TEXAS CAN'T HOLD 'EM ANYMORE: WHY INDIVIDUALS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES COMMITTED TO STATE SUPPORTED LIVING CENTERS NEED JUDICIAL REVIEW OF THEIR COMMITMENT ORDERS

Comment*

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I. INTRODUCTION: A TEXTBOOK ACCOUNT

Gustavo, or Gus as he preferred, woke up on a typical Saturday morning to the sound of his mother's soft voice luring him from a deep sleep.[1] With a big grin on his face, he looked past his mother, watching his brothers kick a ball around in the backyard. As he promptly jumped out of bed, excited to run outside and play, his mother caught him, calmly reminding him that he needed to get dressed and ready for the day. Gus listened to his mother and proceeded to meticulously choose a shirt and a pair of pants from his dresser. He then walked to the small bathroom that he shared with his entire family, and his mother gently helped him brush his teeth and wash his face.

Until that day, Gus had a normal childhood; he played games with his brothers, ran outdoors, enjoyed picking out his clothes, understood and responded to his parents' native Spanish language, and relied on them for love and support. But that day, his life changed forever. When Gus went to the kitchen to eat breakfast with his family, his father told him to say goodbye to his brothers. Although confused, Gus asked no questions and did as he was told. His father then reminded him to grab his blanket and asked him to get in the truck—the family's only car, which was a beat-up pickup. His parents followed him to the truck with a small suitcase. With tears streaming

1. This hypothetical is loosely based on the facts provided in the original pleading in *Abbott v. G.G.E.* Plaintiffs' Original Petition at 14–17, Abbott v. G.G.E. *ex rel.* Courtney, 463 S.W.3d 633 (Tex. App.—Austin 2015, pet. filed) (No. 03-11-00338-CV), http://bit.ly/1R6mdrZ.

down her face, Gus's mother held him closely to her side as the truck drove away from Gus's home.

When the beat-up truck pulled into the parking lot of the Austin State Supported Living Center (SSLC), Gus stared at the building that would be his home for the next three decades of his life. Still not quite understanding what was going on, Gus hugged his parents and told them goodbye. Gus had no idea this would be the last time he would ever see his family.

The one thing that set Gus apart from his brothers was his intellectual disability. Because of this disability, at no fault of his own, his parents feared they could not properly care for him and made the heart-wrenching decision to place him in the care of the state. Instead of moving him with the family as they pursued seasonal work out of state, Gus's parents thought this would be best for him. Sadly, they were wrong.

Gus was later involuntarily committed to the SSLC. That was the last time there was any independent review of his continued confinement. Instead of being placed in a community setting, he was sentenced to a lifetime of confinement at the SSLC.

The isolation and subpar treatment Gus endured at the SSLC killed his spirit. His physical, medical, and psychological condition drastically deteriorated. The once independent and happy child is now unable to feed himself. He even requires staff assistance to complete everyday grooming tasks, such as brushing his teeth, getting dressed, and using the restroom—activities that he would previously do on his own under his mother's supervision. He is also unable to communicate. When Gus arrived at the SSLC, he understood and responded to Spanish. But twenty years passed before the SSLC staff performed a bilingual language evaluation on him. The young boy who used to wake up to his mother's soft-spoken words now languishes in silence, unable to understand or communicate with the English-speaking staff assigned to care for him.

Despite these setbacks, the treating professionals on the interdisciplinary team (IDT)—assigned to review the appropriateness of his confinement—repeatedly recommended that Gus be moved to community-based care. Year after year for the past fifteen years, Gus's treatment professionals have found that his needs could be met in a less restrictive environment. Yet year after year, the same IDT has repeatedly failed to request that Gus be discharged to community-based care or refer him for a community placement; they have never even given Gus the opportunity to visit community placement options. Because there is no judicial review of Gus's continued confinement to ensure his needs are treated in the least restrictive environment, he continues to waste away within the walls of the Austin SSLC. Gus remains the silent captive of a system long known to be a failure.

The only reason Gus was sentenced to the SSLC was because he lacked family and community resources—two factors that are no longer relevant to

determining whether community-based care is appropriate for an individual with intellectual disabilities. Texas now guarantees community resources in the form of Medicaid waivers for individuals just like Gus, who no longer meet the commitment criteria for institutions. He was never moved to a community because his IDT failed to transfer him. Also, there was no independent judicial review of his commitment order to ensure he was living in the most integrated setting appropriate for his needs. Gus could have had a home, a place in the community, and a family within his peer group in community-based care—all things he longed for and remembered from his previous life. Instead, he was forced to adapt to his new reality alone.

This Comment seeks to draw attention to and amend the grave, unjust treatment of vulnerable individuals with intellectual and developmental disabilities who are under the State of Texas's care. Specifically, this Comment advocates for periodic judicial review of individuals involuntarily committed to the Texas SSLCs to ensure that they are served in the least restrictive setting appropriate to their needs.

Part II takes a glimpse at the history of society's treatment of individuals who have intellectual or developmental disabilities (I/DD). Further, Part III introduces the Americans with Disabilities Act (ADA), while Part IV examines a landmark application of the ADA that guaranteed community living for the disabled community. This Comment, in Part V, then shifts to how Texas treats and has failed to appropriately care for individuals with I/DD in its SSLCs. Then, in Part VI, it explains the opportunities the Texas Legislature missed that could have greatly improved the lives of individuals living in its SSLC system. Part VII takes a deep look at how advocates and individuals with I/DD are tirelessly trying to fight for judicial review of their commitment orders. It also addresses how the State of Texas and its SSLCs have fought the individuals tooth and nail in the court system. Next, Part VIII analyzes how the Texas Legislature can end the injustice suffered by individuals involuntarily committed to the SSLCs who should be receiving community-based care. Finally, Part IX recommends ways in which the Texas Legislature can end the unjust treatment of those individuals involuntarily committed by implementing periodic judicial review of their commitment orders.

II. THE EVOLUTION OF INSTITUTIONALIZATION

A. Institutionalization

Before the age of institutions, individuals with I/DD were treated at home by their families or in jails, poorhouses, or community arrangements.[2]

2. Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After* Olmstead v. L.C., 24 HARV. J.L. & PUB. POL'Y 695, 706 (2001).

In the early 1800s, society was optimistic about the chances of rehabilitating, training, and reintegrating individuals with I/DD into normal life.[3] Activists, such as Dorethea Dix, advocated for the building of hospitals to improve the care of people with disabilities and teach them the skills they needed to succeed in their communities.[4] The emergence of urbanization toward the end of the 1800s polluted this optimistic mindset.[5] As society progressed toward an urbanized, modern world, those with I/DD were left in the dust and cast out of society's good graces.[6] The training programs for individuals with I/DD developed earlier in the century were slowly phased out and replaced with residential institutions.[7]

People began to fear that disabilities were transferable and were the cause of poverty, crime, and other urban problems.[8] Consequently, society had an increased desire to segregate individuals with disabilities from the general population.[9] Individuals with I/DD were segregated into institutions "to protect 'normal' society from them and to control their reproductive lives."[10] An increase in the demand for segregation led to overcrowding of the institutions, which in turn led to physical restraint, brutality, seclusion, and neglect.[11] The increased segregation and lack of funding for the institutions defeated their original restorative purpose; institutions turned into "warehouses in which substandard custodial care was the rule rather than the exception."[12]

Perceptions about individuals with I/DD began to change, however, during the aftermath of World War II.[13] Many people felt obligated to do something for the soldiers returning from combat with newly acquired disabilities.[14] This social obligation led to significant changes in laws and legislative protections, as well as significant advancements in the medical treatment of individuals with disabilities.[15] Public awareness of individuals

3. CATHERINE K. HARBOUR & PALLAB K. MAULIK, HISTORY OF INTELLECTUAL DISABILITY 1–2 (2010), http://cirrie.buffalo.edu/encyclopedia/en/pdf/history_of_intellectual_disability.pdf.

4. Smith & Calandrillo, *supra* note 2.

5. *See* HARBOUR & MAULIK, *supra* note 3, at 2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 3 ("Between 1907 and 1944, more than 42,000 people were sterilized in the U.S. . . . in an attempt to eliminate the presumed genetic sources of diseases including feeblemindedness.").

11. *The Closing of Willowbrook*, DISABILITY JUST., http://disabilityjustice.org/the-closing-of-willowbrook/ (last visited Apr. 7, 2016).

12. Margaret F. Ewing, *Health Planning and Deinstitutionalization: Advocacy Within the Administrative Process*, 31 STAN. L. REV. 679, 680 (1979).

13. W. NESBIT & D. PHILPOTT, THE PLIGHT OF INDIVIDUALS WITH COGNITIVE DISABILITIES: SOCIAL AND EDUCATIONAL FACETS OF AN ARDUOUS EVOLUTION 9 (2008), http://bit.ly/20HQ9NF.

14. Michael L. Wehmeyer, *How Have the Lives—and Society's Perception—of People with Intellectual Disability Changed over Time?*, BROOKES PUB. CO., http://bit.ly/1mfcv9R (last visited Apr. 7, 2016).

15. *Id.* The vocational rehabilitation system in place today, which provides soldiers with a support system and enables them to return to being productive citizens, was created after World War II. *Id.*

with I/DD, together with the receptive post-war years, paved the way for special interest groups to advocate for the rights and liberties denied to those with I/DD.[16] These advocates brought to light the horrid living conditions at the institutions.[17] They also drew attention to the devastating effects of prolonged stays in institutions on individuals with I/DD, including distorted personalities and a lack of social and reasoning skills.[18] In 1966, a photographic essay, *Christmas in Purgatory*, graphically revealed the horrific daily life that individuals with I/DD endured in a typical institution:

> Many dormitories for the severely and moderately retarded ambulatory residents have solitary confinement cells . . . officially referred to as "therapeutic isolation". . . . [The cells are] generally tiny rooms, approximately seven feet by seven feet, shielded from the outside with a very heavy metal door having either a fine strong screen or metal bars for observation of the "prisoner." Some cells have mattresses, others blankets, still others bare floors. None that we had seen (and we found these cells in each institution visited) had either a bed, a washstand, or a toilet. What we did find in one cell was a thirteen or fourteen year old boy, nude, [i]n a corner of a starkly bare room, lying on his own urine and feces. The boy had been in solitary confinement for several days for committing a minor institutional infraction.[19]

As the horrors of institutional life became known, disability advocates sought justice for institutional inmates on both the political and judicial fronts. Senator Robert Kennedy, for example, became a catalyst for change after his unannounced visit to the Willowbrook Institution in New York during the 1960s.[20] Senator Kennedy shockingly stated that the residents of Willowbrook were "living in filth and dirt, their clothing in rags, in rooms less comfortable and cheerful than the cages in which we put animals in a zoo."[21] Willowbrook was just one of several large state-run institutions under fire for providing untenable living conditions for individuals with disabilities; state schools across the United States, including Pennhurst in Pennsylvania and Partlow in Alabama, were also exposed for their horrid conditions.[22] In

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16. *See* NESBIT & PHILPOTT, *supra* note 13.

17. Ewing, *supra* note 12.

18. *Id.*

19. BURTON BLATT & FRED KAPLAN, CHRISTMAS IN PURGATORY: A PHOTOGRAPHIC ESSAY ON MENTAL RETARDATION 13 (1974), http://mn.gov/mnddc/parallels2/pdf/undated/Xmas-Purgatory.pdf.

20. *See* Tamie Hopp, *People as Pendulums: Institutions and People with Intellectual and Developmental Disabilities*, NONPROFIT Q. (July 16, 2014), http://bit.ly/1nI8tI6.

21. *Id.*

22. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 6–8 (1981); Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972). The following examples show the "atrocious incidents" that occurred at the Partlow institution in Alabama:

> (a) a resident was scalded to death by hydrant water; (b) a resident was restrained in a strait jacket for nine years in order to prevent hand and finger sucking; (c) a resident was

fact, the conditions at Pennhurst eventually led Pennhurst residents to file a lawsuit alleging that their treatment did not even meet the minimal requirements for habilitation.[23]

Other class action lawsuits also alerted the public to the horrific treatment of residents at state schools.[24] For example, in *Wyatt v. Aderholt*, the Fifth Circuit exposed that the Alabama hospitals were grossly overcrowded.[25] The residents were subject to severe health and safety problems, virtually no privacy—no partitions between toilets or even furniture for residents to store clothing existed—and severe malnourishment.[26] The discovery of these horrid conditions led to the movement for deinstitutionalization.

B. Deinstitutionalization

In addition to seeking improvements for the conditions at institutions, advocates began to campaign for deinstitutionalization.[27] Deinstitutionalization is an effort to dismantle and close state institutions and supplant them with a network of community-based services.[28] The movement is based on the idea that mentally disabled individuals are "entitled to live in the least restrictive environment necessary and lead their lives as normally and independently as they can."[29] This involves (1) a reduction in admission to and retention in institutions, (2) creation or

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inappropriately confined in seclusion for a period of years; and (d) a resident died from the insertion by another resident of a running water hose into his rectum.

Stickney, 344 F. Supp. at 393 n.13.

23. *See Halderman*, 451 U.S. at 6–8 (ordering the closure of a large public institution on the grounds that all similar institutions by their very nature violated residents' fundamental civil and constitutional rights).

24. *See, e.g.*, Wyatt v. Aderholt, 503 F.2d 1305, 1310 (5th Cir. 1974) (stating that "the environment at the hospitals was a far cry from the 'humane psychological and physical environment' . . . envisioned [for] rehabilitative treatment"); N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715, 718 (E.D.N.Y. 1975).

25. *Aderholt*, 503 F.2d at 1310–11.

26. *Id.*

27. DEWAYNE L. DAVIS, WENDY FOX-GRAGE & SHELLY GEHSHAN, DEINSTITUTIONALIZATION OF PERSONS WITH DEVELOPMENTAL DISABILITIES: A TECHNICAL ASSISTANCE REPORT FOR LEGISLATURES 2 (2000), http://mn.gov/mnddc/parallels2/pdf/00s/00/00-DPD-NCS.pdf. *Compare* Samantha A. DiPolito, Comment, Olmstead v. L.C.*—Deinstitutionalization and Community Integration: An Awakening of the Nation's Conscience?*, 58 MERCER L. REV. 1381, 1385 (2007) (discussing the benefits and successes of deinstitutionalization following the Supreme Court's decision in *Olmstead*), *with* Sandra L. Yue, *A Return to Institutionalization Despite* Olmstead v. L.C.*? The Inadequacy of Medicaid Provider Reimbursement in Minnesota and the Failure to Deliver Home- and Community-Based Waiver Services*, 19 L. & INEQ. 307, 313 (2001) (discussing how Minnesota's failure to increase the wages of personal care attendants threatens the movement toward deinstitutionalization and places individuals back in institutions).

28. DAVIS, FOX-GRAGE & GEHSHAN, *supra* note 27, at 2–3.

29. COMPTROLLER GEN. OF THE U.S., RETURNING THE MENTALLY DISABLED TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE 1 (1977), http://www.gao.gov/assets/120/117385.pdf.

expansion of suitable alternative care and services in non-institutional settings for those who do not need to be in institutions, and (3) an improvement in the quality of care and treatment for those in institutions.[30] Various factors strengthened the deinstitutionalization movement, including many advocates' work; sociological studies educating legislators and the public about institutional abuse, neglect, and inhumane conditions; and the growing civil rights movement placing greater emphasis on personal rights and autonomy.[31] Because of these factors, many began to understand that people with I/DD could improve in and benefit from less restrictive environments.[32]

In response, President John F. Kennedy created the President's Panel on Mental Retardation in 1960 (now called the President's Committee on Intellectual Disabilities).[33] The goal of this task force was to investigate the status of people with intellectual and developmental disabilities and develop programs and reforms for their improvement.[34] The task force noted that individuals housed in institutions have "a right to receive training and care which will enable [them] to return to society."[35] Overall, the task force's report promoted deinstitutionalization and the placement of individuals with I/DD back in their communities.[36]

Economic motives also fueled deinstitutionalization, including the realization that the rising number of patients needing treatment paralleled the cost of running the hospitals.[37] With this in mind, Congress enacted the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963.[38] This Act emphasized the need for the development of community services, required planning programs to serve individuals with I/DD outside of institutions, and also provided funds for the

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30. *Id.*; *see also* Lois A. Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1446 (2005) (examining efforts throughout the twentieth century to deinstitutionalize children).

31. PRESIDENT'S COMM. ON MENTAL RETARDATION, MR 76, MENTAL RETARDATION: PAST AND PRESENT 45 (Mary Z. Gray ed., 1977), http://1.usa.gov/1NRpLrs; *see* Yue, *supra* note 27; DiPolito, *supra* note 27.

32. *See* PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 13–16 (1963), http://bit.ly/1PTz9My.

33. *See* HARBOUR & MAULIK, *supra* note 3, at 5.

34. *Id.*

35. PRESIDENT'S PANEL ON MENTAL RETARDATION, *supra* note 32, at 30.

36. *Id.* at 13–28 (discussing justice for individuals with intellectual disabilities and recognizing that new alternatives in treatment, including community placements, are better suited to the interests of individuals with I/DD in allowing them to grow, develop, learn, and modify their behavior in response to social stresses).

37. Sharon Landesman & Earl C. Butterfield, *Normalization and Deinstitutionalization of Mentally Retarded Individuals: Controversy and Facts*, 42 AM. PSYCHOLOGIST 809, 809–10 (1987), http://bit.ly/1nOzJ8g; *see also* COMPTROLLER GEN. OF THE U.S., *supra* note 29, at 1–4 (discussing the economic factors leading to deinstitutionalization).

38. Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. 88–164, 77 Stat. 282 (1963) (repealed 2000).

states to accomplish these goals.[39] In furtherance of this initiative, President Nixon declared a goal "to return one-third of the people in mental institutions to useful lives in their communities."[40] Sadly, a lack of funding at both the federal and state levels and a dearth of knowledge regarding community services frustrated these objectives.[41]

Additionally, the deinstitutionalization movement encountered several roadblocks, including unfavorable judicial interpretations of legislation having enormous potential to promote deinstitutionalization and a lack of government support for community services.[42] Despite these numerous setbacks, the deinstitutionalization movement continued to strengthen.[43] Advocates promoted the development of income, housing, and community support so individuals with I/DD could be successfully integrated into their communities.[44] Studies show many benefits for individuals with I/DD moving from an institution to a community setting, including increased independence, greater competence in daily living skills, improved relationships with others, and increased decision-making abilities.[45] As the known benefits of living in the community increased, the population of individuals with I/DD living in large public facilities significantly decreased from 1965 to 2011.[46] In fact, by 2012, fourteen states closed all public institutions for those with I/DD.[47]

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39. *Id.*

40. Exec. Order No. 11776, 3 C.F.R. 859 (1974), http://www.archives.gov/federal-register/codification/executive-order/11776.html.

41. Ewing, *supra* note 12, at 682.

42. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 10 (1981) (ruling that the Developmentally Disabled Assistance and Bill of Rights Act of 1975 did not provide individuals with I/DD "any substantive rights to 'appropriate treatment' in the 'least restrictive' environment"); *see* P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990); *see also* Phillips v. Thompson, 715 F.2d 365, 368 (7th Cir. 1983) (holding that the state did not have an affirmative duty under § 504 of the Rehabilitation Act of 1973, otherwise known as the Civil Rights Bill of the Disabled, to create less restrictive community residential settings for persons with disabilities).

43. Yue, *supra* note 27.

44. *Id.*; *see also The Arc's 2015–16 Legislative Agenda*, ARC, http://www.thearc.org/what-we-do/public-policy/legislative-agenda-full (last visited Apr. 14, 2016) (discussing the work and goals of several different advocacy organizations for disabilities).

45. Charlie Lakin, Sheryl A. Larson & Shannon King, *Behavioral Outcomes of Deinstitutionalization for People with Intellectual and/or Developmental Disabilities: Third Decennial Review of U.S. Studies, 1977–2010*, 21 POL'Y RESEARCH BRIEF, Apr. 2011, at 3–8, https://ici.umn.edu/products/prb/212/212.pdf.

46. SHERYL LARSON ET AL., RESIDENTIAL SERVICES FOR PERSONS WITH INTELLECTUAL OR DEVELOPMENTAL DISABILITIES: STATUS AND TRENDS THROUGH 2011 xi (2013), http://rtc.umn.edu/risp/docs/risp2011.pdf (discussing the decreasing trend in the number of people living with I/DD in large state-operated facilities; the average daily population decreased from 223,590 in 1965 to 108,164 by 1985, and then to an estimated 29,809 in 2011).

47. *See, e.g.*, NAT'L COUNCIL ON DISABILITY, EXPLORING NEW PARADIGMS FOR THE DEVELOPMENTAL DISABILITIES ASSISTANCE AND BILL OF RIGHTS ACT 74 n.23 (2012), http://1.usa.gov/20aQbLY (listing the states that have closed all institutions: "District of Columbia (1991), New Hampshire (1991), Vermont (1993), Rhode Island (1994), Alaska (1997), New Mexico (1997), West Virginia (1998), Hawaii (1999), Maine (1999), Minnesota (2000), Indiana (2007), Michigan (2009), Oregon (2009), and Alabama (2012)"); *see also* DAVIS, FOX-GRAGE & GEHSHAN, *supra* note 27 (listing

III. THE AMERICANS WITH DISABILITIES ACT

The concept of deinstitutionalization was a driving force behind the passage of the Americans with Disabilities Act of 1990 (ADA).[48] The 1986 Council on Disability sought to include people with disabilities in federal civil rights law; drafting the ADA was their means to accomplish this.[49] Senator Lowell Weicker of Connecticut, the parent of a child with Down syndrome, introduced the first version of the ADA on April 28, 1988.[50] Senator Tom Harkin, the ADA's sponsor and floor manager in the Senate, explained that Congress's purpose was to "ensure once and for all that no Federal agency or judge will ever again misconstrue the congressional mandate to integrate people with disabilities into the mainstream."[51] The ADA's findings include institutionalization as one of the "critical areas" in which "discrimination against individuals with disabilities persists."[52] Instead of defining institutionalization, the ADA spotlights the broader concept of the segregation of individuals with disabilities and emphasizes their right to participate in society.[53]

A. Integration, Not Segregation

The drafters of the ADA hoped to point out and remedy discrimination to make people with disabilities equal members of society.[54] In crafting the ADA, Congress determined that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals," which are all goals of deinstitutionalization.[55] Congress also found that society had a history of isolating and segregating individuals with disabilities, and despite some improvements, discrimination against individuals with disabilities was still a serious social problem.[56]

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when some states closed their institutions).

48. *See* 42 U.S.C. § 12101 (2012) (listing different ways in which individuals with disabilities have been discriminated against, including isolation in institutions).

49. Press Release, The White House, Fact Sheet: The Americans with Disabilities Act of 1990 (July 26, 1990), http://1.usa.gov/1X4OWxN.

50. *Moments in Disability History 28: The Original: Americans with Disabilities Act of 1988*, MINN. GOVERNOR'S COUNCIL ON DEVELOPMENTAL DISABILITIES (Apr. 1, 2015), http://bit.ly/1PjmeUJ.

51. 135 Cong. Rec. S4987, 5 (daily ed. May 9, 1989) (statement of Sen. Harkin).

52. 42 U.S.C. § 12101(a)(3).

53. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–213 (2012).

54. *See ADA—Findings, Purpose and History*, ADA ANNIVERSARY TOOL KIT, http://bit.ly/1X4Pm7o (last visited Apr. 17, 2016).

55. NAT'L COUNCIL ON DISABILITY, DEINSTITUTIONALIZATION: UNFINISHED BUSINESS 15 (2012) (quoting 42 U.S.C.A. § 12101(a)(7)), http://1.usa.gov/1Qe7bf5.

56. *See* 42 U.S.C. § 12101(a)(2).

The purpose of the ADA was to alleviate these discrimination problems.[57] The congressional findings stressed that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society."[58] When signing the law, President George H. W. Bush declared that the ADA "takes a sledgehammer to [a] wall . . . which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp."[59] This purpose is woven throughout all of the ADA's provisions.[60]

B. ADA Provisions

In adhering to the purpose of integrating individuals with disabilities into society, the ADA encompasses a wide range of subjects—from private employment in Title I to telecommunications in Title IV.[61] For instance, Title III applies to privately owned places that provide public accommodations, including restaurants, hotels, theaters, retail stores, private schools, and daycare centers.[62] It further emphasizes the importance of "integrated settings" through its requirements on public places.[63] Under this provision, public places must offer "[g]oods, services, facilities, privileges, advantages, and accommodations" to individuals with disabilities "in the most integrated setting appropriate to the needs of the individual."[64] The most integrated setting involves an environment in which individuals with disabilities can interact with nondisabled persons to the utmost extent.[65] Although the ADA does not cover private residences, if a doctor's office or a day care is located in a home, the portions of the residence used for that purpose are subject to the ADA's requirements.[66] Additionally, Title II applies to state and local governments and protects the rights of individuals with disabilities.[67] It requires public entities to make reasonable modifications to their rules, policies, or practices to allow qualified individuals with disabilities to participate in their services, programs, and activities.[68]

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57. *See* Olmstead v. L.C.*: History and Current Status*, OLMSTEAD RTS. [hereinafter *History and Current Status*], http://bit.ly/1POnULy (last visited Apr. 17, 2016).

58. 42 U.S.C. § 12101(a)(1).

59. *History and Current Status*, *supra* note 57 (alterations in original).

60. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–213.

61. *See id.*

62. U.S. Dep't of Justice, *Americans with Disabilities Act: Questions and Answers*, ADA.GOV, http://www.ada.gov/q&aeng02.htm (last updated Feb. 4, 2009).

63. 42 U.S.C. § 12182(b)(1)(B).

64. *Id.*

65. *See* 28 C.F.R. pt. 35, app. A (2014) (addressing 28 C.F.R. § 35.130).

66. U.S. Dep't of Justice, *supra* note 62.

67. *See* 42 U.S.C. § 12131(1)(B).

68. *Id.* A public entity is a state or local government or "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.*

The ADA also requires the Attorney General to promulgate regulations for Title II.[69] These regulations must be consistent with the regulations "applicable to recipients of Federal financial assistance" under § 504 of the Rehabilitation Act.[70] Under § 504, recipients of federal funds are required to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons."[71] The Title II regulations beef up the ADA's prohibitions against discrimination by public entities.[72] These regulations further emphasize the ADA's main focus of the right to full and equal participation in society.[73] Like the ADA, these regulations fail to define or describe what constitutes an institution or a community-based setting.[74] The regulations do, however, echo the "most integrated setting" language from Title III of the ADA and the Rehabilitation Act regulations: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[75] The most integrated setting is defined as "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."[76] This regulation, which is referred to as the ADA's integration mandate, is at the heart of the landmark *Olmstead* decision.[77]

IV. A QUALIFIED YES TO COMMUNITY LIVING

A. Olmstead v. L.C.

The Supreme Court's decision in *Olmstead v. L.C.* was revolutionary for the disabled community.[78] The *Olmstead* story began when the Atlanta Legal Aid Society commenced an action against the State of Georgia challenging the continued confinement of two women in institutions despite the availability of community-based options that could meet their needs.[79] The two women, Lois Curtis and Elaine Wilson, each had a mental illness in

69. *Id.* § 12134(a).

70. *Id.* § 12134(b).

71. 28 C.F.R. § 41.51(d) (2014).

72. *See id.* § 35.130.

73. *See id.* § 35.130(a) ("No qualified individual with a disability shall, on the basis of 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 public entity."); *id.* § 35.130(b)(2) ("A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different . . . .").

74. Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289, 320 (E.D.N.Y. 2009).

75. 28 C.F.R. § 35.130(d).

76. *Id.* pt. 35, app. B.

77. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 590–93 (1999).

78. *Id.*

79. *See, e.g.*, *About* Olmstead, ADA.GOV, http://ada.gov/olmstead/olmstead_about.htm (last visited Apr. 17, 2016); *see The* Olmstead *Decision*, BAZELON CTR., http://bit.ly/1SwsA9E (last visited Apr. 17, 2016).

addition to I/DD.[80] Both Lois and Elaine were voluntarily admitted to the psychiatric unit at the state-run Georgia Regional Hospital.[81] At the conclusion of their treatment, the mental health professionals determined each was ready to move to a community-based program.[82] Despite this recommendation, the two women remained confined in the institution for several years after their initial treatment concluded because community services were in short supply.[83] The two women filed suit under the ADA.[84] Through this suit, Lois and Elaine stood up for the thousands of individuals deprived of enjoying life in their communities as a result of their detainment in institutions.[85]

In deciding the case, the Court considered the proper construction of the antidiscrimination provision in Title II of the ADA.[86] The Court attempted to answer a critical question: Whether said provision requires individuals with mental disabilities to be placed in communities as opposed to institutions.[87] Relying on the Department of Justice's (DOJ) "integration mandate" to interpret the ADA, the answer was a qualified *yes*.[88] The Court held that unjustified segregation of persons with disabilities constituted discrimination in violation of Title II of the ADA.[89] The Court determined that under Title II, states are required to provide community-based services to persons with disabilities when

> such placement is appropriate, the affected persons do not oppose community-based treatment, and [community-based services] can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[90]

The Court's holding in *Olmstead* solidified the notion that under the ADA, when a community placement is approved, segregation of an individual in an institution is prohibited.[91] First, needlessly isolating individuals with

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80. *Olmstead*, 527 U.S. at 593 (noting that Lois Curtis was diagnosed with schizophrenia and Elaine Wilson was diagnosed with a personality disorder).

81. *Id.*

82. *Id.*

83. *Id.*; *see also The* Olmstead *Decision*, *supra* note 79 (explaining the Bazelon Center's involvement in the case).

84. *Olmstead*, 527 U.S. at 593–94.

85. *See The* Olmstead *Decision*, *supra* note 79.

86. *Olmstead*, 527 U.S. at 587.

87. *Id.*

88. *Id.* at 588–93, 607.

89. *Id.* at 559–603.

90. *Id.* at 607. Community-based services are individualized supports and services provided for people with I/DD who are living with their families or in community settings. *Home and Community-Based Services*, TEX. DEP'T AGING & DISABILITY SERVS., http://bit.ly/1PBFfW5 (last visited Apr. 17, 2016). The services provided include day habilitation, employment assistance, nursing, and behavioral support, among others. *Id.*

91. *Olmstead*, 527 U.S. at 599–600.

disabilities who can benefit from living in the community perpetuates unjustified assumptions about their capabilities and their worthiness to participate in community life.[92] Second, the Court noted that confinement in institutions diminishes everyday life for the individuals restrained therein by depriving them of what is most valued in life: "family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[93] These insights align with the original purpose of the ADA.[94]

In considering the purpose of the ADA, the House of Representatives compared the effect of segregation on disabled individuals to the "separate but equal" segregation of African-American children in schools.[95] The House proclaimed: "[S]egregation for persons with disabilities 'may affect their hearts and minds in a way unlikely ever to be undone.'"[96] The analogy of the intended desegregation aftermath of the *Olmstead* decision to the original intent of the ADA led some to call the *Olmstead* decision the *Brown v. Board of Education* of the disabled community.[97] Like *Brown v. Board of Education*, which solidified the integration of African-American children into schools, the *Olmstead* decision solidified the integration of disabled individuals into their communities.[98] The decision secured a right to community placement that had previously been the subject of vigorous debate in the federal courts.[99]

B. The Aftermath of Olmstead

In the wake of the *Olmstead* decision, the DOJ Civil Rights Division has continuously sought community integration for all individuals with I/DD.[100] Various states have entered into settlement agreements with the

92. *Id.* at 600.

93. *Id.* at 601.

94. *History and Current Status*, *supra* note 57.

95. H.R. REP. 101-485, pt. III, at 26 (1990) (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

96. *Id.*

97. *See* Charles R. Bliss & C. Talley Wells, *Applying Lessons from the Evolution of* Brown v. Board of Education *to* Olmstead*: Moving from Gradualism to Immediate, Effective, and Comprehensive Integration*, 26 GA. ST. U. L. REV. 705, 705 (2010); Mary C. Cerreto, Olmstead*: The* Brown v. Board of Education *for Disability Rights*, 3 LOY. J. PUB. INT. L. 47, 54 (2001).

98. *See* Bliss & Wells, *supra* note 97, at 705–06.

99. *See, e.g.*, Helen L. v. DiDario, 46 F.3d 325, 333–39 (3d Cir. 1995) (determining that the Pennsylvania Department of Public Welfare violated the ADA by requiring a resident to receive care services in a nursing home rather than through an at-home attendant care program that she qualified for). *But see* Phillips v. Thompson, 715 F.2d 365, 366–68 (7th Cir. 1983) (ruling that the state had no affirmative duty to create less restrictive community settings for individuals with I/DD residing in a state institution).

100. Olmstead *Enforcement*, ADA.GOV, http://www.ada.gov/olmstead/olmstead_enforcement.htm (last visited Apr. 17, 2016) (listing cases filed by the ADA based on the integration mandate and the *Olmstead* decision regarding issues that include institutions for individuals with I/DD, persons at risk of institutionalization, nursing facilities, mental health facilities, etc.).

DOJ and have agreed to aid in integrating individuals with I/DD into community life.[101] For instance, Texas entered into a two-year interim agreement requiring the state to expand community-based services for individuals with I/DD needlessly living in nursing facilities or at risk of unnecessary institutionalization in nursing facilities.[102] The goal of the agreement involved Texas providing community-based care by offering community-based management, education about community living, transition planning for individuals who want to live in the community, and services to transition people from nursing facilities into the community.[103] The agreement was also a means of deterring others from being admitted to nursing facilities.[104]

Ten years after the landmark decision in *Olmstead*, President Obama launched "The Year of Community Living."[105] President Obama unveiled the initiative to reinforce his administration's "commitment to vigorous enforcement of civil rights for Americans with disabilities and to ensur[e] the fullest inclusion of all people in the life of [the United States]."[106] The focus of The Year of Community Living involved ascertaining ways to increase accessibility to housing, independent living arrangements, and community living.[107] In 2011, in furtherance of his commitment to the initiative, President Obama met with one of the original plaintiffs in *Olmstead*, Lois Curtis.[108] More individuals who were previously confined in institutions should have the opportunity for successes like Lois Curtis.

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101. *Id.*

102. Interim Settlement Agreement at 5, Steward v. Perry, No. 5:10-CV-1025-OG (W.D. Tex. Aug. 19, 2013), http://1.usa.gov/1NRrRYt; *see also* Olmstead *Enforcement*, *supra* note 100 (listing and providing links to cases the DOJ was involved in).

103. Interim Settlement Agreement, *supra* note 102, at 5–13.

104. *Id.*; *see* Olmstead *Enforcement*, *supra* note 100.

105. Press Release, The White House, President Obama Commemorates Anniversary of *Olmstead* and Announces New Initiatives to Assist Americans with Disabilities (June 22, 2009), http://1.usa.gov/1VOQ07G.

106. *Id.*

107. *Id.* To aid this initiative, the Obama Administration provided over $140 million to fund independent living centers across the nation. *Id.*

108. Press Release, The White House, On Anniversary of *Olmstead*, Obama Administration Recommits to Assist Americans with Disabilities (June 22, 2011), http://1.usa.gov/1nIbRTk; Sue Jamieson, Olmstead *Champion Meets the President*, WHITE HOUSE (June 22, 2011, 2:06 PM), http://1.usa.gov/1QHpJXB. Lois Curtis now rents a home and lives in her community in Georgia, where she has become a successful artist. *Id.* She presented one of her paintings, *Girl in Orange Dress*, to President Obama while in the Oval Office. *Id.* Elaine, the other plaintiff, passed away in 2005. *The* Olmstead *Decision*, *supra* note 79.

V. CARE FOR INDIVIDUALS WITH I/DD IS BIGGER, NOT BETTER, IN TEXAS

A. State Supported Living Centers: The Modern Institutions

Despite the national trend toward deinstitutionalization and the *Olmstead* decision, Texas still relies on the institutional model of care for individuals with I/DD.[109] A disproportionate twelve percent of the total number of institutionalized individuals with I/DD in the United States reside in Texas.[110] In 2008, even though New York operated more large institutions than Texas, the average number of residents at the institutions was forty-one in New York compared to 368 residents in Texas.[111] Texas confines these individuals with I/DD under its care in thirteen Intermediate Care Facilities (Care Facilities) for individuals with I/DD.[112] This includes twelve State Supported Living Centers (SSLCs) and the Care Facility service component of the Rio Grande State Center.[113]

The Texas Department of Aging and Disability Services (DADS) owns and operates the SSLCs.[114] SSLCs provide 24-hour residential services, medical care (nursing, physician, and dental), and day habilitation.[115] In addition to offering vocational programs and specialized therapy, SSLCs provide services to maintain connections between residents and their families.[116]

The individuals receiving those services in the SSLCs are intellectually disabled, developmentally disabled, or have a related condition.[117] Residents with a related condition are considered medically fragile and most often

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109. LEGISLATIVE BUDGET BD., TRANSFORM STATE RESIDENTIAL SERVICES FOR PERSONS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 1 (2011), https://www.disabilityrightstx.org/files/State_Supported_Living_Centers.pdf.

110. *Id.*

111. *Id.*

112. TEX. DEP'T OF AGING & DISABILITY SERVS., STATE SUPPORTED LIVING CENTERS: LONG-TERM PLAN 7 (2015), http://bit.ly/1TFANrc. Care Facilities are Medicaid-funded and receive about 60% of their funds from the federal government and the other 40% from the state's general revenue and third parties. *Id.*

113. *About State Supported Living Centers*, TEX. DEP'T AGING & DISABILITY SERVS., https://www.dads.state.tx.us/services/sslc/ (last updated Feb. 7, 2016). The twelve SSLCs are located in Abilene, Austin, Brenham, Corpus Christi, Denton, El Paso, Lubbock, Lufkin, Mexia, Richmond, San Angelo, and San Antonio. *Id.* The Care Facility, located in Harlingen, is part of the Rio Grande State Center operated by the Texas Department of State Health Services under a contract with DADS. *Id.*

114. Letter from Grace Chung Becker, Acting Assistant Attorney Gen., to Rick Perry, Governor of Tex. 2 (Dec. 1, 2008), http://1.usa.gov/1SlnL2R (containing the DOJ findings after the statewide Civil Rights of Institutionalized Persons Act investigation).

115. *See* TEX. HEALTH & SAFETY CODE ANN. § 531.002(19) (West Supp. 2015); TEX. DEP'T OF AGING & DISABILITY SERVS., *supra* note 112, at 8.

116. TEX. DEP'T OF AGING & DISABILITY SERVS., *supra* note 112, at 8.

117. *See* LEGISLATIVE BUDGET BD., *supra* note 109, at 7. Individuals with intellectual disabilities have an IQ below 70 and considerable difficulty with daily living skills, including communicating, caring for themselves, and engaging with others. TEX. DEP'T OF AGING & DISABILITY SERVS., *supra* note 112, at 8–9 & n.7.

suffer from epilepsy, hypothyroidism, or cerebral palsy.[118] In addition to caring for individuals with I/DD, SSLCs receive juveniles and adults committed under Chapter 55 of the Texas Family Code and Chapter 46B of the Code of Criminal Procedure for competency evaluations or extended commitments.[119]

B. Lock 'em Up and Throw Away the Key: The Commitment Process

Residents are committed to SSLCs through one of seven different types of admissions.[120] Those seven types of admissions are divided into two different categories, voluntary or involuntary.[121] The three types of voluntary admission—respite, emergency, and regular—require "consent of the adult with the capacity to give legally adequate consent."[122] This requirement includes the consent of the legal guardian of an individual or the consent of the parent of a minor.[123] In contrast, residents are involuntarily committed to the SSLCs as a result of court proceedings required by various statutes, including the Persons with Intellectual Disabilities Act (Disabilities Act), the Criminal Code, and the Family Code.[124]

Chapter 593, Subchapter C, of the Disabilities Act governs the involuntary, indefinite commitment of individuals with I/DD to SSLCs.[125] Out of the 196 individuals committed to an SSLC in 2014, 114 were committed under the Disabilities Act.[126] During the initial commitment, an individual receives a judicial hearing with notice, legal representation, and the ability to present and cross-examine witnesses.[127] This process determines if they meet the commitment criteria required for placement in an SSLC.[128] A proposed resident can only be committed to the SSLC if a judge determines beyond a reasonable doubt that the individual cannot be served in a less restrictive environment and that the SSLC provides the services the individual needs.[129] If committed, the individual will serve a lifetime commitment.[130] Committed individuals will never again receive a judicial

118. TEX. DEP'T OF AGING & DISABILITY SERVS., *supra* note 112, at 9.
119. *Id.*
120. *Id.* at 12.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. TEX. HEALTH & SAFETY CODE ANN. § 593.041 (West 2010 & Supp. 2015).
126. TEX. DEP'T OF AGING & DISABILITY SERVS., *supra* note 112, at 13.
127. HEALTH & SAFETY §§ 593.048, 593.050.
128. *Id.*
129. *Id.* §§ 593.050(3), 593.052.
130. *Compare id.* § 593.052 (containing no expiration for a commitment order), *with id.* § 574.035(h) (providing a one-year limit for mental health commitments).

hearing to determine if they still need to be confined in an institutional setting, segregated from the outside world.[131]

Though the Disabilities Act itself fails to provide for periodic judicial review of commitments, it recognizes that individuals with I/DD have the right to live in the least restrictive setting appropriate to their needs.[132] It also requires SSLCs to transfer those individuals to less restrictive settings.[133] DADS created internal review procedures to assess the appropriateness of a resident's confinement in an SSLC.[134] Each resident is assigned an interdisciplinary team (IDT) composed of, at the very least, the resident's legally authorized representative, if they have one, and treating professionals employed by the SSLC.[135] These treating professionals completely control every aspect of the resident's "daily life, including (among other things) what they eat, what they wear, what time they get up in the morning, what type of work they do, [and] their level of supervision."[136] Despite being committed to an SSLC because of intellectual disabilities, these individuals are presumed to be able to advocate for themselves, by themselves, and without assistance in this intimidating setting.[137]

Additionally, the IDT must meet at least once a year to create and review the treatment plans, services, needs, and strengths of each resident.[138] This annual meeting is the only method for review of an individual's lifelong involuntary commitment to an SSLC.[139] IDTs also consider community living options.[140] This process, however, fails to ensure that individuals whose needs can be met in a less restrictive environment are actually released to these settings.[141] Due to this failure, individuals remain in institutions, confined and segregated from their communities, even if they no longer need such a restrictive environment.

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131. *See id.* § 593.052.

132. *Id.* § 592.013 ("Each person with [an intellectual disability] has the right to live in the least restrictive setting appropriate to the person's individual needs and abilities and in a variety of living situations, including living: (1) alone; (2) in a group home; (3) with a family; or (4) in a supervised, protective environment."); *see also id.* § 591.005 ("The least restrictive alternative is: (1) the available program or facility that is the least confining for a client's condition . . . .").

133. *Id.* § 594.001.

134. *See* Abbott v. G.G.E. *ex rel.* Courtney, 463 S.W.3d 633, 639 (Tex. App.—Austin 2015, pet. filed).

135. *See id.*; 42 C.F.R. § 483.440(c) (2015).

136. Plaintiffs' Original Petition, *supra* note 1, at 13.

137. *Id.*

138. 42 C.F.R. § 483.440(f)(2).

139. Plaintiffs' Original Petition, *supra* note 1, at 13.

140. 40 TEX. ADMIN. CODE § 2.274(c)(2) (2015).

141. *See supra* Part IV.

C. The Promised Land: Community-Based Care

The least restrictive living situation for many individuals with I/DD is a community placement.[142] Community living promotes the idea that individuals with I/DD should be able to live where they choose, with whom they choose, and fully participate in their communities.[143] This vision directly opposes the lack of choice and the lack of a voice residents committed to SSLCs live with.[144] They cannot enjoy the freedom of living in a community in which individuals are not at the mercy of everyone else and where they get a say in how they want to live their lives.[145] Individuals with I/DD who live in smaller homes are given the opportunity to have better, more personalized care.[146]

By passing legislation that increases the availability of Medicaid waivers, Texas has dramatically increased the availability of community-based services.[147] Medicaid funds the care of individuals confined in institutions and those receiving community-based care.[148] The average monthly cost to care for an intellectually disabled individual at an SSLC is about $16,034, while the cost of home and community-based care is merely $3,530.[149]

Section 1915(c) of the Social Security Act authorizes Medicaid waiver programs.[150] Waiver programs provide community-based services for individuals with I/DD who qualify for admission to nursing facilities or Care Facilities but choose to remain in their communities and receive the waiver service.[151] Waivers are intended to be cost-effective alternatives to institutions.[152] DADS administers the programs and manages interest lists—more appropriately called waitlists—for most of its programs.[153] Even though some individuals wait up to eleven years for waiver services, those

142. *See Programs & Activities*, ADMIN. FOR COMMUNITY LIVING, http://www.acl.gov/Programs/index.aspx (last modified Jan. 8, 2016).

143. *Id.*

144. Plaintiffs' Original Petition, *supra* note 1, at 13.

145. Paul Flahive, *The Source: State-Run Homes for the Disabled Still Troubled*, TEX. PUB. RADIO (Apr. 23, 2014), http://bit.ly/1nOCKFF (interviewing two Disability Rights lawyers about the SSLCs).

146. *Id.* Individuals with I/DD receiving community-based care typically live with three or four other people and two staff members. *Id.*

147. *See* 40 TEX. ADMIN. CODE §§ 9.151–.192 (2015); Plaintiffs' Original Petition, *supra* note 1, at 12.

148. *See generally* TEX. DEP'T OF AGING & DISABILITY SERVS., 2015 REFERENCE GUIDE (2015), https://www.dads.state.tx.us/news_info/budget/docs/fy15referenceguide.pdf (detailing the programs DADS operates to care for individuals with I/DD).

149. *Id.* at 40, 80.

150. *Id.* at 37. This discussion could comprise a comment on its own. Instead, the Author chose to focus on how Medicaid affects SSLC residents moving to community-based care.

151. *Id.*

152. *Id.*

153. *Id.*

who move to the community from SSLCs skip the waitlists.[154] This process is possible because the Promoting Independence Initiative secures positions on the waitlist to relocate those individuals to community-based care.[155] The waiver services promote the release of individuals from SSLCs.[156] They also enable those in SSLCs to immediately access services in the least restrictive environment.[157]

D. Settling into Old Habits

Despite programs and plans to move individuals into community-based care, Texas has failed to serve its residents with I/DD in the least restrictive environment. Instead, those individuals dwell in closed-off facilities and survive at the mercy of the staff members entrusted with caring for them.[158] The SSLCs' stated vision for their residents is that they "will experience the highest quality of life, supported through a comprehensive array of services designed to maximize well-being, dignity, and respect" while residing in the SSLC.[159] This vision, however, has been impaired by the harsh reality of abuse, neglect, and mistreatment that SSLC residents face on a daily basis.[160]

These horrific conditions prompted the DOJ—by its authority under the Civil Rights of Institutionalized Persons Act—to initiate a statewide investigation into the conditions at the Texas SSLCs.[161] In addition to discovering countless incidents of abuse, including an employee breaking a resident's shin while attempting to restrain him, the DOJ declared that Texas has failed at providing services for individuals in the most integrated setting.[162] The DOJ revealed that less than four percent of the total population of residents in SSLCs were transferred to community settings between 2007 and 2008.[163] DOJ investigators found this fact troubling because many residents were very capable individuals who could easily function in the community.[164] Others who needed a higher degree of care could have been placed in the community if they were provided with appropriate

154. GINGER MAYEAUX, THE ARC OF TEX., TEXAS MEDICAID WAIVERS FOR PEOPLE WITH I/DD 18–20, http://bit.ly/1VAny9v.

155. TEX. DEP'T OF AGING & DISABILITY SERVS., WAIVER SLOT ENROLLMENT PLAN 2 (2015), http://bit.ly/1nGXnUr; *see* MAYEAUX, *supra* note 154, at 19.

156. *See* MAYEAUX, *supra* note 154, at 19.

157. *Id.*

158. Flahive, *supra* note 145.

159. TEX. DEP'T OF AGING & DISABILITY SERVS., *supra* note 112.

160. *See generally* Letter from Grace Chung Becker, *supra* note 114 (revealing the DOJ's findings after investigating the SSLCs).

161. Abbott v. G.G.E. *ex rel.* Courtney, 463 S.W.3d 633, 640 (Tex. App.—Austin 2015, pet. filed); *see* Letter from Grace Chung Becker, *supra* note 114, at 1–5.

162. Letter from Grace Chung Becker, *supra* note 114, at 17, 44.

163. *Id.* at 44.

164. *Id.* at 19.

support.[165] The DOJ attributed this failure to the IDTs at the SSLCs.[166] The IDTs repeatedly misinformed residents and their guardians about the available community placements and how those community placements could care for them.[167] Also, the IDTs did not provide effective discharge and transition planning that would have enabled individuals with I/DD leaving the SSLCs to thrive in their communities.[168]

To address these issues, the United States sued Texas alleging that the atrocious conditions at the SSLCs violated federal law.[169] Conditions at the SSLCs were so bad that Texas did not fight the suit and quickly chose to enter into a settlement agreement (the Settlement) covering all twelve SSLC facilities and the Rio Grande Care Facility.[170] The Settlement required Texas to make significant changes to the SSLCs, including the following: (1) increasing protection of SSLC residents, (2) raising the standard of care provided to a professional level, (3) providing residents with information about the choice to live in community placements, and (4) ensuring that transition occurs successfully.[171] Also, the Settlement called for professional monitors to inspect each SSLC twice a year and report on each facility's compliance with the Settlement.[172]

Even with constant monitoring, Texas has failed to substantially improve the conditions at the SSLCs. Though the overall number of reported incidents of abuse decreased, horrific abuse is still prevalent.[173] At the Mexia SSLC, an employee pushed a resident to the ground and stepped on his throat while other employees just watched; another employee showed residents pornographic pictures and tried to force them to perform oral sex on him; and a different employee provoked a resident into hitting another with a belt, resulting in serious wounds and a trip to the hospital.[174] And employees at the Corpus Christi SSLC organized a ring of what has been called human cockfights between SSLC residents.[175]

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165. *Id.* at 44.

166. *Id.* at 46.

167. *Id.* at 44.

168. *Id.* at 47.

169. Abbott v. G.G.E. *ex rel.* Courtney, 463 S.W.3d 633, 640 (Tex. App.—Austin 2015, pet. filed).

170. Settlement Agreement at 4, United States v. Texas, No. 5:10-CV-1025-OG (W.D. Tex. 2009), http://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/TexasStateSchools_settle_06-26-09.pdf (laying out the terms of the Settlement).

171. *Id.* at 5–33.

172. *Id.* at 34–37.

173. Emily Ramshaw & Becca Aaronson, *Despite Reforms, Abuse Continues at Texas Institutions for Disabled*, TEX. TRIB. (Oct. 23, 2011), http://www.texastribune.org/library/data/abuse-neglect-texas-disabled-institutions/.

174. *Id.*

175. Joseph Shapiro, *Morning Edition: Abuse at Texas Institutions Is Beyond 'Fight Club,'* NPR, http://n.pr/1NRuYzo (last visited May 3, 2016). This disturbing fight club was discovered only after a participating ringmaster lost his phone and it was turned into a police officer. *Id.*

After six years and eight rounds of monitoring, most of the SSLCs' compliance ratings with provisions of the Settlement fell below 40%.[176] Texas even agreed that it had not reached full compliance with the Settlement.[177] To address this, in mid-2014, Texas filed a motion seeking approval to restructure the Settlement.[178] The purpose of the restructuring was to develop sets of outcomes, indicators, and tools that DADS could use when monitoring ends.[179] Some aspects of the SSLCs' quality assurance programs and most-integrated-setting practices were not finalized, evidencing Texas's continued struggle to comply with the federal integration mandate.[180] Because of this, individuals with I/DD, who should have the chance to live and enjoy life while receiving community-based care, languish within the SSLCs' walls and receive substandard care.[181] Many of these individuals could be identified if judicial review of involuntary commitment orders existed.

VI. TEXAS LEGISLATIVE INACTION

Though the Texas Legislature has tried to improve the living conditions at SSLCs, it has failed to ensure that involuntarily committed individuals are treated in the least restrictive environment appropriate for their needs. Under fire from the DOJ, the Texas Legislature has repeatedly tried to address concerns about the conditions and care provided to residents at SSLCs since 2009.[182]

A. A Band-Aid Solution

As an emergency response to the DOJ investigation, the 81st Texas Legislature passed Senate Bill (SB) 643 in 2009.[183] The bill aimed to increase oversight and protection for residents of the SSLCs by increasing training and standards for staff, requiring video surveillance in all common areas, and creating an office of ombudsman to protect the rights of SSLC residents.[184]

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176. *See* AMY TROST ET AL., SUNSET ADVISORY COMMISSION STAFF REPORT: DEPARTMENT OF AGING AND DISABILITY SERVICES 18 (2014), http://bit.ly/1jHV92n.

177. Abbott v. G.G.E. *ex rel.* Courtney, 463 S.W.3d 633, 640 (Tex. App.—Austin 2015, pet. filed).

178. TEX. DEP'T OF AGING & DISABILITY SERVS., *supra* note 112, at 24; *see* MARIA LAURENCE & ALAN HARCHIK, MONITORING TEAM REPORT: AUSTIN STATE SUPPORTED LIVING CENTER 2 (2015), http://www.dads.state.tx.us/monitors/reports/austin-6-19-15.pdf.

179. LAURENCE & HARCHIK, *supra* note 178.

180. *Id.*

181. *See* TROST ET AL., *supra* note 176, at 22.

182. *See generally* H. COMM. ON HUMAN SERVS., BILL ANALYSIS, Tex. S.B. 643, 81st Leg., R.S. at 2–4 (2009), http://bit.ly/20si1so (explaining that the Texas Legislature proposed the bill to amend the shortfalls of Texas's care for the intellectually disabled in response to the Settlement).

183. *Id.*

184. *Id.* at 4. SB 643 also changed the name of the institutions from "'state schools' to a more accurate and illustrative term," state supported living centers. *Id.* at 16.

Despite attempting to address the abuse and neglect at the SSLCs, SB 643 failed to mention how Texas would serve SSLC residents in the most integrated setting.[185] The bill indicates that the SSLCs are supposed to teach employees about community-based services and the community living options information process (community options).[186] Even though the bill requires this training, it does nothing to ensure that residents who could be better served with community-based care actually get the chance to move into a community setting.[187]

Those opposed to SB 643 voiced concerns about training all employees in the community options process.[188] They thought it would not be appropriate for all staff members, just like they thought it was not appropriate for all residents.[189] SB 643 opponents believed that many residents did not have the mental capacity to make decisions about their care because of their intellectual disabilities.[190] Additionally, the bill opponents stated that 60% of SSLC residents did not have legal guardians.[191] This fact, coupled with their intellectual disabilities, meant they would not be in any position to participate in the community options process, and the process would be subject to manipulation.[192] Though the opponents' views about the community living process were misguided, their fears of manipulation throughout the process were not in vain.[193] The SB 643 opponents foretold the future of the IDTs' manipulation of SSLC residents by refusing to place them in community-based care.

B. Why Do Today What You Can Do Tomorrow?

In 2013, the 83rd Texas Legislature faced a second opportunity to overhaul the SSLC system. Several bills originating in both the house and senate sought to revamp the SSLCs.[194] Instead of taking on this task, however, the legislature focused on increasing access to Medicaid waivers and the quality of care provided by them.[195] The purpose of SB 7 was to provide high-quality, personalized Medicaid care to more individuals,

185. *See generally* Tex. S.B. 643, 81st Leg., R.S. (2009).
186. *Id.*
187. *See id.*
188. BILL ANALYSIS, Tex. S.B. 643, at 23.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. COAL. OF TEXANS WITH DISABILITIES, A CLASH OF EGOS. A BATTLE OF IDEOLOGIES. A REPORT ON SESSION 8 (2013), http://bit.ly/1UMJjD2 (explaining that SB 1766 and HB 3527 sought a plan for the closure of the SSLCs, HB 3528 and SB 729 would have created a board to oversee the operation and management of the SSLCs; and SB 1045 sought an independent evaluation of an SSLC if it were to be closed or consolidated).
195. *See* Tex. S.B. 7, 83rd Leg., R.S. (2013).

thereby reducing unnecessary institutionalization.[196] Although the legislature increased Medicaid waiver availability, it did nothing to ensure that individuals institutionalized in SSLCs are served in the most integrated setting appropriate to their needs.[197] SB 7 did not affect those individuals residing at the SSLCs because no review of their commitment orders exists that would enable them to obtain a community placement and have a need for a Medicaid waiver to pay for their community-based care.

Although not a single one of the major SSLC reform bills made it through the legislative labyrinth to become law, the 83rd Texas Legislature did manage to secure one victory by attaching Rider 39 to SB 1 (the budget that passed).[198] Rider 39 instructed DADS to create a ten-year plan for the provision of services to residents of SSLCs.[199] Additionally, DADS looked at the SSLC system needs, infrastructure needs, associated costs, capacity needs, and demand needs of the state.[200] Besides that, DADS was also supposed to consider serving individuals with I/DD in the most integrated setting and ensure the effective transition of those individuals into the community.[201] Also, the plan actually lists obstacles to community referral and transitions, including an individual's reluctance toward community placement, lack of funding, etc., but addresses no way of remedying these obstacles.[202]

In fact, DADS's January 2015 Rider 39 report detailed that SSLC staff does not always support residents who want to move into the community.[203] It may even be recommending that families keep their loved ones in the SSLCs rather than move them into the community.[204] The report also voices concerns about the conflict of interests created by the SSLC staff handling the transition process.[205] Despite this plan to address the services provided to residents of SSLCs, those who were involuntarily committed are still confined within the SSLCs because of the IDT's failures and a lack of review of their commitment orders.

196. H. COMM. ON HUMAN SERVS., BILL ANALYSIS, Tex. S.B. 7, 83rd Leg., R.S. at 3 (2013), http://bit.ly/1JZCDAV.

197. *See supra* Part IV.

198. COAL. OF TEXANS WITH DISABILITIES, *supra* note 194.

199. TEX. DEP'T OF AGING & DISABILITY SERVS., *supra* note 112.

200. *Id.*

201. *Id.*

202. *Id.* at 14–16.

203. *Id.* at 60.

204. *Id.*

205. *Id.*

C. You Can Lead a Horse to Water but You Cannot Make Him Drink

Like the 83rd Texas Legislature, the 84th Texas Legislature had the opportunity to make substantial changes to the SSLC system.[206] Unfortunately, this opportunity was forgone. On a positive note, however, the 84th Texas Legislature did pass SB 219, which updates terminology within statutes that is "recognized as offensive or insensitive."[207] This bill replaced every instance of "mentally retarded" with "intellectual disability."[208] The legislature also abolished DADS and transferred its functions to the Health and Human Services Commission (Health Commission), to be completed by September 1, 2017.[209] Despite these changes, the Texas Legislature let the opportunity to make additional, substantial changes for its most vulnerable citizens slip through its fingers.

One example of this was the legislature's failure to pass SB 204, a bill that encompassed the Sunset Advisory Commission's recommendations to solve the problems in the SSLCs.[210] The Sunset Advisory Commission's review of DADS and the SSLCs came out in 2014, a year before the legislative session.[211] The Sunset review was critical of DADS's control of the SSLC system.[212] Because of declining enrollment in the SSLCs, skyrocketing operating costs, and a lack of progress meeting the Settlement conditions at most of the SSLCs, the Sunset Commission called for the closure of the Austin SSLC.[213] It also called for the establishment of the SSLC Closure Commission to determine which five additional centers should be closed.[214] Supporters of SB 204 acknowledged that not all of the SSLCs would close because some needed to remain open to serve individuals who truly cannot function in the community.[215] The Sunset Commission recommended, however, that the Austin SSLC close because it continues to

206. *See* Tex. S.B. 204, 84th Leg., R.S. at 14 (2015) (calling for the closure of several SSLCs to increase the quality of care provided at the remaining ones).

207. S. COMM. ON HEALTH & HUMAN SERVS., BILL ANALYSIS, Tex. S.B. 219, 84th Leg., R.S. at 1 (2015), http://bit.ly/1T1MJVr.

208. *Id.* at 1–2.

209. *See* Tex. S.B. 200, 84th Leg., R.S. (2015). When DADS was abolished, it became inactive, and its services were reorganized within the Health Commission to "better address ongoing problems of fragmentation, misaligned or poorly focused programs, and blurred accountability." SUNSET ADVISORY COMM., SUNSET IN TEXAS 2015–2017 8 (2015), http://bit.ly/1UMJVIU.

210. AMY TROST ET AL., SUNSET ADVISORY COMMISSION STAFF REPORT WITH FINAL RESULTS: DEPARTMENT OF AGING AND DISABILITY SERVICES 7 (2015), http://bit.ly/1JZCKwy.

211. TROST ET AL., *supra* note 176, at 1–7. The Sunset Advisory Committee is comprised of five members of the senate, five members of the house, one member appointed by the Lieutenant Governor, and one appointed by the Speaker of the House. SUNSET ADVISORY COMM., *supra* note 209, at 1. Its goal is to assess the continuing need for a state agency or program to exist. *Id.*

212. TROST ET AL., *supra* note 176, at 15–27.

213. *Id.* at 25.

214. *Id.* at 26.

215. H. COMM. ON HUMAN SERVS., BILL ANALYSIS, Tex. S.B. 204, 84th Leg., R.S. at 10 (2015), http://bit.ly/1X4UGYz.

have the most serious violations, threatening its federal certification and the safety of its residents.[216]

The senate incorporated the Sunset Commission's recommendations into SB 204.[217] The bill passed in the senate with a few minor changes.[218] The house, however, paid no attention to the Sunset Commission's recommendations.[219] Instead, it stripped the bill of its recommendations to close the Austin SSLC and create the SSLC Restructuring Commission.[220] As a result of this action and the inability of house members to agree on the bill's content, SB 204 died in the last days of the session.[221] Consequently, another legislative session ended without addressing the SSLCs and ensuring that those SSLC residents are served in the most integrated setting appropriate to their needs.

D. What Could Have Been

One bill that could have changed the legislature's dismal record regarding this issue came from the 82nd Texas Legislature in 2011.[222] SB 415, if passed, would have required an annual judicial review of an SSLC resident's commitment order.[223] The purpose was to prevent SSLC residents "from continuing to be unnecessarily confined in violation of their statutory, substantive, and procedural due course of law protections."[224] The author of the bill recognized that Texas has increased the availability of community-based services for individuals with I/DD confined in SSLCs.[225] Further, the author recognized that an individual's initial commitment hearing is the only time an independent review of the person's commitment is ever made.[226]

This bill would have added a section to Chapter 593, Subchapter C, of the Disabilities Act, authorizing a commitment to an SSLC for no longer than twelve months.[227] The added section would have been consistent with the

216. TROST ET AL., *supra* note 176, at 15–27.
217. TROST ET AL., *supra* note 210.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *See* Tex. S.B. 415, 82nd Leg., R.S. (2011).
223. S. COMM. ON HEALTH & HUMAN SERVS., BILL ANALYSIS, Tex. S.B. 415, 82d Leg., R.S. at 1 (2011), http://bit.ly/1nIfWa7.
224. *Id.*
225. *Id.*
226. *Id.*
227. *See* Tex. S.B. 415.

commitment language in the Mental Health Code.[228] This bill, however, failed to become law.[229]

VII. TEXAS WON'T LET THE CAGED BIRD SING: *ABBOTT V. G.G.E.*

The repeated failures of the Texas Legislature to address the lifetime confinement of individuals in SSLCs left those individuals with no choice but to pursue their freedom in the judicial arena. *Abbott v. G.G.E.* embodies the struggles individuals with I/DD must endure to attempt to have a voice and advocate for their rights.[230] Originally filed in 2011 as a class action, three different intellectually disabled individuals, G.G.E., E.M.B., and G.D.E. (Individual Plaintiffs), initiated the suit through their next friend, Geoffrey Courtney.[231] Disability Rights Texas (Disability Rights) represented the plaintiffs, which sought to provide a voice for all persons who have been or will be involuntarily committed to an SSLC.[232] Four grueling years of litigation, however, have only answered procedural issues.[233] The substantive heart of the case remains untouched, while individuals remain wrongfully imprisoned in institutions.[234]

Each of the Individual Plaintiffs has an intellectual disability, and together, they have been confined in Texas SSLCs for a total of more than 138 years.[235] Even though the IDTs for each individual determined that they would thrive in a less restrictive environment, each one is still serving a life sentence in an SSLC rather than residing in a community.[236] Not a single one of the Individual Plaintiffs have had his or her commitment order judicially reviewed.[237] They have had no check to ensure that they reside in the least restrictive setting appropriate to their needs.[238] Unfortunately, they lack the

228. *Id.*; *cf.* TEX. HEALTH & SAFETY CODE ANN. § 574.035(h) (West 2010) (providing a one-year limit for mental health commitments).

229. *Bill Stages*: *SB 415*, TEX. LEGIS. ONLINE, http://www.capitol.state.tx.us/BillLookup/BillStages.aspx?LegSess=82R&Bill=SB415 (last visited Apr. 17, 2016).

230. *See* Abbott v. G.G.E. *ex rel.* Courtney, 463 S.W.3d 633, 642 (Tex. App.—Austin 2015, pet. filed).

231. *See id.* at 639–40; Plaintiffs' Original Petition, *supra* note 1, at 1–7. At the time the petition was written, there were approximately 4,200 involuntarily committed individuals living in the thirteen Texas SSLCs. Plaintiffs' Original Petition, *supra* note 1, at 7. Disability Rights is a nonprofit protection and advocacy agency created by various federal acts that advocates for and ensures the protection of the rights of disabled individuals. *Abbott*, 463 S.W.3d at 640; *see Who We Are*, DISABILITY RIGHTS TEX., http://www.disabilityrightstx.org/who-we-are (last visited Apr. 17, 2016).

232. *See Abbott*, 463 S.W.3d at 640.

233. *See id.* at 639.

234. *See id.*

235. *Id.* "G.G.E. has been confined for more than 40 years, E.M.B. for more than 60 years, and G.D.E. for more than 38 years." *Id.* at n.4. G.G.E. was confined in the Austin SSLC, E.M.B. was confined in the Austin SSLC and later transferred away from her family without her consent to the Mexia SSLC, and G.D.E. was confined in the Lufkin SSLC. Plaintiffs' Original Petition, *supra* note 1, at 3–4.

236. *Abbott*, 463 S.W.3d at 640.

237. *Id.* at 639–40.

238. *Id.*

sophistication and skills needed to seek assistance in reviewing their involuntary confinement.[239] Consequently, these individuals have remained unnecessarily confined in the SSLCs against their will and without their consent.[240]

In an effort to gain freedom from the SSLCs, the Individual Plaintiffs filed suit seeking both declaratory and injunctive relief.[241] The Individual Plaintiffs asserted that their continued confinement without judicial review violated procedural due course of law under the Texas Constitution.[242] They also alleged that the State Defendants' failure to provide them with community placements, even though their treatment teams determined they could thrive in less restrictive environments, violated the Disabilities Act and substantive due course of law under the Texas Constitution.[243]

Instead of actually facing the substantive merit of the Individual Plaintiffs' claims, the State Defendants hid from accepting liability for their mistreatment of involuntarily committed I/DD individuals.[244] They attempted to get the case thrown out on procedural grounds.[245] The trial court denied both a plea to the jurisdiction and a motion to show authority.[246] The State Defendants appealed the decision and presented five issues on appeal: (1) the Individual Plaintiffs lacked standing because the relief they sought for their due course of law claims would not redress their injuries if a favorable decision was granted, (2) Disability Rights did not have associational standing, (3) Courtney did not have the authority to represent the Individual Plaintiffs as next of friend, (4) the district court did not have jurisdiction over the claims under the Disabilities Act, and (5) the trial court had no jurisdiction over the claims under the Uniform Declaratory Judgments Act.[247] Once again, the State Defendants are evading the substantive issues of the case.

A. Redressability

In deciding the crux of the appeal—whether the Individual Plaintiffs have standing because their claims are redressible—the court noted that standing under the Texas Constitution is equal to the requirement under

239. Plaintiffs' Original Petition, *supra* note 1, at 2.

240. *Id.*

241. *Abbott*, 463 S.W.3d at 640–41. The suit was filed against Greg Abbott, Governor of Texas; Kyle Janek, Executive Commission of the Texas Health and Human Services Commission; Jon Weizenhaum, Commissioner of the Texas DADS; Laura Cazabon-Braly, Director of the Austin SSLC; Gale Watson, Director of the Lufkin SSLC; and Mike Davis, Director of the Mexia SSLC (collectively, State Defendants). *Id.* at 636–37.

242. *Id.* at 638.

243. *Id.*

244. *Id.* at 641.

245. *Id.*

246. *Id.* at 642.

247. Brief for Appellant at xvi, *Abbott*, 463 S.W.3d 633 (No. 03-11-00338-CV), 2011 WL 3623692.

federal law.[248] Standing refers to the requirements a plaintiff's claim must meet for a court to exercise subject matter jurisdiction.[249] The State Defendants only questioned one element because they admitted that the Individual Plaintiffs suffered from a loss of liberty.[250] Redressability, the element the State Defendants challenged, requires that the Individual Plaintiffs prove that it is "likely, as opposed to merely speculative," that their injury will be remedied by a favorable decision.[251] The court addressed the redressability of both the Individual Plaintiffs' procedural and substantive due course of law claims.[252] The Texas due course of law clause resembles the Due Process Clause of the United States Constitution and is construed in the same manner by Texas courts.[253]

1. Procedural Due Course of Law

Like due process, due course of law commands "that any government action depriving a person of life, liberty, or property be implemented in a fair manner."[254] The Individual Plaintiffs argued that their continued restraint by the State Defendants was unconstitutional.[255] They asserted that by failing to require periodic judicial review of their commitment orders, the Disabilities Act deprived them of their liberty without due course of law protections.[256] The Individual Plaintiffs sought declaratory relief to redress the procedural due course of law violations.[257]

The State Defendants claimed that "declaratory relief would not redress the Individual Plaintiffs' injur[ies]" because a favorable ruling would merely be an advisory opinion, leaving individuals institutionalized with no review.[258] The Texas Constitution forbids courts from issuing advisory opinions; however, when the constitutionality of a statute is challenged, declaratory relief is the proper remedy.[259] The court determined that the Individual Plaintiffs' "requested declarations go to the heart of the controversy"—the constitutionality of involuntarily committing adults with

248. *Abbott*, 463 S.W.3d at 645–46.

249. *Id.* The three elements of standing are (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between that injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable judicial decision. *Id.* (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

250. *Id.* at 647.

251. *Id.* at 646 (quoting *Lujan*, 504 U.S. at 561).

252. *Id.* at 647–52.

253. *Id.*

254. *Id.* at 647.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* An advisory opinion does not bind the parties; it only decides abstract questions of law. Brown v. Todd, 53 S.W.3d 297, 302 (Tex. 2001).

259. *Abbott*, 463 S.W.3d at 647.

I/DD for life—rather than asking abstract questions or making hypothetical claims.[260] Because the court believed that the legislature would respond to its ruling that the Disabilities Act was unconstitutional, the court determined that declaratory relief was proper.[261]

In addition to the redressability under the Disabilities Act, the State Defendants claimed that the 2009 Settlement between Texas and the DOJ would invalidate any declaratory relief granted by the court.[262] The DOJ's statement of interest in the case, however, declared that the Individual Plaintiffs' claims would add "an additional mechanism for discharge of individuals to the most integrated setting appropriate to their needs," not disrupt the Settlement.[263]

Rather than commenting on the merit of the procedural due course claims, the court simply concluded that the Individual Plaintiffs met "the minimum threshold interest that confers standing under the Texas Constitution."[264] Thus, the court declared that the procedural due course claims satisfied the redressability requirement of standing.[265]

2. Substantive Due Course

Additionally, the Individual Plaintiffs argued that the State Defendants violated their right to substantive due course of law under the Texas Constitution.[266] The government violates substantive due course of law when it deprives a person of his or her protected rights through an arbitrary use of its power.[267] The Individual Plaintiffs claimed that their substantive rights were violated because the State Defendants (1) failed to refer them to community placements and (2) failed to properly train their staff on the proper procedures of moving individuals to community settings when they no longer qualify for institutional commitment.[268] In a feeble attempt at blocking the Individual Plaintiffs' substantive due course claims, the State Defendants maintained that the Individual Plaintiffs' claims were not redressible.[269] They argued that the claims duplicated those already brought against the same defendants in the 2009 Settlement.[270] This contention, however, directly contradicted the DOJ statement of interest acknowledging

260. *Id.* at 648.
261. *Id.* at n.11.
262. *Id.* at 648–49.
263. *Id.* at 649.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 648–49.
270. *Id.*

that the Individual Plaintiffs' claims did not disrupt the Settlement.[271] The court concluded that the trial court had jurisdiction to hear the substantive due course claims.[272] Therefore, the court overruled the State Defendants' first issue on appeal.[273]

B. You've Got a (Next) Friend in Me

In their third attempt to evade liability, the State Defendants argued (1) that Mr. Courtney was not qualified to serve as next friend because he had a conflict of interest and (2) that he was not authorized to serve as next friend because he had not been appointed in a probate proceeding similar to that of a guardianship proceeding under the Estates Code.[274] Individuals with I/DD lack legal capacity to sue due to their disability, so Texas Rule of Civil Procedure 44 allows incompetent individuals who have no legal guardian to sue and be represented by a next friend.[275] A next friend does not need to be related to or have any kind of relationship with the person they seek to represent.[276] To qualify as a next friend, one need only be a competent adult acting in good faith.[277]

Mr. Courtney, the Individual Plaintiffs' next friend, was an experienced lawyer in disability rights.[278] He took State Bar courses that authorized him to serve as an attorney *ad litem*, and he did so on many occasions.[279] After being approached by Disability Rights to review "the appropriateness of community placement for the Individual Plaintiffs," determining they were appropriate candidates for community living, and meeting the Individual Plaintiffs, Courtney filed suit on their behalf as next friend.[280] The trial court determined that Courtney did not have any interest that conflicted with the Individual Plaintiffs and allowed him to proceed as next friend.[281] The court of appeals upheld the trial court's decision because, without contrary evidence, courts presume an action is brought with as much consent and permission as the Individual Plaintiffs are able to give.[282] The State Defendants' second argument regarding the Individual Plaintiffs' next friend was based on the court's prior decision in *Saldarriaga v. Saldarriaga*.[283] In

271. *Id.* at 649.
272. *Id.*
273. *Id.*
274. *Id.* at 643.
275. *See id.*; TEX. R. CIV. P. 44.
276. *Abbott*, 463 S.W.3d at 644.
277. *Id.*
278. *Id.* at 643.
279. *Id.*
280. *Id.*
281. *Id.* at 644.
282. *Id.* at 645.
283. *Id.* at 643; *see* Saldarriaga v. Saldarriaga, 121 S.W.3d 493, 498–99 (Tex. App.—Austin 2003, no pet.).

Saldarriaga, the trial court appointed a next friend to represent a wife in a divorce proceeding against her objections, without a formal adjudication of her competency.[284] The court determined that when fact issues about the competence of an individual are in question, for due process purposes, the appointment of a next friend should parallel probate court proceedings for the appointment of a guardian.[285] The court reasoned that complying with the procedural safeguards of the Estates Code was necessary only when an individual's competence was in question.[286] If she was competent, she was entitled to appear in person or to choose her own representative.[287] Unlike *Saldarriaga*, the Individual Plaintiffs in *Abbott* had severe intellectual disabilities.[288] It was undisputed that they lacked the capacity to care for their interests in the litigation.[289] The court determined that the only requirement to be represented by a next friend was that the individual be incapable of properly caring for his or her interest in the litigation, regardless of whether that is by mental or bodily disability.[290]

Because Courtney was both qualified and authorized to represent the Individual Plaintiffs as next friend, the court overruled the State Defendants' third issue on appeal.[291] The court did not consider the State Defendants' second issue on appeal because Disability Rights asserted the same claims and sought the same relief as the Individual Plaintiffs.[292]

C. Declaratory Relief

The Individual Plaintiffs sought a declaration under the Uniform Declaratory Judgments Act (Declaratory Act) that the State Defendants' failure to discharge them, despite the IDTs' determinations that they could live in less restrictive environments, violated various rights guaranteed under the Disabilities Act.[293] The Disabilities Act indicates that a person who violates the rights guaranteed by the Act is liable to the person injured for civil penalties ranging from $100 to $5,000.[294] Additionally, the Act

284. *Saldarriaga*, 121 S.W.3d at 494–95.
285. *Id.* at 499.
286. *Id.* at 500.
287. *Id.*
288. *Abbott*, 463 S.W.3d at 645.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at n.10 ("Because the other plaintiffs . . . bring the same facial challenges and seek the same declaratory relief . . . we need not address their individual standing and we express no opinion thereon." (quoting Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 519 (Tex. 1995))).
293. *Id.* at 650. The purpose of the Declaratory Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b) (West 2015); *see id.* § 37.004 (individuals whose rights or status are affected by statute can have any question of construction arising under that statute determined and can obtain a declaration of their rights).
294. TEX. HEALTH & SAFETY CODE ANN. § 591.022(a)–(b) (West 2010 & Supp. 2015).

specifies that the private civil penalties provided in the statute do not replace other remedies existing at law.[295] The State Defendants argued that the Individual Plaintiffs could not seek relief under the Declaratory Act because the civil penalties specified in the statute were intended to be the exclusive remedy for the private enforcement of rights.[296]

The court noted that, generally, when a cause of action and the remedy for its enforcement are derived from a statute rather than common law, the statutory remedy is exclusive.[297] This rule, however, has no merit when the legislature has expressly provided that the remedies are non-exclusive.[298] Sections 591.022(f) and 591.023(g) of the Disabilities Act expressly provide that the remedies indicated in the statute do "not supersede or abrogate other remedies existing in law."[299] Because the language of the statute expressly states that the remedies under the Disabilities Act are not exclusive, the court concluded that an individual injured by a violation of the Disabilities Act could seek remedies in addition to those in the statute.[300] Therefore, the plaintiffs could seek a declaration of their rights under the Declaratory Act.[301]

D. Exclusive Jurisdiction

In their last attempt at shielding themselves from liability, the State Defendants asserted that the Individual Plaintiffs could not seek relief under the Declaratory Act.[302] They argued the Individual Plaintiffs' claims were focused on an administrative rule that is governed solely by the Texas Administrative Practices Act (Administrative Act)—the DADS internal review procedures.[303] Based on their failure to obtain community living, the Individual Plaintiffs sought a declaration that the State Defendants' policies, which fail to refer qualified individuals to community-based services, were unconstitutional and violated the Disabilities Act.[304]

The Administrative Act provides the exclusive remedy for a party to seek a declaratory judgment invalidating a state agency's policies, regulations, or procedures; the Declaratory Act, however, can only be used to attack a statute.[305] The court pointed out that the Individual Plaintiffs' pleadings did not challenge any generally applicable policy promulgated by

295. *Id.* § 591.022(f).
296. *Abbott*, 463 S.W.3d at 651.
297. *Id.*
298. *Id.*
299. HEALTH & SAFETY §§ 591.022(f), 591.023(g).
300. *Abbott*, 463 S.W.3d at 652.
301. *Id.*
302. *Id.* at 653.
303. *Id.*
304. *Id.* at 654.
305. *See id.* at 653–55; TEX. GOV'T CODE ANN. § 2001.038 (West 2008).

DADS.[306] In direct opposition to the State Defendants' claims, the court decided that the Individual Plaintiffs challenged the constitutionality of a statute, the Disabilities Act; this statute rightfully invoked the jurisdiction of the Declaratory Act.[307] Accordingly, the State Defendants' fifth and final issue on appeal was overruled.[308]

VIII. TEXAS CAN'T RESIST ANY LONGER

As evidenced by *Abbott v. G.G.E.*, Texas is resisting the chance to ensure that individuals with I/DD involuntarily committed to SSLCs are served in the most integrated setting appropriate to their needs. This resistance is seen on three fronts: (1) federal legislative and judicial, (2) state legislative, and (3) state judicial.

A. The Federal Front: A Fictitious Surrender

Texas has no defense left on the federal front. The passing of the ADA and its integration mandate set in motion the federal government's attack on the Texas SSLC system.[309] The Supreme Court's decision in *Olmstead* drove a stake right through the system's heart.[310] Yet, somehow Texas still keeps that system alive.

Olmstead prohibits the segregation of individuals behind the walls of an institution once they have been approved for community living.[311] As a decision from the highest court in the nation, it is the law of the land. One would expect that Texas, as well as any other state and any other person, would follow the Court's clear ruling. Yet, for the past two decades, Texas has openly violated *Olmstead*'s integration mandate.[312] In direct violation of the law, Texas currently detains hundreds of individuals with I/DD within the walls of its SSLCs despite approval for community-based care.[313] Many of these individuals sit and watch years pass by as they wait for their proposed transfer to the community.[314] Needlessly isolating these individuals deprives them of social contacts, family relationships, and other valued aspects of life.[315] They lose the skills they once had when they lived outside the SSLC. Instead, they are forced to rely on the staff to complete those same daily tasks

306. *Abbott*, 463 S.W.3d at 653–55.
307. *Id.* at 655.
308. *Id.*
309. *See supra* Part III.
310. *See supra* Part IV.A.
311. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 604–08 (1999).
312. *See id.*; *see also supra* Part V.D.
313. *See supra* Part V.
314. *See supra* Parts V.B, VII.
315. *Olmstead*, 527 U.S. at 600–01.

that they once took pride in doing.[316] The continued segregation of these individuals affects the way they see themselves and the way society sees them.

When the DOJ stepped in, Texas immediately appeared to wave the white flag to surrender. The state entered into a Settlement to amend the wrongdoings at the Texas SSLCs.[317] The Settlement was intended to make the SSLCs compliant with federal law and ensure that Texas implemented the integration mandate.[318] To date, however, Texas has yet to comply and has sought numerous delays.[319] The Settlement restructuring bought Texas more time and further delayed its complete surrender.[320] The lack of enforcement raises concern for the weight that Supreme Court decisions have as the law of the land.

If it had not been so easy to delay implementation of the federal law and for Texas to defy Supreme Court mandates, the SSLCs would be in compliance with the Settlement. Individuals who had been involuntarily committed would be receiving the care most appropriate to their needs; for many, this would be living in and receiving community-based care. Instead, the battle continues for these individuals in the Texas Legislature and the court system.

B. The Texas Legislative Front

The Texas Legislature has a history of valiant efforts to amend the lack of judicial review that detains many involuntarily committed individuals with I/DD. But most of those efforts have either failed or have been small wins on the battlefield that have not had much impact on the overall issue.[321] These efforts could have made Texas compliant with the ADA and *Olmstead* in the way it handles its SSLC system.

1. A Missed Opportunity

The 82nd Texas Legislature rejected an opportunity to fix the lack of periodic judicial review for involuntarily committed individuals when it failed to consider SB 415 in 2011.[322] This bill would have secured review for those individuals committed to the SSLCs ensuring that their rights were

316. *See supra* Part I.

317. *See* Settlement Agreement, *supra* note 170, at 5–33.

318. TEX. DEP'T OF AGING & DISABILITY SERVS., *supra* note 112, at 24.

319. *See supra* notes 173–81 and accompanying text (discussing the Settlement, lack of compliance with that agreement, and the restructuring of that agreement).

320. *See supra* notes 176–80 and accompanying text (discussing Texas's motion to restructure the Settlement).

321. *See supra* Part VI.

322. *See Bill Stages: SB 415*, *supra* note 229.

not violated.[323] Because this bill was not passed, the IDTs—composed of SSLC employees—perform the only review that the individuals receive to determine if they actually require the level of care provided in an institution.[324]

This IDT review, which was supposed to be closely monitored by the DOJ Settlement, was one of the focus points of the Settlement's restructuring.[325] The IDT process was far from complying with the original terms set forth in the Settlement.[326] This current process, with its potential for bias favoring the SSLC, has a history of failing to move qualified individuals to community-based care.[327] In these reviews, the individuals who have been committed to the SSLCs because they are intellectually or developmentally disabled have no representation, especially if they do not have a guardian or other personal representative.[328] They are also unable to advocate for themselves.[329] In this situation, they are the sheep in the lion's den. Expecting them to advocate for their own interest in a community placement, when in a room full people who only want to protect their jobs at the SSLC, is a task daunting enough to scare a person who has no intellectual disabilities. Thus, these individuals are at a severe disadvantage.

Judicial review of this process would ensure that individuals who are unable to advocate for themselves are not taken advantage of in the IDT transfer process.[330] It would ensure that those qualified individuals actually get transferred to community-based care. Because SB 415 did not pass and did not provide a remedy for the lack of judicial review, many individuals are still unnecessarily confined in institutions when that level of care is inappropriate for their needs.

2. Dropping a Bombshell

In 2015, the 84th Texas Legislature set in motion the restructuring of agencies that will eventually place the responsibility of both mental health care and intellectual disability care under the same commission.[331] This will occur in two phases.[332] When this happens, the agency in control of the SSLCs and the care of individuals with I/DD, DADS, will be joined with the Department of State Health Services (Mental Services), which oversees the

323. *See* Tex. S.B. 415, 82nd Leg., R.S. (2011).
324. Plaintiffs' Original Petition, *supra* note 1, at 13.
325. *See* LAURENCE & HARCHIK, *supra* note 178.
326. *See id.*
327. Letter from Grace Chung Becker, *supra* note 114, at 43–44.
328. Plaintiffs' Original Petition, *supra* note 1, at 13.
329. *Id.*
330. *Id.*; *see* Letter from Grace Chung Becker, *supra* note 114, at 45.
331. *See* TEX. GOV'T CODE ANN. §§ 531.02001–.0207 (West Supp. 2015).
332. *Id.* §§ 531.0201–.02011; S. COMM. ON HEALTH & HUMAN SERVS., BILL ANALYSIS, Tex. S.B. 200, 84th Leg., R.S., at 3 (2015), http://bit.ly/1nXyrrt.

care of individuals with a mental illness in the Health and Human Services Commission (Health Commission).[333]

Mental Services operates under the Texas Mental Health Code.[334] The Texas Mental Health Code provides for an annual periodic review of commitments to state hospitals.[335] Section 573.035(h) sets a limit of one year on a mental health commitment.[336] To renew a commitment order for extended mental health services, the court must find that the patient meets the criteria for treatment in a state hospital.[337] This ensures that individuals with a mental illness are treated in the most appropriate setting for their needs.

Once phase two for the transfer of power to the Health Commission is complete, the regimen for mental health commitment review will be under the same commission as that of the I/DD review.[338] This puts I/DD review squarely in line with the process for mental health commitment review.[339] The infrastructure and regimen for review will already be in place; therefore, it would not be that much of a stretch to apply a process similar to the mental health commitment review to I/DD commitment review.[340]

Judicial review of mental commitments does not solely determine whether an individual is or is not mentally ill; the purpose is to determine what kind of care is most appropriate for that individual.[341] The mental health review ensures that each individual's needs are treated in the most integrated setting appropriate.[342] This is the same kind of review that individuals committed to SSLCs should have.

After the implementation of phase two of the restructuring is complete, Texas will reap many benefits from performing judicial review of the commitment order of individuals with I/DD. This judicial review would make the Texas process for handling commitments to SSLCs compliant with both due course of law under the Texas Constitution and the integration mandate of the *Olmstead* decision. It will also ensure that individuals are not

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333. GOV'T §§ 531.02001–.02011; *see also Mental Health*, TEX. DEP'T ST. HEALTH SERVS., http://www.dshs.state.tx.us/Mental-Health/ (last visited Mar. 15, 2016) (discussing different mental health services that the agency offers). This consolidation will be completed by either September 1, 2017, or a date submitted by the Health Commission Commissioner. GOV'T § 531.02001. The absolute final date of this consolidation is September 1, 2023, the day the subchapter expires. *Id.* § 531.0207.

334. *See* TEX. HEALTH & SAFETY CODE ANN. § 571.003(5) (West 2010 & Supp. 2015) (defining the use of department throughout the code as the Department of State Health Services).

335. *Id.* §§ 574.035(h), 574.066(f). A state hospital provides psychiatric care for persons with mental illness. *North Texas State Hospital*, TEX. DEP'T ST. HEALTH SERVS., http://www.dshs.state.tx.us/mhhospitals/NorthTexasSH/default.shtm (last updated Jan. 26, 2016).

336. HEALTH & SAFETY § 574.035(h).

337. *Id.* § 574.066(f).

338. *See* GOV'T §§ 531.0201–.02011; S. COMM. ON HEALTH & HUMAN SERVS., BILL ANALYSIS, Tex. S.B. 200, 84th Leg., R.S., at 3 (2015), http://bit.ly/1nXyrrt.

339. *See* GOV'T §§ 531.0201–.02011; BILL ANALYSIS, Tex. S.B. 200.

340. *See* GOV'T §§ 531.0201–.02011; BILL ANALYSIS, Tex. S.B. 200.

341. *See* HEALTH & SAFETY §§ 571.035(h), 574.066(f).

342. *Id.*

detained in institutions for life and receive care in the most appropriate setting for their needs.

C. The Judicial Front: Texas Holds the Court's Fire

In the meantime, on the judicial front, *Abbott v. G.G.E.* is dragging on to the Texas Supreme Court.[343] Still relying upon their claim that the Individual Plaintiffs do not have standing to bring the suit, the State Defendants filed a petition for review.[344] These challenges to standing are attempts to avoid the due course of law analysis of the lack of review for individuals committed to SSLCs.[345] If the IDT internal review process was done properly, the due course of law analysis would not be necessary. The IDT would have already placed individuals in the most integrated setting. Judicial review of this IDT process would ensure that there was a check on the IDT's decisions for the care of individuals with I/DD. If review is denied or if the case is ultimately decided in favor of the Individual Plaintiffs, this case will be a round-about way of getting the current review process declared unconstitutional and, thereafter, replaced with periodic judicial review to ensure that the federal integration mandate is implemented.[346]

The State also alleged that judicial review of commitment proceedings would interfere with the Settlement.[347] This argument, however, makes no sense. The Individual Plaintiffs are actually asking for the implementation of the Settlement review procedures by requesting the use of an additional mechanism for review.[348] Their request does not disrupt the current process in the Settlement.[349] In a statement of interest in this case, the DOJ acknowledged that the Settlement "expressly contemplates and reconciles the existence of parallel mechanisms for discharging individuals to the community, including court-ordered discharge."[350] The State continues to drag out the judicial process with procedural issues and arguments that lack merit.[351] Meanwhile, individuals with I/DD continue to live in institutions in violation of the federal integration mandate and the Texas Constitution while they should be receiving community-based care.

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343. Petition for Review at 5, Abbott v. G.G.E. *ex rel.* Courtney, 463 S.W.3d 633 (Tex. App.—Austin 2015, pet. filed) (No. 15-0422), 2015 WL 5125872; *see also* Respondents' Response to Petitioners' Petition for Review at 4, *Abbott*, 463 S.W.3d 633 (No. 15-0422), 2015 WL 6696554.

344. Petition for Review, *supra* note 343, at 5–6.

345. *See Abbott*, 463 S.W.3d at 638–40.

346. *See id.* at 650.

347. Petition for Review, *supra* note 343, at 8–12.

348. *Abbott*, 463 S.W.3d at 641.

349. *Id.*

350. *Id.* (quoting the DOJ statement of interest).

351. *See* Petition for Review, *supra* note 343, at 19–23.

IX. HOW TO UNLOCK THE DOORS OF THE SSLCS AND RELEASE THOSE WITHIN

The I/DD community is one of the most vulnerable minority groups and has consistently been shut off from the outside world.[352] Though these individuals have disabilities, they still deserve the chance to live their lives to the fullest. The opportunity to live in community-based care, if appropriate, should be available to them. They should not be stuck segregated behind the walls of an institution.[353] The purpose of the ADA is integration, not segregation.[354] This integration was mandated for the institutionalized individuals of the disabled community by the *Olmstead* decision.[355] It is time for Texas to quit stalling and open the doors of its SSLCs to finally let those individuals qualified to receive community-based care out of the institutions and back into their communities. Periodic judicial review of commitments to SSLCs will open those doors and guarantee that individuals receive care in the most integrated setting. Texas just needs to decide how to open those doors.

The Texas Legislature holds the keys to those doors. Sitting and waiting for the Texas Supreme Court to rule on the constitutionality of the lack of judicial review individuals in SSLCs receive will not take those keys out of the hands of the legislature.[356] If the Court determines that the lack of judicial review violates due course of law under the Texas Constitution, then odds are that the legislature will have to act to remedy that ruling.[357] The keys would remain in the hands of the legislature and require legislators to figure out how to open the doors of the SSLC to let individuals transfer into their communities.[358] The legislature should accomplish this by either of two methods.

A. Method 1: The Take the Reigns Approach

The first and most direct method of opening the doors requires the legislature to introduce and pass a bill. This bill would require periodic judicial review of commitment orders for individuals with I/DD committed to the SSLCs. Reintroducing SB 415 from the 82nd Texas Legislature would accomplish this.[359] This bill requires the legislature to amend the Disabilities

352. *See* HARBOUR & MAULIK, *supra* note 3, at 3.
353. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 604–07 (1999).
354. *See ADA—Findings, Purpose and History*, *supra* note 54.
355. *See Olmstead*, 527 U.S. at 583.
356. *See* Abbott v. G.G.E. *ex rel.* Courtney, 463 S.W.3d 633, 648 n.11 (Tex. App.—Austin 2015, pet. filed).
357. *See id.*
358. *See id.*
359. *See* Tex. S.B. 415, 82nd Leg., R.S. (2011).

Act to authorize a long-term placement for no longer than twelve months.[360] The legislature must amend § 593.052 of the Health and Safety Code by adding subsection (b)(1) containing language similar to that from § 574.035(h) as follows:

> (b)(1) An order for long-term placement in a residential care facility must state that the commitment for care, treatment, and training is authorized for not more than 12 months.[361]

This amendment would ensure that individuals with I/DD do not spend their entire lives within the walls of an SSLC if that care is no longer appropriate for them.

The bill would also need to make sure the Health Commission either (1) creates a plan to place a committed individual in a community setting or (2) files an application to renew an order for long-term commitment to an SSLC.[362] This can be accomplished by amending the Disabilities Act, Subchapter C, Chapter 593 of the Health and Safety Code, to include § 593.0521, "Renewal of Order For Commitment," with included provisions based off of § 574.066(a)–(h) of the Health and Safety Code.[363] By modeling these provisions after the Mental Health Code, which requires judicial review of commitment orders, courts would have to review the application of an individual committed to an SSLC.[364] A judge would provide an independent, unbiased check on the IDT review process.[365] The judicial review would determine if an individual still needs to be housed in an SSLC or can safely be transferred to community-based care.[366] The amended § 593.0521(d) would require the court to appoint an attorney to represent the SSLC resident.[367] This would remedy the lack of representation current SSLC residents experience in the IDT reviews.[368] The reintroduction and passage of this bill would guarantee that SSLC residents receive an independent judicial review after their initial commitment.[369] Also, the bill would ensure they are treated in the most integrated setting appropriate to their needs in compliance with *Olmstead*.[370]

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360. *Id.*

361. *See id.*; TEX. HEALTH & SAFETY CODE ANN. § 574.035(h) (West Supp. 2015); *see also* S. COMM. ON HEALTH & HUMAN SERVS., BILL ANALYSIS, Tex. S.B. 415, 82d Leg., R.S. at 1–2 (2011), http://bit.ly/1nIfWa7.

362. Tex. S.B. 415.

363. *See* HEALTH & SAFETY § 574.066.

364. *Id.*

365. *See* BILL ANALYSIS, Tex. S.B. 415.

366. *See* Tex. S.B. 415.

367. *See* HEALTH & SAFETY § 574.066(d).

368. *See* Plaintiffs' Original Petition, *supra* note 1, at 13.

369. *See* HEALTH & SAFETY § 574.066.

370. *See* Olmstead v. L.C. *ex rel*. Zimring, 527 U.S. 581, 583 (1999).

B. Method 2: The Hurry Up and Wait Approach

The second method will take several years to put in place unless the 85th Texas Legislature acts to speed it up. The wooden frame-like structure of this method was built during 2015 when the 84th Legislature passed SB 200.[371] That bill set in motion the transfer of powers from both Mental Services and DADS to the Health Commission.[372] Although this merging of agencies may be years down the road, it will set the infrastructure for judicial review of mental health commitment orders to state hospitals under the same agency that controls the SSLCs.[373] The Health Commission should then begin implementing this mental health commitment review process for its SSLC residents. The Health Commission would place the same department in charge of commitment renewal applications for both mental health and I/DD reviews.

Once the agencies are officially under the command of the Health Commission, the legislature must devise the commission with the power to perform judicial reviews of the SSLC resident commitment orders. This can be accomplished by amending Subchapter C, Chapter 593, of the Health and Safety Code, which is part of the Disabilities Act, to include provisions modeled after the mental health commitment review regimen laid out in §§ 574.035 and 574.066 of the Health and Safety Code.[374]

Unfortunately, this approach involves waiting for the merger of the two agencies, which will not be complete for several years.[375] Consequently, involuntarily committed SSLC residents will remain confined in the SSLCs in violation of *Olmstead* and their constitutional rights.[376] Thus, this option leaves Texas as a target for DOJ involvement and private lawsuits.

C. Long-Term Possibilities

If and when the legislature adopts a system requiring judicial review of commitment orders for individuals committed to SSLCs, more individuals will be moved into higher quality and more affordable community-based care.[377] This would be partially made possible by increasing accessibility to Medicaid waivers for community care.[378]

Once the judicial review process is put into place, the decreasing number of individuals residing in the SSLCs will diminish the need for Texas

371. *See* TEX. GOV'T CODE ANN. §§ 531.02001–.0207 (West Supp. 2015).
372. *See* Tex. S.B. 200, 84th Leg., R.S. (2015).
373. *See* GOV'T § 531.02001.
374. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 574.035(h), 574.066 (West 2010).
375. *See* GOV'T §§ 531.0201, 531.02011, 531.0207.
376. *See* Olmstead v. L.C. *ex rel*. Zimring, 527 U.S. 581, 559–603 (1999).
377. *See* TROST ET AL., *supra* note 176, at 36.
378. *See supra* Part V.C.

to operate so many large institutions.[379] At this point, Texas should again consider the Sunset Advisory Commission's recommendations and reintroduce SB 204 from the 84th Texas Legislature.[380] SB 204 called for the creation of an SSLC Closure Commission to determine which SSLCs should close.[381] Some SSLCs will remain open to care for individuals who do not qualify for community placement.[382]

The closure of the chosen SSLCs will increase the amount of money Texas has available to care for those remaining in the SSLCs and those that have transferred to community-based care.[383] This influx of available funds will increase the number of individuals who can be served in the community.[384] It will also allow Texas to increase the quality of care it provides to its most vulnerable citizens.

X. CONCLUSION: DON'T LET IT HAPPEN ANYMORE

Texas is long overdue in righting the wrongs it has committed in its treatment of individuals with I/DD, especially those housed in SSLCs. The SSLCs were intended to be homes with a nurturing environment in which individuals with I/DD could thrive.[385] Instead, they are institutions in which residents suffer neglect, abuse, mistreatment, and segregation from the outside world.

Many of the individuals confined within the walls of these SSLCs should not be there. The ADA and the United States Supreme Court's decision in *Olmstead* guaranteed that they be served in the most integrated setting appropriate to their needs.[386] Despite this, Texas has repeatedly refused to ensure that those individuals are actually transferred out of the SSLCs into community-based care.[387] Even with the DOJ pressuring it to make changes to the SSLCs and the care provided to the residents within, Texas has still failed to make any substantial progress towards making those changes a reality. The years in which the Settlement between the DOJ and Texas prescribed these changes be made have come and gone.[388] Meanwhile, individuals who qualify for transfer to community-based care remain trapped inside the walls of the SSLCs, segregated from their communities.[389]

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379. *See* TROST ET AL., *supra* note 176, at 2.

380. *See* TROST ET AL., *supra* note 210, at 1–7.

381. Tex. S.B. 204, 84th Leg., R.S. (2015).

382. H. COMM. ON HUMAN SERVS., BILL ANALYSIS, Tex. S.B. 204, 84th Leg., R.S. at 10, 12 (2015), http://bit.ly/ 1X4UGYz.

383. *See* TROST ET AL., *supra* note 176, at 36.

384. *See* BILL ANALYSIS, Tex. S.B. 204, at 9.

385. *See History and Current Status*, *supra* note 57 (discussing the intended purpose of the SSLCs).

386. *See generally* Olmstead v. L.C. *ex rel*. Zimring, 527 U.S. 581 (1999).

387. *See supra* Part VI.

388. *See supra* notes 169–72 (discussing the duration of the Settlement).

389. *See* TROST ET AL., *supra* note 176, at 22.

Judicial review of the commitment orders of individuals who are involuntarily committed to the SSLCs would help guarantee that they are no longer segregated from the outside world. The biased IDT internal review process has consistently failed to transfer individuals into community-based care.[390] An unbiased judge reviewing the file on an individual would ensure that, when appropriate, he or she is transferred out of the confines of the SSLC and into the community.

Though the Texas Legislature took small steps forward in its care of individuals with I/DD, it forwent several opportunities to ensure individuals are treated in the most integrated setting. Because of this, these individuals took their fight to gain judicial review of their commitment orders to the courts.[391] Instead of allowing the courts to determine the substantive due course of law issues of the case, the State Defendants in *Abbott v. G.G.E.* have fought procedural issues for over four years, all the way to the Texas Supreme Court.[392]

No matter what the Texas Supreme Court decides, the Texas Legislature will still need to act to fix the problem. Texas can no longer sit and do nothing. Its most vulnerable citizens are segregated away from their communities. The solution to this problem is right under the nose of the legislature; they only need to look down to see it. Applying the judicial review that mental health commitment orders receive to the cases of those with I/DD is all that needs to happen. The legislature should do this now, in the upcoming legislative session, rather than later, which would open the door for more lawsuits and increased pressure from the DOJ.

It is time for Texas to properly care for its citizens with I/DD. There should never be another situation in which an individual is placed under the care of the State and withers away to a fraction of what he once was. Texas should ensure that a story like Gus's never happens again.

390. *See supra* notes 125–41 (discussing the current IDT review process).

391. *See* Abbott v. G.G.E. *ex rel.* Courtney, 463 S.W.3d 633, 642 (Tex. App.—Austin 2015, pet. filed).

392. *See id.*