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June 15, 2011

The Honorable Lamar Smith
Chair, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: American Bar Association's Opposition to H.R. 2032

Dear Chairman Smith and Ranking Member Conyers:

On behalf of the American Bar Association, I am writing to express our opposition to H.R. 2032, which will place restrictions on the ability of state Protection and Advocacy Agencies to bring class action lawsuits on behalf of individuals with disabilities in intermediate care facilities. The ABA opposes this legislation as an unnecessary change in class action rules and a limitation on the ability of those representing individuals with disabilities to obtain protection for their legal rights in the courts.

H.R. 2032 prohibits entities that receive federal funds from using those funds to file a class action lawsuit on behalf of residents of intermediate care facilities for the mentally retarded (ICF/MRs) unless the residents have the opportunity, after receiving notice, to opt out of the class. As written, H.R. 2032 applies only to the Protection and Advocacy Agencies (P&As), whose mission is to prevent the abuse and neglect of individuals with disabilities, particularly those who reside in institutions or other facilities. P&As have special investigatory authority and are required under the Developmental Disabilities Assistance and Bill of Rights Act of 1975 (the DD Act) to pursue legal, administrative, and other appropriate remedies to protect and advocate for the rights of individuals with developmental disabilities under all applicable federal and state laws. The DD Act also authorizes P&As to undertake class actions.

Class actions have long been recognized as providing an efficient and effective form of legal action designed to fairly and adequately protect the interests of a group of individuals with common questions of law and fact, pursuant to the Federal Rules of Civil Procedure (FRCP). Although the FRCP allow class members to opt out of an action involving damages (FRCP 23(b)(3)), they do not permit class members to opt out of actions pursuing injunctive relief, since that relief should apply to the class as a whole. If H.R. 2032 is enacted, residents of ICF/MRs would be the only persons in federal courts with the right to opt out of a class action for

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injunctive relief, such as when a P&A files an action to address abuse and neglect, unhealthy living conditions, or insufficient staffing at a facility.

H.R. 2032 is unnecessary. Federal Rules already provide class members with a number of protections to ensure that their voices are heard. For example, in an action for injunctive relief, the court “may direct appropriate notice to the class,” thus providing notice to all class members of the filing of the action. FRCP 23(c)(2)(A). Under the FRCP, the judge may also order additional notice to class members or otherwise allow them to signify if representation is fair and adequate. FRCP 23 (d)(1)(B). In addition, class members may intervene as parties in the class to insure that they are adequately represented and that the action is conducted fully and fairly. FRCP 24. Finally, the court cannot allow a settlement, dismissal or compromise of the class action without a fairness hearing, which involves notice to all class members and an opportunity for class members to express their views on the proposed outcome. FRCP 23 (e)(2).

Attached to this letter you will find the ABA’s policy recommendation related to this issue. While not officially endorsed by the ABA, the report that accompanies the recommendation provides extensive background information and further explains the functions of the Protection and Advocacy System. Having a full range of appropriate remedies, including the use of a class action, has been a keystone to protecting the civil and legal rights of individuals with disabilities in all facets of their lives.

For these reasons, the ABA strongly opposes legislation that would create a different class of justice for certain segments of the population, and we ask that you oppose H.R. 2032.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

Enclosures

cc: Members of the House Committee on the Judiciary

AMERICAN BAR ASSOCIATION

COMMISSION ON LAW AND AGING

COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW

SENIOR LAWYERS DIVISION

SECTION OF REAL PROPERTY, PROBATE, AND TRUST LAW

SECTION ON FAMILY LAW

STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS

SECTION OF STATE AND LOCAL GOVERNMENT LAW

TORT TRIAL AND INSURANCE PRACTICE SECTION

GOVERNMENT & PUBLIC SECTOR LAWYERS DIVISION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

YOUNG LAWYERS DIVISION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges Congress to reauthorize the Protection
2 and Advocacy System and related programs of legally based advocacy services protecting the
3 rights of persons with disabilities in the states and territories.

4
5 FURTHER RESOLVED, That the American Bar Association opposes legislation that includes
6 more restrictive requirements for class actions on behalf of individuals with disabilities seeking
7 relief through the Protection and Advocacy System than class action requirements under the
8 Federal Rules of Civil Procedure.

9
10 FURTHER RESOLVED, That the American Bar Association urges Congress to provide
11 adequate funding for the Protection and Advocacy System and related programs, and to preserve
12 its authority to protect, represent, and fully investigate on behalf of persons with disabilities in
13 institutions, facilities and the community.

REPORT

1. The Protection and Advocacy System. The Protection and Advocacy System is the nation's largest provider of legally based advocacy services for individuals with disabilities. Protection and Advocacy Agencies (P&As) exist in all states and territories and receive funds under a variety of federal programs as described below. Although many, if not most, P&A clients are low-income, the P&As are authorized by statute to serve all individuals with disabilities, without any income restriction.

The first P&A program – PADD (Protection and Advocacy for Individuals with Developmental Disabilities) was created in 1975 after a series of television reports exposed the deplorable conditions at Willowbrook, a large New York state institution for people with mental retardation. Similar concerns about the abuse and neglect of individuals in mental health facilities led to enactment of PAIMI (Protection and Advocacy for Individuals with Mental Illness).

The initial focus of PADD and subsequent P&A statutes was to safeguard the well-being of individuals living in institutions, and this remains a major focus of P&A activity today. All P&As continue to monitor, investigate and attempt to remedy adverse conditions in large and small, public and private facilities that care for people with disabilities. P&As also assist persons with disabilities to find living arrangements that are the least restrictive possible. Indeed, the P&As have been at the forefront of the de-institutionalization movement.

Over the years, the focus of P&A work was broadened to one that secures the rights of persons with all types disabilities wherever they reside. P&A statutes were expanded to give the P&As additional authority so that the P&As now devote considerable resources to ensuring full access to inclusive educational programs, financial entitlements, healthcare, accessible housing, transportation, and productive employment opportunities, as well as continuing to seek prevention of abuse and neglect.

There are currently eight separate P&A programs. The largest, dollar-wise, are PADD, PAIMI and PAIR, and most P&A work is done under those programs. The other P&A programs are significantly smaller. Some of the programs began as demonstration projects in a few states, but all have expanded so that these programs now provide services in all states and territories. With the exception of the CAP program, which is separate in many states, all of the P&A programs are implemented by a single agency within each state and territory. (Note: Not all P&A agencies use the words “protection and advocacy” but rather use varying titles. To find the P&A in each state, see <http://www.acf.hhs.gov/programs/add/states/pas.html> or <http://www.ndrn.org>.)

- PADD (Protection and Advocacy for Individuals with Developmental Disabilities), 42 U.S.C. 15041, et seq. PADD is the first P&A program, created by the Developmental Disabilities Assistance and Bill of Rights (DD) Act of 1975. P&A agencies are required by the Act to pursue legal, administrative and other appropriate remedies to protect and

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advocates for the rights of individuals with developmental disabilities under all applicable federal and state laws.

The DD Act provided for the governor of each state to designate an agency to be the P&A and to assure that the P&A was, and would remain, independent of any service provider. Most entities designated as P&As are private non-profit organizations created specifically for the purpose of conducting the P&A programs. However, some P&As are part of state government, a few are hybrid quasi-public agencies, and a few P&As reside within civil legal services programs. Subsequent P&A statutes, with a single exception (CAP), provide for the new P&A programs to be housed within the same agency designated by the governors under PADD.

- CAP (Client Assistance Program), 29 U.S.C. 732. CAP was established by the 1984 Amendments to the Rehabilitation (Rehab) Act. Services provided by CAPs include assistance in pursuing administrative, legal and other appropriate remedies to persons receiving or seeking services from state rehabilitation agencies under the Rehab Act. A CAP agency may provide assistance and advocacy with respect to services that are directly related to employment for the client or client applicant. CAP is the only program that does not require the funds to go to the entity designated as the P&A under PADD.
- PAIMI (Protection and Advocacy for Individuals with Mental Illness), 42 U.S. C. 10801 et seq. The PAIMI Program was established in 1986. The P&As are mandated to protect and advocate for the rights of people with mental illness and investigate reports of abuse and neglect in facilities that care for or treat individuals with mental illness. The Act was subsequently amended to allow P&As also to serve individuals with mental illness who reside in the community.
- PAIR (Protection and Advocacy for Individual Rights), 29 U.S.C. 794e. The PAIR program was established by Congress under an amendment the Rehabilitation Act in 1993. PAIR programs provide for services to persons with disabilities who are not eligible for services under the three previously established P&A programs (PADD, PAIMI, and CAP). With PAIR, the P&As are authorized to serve able to serve persons with all types of disabilities. Although PAIR is funded at a lower level than PADD and PAIMI, it represents an important component of a comprehensive system to advocate for the rights of all persons with disabilities.
- PAAT (Protection & Advocacy for Assistive Technology), 29 U.S.C. 3004. The PAAT program was created in 1994 when Congress expanded the Technology-Related Assistance for Individuals with Disabilities Act (Tech Act) to include funding for P&As to assist individuals with disabilities in the acquisition, utilization, or maintenance of assistive technology devices or assistive technology services through case management, legal representation and self advocacy training.
- PABSS (Protection & Advocacy for Beneficiaries of Social Security) 42 U.S.C. 1320b-21. The PABSS program was established in 1999 when the Ticket to Work and Work Incentive Improvement Act (TWWIIA) was enacted into law. Under this Act, grants to

the P&A programs provide advocacy and other services to assist beneficiaries of Social Security secure or regain gainful employment.

- PATBI (Protection & Advocacy for Individuals with Traumatic Brain Injury), 42 U.S.C. 3000d-53. The PATBI program was created in 2002 to provide protection and advocacy services to individuals with traumatic brain injury. Although P&As often served such individuals under PAIR, CAP, or PABSS, this grant provides more resources specifically to address the unique needs of this population.
- PAVA (Protection & Advocacy for Voting Accessibility), 42 U.S.C. 15461. The PAVA program was established in 2003 as part of the Help American Vote Act of 2002 (HAVA). Under this program, P&As have a mandate to help ensure that individuals with disabilities participate in the electoral process through voter education, training of poll officials, registration drives, polling place accessibility surveys and the like. P&A agencies may not use PAVA program funds for litigation. There is no such restriction in any of the other P&A programs.

2. Special Investigatory Authority of Protection and Advocacy Agencies. The central mission of the P&A system is to prevent the abuse and neglect of individuals with disabilities, particularly those who reside in institutions or other facilities. To this end, the PADD and PAIMI statutes provide the P&As extraordinary investigative access authority. Pursuant to PADD (42 U.S.C. 15043(2), this P&A Access Authority allows routine access to all individuals with developmental disabilities in facilities providing services; access (within 3 days of request) to all records of individuals with developmental disabilities and other records that are relevant to conducting an investigation under certain conditions; and immediate access (within 24 hours of request), without consent from another party, to all records in the event of a death, or if the P&A determines there is “probable cause to believe that the health or safety of an individual is in serious and immediate jeopardy.”

Similar authority is afforded under PAIMI (42 USC 10805 (a)(3) and (4), 42 USC 10806). Additionally, a number of states have enacted laws giving their P&A additional authority – for example, requiring facilities to report deaths and/or other types of incidents to the P&A directly. P&As have authority to take a variety of actions in response to findings of abuse and neglect including litigation to enforce constitutional and statutory rights of facility residents individually or as a class action; issuing public reports describing findings and recommending corrective action; developing cooperative protocols with facilities for monitoring and making improvements; and providing technical assistance to facilities and self advocacy training for individuals with disabilities.

P&As are facing increasing resistance to their efforts to investigate abuse and neglect. As a result, numerous cases have been brought by P&As to enforce their access rights created under the P&A statutes. While this access authority has been confirmed by the courts over the 30 year history of the P&As, recent cases have sought to undercut P&A access authority.

In 2009, the Fourth and Seventh Circuit federal Courts of Appeal dealt serious blows to the ability of state agency P&As to enforce federal law against state officials in federal court for

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prospective injunctive relief. The Fourth Circuit and the Seventh Circuit issued opinions holding that the state agency P&A is barred by the Eleventh Amendment to the U.S. Constitution from enforcing federal law against State Officials in federal court. The Courts declined to rely on *Ex Parte Young* to adjudicate what was characterized by the court as an “intramural state dispute”. *Virginia Office for Protection and Advocacy v. Reinhard*, 568 F.3d 110 (4th Cir. 2009); *Indiana Protection and Advocacy Services .v Indiana Family and Social Services Admin.*, 573 F.3d 548 (7th Cir. 2009). The Fourth Circuit opinion was appealed and a *Petition for Certiorari* is pending in the U.S. Supreme Court. The Seventh Circuit granted a rehearing en banc and the decision is pending.

Both the Virginia and Indiana cases involve P&A access to patient and peer review records as part of their investigations of deaths and abuse of individuals living in institutions, but the implications of these decisions are much broader than just P&A access authority.

These rulings restricting the scope of *Ex Parte Young* could affect the ability of the ten state agency P&A Systems to enforce federal rights in federal court and may also serve as a catalyst for undercutting the federally-mandated authorities of all P&As, including not-for-profit agencies because the Seventh Circuit also held that P&As have no implied right of action to sue to enforce their access authority. The ability to challenge state entities in federal court is critical to P&A ability to protect the legal rights of persons with disabilities. These decisions could effectively allow states to avoid federal litigation and channel all such litigation into state courts.

3. Class Actions Protecting the Rights of Individuals with Disabilities. In 2009, Rep. Barney Frank introduced HR 1255, “to protect the interests of each resident of intermediate care facilities for the mentally retarded in class action lawsuits on behalf of such resident.” The bill was referred to the Judiciary Committee and now has 71 bipartisan cosponsors.

H.R. 1255 as currently drafted provides that “no entity that receives funds from the Federal government may use such funds to file a class action lawsuit against an intermediate care facility for the mentally retarded on behalf of any resident of such facility unless the resident (or, if there is a legal representative of the resident, such legal representative), after receiving notice of the proposed class action lawsuit, has the opportunity to elect not to have the action apply to the resident.”

- The “entity” must provide notice to the facility at least 90 days before filing a class action;
- The facility must provide notice to the residents or legal representative within 30 days of receiving notice from the “entity” of a proposed class action lawsuit;
- The resident or legal representative has 60 days to notify the facility that they elect to not participate in the proposed class action lawsuit.

The P&As are the only “entity” to which this bill applies. Class actions are recognized as an important form of legal action designed to fairly and adequately protect the interests of a group of individuals with common questions of law and fact pursuant to the Federal Rules of Civil Procedure.

Having a full range of appropriate remedies, including the use of a class action, has been a keystone to protecting the civil and legal rights of individuals with developmental disabilities in all facets of their lives, including community integration. Community integration is

something that is not only important to individuals with developmental disabilities, but also reflected in the Administration's New Freedom Initiative. The DD Act of 2000 provides the individual P&A systems with the authority to undertake class actions (42 U.S.C. §15043(a)(2)(i)) and 42 U.S.C. §15044(b)(1).

Litigation, including class actions, is a necessary tool in the arsenal of intervention strategies to ensure the protection of the civil and legal rights of individuals with developmental disabilities. A regrettable part of the history of people with developmental disabilities, particularly those with severe cognitive or intellectual disabilities, is that all too often the public and private systems designed to serve them have not served them well – even engaging in abusive and neglectful treatment of individuals. At the same time, families, guardians or representatives may remain unaware of the situation, often relying on the abusers themselves to assure them that all is well.

H.R. 1255, allowing class representatives (guardians on behalf of individuals) to opt out of class action cases brought by the P&As, is a dangerous precedent for people with developmental disabilities and a threat to the community-integration movement which guides the disability community. Judges should be permitted to look at the entire picture and craft injunctive relief that may be necessary to protect all people with disabilities in institutions. No guardian, whether agency or a family member, should have the individual right to prevent a federal judge from awarding complete relief, if it is necessary to address abuse and neglect at a facility, including unhealthy living conditions, insufficient staffing, inadequate health services or a failure to promote community integration. *Ligas v. Maram*, Docket No. 05-C-4331 (2007), WL 4225459 at *1 (N.D. Ill., Nov. 27, 2007).

4. Existing ABA Policy Concerning Protection and Advocacy Agencies. The Association has no existing policy concerning Protection and Advocacy agencies. However, in 1978, the ABA urged the establishment of advocacy programs for the representation of persons with mental disabilities and called on the Legal Services Corporation to increase representation for this population. That ABA policy is still in effect. Moreover, the ABA has been a strong voice opposing limits on Legal Services Corporation funding and actions. A 1995 resolution concerning LSC funding provides that “the American Bar Association calls upon bar associations and lawyers to exert strong leadership and advocacy to preserve existing funding for legal services, prevent the diversion of funds for other purposes and preclude limits on the purposes for which funds may be used.” The P&A System is in many respects a parallel legal/advocacy entity to the Legal Services Corporation and requires the similar independence and support.

5. Conclusion. The American Bar Association, as a staunch defender of the individual rights and responsibilities of all persons including those who are poor or disadvantaged, should take a strong interest in the Protection and Advocacy System – the backbone of legal representation for individuals with all types of disabilities in the United States. Yet the Association has no policy on this vigorous legal provider. The Protection and Advocacy System is currently jeopardized on two fronts – threats to its full and necessary investigative authority;

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and threats to its ability to bring class action litigation to protect residents in intermediate care facilities. The ABA should have a voice in upholding P&A authority in these key areas of legal advocacy – just as it upholds the independence and capacity of a similar legal advocacy entity, the Legal Services Corporation.

Submitted By:
Jeffery Snell Chair
ABA Commission on Law and Aging
May 2010