

Alan Fortney, Past President

Conway Human Development Center Parents Association

Thank you Committee and Mr. Chairman for allowing me to testify before you today. My name is Alan Fortney and I am representing the residents, parents and guardians of the Conway Human Development Center - a publicly funded and state-managed congregate care facility for individual with developmental/intellectual disabilities in Arkansas. Our daughter's name is Kim. She is a 37 year old adult that has the mental capacity of a 15-month old baby.

I come before you today in regards to the appropriations to the Department of Justice, most specifically in regards to the Civil Rights Division - Special Litigations Section of the Department of Justice. This section of the DOJ has filed and threatened to file numerous lawsuits against states across the country in an effort to close down or cripple the infrastructure of the publicly funded congregate care facilities for individuals with Developmental Disabilities and Intellectual Disabilities (DD/ID). I represent the Parent's Association of the Conway Human Development Center in Conway, Arkansas, who as of last summer defeated the DOJ in a federal lawsuit in Little Rock, Arkansas, in one of these very lawsuits. The most recent lawsuit of which I am aware was filed and tentatively agreed as a settlement in Virginia to close 4 out of 5 congregate care facilities. These lawsuits claim to be pursuing the "requirement" of the Americans with Disabilities Act (ADA) and the Supreme Court decision of Olmstead. However, the DOJ is ignoring the fact in the law that allows and acknowledges the need of some individuals to maintain this level of care for those who choose or require it.

In the Olmstead decision by the Supreme Court, a majority of Justices in Olmstead recognized an ongoing role for publicly and privately-operated institutions:

"We emphasize that nothing in the Americans with Disabilities Act 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." 119 S. Ct. at 2187

The plurality opinion in Olmstead stated:

"Each disabled person is entitled to treatment in the most integrated setting possible for that person - recognizing on a case-by-case basis, that setting may be an institution." 119 S. Ct. at 2189.

Federal Judge Leon Holmes from the DOJ vs. Arkansas lawsuit ruled:

“Most lawsuits are brought by persons who believe their rights have been violated. Not this one . . . All or nearly all of those residents have parents or guardians who have the power to assert the legal rights of their children or wards. Those parents and guardians, so far as the record shows, oppose the claims of the United States. Thus, the United States [Department of Justice] is in the odd position of asserting that certain persons’ rights have been and are being violated while those persons – through their parents and guardians disagree.”

In an 85-page ruling, the Chief U.S. District Judge J. Leon Holmes said DOJ failed to prove its claims that the Conway Human Development Center violated its residents’ rights under the U.S. Constitution, as well as under the Americans with Disabilities Act (ADA).

Judge Holmes questioned the authority, expertise and methods of several expert witnesses used to support the federal government’s arguments. He extensively cited testimony of residents’ parents and guardians who were satisfied with the treatment the residents receive there.

I was a witness in this case, actually called as a witness by the DOJ. They tried to discredit me (their own witness) by claiming that the parents and guardians of the residents were ignorant and didn't understand the residential and service options available to our loved ones. As I stated in my court testimony, my wife and I have visited with many community providers of services, as well as researched housing options for our daughter. I have worked with local providers through fund-raising efforts by the local United Way, where many of the local service providers are receiving a portion of their funding. We have also been provided documentation regarding all options available for our daughter from the state Department of Human Services - Developmental Development Services division.

During the DOJ investigation, the attorneys from the DOJ asked me, as the president of the Parent's Association, to arrange a meeting with the parents/guardians of the residents. We had several meetings with a small group of parents/guardians as it was difficult to arrange a large group meeting, but the DOJ attorneys asked to speak to the whole group of parents/guardians. As I was arranging for such a meeting, the attorneys from the DOJ told me they could not discuss the case, nor did they wish to hear "praise" for the center, but were coming to hear the complaints and what the parents/guardians thought should be "improved". In other words, they only wanted the parents/guardians to provide ammunition for the lawsuit against the very **home** of their loved one. After sharing this information with the parents/guardians, the group decided, as a whole, to **not** meet with these attorneys. The DOJ attorneys did not want to hear the truth from those who actually live or represent those who live at the center, they simply wanted to tell us “we are the government and we’re here to help”.

During the trial in September through mid-October of 2010, the DOJ attorneys acted very unprofessional towards the witnesses, the parents/guardians, and the employees who are entrusted with the care of our loved ones. **There were 15 attorneys in the courtroom for the DOJ, while there were 4 attorneys defending the state of Arkansas in this case. The cost of that many attorneys for 6 weeks is quite expensive to the people of this United States!!** With the exception of one attorney (Benjamin O. Tayloe), the DOJ attorneys laughed at witnesses responses, had private conversations that disrupted the court, and acted very arrogant. The judge asked each side to wrap up their side of the case in a specific amount of time, but the DOJ attorneys constantly pushed the limits of the court. The attorneys for the state were quite the contrast. They were very considerate, kind, respectful of the court, and respectful of those who were there to represent their loved ones. Unfortunately for the citizens of the United States and the citizens, specifically in Arkansas, our tax dollars were fighting against our tax dollars in this case. Millions of our tax dollars on both sides were spent in this case. All this, and the DOJ lost the case!! Not only that, but the parents and guardians of the residents had to dip into their own personal pockets to hire a third-party attorney to write an Amicus Brief to intervene in this case, just to have representation of the actual residents involved, because nether the state of Arkansas, nor the United States of America was actually representing the residents. The DOJ was suing the state, but they were not asking any resident or resident's guardian if they wanted to be a part of or opt out of the lawsuit. They sought to force the state, either by outspending them on the case, or by judge's decision to downsize or close a facility or all publicly managed facilities of residential services for the DD/ID population.

The attorneys from the DOJ do not respect the decisions of the guardians of their loved ones to allow the individual to reside where they choose. During these lawsuits and settlements, the DOJ assumes that all individuals should be removed from of their homes and be required to hire their own staff and find housing, physical therapy, dentists, doctors, psychologists, care-givers, transportation, occupational therapy, etc. There is no way in the world our daughter Kim could hire her own staff and manage her own care/needs at her mental age.

The mental age/capability of most of the residents at CHDC are at the infant to toddler level of understanding. Our daughter does not have the capability to understand the concepts of potty-training, work, or even the reason behind money in any form. It's not that professional special education teachers and her mother haven't tried for many, many years. She is just **not** mentally capable of understanding these concepts. She needs and requires 24-hour care, 7 days a week, for 365 days a year. With the comprehensive services she receives at the Conway Human Development Center, she has 24-hour care, 24-hour access to medical facilities, access to a dentist on-campus, therapeutic pool, more than 3 sets of eyes on her to watch-out for and protect her at all

times. In a community setting, this would **not** be the case. Yet, the DOJ Civil Rights Division - Special Litigation Section believes and pushes for "community or home, only" settings for individuals with these specialized needs. They believe so strongly that residential settings like my daughter's home should be closed that they refer to the residents in legal filings as "confined", or "confinements", etc. The DOJ files lawsuits against states in an effort to close or severely downsize these facilities.

The DOJ Civil Rights Division - Special Litigation Section attorneys tell all parents/guardians that they do not try to close or downsize congregate care facilities. However, in every lawsuit that has ever been filed by this agency, there has never been an instance where the same number of residents were allowed to stay in their congregate care facility home, or where more residents were allowed to enter the congregate care facility. There are constant waiting lists for admittance to congregate care facilities, but most of these who are waiting are never allowed admittance due to diversions to home and community based programs.

I ask that you limit the appropriations to the Department of Justice to prohibit lawsuits or "settlements" with states where there has been no complaint from a resident, and where the congregate care facility meets or exceeds all oversight requirements from federal and state surveyors. The Conway Center was under investigation for 8 years before the lawsuit was eventually filed. Before, during, and after this lawsuit was filed, the CHDC met all federal and state regulations with oversight from federal surveyors from the Centers of Medicaid Services (CMS), state surveyors from the Office of Long Term Care (OLTC), and an independent international accreditation from the Commission on Accreditation of Rehabilitation Facilities (CARF).

Please reduce the needless spending of tax dollars by limiting the frivolous lawsuits being pursued by the DOJ Civil Rights Division – Special Litigation Section in an effort to reduce or undermine the congregate care options for individuals with developmental and intellectual disabilities.

Thank you for your time and consideration in this matter regarding the appropriation to the Department of Justice.

Respectfully,

Alan Fortney