelly was 12 years old, Dan and Kelly's mother looked for permanent placement for Kelly outside of the home.

101. When consulting with the Cuyahoga County DD Board, the case manager first only told Dan and Kelly's mother of "waiver" options. Kelly now enjoys the best, fullest life possible with maximum services provided at her ICF.

102. For Kelly, a so-called community (i.e., waiver) setting would be the most restrictive setting for her – as her quality of life would deteriorate – while an ICF is the least restrictive environment.

103. A large ICF is Dan's choice for Kelly.

**Glenn Baxter**

104. Lee Ann Mielke is the sister and guardian of Glenn Baxter, a 54 year old man with autism and severe obsessive compulsive disorder. Glenn functions intellectually approximately at the age of a 5-year old. Since 2010, Glenn has resided in a 23-bed ICF in Minster, Ohio.

105. As a child, Glenn was cared for in his family home until his mother's death in 2001.

106. Upon the death of their mother, Lee Ann assumed guardianship and Glenn was cared for by Lee Ann and her husband in their home. After 10 years of caring for Glenn, Lee Ann chose to place him at his present ICF when an opening became available. Lee Ann was surprised and pleased how well Glenn adapted to the new setting.

107. For Glenn, a so-called community (i.e., waiver) setting would be the most restrictive setting for him – as his quality of life would deteriorate – while an ICF is the least restrictive environment.

108. A large ICF is Lee Ann's choice for Glenn.

**Noah Goldberg<sup>2</sup>**

109. Shari and Michael Goldberg are the parents of Noah Goldberg, a 21 year old man with autism, who reads at the fourth grade level and needs supports to help with daily living skills. Shari is his guardian and reports that he can never live alone. Shari and Michael also have another son, who recently graduated college, and now lives in New York City, his choice. They live with Noah in Pepper Pike, Cuyahoga County, Ohio.

110. Noah has received waiver services from the Cuyahoga County DD Board since he was four years old. Noah attended the local public schools through graduation and currently

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<sup>2</sup> The Guardians have moved to join the Goldbergs and the Edlers as additional parties pursuant to the Motion filed contemporaneously with these Crossclaims and Third-Party Complaint.

receives vocational training services, which includes him working at a food bank, working at Goodwill, and working at MedWish, a charity that sends unused medical supplies around the world – all non-paid.

111. Despite interacting with the DD Board for almost two decades, Shari has never been told about – let alone offered – the ICF option. Whether she would select it or not, she would like to know of all her (and Noah's) options.

112. Shari does not care how bureaucrats classify or score options. She does not care about acronyms. She simply wants options for Noah, including perhaps an "intentional (waiver) community," where Noah could live – if allowed – with the (disabled) friends he grew up with and attended school. She believes this will be his least restricted environment and the one that will allow him to flourish. But her experience is that DRO opposes intentional communities as being "segregated." She wants Noah to have the same choices as his brother, who recently lived "segregated" with only other college students, and now lives "segregated" in a large, impersonal apartment building.

**Zoe & Maya Edler**

113. Lisa and Jeff Edler are the parents of two children, Zoe, age 14 and Maya, age 11. The family lives in Mentor, Ohio. Zoe attends Mentor High School and Maya attends Sterling Morton School.

114. Zoe has a cognitive disorder due to a medical condition that affects her memory and has caused memory and language deficits. Maya has Down Syndrome. Both young ladies are active participants in their schools and communities.

115. In June 2014, after Lisa received a letter from the DD Board to determine whether their children were eligible for services, she was asked to schedule an appointment.

116. When Lisa was interviewed by the DD Board, they discussed different services and types of waivers available. The representative encouraged Lisa to immediately "get on the waiver list." At no time was an ICF mentioned in the discussion – either as an option or alternative. Additionally, it was never explained that a waiver meant "waiving our rights" to an alternative option. Both children have been placed on the DD Board waiting list for approximately four years running.

117. Zoe and Maya do not presently receive any services from the DD Board.

118. The DD Board representative has visited the Edler home several times. Lisa has also been in contact with the SSA numerous times over the years regarding waiting list placement, support services, waiver options, and the re-evaluation process.

119. Even if Lisa will never choose an ICF for her children, Lisa feels strongly that DD Board representatives should be explicit in articulating to all families what they are actually waiving from and that all options should be presented in a balanced way.

**Robert Hotze (ECF No. 258)**<sup>3</sup>

120. Linda Williams, a retired registered nurse, is the sister and guardian of Robert “Bobby” Hotze, a 64 year old mostly non-verbal man with intellectual and developmental disabilities who has resided at Mt. Aloysius, a large ICF in New Lexington, Ohio, since 1971. Linda is 70 years old and resides in Florida.

121. Linda only became guardian for Bobby on September 26, 2017 when his ICF placement became threatened. Linda had not sought guardianship previously as she lived out of state.

122. Bobby was cared for in his home by his parents and Linda until about 40 years ago.

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<sup>3</sup> The following is a summary for one of the 99 “Additional Guardians” who filed Joinders.

By that point, Linda had married and left home, and Bobby's parents realized they could no longer care for him at home.

123. Bobby's parents searched for the best placement for Bobby and chose Mt. Aloysius. Bobby's parents, along with other families, donated thousands of dollars and volunteer hours to build a swimming pool on campus and "Glow" House, an eight bed ICF where Bobby has lived since 2009. Bobby's parents had hoped that by moving Bobby into "Glow" House, Bobby's future at Mt. Aloysius would be secured. In her joinder, Linda wrote that Bobby's mother, who served as an ARC chapter president and ran a summer camp for DD children, knew "he would be safe and happy living there (at Glow House) for the rest of his life." ECF 258. Linda writes: "Glow House is Bobby's ideal community placement because Glow House IS Bobby's community." *Id.* Regarding life at Mt. Aloysius. Linda writes: "Many, like Bobby, reach and maintain their highest potential." *Id.*

124. Bobby's mother and father left a large portion of their estate to the Mr. Aloysius Foundation. Their memorial services were held at the Mt. Aloysius chapel and their ashes were scattered on the grounds.

125. In mid-2017, Linda was contacted by Mt. Aloysius to inform her that Bobby had undergone "options counseling" by his guardian, Advocacy & Protective Services, Inc. (APSI), which became Bobby's guardian in 2009. Mt. Aloysius told Linda that the APSI guardian purportedly asked Bobby if he wanted to move to the community. Bobby purportedly replied, "Yes." Though Bobby had lived at Mt. Aloysius more than 40 years, APSI requested an "exit" waiver for Bobby without even contacting Linda.

126. Bobby functions intellectually at the level of a small child. Though he can answer simple questions, such as "Do you want vanilla or chocolate," he cannot manage complex

decision-making, as he cannot understand the ramifications of his response. Linda explained that if you ask Bobby a question with a smile, he will reply, “Yes,” as he wishes to please.

127. The Ohio Administrative Code states that APSI should consider the input of family members and providers when making placement decisions. Ohio Administrative Code § 5123:1-15-01(c)(1)(h) (hereinafter “O.A.C.”). Linda was not consulted by APSI about the options counseling, nor was she notified by the APSI guardian that she had requested an exit waiver for Bobby.

128. Upon learning that Bobby had been slated for an exit waiver, Linda left Florida and drove to Ohio to meet with the APSI guardian. The APSI guardian informed her that APSI is contracted by DODD to provide guardianship services. The APSI guardian explained that APSI had been ordered by DODD to meet with each of their wards and offer them an exit waiver to encourage them to move to the community.

129. Linda was disturbed that DODD had APSI approach Bobby about an exit waiver and that it was willing to rely upon his one second response to forever change his life, a life he had lived, and enjoyed, for 50 years at Mt. Aloysius.

130. Linda expressed to the APSI guardian her desire for Bobby to remain at Mt. Aloysius.

131. As Linda was not confident her wishes would be followed, she petitioned the probate court for guardianship of Bobby and was granted guardianship.

**Kevin Fox** \*<sup>4</sup>

132. Barbara Fox is the mother and guardian of Kevin Fox, a 17-year-old teenager with

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<sup>4</sup> The individuals with asterisks (\*) are some of the individuals who have contacted Guardians since this action was filed, whose stories are briefly shared.

severe autism, mental retardation, and an intractable seizure disorder. Kevin is non-verbal and functions at approximately the age of a 1 year old toddler.

133. Barbara and Kevin's father cared for Kevin in their home as a young child. They were recommended to seek waiver services by their attorney. Kevin was enrolled in the Ohio Home Care waiver when he was a toddler to receive home nursing care. Kevin also attended a DD Board preschool.

134. Barbara and Kevin's father were not informed when they applied for the Ohio Home Care waiver that they were waiving from Kevin's entitlement to care in an ICF. ICF placement would have provided Kevin with on-site 24 hour nursing and supervision, therapy services, psychological, and nutritional services, and active treatment, among other benefits.

135. As Kevin approached teenage years, it became increasingly difficult for Barbara and Kevin's father to care for him in his home. He would not remain in bed at night causing worry for his parents as to his safety. Kevin was unaware of hazards, therefore his parents were concerned that he may hurt himself if they should not awaken when he did.

136. Barbara began to search for placement outside of the home on her own. Because of its high reputation, Barbara learned of Hattie Larlham (HL), a large ICF that specializes in the treatment of children with profound needs. Barbara was not aware of the term ICF at the time.

137. Barbara contacted HL to inquire about its services. HL did not accept children who were ambulatory, but told Barbara of another facility that could care for Kevin called Rose-Mary Center (RM), a 42-bed ICF in northeast Ohio.

138. After contacting and visiting RM, Barbara and Kevin's father placed him on the waiting list for admission to the facility. Kevin was admitted in 2013 (age 12) as the family was becoming increasingly desperate for assistance. Barbara describes the time as looking for "any



port in the storm.”

139. Kevin benefitted from a medical director, 24-hour nursing care, on-site dental care, on site nutritionist, and a professional cook that prepares meals. A mobile X-ray unit would come to the facility, which was very important for Kevin whose service seizure disorder placed him at higher risk for broken bones. RM owned an entire fleet of cars, vans and buses, including those adapted for wheelchairs giving Kevin much flexibility for community outings.

140. Barbara saw that Kevin benefitted from many social and recreational aspects of RM’s campus setting. Kevin enjoyed the many volunteer groups that would come to RM to host holiday parties, concerts, crafts, petting zoos, and visits from a therapy dog. RM’s facilities offered recreation in a safe environment, on many acres, and with trained staff. The campus had a heated therapy pool. Swimming became a preferred activity for Kevin as did riding his tricycle through the long, wide halls of his living facility, both activities important to a growing boy. RM also had a large fenced-in playground with a rubberized surface. The fencing was important to a child unaware of hazards who was prone to run-off. The rubberized surface served as protection from head trauma, especially important given Kevin’s serious seizure disorder.

141. In October 2016, Kevin was forced out of RM Center after an agreement was negotiated with DODD in response to a report filed by DRO. As a result, RM agreed to transition residents to new 4 and 6-bed ICFs homes supposedly “integrated” in neighborhoods throughout Cuyahoga County.

142. Though Kevin’s 6-bed ICF home has a more intimate, family-style living environment and includes many amenities such as stainless steel appliances, Barbara is concerned that the 6-bed ICF home is not the most integrated setting appropriate for Kevin’s complex needs.

143. Nursing responsibility has been delegated to a direct care professionals (DSP) who

administers Kevin's complex mix of medications. The mobile X-ray unit is no longer available, an important support given Kevin's susceptibility for broken bones related to seizures. His meals are no longer overseen by a nutritionist and a trained cook, but prepared by DSPs. DSPs must grocery shop, cook, take out trash, shovel and salt the driveway, do laundry, etc., taking them away from more important core duties such as personal care and assistance with Kevin's active treatment plan.

144. Kevin no longer engages in his preferred activities of swimming and riding a bike. DSPs are not able to take him swimming as they are not trained in water safety. Riding a bike outdoors is too hazardous for a fast-moving teenager with no understanding of hazards. Likewise, the small yard of the 6-bed home is not an appropriate play area for Kevin given the yard's proximity to moving traffic. There is a small fenced in area, but with concrete flooring, it is not safe for Kevin.

145. Kevin no longer benefits from the social life of a 42 bed home with many and varied professionals and volunteer groups. The small number of residents in a 6-bed home make it impractical for volunteers to host the parties and activities to which Kevin was previously accustomed. Kevin's neighbors do not visit him, nor invite Kevin to their homes for social gatherings.

146. Kevin's overall quality of life has suffered relative to his previous life at the large Rose-Mary campus.

**Amy Axmacher\***

147. Karen and Mark Axmacher are the parents and guardians of Amy Axmacher, a 37 year old woman with profound intellectual and developmental disabilities, who since November 2016 has resided at Brookside Extended Care, a large ICF in Mason, Ohio.

148. Amy was ambulatory until the age of approximately 16.

149. Until Amy's admission to Brookside, Karen and Mark cared for Amy in their home. When Amy was 12 years old she began having seizures. That prompted Mark to contact the State of Ohio to apply for waiver services to receive home care and nursing services. But Karen and Mark were turned down for waiver services.

150. Karen and Mark continued to rely upon private insurance to cover Amy's care needs. Amy also attended special education classes in the Middletown Public Schools.

151. When Amy turned 18, Amy received the Ohio Home Care Waiver and was told to apply for SSI. Amy was given full time nursing care, split between nursing, home health aide hours, and respite hours.

152. Even though Amy had profound intellectual and developmental disabilities, Karen and Mark were never informed that Amy was entitled to ICF services that would have provided facility-based 24 hour nursing care, therapy services, personal care, and the oversight of a medical director, among other supports, for someone with Amy's complexity of need.

153. Karen states that neither she nor Mark understood the term "ICF." In a May 26, 2016 email reply Karen wrote to her Medicaid case manager, she specifically asked what the case manager meant by "ICF/MR." Karen did not receive a response.

154. In 2016, when she was 35, Amy's neurologist recommended Brookside. Mark toured it and met with staff and was confident Brookside could meet Amy's care needs.

155. Amy has adapted well to Brookside where she is receiving excellent care and Karen and Mark can visit frequently. Amy also enjoys attending the sheltered workshop. She has a bunch of friends now and is very happy. Karen and Mark lament Amy could have flourished much earlier at Brookside, if only anyone had told them an ICF was an option.

156. For Amy, a so-called community (i.e., waiver) setting would be the most restrictive setting for her – as her quality of life would deteriorate – while an ICF is the least restrictive environment.

157. A large ICF is Mark and Karen’s choice for Amy.

**Samantha Miller\***

158. Linda Jeanne Marker-Miller is the mother and guardian of Samantha Erin Miller, a 25 year old woman with Rett’s Syndrome. Samantha is profoundly mentally retarded and has a seizure disorder. Samantha’s story reflects that many of the tens of thousands receiving waiver services in Ohio have no idea of their ICF option.

159. Linda and her husband have cared for Samantha in their home throughout Samantha’s life. Since the age of 4, Samantha has received services through the Hamilton County DD Board. Services included early intervention, school services and ESY (extended school year) at the Margaret Rost School, a DD Board School. Samantha graduated from Margaret Rost in May 2015.

160. When Samantha was 10, it was discovered that the DD Board had failed to place her on the waiting list when the family first sought services. Upon being placed on the waiting list, the DD Board did not provide Linda with any information about alternative services. Linda was not informed at this time about the immediate availability of ICF services as an alternative to waiver services.

161. In 2014, Linda began researching day habilitation options for Samantha in anticipation of her graduation from the DD Board school. Linda learned that because of DRO’s activities, the local sheltered workshop and facility-based day programs were threatened. Without the DD Board programs and without a waiver, Linda was unable to find a day program that would

accept Samantha.

162. Linda began meeting monthly with a DD Board Service Support Administrator (SSA). The SSA suggested alternatives to Linda that were not acceptable, referring her to grant opportunities for home modifications or assistive technology. An ICF was not discussed as an alternative.

163. Linda related to yet another DD Board official that she was so desperate she was considering yielding custody of her daughter to the state. The SSA told Linda that she did not want to do that because if the state took custody of Samantha, she might be placed out of state.

164. At wits-end, Linda also wrote letters to Governor Kasich, her three County Commissioners, and the ARC of Ohio appealing for assistance.

165. Gary Tonks of the ARC of Ohio called Linda. He told Linda that she was not alone and that ARC and others were working hard to fix the system. He told Linda about public meetings held by DRO. Tonks told her many things, but he did not tell Linda about ICF services during the phone call.

166. Linda received a response from one of the County Commissioners who offered his assistance. The Commissioner reached out to the DD Board on Linda's behalf. Through the Commissioner's assistance, Samantha received DD Board funding for placement in a day habilitation program, the Frank Center. This placement allowed Linda to retain her job. This program has since been privatized and is called Active Day Frank Center.

167. Since that time, Samantha received the SELF waiver in 2015 and the IO waiver in 2017. All along Linda was never informed of Samantha's entitlement to an ICF when Samantha was enrolled in various waivers. Linda was not informed of the ICF entitlement at any of the yearly ISP meetings she attended when Samantha's waivers were renewed.

168. Linda only learned about the ICF entitlement from Caroline Lahrmann on September 9, 2018. Linda wishes she had known about the ICF option all along, as she – like all guardians – wants options for her DD child. She would have liked to tour an ICF facility to understand what it provides. Doing so would have helped in their long-term planning for Samantha.

**Sean Dickinson\***

169. Tracy and Mark Dickinson are the parents and guardians of Sean Dickinson, a 20 year old social young man with multiple disabilities including autism, developmental delay, and epilepsy. Sean requires supports for daily living, working, and safety. Sean has a younger sister Megan who is 18. The family lives together in their home in Pepper Pike, Ohio.

170. Sean is a student of the Orange Public School System where he attends a vocational training program and through it works at Goodwill Industries.

171. Tracy and Mark are grateful for the beneficial services they have received through their school system.

172. The Dickinsons moved to Ohio from Wisconsin in 2006, at which time they contacted the Cuyahoga County Board of DD to inquire about services for Sean. Through bureaucratic delay, Sean was not placed on the waiver waiting list for Cuyahoga County until 2008 after intervention and advocacy from Tracy. Sean remains on the waiting list and currently does not receive services from the DD Board.

173. When Tracy asked the DD Board representative what services were available, she was told, "we do not have a menu. You need to tell us what you want." Tracy has contacted the DD Board approximately three times per year over the past four years inquiring about services, but was never told about the ICF choice. She was not aware of what an ICF was until the filing of

this statement.

174. Tracy indicates that the lack of discussion with respect to options makes it impossible for Mark and her to plan for life after Sean reaches the age of 22 and graduates from school. Tracy does not know what her options are, which takes away the ability of her family to plan for Sean.

**B. The State Defendants**

**John Kasich, Governor of the State of Ohio**

175. Defendant John Kasich is the Governor of the State of Ohio, a position he has held since January 2011.

176. Under Article III, Section 6 of the Ohio Constitution, he is charged with seeing that the laws of the State of Ohio are faithfully executed.

177. Defendant Kasich appoints the directors of the Ohio Department of Developmental Disabilities (“DODD”), the Ohio Department of Medicaid (“ODM”), and Opportunities for Ohioans with Disabilities (“OOD”) in accordance with Article III, Section 21 of the Ohio Constitution. He is responsible for directing, supervising, controlling, and setting policy for the executive departments of state government.

178. Defendant Kasich is responsible for developing and submitting an executive budget to the legislature each fiscal biennium, and for approving a final budget and budget modifications that include funding for DODD, ODM, and OOD.

179. Defendant Kasich is responsible for the Governor’s Office of Health Transformation, which he created through Executive Order 2011-02K “in order to carry out the immediate need to address Medicaid spending issues, plan for the long-term efficient administration of Ohio’s Medicaid program, and act to improve overall health system performance

in Ohio.” Since its creation, the Governor’s Office for Health Transformation has coordinated and implemented planning and budget activities for the State of Ohio’s compliance with the U.S. Supreme Court’s decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). Defendant Kasich has authority to issue proclamations and executive orders regarding disability services for people with intellectual and developmental disabilities and has issued such executive orders. He is responsible for ensuring that state agencies fully implement his policies concerning services for people with intellectual and developmental disabilities.

180. The Guardians bring these claims against Defendant Kasich in his official capacity.

**John Martin, Director of the Ohio Department of Developmental Disabilities**

181. Defendant John Martin is the Director and executive head of DODD. He was first appointed Director in January 2007 (of the Ohio Department of Mental Retardation and Developmental Disabilities, which was renamed DODD in 2009), and was reappointed by Governor Kasich in January 2011.

182. DODD is legally responsible for the operation of Ohio’s statewide comprehensive programs and services for people with intellectual and developmental disabilities and their families, including public education, prevention, diagnosis, treatment, training, and care, pursuant to O.R.C. § 5123.02.

183. Defendant Martin has oversight and control over all of DODD’s programs and operations. Through interagency agreements with the ODM, Defendant Martin also exercises certain powers and duties with regard to the administration, licensing, and operations of privately-operated ICFs in Ohio. Defendant Martin is required to “provide monitoring of county boards of developmental disabilities.” O.R.C. § 5123.04(F).

184. Defendant Martin is responsible for the administration of Ohio’s four Medicaid



funded home and community-based waiver programs for people with intellectual and developmental disabilities.

185. Defendant Martin's duties include, but are not limited to, entering into contracts and other agreements on behalf of DODD, monitoring county boards of developmental disabilities, and adopting, amending, or rescinding agency rules, including rules for administration and licensing of ICFs in Ohio and those which regulate the certification of home and community-based services waiver providers.

186. Defendant Martin has responsibility for ensuring that DODD's programs and services operate in compliance with federal law.

187. The Guardians bring these claims against Defendant Martin in his official capacity.

**Barbara Sears, Director of the Ohio Department of Medicaid**

188. Defendant Barbara Sears is the Director and executive head of the Ohio Department of Medicaid (ODM), a position she has held since being appointed by Governor Kasich in November 2016.

189. ODM is Ohio's single state Medicaid agency, responsible under 42 U.S.C. § 1396a(a)(5) and O.R.C. §5162.03 for the administration of Ohio's Medicaid program. Under this program, the federal government partially reimburses states for the costs of medical and other services provided to eligible persons, including long term services and supports to people with intellectual and developmental disabilities.

190. Defendant Sears has ultimate responsibility, authority, oversight, and control over all ODM programs, services and operations. ODM has delegated responsibilities for administration of Ohio's Medicaid waivers programs for people with intellectual and developmental disabilities to DODD. ODM has also delegated to DODD its powers and duties

regarding Medicaid-funded ICF services, including licensure, level of care determinations for admissions to Medicaid-funded ICFs, and adopting, amending, or rescinding administrative rules regulating the operation of ICFs. ODM also delegates to local DD Boards the determination of eligibility for waiver services.

191. Defendant Sears is directly responsible for the design and structure of the Medicaid program in Ohio and for ensuring that the programs administered by ODM are operated and administered in compliance with federal law.

192. The Guardians bring these claims against Defendant Sears in her official capacity.

**C. Ohio Association of County Boards Serving People with Developmental Disabilities**

193. The Ohio Association of County Boards Serving People with Developmental Disabilities (“OCB”) appears in this case “on behalf of itself and all 88 county boards of developmental disabilities in the State of Ohio.” *OCB Motion to Intervene* at 1 (ECF No. 68).

194. All DD Boards are members of OCB, and as OCB stated in its motion, “Members of OCB[] would have standing to act as parties in their own right.” *Id.* at 10.

195. In its motion, OCB stated:

- “The DD Boards play an integral and legally mandated role in the implementation and monitoring of community services in Ohio.” *Id.* at 1.
- “OCB[] represents the interests of its membership, which consists of all 88 County Boards of Developmental Disabilities (“DD Boards”) in Ohio.” *Id.*
- Its mission is: “To support County Boards of Developmental Disabilities in providing services and supports to people with developmental disabilities.” *Id.*
- Its “purposes” include “to work for the interests of people with developmental disabilities in the State of Ohio.” *Id.* at 2.

196. DD Boards are political subdivisions governed by O.R.C. Chapter 5126.

197. DD Boards claim to serve approximately 90,000 Ohioans with DD.

198. DD Boards are required to “plan and set priorities based on available resources for the provision of facilities, programs, and other services to meet the needs of county residents who are individuals with developmental disabilities.” O.R.C. § 5126.04(A).

199. DD Boards are required to “assess the facility and service needs of the individuals with developmental disabilities who are residents of the county.” *Id.*

200. In performing their duties, DD Boards are required to develop “individual habilitation or service plans for individuals with developmental disabilities who are being served or who have been determined eligible for services and are awaiting the provision of services.” *Id.*

201. DODD “may adopt rules . . . as necessary to implement this section.” O.R.C. § 5126.04 (C). DODD is required to adopt rules “for all programs services offered by a county board of developmental disabilities,” which rules shall include:

- Standards to be followed by a board in administering, providing, arranging, or operating programs and services;
- Standards for determining the nature and degree of developmental disability; and
- Standards and procedures for making eligibility determinations for the programs and services

O.R.C. § 5126.08.

202. “The responsibility or authority of a county board to provide services under this chapter does not affect the responsibility of any other entity of state or local government to provide services to individuals with developmental disabilities.” O.R.C. § 5126.04 (D).

203. O.R.C. §5126.05(A) states in relevant part that each DD Board has the duty to: “(1) Administer and operate facilities, programs, and services as provided by this chapter ... (2) Coordinate, monitor, and evaluate existing services and facilities available to individuals with developmental disabilities ... (8) Provide service and support administration in accordance with

section 5126.15 of the Revised Code . . . .”

204. Under O.R.C. §5126.051, a DD Board has a duty to provide residential services and adult services to the extent that resources are available and in accordance with an individual’s service plan. O.R.C. §5126.051(A), (B).

205. Even so, as detailed in its Motion to Intervene, OCB – and DD Boards – views and performs its role for DD individuals as limited to the administration and provision of waiver (not ICF) services.

206. As stated in its motion, DD Boards’ role as relates to ICF residents is to counsel them to make sure they understand their waiver alternatives: “An ICF serving nine or more residents must give prior notice to the local DD Board if the ICF seeks to admit a new resident.” ECF No. 68) Then, “the DD Board must evaluate the individual and counsel the individual about the nature, extent, and timing of the services that the individual needs and the least restrictive environment in which the individual could receive the needed services.” *Id.*

207. Through “exit” and “diversion” waivers, DD Boards also counsel (existing and prospective) ICF residents, meaning apprise them of their waiver option and enroll them in same, which is not subject to a waiting list. In such cases: “The DD Board must make the waiver available regardless of the resident’s place on the waiting list established under O.R.C. §5126.042.” *Id.* at 5.

208. “Ohio law gives DD Boards specific authority to manage HCBS waivers in the county,” including to “[p]erform assessments and evaluations of the individual,” and to “[a]ssist eligible individuals to exercise the individual’s right to choose a qualified and willing provider of services.” *Id.*

209. DD Boards – not the State – pay the roughly 40% share of the local match for

waiver services, except for ICF residents enrolling in waiver services through exit or diversion waivers, or through ICF downsizings (together “ICF Waiver Enrollees”), in which instances the state (not DD Board) pays the local share. *Id.* at 6-7.

210. As such, when it comes to the provision of waiver services, DD Boards have a financial incentive to enroll individuals as ICF Waiver Enrollees because the State, not the DD Boards, then pays the local share of the waiver cost. In contrast, when someone enrolls in the waiver as a non-ICF Waiver Enrollee (i.e., off the traditional “waiting list”), then the DD Board is responsible for the roughly 40% share of the local match.

211. In 2015, DD Boards paid \$324 million of the local match obligations – 64.2% of the total local portion – with DODD paying the remaining portion. *Id.* at 7.

212. Local DD Boards are responsible for managing waiting lists for persons seeking HCBS waivers. *Id.*

213. DD Boards are the effective gatekeepers for DD individuals seeking services in the DD system in Ohio, meaning DD Boards normally: (a) determine and process eligibility for Medicaid services, (b) once a DD individual is determined eligible for Medicaid services, counsel the individual (or guardian) about available service options, (c) maintain “waiting lists” for those seeking waiver services, and (d) administer and process waiver selections, and once the individual receives waiver services, then at least annually thereafter review the person’s Individual Service Plan (“ISP”).

214. By definition, any resident eligible for waiver services is necessarily also eligible for ICF services.

215. But DD Boards do not routinely provide information about ICF services to eligible individuals.

216. Few, if any, of the 88 DD Boards provide information about ICF services on their websites (other than on how to leave an ICF or be diverted from an ICF).

217. OCB publishes a detailed guide called “Life Map,” which is a guide for DD services from birth through retirement.” <http://www.oacbdd.org/clientuploads/publications/OACB-LifeMap-ThirdEdition.pdf> (visited Sept. 7, 2018).

218. Though the Life Map references nursing homes, it makes no reference to ICFs.

219. When DD Boards annually send wait-listed individuals letters regarding their status on the waiver wait list, they do not mention that the recipient has the right – the entitlement – to an immediate ICF placement, let alone provide information on the ICF entitlement.

220. If DD Boards are supposed to provide ICF information to eligible residents, they are not doing so.

221. Alternatively, if DD Boards assert that it is not their duty to provide ICF information to eligible residents – despite being the main interface for eligible residents to receive information about DD services – then the vast majority of such eligible residents fail to receive information about their ICF entitlement from any source (i.e., DODD, OCB, ODM, or DRO). That is, the vast majority of DD Medicaid eligible residents receive information about DD services only from, or principally from, their DD Boards, but their DD Boards do not provide them information about ICF services, leaving the vast majority of eligible residents ignorant of their ICF entitlement.

#### **IV. STATUTORY PROVISIONS**

##### **A. The Americans with Disabilities Act (“ADA”)**

222. The ADA was enacted in 1990. 42 U.S.C. § 12101(b)(1).

223. Title II of the ADA applies to public entities, including state or local governments and any departments, agencies, or other instrumentalities of state or local governments. 42 U.S.C.

§§ 12131, 12132. It provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

224. “Public entity” includes “any state or local government” and “any department, agency . . . or other instrumentality of a State or . . . local government.” *Id.* at § 12131(1).

225. The remedies and rights under the ADA are “provide[d] to any person alleging discrimination on the basis of disability.” *Id.* at § 12133.

226. The ADA also provides that a “State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.” *Id.* at § 12202. The ADA also includes “the power to enforce the fourteenth amendment.” *Id.* at § 12201(b)(4).

227. The U.S. Department of Justice (“DOJ”) has authority under 42 U.S.C. § 12134 to issue federal regulations implementing and enforcing Title II of the ADA.

228. Title II’s implementing regulations:

- prohibit a public entity from “[d]eny[ing] a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service” or “limit[ing] a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.” 28 C.F.R. § 35.130(b)(1)(i), (vii);
- state a public entity “shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” *Id.* at § 35.130(b)(7)(i); and
- state a public entity “shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” *Id.* at § 35.130(d).

**B. Section 504 of the Rehabilitation Act of 1973 (“Rehabilitation Act”)**

229. The Rehabilitation Act prohibits discrimination against people with disabilities under any program or activity that receives federal financial assistance. 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability in the United States . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

230. “Program or activity” is defined broadly under the Rehabilitation Act to include: “a department, agency, . . . or other instrumentality of a State or of a local government or the entity of such State or local government that distributes such assistance and each such department or agency to which the assistance is extended.” *Id.* at § 794(b).

231. The Rehabilitation Act’s implementing regulations prohibit recipients of federal financial assistance from “deny[ing] a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service” or providing “an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result . . . or to reach the same level of achievement as that provided to others.” 45 C.F.R. § 41.51(b)(1)(i), (iii).

232. These implementing regulations also require entities receiving federal financial assistance to “administer programs and activities in the most integrated setting appropriate to the needs of qualified . . . persons [with disabilities].” 28 C.F.R. § 41.51(d); see also, 45 C.F.R. § 84.4(b)(2).

233. States have no immunity against claims brought under the Rehabilitation Act. 42 U.S.C. § 2000d-7 (1986) (“A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973.”).



**C. The Social Security Act**

234. The State of Ohio is required to operate its Medicaid program in compliance with the Social Security Act, 42 U.S.C. § 1396, and its implementing regulations.

235. Section 1915(c) of the Social Security Act, 42 U.S.C. § 1396n(c), allows states to submit a request to the U.S. Secretary of Health and Human Services (“Secretary”) to “waive” certain federal Medicaid requirements in order to offer a broad range of home and community-based services as an alternative to institutional care.

236. The entire waiver statutory and regulatory scheme requires and presupposes that Medicaid eligible individuals will be advised of their ICF entitlement before being advised of any alternative, optional waiver services.

237. Specifically, federal law requires that for a state to offer waiver services, it must first: (a) provide “assurance” that “[a]n evaluation of the need for the level of care provided in an . . . ICF” is conducted, (b) determine “that the beneficiary, but for the provision of waiver services, would otherwise be institutionalized in such a facility,” and (c) provide “assurance” that beneficiaries “will be informed of any feasible alternatives under the waiver, and [g]iven the choice of either institutional or home and community-based services.” 42 C.F.R. § 441.302(c), (d).

238. Plaintiffs cite and acknowledge these requirements in their Complaint at ¶¶ 128-30.

239. The Social Security Act requires states to provide the ICF entitlement to Medicaid eligible residents with “reasonable promptness.” 42 U.S.C. § 1396(a)(8).

**D. Developmental Disabilities Assistance & Bill of Rights Act of 2000 (“DD Act”)**

240. The DD Act “provide[s] for allotments to support a protection and advocacy system in each State to protect the legal and human rights of individuals with developmental disabilities.” 42 U.S.C. § 15041.

241. Congress allocates funds for each state to administer its “protection and advocacy” system (“P&A”). *Id.* at § 15042.

242. Amongst other things, each state’s P&A is required to:

- “ensure the protection of, and advocacy for, the rights of [DD] individuals . . . who are or who may be eligible for treatment, services, or habilitation.” *Id.* at § 15043(a)(2)(A)(i).
- “provide information on and referral to programs and services addressing the needs of individuals with developmental disabilities.” *Id.* at (ii).
- annually submit to HHS a list of “goals and priorities developed through data driven strategic planning.” *Id.* at (a)(2)(C).
- annually allow the public and individuals with DD an opportunity to comment on the P&A’s goals and priorities. *Id.* at (a)(2)(D).
- “establish a grievance procedure for clients or prospective clients of the system to ensure that individuals with developmental disabilities have full access to services of the system.” *Id.* at (a)(2)(E).

Collectively the “P&A Duties”

243. In performing its P&A Duties, a P&A must “address[] the needs of [all] individuals with developmental disabilities,” not just a subset, or favored portion, of individuals with developmental disabilities. *Id.*

244. The DD Act also requires that a P&A have a governing board “composed of members who broadly represent . . . the needs of individuals served by the system” *Id.* at § 15044(a). The majority of its members “shall” be “individuals with disabilities (or their guardians) . . . who are eligible for services . . . through the system.” *Id.*

245. The implementing regulations of the DD Act specify that a P&A “shall not implement a policy or practice restricting the remedies which may be sought on the behalf of individuals with developmental disabilities or compromising the authority of the Protection and Advocacy System (P&A) to pursue such remedies through litigation, legal action or other forms

of advocacy.” 45 C.F.R. § 1386.21(c).

246. A P&A must, at least annually, “[o]btain formal public input on its Statement of Objectives and Priorities” and then “[i]ncorporate or address any comments received through public input.” 45 C.F.R. § 1386.21(d)(1), (4).

247. The Ohio statute that implements the DD Act – O.R.C. § 5123.60 – requires the State’s P&A (DRO) to provide “[a]dvocacy services for people with disabilities,” not just certain disabled people. *Id.* at (B)(1).

248. Finally, when it comes to making decisions about care, the DD Act states that individuals and their guardians “are the primary decision-makers . . . regarding choosing where the individuals live from available options.” 42 U.S.C. 15001(c)(3)(2000) (“Individuals with developmental disabilities and their families are the primary decision-makers regarding the services and supports such individuals and their families receive, including regarding choosing where the individuals live from available options and play decision-making roles in policies and programs that affect the lives of such individuals and their families.”).

## **V. FACTS COMMON TO ALL CLAIMS**

### **A. Medicaid Background & ICF Requirements**

249. The federal Medicaid program was established in 1965.

250. Once a state chooses to participate in the federal Medicaid program, its provision of services is mandatory, and it must comply with federal Medicaid law. 42 U.S.C. § 1396a(a)(1).

251. Ohio, like all states, has chosen to participate in the Medicaid program, and it includes as a program requirement the provision of ICF services to Medicaid eligible individuals with intellectual disabilities. 42 C.F.R. 440.150(a).

252. Ohio administers its services for Medicaid eligible DD residents through DODD.

253. In contrast to the ICF entitlement, “waiver” services – including provision of services in smaller so-called HCBS “community” settings – are entirely optional, meaning states need not provide waiver services to eligible Medicaid DD recipients. 42 U.S.C. 1396n(c).

254. To receive a “waiver,” an individual must first be determined eligible for and require “the level of care in a hospital, nursing facility or intermediate care facility for the mentally retarded.” 42 U.S.C. § 1396n(c)(2)(C). If an individual is not eligible for ICF level of care, she is not eligible for a “waiver.”

255. DODD administers three home and community based waivers: (1) Individual Options (“IO”) waiver; (2) Level One (L1), and Self-Empowerment Life Funding (SELF). <http://dodd.ohio.gov/IndividualFamilies/ServiceFunding/Documents/IO%20Approval%20and%20Amendment.pdf> at 7 (visited Sept. 7, 2018). The IO waiver is the costliest because it provides the most benefits. <https://doddportal.dodd.ohio.gov/Documents/summary-individualoption.pdf> (visited Sept. 7, 2018).

256. Under Ohio’s current five year Medicaid “State Plan” approved by CMS, the total number of IO waivers is capped at between 19,000 (year 1) and 25,000 (year 5). <http://dodd.ohio.gov/IndividualFamilies/ServiceFunding/Documents/IO%20Approval%20and%20Amendment.pdf> (visited Sept. 7, 2018).

257. As described in the State’s waiver application: “The organizational structure for this waiver includes the Ohio Department of Medicaid (ODM) as the Single State Medicaid Agency, the Ohio Department of Developmental Disabilities (DODD) as the administrator of the waiver, and DD Boards of Developmental Disabilities (County Boards of DD) as the local operating entity. The two state departments operate in accordance with an interagency agreement.” *Id.* at p. 3.

258. “Waivers” first became available in 1981 when Congress amended the relevant section of the Social Security Act to allow states to provide “waivers,” thereby allowing states to offer Medicaid eligible DD individuals services outside the ICF setting. No state is required to offer “waiver” services; instead, “waiver” services – the provision of which must be approved by CMS – are an optional alternative to “institutional services” (i.e., ICF) that a state may, but is not required to, provide.

259. Before 1981, there were no waiver services, and 100% of Medicaid DD recipients receiving residential services received ICF services or non-Medicaid certified institutional care.

260. Yet today – in 2018 – more than 40,000 Medicaid eligible Ohioans receive waiver services while fewer than 5600 individuals receive ICF services. *See* DODD “Greenbook” at 7-8 (August 2017) <https://www.lsc.ohio.gov/documents/budget/132/MainOperating/greenbook/DDD.PDF> (visited Sept. 14, 2018).

261. Thus, in less than 40 years, Ohio has shifted from having 100% of its DD Medicaid eligible residents who receive residential services served in ICF settings to less than 15% who receive services today in ICF settings.

262. Despite this rebalancing, Plaintiffs claim Defendants have a “continued overreliance on large ICFs,” which Plaintiffs define and disparage as “institutions” that “segregate” and isolate residents “from their families, friends, and communities.” *Complaint* at ¶¶ 5, 9.<sup>5</sup>

263. ICFs are not “institutions” that “warehouse” and “segregate” and “isolate.” *Id.*

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<sup>5</sup> In their Complaint, Plaintiffs use variants of the words “institution,” “segregation,” “integrated,” and “community” more than 300 times.

264. ICFs are homes. ICFs are communities.

265. ICFs provide a level of service – including on-site nursing, therapy rooms and pools, nutritional services, and developmental training – that residential waiver services almost universally lack.

266. On average, there is no cost savings to move an ICF resident to a residential waiver setting.

267. If the Guardians' loved ones who now reside in ICFs were to move to residential waiver settings, it would either: (a) be impossible to maintain the breadth of services they now receive in their ICFs, or (b) if possible to maintain the breadth of services they now receive in their ICFs, it would cost more to provide such services.

268. The ICF choice – an “entitlement” – is what each Guardian wants and requests for their loved one(s).

269. Yet in Ohio, those eligible for ICF services are routinely not informed of their ICF entitlement. Defendants often refrain from formally determining a person's eligibility for services until the person has been selected for a “waiver,” at which time the state or DD Board first “informs” the person of the ICF entitlement as part of a paperwork formality. In effect, Defendants shield the ICF entitlement from Medicaid eligible participants while promoting and offering the optional “waiver” benefit. As a result, Medicaid eligible residents often sit on waiver waiting lists for years, ignorant of their ICF entitlement.

270. Medicaid law requires that eligible individuals be “informed of the feasible alternatives if available under the waiver.” 42 U.S.C. § 1396n(c)(2)(C). As such, Medicaid law presupposes that all eligible individuals will have been informed of their ICF entitlement before being informed of their (optional) waiver. But in Ohio, this premise – that Medicaid eligible

individuals are first informed of their ICF entitlement – is false. Because of the State’s laws, rules, policies, and practices, Medicaid eligible DD individuals are routinely denied information about their ICF entitlement.

**B. ICFs Under Attack**

271. Since at least 2011, the Defendants have acted in concert to limit, and eliminate, the ICF entitlement in Ohio.

272. Governor Kasich took office on January 10, 2011.

273. Three days later, on January 13, 2011, he created The Office of Health Transformation (“OHT”) “in order to carry out the immediate need to address Medicaid spending issues.” Executive Order 2011-02K. The Executive Order stated that “Medicaid spending is growing at an unsustainable rate . . . and now consumes 30 percent of total state spending.” *Id.*

274. Next, still in 2011, pursuant to H.B. 153 of the 129<sup>th</sup> General Assembly, DODD took control of administering the ICF program from ODM.

275. Upon doing so, DODD immediately sought to “rebalance” the DD system in Ohio by de-emphasizing, phasing out, and defunding the ICF entitlement. Specifically, in 2012, DODD issued a “white paper” entitled, “The Future of the ICF-IID Program: Values, Vision, Rebalancing & Funding” (the “White Paper”).

<http://dodd.ohio.gov/Medicaid/Documents/ICF%20White%20Paper.pdf>. In the White Paper, DODD stated:

- “The department is committed to rebalancing in the state of Ohio, through both the downsizing of large facilities and the conversion of ICF-IID funded beds (and smaller homes) to home and community based waiver services.” *Id.* at 1.
- “It is the department’s view that those individuals currently being assessed as ‘Typical Adaptive’ may not require the bundle of services provided by the ICF-IID program. The department also believes that a portion of the individuals with IAF results in the ‘High Adaptive Needs and/or Chronic

- Behaviors’ RAC could also be served in community settings.” *Id.* at 3.
- “The department envisions DD Boards of dd taking a more active role in this process.” *Id.*
  - “One of the Governor’s policy priorities is to rebalance long-term care. This effort includes shifting resources from facility based services to home and community based services.” *Id.* at 4.
  - “Conversion of ICF-IID beds to waiver funding will assist with providing services to individuals in the most integrated and least restrictive setting possible.” *Id.* at 5.
  - “In addition to converting ICF-IID beds to waiver services, there is a desire to reduce the number of ICF-IID beds located in a single dwelling.” *Id.* at 6.
  - “We strongly encourage providers and boards to keep this in mind as part of their strategic planning efforts and understand that the department will be hesitant to approve long-term investments in capital for large settings, as this is not the department’s vision for where individuals will be served in the future.” *Id.*

276. After issuing its White Paper, DODD, through the passage of new legislation and its adoption of new rules, did indeed “rebalance” the system and “shift resources from [ICFs] to home and community based services.” *Id.*

#### 2013: The “Grand Bargain”

277. In 2013 – with the support of DODD, OCB, DRO, and numerous industry groups working together – the state passed the so-called “Grand Bargain” as part of the biennial budget bill (HB 59). O.R.C. Chapters 5123, 5124, 5126, 5164, 5166, 5168.

278. Some of the measures the Grand Bargain enacted include:

- Required DODD “to strive to achieve, not later than July 1, 2018, statewide reduction” of at least 500 ICF/IID beds.”
- Authorized DODD to establish an “Employment First Task Force.”
- Required each DD Board to implement an employment first policy that clearly identifies community employment as the desired outcome for every individual of working age who receives services from the board.
- For large ICFs (those with more than 8 beds): (i) cut in half the efficiency incentive payments they receive; (ii) eliminated certain renovation payments they previously received; and (iii) eliminated return on equity payments to all ICFs.
- Changed ICF rate reimbursement formulas to generally decrease rates paid to ICFs.



- Required DODD to “collaborate” with OCB, the Ohio Provider Resource Association (“OPRA”), and other organizations to achieve the ICF bed reductions by, amongst other things: (i) encouraging ICFs to reduce the number of their beds; (ii) creating incentives for the reductions; (iii) developing a mechanism to compensate ICF providers who convert their beds to waiver beds.
- Appropriated 600 new waivers to de-convert ICF beds to waiver beds.
- Created economic incentives for ICF providers to convert ICF beds to waiver beds.
- Maintained the “franchise permit fee” ICF providers must pay DODD for each ICF bed at approximately \$18/day/bed.

279. Shortly thereafter, in summer 2013, DODD’s Director, John Martin, summarized the Grand Bargain in DODD’s *Pipeline Quarterly* publication:

To expand and improve residential options for Ohioans with developmental disabilities, the 'Grand Bargain,' (part of HB59, 'the budget bill') includes a commitment by stakeholders to convert up to 600 ICF beds to waivers, and to downsize up to 600 large ICF beds to settings no larger than eight-bed homes. Much of the work to accomplish the goal will require new approaches and partnerships to accelerate this desired trend.

<http://dodd.ohio.gov/Pipeline/Documents/Pipeline%20Quarterly,%20Summer%202013,%20FINAL.pdf> (visited Sept. 7, 2018).

#### 2014: DRO Threatens Litigation

280. Despite the mandate to eliminate ICF beds and reduce ICF reimbursements, the Grand Bargain was not grand enough for DRO. So on July 1, 2014, DRO wrote a letter to Governor Kasich, Director Martin, ODM’s (then) Director McCarthy, and OHT’s director, which began: “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.”

<http://files.ctctcdn.com/141902ea301/348c248b-9c0f-4785-9902-c95cfd0d566a.pdf> (visited Sept. 7, 2018).

281. In its letter, DRO stated: “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.” *Id.* at 3.

282. In its letter, DRO threatened to “resort to litigation” if the State did not “take immediate action to 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.” *Id.* at 5-6. DRO then proposed the State “initiate” 12 “remedial actions,” including to: (i) “decrease the number of persons in developmental centers, ICFs/IID sheltered workshops, and facility-based day services”; (ii) “[d]evelop 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”; and (iii) “[d]evelop 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 . . . [which] must encourage individuals in developmental centers and ICFs/IID to seek integrated placements and services.” *Id.* at 6-8.

283. DRO ended its letter requesting a meeting with DODD, ODM and OHT. *Id.* at 8.

284. On July 31, 2014, Director Martin responded to DRO’s letter writing, “while we do not agree with many of your findings and conclusions, it is true that we share a similar vision for supporting individuals with disabilities.” Director Martin also agreed to meet with DRO.

285. On August 1, 2014, DRO responded to Director Martin by writing, “the state’s current initiatives will not be enough to forestall legal action. Significant, measurable improvements to the system that reflect the recommendations in our initial letter must occur in a

timely fashion.”

2015: DRO’s Threats Work – HB 64 Passed Further Limiting the ICF Entitlement

286. DRO’s threats worked. Over the next eight months, the parties – DRO, DODD, OCB, ODM, and various industry associations – met several times and engaged in on-going dialogue over the 2016 biennium budget.

287. On March 26, 2015, DRO wrote Director Martin stating “the proposed initiatives contained in the FY 2016-17 Executive Budget represent an important first step towards enabling people with developmental disabilities to access opportunities to live, work, and spend their days in integrated settings in their communities. Nevertheless, much work remains to create a system that complies with the Americans with Disabilities Act and the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999).”

288. Although the proposed budget – culminating in the passage of HB 64 – would further increase waivers and limit ICFs, DRO nonetheless wrote: “Without the complete package of reforms laid out in the proposed budget, there would be no foundation for a future agreement and no alternative for class members but to pursue their claims in court.” *Id.* The letter then listed “key items” DRO demanded be included in the budget bill, including:

- “A financial commitment to continue expansion of community-based services, including new state-funded waiver slots, to ensure individuals in ICFs or at risk of institutionalization can be served through integrated services in the community. The state must cement adequate state-funded home and community-based waiver services as a model for the future.”
- “Systemic strategies to divert individuals from unnecessary ICF admissions and reduce reliance on institutional levels of care.”
- “A comprehensive outreach and education effort for individuals and families who are currently utilizing the ICF service model so that they fully understand the benefits and opportunities of integrated community options.”

289. A week later, on April 3, 2015, Directors Martin (DODD) and Gargan (OCB), along with the leaders of three industry associations – Ohio Health Care Association, Ohio Provider Resource Association, and Values and Faith Alliance – wrote a letter to Chairmen Ryan Smith and Scott Oelslager of the Ohio legislature stating:

We write to convey that agreement, among the undersigned, has been reached regarding amendments to House Bill 64 that will modernize Ohio’s Intermediate Care Facility (ICF) program. The proposed amendments will encourage both the conversion of ICF beds to waivers, and downsize large ICFs (nine or more beds) to smaller community-based ICF homes – this will build on the “Grand Bargain” reached in the last operating budget, House Bill 59. . . . We look forward to meeting with you in the near future to discuss this agreement and the changes made to the As Introduced version of House Bill 64.

290. In June 2015, Governor Kasich signed HB 64, enacting it into law. As relates to Ohio’s DD system, HB 64 (O.R.C. Chapters 5123-24):

- provided a 6% waiver rate increase for direct support staff;
- provided funding for an additional 3,000 waiver slots (2,000 IO waivers and 1,000 SELF waivers);
- added nursing to waiver services;
- increased funding for APSI, the state guardian who serves DD individuals lacking guardians;
- mandated “pre-admission counseling” for those selecting ICF placement to be performed by DD Boards;
- required DODD to provide intensive “outreach” services and “options counseling” for existing ICF residents, which DODD contracted to a third-party provider to perform called CareStar;
- created and funded an additional 1100 waivers to divert individuals who have selected ICF services (“diversion waivers”) and to facilitate the transfer of existing ICF residents to waiver services (“exit waivers”);
- required that by 2025, ICFs have no more than two residents per bedroom;
- required that ICF providers, when downsizing and building smaller (six bed or less) ICFs, such facilities not be adjacent to any existing ICFs;
- instituted a “flat rate” methodology for certain ICF residents, resulting in ICF providers receiving less funding, on average, for such residents than previously received;
- requires ICF residents (and guardians) to receive a pamphlet annually informing them of community options;
- limits new ICFs in size to no more than six beds, except DODD may approve eight beds if required for provider to be “financially viable”;
- authorizes and provides funding for DODD to buy back ICF beds, thereby

- forever eliminating the ICF bed; and
- mandated that by June 30, 2017 at least 350 more ICF beds be converted to waiver beds.

291. In its January 2016 weekly *Pipeline* publication, DODD wrote: “It’s important to note that the rate increase applies only to staff who provide waiver services, not to staff who provide services in an Intermediate Care Facility (ICF).”

[http://dodd.ohio.gov/pipelinenewweekly/default.aspx?Paged=TRUE&p\\_PublishedDate=20160125%2016%3A54%3A00&p\\_ID=73&PageFirstRow=3611&&View=%7B43E7A49F-AC48-4E8C-AE4B-D85B8F396920%7D](http://dodd.ohio.gov/pipelinenewweekly/default.aspx?Paged=TRUE&p_PublishedDate=20160125%2016%3A54%3A00&p_ID=73&PageFirstRow=3611&&View=%7B43E7A49F-AC48-4E8C-AE4B-D85B8F396920%7D) (visited Sept. 7, 2018).

292. The non-profit group the Center for Community Solutions, summarized HB 64 as follows:

The department’s main focus will be reductions or conversions of beds at large ICFs to waiver status. Part of the administration’s urgency to continue downsizing ICFs is due to the threat of a lawsuit from Disability Rights Ohio (DRO) . . . . The budget takes a series of actions to incentivize individuals to move from institutions to the community and to make it more difficult for large ICFs to take new residents. . . . HB 64 creates a new, more stringent procedure to review new ICF admissions . . . . County board case managers will review admissions to these facilities . . . .

Center for Community Solutions, “The Department of Developmental Disabilities FY 2016-2017 Budget: Taking the Road Toward Change,” Volume 11, Number 12 (July 2015).

Recent Budgets: Robbing Peter (ICFs) to Pay Paul (Waivers)

293. The biennium budget passed in June 2017 (HB 49 covering FY 18-19), allocated and funded 750 new waivers, as DODD announced on July 14, 2017.

<http://dodd.ohio.gov/Communications/Lists/Posts/Post.aspx?ID=707> (visited Sept. 7, 2018).

294. As Director Martin said in his budget testimony in March 2017, “The Executive Budget builds on transformational gains made in the last budget, and makes additional investments in programs that support individuals who want to live and work in the community.”

<http://dodd.ohio.gov/Communications/SiteAssets/DODD%20Testimony%20John%20Martin.pdf>

(visited Sept. 7, 2018).

295. More recently, in June 2018, though not a budget year, another \$24 million was allocated to DODD for waiver housing needs. <http://dodd.ohio.gov/Communications/Lists/Posts/Post.aspx?ID=996> (visited Sept. 7, 2018).

296. In July 2018, DODD proposed rate increases for respite care reimbursement – which CMS approved – but the rate increases for waiver respite services are higher than the rate increases for ICF respite services. <http://dodd.ohio.gov/Communications/SiteAssets/RateIncreaseCommunityRespite.pdf> (visited Sept. 7, 2018).

297. In August 2018, DODD increased rates – called an “add-on” – paid to direct service professionals (DSPs), but only for those DSP’s working in waiver settings. <http://dodd.ohio.gov/Communications/SiteAssets/TrainingLongevityAddOnGuide.pdf> (visited Sept. 7, 2018). For DSP’s in ICFs, there is no add-on. *Id.*

#### New Waiver Waiting List Rule

298. DODD recently amended its rules relating to the “waiver” waiting list. It did so because the claimed waiting list of more than 40,000 maintained by DD Boards was grossly inflated and not reflective of those actually desiring or needing waiver services. For instance, seven of the ten (original) Guardians are listed on their local DD Board’s waiting lists, even though they have no immediate need or desire for waiver services. Instead, their choice and need are for a continued ICF setting. DODD – working with other agencies and groups – did this as part of an effort called “Fix the List.” <http://www.fixthelist.info/> (visited Sept. 7, 2014). Members of the Fix the List group included OPRA, APSI, and OCB.

299. The culmination of DODD’s efforts is a new rule, titled “Home and Community-

Based Services Waivers – Waiting List,” which became effective September 1, 2018. O.A.C. § 5123-9-04 (the “New Rule”).

300. The stated purpose of the New Rule is to set “forth requirements for the waiting list established pursuant to section [5126.042](#) of the Revised Code when a county board determines that available resources are insufficient to enroll individuals who are assessed to need and who choose home and community-based services in department-administered home and community-based services waivers.” *Id.* at § (A).

301. The New Rule establishes two categories, called “Immediate Need” and “Current need,” as determined by an assessment performed by DD Boards. *Id.* at § (B)(5), (9).

302. Those with an “Immediate Need” are not placed on the waiting list. *Id.* at § (D)(3)(b). Instead, those with an “Immediate Need” are given the immediate option for a waiver service:

the county board shall take action necessary to ensure the immediate need is met. The county board shall provide the individual or the individual's guardian, as applicable, with the option of having the individual's needs met in an intermediate care facility for individuals with intellectual disabilities or through community-based alternative services. Once an individual or individual's guardian chooses the setting in which he or she prefers to receive services, the county board shall take action to ensure the individual's immediate need is met, including by enrollment in a home and community-based services waiver, if necessary. Such action may also include assisting the individual or the individual's guardian, as applicable, in identifying and accessing alternative services that are available to meet the individual's needs. *Id.*

303. The New Rule effectively creates a first-ever waiver entitlement for anyone deemed having an “immediate need,” because anyone having an “immediate need” has the “option” to choose waiver services and then “the county board shall take action to ensure the individual’s immediate need is met, including by enrollment in a home and community-based services waiver.”

*Id.*<sup>6</sup>

304. The New Rule subjects DD Boards to an unlimited number of waivers they must provide since they cannot control the number of individuals who will be deemed to have an “immediate need.” But under Ohio’s current five year Medicaid “State Plan” approved by CMS, the total number of permissible waivers is capped at between 19,000 (year 1) and 25,000 (year 5). <http://dodd.ohio.gov/IndividualFamilies/ServiceFunding/Documents/IO%20Approval%20and%20Amendment.pdf> (visited Sept. 7, 2018).

305. Those with “immediate needs” are, on average, those with the highest, most critical, and more expensive needs. The practical result of the New Rule is that those with the highest (and most expensive) needs are often not even advised of their ability to receive immediate ICF care. This is the opposite of DODD’s goal stated in its 2012 White Paper: “we envision a system where individuals with the most severe disabilities and the highest needs . . . would be appropriate to receive the bundle of services that are provided in intermediate care facilities.” *White Paper* at 3 <http://dodd.ohio.gov/Medicaid/Documents/ICF%20White%20Paper.pdf> (visited Sept. 7, 2018). But the practical result of the New Rule, if implemented as directed, is that high needs people who select a waiver, despite perhaps best suited for an ICF that can provide a bundle of services cheaper than a waiver setting, will leave fewer dollars for the remaining eligible residents requesting a waiver setting.

306. Only those with a “Current Need” are placed on a DD Board’s waiting list. *Id.* at § (D)(2)(b).

307. The New Rule includes ICFs in the definition of “Alternative Services.” *Id.* at (B)(2).

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<sup>6</sup> Whether such was DODD’s intent is unclear, but such is the literal reading of the New Rule.



308. The New Rule requires DD Boards to provide those with an “immediate need” or a “current need” information about “Alternative Services,” which includes ICFs. *Id.* at § (D)(3)-(5).

309. But by definition, anyone with an “immediate need” or a “current need” is eligible for Medicaid DD services.

310. There is nothing “alternative” about the ICF entitlement. It is to be offered upon a person first being deemed eligible for Medicaid services.

311. But the New Rule directs the DD Boards to offer the ICF entitlement only as an “alternative” to a waiver selection, which unlike the ICF entitlement, is an optional, alternative service.

312. For those eligible for Medicaid DD services, waiver services are, by definition, “alternatives,” to the ICF entitlement. The New Rule, however, inverts this legal reality, requiring the ICF entitlement only to be discussed in the context of, and as an “alternative to,” someone choosing or considering waiver services.

313. Moreover, the “old” DODD rule that the New Rule replaced, already required DD Boards to offer the ICF entitlement as an alternative service to Medicaid eligible residents, but DD Boards rarely did so. OAC § 5123:2-1-08 (B)(1)(d) (rescinded September 1, 2018) <http://codes.ohio.gov/oac/5123:2-1-08v1> (visited Sept. 7, 2018).

314. In August 2018, the Hamilton County DD Board gave a 40 minute video presentation describing the “new” Waiting List rule. [https://www.youtube.com/watch?v=lgPrrqnA2s8&feature=youtu.be&utm\\_source=Reflections+August+2018&utm\\_campaign=Reflections+August+2018&utm\\_medium=email](https://www.youtube.com/watch?v=lgPrrqnA2s8&feature=youtu.be&utm_source=Reflections+August+2018&utm_campaign=Reflections+August+2018&utm_medium=email) (visited Sept. 11, 2018). Though the speaker, who was on the work group that developed the new rule, mentions

“alternatives” to waivers – “community alternatives” – ICF’s are not mentioned once during the entire presentation. *Id.*

315. A similar presentation was given in Medina County in August 2018. <https://www.youtube.com/watch?v=XiC0HU9eYtQ> (visited Sept. 11, 2018). During the hour-long presentation, ICFs are not mentioned once, even though “alternatives” to waiver are frequently mentioned. *Id.*

#### How the System Really Works

316. Historically, when DD Boards send annual letters to those on their waiting lists informing them of their waiting list number, the DD Boards do not include any information about the ICF entitlement the individual could immediately select that could meet their needs and forestall their placement on a waiting list. Thus, the vast majority of people on DD Boards’ waiting lists do not understand they have an immediate right to an ICF placement, and they have no knowledge about ICF settings with immediate vacancies.

317. Though CareStar (a third party entity contracted by DODD) counsels existing ICF residents and DD Boards counsel new admissions to ICFs about their waiver alternatives, they do not counsel existing waiver recipients of their ICF entitlement, nor does DODD, ODM, or any entity do so.

318. Thus, while ICF residents receive counseling regarding optional waiver services, those receiving waiver services (and those awaiting waiver services) do not receive counseling regarding their ICF entitlement.

319. At most, as part of an annual process while signing a slew of papers, waiver recipients (and those awaiting waiver services) may sign a so-called “Freedom of Choice” form provided by their DD Board listing ICF services as a choice.

<http://dodd.ohio.gov/Forms/Documents/Freedom%20of%20Choice%20Document.pdf> (visited Sept. 7, 2018). Inverting things, the form begins: “A person eligible for a Medicaid home and community-based services waiver is also eligible for services in an intermediate care facility.” *Id.* The form provides scant information about ICFs and regardless, it is normally presented by the DD Board as a formality included with a series of documents signed annually by those already receiving waiver services.

320. So how does the “Freedom of Choice” work in practice?

321. “Nick”<sup>7</sup> is an administrator at a DD provider that provides both ICF *and* waiver services to more than 300 people. Nick has worked in the DD field for more than 20 years. Before joining his provider, Nick was a Service and Support Administrator (“SSA”) at a large DD Board. Because Nick has worked with individuals of varying abilities, he understands that there needs to be a variety of residential options available to individuals. Mike has found that each individual is unique and needs to be treated as such.

322. On Friday, September 7, 2018, Nick attended the annual meeting for a waiver resident (Tim”). Nick has attended more than 100 such annual meetings for waiver residents over the years. In fact, as a former SSA, Nick used to conduct such meetings. This meeting was led by an SSA from the DD Board. Tim is high functioning and his own guardian.

323. At Tim’s annual meeting, the SSA handed Tim a bunch of forms to sign. When it came to the Freedom of Choice form, the SSA did not say the name of the form. Instead, as he handed it to Tim to sign, the SSA said: “This one says you are being offered the waiver again for the new year and that you do not want to live in an ICF.” Tim responded: “What’s that? Is that

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<sup>7</sup> “Nick” is a real person, who out of fear of reprisal, requested anonymity. The events contained herein are typical and were all documented.

like a group home?" The SSA responded: "No, it's like a nursing home, but for people with DD and I don't know anyone who would want to live in a nursing home, do you?" The SSA then laughed.

324. Nick reports such use of the Freedom of Choice form is typical, that rarely are residents (or their guardians) given a real explanation of what the ICF is, let alone the benefits ICFs provides or how to find more information about ICFs.

325. No matter the formal rules or requirements, DD Boards – which are agents for DODD and ODM – normally do not inform Medicaid eligible residents of ICF services, either when the person initially inquires about potential DD services or upon the formal determination of Medicaid eligibility, nor does ODM, DODD, DRO, or any other entity. As such, individuals are often unaware of the ICF entitlement when considering services options. Instead, individuals usually only first sign their Freedom of Choice forms – ostensibly giving them a choice of ICF or waiver service – “when the individual is essentially on the doorstep of the [waiver setting] already,” as Plaintiffs state. *Plaintiffs’ Reply and Supplemental Evidence in Support of Motion for Class Certification* at 25 (ECF No. 283).

326. Exit and diversion waivers are undersubscribed, meaning – despite outreach and counseling efforts by CareStar and the DD Boards – not all of the roughly 1100 exit and diversion waivers have been utilized.

327. For the exit and diversion waivers that have been utilized by ICF guardians, most are requested by those residents whose guardian is APSI, the state designated “guardian” of last resort. The percentage of ICF residents with APSI as their guardian who express interest in exit and diversion waivers is 49%. In contrast, the percentage of all other ICF residents (meaning those with family or friend guardians) interested such waivers is 15%. Thus, an ICF resident with APSI

as its guardian is more than three likely to request an exit or diversion waiver than is one who has a father, mother, sibling, or friend as her guardian. *Affidavit of Lori Horvath*, Deputy Director DODD (ECF Nos. 273-3 & 291-1).

328. Kristen Henry is the Executive Director of APSI. Prior to joining APSI, Ms. Henry worked as an attorney at DRO.

329. Since 2015, as authorized by HB 64, DODD has purchased ICF beds from providers “for the purpose of reducing the number of ICF/IID certified beds in Ohio.”

<http://dodd.ohio.gov/Initiatives-and-Partnerships/Documents/RFISaleLicensedICFBeds.pdf>

(visited Sept. 7, 2018). Doing so eliminates the ICF license. DODD incentivizes providers by paying them approximately \$7,000 per bed license. DODD also makes it hard for providers to instead sell their ICF beds to another provider, which the providers could normally do for more than \$7,000. DODD frustrates the process of private sale by causing the buyer delays in approving their ICF beds, meaning the buyer is immediately paying the roughly \$7000 annual franchise fee for the new bed (i.e., “bed tax”), but is unable to immediately use the license. This limits the market for ICF licenses, often causing a provider to instead sell the bed license to DODD, which eliminates it from the system. Doing so eliminates the annual approximate cost of \$70,000 for the license (40% paid by DODD and 60% by Medicaid) in perpetuity.

330. The result of all these efforts – converting ICF beds to waivers, downsizing large ICFs, increasing waiver funding, eliminating building new ICFs greater than 8 beds, changing the wait list rule, buying back ICF licenses, options counseling, and decreasing ICF reimbursement through changes in rate methodology – is that in just the past five years, more than 20 private ICFs have closed, eliminating or downsizing more than 600 private ICF beds, with another 600 or more planned for elimination. This effort is separate and apart from State Defendants efforts to close its

own developmental centers, which over the past decade has resulted in the elimination of hundreds more (public) ICF beds. These ICF beds have been eliminated not from a lack of demand, but instead based on Defendants' concerted efforts to eliminate them for policy and perceived economic reasons.

331. The cumulative effect of these efforts is: (i) tens of thousands of Medicaid eligible DD residents and their guardians are unaware the ICF entitlement exists, (ii) for those living in ICFs, their homes face closure due to inadequate rates, forced downsizing of ICF beds, and operating limitations that make it financially challenging for ICF providers to continue to offer their residents the necessary services and supports.

#### DRO's Lawsuit & Interactions with Defendants

332. Despite the Grand Bargain and HB 64 adding thousands of waiver slots, eliminating more than 1,000 ICF beds, increasing waiver reimbursement rates, and curtailing the admission of new residents to ICFs, DRO – on behalf of Plaintiffs – followed through in its threats and filed the instant lawsuit on March 31, 2016.

333. On May 2, 2016, shortly after this lawsuit was filed, the Ohio Olmstead Task Force (“OOTF”) wrote a letter to DRO “inform[ing] that OOTF has voted to support DRO in the lawsuit you filed on behalf of Ohioans who wish to live and work in their local communities – but are unable to do so. . . . OOTF appreciates and values the work of Disability Rights Ohio and looks forward to assisting you in gaining a positive outcome of the lawsuit.” [https://www.disabilityrightsohio.org/assets/documents/ohio\\_olmstead\\_task\\_force\\_letter\\_of\\_support.pdf](https://www.disabilityrightsohio.org/assets/documents/ohio_olmstead_task_force_letter_of_support.pdf) (visited Sept. 7, 2018).

334. Formed in 2002, OOTF describes itself “as a grassroots coalition of people who have disabilities, family members, and people who support people with disabilities. The purpose

of OOTF is to ensure that people with disabilities have the right to live and work in their communities. *Id.*

335. OOTF is comprised of approximately 30 members, including Opportunities for Ohioans with Disabilities (“OOD”), which is the designated state agency in Ohio legally responsible for providing vocational and employment services to DD Ohioans. *Complaint* at ¶ 94.

336. OOD is a party defendant in this case. *Id.*

337. Other OOTF members include CareStar, the third party company DODD hired to provide “outreach” and counseling services to ICF residents for more than \$1 million.

338. Thus, a defendant in this case – OOD – is on a task force that “support[s]” the filing of the lawsuit against the Defendants.

339. Another defendant, ODM, regularly attends OOTF meetings. <https://ohioolmstead.com/participants-2/> (visited Sept. 7, 2018).

340. ODM’s representatives at the OOTF meetings include Linda Wetters and Sue Willis. *Id.*

341. Wetters and Willis are DRO Board Members. <http://www.disabilityrightsohio.org/board-directors> (visited Sept. 7, 2018).

342. Accordingly, two defendants in this case – OOD and ODM – are members of, or attend the meetings of, OOTF, a task force that supports the filing of this lawsuit against them. And the ODM representatives that attend the OOTF meetings are on DRO’s Board, the organization that filed this lawsuit. *Id.*

343. On or about September 11, 2018, Governor Kasich appointed Michael Kirkman to the Opportunities for Ohioans with Disabilities (“OOD”) Council, for a term ending June 1, 2019. <http://www.hannah.com/DesktopDefaultPublic.aspx?type=hns&id=Xics2beb2rw%3d&u=onMq>

[%2fJUhbvw%3d](#) (visited Sept. 12, 2018).

344. Governor Kasich and OOD are defendants in this case.

345. Kirkman is the longtime Executive Director of DRO, the organization that spearheaded this lawsuit and represents the Plaintiffs.

## VI. CROSSCLAIMS

### **First Claim for Relief** **Violation of Title II of the Americans with Disabilities Act** **(Against the State Defendants)**

346. The allegations of paragraphs 1 through 345 are hereby re-alleged as if set forth fully herein and incorporated by reference.

347. Guardians, on behalf of their children/wards, as well as all others who seek, or may seek, to live in an ICF, have disabilities that substantially limit one or more major life activities, such as self-care, learning, working, and brain function. 42 U.S.C. § 12101(1)(A), 12102(2). They are qualified to participate in the State Defendants' activities and system of programs and services, with or without reasonable modifications to their rules, policies, or practices. 42 U.S.C. § 12131(2).

348. Title II of the ADA applies to public entities, including state or local governments and any departments, agencies, or other instrumentalities of state or local governments. 42 U.S.C. §§ 12131, 12132; 28 C.F.R. § 35.104.

349. The State Defendants – Governor Kasich, Director Martin, and Director Sears – acting in their official capacities are public entities within the meaning of Title II of the ADA.

350. Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42



U.S.C. § 12132.

351. Guardians, as well as all others who seek, or may seek, to live in an ICF, represent and are acting on behalf of qualified individuals with a disability who the State Defendants have discriminated against and excluded from full participation in or denied the benefits of the services, programs, or activities that they are required to provide to them, as relates to provision of the ICF entitlement, including their: (i) failure to inform about the ICF entitlement, (ii) failure to adequately fund the ICF entitlement, (iii) failure to administer services, programs, and activities in the most integrated setting appropriate to their needs; and (iv) creation of rules and procedures that endanger or limit the continued provision of the ICF entitlement to those choosing it.

352. The State Defendants not only lack a comprehensive and effectively working plan designed to provide the Guardians, as well as all others who seek, or may seek, to live in an ICF, their ICF entitlement, they instead are implementing a comprehensive plan to deny or limit their ICF entitlement.

353. The remedies and rights under the ADA are “provide[d] to any person alleging discrimination on the basis of disability.” *Id.* at § 12133.

WHEREFORE, the Guardians respectfully request that the Court:

A. Issue Declaratory Judgment finding that the State Defendants are violating the ADA by denying Guardians, as well as all others who seek, or may seek, to live in an ICF, the full participation in, and the benefits of the services, programs, or activities that they are required to provide to them.

B. Grant permanent, injunctive relief to remedy the State Defendants’ violations of the ADA, including requiring them to provide Guardians, as well as all others who seek, or may seek, to live in an ICF, full participation in, and the benefits of the services, programs, or activities that

they are required to provide to them.

C. Award the Guardians their reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 12205, 42 U.S.C. § 1988, and any other applicable provision of law; and

D. Grant any other relief which is necessary and proper to protect the rights of the Guardians, as well as all others who seek, or may seek, to live in an ICF.

**Second Claim for Relief**  
**Violation of Section 504 of the Rehabilitation Act of 1973**  
**(Against the State Defendants)**

354. The allegations of paragraphs 1 through 353 are hereby re-alleged as if set forth fully herein and incorporated by reference.

355. Guardians, on behalf of their children/wards, as well as all others who seek, or may seek, to live in an ICF, have disabilities that substantially limit one or more major life activities, such as self-care, learning, working, and brain function. 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102. They are qualified to participate in the State Defendants' system of programs and services, with or without reasonable modifications to their rules, policies, or practices. 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102.

356. The Rehabilitation Act prohibits discrimination against people with disabilities under any program or activity that receives federal financial assistance. 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance").

357. The State Defendants are a program or activity receiving Federal financial assistance within the meaning of the Rehabilitation Act.

358. The State Defendants have and continue to exclude Guardians, as well as all others

who seek, or may seek, to live in an ICF, from their full participation in, or their denial of the benefits of, the provision and receipt of the ICF entitlement.

359. The State Defendants are violating the Rehabilitation Act and its implementing regulations by administering, funding, and operating their service system for people with intellectual and developmental disabilities in a manner that fails to make the ICF entitlement available, or available in the most integrated setting appropriate to the needs of the Guardians, as well as all others who seek, or may seek, to live in an ICF. 28 C.F.R. § 41.51(d).

360. Providing the Guardians, as well as all others who seek, or may seek, to live in an ICF, the full benefits of the ICF entitlement would not fundamentally alter the State Defendants' service system for people with intellectual and developmental disabilities.

361. The State Defendants not only lack a comprehensive and effectively working plan designed to provide the Guardians, as well as all others who seek, or may seek, to live in an ICF, their ICF entitlement, they instead are implementing a comprehensive plan to deny or limit their ICF entitlement.

WHEREFORE, the Guardians respectfully request that the Court:

A. Issue Declaratory Judgment finding that the State Defendants are violating the Rehabilitation Act by excluding or limiting Guardians, as well as all others who seek, or may seek, to live in an ICF, from their full participation in, or the denial of the benefits of, the ICF entitlement.

B. Grant permanent, injunctive relief to remedy the State Defendants' violations of the Rehabilitation Act, including requiring them not to exclude or limit Guardians, as well as all others who seek, or may seek, to live in an ICF, from their full participation in, and their denial of the benefits of, the ICF entitlement.

C. Award the Guardians their reasonable attorneys' fees and costs pursuant to 29

U.S.C. § 794a, 42 U.S.C. § 1988, and any other applicable provision of law; and

D. Grant any other relief which is necessary and proper to protect the rights of the Guardians, as well as all others who seek, or may seek, to live in an ICF.

**Third Claim for Relief**  
**Violation of the Social Security Act**  
**(Against the State Defendants)**

362. The allegations of paragraphs 1 through 361 are hereby re-alleged as if set forth fully herein and incorporated by reference.

363. The State of Ohio is required to operate its Medicaid program in compliance with the Social Security Act, 42 U.S.C. § 1396 and its implementing regulations governing level of care determinations and freedom of choice.

364. The Social Security Act requires and presupposes that Medicaid eligible individuals will be advised of their ICF entitlement before being advised of any alternative, optional waiver services.

365. Specifically, the Social Security Act requires that before a state offers waiver services, it must: (a) provide “assurance” that “[a]n evaluation of the need for the level of care provided in an . . . ICF” is conducted, (b) determine “that the beneficiary, but for the provision of waiver services, would otherwise be institutionalized in such a facility,” and (c) provide “assurance” that beneficiaries “will be informed of any feasible alternatives under the waiver, and [g]iven the choice of either institutional or home and community-based services.” 42 C.F.R. § 441.302(c), (d).

366. As regards the provision of the ICF entitlement, the Social Security Act also requires states to provide it to Medicaid eligible residents with “reasonable promptness.” 42 U.S.C. § 1396(a)(8).

367. The State Defendants, however, have failed to meaningfully inform Guardians, as well as all others who seek, or may seek, to live in an ICF, of their ICF entitlement, either when the Guardians were originally assessed as eligible for Medicaid benefits or thereafter, and in so doing the State Defendants failed to provide the ICF benefit with reasonable promptness.

368. As a result of these failures, Guardians, as well as all others who seek, or may seek, to live in an ICF, were denied, and in some cases remain denied, the opportunity to make a timely and informed decision regarding their ICF benefit, and also were not provided their ICF benefit with reasonable promptness.

WHEREFORE, the Guardians respectfully request that the Court:

A. Issue Declaratory Judgment finding that the State Defendants are violating the Social Security Act by failing to timely and meaningfully inform Guardians, as well as all others who seek, or may seek, to live in an ICF, of their ICF entitlement, either when the Guardians were originally assessed as eligible for Medicaid benefits or thereafter, and in so doing the State Defendants failed to provide the ICF benefit with reasonable promptness.

B. Grant permanent, injunctive relief to remedy the State Defendants' violations of the Social Security Act, including requiring them to timely and meaningfully inform Guardians, as well as all others who seek, or may seek, to live in an ICF, of their ICF entitlement, both when someone is originally assessed as eligible for Medicaid benefits and thereafter, and to then provide the ICF benefit with reasonable promptness.

C. Award the Guardians their reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable provision of law; and

D. Grant any other relief which is necessary and proper to protect the rights of the Guardians, as well as all others who seek, or may seek, to live in an ICF.

**Fourth Claim for Relief**  
**Violation of Title II of the Americans with Disabilities Act**  
**(Against OCB)**

369. The allegations of paragraphs 1 through 368 are hereby re-alleged as if set forth fully herein and incorporated by reference.

370. OCB appears in this case “on behalf of itself and all 88 county boards of developmental disabilities in the State of Ohio.” *OACB Motion to Intervene* at 1 (ECF No. 68).

371. Title II of the ADA applies to public entities, including state or local governments and any departments, agencies, or other instrumentalities of state or local governments. 42 U.S.C. §§ 12131, 12132; 28 C.F.R. § 35.104.

372. The DD Boards are public entities within the meaning of Title II of the ADA.

373. Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

374. Guardians, as well as all others who seek, or may seek, to live in an ICF, are qualified individuals with a disability who the DD Boards have discriminated against and excluded from full participation in, or denied the benefits of the services, programs, or activities that the DD Boards are required to provide to them, as relates to provision of the ICF entitlement, including their failure to: (i) timely determination of Medicaid eligibility; (ii) timely information and counsel about the ICF entitlement; and (iii) provide adequate service and support administration to individuals seeking services.

375. The DD Boards lack a comprehensive and effectively working plan designed to provide the Guardians, as well as all others who seek, or may seek, to live in an ICF, information

concerning their ICF entitlement.

376. The remedies and rights under the ADA are “provide[d] to any person alleging discrimination on the basis of disability.” *Id.* at § 12133.

WHEREFORE, the Guardians respectfully request that the Court:

A. Issue Declaratory Judgment finding that the DD Boards are violating the ADA by denying Guardians, as well as all others who seek, or may seek, to live in an ICF: (i) timely determination of Medicaid eligibility; (ii) timely information and counsel about the ICF entitlement, and (iii) adequate service and support administration to individuals seeking services.

B. Grant permanent, injunctive relief to remedy the DD Boards’ violations of the ADA, including requiring them to provide Guardians, as well as all others who seek, or may seek, to live in an ICF, the information necessary to make a timely decision about their ICF entitlement.

C. Award the Guardians their reasonable attorneys’ fees and costs pursuant to 42 U.S.C. § 12205, 42 U.S.C. § 1988, and any other applicable provision of law; and

D. Grant any other relief which is necessary and proper to protect the rights of the Guardians, as well as all others who seek, or may seek, to live in an ICF.

**Fifth Claim for Relief**  
**Violation of Section 504 of the Rehabilitation Act of 1973**  
**(Against OCB)**

377. The allegations of paragraphs 1 through 376 are hereby re-alleged as if set forth fully herein and incorporated by reference.

378. The Rehabilitation Act prohibits discrimination against people with disabilities under any program or activity that receives federal financial assistance. 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability in the United States . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program

or activity receiving Federal financial assistance”).

379. The DD Boards are a program or activity receiving Federal financial assistance within the meaning of the Rehabilitation Act.

380. The DD Boards have and continue to exclude Guardians, as well as all others who seek, or may seek, to live in an ICF, from their full participation in, or their denial of the benefits of, the provision and receipt of the ICF entitlement.

381. The DD Boards are violating the Rehabilitation Act and its implementing regulations by administering, funding, and operating their service system for people with intellectual and developmental disabilities in a manner that fails to make the ICF entitlement available, or available in the most integrated setting appropriate to the needs of the Guardians, as well as all others who seek, or may seek, to live in an ICF. 28 C.F.R. § 41.51(d).

382. Providing the Guardians, as well as all others who seek, or may seek, to live in an ICF, information necessary to receive the full benefits of the ICF entitlement would not fundamentally alter the DD Boards service system for people with intellectual and developmental disabilities.

383. The DD Boards not only lack a comprehensive and effectively working plan designed to provide the Guardians, as well as all others who seek, or may seek, to live in an ICF, information necessary to obtain their ICF entitlement, they instead are implementing a comprehensive plan to deny or limit their ICF entitlement.

WHEREFORE, the Guardians respectfully request that the Court:

A. Issue Declaratory Judgment finding that the DD Boards are violating the Rehabilitation Act by excluding or limiting Guardians, as well as all others who seek, or may seek, to live in an ICF, from the information and administration necessary to provide them the ICF



entitlement.

B. Grant permanent, injunctive relief to remedy the DD Boards' violations of the Rehabilitation Act, including requiring them to timely provide the information necessary for Guardians, as well as all others who seek, or may seek, to live in an ICF, to elect the ICF entitlement.

C. Award the Guardians their reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 794a, 42 U.S.C. § 1988, and any other applicable provision of law; and

D. Grant any other relief which is necessary and proper to protect the rights of the Guardians, as well as all others who seek, or may seek, to live in an ICF.

**Sixth Claim for Relief**  
**Violation of the Social Security Act**  
**(Against OCB)**

384. The allegations of paragraphs 1 through 383 are hereby re-alleged as if set forth fully herein and incorporated by reference.

385. The DD Boards are required to operate the Medicaid program in compliance with the Social Security Act, 42 U.S.C. § 1396 and its implementing regulations governing level of care determinations and freedom of choice.

386. The Social Security Act requires and presupposes that Medicaid eligible individuals will be advised of their ICF entitlement before being advised of any alternative, optional waiver services.

387. Specifically, the Social Security Act requires that before a state offers waiver services, it must first: (a) provide "assurance" that "[a]n evaluation of the need for the level of care provided in an . . . ICF" is conducted, (b) determine "that the beneficiary, but for the provision of waiver services, would otherwise be institutionalized in such a facility," and (c) provide

“assurance” that beneficiaries “will be informed of any feasible alternatives under the waiver, and [g]iven the choice of either institutional or home and community-based services.” 42 C.F.R. § 441.302(c), (d).

388. As regards the provision of the ICF entitlement, the Social Security Act also requires states to provide it to Medicaid eligible residents with “reasonable promptness.” 42 U.S.C. § 1396(a)(8).

389. In administering Medicaid benefits as the State’s designated agent, the DD Boards, however, have failed to meaningfully inform Guardians, as well as all others who seek, or may seek, to live in an ICF, of their ICF entitlement, either when the Guardians were (or should have been) originally assessed as eligible for Medicaid benefits or thereafter

390. For those DD Boards that also administer ICFs, they have failed to provide the ICF benefit with reasonable promptness to those who seek, or may seek, it.

391. As a result of these failures, Guardians, as well as all others who seek, or may seek, to live in an ICF, were denied, and in some cases remain denied, the opportunity to make a timely and informed decision regarding their ICF benefit, and also for those DD Boards that administer ICFs, were not provided their ICF benefit with reasonable promptness.

WHEREFORE, the Guardians respectfully request that the Court:

A. Issue Declaratory Judgment finding that the DD Boards are violating the Social Security Act by failing to timely and meaningfully inform Guardians, as well as all others who seek, or may seek, to live in an ICF, of their ICF entitlement, either when the Guardians were (or should have been) originally assessed as eligible for Medicaid benefits or thereafter, and for those DD Boards that administer ICFs, in by failing to provide the ICF benefit with reasonable promptness.

B. Grant permanent, injunctive relief to remedy the DD Boards' violations of the Social Security Act, including requiring them to timely and meaningfully inform Guardians, as well as all others who seek, or may seek, to live in an ICF, of their ICF entitlement, both when someone is (or should have been) originally assessed as eligible for Medicaid benefits and thereafter, and for those DD Boards that administer the ICF benefit, to then provide the ICF benefit with reasonable promptness.

C. Award the Guardians their reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable provision of law; and

D. Grant any other relief which is necessary and proper to protect the rights of the Guardians, as well as all others who seek, or may seek, to live in an ICF.

**THIRD-PARTY COMPLAINT AGAINST OHIO DISABILITY RIGHTS LAW AND POLICY CENTER, INC. d/b/a DISABILITY RIGHTS OHIO ("DRO")**

For their Third-Party Complaint against Ohio Disability Rights Law and Policy Center, Inc. d/b/a Disability Rights Ohio ("DRO"), Third-Party Plaintiffs, Intervenor-Guardians ("Guardians") allege and state as follows:

1. The allegations of paragraphs 1 through 345 of their Crossclaims are hereby re-alleged as if set forth fully herein and incorporated by reference.

2. DRO is a non-profit corporation based in Columbus, Ohio.

3. In 2012, Governor Kasich designated DRO to replace Ohio Legal Services as Ohio's Protection and Advocacy ("P&A") system pursuant to the DD Act, 42 U.S.C. § 15041 et seq. Executive Order 2012-14K.

4. DRO is "the Ohio agency responsible for administering the system of protection and advocacy required by the Developmental Disabilities Assistance Act." *Id.* at 2.

5. As the State's P&A, DRO has those duties as prescribed by the DD Act, 42 U.S.C.

§ 15041 et seq., and implementing regulations, 45 C.F.R. § 1325 *et seq.*

6. As the State's P&A, DRO annually receives federal financial assistance and further "agrees that the federal funds it receives pursuant to the Developmental Disabilities Assistance Act and other related provisions of federal law shall be maintained, expended and accounted for in accordance with all applicable federal and State law requirements." Executive Order 2012-14K.

7. DRO's website states its Board of Directors consists of "[u]p to 15 members . . . with the majority being people with disabilities or their family members." <http://www.disabilityrightsohio.org/board-directors> (visited Sept. 14, 2018).

8. Per DRO's website, it currently has 13 Board members. *Id.*

9. None of DRO's Board members are residents of an ICF or are guardians of someone who lives in an ICF.

10. On information and belief, no member of DRO's Board has ever been a resident of an ICF or a guardian of someone who lives in an ICF.

11. DRO openly advocates for the closure of ICF facilities.

12. On information and belief, DRO does not provide information on ICFs to Medicaid eligible individuals.

13. On information and belief, DRO rarely, if ever, helps place an individual in a public or private ICF, even when requested to do so.

14. On information and belief, DRO has never instituted any formal action on behalf of someone seeking entry into an ICF, but it has instituted numerous formal actions on behalf of individuals seeking a waiver setting.

15. Some of the Guardians have submitted, or attempted to submit, formal public input to DRO for its required annual "Statement of Objectives and Priorities," which input DRO has

ignored or refused to incorporate into its Statement of Objectives and Priorities.

16. In 2014, DRO held public meetings to discuss its goals of downsizing and closing ICFs and sheltered workshops. Some of the Guardians – along with hundreds of other ICF and sheltered workshop families – showed up at the meetings and expressed their opposition to DRO’s intended platform. The Guardians’ (and others) were ignored. Instead, DRO pressed the State – as reflected in its July 1, 2014 letter to the Defendants and its subsequent actions – to close and limit ICFs and sheltered workshops.

17. Similarly, in 2015, some of the Guardians, and hundreds, perhaps thousands, of other ICF and sheltered workshop families, rallied to oppose H.B. 64. DRO not only ignored and opposed their efforts, but DRO instead lobbied the Defendants to further limit and impede the ICF option.

### **VENUE AND JURISDICTION**

18. This Third-Party Complaint is brought pursuant to: (i) the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (“DD Act”), 42 U.S.C. § 15041 *et seq.*, (ii) Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132 *et seq.*, and (iii) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, (iv) the Fourteenth Amendment to the United States Constitution, and (v) Ohio Revised Code (“O.R.C.”) Chapters 5123, 5124, 5126, 5162-66.

19. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and to the extent necessary, 28 U.S.C. § 1367(a).

20. The Guardians’ claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201(a) and 2202, 42 U.S.C. § 12133, 29 U.S.C. § 794a, and 42 U.S.C. § 1983, and by Rules 57 and 65 of the Federal Rules of Civil Procedure.

21. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the acts and omissions giving rise to the claims occurred in the Southern District of Ohio.

**CLAIMS FOR RELIEF**

**COUNT ONE**

**Violation of Developmental Disabilities Assistance & Bill of Rights Act of 2000**

22. The preceding allegations of this Third Party Complaint are hereby re-alleged as if set forth fully herein and incorporated by reference.

23. Pursuant to the DD Act, 42 U.S.C. § 15041 et seq., DRO is Ohio's designated agency "to protect and advocate the right of individuals with developmental disabilities" in Ohio.

24. The Guardians are the guardians of Ohioans who have developmental disabilities.

25. DRO fails to protect and advocate for the Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, by failing to do the following, as required by the DD Act:

- "to ensure the protection of, and advocacy for, the rights of [DD] individuals . . . who are or who may be eligible for treatment, services, or habilitation." *Id.* at § 15043(a)(2)(A)(i).
- "provide information on and referral to programs and services addressing the needs of individuals with developmental disabilities." *Id.* at (ii).
- annually submit to HHS a list of "goals and priorities developed through data driven strategic planning." *Id.* at (a)(2)(C).
- annually allow the public and individuals with DD an opportunity to comment on the P&A's goals and priorities. *Id.* at (a)(2)(D).
- "establish a grievance procedure for clients or prospective clients of the system to ensure that individuals with developmental disabilities have full access to services of the system." *Id.* at (a)(2)(E).

Collectively, along with the "Requirements" listed below, the "P&A Requirements."

26. As Ohio's P&A, DRO is required to "address[] the needs of [all] individuals with developmental disabilities," not just a subset, or favored portion, of individuals with developmental disabilities. *Id.* at 15043(a)(2)(A)(ii) (the "Needs Requirement").

27. By failing to address the needs of those represented in this lawsuit by the Guardians, as well as all others who seek, or may seek, to live in an ICF, DRO violates the Needs Requirement of the DD Act.

28. The DD Act also requires that a P&A have a governing board "composed of members who broadly represent . . . the needs of individuals served by the system." *Id.* at § 15044(a). The majority of its members "shall" be "individuals with disabilities (or their guardians) . . . who are eligible for services . . . through the system." *Id.* (the "Board Requirement"). *Id.*

29. By failing to have any members of its Board who are residents of an ICF or are guardians of someone who lives in an ICF, DRO violates the Board Requirement.

30. The DD Act also requires that DRO "not implement a policy or practice restricting the remedies which may be sought on behalf of individuals with developmental disabilities or compromising the authority of the Protection and Advocacy System (P&A) to pursue such remedies through litigation, legal action, or other forms of advocacy." 45 C.F.R. § 1326.21(c) (the "No Restriction Requirement").

31. By failing to advocate on behalf of the Guardians, as well as all others who seek, or may seek, to live in an ICF, DRO violates the No Restriction Requirement of the DD Act.

32. The DD Act requires DRO to, at least annually, "[o]btain formal public input on its Statement of Objectives and Priorities" and then "[i]ncorporate or address any comments received through public input." 45 C.F.R. § 1326.22(d)(1), (4) (the "Public Input Requirement").

33. By ignoring the input provided by some Guardians, or refusing to incorporate

Guardians' input into its "Statement of Objectives and Priorities," DRO violates the Public Input Requirement of the DD Act.

WHEREFORE, the Guardians respectfully request that the Court:

A. Issue Declaratory Judgment finding that DRO is violating the DD Act by failing to provide the Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, the P&A Requirements, causing them to be denied the protection and advocacy services to which they are entitled under the DD Act;

B. Grant permanent, injunctive relief to remedy DRO's violations of the DD Act, including requiring DRO to: (i) advocate for, and provide information to, individuals who live in an ICF, or seek to live in an ICF or participate in sheltered workshops; (ii) add individuals who live in an ICF, or seek to live in an ICF, to its Board; and (iii) incorporate the input of individuals who live in an ICF, or seek to live in an ICF or participate in sheltered workshops, into its annual Statement of Objectives and Priorities;

C. Award the Guardians their reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable provision of law; and

D. Grant any other relief which is necessary and proper to protect the rights of the Guardians, as well as all others who seek, or may seek, to live in an ICF.

**COUNT TWO**  
**Violation of Title II of the Americans with Disabilities Act**

34. The preceding allegations of this Third-Party Complaint are hereby re-alleged as if set forth fully herein and incorporated by reference.

35. Guardians, on behalf of those they represent, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, have disabilities that substantially limit one or more major life activities, such as self-care, learning, working, and brain function. 42



U.S.C. § 12101(1)(A), 12102(2). They are qualified to participate in DRO's activities and system of programs and services, with or without reasonable modifications to DRO's rules, policies, or practices. 42 U.S.C. § 12131(2).

36. Title II of the ADA applies to public entities, including state or local governments and any departments, agencies, or other instrumentalities of state or local governments. 42 U.S.C. §§ 12131, 12132; 28 C.F.R. § 35.104.

37. As Ohio's designated agency "to protect and advocate the right of individuals with developmental disabilities," DRO is a public entity.

38. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

39. Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, are qualified individuals with a disability who DRO has excluded from participation in, and denied the benefits of the services, programs, or activities that DRO is required to provide to them, including the P&A Requirements.

40. DRO has also subjected the Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, to discrimination.

41. Providing the Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, with the P&A Requirements would not fundamentally alter DRO's service system for people with intellectual and developmental disabilities.

42. DRO lacks a comprehensive and effectively working plan designed to provide the Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered

workshops, the P&A Requirements.

43. The remedies and rights under the ADA are “provide[d] to any person alleging discrimination on the basis of disability.” *Id.* at § 12133.

WHEREFORE, the Guardians respectfully request that the Court:

A. Issue Declaratory Judgment finding that DRO is violating the ADA by denying Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, participation in, and the benefits of the services, programs, or activities that DRO is required to provide to them.

B. Grant permanent, injunctive relief to remedy DRO’s violations of the ADA, including requiring DRO to provide Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, full participation in, and the benefits of the services, programs, or activities that DRO is required to provide to them.

C. Award the Guardians their reasonable attorneys’ fees and costs pursuant to 42 U.S.C. § 12205, 42 U.S.C. § 1988, and any other applicable provision of law; and

D. Grant any other relief which is necessary and proper to protect the rights of the Guardians, as well as all others who seek, or may seek, to live in an ICF.

**COUNT THREE**  
**Violation of Section 504 of the Rehabilitation Act of 1973**

44. The preceding allegations of this Third-Party Complaint are hereby re-alleged as if set forth fully herein and incorporated by reference.

45. Guardians, on behalf of those they represent, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, have disabilities that substantially limit one or more major life activities, such as self-care, learning, working, and brain function. 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102. They are qualified to participate in DRO’s system of

programs and services, with or without reasonable modifications to DRO's rules, policies, or practices. 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102.

46. The Rehabilitation Act prohibits discrimination against people with disabilities under any program or activity that receives federal financial assistance. 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance").

47. DRO is a program or activity receiving Federal financial assistance, and "agrees that the federal funds it receives pursuant to the Developmental Disabilities Assistance Act and other related provisions of federal law shall be maintained, expended and accounted for in accordance with all applicable federal and State law requirements." Executive Order 2012-14K.

48. DRO has excluded Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, from their participation in, and denial of, DRO's services, including the provision of DRO's P&A Requirements.

WHEREFORE, the Guardians respectfully request that the Court:

A. Issue Declaratory Judgment finding that DRO is violating the Rehabilitation Act by excluding Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, from their participation in, and their denial of the benefits of, DRO's services, including its the provision of DRO's P&A Requirements.

B. Grant permanent, injunctive relief to remedy DRO's violations of the Rehabilitation Act, including requiring DRO not to exclude Guardians, as well as all others who seek, or may seek, to live in an ICF or participate in sheltered workshops, from their participation in, and their denial of the benefits of, DRO's services, including its the provision of DRO's P&A

Requirements.

C. Award the Guardians their reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 794a, 42 U.S.C. § 1988, and any other applicable provision of law; and

D. Grant any other relief which is necessary and proper to protect the rights of the Guardians, as well as all others who seek, or may seek, to live in an ICF.

Respectfully submitted,

/s/ Roger P. Sugarman

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Crossclaims and Third-Party Complaint of Intervenor-Guardians was filed via the Court's authorized CM/ECF system on this 14<sup>th</sup> day of September, 2018, which will send notification of such filing to all other parties to this action.

*/s/ Roger P. Sugarman*

Roger P. Sugarman (0012007)