



Disability Rights Ohio  
50 W. Broad St., Suite 1400  
Columbus, Ohio  
43215-5923

614-466-7264 or 800-282-9181  
FAX 614-644-1888  
TTY 614-728-2553 or 800-858-3542  
disabilityrightsohio.org

**Testimony on House Bill 64**  
**Michael Kirkman, Executive Director of Disability Rights Ohio**  
**House Finance Health and Human Services Subcommittee**  
**March 17, 2015**

Chairman Sprague, Ranking member Sykes and members of the House Finance Health and Human Services Subcommittee, thank you for the opportunity to present information to you today as an interested party on House Bill 64, the biennial budget bill.

My name is Michael Kirkman and I am Executive Director of Disability Rights Ohio, Ohio's designated system under federal law to protect and advocate the rights of people with disabilities. Our mission is to advocate for the human, civil, and legal rights of people with disabilities in Ohio. We envision a society in which people with disabilities:

- are full and equal members;
- enjoy the rights and opportunities of all people;
- are self-directed;
- make decisions about where, how and with whom they will live, learn, work and play;
- have access to needed services and supports;
- and are free from abuse, neglect, exploitation and discrimination.

Disability Rights Ohio's primary role is to provide direct legal advocacy to people with disabilities in Ohio. Beyond that, however, we recognize that we are often called upon to share our staff's expertise on issues with the Ohio service system for our clients. In that capacity we have worked with many of you and others in the General Assembly to develop laws that advance the interests of people with disabilities and their families. Since moving our program from state government to the private sector in 2012, we also have actively developed a role as a convener of diverse groups of people with disabilities, providing a platform for individuals with disabilities to discuss important issues.

DRO has staff working everyday around the state to advocate for people faced with a wide range of disabilities and challenges. For example, some of our efforts include advocacy on behalf of

- veterans with traumatic brain injury or PTSD;
- individuals with psychiatric disabilities secure housing, employment and other community supports;
- students seeking high quality and timely special education services; and
- job seekers with disabilities looking for vocational rehabilitation services and supports.

Federal law also requires that we investigate allegations of abuse and neglect and monitor facilities providing services to people with disabilities. These functions are among the most

critical work that we do, monitoring the monitors and pushing state and local regulators to ensure the health and safety of our clients.

Our work is client-directed and we focus much of our efforts on educating and informing the public about issues of importance to the disability community, as well as supporting our clients and individuals with disabilities to become their own advocates. As you might expect, our plate is full; our very skilled staff of fifty five people is called on every day to serve even more individuals who are challenged by the very systems that are supposed to serve them.

I am here today to discuss some issues of interest and concern with respect to the House Bill 64, and to answer any questions you might have about my remarks.

### **Developmental Disabilities / Community Integration**

Let me begin with some comments about what I understand many of you are currently hearing about and discussing: Disability Rights Ohio's efforts to achieve greater community integration in Ohio's developmental disabilities system. This is the premiere civil rights issue of the day for people with disabilities, many of whom liken living in nursing homes and other institutions to the functional equivalent of imprisonment. Slogans such as "nothing about us without us" and "free our people" are expressed by self-advocates who want, as any of us would, to live in their community. The notion of community that pervades federal law recognizes as Eleanor Roosevelt said, that rights begin:

In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person... Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere."

In July of 2014, following an 18-month investigation, Disability Rights Ohio concluded that Ohio's system appeared to be in violation of the Americans with Disabilities Act and the Supreme Court's holding in *Olmstead v. L.C.*, which require the State to serve people with disabilities in the most integrated, least restrictive setting appropriate to their individual needs. A letter, focused primarily on large ICFs and state run developmental centers, and day habilitation services, was sent to state officials seeking a negotiation to determine if this ongoing violation could be resolved short of class action litigation. Those discussions are unresolved, but it is fair to say that some of the proposals in the Governor's budget are reflective of the content of those discussions.

Disability Rights Ohio's primary intention with this initiative is to increase meaningful choice for individuals with disabilities. Our goal is not to force all individuals into the community, nor to force individuals to accept community based services against their will. Rather, it is to create a robust and rich system in which, after individualized assessments are conducted, individuals with disabilities can receive the care that they need in a setting they choose.

Ohio's DD system is very segregated and very unbalanced. Ohio is among the top two or three states to depend on large ICF or state center services. Not only does this cause unnecessary isolation of individuals who live in these facilities (and often spend their days in affiliated day hab centers), but it is unduly expensive for the state. The cost of such placements includes the

full range of services, including some that the individual may not need. A scalable system that allows the identified needs of the individual to be met in the home of his or her choice would be more efficient, cost effective, and better for the individuals and the state.

Still, the steps proposed in HB 64 are welcome. In particular, the move to downsize ICFs and to incentivize moves to the community by individuals in those facilities who choose to do so will help point Ohio in the right direction. Requiring an evaluation of the individual's needs before placement in an ICF is a step toward the type of individualized program I described above. Yet much remains to be done, and our negotiations with the state are ongoing.

We have worked very hard to be transparent about our purpose, holding forums with concerned family members and responding to individual complaints. Yet two other issues have created confusion and anxiety in the DD system at this time, and we are working hard to provide information on these and to collaborate with others in the system to address them.

As you know, in late 2014 federal Medicaid officials issued a final regulation proscribing the use of Home and Community Based Service waiver dollars in certain settings. The so called "community" rule and related guidance set out clear prohibitions on the use of waiver dollars (for example, on the grounds of a state center) but also suggested that other types of settings would be given heightened scrutiny to prevent isolation of individuals. The state was given a five year period to implement the regulation and for programs to adapt and comply with it.

I understand that it is easy to conflate these, but it is critical to understand the different aspects and aims of these initiatives. Disability Rights Ohio is not part of CMS, and we are not responsible for the development, implementation or oversight of the federal CMS rule. County officials who are saying that their sheltered workshop will close because of our negotiations are mistaken; rather, in some cases those programs can no longer be supported with waiver dollars or under the CMS rule's conflict of interest provision, or will eventually be limited by newly passed transition requirements under the Workforce Incentive Opportunities Act.

Regarding the regulation, we have commented on the state's draft transition plan and encouraged the state to include families and people with disabilities in the planning process, rather than rely on providers as it had done. In fact, our letter and the ongoing discussions do not directly speak to this regulation, which has to do exclusively with waiver services. In fact, I and others on our staff are working with providers and their representatives to find ways to implement the laudable purpose of the rule without unnecessarily disrupting programs that are successfully serving our mutual clients.

Finally, the unexpected introduction by the Department of Medicaid of its plan to eliminate independent providers (IPs) in favor of home health agencies has created even more distrust and anger among those receiving services and their families. Starting July 1st, 2016 the state would not accept any new IPs, and any current IP who needed to renew with the state would not have an opportunity to renew. By July 1, 2019, the state would only accept claims from agency providers.

Unfortunately, Medicaid chose not to vet this proposal with stakeholders. It involves very complex legal questions under FLSA and other Department of Labor regulations, and also has implications for the integration mandate / *Olmstead* because it may put people at risk of institutionalization (see attached DOJ/HHS letter). It potentially can place additional financial and support obligations on families and waiver enrollees.

In response the state now says that it will expand self-direction to all waivers in order to address these regulatory issues. To the extent that this would bring greater self determination to Ohio's DD waivers, and if implemented properly, this could result in a positive outcome for people with disabilities and their families. But this discussion cannot take place under the current proposal, and it should be removed from HB 64 to allow all interested parties to study the implications and to develop a plan for implementation that will hold harmless elders, people with disabilities, and their families.

It has been over twenty years since Ohio seriously examined its DD service delivery system, and the federal regulatory environment has changed dramatically in that time. Maintaining the status quo is not an option. The department under Director Martin has engaged in a significant strategic planning process that, if fully implemented, would provide much greater opportunity for those with disabilities to live in, work in, and interact with their communities. I remain hopeful that all interested parties within the system will ultimately view this budget and DRO's related policy initiatives as a catalyst toward an improved system that provides rich options, meaningful choice, and most importantly quality services and supports individualized to the person's needs.

As a final note concerning a component of the developmental disabilities service system in Ohio, I must also share some concern coming from the county boards of developmental disabilities regarding their tax base and the phase out of the tangible personal property tax. Ohio county boards will continue to be an important provider of services and supports to individuals with disabilities, and a major reduction in their local funding could be harmful to that system's ability to maintain services.

#### **Access to appropriate community mental health services and supports**

With respect to services for individuals with psychiatric disabilities, Disability Rights Ohio applauds the administration's continued support for greater access to health care and appropriate mental health services and supports. The budget provides for an increase in funding for the Residential State Supplement (RSS) program and continued support for the Recovery Requires a Community Program, which provide important treatment options for individuals with mental illness. Related to our abuse and neglect investigations, the expanded authority for the department to suspend admissions, deny licenses, or revoke licenses of facilities based on non-compliance could improve oversight of mental health facilities. DRO is also encouraged by the continued support of trauma-informed care and other evidence based initiatives that focus on prevention and crisis intervention.

And we look forward to hearing more details about some of the new programs aimed at individuals with serious mental illness who may no longer be eligible for Medicaid due to the elimination of spend down. We also are interested in how the administration plans to unbundle the CPST benefit and have those individual services become separate reimbursable services. This is particularly important for children on the Autism spectrum and Ohio's EPSDT program, which has struggled to meet the complex needs of such children. New services will be developed within Medicaid for people with 'high-intensity service need' – this includes adding Assertive Community Treatment, Intensive Home Based Treatment, High Fidelity Wraparound, peer services, supportive employment, and Substance Abuse Disorder residential services as Medicaid reimbursable services.

#### **Streamlining Eligibility for Social Security and Medicaid**

The proposed change from a 209b state to a 1634 state means individuals will no longer have to complete separate application processes for both Social Security and Medicaid. Once they are approved for social security, they will be automatically enrolled into Medicaid. In addition to the removal of this burdensome and lengthy duplicative administrative process, this initiative will also raise the income standard from 64% of federal poverty guidelines to 75% federal poverty guidelines, and the resource limits from \$1,500 to \$2,000, thus allowing individuals to make and keep slightly more earnings. Moreover, this change would also cause the elimination of Medicaid spend down. Individuals who live in institutions or on Home and Community Based Services (HCBS) waivers will continue to receive Medicaid, including those individuals participating in the Medicaid Buy In for Workers with Disabilities program. However, if an individual with disabilities that was on Medicaid spend-down has income above the limit, they must establish a Miller Trust. We look forward to working with the Department of Medicaid as they establish exactly how these provisions will operate.

### **Employment for individuals with disabilities**

In addition to being designated as the protection and advocacy system for Ohio, Disability Rights Ohio is also the Client Assistance Program (CAP), meaning we are the designated entity to advocate for individuals with disabilities who seek to access and navigate the vocational rehabilitation system in Ohio. We were pleased to see that the budget supported the Opportunities for Ohioans with Disabilities (OOD) request for sufficient resources in order to draw down its full allotment of federal funding.

DRO has many clients that are seeking employment, and timely, high quality vocational rehabilitation services are often key to success. On a related note, a group of disability advocates are beginning discussions with Director Miller about ways to increase consumer voice and representation with OOD by creation of a State Rehabilitation Council as mandated by the Rehabilitation Act. The disability community is represented by a broad spectrum of individuals and having this diversity of interest and expertise reflected in the governance structure of OOD is important.

### **Improvements to the Adult Protective Services**

The budget also includes funding and provisions to establish a statewide APS information system, interdisciplinary teams for APS investigations, improved referral policies. This is an important step in the right direction but there is yet more to be done. Ohio is behind other states in recognizing that protective services and guardianship are related. Guardianship in Ohio is overused because of the weak APS system, and this overuse is reflected in the types of abuses raised by elder and disability advocates and highlighted by the Columbus Dispatch last year. For the last twenty years counties have experimented with volunteer or paid public guardianship models; last year this body authorized a real county public guardian system for Franklin County. This model should be studied and, if successful, taken statewide with appropriate funding.

Disability Rights Ohio appreciates the Governor's often stated commitment to support of people with disabilities, and is pleased to see that focus in his executive budget. I hope that you will continue to look carefully at the provisions I highlighted and continue to prioritize these issues. Thank you again for the chance to testify before you today, and I will try to answer any questions you may have.



**U.S. Department of Justice**  
*Civil Rights Division*

**Department of Health and  
Human Services**  
*Office for Civil Rights*



December 15, 2014

Dear Colleague:

On October 1, 2013, the Department of Labor promulgated a rule extending the minimum wage and overtime protections of the Fair Labor Standards Act (FLSA) to most home care workers (“Home Care Rule”). Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013). The Home Care Rule becomes effective on January 1, 2015.<sup>1</sup>

The Civil Rights Division and the Department of Health and Human Services’ Office for Civil Rights (OCR) recognize the importance of ensuring adequate workplace protections for home care workers, who provide critical services to millions of Americans. At the same time, it is important that states implement the Department of Labor’s rule in ways that also comply with their obligations under Title II of the Americans with Disabilities Act (ADA). In particular, because home care workers, such as personal care assistants and home health aides, often provide essential services that enable people with disabilities to live in their own homes and communities instead of in institutions, states should consider whether reasonable modifications are necessary to avoid placing individuals who receive home care services at serious risk of institutionalization or segregation.

The Department of Justice and OCR enforce the rights of people with disabilities to live integrated lives free from unnecessary segregation in institutions. Specifically, Title II of the ADA requires 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.”<sup>2</sup> As directed by Congress, the Attorney General issued regulations implementing Title II, which are based on regulations issued under section 504 of the Rehabilitation Act.<sup>3</sup> The Title II regulations require public entities to “administer services, programs, and activities in the most integrated setting

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<sup>1</sup> The Department of Labor announced that it will not bring an enforcement action against any employer related to FLSA obligations under the new Home Care Rule before June 30, 2015. It will then use prosecutorial discretion until December 31, 2015 to determine whether to bring enforcement actions, taking into account the good faith efforts of states and other entities to bring their home care programs into compliance with the Home Care Rule. Application of the Fair Labor Standards Act to Domestic Service; Announcement of Time-Limited Non-Enforcement Policy, 79 Fed. Reg. 60,974 (Oct. 9, 2014).

<sup>2</sup> 42 U.S.C. § 12132 (1990).

<sup>3</sup> See *id.* § 12134(a); 28 C.F.R. § 35.190(a) (1991); Exec. Order No. 12,250 (1980), 45 Fed. Reg. 72,995 (1980), reprinted in 42 U.S.C. § 2000d-1. Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, 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 . . .”).

appropriate to the needs of qualified individuals with disabilities.”<sup>4</sup> The preamble discussion of the “integration regulation” explains that “the most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . .”<sup>5</sup>

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court held that Title II’s integration mandate prohibits the unjustified segregation of individuals with disabilities. Furthermore, compliance with Title II’s integration mandate requires that public entities reasonably modify their policies, procedures, or practices when necessary to avoid discrimination.<sup>6</sup> The obligation to make reasonable modifications may be excused only where the public entity demonstrates that the requested modifications would “fundamentally alter” its service system.<sup>7</sup>

Moreover, the ADA and the *Olmstead* decision are not limited to individuals currently in institutional or other segregated settings. They also apply to persons at serious risk of institutionalization or segregation. For example, a public entity could violate *Olmstead* if it fails to provide community services, or reduces those services, in a way likely to cause a decline in health, safety, or welfare leading to an individual’s eventual placement in an institution.

The Department of Labor’s Home Care Rule narrows the circumstances in which the companionship services and live-in domestic service employee exemptions from FLSA protections apply, both by updating the definition of “companionship services” and by prohibiting third party employers from claiming either exemption. Because of these changes, most home care workers, including those providing services through publicly funded programs, will be entitled to receive at least the Federal minimum wage for all hours worked and overtime compensation—one and a half times the worker’s regular hourly rate of pay—for all hours worked over 40 in a workweek.

Implementation of the Home Care Rule will require each public or private agency that administers or participates in a consumer-directed home care program, including those funded by Medicaid, to evaluate whether it is a joint employer under the FLSA. If it is a joint employer, the entity will then be responsible for compliance with the requirements of the FLSA. The Act’s minimum wage requirement applies to any time spent traveling between worksites—in the home care context, the consumer’s home—when employed by the same sole or joint employer at each worksite. The FLSA’s overtime compensation requirement includes, in the home care context, combined hours spent working for more than one consumer as part of the joint employment by the third party entity. More information and guidance regarding the Home Care Rule can be found at: U.S. Dept. of Labor, Wage and Hour Div., *We Count on Home Care*, available at: <http://www.dol.gov/whd/homecare/> (last visited December 5, 2014).

The Civil Rights Division and OCR encourage states to conduct a thorough analysis of all their home care programs to determine whether any changes must be made to comply with the FLSA once the Home Care Rule becomes effective. In planning implementation steps, states must

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<sup>4</sup> 28 C.F.R. § 35.130(d) (1991).

<sup>5</sup> 28 C.F.R. Pt. 35, App. B at 673 (2011).

<sup>6</sup> 28 C.F.R. § 35.130(b)(7) (1991).

<sup>7</sup> *Id.*; see also *Olmstead*, 527 U.S. at 604-07.

consider whether reasonable modifications are necessary to avoid placing individuals who receive home care services at serious risk of institutionalization or segregation.<sup>8</sup> A state's obligation to make reasonable modifications to its policies, procedures, and practices applies even when a home care program is delivered through non-public entities.

Many states are already taking concrete steps to implement the Home Care Rule. Some states are developing budget proposals to pay overtime and travel time for home care workers who work over 40 hours in a week. The Centers for Medicare and Medicaid Services (CMS) has published guidance to assist states in understanding Medicaid reimbursement options that will enable them to account for the cost of overtime and travel time that may be compensable as a result of the Home Care Rule. See Cindy Mann, *CMCS Informational Bulletin: Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes* (July 3, 2014), <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf>.

Other states are planning to comply with the new rule by setting limits or capping direct care workers' hours or travel time. We are sensitive to states' budgetary constraints. However, implementation of across-the-board caps risks violating the ADA if the caps do not account for the needs of individuals with disabilities and consequently places them at serious risk of institutionalization or segregation. For example, if a state prohibits home care workers from exceeding 40 hours a week of work, individuals who need more than 40 hours a week of care may not receive their full hours where home care workers are scarce. And even where home care workers are available, consumers with extraordinary medical or behavioral needs may not be able to tolerate multiple workers in their home. Emergency situations may also arise where a scheduled second worker is not available and the individual's home care support needs would not be met without immediate authorization of overtime hours and pay.

Therefore, states need to consider reasonable modifications to policies capping overtime and travel time for home care workers, including exceptions to these caps when individuals with disabilities otherwise would be placed at serious risk of institutionalization.<sup>9</sup> Whether a reasonable modification is needed and what the modification should be depends on the specific factual circumstances. States should also consider implementing processes that reliably and expeditiously enable individuals with disabilities to obtain cap exceptions when they are warranted. Finally, where implementation of the Home Care Rule disrupts services, states should collect and monitor data to ensure that the service disruption does not place individuals with disabilities at serious risk of institutionalization.

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<sup>8</sup> In the final Home Care Rule regulations, the Department of Labor recognized states' obligations to comply with the requirements of the Americans with Disabilities Act when considering changes to implement the Home Care Rule. 78 Fed. Reg. 60,454, 60,485-87.

<sup>9</sup> CMS has similarly encouraged states to consider exceptions to limitations on overtime and travel time when necessary to avoid placing an individual at risk of harm. See Cindy Mann, *CMCS Informational Bulletin: Self-Direction Program Options for Medicaid Payments in the Implementation of the Fair Labor Standards Act Regulation Changes* (July 3, 2014), <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf>; see also CMS, *Application for a § 1915(c) Home and Community-Based Waiver, Instructions, Technical Guide and Review Criteria* at 141 (January 2008), <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/Technical-Guidance.pdf>.

For more information regarding states' obligations under *Olmstead* and the Americans with Disabilities Act's integration mandate, visit *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, available at: [http://www.ada.gov/olmstead/q&a\\_olmstead.htm](http://www.ada.gov/olmstead/q&a_olmstead.htm) (last visited December 5, 2014).

The Civil Rights Division and OCR recognize and appreciate the work that states do in supporting individuals with disabilities to live integrated lives in their communities.

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Vanita Gupta  
Acting Assistant Attorney General  
Civil Rights Division  
U.S. Department of Justice

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Jocelyn Samuels  
Director  
Office for Civil Rights  
Department of Health and Human Services