Nos. 11-3684, 11-3685

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FRANKLIN BENJAMIN, *et al.*,

Plaintiff-Appellees

v.

PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, *et al.*,

Defendant-Appellees

CRAIG SPRINGSTEAD, *et al.*,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case implicates the rights of individuals with disabilities under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504), and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12132 (Title II). The Attorney General has authority to bring civil actions to enforce Title II and Section 504 and has promulgated regulations implementing both statutes. See 42 U.S.C.

12133, 12134(a); 29 U.S.C. 794a; 28 C.F.R. Pt. 35, App. B, Subpt. F; 28 C.F.R. Pts. 35 and 41.

Here, plaintiffs filed a class action lawsuit to enforce regulations promulgated under Section 504 and Title II that require individuals with disabilities to be served "in the most integrated setting appropriate" to their needs. See 28 C.F.R. 41.51(d); 28 C.F.R. 35.130(d). The Supreme Court in *Olmstead* v. *L.C. by Zimring*, 527 U.S. 581 (1999), interpreted these regulations to mean that "[u]njustified isolation" of individuals with disabilities "is properly regarded as discrimination based on disability." *Id.* at 597.

The United States regularly brings cases and files amicus briefs to vindicate the *Olmstead* rights of institutionalized individuals. See, *e.g.*, *United States* v. *Delaware*, No. 11-cv-591 (D. Del.); *United States* v. *Georgia*, No. 10-cv-249 (N.D. Ga.); see also, *e.g.*, U.S. Br., *Disability Advocates, Inc.* v. *Paterson, et al.*, No. 10-235-cv (L) (2d Cir.) (Oct. 6, 2010); U.S. Br., *Cota, et al.* v. *Maxwell-Jolly, et al.*, No. 10-15635 (9th Cir.) (July 22, 2010). This case presents issues that may profoundly impact our *Olmstead* enforcement.

STATEMENT OF THE ISSUES

The United States will address:

1. Whether the district court abused its discretion in approving a settlement agreement that requires community placement for individuals with developmental

disabilities who are qualified for community-based services but express no preference regarding such placement and lack a guardian or involved family member to express a preference on their behalf.

2. Whether the district court abused its discretion when it certified the proposed class.

3. Whether the district court abused its discretion in approving the settlement.

STATEMENT OF THE CASE

1. Five people institutionalized in Pennsylvania state centers for individuals with developmental disabilities (State Centers) filed this lawsuit seeking community placements for themselves and others similarly situated. JA75-102 (Amended Complaint). They alleged that, in violation of Section 504 and Title II, Pennsylvania failed to offer community placements to State Center residents who do not oppose community placement and for whom such placement is appropriate. JA76, 97-101.

Pennsylvania has five State Centers. JA297 (Plaintiffs' Statement of Undisputed Facts). The largest, Selinsgrove Center, had 334 residents in September 2009, while the smallest, Hamburg Center, had 124; as of December 2011 the total census is 1150. JA298; Appellants' Br. 11 (citing Kuhno Testimony). Because of the institutional nature of the State Centers, they provide

very limited opportunities for residents to interact with the community at large. JA305. Most of the centers are located in rural areas and daily activities typically are held on the grounds of the institution. JA305.

In addition to providing these State institutions and funding similar private congregate care institutions,[1] Pennsylvania funds community-based services for more than 50,000 individuals with developmental disabilities. JA356 (Defendants' Statement of Undisputed Facts). This funding supports a range of community-based services, including: "residential services (such as small group homes or family living situations); day programming (such as vocational training, supported employment, development of community integration skills, and socialization); therapies (including behavioral supports); home health care (including up to 24 hours per day of skilled nursing); home modifications; assistive technology; and respite services." JA300 (Plaintiffs' Statement of Undisputed Facts).

Plaintiffs allege that they are able, with appropriate services and supports, to live in a community setting instead of an institution; they are not opposed to moving to a community placement; and the State has failed to provide them with the option of moving to a community setting. JA76-78 (Amended Complaint).

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[1] Approximately 2500 individuals with developmental disabilities in Pennsylvania live in private congregate care institutions. JA300 (Plaintiffs' Statement of Undisputed Facts).

3. Soon after filing the case, plaintiffs moved for class certification. JA103-104. They defined the class as:

> All persons who: (1) currently or in the future will reside in one of Pennsylvania's state-operated intermediate care facilities for persons with mental retardation; (2) could reside in the community with appropriate services and supports; and (3) do not or would not oppose community placement.

JA103-104.

Pennsylvania did not oppose class certification. JA103. It admitted that all residents of the five State Centers could, with the appropriate services and supports, live in a community placement. JA303 (Plaintiffs' Statement of Undisputed Facts). It also admitted that there are no services or supports provided at the State Centers "that cannot be and are not currently provided" to individuals with developmental disabilities in Pennsylvania's community system. JA304. The district court certified the class (JA36-39) and denied Pennsylvania's motion to dismiss. JA177-178.

While the motion to dismiss was pending, a group of State Center residents (collectively "Springstead") moved to intervene to protect their ability to continue to live in a State Center. JA166-170. The district court denied the motion, concluding that Springstead was not part of the class. JA189-210. Springstead appealed. JA55 (Doc. 42).

While that appeal was pending, the parties each moved for summary judgment (the United States filed a brief supporting the plaintiffs' motion). JA56-57 (Docs. 48, 51, & 62). The district court granted plaintiffs summary judgment. JA410-433. It recognized that the first two elements of an *Olmstead* claim, appropriateness of community placement and non-opposition to community placement, were clearly established. JA425. It ruled that the State could not establish that providing community placement for State Center residents was a fundamental alteration of its program. JA429-431. The court did not grant relief, but referred the case to mediation. JA432 & n.12.

4. This Court affirmed the denial of Springstead's intervention motion (JA436-446) concluding that Springstead and Diane Solano[2] (collectively "Springstead/Solano") failed to show that the litigation poses a tangible threat to a legally cognizable interest. JA443. It rejected Springstead/Salono's argument that they are *de facto* members of the class (JA443) and held that "they will not be personally bound by anything that is decided in this litigation." JA443.

5. After this Court's decision, the parties agreed to a settlement (JA466-480) that the district court preliminarily approved (JA485-488). The settlement agreement provides that the State will maintain a "Planning List" of all State

[2] Diane Solano (now an appellant), a State Center resident whose guardian wants her to remain in a State Center, was an amicus curiae in the first appeal. See *Benjamin* v. *Dept. of Pub. Welfare*, No. 10-1908 (3d Cir. 2010) docket.

Center residents not opposed to community placement. JA470. Opposition includes opposition by guardians or involved family members, and will be assessed annually for each resident. JA470-471. A resident not opposed to community placement will be placed on the Planning List unless an involved family member or guardian opposes community placement for the resident. JA471. Only a legal guardian can override a resident's stated preference for community placement. JA471. The settlement also provides for education about community placement, including: training events for residents and family members; distribution of written material about community placement options; opportunities for residents and families to visit community placements serving individuals with needs similar to those of the residents; and opportunities to speak with family members of individuals with developmental disabilities currently in community placements. JA472-474. The settlement requires the State to develop an integration plan that provides community placements to 50 State Center residents in the current fiscal year, 75 residents next year, 100 residents in years three and four, and 75 residents in year five. JA474-475.

Springstead and Solano filed objections to the settlement (JA948-998 (Solano Objections); JA1013-1052 (Springstead Objections)) and again moved to intervene (JA1000-1012 (Solano Motion); JA1062-1066 (Springstead Motion)).

They raised the same objections to the settlement they raise here, and argued, as they have here, that class certification was improper. JA948-998, 1013-1052.

Plaintiffs argued that all of the factors this Court set out in *Girsh* v. *Jepson*, 521 F.2d 153 (3d Cir. 1975), favor approval of the settlement. Doc. 261 at 13-22. The United States supported this argument. JA1067-1084.

A week before the fairness hearing, the district court denied Springstead/Solano's new motions to intervene, incorporating its denial of the first motion to intervene and noting that this Court affirmed that ruling on appeal. JA33-35. The district court said that it would nonetheless consider Springstead/Solano's written objections and allow them to question witnesses and speak at the fairness hearing. JA34.

At the fairness hearing, three witnesses testified about the process of determining a resident's preference, and of moving individuals to community placements. JA1353-1438. Springstead/Solano questioned these witnesses, and argued against the settlement. JA1457-1474, 1491-1492. Plaintiffs, the State, and a Department of Justice attorney argued in support of the settlement. JA1475-1491.

6. A week later, the district court approved the proposed settlement, carefully analyzing the *Girsh* factors. JA5-32. The court concluded that objections from people who are not class members because they oppose

community placement are not probative of the class members' views and thus not relevant. JA17. The court determined that the settlement's effect on non-class members "is negligible compared to the effect that a wholesale denial of the Settlement Agreement will have on those who do not oppose discharge." JA17 n.2. It held that because the settlement did not require any State Center to close, objection on the grounds that State Centers should stay open was misplaced. JA22. It declined to reconsider its class certification decision. JA19 n.4. The district court did, however, express concern about the settlement agreement's treatment of State Center residents with profound disabilities who have no guardian or involved family member. JA21-22.

Springstead/Solano appealed the approval of the settlement and denial of their motions to intervene. JA1-2 (Springstead NOA); JA3-4 (Solano NOA). They also sought a partial stay of the settlement approval, which the district court denied. Doc. 297 at 1-2 & n.1. In that denial, the court dropped its prior reservations about the settlement, calling that portion of its opinion "an inconsequential observation." Doc. 297 at 2 n.1.

SUMMARY OF THE ARGUMENT

"Unjustified isolation" of individuals with mental disabilities "is properly regarded as discrimination based on disability," and is prohibited by federal law. See *Olmstead* v. *L.C. by Zimring*, 527 U.S. 581, 597 (1999). That is the promise of

Olmstead. The United States presents this amicus brief because appellants' arguments threaten that promise in two fundamental ways, and because the district court correctly approved the fair, adequate, and reasonable settlement in this case.

1. Appellants argue that the legal "default" for an institutionalized person who can appropriately be served in a community placement but is unable to express a preference for or against community placement is to remain institutionalized. That is wrong. An institutionalized person who can live in the community, but cannot express a preference regarding community placement and lacks a guardian or involved family member to express a preference on his or her behalf, should be placed in the community. Federal law strongly favors integration of individuals with disabilities into the community over segregation in large institutions. *Olmstead* confirms that community placement, not institutionalization, is the legal presumption. Moreover, a significant body of research and scholarship supports the law's unambiguous preference for community-based care, even for individuals whose disabilities are severe.

2. Appellants' argument that class certification was improper attacks the availability of *Olmstead* class actions generally. But *Olmstead* clearly indicates that class actions are the best private means of enforcing the right to be free from unjustified institutionalization.

Class certification in this case was proper. The class is not too indefinite because inclusion on the Planning List determines current class membership. The class definition does not include an "opt-out" provision but merely reflects, as it must, the substantive right the class seeks to enforce. The class meets Rule 23's commonality requirement because a single inquiry decided liability for the entire class and the class is entitled to a single remedy. The class meets the typicality requirement because the named plaintiffs have precisely the same legal claim as everyone else in the class – *i.e.*, no legally relevant facts distinguish the named plaintiffs from other class members. Class certification was procedurally proper.

3. Finally, the district court correctly determined that the settlement is fair, adequate, and reasonable. [3]

[3] The United States recognizes that if this Court accepts appellees' argument that this appeal is improper, it need not consider the merits issues we address in this brief. This brief does not address the appealability issue, although we stand by our position in the district court that appellants are not class members because they oppose community placement. See JA1076-1077 (U.S. Statement Supporting the Settlement Agreement).

ARGUMENT

I

COMMUNITY PLACEMENT IS THE LEGALLY CORRECT PLACEMENT FOR INDIVIDUALS IN THE "DEFAULT" GROUP

A. The Settlement's Treatment Of The "Default" Group

Many State Center residents simply are unable, because of the nature of their disabilities, to express a preference for or against community placement. Most of them have a guardian or involved family member who speaks for them and who, under the settlement agreement, will decide whether they oppose a community placement. Approximately 125 State Center residents (about 10%) similarly cannot express a preference but do *not* have a guardian or involved family member who speaks for them. JA1483-1484 (Hearing Transcript). Under the terms of the settlement agreement (JA470-471), these residents (the "default" group) are part of the class because they do not oppose community placement. They will be placed on the Planning List (JA470-471), and will move to a community placement when their treatment team determines there is a placement available that meets their needs (JA476).

Appellants maintain that this part of the settlement agreement violates *Olmstead* v. *L.C. by Zimring*, 527 U.S. 581 (1999). They argue that individuals in the "default" group should stay in the State Centers. Br. 56. This argument is the

primary support for their claim that the settlement is unfair, and is a key component of their arguments that class certification was improper.

The "default" group issue raises a critical legal question about the implementation of *Olmstead*. In our view, the correct interpretation of the ADA, Section 504, their implementing regulations, and *Olmstead* is that people who can be served in the community and do not express opposition to moving to the community should be served in the community. This category includes people who are unable, because of their disabilities, to express an opinion about whether to move to a community placement.

B. Federal Law Prefers Community-Based Rather Than Institutional Treatment For Individuals With Mental Disabilities

Federal law exhibits a strong preference for treatment in the community rather than in large institutions. When it enacted Section 504 of the Rehabilitation Act in 1973, and again when it enacted the Americans with Disabilities Act in 1990, Congress was concerned that individuals with disabilities were unnecessarily segregated from society. Sponsors of the Rehabilitation Act condemned the "invisibility of the handicapped in America," and introduced bills responding to the country's "shameful oversights" that caused individuals with disabilities "to live among society 'shunted aside, hidden, and ignored.'" See *Alexander* v. *Choate*, 469 U.S. 287, 296 (1985) (citing 118 Cong. Rec. 525-526 (1972)). An

express purpose of Section 504 was "to maximize" the "inclusion and integration [of individuals with disabilities] into society." 29 U.S.C. 701(b)(1).

Before enacting the ADA, Congress recognized that the Rehabilitation Act had not fulfilled the "compelling need * * * for the integration of persons with disabilities into the economic and social mainstream of American life." S. Rep. No. 116, 101st Cong., 1st Sess. 20 (1989). Congress passed the ADA to "continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life." H.R. Rep. No. 485 (pt. 3), 101st Cong., 2d Sess. 49-50 (1990). Congress specifically found that "institutionalization" is one of the "critical areas" in which discrimination against individuals with disabilities persists. 42 U.S.C. 12101(a)(3). It further found that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). And it found that "segregation" of individuals with disabilities is a "form[] of discrimination." 42 U.S.C. 12101(a)(5).[4]

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[4] These findings were drawn from the almost-identical findings made by the U.S. Commission on Civil Rights in a report entitled *Accommodating the Spectrum of Individual Abilities* (Clearing House Pub. No. 81, 1983) (Report). The Report also observed that "[i]nstitutionalization almost by definition entails segregation and isolation," and noted that, while "[t]here has been increasing acceptance in recent years of the fact that most training, treatment, and habilitation services can

(continued…)

Section 504, and Title II of the ADA (which applies to public entities) mandate integration of individuals with disabilities into the community. The ADA's integration regulation provides that "[a] public entity shall administer services, programs, and activities in the *most integrated setting appropriate* to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d) (emphasis added). Section 504's integration regulation is nearly identical. See 28 C.F.R. 41.51(d). The preamble to the ADA's regulations explains that "the most integrated setting" is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,694, 35,705 (July 26, 1991) (codified at 28 C.F.R. 35.130, App. A (1996)). As the Supreme Court said in *Olmstead*, the Department of Justice has consistently interpreted its Section 504 and ADA regulations to prohibit undue institutionalization, and has argued that undue institutionalization is discrimination by reason of disability. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation") (citation and internal quotation

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(…continued)
be better provided to handicapped people in small, community-based facilities rather than in large, isolated institutions, * * * a great many handicapped persons remain in segregative facilities." Report at 44-46.

marks omitted); see also *M.R.* v. *Dreyfus*, 663 F.3d 1100, 1117 (9th Cir. 2011) (applying *Auer* deference to the Department of Justice's interpretation of integration regulations). This Court has interpreted these regulations to mean that "where appropriate for the patient, both the ADA and [Section 504] favor integrated, community-based treatment over institutionalization." *Pennsylvania Prot. & Advocacy, Inc.* v. *Pennsylvania Dept. of Pub. Welfare*, 402 F.3d 374, 379 (3d Cir. 2005) (citation omitted).[5]

In *Olmstead*, the Court held that "[u]njustified isolation * * * is properly regarded as discrimination based on disability." 527 U.S. at 597. It explained that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Id.* at 600. And it determined that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 600-601. The Court ruled that public entities must provide community-based services to people with disabilities when (a) such services are appropriate, (b) the affected person does not oppose community-based treatment, and (c) community-based

[5] Pennsylvania law also indicates a preference for community-based care rather than institutionalization for individuals with mental disabilities. 55 Pa. Code § 6400.1 (2012).

services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. *Id.* at 607; see also, *e.g.*, *Pennsylvania Prot. & Advocacy, Inc.*, 402 F.3d at 379 (citing this three-part test).

C. The Legally Correct "Default" For Individuals Who Can Be Served In A Community Placement Is Community Placement

The question here is what placement is appropriate under the law for those residents who cannot express a preference concerning community placement and do not have a guardian or involved family member to express a preference for them. This might be a conundrum if federal law were neutral between the two available options. But federal law is *not* neutral; it plainly favors community-based treatment over institutional treatment for people for whom community placement is appropriate. In view of this clear preference, it would make no sense at all for the legal default to be that the State keeps these individuals unnecessarily in institutional care. The default for people who could be served in a community setting but cannot make their wishes known hardly should be care that "perpetuates unwarranted assumptions that [they] are incapable or unworthy of participating in community life" and "severely diminishes [their] everyday life activities." See *Olmstead*, 527 U.S. at 600-601.

The Court's formulation of the *Olmstead* test confirms that community-based treatment is the presumption for people for whom it is appropriate. The

Court was careful to say that, subject to the other two conditions, people must be transferred from institutional to community care if such transfer "is *not opposed* by the affected individual." 527 U.S. at 587 (emphasis added). The Court used the same non-opposition formulation at the end of the opinion: community-based treatment is required when "the affected persons do *not oppose* such treatment." *Id.* at 607 (emphasis added). And when the Court applied the test, it concluded that the first two prongs were satisfied because "[t]he State's own professionals determined that community-based treatment would be appropriate for [the plaintiffs], and neither woman opposed such treatment." *Id.* at 603. Because the plaintiffs in *Olmstead* affirmatively sought transfer from institutions to community-based programs, *id.* at 593-594, the Court could have decided *Olmstead* more narrowly by holding only that residents who express a desire to go to a community placement must be moved. Yet the Court was careful to say (indeed it seemed to stress) that the requirement is *non-opposition* to community treatment.

Olmstead also confirms in another way that community placement should be the default. As appellants point out (Br. 17-18), the Court said that there is no "federal requirement that community-based treatment be imposed on patients who do not desire it." 527 U.S. at 602. But then the Court cited two regulatory provisions, one explaining that "[n]othing in [the ADA's integration regulation]

shall be construed to require an individual with a disability to accept an accommodation ... which such individual chooses not to accept" and another stating that "persons with disabilities must be provided the option of declining to accept a particular accommodation." See *ibid.* (citing 28 C.F.R. 35.130(e)(1) (1998) and 28 C.F.R. Pt. 35, App. A, p. 450 (1998)). Based on this regulatory language, to stay in an institutional setting, a person who could be served in a community setting must "choose[] not to accept" or must "declin[e] to accept" the option of community-based treatment. See *ibid.* If an affirmative decision to stay in an institution is required for a person for whom community-based treatment would be appropriate, that obviously means that, without that affirmative decision to stay, the person should be moved into the community.

While no federal court of appeals decision has directly confronted this "default" issue, the issue was addressed in *Messier* v. *Southbury Training School*, 562 F. Supp. 2d 294 (D. Conn. 2008). In *Messier*, as here, a class of residents of a state-run institution for individuals with mental disabilities alleged that they could be treated in community settings, but were being unjustifiably institutionalized. *Messier* held that "[t]he ADA's preference for integrated settings is not consistent

with a procedure in which remaining at [the institution] is the default option for residents." *Id.* at 337.[6]

D. Appellants' Arguments Fail

Springstead/Solano's primary legal argument is that "[a] central tenet of *Olmstead* is that residents have a right to remain in institutional facilities unless they choose to move elsewhere." Br. 55-56. They fail to point to specific language in *Olmstead* that supports this characterization, nor do they proffer other authority. *Olmstead* really means that residents for whom community placement is appropriate have a right to live in the community unless they choose not to. As explained above, the ADA, Section 504, the integration regulations, and *Olmstead* reveal that the "default" for individuals for whom community-based treatment is appropriate is community-based treatment. So in the absence of discernable choice they should be placed in a community setting.

Springstead/Solano also argue that *Olmstead* requires an individual with developmental disabilities to be moved from an institutional placement to a community placement only if there is a showing that the community placement

[6] We recognize *Messier* is not precisely on all fours with this case because in Connecticut individuals with mental disabilities who have no guardian are wards of a state-appointed organization. The "default" in *Messier* was the State's use of responses to one very general and ambiguous survey question to categorically exclude the vast majority of the residents of a large institution from consideration for a community placement, even though other evidence suggested many of the excluded persons were not opposed to a community placement. *Id.* at 337-339.

would be better for that individual than an institutional placement, and claim that showing was not made here. Br. 57-58. They cite as support *Olmstead*'s statement that federal law does not "condone[] termination of institutional settings for persons unable to handle or benefit from community settings." 527 U.S. at 601-602. But in the sentences that immediately follow and elucidate this statement, the Court explained that Title II protects only "qualified individuals," meaning people who "mee[t] the essential eligibility requirements" for community placement. *Id.* at 602 (citation omitted). Context accordingly reveals that the Court was merely saying that people who cannot live in a community placement should not be moved to one. This is consistent with the first component of the Court's test that requires a determination of whether community placement is "appropriate" for the resident. *Id.* at 587, 607.

Springstead/Solano also say that the State Centers are "home" for these individuals with severe disabilities because many of them have lived there for years and consider staff members and fellow residents family. Br. 56-59. They argue that moving will be traumatic and harmful for these individuals (Br. 56-59) and cite an article giving community-based treatment mixed reviews and noting certain drawbacks. Br. 34 & n.5.[7]

[7] An amicus brief filed in support of appellants claims that "research shows that these individuals *will* ultimately face neglect, abuse, and death in community (continued…)

Those arguments must be rejected. First, Springstead/Solano are merely projecting. Their feelings about how moving would impact their wards provide no basis for conclusions about how State Center residents in the "default" group are likely to feel about and react to community placement. Springstead/Solano do not know the people whose unexpressed thoughts and feelings they purport to understand and explain, nor do they cite any evidence to support their theory about how these people feel. The article they cite discusses certain objective risks, but provides no support for the claim that moving individuals with severe disabilities to community settings "may irreparably aggravate psychological injuries." See Br. 34, 58. In reality, Springstead/Solano have no idea how individuals in the "default" group will react to a community placement.

On the other hand, the people charged with caring for State Center residents do know the people in the "default" group. These professionals, not Springstead/Solano, must ensure the appropriateness of community placements for the individuals on the Planning List, including those in the "default" group. Moreover, the State's conclusion that all State Center residents could be

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(…continued)
placement because there simply is [sic] not enough services to care for them." VOR Br. 16. As explained, pp. 23-25, *infra*, this view is hardly unanimous. In fact, most professionals in the field have concluded that moving individuals with developmental disabilities to the community is extremely beneficial. A very significant body of academic research supports that conclusion.

appropriately cared for in a community setting with the requisite services and supports is not, as Springstead/Solano say, "an unfounded presumption." See Br. 62. The State provides community-based mental-health services to over 50,000 people, and there are "currently people with the same types of needs as the residents of the state centers who are currently living in the community," including people who need "24-hour awake supervision," and people who cannot feed themselves. JA356 (Defendants' Statement of Undisputed Facts); JA1420-1421 (Hearing Transcript). Indeed, the state employee in charge of ensuring that community services and supports are appropriate testified that she could not think of any need an individual with developmental disabilities could have that cannot be met in the community. JA1417-1418, 1421.

Additionally, there is a significant body of research and scholarship showing that many individuals with developmental disabilities, including severe developmental disabilities, have experienced measurable benefits after moving from an institutional setting to a community setting. One early study concluded that institutionalized people who moved to community living arrangements "became sharply less dependent." U.S. Dept. of Health & Human Servs., *The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* 187 (1985). That same study found that "the people who seem to make the greatest gains in adaptive behavior tend to be those who start out lowest"; in other

words, "the people with the most severe impairments turn out to be those who benefit the most from community placement." *Ibid.*

Other studies have reached similar conclusions. A comprehensive review of literature identified 38 studies conducted between 1980 and 1999 that followed measured changes in functional abilities (adaptive behavior) of individuals leaving institutions. It concluded that this research "demonstrate[s] strongly and consistently that people who move from institutions to community settings have experiences that help them to improve their adaptive behavior skills * * * [and] that community experiences increasingly provide people with environments and interventions that reduce challenging behavior." K. Charlie Lakin, et al., *Behavioral Outcomes of Deinstitutionalization for People with Intellectual Disability: A Review of U.S. Studies Conducted Between 1980 and 1999*, 10 Research and Training Center on Community Living, No. 1, Oct. 1999, at 8. It concluded also that "a growing body of research suggests that people [who leave institutions for a community placement] enjoy a better quality of life." *Ibid.*

In 2011, the authors of this review updated their research to include studies of post-institutional changes in adaptive behavior through the end of 2010. The authors determined that, "[w]ith regard to adaptive behavior there remains highly consistent evidence of benefits accruing to people with ID/DD [intellectual disabilities/developmental disabilities] from movement from institutions to

community." K. Charlie Lakin, et al., *Behavioral Outcomes of Deinstitutionalization for People with Intellectual and/or Developmental Disabilities: Third Decennial Review of U.S. Studies, 1977-2010*, 21 Research and Training Center on Community Living, No. 2, at 8.

In short, the federal law's preference for community-based treatment over institutional treatment is well supported by a significant body of research and professional opinion.

II

THE CLASS MEETS RULE 23'S REQUIREMENTS

It is important that *Olmstead* cases proceed as class actions. In *Olmstead*, the Supreme Court said that courts should not "order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions." *Olmstead* v. *L.C. by Zimring*, 527 U.S. 581, 606 (1999) (plurality). It is difficult to see how a district court can ensure that institutionalized individuals for whom community-based care is appropriate, and who are not opposed to it will all be treated fairly if they are not all before the court. Moreover, when *Olmstead* cases are brought as class actions, the court can, if necessary, order comprehensive relief. On the other hand, in *Olmstead* cases brought by individuals, a state may simply provide community-based care for the individual plaintiffs without comprehensively addressing its broader *Olmstead*

obligations. Most of Springstead/Solano's arguments that class certification in this case was improper threaten the availability of *Olmstead* class actions generally. Each argument lacks merit.

A. The Class Is Not Too Indefinite

Appellants' indefiniteness argument (Br. 30-36) misunderstands the law. They cite Federal Practice and Procedure for the proposition that "the requirement that there be a class will not be deemed satisfied unless the class description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." See Br. 30-31 (citing Charles Alan Wright, et al., Federal Practice and Procedure § 1760 (3d ed. 2005) (alterations omitted) (FPP)). Appellants seem to think this quotation means that class membership must be precisely determined at the beginning of a case and cannot change thereafter. But that very section of the treatise makes clear that this is not what is required. See FPP § 1760 (explaining that "specific members may be added or dropped during the course of the action" without destroying the viability of the class); *ibid.* ("[T]he class does not have to be so ascertainable that every potential member can be identified at the commencement of the action."); see also, *e.g.*, *Hagan* v. *Rogers*, 570 F.3d 146, 157-158 (3d Cir. 2009) (the district court abused its discretion in failing to certify a class of prisoners who "were either

subject to actual skin infections, or were subject to the threat of future injury due to deliberate indifference on the part of prison officials").

The class certified here clearly meets "the requirement that there be a class"; the question "whether a particular individual is a member" of the class can be determined by simply consulting the Planning List. See FPP § 1760. That some individuals currently in the class might decide to leave the class, and others might join the class, does not make the class certified here impermissibly indefinite.

Appellants also claim the class definition impermissibly defines the class based on the state of mind of its members. Br. 31-32. But the "do not or would not oppose community placement" prong of the class definition has been interpreted in this litigation in a way that is not subjective.

Appellants interpret this language to mean that anyone who "would not oppose community placement" at some point in the future is a current class member, even if he or she currently opposes community placement. That is not how the district court and this Court read the class definition, and it is not a reasonable reading in the context of this case. See JA199-200 (Dist. Ct. Opinion Denying First Intervention Motion); JA443 (Opinion of This Court Affirming Denial of Intervention). Both courts read the class definition, consistent with its clear intent, to exclude those State Center residents who *currently* oppose community placement, while allowing those residents to join the class in the future

should they change their minds. The settlement concretizes this interpretation. It requires the State to maintain a Planning List consisting of State Center residents who do not oppose community placement, and to keep that list open for any resident who currently opposes, but may in the future not oppose, community placement. JA470-474. The Planning List accordingly functions as a roll of current class members, defined by the objective requirement of non-opposition to community placement.

B. The Class Definition Does Not Contain An "Opt-Out" Provision

Appellants also argue that the "do not or would not oppose community placement" prong of the class definition operates as an impermissible *de facto* opt-out provision. Br. 38-40. But non-opposition to community placement is a required component of the claim *Olmstead* defined. As the Supreme Court explained in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." 131 S. Ct. at 2557. The Court also explained that Rule 23(b)(2) classes work "when a single injunction or declaratory judgment would provide relief to each member of the class." *Ibid.* In other words, class members must share the same claim and benefit from a single remedy. The class the district court certified meets

these requirement. The settlement does not address individualized claims; it sets up a single remedy – the integration plan – to vindicate all State Center residents who are subjected to unjustified institutionalization. Indeed, class treatment for this claim is ideal, as it forces the State to deal with its *Olmstead* obligations comprehensively.

Because non-opposition to community placement is a necessary component of an *Olmstead* claim, the class must include only individuals who do not oppose community placement. Including people in the class who currently oppose community placement would violate Rule 23(b)(2), because they do not have an unjustified institutionalization claim and thus would not benefit from the injunction. The class definition does not contain an opt-out provision; it simply mirrors the substantive law, as it must.

C. The Class Meets Rule 23's Cohesiveness And Commonality Requirements

Appellants next argue that the class definition, particularly the second prong that requires class members to be capable of moving to a community placement with appropriate services and supports, will not "generat[e] 'common answers' that will lead to resolution of the case." Br. 44 (citing *Wal-Mart*). The point of *Wal-Mart*'s commonality discussion, however, is that cases should proceed as class actions only when the questions *being litigated by the class* can productively be resolved all at once. See 131 S. Ct. at 2550-2552. When liability turns on issues

that require individualized proof for each particular plaintiff, rather than a liability determination that applies to everyone in the class, the commonality requirement is not met.

Here, liability turned on whether Pennsylvania was violating *Olmstead* by failing to provide community placements for the entire class, and whether it had established a "fundamental alteration" defense. These issues were productively litigated as to the entire class of unjustifiably institutionalized State Center residents. A single legal determination decided liability, including the merits of the "fundamental alteration" defense, for every State Center resident who does not oppose community placement and for whom community-based services are appropriate.

Moreover, the record contradicts the notion that individualized analysis will be required to determine whether appropriate services can actually be provided for a particular individual. It shows that Pennsylvania is currently providing community-based services for more than 50,000 individuals with mental disabilities, including individuals who need the same level of care as State Center residents with the most significant disabilities. JA303 (Plaintiffs' Statement of Undisputed Facts); JA356 (Defendants' Statement of Undisputed Facts). The State has also admitted that all State Center residents can be served in the community. JA303.

D. The Class Meets Rule 23's Typicality Requirement

Springstead/Solano next argue that the named plaintiffs are not typical of the class, primarily because their disabilities are less severe than those of other State Center residents. Br. 45-47. This argument is meritless.

First, State Center residents who choose to stay are not part of the class. The fact that the named plaintiffs have different interests from those residents is neither surprising nor problematic. Second, severity of disability is not a factor upon which the legal claims that the class pursued turned because, as the State has admitted, all State Center residents, with the appropriate services and supports, could live in the community. JA303; see also *In re Schering Plough Corp. ERISA Litigation*, 589 F.3d 585, 597-598 (3d Cir. 2009) (the typicality inquiry considers factual differences between the named plaintiffs and the class that are relevant to the legal claims at issue in the case).

Third, the question whether individuals in the "default" group should be part of the class is not relevant to the typicality inquiry. To determine whether the typicality requirement is met, courts determine whether the named plaintiffs' claims are typical of other *members* of the class. See Fed. R. Civ. P. 23(a)(3). Once it is determined that individuals in the "default" group are part of the class, their claims are no different from those of other class members. If they are class members, that necessarily means they have the very same right to be free from the

discrimination inherent in unjustified institutionalization as individuals who affirmatively seek community placement.

E. Class Certification Was Procedurally Proper

Finally, relying on *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), Springstead/Solano argue that the class certification order must be vacated because the district court failed to hold a hearing and because the order failed to satisfy the requirements of Rule 23(c)(1)(B). Br. 48. *Peroxide* does not require a hearing; it requires the court to resolve factual and legal disputes relevant to class certification. *Id.* at 307. The district court's order, while undoubtedly more brief than it would have been if class certification had been opposed, met this requirement and the other the requirements of Rule 23(c)(1)(B). See JA36-39.

III

THE SETTLEMENT AGREEMENT IS FAIR, ADEQUATE, AND REASONABLE

As appellees point out (Appellees' Br. 54), the appellants in this case do not directly challenge the district court's application of the factors relevant to a class action settlement's fairness this Court set out in *Girsh* v. *Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). Because of this, and because appellees' brief already recounts the district court's careful weighing of the *Girsh* factors, we do not address this issue

in detail.[8] We simply point out that the settlement fits *Olmstead*'s description of what an integration plan should be: "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings * * * [that includes] a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." *Olmstead* v. *L.C. by Zimring*, 527 U.S. 581, 605-606 (1999) (plurality).

[8] The United States filed a "Statement Of Support By The United States" in the district court supporting final approval of the settlement agreement in which we addressed the *Girsh* factors in detail. See JA1067-1084. The United States' analysis of the *Girsh* factors' application to this case is consistent with the district court's application of those factors (JA5-32), which appellees' brief recounts (Appellees' Br. 49-54).

CONCLUSION

This Court should affirm the district court's approval of the settlement.

Respectfully submitted,

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CERTIFICATE OF EXEMPTION FROM BAR MEMBERSHIP

I certify that, as an attorney representing the United States, I am not required to be a member of the bar of this Court. See L.A.R. 28.3(d) and Committee Comments.

Dated: April 5, 2012

s/ Nathaniel S. Pollock
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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a), that this BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE was prepared using Word 2007 and Times New Roman, 14-point font. This brief contains 6994 words of proportionately spaced text.

I also certify that the copy of this brief that has been electronically filed is an exact copy of what has been submitted to the Court in hard copy. I further certify that the electronic copy has been scanned with the most recent version of Trend Micro Office Scan Corporate Edition (version 8.0) and is virus-free.

s/ Nathaniel S. Pollock
NATHANIEL S. POLLOCK
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Dated: April 5, 2012

CERTIFICATE OF SERVICE

I certify that on April 5, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by means of the appellate CM/ECF system and that ten paper copies identical to the brief filed electronically, were sent to the Clerk of the Court by first class mail.

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