IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ERIC STEWARD, by his next friend and mother, Lillian Minor, *et al.*,

Plaintiffs,

v.

CHARLES SMITH, in his official capacity as the Executive Commissioner of Texas' Health and Human Services Commission, *et al.*,

Defendants.

Case No. SA-5:10-CV-1025-OG

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

THE STATE OF TEXAS,

Defendant.

DECLARATION AND EXPERT DISCLOSURE OF KYLE PICCOLA

I declare under the pains and penalties of perjury under the laws of the United States and in compliance with Fed. R. Civ. P. 26(a)(2)(B), that the foregoing is true and correct and that I am submitting this disclosure regarding my work as an expert consultant in the above case.

1. My report, which is attached, contains a complete statement of all of my opinions as well as an explanation of the basis and reasons for those opinions.

2. My report describes the facts, data and other information I considered in forming my opinions.

3. There are no exhibits prepared at this time to be used as a summary of or support for my opinions.

4. My attached curriculum vitae states my qualifications and lists all publications I have authored within the past ten years.

5. Within the last four (4) years, I have not testified as an expert either in a deposition or at trial.

6. I have not received any compensation for the preparation of the attached report.

Signed and dated: April __, 2018

Kyle Piccola 04/29/18

Kyle Piccola

CERTIFICATE OF SERVICE

I certify that on this 30th day of April, 2018, a true and correct copy of the foregoing Plaintiffs' and the United States' Declaration and Expert Disclosure of Kyle Piccola was delivered via electronic mail to the attorneys for defendants at the addresses below:

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REBUTTAL REPORT OF KYLE PICCOLA

I. Purpose of the Report

I reviewed and am responding to the report of Eleanor Shea-Delaney. While Ms. Shea-Delaney describes some ways in which Texas has implemented changes to its service delivery system for individuals with intellectual and developmental disabilities (IDD) institutionalized in, or at risk of admission to, a nursing facility, many of the community services, supports and actions described by Ms. Shea-Delaney are not accessible, available, or adequate for individuals with IDD in or at risk of entering nursing facilities. Similarly, many of the intended "benefits" of these services and supports have not been realized due to HHSC's failure to implement and deliver them. Finally, I find it surprising that Ms. Shea-Delaney did not consult with a single individual with IDD, their family members, or direct care providers to develop her report. Many of these individuals can confirm my own opinion that Texas' *Olmstead* plan fails to meet the needs of people with IDD and that systemic gaps in the State's IDD service system result in unnecessary institutionalization, crises, and risks of institutionalization for people with IDD.

Based on my experience advocating for the human rights and self-determination of individuals with IDD in Texas and serving on Texas' Promoting Independence Advisory Committee (PIAC), which – before the State dissolved it – was tasked with advising Texas on the development and implementation of its *Olmstead* plan (known as the Texas Promoting Independence Plan) it is my opinion that Texas does not have an effective *Olmstead* Plan.[1] The Plan is not comprehensive, is not moving at a reasonable pace, and is not effectively working in a manner that ensures that people with IDD do not unnecessarily enter or remain in nursing facilities.

II. Background and Expertise

I have worked on legislative, policy, and systemic reform initiatives since 2008. I served as an intern for Colorado Senate Majority Leader Brandon Shaffer. After this internship, I accepted a position as the committee clerk for the Business Personal Property Tax Committee chaired by Senator Joyce Foster. I then served as the Chief of Staff to Colorado State Senators Pat Steadman and Linda Newell working on health and human services issues, budget priorities and issues affecting people with IDD. Later, I accepted a position with the Colorado State Senate Majority Office as the Community Outreach Manager. I worked directly with Senators on health and human services legislation and the Colorado State Budget. I continued supporting Senator Pat Steadman after he was appointed to serve on the Joint Budget Committee. In this role, I served as a liaison between community members and stakeholders and the Senate to ensure that meaningful public input was gathered and implemented. I later accepted a position in Kansas City, Missouri as the Senior Field Organizer for PROMO, Missouri's statewide organization that advocates for LGBT Missourians. I have led advocacy, policy efforts, and systemic improvement initiatives for individuals with IDD at the local and state level.

[1] I refer to the Texas *Olmstead* Plan and the Promoting Independence Plan interchangeably throughout this report.

I began working for The Arc of Texas as the Director of Governmental Affairs (now Chief Government and Community Relations Officer) in July of 2015. I direct all public policy efforts for The Arc of Texas. I work with decision makers at the local, agency and state level. In this role, I work directly with individuals with IDD and their family members to advocate to improve the quality of life for Texans with IDD, including helping individuals transition from and divert from entering institutions. I have served as a member of the following important committees and workgroups: PIAC; Disability Policy Consortium (DPC); IDD Systems Improvement Workgroup; Level of Need Ad Hoc Workgroup; HCBS Remediation Workgroup; former Health and Human Services Commission (HHSC) Associate Commissioner Jami Snyder's managed care carve-in workgroup; SB 2027 employment workgroup, and HHSC Executive Commissioner Traylor's "Managed Care Stakeholder Improvement Forum."

My curriculum vitae is attached as Attachment A.

III. Documents and Information Considered and Methodology

I reviewed the Report of Eleanor Shea-Delaney. I also reviewed various versions of Texas' Promoting Independence Plan, which is Texas' *Olmstead* Plan. A full list of the documents and information I considered is included in Attachment B.

IV. Findings

For the reasons discussed below, it is my opinion that Texas does not have a comprehensive *Olmstead* Plan that adequately addresses the needs of all qualified individuals with IDD in or at risk of entering nursing facilities or that moves at a reasonable pace.

A. HHSC has restricted access to community services, thereby increasing the risk of unnecessary institutionalization in nursing facilities for persons with IDD and preventing the *Olmstead* Plan from moving at a reasonable pace.

Individuals with IDD, including those who have complex or high support needs, can be successfully served in the community with appropriate supports. However, adequate community supports and services are essential to preventing individuals with IDD from entering nursing facilities or institutions in the first place, and are equally as essential to transitioning individuals out of nursing facilities and institutions. If an individual with high support needs does not receive adequate and appropriate services, his or her risk of entering or re-entering the nursing facility or not transitioning out increases exponentially.

1. The State does not adequately support individuals with IDD who have high or complex support needs.

The Texas Legislature recognized that many individuals with IDD and complex needs can be served appropriately in the community and, in 2015, appropriated funds for the 2016-17 biennium to provide individuals with high medical needs the enhanced level of support they needed to live in the community. HHSC is likewise aware of this need, noting in its

Consolidated Budget Request for the 2018-2019 Biennium, published in February 2017, that "the state still has challenges in its treatment of individuals with IDD who also have complex medical and/or mental health issues. This fact has been noted by numerous stakeholders as well as Texas Sunset Commission staff."[2] The Consolidated Budget Request goes on to proclaim that, "effective January 2017, HHSC will implement the following new services under the Home and Community-Based Services (HCS) program to provide additional support for eligible persons who have medical needs that exceed the service specification for existing HCS services and who need additional support in order to remain in a community setting: High Medical Needs (HMN) Support, HMN Registered Nursing (RN) and Licensed Vocational Nursing (LVN) services. HCS providers who care for high-needs individuals will receive separate payment rates for these new services." This initiative was halted due to HHSC rulemaking and ultimately was never implemented. As a result of its abrupt termination, the State has taken no other effective action to assist individuals with complex medical needs to remain in, or transition to, the community. This failure places a disproportionate risk on individuals with IDD in nursing facilities. Ms. Shea-Delany fails to address this significant failure or its impact.

Moreover, in its effort to develop a proposed rule to expand HCS to include high medical needs services, HHSC restricted the eligibility criteria for these funds to those individuals who needed more than 180 minutes of nursing per week. This decision greatly diminished the impact of the appropriation, limited the number of individuals who could receive additional support services, and excluded many individuals who, because of their complex physical or behavioral needs, required additional support services to transition from, or avoid admission to, segregated settings like nursing facilities. HHSC drafted rules and received a great deal of public comment urging it to modify and expand these eligibility criteria, yet ignored these comments, maintained the restrictive criteria, and moved forward with the original proposed rule language. In the end, however, HHSC never implemented the HCS high medical needs project and never used the appropriated funds to support individuals with IDD who needed additional support services. To date, HHSC has failed to explain where the appropriated funds were funneled. However, in FY 2016, HHSC implemented an add-on rate for individuals with complex or high medical needs living in Intermediate Care Facilities (ICFs), which had no impact on, and intentionally excluded, similarly situated individuals with IDD in nursing facilities transitioning to the community.

The Arc works with individuals with IDD, and their families, who feel they are forced to remain in an ICF because they do not feel that the available community options are viable to support their high medical needs. Other families have had to make life-altering decisions, including leaving their careers, living in different homes than the rest of their immediate family, and removing their loved ones from an HCS group home because the available community options did not have the resources to support the intensive medical care or high behavioral needs of their loved ones. The toll of providing intensive care to a loved one without sufficient supports and services can be unbearably challenging, and I have seen this lead to unwanted and unnecessary institutional admissions. Additionally, HHSC heard directly from community

[2] Texas Health and Human Services, Consolidated Budget Request 2018-2019 Biennium, February 2017, at 77, available at https://hhs.texas.gov/sites/default/files/documents/about-hhs/budget-planning/consolidated-budget-request-2018-2019.pdf.

providers during multiple Level of Need Ad Hoc Workgroup meetings that not receiving the appropriate level of need after individuals have transitioned from nursing facilities and other institutions forced some people back into an institution because the community system was not successful without the right level of resources.

For example, a family who opened a trust account with the Master Pooled Trust was very concerned that their daughter would never leave a nursing facility after she had to have her leg amputated. They were facing challenges finding an adequate community alternative due to lack of resources and community-based supports that were adequate enough to support her high medical needs. HHSC's failure to appropriately coordinate, support, and administer appropriated funds to individuals needing a higher level of support increased, and continues to increase, Texans with IDD's risk of admission into a nursing facility or other institutions. Furthermore, this creates greater barriers for individuals wishing to transition out of nursing facilities and other institutions, and diminishes the system of support individuals with IDD receive in the community.

2. Texas's massive waiting list for waiver services hurts Texans with IDD.

Texas also failed to create sufficient waiver slots to reduce its massive waiting list, referred to in Texas as the "interest" list, for community-based Medicaid waivers and greatly reduced the number of promoting independence slots for the FY 2018-2019 biennium. The only mechanism Texans with IDD can use to obtain comprehensive, long-term services and supports is through a Medicaid 1915(c) waiver or an 1115 waiver. An individual can receive one of these waivers when his or her name comes up on the lengthy interest list or through a Promoting Independence waiver slot. More than a decade after the *Olmstead* decision and many years after Promoting Independence waiver slots were provided for individuals with IDD in other institutions like the State Supported Living Centers (SSLCs), Promoting Independence slots finally were provided in 2014 to help prevent the wrongful admission of Texans with IDD into nursing facilities and other institutions and to help Texans with IDD transition out of nursing facilities and other institutions to live in the community. Texans with IDD living in nursing facilities were never even mentioned in Texas' *Olmstead* Plan until the *Steward* Case forced the State to acknowledge this population. Prior to the case, Texas' *Olmstead* Plan did not address individuals with IDD living in nursing facilities who need access to the HCS waiver, and they were instead required to put their name on the interest list and wait years until they got to the top of the list.

Adequately supporting individuals with IDD in the community and preventing them from needlessly entering institutions is at the heart of the *Olmstead* decision. HHSC, in its revised 2017 legislative appropriations request (LAR) for FY 2018-2019, did not request funding to reduce the interest list for community-based 1915(c) Medicaid waivers —which it has traditionally requested. It is well-documented in HHSC's "Interest List Reduction" reports that, prior to the 85th Legislative Session, individuals on the interest list waited up to 13 years before their names came to the top of the interest list. Without dedicated funding to reduce the interest list in the FY18-19 biennium, Texans with IDD will likely wait at least an additional two years for a 1915(c) waiver.

Further, the waiting list for waiver services has steadily increased since my time at The Arc of Texas. From January 2016 to August 2017, the interest list has grown from 105,872 unduplicated individuals waiting for waiver services to 141,065 individuals. That is a 33.2% increase over 19 months. Sadly, the rate at which the Legislature has funded interest list reduction prior to 2017 has done little to serve the unmet needs of Texans with IDD for these life-saving services. The Texas *Olmstead* Plan cannot be considered to be moving at a reasonable pace when individuals with IDD have to wait more than a decade to receive needed waiver services to remain in the community. Texas is now operating a crisis-driven system that forces individuals and families into medical, behavioral and family crisis – as a direct result of a lack of accessible, available, and timely community waiver services – before they are able to receive critical services. This crisis-driven system puts them at great risk of entering an institution such as a nursing facility. Tellingly, Texas does not maintain a waiting list for institutional services, and individuals on the waiting list for waiver services can at any time enter a nursing facility or SSLC if they meet the eligibility requirements to receive services.

3. Texas does not ensure that there are sufficient resources to help individuals with IDD to transition and divert from nursing facilities.

After making a decision to not prioritize interest list reduction for Texans with IDD, the State significantly reduced the number of Promoting Independence waiver slots intended to prevent nursing facility admission and to let people transition out of nursing facilities. Although 700 transition slots and 600 diversion slots were appropriated for the FY2016-2017 biennium, the number of appropriated slots precipitously dropped by almost 75% for the FY2018-2019 biennium. The State only appropriated 150 nursing facility transition slots for the full FY2018-2019 biennium. And the approximately 100 slots that were needed to fulfill the previous biennium's pending enrollments count against the 150 slots for FY2018-2019. Likewise, only 150 nursing facility diversion slots were appropriated for the fully FY2018-2019 biennium, and that total again is actually lowered by the approximately 70 diversion slots needed to enroll individuals carried over from the previous biennium.

The State also completely eliminated other priority populations—individuals at risk of entering an SSLC—and did not propose an alternative solution when this decision was made.

Additionally, I understand that an analysis of the nursing facility census of individuals with IDD in Texas, including both the monthly census and long term stay population, shows that the census has remained relatively stagnant between May 2014 and May 2017. In my opinion, this data indicates that Texas's *Olmstead* Plan is not moving people with IDD from nursing facilities at a reasonable pace. If the Plan was working effectively, I would expect that the nursing facility census of individuals with IDD would decrease over time.

B. <u>The State's implementation of its waiver services does not sufficiently support people with IDD to live successfully in the community.</u>

Ms. Shea-Delaney claims that the existing services offered through the HCS waiver demonstrate the State's commitment to enabling individuals with IDD to be "sustained in the community." However, in my experience, the array of HCS services is insufficient to adequately

serve many individuals who are currently in a nursing facility or at risk of institutionalization in a nursing facility. For example, the HCS waiver services are insufficient to support certain individuals with high medical needs. When Texas implemented Community First Choice (CFC) (discussed in more detail below), it did so in a way that made receiving certain waiver services more confusing, and it functionally eliminated other services altogether.

For example, The Arc of Texas received calls about individuals who no longer were approved for protective supervision hours and were at risk of entering an institution. Specifically, a member of The Arc enrolled into the HCS waiver from the STAR+PLUS waiver and lost protective supervision hours, which put this individual at risk of institutionalization. Protective supervision is essential for some individuals with IDD to live successfully in the community. She no longer had the critical supervision to remain in the community because of the weakened HCS waiver services. The member tried to utilize other services, specifically day habilitation, but could not find a day habilitation provider that would accept her daughter because of her high medical needs. HHSC received feedback on many occasions about this problem from The Arc of Texas and other stakeholders and despite having implemented a limited High Medical Needs bump, this did not substantially address the problem.

Ms. Shea-Delaney suggests that waivers other than HCS, such as CLASS or TxHmL, are viable options for individuals in nursing facilities to transition to the community. However, neither of these waivers has a residential option, which is vital to supporting and maintaining an individual to live as independently as possible in the community. Additionally, TxHmL has the lowest cost cap out of any of the waivers ($17,000) and has the most limited income eligibility of any of the other Texas Medicaid waivers (100% of Supplemental Security Income (SSI) versus 300% SSI). These restrictions make TxHmL inaccessible to many individuals with IDD who are in or at risk of institutionalization. Without a residential option, it is difficult to see how anyone could suggest that CLASS or TxHmL would be a viable option to support a long-term, meaningful life in the community for individuals with nursing facility level of care. The reality is that for many individuals with IDD in Texas, there is simply not a viable community option, other than HCS, to support long term, and meaningful life in the community. There is little basis to support Ms. Shea-Delaney's claim that the State has a commitment to provide a system of long-term services and supports that enable people with IDD to live successfully in the community. In fact, my experience, through my work at The Arc of Texas, has shown me that the state has very little commitment to address the significant needs of Texans with IDD.

It is also important to note that Ms. Shea-Delaney makes an assertion in her report that the Local Intellectual and Developmental Disability Authorities (LIDDAs) are the first point of contact for all IDD services in Texas. That is inaccurate. CLASS, DBMD and MDCP are all waivers that can provide services to individuals with IDD, subject to the interest list, that do not interact with the LIDDAs. Such a statement, together with Ms. Shea-Delaney's misguided assertion that waivers that lack a residential option can be a viable way for individuals with IDD in nursing facilities to transition to the community, leads me to believe she is fundamentally unaware of how IDD services are coordinated in Texas.

C. The State's *Olmstead* Plan does not represent the views and decisions of a representative group of individuals with disabilities and other stakeholders.

Meaningful stakeholder engagement and active participation in developing and implementing an IDD service system is essential to allowing people to successfully move to or remain in the community. In my experience, facilitating broad stakeholder involvement, seeking meaningful public input, and incorporating that feedback is the best way to achieve positive changes and community integration for people with IDD. The Arc of Texas believes, "nothing about us, without us," which means we do not create policy without the individuals it will impact and their advocates at the table. The Shea-Delaney report makes many references to meaningful stakeholder input in Texas, and particularly in developing its Promoting Independence Plan. It must be noted that not a single individual with IDD was a member of the PIAC during my time on the Committee. But Ms. Shea-Delaney ignores or is not aware of the many recommendations of the Promoting Independence Advisory Committee (PIAC) and numerous elements of the 2016 PIAC report that HHSC disregarded or did not implement. Similarly, her report never mentions the many ways that HHSC failed, and continues to fail, to meaningfully engage and incorporate stakeholder and public input, which has diminished the community-based system of support for Texans with IDD.

One clear departure from stakeholder and public input is the decision to discontinue the PIAC as an official advisory committee to HHSC. The PIAC has been fundamental in helping HHSC craft meaningful and systemic changes to Texas' system of community-based supports and transitioning individuals with IDD out of institutions. The PIAC worked closely with HHSC to develop the Money Follows the Person (MFP) initiatives. One of the initiatives created through MFP was "Enhanced Care Coordination," which helped individuals transitioning out of nursing facilities and other institutions. That funding is set to disappear and HHSC has not suggested a sustainable replacement.

In August of 2017, the State unilaterally terminated the PIAC, even though the PIAC could have either been continued by statute or through HHSC Commissioner Smith's authority to continue it in its role as a longstanding, official advisory committee since 2001. The Arc of Texas, along with other PIAC members, urged HHSC leadership not to unilaterally terminate this longstanding stakeholder group, which its own experts, like Ms. Shea-Delaney, cite as a key mechanism for community involvement. Members of the PIAC were given very little advance notice of HHSC's decision to terminate it. HHSC was not proactive in providing information about the statutory expiration deadline for PIAC to the group. If the PIAC was valued, as Ms. Shea-Delaney states, HHSC would have likely given members ample notice to advocate to continue the committee. When HHSC terminated the PIAC, there was not another committee with a similar focus and expertise that could oversee and provide formal input on the State's Olmstead/Promoting Independence efforts.

In addition, Texas does not consistently or adequately consider and adopt IDD stakeholder recommendations, and failed to accept and/or implement a large majority of the recommendations from the 2016 PIAC report. For example, the PIAC recommended that the State continue to fund Promoting Independence waiver slots at the 2016-2017 levels for the 2018-2019 biennium. I have seen firsthand the value that Promoting Independence waivers have

on the lives of Texans with IDD and their families. This recommendation was made to advise Texas to comply with Olmstead and to prevent the unnecessary institutionalization of Texans with IDD. With seemingly little opposition from HHSC, the Legislature significantly reduced the number of Promoting Independence slots that were appropriated. This puts individuals at imminent risk of entering and not transitioning out of a nursing facility. And there were no other diversion or crisis slots appropriated to divert individuals from entering most institutions.

Other recommendations that were made by the PIAC and not accepted and implemented by the State include:

- Funding waiver modifications for high support needs
- Reducing the Interest Lists by 20%
- Consolidation, which includes closure of the state supported living centers (SSLC) system in Texas. Monies saved should be dedicated to community services for people with disabilities.
- Restoring the In-Home and Family Support Program benefit to $3,600 annually, in addition to maintaining service levels.
- Include comprehensive behavioral health services in the Texas Medicaid State Plan.
- HHSC and the legislature should support policies that encourage, promote, and place individuals with disabilities in integrated, competitive employment.
- Increase the base wage to $13 per hour for direct support workers (DSWs), including attendants providing personal assistance and habilitation services in all HCBS programs.

D. Texas has not adequately implemented Community First Choice (CFC).

Ms. Shea-Delaney references CFC multiple times in her report as a beneficial addition to the service array for Texans with IDD. CFC is a Medicaid State Plan Service that has allowed certain individuals with disabilities to access personal attendant care and habilitation services, among other less commonly used services. It is not as helpful for individuals with IDD who are at risk of admission to or are in a nursing facility. CFC also allows Texas to receive an additional 6% in federal Medicaid match funds to pay for these support services. The personal attendant care and habilitation that CFC provides, in conjunction with other critical long-term services and supports only available through waiver programs, can be an important resource to assist people with IDD to avoid, or transition from, nursing facility and other institutional placement. However, it is not sufficient on its own to allow most people to transition from a nursing facility or to avoid nursing facility placement in the first place, particularly since it does not provide residential services or the 24-hour care someone with high medical needs may require. Also, HHSC's implementation of CFC was fraught with misinformation, fell far short of helping individuals on the interest list, and placed additional burdens, which do not exist in other 1915(c) waivers, on individuals and families in HCS and TxHmL waivers.

Texas initially implemented CFC to create a new Medicaid State Plan service for Texans who were currently not receiving basic attendant, habilitation and other limited community supports like emergency response services. Unfortunately, the implementation of CFC had missteps that hurt its success. It became clear to me after receiving many complaints from The

Arc of Texas members, community providers, and LIDDAs that there was systemic confusion on how to access and implement CFC. They expressed to me on multiple occasions that HHSC rolled out CFC without any clear guidance to LIDDAs about how to properly draft Personal Assistant Services and Habilitation (PAS/HAB) plans. As a result, the PAS/HAB hours requested by the Interdisciplinary Team were often denied because of the lack of clarity and direction from HHSC. The Arc of Texas members described CFC as bartering for the services they needed, instead of evaluating what the individual needed. There was a widespread belief among The Arc of Texas members that LIDDA staff communicated that getting anything at all, even if it was less than what the individuals should be receiving, was okay. I have spent many hours evaluating the CFC assessment and walking through it with individuals with IDD and family members to help provide input and suggest needed improvements. Moreover, based on complaints from waiver providers, LIDDAs, The Arc of Texas, families and other disability advocates, HHSC agreed more than a year ago to review and possibly revise the PAS/HAB evaluation process. As of September 2017, the status of the assessment remained a "work in progress" and the flawed assessment remained in place.

Further, for those receiving HCS waiver services, CFC is limited to those receiving HCS services in their own home or family home. Supported Home Living (SHL) services that are available, and that have been approved under the HCS waiver program, have been denied under CFC. Specifically, SHL hours for the individual's health, safety and security have been denied. This denial resulted in a reduction of PAS/HAB hours, putting at risk the individual's ability to remain safely at home and, as a result, remain in the community. HCS SHL billing guidelines and CFC PAS/HAB services do not allow for supervision for health and safety, creating a gap or inappropriate reduction in services that can lead to institutionalization.

The Arc of Texas received numerous complaints from Arc members about the transition to CFC and the misinformation that was given to people with IDD and their families. One member was told by a Managed Care Organization (MCO) that CFC would not be a good option because the individual would not "get better" after a period of time, and as result, the MCO would slowly start to reduce the CFC hours. Another member was wrongly told by his MCO that CFC was not appropriate for helping him socialize and be in the community. In addition, because he was able to wash himself and brush his teeth, he was mistakenly informed that he would not qualify for CFC. The Arc of Texas received many calls from individuals needing services who were never made aware of the CFC benefit, even after speaking with HHSC, their MCO and the LIDDA. This type of misinformation proved to be detrimental to individuals in understanding the program's benefits, especially for those who are currently waiting many years for a community-based Medicaid waiver.

These issues persist today. HHSC was informed on multiple occasions, including at PIAC meetings, that the public was unaware of CFC and was receiving information that was contrary to the goals of CFC. At the time that CFC was first implemented, HHSC projected in reports to the PIAC that CFC would be able to serve approximately 12,000 people, who currently were not enrolled in services. During PIAC meetings, HHSC would verbally provide unofficial CFC enrollment data, but HHSC never provided the PIAC with an official or written report of actual CFC enrollment. CFC was considered as one of the only benefits to people with disabilities to come from the FY 2013 legislative session, but it has not lived up to its promise or

potential. At each PIAC meeting, members of the PIAC noted how far behind projections Texas was in helping individuals on the interest lists receive CFC services.

Ms. Shea-Delaney suggests that CFC had a positive impact on individuals with IDD. However, I believe the primary benefit from CFC thus far is that it allows the State to receive an additional 6% in federal funds. Shortly after CFC was created, the State implemented restrictions that limited access to the benefit for individuals with IDD. CFC was originally designed to allow an individual receiving the CFC benefit to be supported by someone who lived in the same home. Allowing this in the Texas Home Living (TxHmL) and Home and Community Services (HCS) waivers had been beneficial because, many times, people who live with individuals receiving services understand their personal attendant care and habilitation needs, are more readily available and reliable, and are preferred by individuals receiving services because they know and trust them, and because they typically provide much greater stability in staffing. After concerns that CFC in the TxHmL and HCS waivers was costing the State more than what was projected, HHSC reversed the policy and implemented a rule that individuals living in the same home as the individual receiving CFC could not be the CFC provider in either of those Medicaid waivers. This caused major disruptions in the lives of individuals with IDD who were using CFC to remain in their own homes, and in the lives of their families. HCS and TxHmL continue to be the only two waivers where this provision is enforced. It was bewildering to The Arc of Texas for HHSC not to implement this rule along with an assessment. If the assessment accurately determined the number of CFC hours that were needed, it should not matter who the CFC provider is. Ms. Shea-Delany did not consider this restriction in her report.

Lastly, at the urging of HHSC, Texas recently implemented rate cuts to CFC—further diminishing the community-based system of support that serves Texans with IDD. Despite stakeholder and public input, HHSC recommended a 21% rate cut. Without even mentioning these drastic cuts, Ms. Shea-Delaney applauds the CFC program, but fails to recognize how the rate cuts have impacted the implementation of CFC. Before the rate reduction, these two waivers provided essential community support to Texans with IDD, and according to the Rider 89 Cost report, proved to have the lowest provider staff turnover among all programs and waivers that provide CFC. Being able to retain quality, trained personal attendant care staff is critical to the success of individuals living in the community. After the rate cut was implemented, some TxHmL providers have either stopped serving individuals on the TxHmL waiver, or no longer have the capacity to accept more individuals because of the rate cut. HHSC's action has created a barrier for serving individuals with IDD in HCS and TxHmL, and increased the risk of institutionalization for individuals who need CFC services to remain in the community.

The Arc has members who provided testimony to legislators during the 2017 Legislative Session and to HHSC at rate hearings, that CFC was their lifeline to independent living. Without personal attendant care, some of our members would not be able to get out of bed in the morning to go to work. Since the rate cuts went into effect, The Arc of Texas has heard from members having difficulty in finding CFC providers. Access to these services is critical to maintaining an adequate community support system for individuals with IDD to prevent unnecessary institutionalization and to allow for transition from nursing facilities. It appears that Ms. Shea-Delaney, in applauding the creation of CFC and noting the importance of the HCS and TxHmL waivers, was unaware of, or else chose to ignore, these rate reductions.

E. Texas' *Olmstead* Plan is not transitioning individuals with IDD from nursing facilities through the Money Follows the Person Demonstration Program.

Texas began participating in the federal Money Follows the Person (MFP) Demonstration in 2007. The MFP Demonstration has the goal of moving individuals out of institutions and into the community. According to Mathematica Policy Research, Texas reported to CMS that it has transitioned 2,665 individuals with IDD to the community using MFP Demonstration funds, from the start of the MFP Demonstration program in 2007 through December 2016. Ms. Shea-Delany reports that almost all of these individuals (2,337) were Texans with IDD living in nursing facilities who transitioned from 2013 to 2017. However, this total number reported to CMS is not limited to transitions from nursing facilities, and included transitions from multiple types of facilities, such as public and private Intermediate Care Facilities (ICFs) and State Supported Living Centers (SSLCs). The State separately reported that it has transitioned 548 individuals with IDD from nursing facilities to waiver slots using Promoting Independence slots. Therefore, it is unclear how 2,337 individuals with IDD were transitioned from nursing facilities through the MFPD demonstration from calendar years 2013 through 2017, as claimed by Ms. Shea-Delaney in her report.

Another MFP loss is the Enhanced Community Coordination (ECC) and Transition Support Teams that MFP funded to help Texans with IDD transition out of institutions. Both of these services augmented the array of services available to help Texans with IDD who have high support needs transition out of institutions. According to the 2016 Revised Texas Promoting Independence Plan, ECC successfully helped transition 467 individuals out of institutions, primarily nursing facilities. Unfortunately, these services will no longer have a sustainable funding stream. Even after recognizing the benefits it has had in transitioning Texans with IDD out of nursing facilities, Texas does not have a funding plan to continue this service after December 2018. In combination with the significant reduction in Promoting Independence slots, Texas' *Olmstead* Plan lacks the structure to effectively help Texans with IDD.

F. Texas' *Olmstead* plan is not effective because of the prohibitively burdensome diversion process.

In addition to the many deficiencies in Texas' IDD system and its failure to implement an effective *Olmstead* plan, the diversion process is burdensome on people with IDD. Texas requires that individuals with IDD seeking a diversion waiver to prevent an institutional placement exhaust all possible "community" services before they use a diversion waiver. Often, at the point an individual or family is requesting a diversion, they are already in crisis. Either the individual's current living situation has been upended or the individual has support needs that can no longer be met without the addition of critical waiver services. Both of the circumstances place individuals with IDD at risk of entering an institution, such as a nursing facility. The services Texas requires individuals to consider include placement at an Intermediate Care Facility (ICF), which is an institutional setting, services provided through a public school and CFC. The Arc of Texas has found that, many times, members have had to explore unwanted ICF institutional placements and provide substantial evidence why those placements were not appropriate, all while still experiencing crisis. Requiring someone to pursue one institutional

setting (an ICF) to avoid admission into another institution (a nursing facility) is at odds with the philosophy and goals of promoting independence and *Olmstead*.

Additionally, exploring CFC can also put an individual even further at risk. It requires someone to be assessed, choose a provider, find staff, train and retain staff, and document if CFC was able to divert the crisis. This process makes it less likely that the individual will stabilize in the community, and further increases the chances of institutionalization. CFC may augment needed services; however, it may not provide the supports and services that someone may need because of high medical needs and nursing needs. This also increases the likelihood that an individual with IDD and high medical needs will end up in a nursing facility. This is supported by the consistent number of individuals with IDD who are admitted to nursing facilities yearly.

Furthermore, individuals who currently do not receive 1915(c) Medicaid waiver services can receive CFC if they meet the CFC criteria. These individuals would receive CFC services through a managed care organization and not through an IDD Medicaid Waiver provider like HCS, CLASS or TxHmL. The PIAC has requested multiple times to receive status reports on the implementation of CFC from managed care organizations. HHSC never provided this information. Therefore, it is impossible to evaluate whether or not managed care organizations are assessing for or providing effective and sufficient CFC services.

V. Conclusion

Ms. Shea-Delaney's opinions do not take into account the actual implementation of Texas' *Olmstead* Plan and other policies that merely sound good on paper. Nor does her report accurately reflect the real life experiences of many Texans with IDD who are forced into crisis and may face unwanted institutionalization because of Texas' failure to provide adequate services and supports that would allow them to remain in the community in the first place or transition out of institutions. As a member of the now defunct Promoting Independence Advisory Committee, which helped to develop Texas' *Olmstead* Plan, it is my opinion that the plan simply does not work to keep individuals with IDD who want to live in the community out of nursing facilities. Given Texas' failure to effectively address the well-known needs of individuals with IDD with complex medical needs and its disregard for stakeholder engagement, the State's *Olmstead* Plan cannot be considered comprehensive. Likewise, it is my opinion that the massive size of Texas' interest lists, coupled with the minimal change in the number of individuals with IDD admitted to nursing facilities over the past several years, renders it impossible to conclude that the State's *Olmstead* Plan is moving at a reasonable pace.

Attachment A

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Professional Experience

Chief Government & Community Relations Officer | The Arc of Texas, 2015-present

- Lead all advocacy efforts for The Arc of Texas.
- Build and nurture essential partnerships with elected officials, corporate leaders, local and state agencies, and nonprofits to improve outcomes for Texans with IDD.
- Support individuals with IDD and their family members to share their life experiences and engage decision makers about polices that directly impact their quality of life.
- Develop policies and practices to ensure policy priorities are adopted and implemented in state law and agency rules.
- Coordinate with legislators, agency leaders, policy makers, partner organizations and legislative staff to promote policy priorities.
- Supervise the Government Affairs team to effect positive change for Texans with IDD.

Senior Field Organizer and Lobbyist | PROMO Missouri, 2013 – 2015

- Managed the Kansas City regional office to improve equal opportunities for LGBT Missourians.
- Served as PROMO's lobbyist during legislative session to advocate for and defend public policy priorities.
- Guided PROMO's public policy team and commanded strategic efforts to further our mission and goals.
- Mobilized communities to advocate for local policy updates that would enhance their quality of life through improved access to services, legal protections, rights, and social acceptance.
- Coordinated with the media to maximize exposure of LGBT issues and convey a cohesive message.
- Recruited volunteers and created training programs to further strategic aspirations for the state.
- Provided direct client support to help LGBT Missourians navigate diverse challenges.

Community Outreach Manager | Colorado State Senate Majority Office, 2010 – 2013

- Developed comprehensive outreach plans to meet the unique needs of 20 senator's districts.
- Supervised 20 legislative assistants to guide their outreach efforts and increase the amount of direct constituent contact and support.
- Staffed the Community Improvement Committee and provided input on ways to meet the needs of diverse communities in Colorado.
- Organized more than 100 large and small-scale events to educate the public about Senate initiatives and how they would impact their life.
- Managed the "Girls With Goals" program that introduced 70 fifth-grade girls to the legislative process and developed their abilities to serve as leaders in their schools.

Chief of Staff | Office of Senator Pat Steadman and Linda Newell, 2009 – 2010

- Served as the first point-of-contact for the Senators.
- Coordinated all administrative duties like scheduling, handling constituent concerns and creating
- newsletter content. Staffed the committees where the Senators served as the Chair.

Leadership

- Received the 2011 Volunteer of the Year award from the Boulder County AIDS Project for providing more than 800 volunteer hours since 2007.
- Received the 2017 Texas Advocates President's Ally Award.
- Member of the Texas Promoting Independence Advisory Committee.
- LGBT Advisory Council member to Chancellor Leo Morton at the University of Missouri, KC.
- Law Enforcement and LGBT Advisory Board member.
- Ambassador for the Mid America Chamber of Commerce.

Publications

- A Fresh Perspective on Gaining LGBT Rights in Missouri, Camp Magazine (http://camp.lgbt/2014/01/24/a-fresh-perspective-on-gaining-lgbt-rights-in-missouri/)
- PROMO Blog, March 2014 – May 2015 (https://promoonline.org/author/kyle-piccola/)

Education

University of Colorado at Boulder
2006-2010

- Political Science

Attachment B

Steward v. Smith
5:10-CV-1025-OLG
In the United States District Court
for the Western District of Texas
San Antonio Division

REBUTTAL REPORT OF KYLE PICCOLA
CONSIDERED MATERIALS
Attachment B

	DOCUMENT	**BATES NUMBER**
1.	Expert Report, *Steward, et al. v. Smith et al.*, Prepared by Eleanor Shea-Delaney, Senior Consultant, Bailit Health Purchasing (March 30, 2018).	
2.	Report of Darlene O'Connor, PhD, in the matter of *Steward, et al. v. Smith* (March 29, 2018).	
3.	Rebuttal Report of Ann Coffey, in the matter of *Lane, et al. v. Oregon* (May 12, 2015)	US00271822-271843
4.	Exhibit 945 submitted at the 30(b)(6) deposition of Haley Turner, February 21, 2018 (Austin, Texas).	US00266122-6159
5.	Documents reviewed by Haley Turner in preparation for 30(b)(6) deposition, February 21, 2018, (Austin, Texas).	US00214359-4360, US00214366-4372, US00214415-4416
6.	Tex. Health & Human Svcs. Comm'n, Consolidated Budget Fiscal Years 2016-2017, (Oct. 2014), https://hhs.texas.gov/sites/default/files/documents/about-hhs/budget-planning/consolidatedbudget2016-2017.pdf	US00272092-272223
7.	Tex. Health & Human Svcs Comm'n, Consolidated Budget Request: 2018-2019 Biennium, (Feb. 2017) https://hhs.texas.gov/sites/default/files/documents/about-hhs/budget-planning/consolidated-budget-request-2018-2019.pdf	US00271964-272091
8.	Tex. Health and Human Svcs. Comm'n, Interest List and Waiver Caseload Summary Archive (Jan 2016 – August 2017), https://hhs.texas.gov/about-hhs/records-statistics/interest-list-reduction/interest-list-waiver-caseload-summary-archive	
9.	Coughlin, Rebecca, et al., *Money Follows the Person Demonstration: Overview of State Grantee Progress January to December 2016*, Mathematica Policy Research (Sept. 25, 2017), https://www.medicaid.gov/medicaid/ltss/downloads/money-follows-the-person/2016-cross-state-report.pdf	US00271395-271566
10.	Tex. Health & Human Svcs. Comm'n, 2016 Revised Texas Promoting Independence Plan (August 2017)	US00255646-255711

	https://hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2017/revised-tx-promoting-independence-plan-2016-sept-1-2017.pdf	
11.	Tex. Health & Human Svcs. Comm'n, Promoting Independence Advisory Committee Stakeholder Report 2016, https://hhs.texas.gov/reports/2017/03/promoting-independence-advisory-committee-stakeholder-report-2016	US00271174-271201
12.	Tex. Health & Human Svcs. Comm'n, Report on the Cost-Effectiveness of Community First Choice in STAR+PLUS (February 2017), https://hhs.texas.gov/reports/2017/03/report-cost-effectiveness-community-first-choice-starplus	
13.	Tex. Health & Human Svcs. Comm'n, Presentation to the House Appropriations Committee on House Bill 1, (Feb. 2017), https://hhs.texas.gov/sites/default/files//documents/laws-regulations/reports-presentations/leg-presentation-house-appropriations-comm-hb1-170220.pdf	US00271794
14.	Tex. Health & Human Svcs. Comm'n, Presentation to the Senate Finance Committee on Senate Bill 1, (Jan. 30, 2017), https://hhs.texas.gov/reports/2017/01/presentation-senate-finance-committee-senate-bill-1	
15.	Eric D. Hargan, Report to the President and Congress, The Money Follows the Person (MFP) Rebalancing Demonstration, (June 2017), http://www.nasuad.org/sites/nasuad/files/mfp-rtc.pdf	
16.	Tex. Health & Human Svcs. Comm'n, Waiver Slot Enrollment Progress Report, (March 2017), https://hhs.texas.gov/reports/2017/03/waiver-slot-enrollment-progress-report-march-2017	
17.	Tex. Health & Human Svcs. Comm'n, Presentation to the Senate Finance Workgroup on Healthcare Costs, (Feb. 3, 2017), https://hhs.texas.gov/reports/2017/02/presentation-senate-finance-workgroup-healthcare-costs	