December 8, 2011

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

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

Re: Opposition to H.R. 2032

Dear Chairman Smith and Ranking Member Conyers:

On behalf of the Rights Task Force of the Consortium of Citizens with Disabilities (CCD), we submit this letter to express our strong opposition to H.R. 2032, which would restrict the ability of protection and advocacy systems for individuals with disabilities, as well as the United States Department of Justice, to bring class action lawsuits to enforce the rights of individuals with disabilities. CCD is a coalition of national disability-related organizations working together to advocate for national public policy that ensures full equality, self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. CCD represents individuals with disabilities, family members, and professionals in the disability field.

H.R. 2032 would create special rules for class actions brought on behalf of institutionalized individuals with intellectual disabilities, and would make it more difficult to enforce their rights than the rights of others. It would:

- prohibit entities that receive federal funds from using those funds to file a class action suit on behalf of residents of ICF/MRs[1] unless the residents or their legal representatives are given advance notice of the proposed class action and the chance to withdraw from the lawsuit.

[1] ICF/MR is a Medicaid term that refers to "intermediate care facilities for the mentally retarded." ICF/MRs are institutional or other congregate settings serving individuals with intellectual

- prohibit the United States Department of Justice from taking *any action*, including investigations or other actions to enforce the rights of ICF/MR residents under the Americans with Disabilities Act (ADA), the Civil Rights of Institutionalized Persons Act (CRIPA), or any other law, without first consulting with the residents of the institution or their legal representatives and "all other interested parties."

- provide an automatic right of intervention by ICF/MR residents or their legal representatives in any action brought by the Justice Department to enforce the residents' rights.

It is beyond ironic that this bill seeks to create special obstacles to the enforcement of the civil rights of a group of people who, as Justice Thurgood Marshall noted, once faced "a regime of state-mandated segregation and degradation . . . that, in its virulence and bigotry, rivaled, and indeed paralleled, the worst excesses of Jim Crow."[2] Congress should not entertain an effort to diminish civil rights enforcement for these individuals.

We strongly object to H.R. 2032 for the following reasons.

The Bill Would Create Different Rules of Civil Procedure for People with Intellectual Disabilities than for Everyone Else

The Federal Rules of Civil Procedure, promulgated by the United States Supreme Court, set forth uniform rules for federal court actions, including the procedures governing class action lawsuits. These rules ensure fairness by applying the same standards and procedures to all litigants in federal court. It would be a dangerous and troubling precedent to create a different set of rules for class actions involving the rights of individuals with intellectual disabilities. There is no reason why individuals with intellectual disabilities should have greater obstacles to proceeding as a class than those imposed by Federal Rule 23, which applies to all class actions.

Indeed, it is particularly troubling that H.R. 2032 seeks to make it *harder* to obtain systemic relief for institutionalized people with intellectual disabilities, when it is precisely this type of relief that has been critical to stop shameful widespread abuse, neglect, and violations of the civil rights of these individuals. Class action lawsuits have been an extraordinarily important tool in remedying these problems in cases such as the *Willowbrook* case in New York, the *Wyatt* case in Alabama, the *Pennhurst* case in Pennsylvania, and numerous others. Even now, systemic failures occur in institutional settings, placing people with disabilities at great risk of harm. In June, 2011, a front-page New York Times story reported that New York's institutions for individuals with intellectual disabilities:

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disabilities. "Intellectual disabilities," rather than "mental retardation," is now the preferred terminology.

[2] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 462 (1985) (Marshall, J., concurring in part and dissenting in part).

> . . . are hardly a model: Those who run them have tolerated physical and psychological abuse, knowingly hired unqualified workers, ignored complaints by whistleblowers and failed to credibly investigate cases of abuse and neglect, according to a review by the New York Times of thousands of state records and court documents, along with interviews of current and former employees.[3]

In addition to remedying abuse and neglect, class action lawsuits are the only effective way to achieve systemic enforcement of the right of people with disabilities to be served in the most integrated setting appropriate to their needs. *Olmstead v. L.C.*, 527 U.S. 581 (1999). Many thousands of individuals with intellectual disabilities (as well as individuals with other disabilities) remain needlessly confined in public and private institutions. Class action litigation has been the impetus for virtually every large-scale effort to offer institutionalized people with intellectual disabilities the opportunity to live in their own homes with supports.

The Bill Would Make it Difficult to Pursue Class Relief on behalf Institutionalized Individuals with Intellectual Disabilities

H.R. 2032's requirement to offer class members the chance to "opt out" even before a lawsuit proceeds would make it difficult to pursue class actions. While class members typically have opportunities to opt out of *relief* that is obtained in a class action, permitting class members to *remove themselves from the class* would wreak havoc with class action litigation. Among other things, it would eliminate the efficiency and purpose of class actions, as class members who "opted out" of a class could presumably choose to bring a similar suit on their own.

Moreover, allowing class members to opt out of an action would open the door for institutions (many of which are for-profit entities with financial incentives to keep their facilities full) or others with vested interests in keeping residents institutionalized to prevent a lawsuit from proceeding by using scare tactics to pressure other class members to drop out. As advocates for individuals with disabilities, we have witnessed numerous instances of intimidation and campaigns to perpetuate misinformation and false beliefs in order to scare institutional residents or their guardians out of seeking to leave the institution.

The bill would also make it more difficult for the Justice Department to use its normal tools to safeguard the rights of institutionalized people with disabilities. It is extremely troubling that the Justice Department would not even be permitted to open an investigation of abuse, neglect, or civil rights violations without first talking to all interested parties, including individuals responsible for violating individuals' rights. The Department is not limited in this way with respect to any other civil rights enforcement, and should not be so limited in enforcing the rights of individuals with disabilities.

[3] Danny Hakim, *A Disabled Boy's Death, and a System in Disarray*, N.Y. Times, June 6, 2011, at A1.

The Bill is Unnecessary

The existing rules for class actions already provide the type of protections that this bill purports to provide. Federal Rule of Civil Procedure 23 provides a host of procedural protections to ensure that the interests of all class members are fairly and adequately represented. Among other things, Rule 23 requires that, before a class action may be settled, the court "must direct notice in a reasonable manner to all class members who would be bound by the proposal," and may approve the settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. Pro. 23(e). Class members must be given an opportunity to object to the proposal. *Id*. Objectors routinely offer testimony and/or submit written comments expressing their objections to a proposed settlement. When objectors have demonstrated that a proposed settlement is not fair, adequate and reasonable, courts have declined to approve such settlements.

Moreover, in cases where individuals seek to enforce their rights under the ADA and *Olmstead* to leave institutions and live in community settings, class members who do not wish to live in a community setting cannot be forced to do so. Neither the ADA nor *Olmstead* forces accommodations on individuals who do not want them. Settlements and remedy orders in *Olmstead* cases make community services and housing available to class members who choose them, without forcing them on individuals who do not.

The Bill Would Preclude Effective Representation of Individuals with Disabilities in Institutional Settings

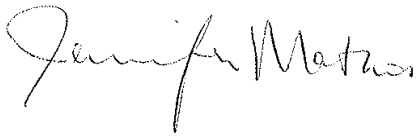
The primary legal entities affected by the bill's restrictions on class actions are protection and advocacy systems for individuals with disabilities (P&As) and the Justice Department. Both P&As and the Justice Department play a critically important role in safeguarding and enforcing the rights of individuals with disabilities in institutional settings. The vast majority of litigation to enforce the civil rights of individuals with disabilities in institutional settings is done by P&As and the Justice Department.

Indeed, Congress created the P&A system because of a recognition that a network of legal advocates was needed to ensure that individuals with disabilities could live "free of abuse, neglect, financial and sexual exploitation, and violations of their legal and human rights; and achieve full integration and inclusion in society, in an individualized manner, consistent with the unique strengths, resources, priorities, concerns, abilities, and capabilities of each individual." 42 U.S.C. § 15001(a)(16). Creating extra hurdles to the ability of P&As to enforce the legal rights of individuals with disabilities would undermine the very system that Congress recognized was desperately needed to ensure protection for institutionalized people with disabilities.

For these reasons, we strongly oppose H.R. 2032 and would urge you to prevent its passage.

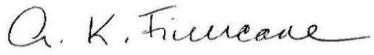
Sincerely yours,

CCD Rights Co-Chairs
On behalf of CCD Rights Task Force



Jennifer Mathis
Bazelon Center for Mental Health Law

Curt Decker
National Disability Rights Network



Sandy Finucane
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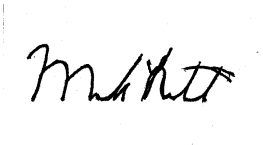

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