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ON INTEGRATING PERSONS WITH MENTAL RETARDATION: THE ADA AND ADR

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I. INTRODUCTION

The Americans with Disabilities Act ("ADA" or "Act")[1] has been characterized by some as a "nightmare" for employers and a "dream" for plaintiffs' lawyers. Employers have expressed widespread concern about the scope and coverage of the Act. The Equal Employment Opportunity Commission ("EEOC"), charged with enforcing the employment provisions of the Act, has acknowledged that many of the provisions of the Act will need to be interpreted on a case-by-case basis, often with guidance from the courts. Though potentially unfounded, the resulting message seems to be that much litigation will be needed to interpret the rights and obligations of "consumers" (e.g., persons with disabilities) and "users" (e.g., employers or operators of public services) under the Act.[2]

This article attempts to highlight the potential importance of alternative dispute resolution ("ADR") techniques to the efficient resolution of complex disputes arising under the ADA. The ADA contains a provision for alternative dispute resolution based on the Administrative Dispute Resolution Act of 1990.[3] To underscore the relevance of ADR techniques to resolving disputes

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[1] 42 U.S.C.A. §§ 12101-12213 (Supp.1991). For a review, see **Blanck,** Empirical Study of the Employment Provisions of the Americans with Disabilities Act: Methods, Preliminary Findings, and Implications, 22 N.M.L.Rev. 119 (1992) (this issue).

[2] See **Blanck,** supra note 1, at 127-29 (identifying problems of scope of definitional issues under the Act).

[3] Compare 42 U.S.C.A. § 12212 with 5 U.S.C.A. §§ 581-593 (Supp.1991). See also Stein, The Americans with Disabilities Act of 1990: A New 'Bill of Rights' for Millions, 46 Arb. 6, 15 (1991) (reviewing ADR provision of

brought under the ADA, this article uses an example of "law in action." "Law in action" here refers to a real-world attempt to resolve complex public law issues related to the integration and prevention of discrimination against persons with disabilities covered under the ADA (in this case, related to the rights of persons with mental retardation), without first resorting to trial litigation.

A. Integrating Persons with Mental Retardation

Beginning with the well-known Pennhurst[4] and Willowbrook[5] legal cases in the 1970s, the closure or phasing-down of large public residential care facilities for persons with mental retardation has been the national trend. Largely as a result of federal class action lawsuits brought by residents of public institutional facilities, in the last two decades the majority of states have refocused their efforts toward the development of integrated programs for persons with mental retardation. Such efforts have involved, for instance, the court ordered closure or phasing-down of large public institutions and the development of integrated and accessible community services for persons with mental disabilities. Recently, the State of New Mexico has been a party in such a federal anti-discrimination class action lawsuit involving the rights of persons with mental retardation.[6] After a long and expensive trial,[7] the federal district court issued an order that mandated the State of New Mexico to close a large public residential facility and to develop integrated and accessible programs and services for persons with mental retardation. In the New Mexico case, the court also ordered that the state enhance community services provided for individuals with developmental disabilities.

The last twenty years have evidenced great advances through public law litigation in integrating persons with mental retardation into society. The lawsuits against states and their agencies, typically brought by public advocacy groups, have furthered the provision of integrated community, residential, educational, and employment programs for many persons with disabilities previously excluded from the mainstream of society.

Others have analyzed the benefits and costs of public law litigation in the area of integrating persons with mental retardation (and with other disabilities such as mental illness).[8] Several

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the ADA). Also note that the Civil Rights Act of 1991 contains a similar ADR provision, see **Blanck,** infra note 46 (discussing the measure of damages under the Civil Rights Act of 1991 and the ADA).

[4] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). The Pennhurst case is by no means resolved. Recently, a federal district court denied defendants' attempt to modify the consent decree. Halderman v. Pennhurst State School & Hosp., 784 F.Supp. 215 (E.D.Pa.1992).

[5] Wilson v. Willowbrook, Inc., 433 F.Supp. 321 (W.D.Tex.1977), aff'd, 569 F.2d 1154 (5th Cir.), cert. denied, 439 U.S. 845 (1978).

[6] Jackson v. Fort Stanton Hosp. & Training School, 757 F.Supp. 1243 (D.N.M.1990) (Memorandum Opinion and Order).

[7] The trial spanned two and half years and included several evidentiary hearings, involving numerous experts and reports. Id. at 2.

[8] See, e.g., V. Bradley, Deinstitutionalization of Developmentally Disabled Persons (1978); Landesman & Butterfield, Normalization and Deinstitutionalization of Mentally Retarded Individuals, 42(8) Am. Psychologist 809 (1987); see also Anderson, Implementation of Consent Decrees in Structural Reform Litigation, 1986 U.Ill.L.Rev. 725, 768-74 (identifying several "phases" of large scale structural reform litigation involving persons

common themes of these analyses emerge: results of such litigation often take years and even decades to implement successfully and appropriately; appeals to the United States Supreme Court on a variety of related issues are common;[9] and this complex anti-discrimination litigation is financially costly to all parties.

B. The ADA and ADR

Section 513 of title V of the ADA provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, facilitation, conciliation, mediation, fact-findings, mini-trials, and arbitration, is encouraged to resolve disputes arising under this Act." The use of ADR is voluntary under the ADA.[10] Nevertheless, the experience highlighted above with regard to federal anti-discrimination litigation for persons with mental disabilities suggests that without fair and cost-effective dispute resolution practices, the implementation of the ADA could become unnecessarily burdensome for consumers and users of the Act.

The purpose of this article is threefold: (1) to highlight a recent attempt in the State of Wyoming at resolving the complex issues associated with the integration of persons with mental retardation, without resort to costly and protracted litigation; (2) to identify a number of benefits and themes derived from the Wyoming approach, with particular emphasis on the innovative nature of the ADR procedures in the Wyoming Agreement,[11] at least as compared to earlier anti-discrimination litigation of this sort; and (3) to identify a number of challenges, future and present, faced by the parties to the Wyoming approach in particular, and by potential parties bringing claims under the ADA in general. Part II provides an overview of the Wyoming experience and highlights the substantive aspects of the Agreement. Part III identifies several themes reflected in the Agreement that may prove useful to other parties for resolving disputes raised under the ADA. Finally, part IV concludes with comments on the prognosis for success and the challenges faced by parties in federal anti-discrimination disputes, such as in the Wyoming experience and those brought under the ADA.

II. OVERVIEW OF THE WYOMING CASE

In March of 1991, the State of Wyoming and the Wyoming Protection and Advocacy System entered into an agreement designed to enhance the integration and quality of life of Wyoming citizens with mental retardation.[12] The Agreement sets forth many objectives designed to improve conditions at the Wyoming State Training School ("Training School"), a large public

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with mental illness); Sturm, A Normative Theory of Public Law Remedies, 79 Geo.L.J. 1355 (1991) (review of remedial process in public law litigation).

[9] See, e.g., Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984); see also Halderman v. Pennhurst State School & Hosp., 784 F.Supp. 215 (E.D.Pa.1992) (noting that in the eleven years of litigation prior to the consent decree, there were approximately 500 court orders, 28 published opinions, and three arguments before the United States Supreme Court).

[10] See Stein, supra note 3, at 15 (citing Congressional Conference Report, 101-396, at 89).

[11] Weston v. Wyoming State Training School, No. C90-0004 (D.Wyo. Apr. 27, 1991) (stipulated agreement and consent decree) [hereinafter Agreement].

[12] Id. The federal court subsequently approved the Agreement as a consent decree.

residential facility for persons with mental retardation. It is designed also to expand community and educational services to support the placement of the Training School residents to integrated and accessible living arrangements.

A. Events Leading to the Agreement

In January of 1990, a group of plaintiffs with mental retardation residing at the Training School initiated a federal class action lawsuit against the State of Wyoming.[13] At that time, approximately 300 persons (adults and children) with varying degrees of mental retardation, some of whom also have medical disabilities and physical challenges, resided at the facility. The Training School serves as the only such public facility in the state.[14]

By the 1990s, when the lawsuit was filed, the state had begun an effort to reduce the number of individuals residing at the Training School. In addition, the state had implemented programs to enhance the development of integratedand accessible community services for residents at the Training School. But progress toward the development of integrated living alternatives was slow and limited in number. Living conditions at the Training School also required ongoing improvement and enhancement. Buildings needed refurbishment to be accessible, treatment programs required enhanced staffing, and school-age residents at the Training School needed specialized educational services and programs.

The lawsuit filed by the Wyoming Protection and Advocacy System sought not only the improvement of conditions at the Training School, but also the establishment of a framework for integrated community services and accommodations as an alternative to institutional care. At the time the lawsuit was filed, the parties were aware of the costly and protracted nature of litigation of this kind. Similar litigation was pending in other states, including New Mexico and Oklahoma, and the amount of money spent on legal fees alone in those cases could support many of the programs targeted for all the clients in Wyoming.

Three months after filing the lawsuit, the parties entered into an agreed upon dispute resolution framework (through a stipulated agreement filed with the federal court) to expeditiously and inexpensively settle the litigation.[15] The main goal of the settlement framework was to ensure the development of integrated services and that money spent on the issues would go toward client services, not legal fees.

The impetus for entering into the settlement framework was clear to the political leadership of

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[13] The state, through its Department of Health and Department of Education, was the named defendant in the complaint filed with the United States District Court for Wyoming. The plaintiffs in this class action lawsuit were represented by the Wyoming Protection and Advocacy System, which is a non- profit corporation established pursuant to federal law.

[14] The Training School is located in Lander, Wyoming, in the Wind River Mountain Range district in the northwest quadrant of the state. The facility is a five hour drive from the state capital, Cheyenne, which is in the southeast quadrant of the state. There is no direct commercial air service between the two locations. Wyoming is a state with a population of 450,000. Medical and program resources and services are limited by the frontier nature of the state and by the location of the facility. The Training School residents often receive specialized medical services in the surrounding states, such as Utah, Colorado, or Montana.

[15] Agreement, supra note 11, stipulated agreement at 1.

the state. The leadership was aware of the large amounts of money and resources in other cases that were consumed through courtroom battles over the integration of persons with mental disabilities. The political leadership also recognized the detrimental effect of protracted litigation on individuals with disabilities, their families, and public and private professionals. Such litigation in other states not only polarized public opinion, but created a confrontational setting that detracted from the development of integrated services for persons with disabilities. Litigation in other states had also resulted in overly bureaucratic decision-making processes in response to court ordered implementation of programs.

B. Establishing a Settlement Framework

The dispute resolution settlement framework involved the designation by each party of three individuals to negotiate the various anti-discrimination claims. For the state, the negotiating team consisted of specialists in the areas of education and program services, as well as a representative from the Attorney General's Office. The plaintiffs' team consisted of program and legal specialists from the Wyoming Protection and Advocacy System.

A major aim of the settlement negotiations was to develop realistic plans for the integration into society of persons with mental retardation. The negotiating teams sought solutions that extended beyond the confines of this particular lawsuit. The parties recognized that, to be accepted by the legislative and executive leadership of the state, the Agreement had to be fiscally responsible. To ensure long term appropriations for citizens covered under the Agreement, the state team developed its negotiating position in consultation with the political leadership of the state.

During the negotiations, the parties agreed to the establishment of an Immediate Needs Assessment Team funded by the state, to develop plans and make recommendations to address the needs of individuals residing at the Training School. The establishment of the Immediate Needs Assessment Team allowed the parties to continue their negotiations while the pressing needs of class members would be addressed.[16] As a result of the assessment team screening process, for example, individuals at the Training School with medical needs were assessed and their services prioritized. Thus, during the course of the dispute resolution negotiations, residents continued to receive assessments related to their service needs.

In March of 1991, after several months of negotiations and numerous draft agreements, the parties reached formal agreement. The Agreement acted as a complete settlement by the parties, superseding prior stipulations. The next section provides an overview of the substantive provisions of the Agreement.

C. Provisions of the Agreement

Several principles that focus on the importance of providing integrated services and opportunities to persons with mental retardation and related disabilities guide the Agreement. Services are to be tailored to the needs of the individual and are intended to foster individual

[16] The Immediate Needs Assessment Team addressed individual class members' needs related to medical requirements, physical therapy, positioning and eating strategies, and behavioral supports.

growth, dignity, and integration into society. To ensure the efficient provision of integrated services, various alternative dispute resolution procedures were developed.[17] The focus of the dispute resolution procedures is to force the parties to develop and implement solutions.

This section explores the main substantive provisions of the Agreement, including agreed upon improvements at the Training School, the development of integrated community services, and the provision of free and appropriate public education for school age class members at the Training School. The section also describes the ADR procedures of the Agreement, including the establishment of a Compliance Advisory Board and a hearing officer.

1. Substantive Provisions

The "class" of citizens covered by the Agreement is focused and, at the same time, more dynamic than in previous anti-discrimination lawsuits of this kind. Class members are defined as those individuals residing at the Training School ("on the rolls") at the time the lawsuit was filed and those individuals who may be at "future risk" of being placed at the Training School. "Future risk" of placement is defined by an evaluation procedure developed by the parties subsequent to the completion of the final Agreement.[18]

Under the Agreement, the Training School is not to close. Instead, the quality of services provided at the Training School are enhanced substantially. During the pendency of the Agreement no new admissions may be made to the Training School, unless certain exceptional conditions exist. Moreover, readmissions of class members are limited to cases of emergency medical care. Readmissions are to be provided in the shortest time necessary to serve the needs of the client.[19] Although the number of clients served at the Training School is reduced significantly, staffing ratios at the facility (e.g., professional and direct care staff) are enhanced by the Agreement.[20]

Under the Agreement, the physical environment of the Training School is improved to afford residents privacy, accessibility, comfort, and dignity. For example, all residents are to be provided with clean and appropriate clothing. Integrated recreational opportunities must be made available.[21] Restraints of any form are prohibited. Medical and behavior support programs are monitored and enhanced. No medication may be administered without the written order of a physician.

The Agreement is meant to protect the basic constitutional rights of persons residing at the

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[17] Agreement, supra note 11, stipulated agreement at 17.

[18] Class members may be deleted or added to coverage by the Agreement through administrative procedures, negotiations, or appeals.

[19] Over the four year period, the Training School census is reduced from 310 to 161 on-campus residents. Twenty-nine additional beds are to be reserved for persons admitted to the intensive health care center at the Training School, projecting the total number of clients served at 190.

[20] By the end of four years, the overall staff-to-client ratio at the Training School is not to be more than 3.5 staff to one client. During the agreement, the state will continue to recruit staff at the Training School whose qualifications are suitable for practice or employment in community-based programs.

[21] Residents are also to receive a well-balanced and nutritional diet, with appropriate time set aside for meals and opportunities for family-style dining.

Training School. Each Training School resident is to have the opportunity to learn skills that help him or her integrate successfully into society. Also, while living at the Training School, residents are not to be segregated according to their degree of disability.

The placement of class members into integrated community living arrangements is to be conducted in accordance with the clients' individual program plans, with meaningful input from clients and their families. Each class member is to be placedin a location as close as practical to the area where his or her parents reside.[22] The state is to develop integrated and accessible community facilities, programs, and support services. The range of community living alternatives include, but are not limited to: independent living, natural home living, adult companion programs, shared living arrangements, foster home living, supported living arrangements, and small group living.[23]

Priority for community placement is given to those who request (or whose parents or guardians request) placement, and to those age twenty-one or younger. During each year the Agreement is in effect, class members with varying degrees of disabilities are to be placed in the community to ensure the development of comprehensive integrated services. The Agreement, however, does not require the expenditure of funds for services in the community that exceed the average cost of services at the Training School, exclusive of community related start-up costs. Nonetheless, the state is to provide sufficient funds for the development of integrated community services to serve the needs of class members.[24]

Parents, guardians, and private providers of services (i.e., employers) are expected to play an active and meaningful role in the development and implementation of the integrated community programs.[25] The programs are intended to be consistent with the services offered by the state to citizens not considered "class members" in this litigation. The focus of the Agreement is therefore on individuals and is strengthened by fostering working partnerships among state professionals, the private sector, families, and their advocates.

Each class member is also provided integrated community supports and services that are tailored to foster meaningful participation in the ordinary circumstances of life.[26] In support of this goal, an independent case management unit is established to assist class members in receiving appropriate services. The unit is meant to function as a point of contact for clients with disabilities and their families to initiate and coordinate services.[27]

In support of the Agreement, the parties also prepared a document summarizing the legal and

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[22] The on-campus census of the Training School is reduced by agreed- upon yearly reductions over the covered four year period. But no class member is to be placed into a community setting to meet a placement timetable.

[23] For more extensive review of these programs, see generally **Blanck,** supra note 1.

[24] The state is obligated to provide funding for programs at rates that reflect the actual cost of services and any regional variation in such costs.

[25] Cf. **Blanck,** supra note 1, at 221-22 (importance of employer and co- worker support in successfully implementing the employment provisions of the ADA).

[26] Cf. id. at 125-27 (major thrust of ADA).

[27] The staffing standard for case managers is to be determined, within certain levels, according to the complexity and needs of individual cases and the relative ability of the class member or his or her family or guardian to act as an advocate. All class members at the Training School or in the community are assigned to case managers.

civil rights of class members. The document was then circulated to the clients, their parents or guardians, and the public. A quality assurance and central record keeping system is to be developed so that the parties may assess systematically client programs and development.[28]

The educational programs at the Training School, serving approximately forty children in 1991, will end under the Agreement. The Wyoming Department of Education is to provide a free and appropriate public education for students formerly at the Training School. To achieve this goal, the Agreement established an Educational Needs Assessment Team to review the school-age Training School residents' educational needs. This assessment team consisted of members experienced in early childhood and transitional education and the general education of persons with disabilities. This assessment team helped develop plans for the placement of school age children at the Training School into integrated educational settings.[29]

2. Dispute Resolution and Compliance

The Agreement establishes a Compliance Advisory Board of two persons. One member of the advisory board was selected by the state and the other by the Wyoming Protection and Advocacy System. The advisory board has primary responsibility for assisting the federal district court and the parties in the implementation of the Agreement. The advisory board is to use alternative dispute resolution procedures, such as arbitration, fact-finding, negotiations, and mediation, that minimize litigation and fault-finding. The advisory board is to ensure that the energies and resources of the parties are focused on forwarding the best interests of the class members.

The advisory board is to function informally, but may hire staff or experts as necessary to ensure compliance. The advisory board is to have access to all information relating to the Agreement. The parties are required to prepare and submit reports to the advisory board outlining the degree of progress with respect to implementation. The ADR process forces the parties to use their best efforts to resolve their differences on an informal basis, with the assistance of the advisory board as necessary. This approach may be contrasted with more formal dispute resolution or remedial procedures employed in similar cases, such as a federal court establishing an office of a special master. If the parties cannot resolve a dispute, the advisory board formally resolves it for them. In such a case, a party submits a written notice of dispute to the advisory board, the opposing party responds, and if the moving party is not satisfied with the response, it may request review by the advisory board.

Once engaged formally, the advisory board may request information as needed and sets the matter for a settlement conference. After the settlement conference, the advisory board makes its recommendations and conclusions. In the event that the advisory board cannot agree how to settle the dispute, the matter is referred to a hearing officer. The hearing officer takes additional evidence, makes findings, and relays recommendations to the advisory board for a final decision

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[28] Cf. **Blanck,** supra note 1, at 146-60 (suggestions for tracking and monitoring implementation and compliance of the ADA).

[29] In terms of fiscal incentives, for the first year that a local school district is required to provide educational services to school-age class members, the district will receive 100% of allowable costs for services from the state. Thereafter, the related educational costs will be computed in a fashion consistent with local educational area practices.

on the matter. Any party not satisfied with the final advisory board decision may appeal the decision to the federal district court. The dispute resolution process may be modified by the advisory board when an issue involves an immediate threat of harm to a class member. Finally, a State Liaison Office is established to help coordinate compliance.

III. INNOVATIONS OF THE WYOMING AGREEMENT

This section identifies several of the innovative aspects of the ADR mechanisms of the Agreement and suggests, where appropriate, their potential relevance to resolving disputes that may arise under the ADA. Each innovation contributes to a more cost efficient and fair solution of issues covered by the Agreement and, potentially, to others like it. The innovations are not listed in any particular order, although some may be more important than others to the successful implementation of federal anti-discrimination disputes. Different states facing similar litigation may weigh the importance of the themes differently. To provide one illustration, the provision of specialized medical services may be a less pressing issue in more urban states. Likewise, under the ADA, smaller versus larger business entities will likely face the issues listed below to differing degrees. For example, advocates for persons with disabilities and the EEOC itself are considering whether some large employers with medical departments might be required to provide self-care and medically-related accommodations for their employees with complex disabilities.[30]

A. Realistic Goals That Are Capable of Success

The central purpose of the Agreement is to allow the parties to develop and implement a realistic system of integrated services for persons with mental retardation. The Agreement is not intended to revamp the existing service delivery system. Rather, the goal is to develop services that foster achievable and positive results. The goals and objectives of the Agreement are supported by appropriate "safety net" provisions, including an independent case management system, the appointment of ombudspersons for class members, the development of a quality assurance system, and the availability of ADR mechanisms through the advisory board. Similar strategies, such as arbitration agreements and systematic assessment of implementation, may be useful for employers in monitoring their compliance with the ADA.[31]

The class of citizens covered by the Agreement is, for the most part, identifiable. State administrators and legislators may forecast adequate appropriations to meet class and non-class member needs. In contrast, a concern expressed by employers with regard to the ADA, for example, has been the potentially large definitional scope of persons with disabilities covered by the Act.[32]

B. Model for Other Programs

The Agreement is meant to be a model for the development of integrated services for similarly

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[30] See **Blanck,** supra note 1, at 191-93 (preliminary findings for persons with mental retardation general medical needs and their relevance to employers).

[31] Cf. id. at 226-29 (discussing strategies for employers in complying with title I of the ADA).

[32] Id. at 127-29 (identifying definitional issues related to concept of disability under the ADA).

situated citizens with disabilities. But, the parties recognize the importance of using existing or generic systems to provide services for class members. The parties also recognize that substantial efforts must be devoted to staff training and education, for example, to boost the morale of the employees at the Training School who fear that they may lose their jobs as a result of the Agreement, or to educate potential co-workers of persons with disabilities.[33] The Agreement serves also as a useful impetus for Training School employees to gain work experience in integrated community programs.

C. No "Classes" of Citizens with Mental Retardation

The Agreement does not create separate systems of service delivery, one for class members and another for non-class members. Rather, it serves as a model for the development of integrated services that will be available to other similarly situated individuals. Other states involved with this type of litigation have experienced political and fiscal pressures when one group of citizens with disabilities receives "priority" over another group because they are members of a legally created "class." The Agreement attempts to avoid this problem. Similarly, those responsible for implementing aspects of the ADA (e.g., employers' obligation to provide reasonable accommodations to qualified individuals) should focus on the unique abilities of persons with and without disabilities. To the extent that this is accomplished, the perpetuation of tensions, myths, and stereotypes about persons with disabilities are lessened.

D. Client/Family/Guardian Involvement

Meaningful involvement of the clients and their families is of paramount importance. The parties view clients and their families as the ultimate consumers of the services. Professional judgments are intended to reflect the views of the persons with disabilities and their families. The Agreement illustrates a "grass roots" approach that may help resolve potential issues brought under the ADA. Implementation involves helping families and the community to support and to accept people with disabilities into the mainstream of society.

For some parents (and for other citizens not familiar with the needs of persons with mental disabilities), it will take time to accept the idea that their son or daughter, who may have spent the last thirty years of his or her life at the Training School, can live safely and independently in an integrated community setting. This observation has been true in litigation of this kind in other states. Educational and counseling programs identified in the Agreement are meant to alleviate parental concerns and fears. Also, technical assistance programs, quality assurance mechanisms, and medical safeguard procedures are included to lessen these concerns. Many of these initiatives will be used to implement the ADA. For example, the development of peer support or co-worker programs by employers for employees with severe and complex disabilities may help these employees reach their full potential in the work place.

E. Money Spent on Clients, Not Legal Fees

[33] See id. at 226-29 (stressing the importance of employer education programs for persons with and without disabilities).

The ADR process and relatively early settlement (without a trial) enables money to be spent on persons with mental retardation and not on protracted litigation fees and related costs.ADR also reduces the polarization of parties. The ADR process is geared toward avoiding an adversarial, costly, and time consuming approach to problem solving. For example, ex parte communication with the court by the parties or the Compliance Advisory Board is limited, forcing dispute resolution at less formal levels. Effective methods for "dispute avoidance" is likewise one important tool under the ADA.[34] Many potential disputes under the ADA may be avoided by having in place practical and informal ADR procedures that allow parties to resolve disputes without first resort to litigation.[35]

F. Fiscal Responsibility

The governor's office and the legislature were consulted during the settlement process. For example, as mentioned above, the costs of services are capped at the average cost of serving class members at the Training School. Fiscal incentives are developed also for local school districts to enhance appropriate educational services for school age class members. In addition, the Agreement supports planning strategies that seek federal funds (e.g., medicaid community-based waiver funds) for the expansion and development of integrated community programs and services. The Agreement therefore is meant to strengthen planning of fiscal partnerships at the federal, state, and local levels. Employers may pursue similar strategies covered under the ADA; for example, employers or other state and local entities may seek federal funds to develop training and technical assistance programs that support the implementation of the Act.

G. The Agreement Is Dynamic

The Agreement in general, and the ADR processes in particular, are designed to allow modifications by the parties and the advisory board to ensure that the terms remain appropriate. The "working contract" between the parties is therefore relational in nature, subject to appropriate adjustment.[36] To cite one illustration, class members may be added or deleted through agreed upon administrative procedures. Nevertheless, for planning purposes, ultimate compliance with the Agreement is governed by various outcome measures, including census levels at the Training School at the end of the four-year period. In this way, outcomes are measurable yet flexible enough to meet the changing needs of the setting.

Likewise, employers or other entities covered under the ADA will need to develop "working agreements" with their employees to implement rights guaranteed under the Act. The EEOC guidelines for title I (the employment provisions), for instance, support the view that the

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[34] See Stein, supra note 3, at 14 (discussing dispute avoidance and resolution under the ADA).
[35] Id.
[36] Cf. Rufo v. Inmates of Suffolk County Jail, 112 S.Ct. 748, 760 (1992) (adopting flexible standard to modify consent decrees in institutional reform litigation, a party seeking a modification must establish that a significant change in facts or law warrants revision of the decree and that the modification is suitably tailored to the changed circumstances). But cf. Halderman v. Pennhurst State School & Hosp., 784 F.Supp. 215, 216 (E.D.Pa.1992) (determining pursuant to Rufo that defendant had not carried its burden of establishing a "significant change in factual circumstances or in law.").

appropriateness of a particular reasonable accommodation will involve a dialogue between employer and employee.[37] These discussions will be ongoing because the needs, concerns, and interests of potential employees and their employers will change over time; for example, they may be subject to economic and other fiscal considerations.

H. Ownership in the Agreement by the Parties

The parties have the primary responsibility for dispute resolution and for preparing reports to the advisory board. This procedure is meant to encourage the parties to work out their disputes informally in ways that last after the Agreement is completed. The expensive and time-consuming route of appealing settlement related issues to the federal district court is provided as a last resort.

Potential disputes under the ADA may be avoided by encouraging parties to undertake primary responsibility for the dispute resolution of issues arising under the Act. One way to follow this approach is to ensure that those involved understand their rights and obligations and are given an opportunity to resolve disputes and comply with the Act prior to the formal filing of court action.[38] For example, it is expected that under the ADA anindividual with a disability will initially approach the employer to explain what the individual requires in the nature of an accommodation.

I. The Development of a Liaison Office

To foster compliance with the Agreement, the State of Wyoming created a liaison staff serving from the Governor's Office. The responsibility of the liaison office is to facilitate the implementation of the Agreement through the coordination of information across the state's health and education agencies, or through any other agencies that may become involved, such as vocational or family services. The liaison office focuses accountability for the process of implementation and aids in coordination of implementation activities.

Many large corporations and public institutions have similar "liaison offices" to serve persons with disabilities. The responsibility of a liaison office is to facilitate the implementation of the ADA through the coordination of information to all parties. A liaison office may be particularly important in large entities or businesses, given that in several recent surveys a high percentage of large employers polled were not familiar with the basic provisions of the ADA.[39] Such offices may aid in the elimination of the myths that certain businesses covered by the Act have concerning the cost and time involved in accommodating individuals with disabilities.[40]

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[37] See **Blanck,** supra note 1, at 131-35 (discussion of definition of reasonable accommodation under title I).
[38] Id. at 225-26 (most employers surveyed were not even aware of title I provisions); Stein, supra note 3, at 14 (discussion of dispute avoidance under the ADA); Sturm, supra note 8, at 1394 (participation serves educative function at the remedial stage of public law litigation).
[39] See **Blanck,** supra note 1, at 225-26 (survey of employers' awareness of the provisions of the ADA showed that a majority of employers surveyed in 1990--sixty-eight percent--did not know of the passage of the Act).
[40] See id. at 223-25 (discussing the various myths employers have about the ADA and employing individuals with disabilities).

J. Support of Local Advocacy

Through the Agreement the local advocate's role is supported and enhanced. The state and the advisory board provide supplemental funds for the Wyoming Protection and Advocacy System personnel to continue to act as independent advocates for class members. The state provides the Wyoming Protection and Advocacy System access to information relevant to the Agreement. Also, the Agreement sets forth a "review process" whereby the Wyoming Protection and Advocacy System is provided the opportunity to make meaningful review and comment on programs developed by the state. In similar ways, compliance under the ADA will require the development of working relationships between advocacy groups for persons with disabilities and those entities covered by the Act.

K. Focus is Not on Micro-Management

The thrust of the Agreement is to empower citizens with mental retardation, their families, and other parties to ensure compliance. Therefore, the alternative dispute resolution process is not geared toward the "micro-management" of the state and private professionals charged with the primary responsibility for carrying out the Agreement. Ultimate compliance by the state is meant to serve as the measure of the successful implementation of the Agreement. The state and private professionals, and not the lawyers, manage program responsibilities.

L. Reduction in Paperwork

The Agreement is structured to reduce the amount of paperwork required for the parties to show compliance. The majority of written plans or reports required proceed through the "review process," in which the parties develop and share ideas and concerns. The goal is to make any paperwork useful to the implementation of the Agreement. Plan writing for the sake of generating paperwork is discouraged by the advisory board.

The development of practical ways to document compliance with many of the provisions of the ADA will similarly require further detailed study. The central role of systematic empirical study in the assessment of the effectiveness of the Act will become increasingly important. The development of adequate empirical information on the implementation of the ADA is crucial and will help define the parameters of many of its affirmative obligations.[41]

M. Sensitivity to the Wyoming Culture

The parties and the advisory board recognize the cultural and geographic needs of the state. In a state with 450,000 residents and a land area equal to that of New England, transportation to medical care is often provided by helicopter, school districts cover large areas, and citizens retain frontier views. The challenge is to provide services that meet the particular needs of the state and its citizens. To provide a central illustration, it is envisioned that, in the long term, the Training School may become a resource center for the entire state. But the state's short-term goal is the development of integrated community services.

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[41] Id. at 236-39 (highlighting the importance of empirical study of the ADA).

Likewise, increased sensitivity to cultural, ethnic, geographic, and economic factors will likely prove important to the successful implementation of the ADA. Title I of the Act, for example, limits the obligation for employers to provide reasonable accommodations through the concept of "undue hardship."[42] The primary means for interpreting whether a firm experiences an undue hardship will be through the analysis of the economic impact of the proposed accommodation on the entity. But other factors will need to be identified with regard to the concept of undue hardship, such as the size of the firm, the composition of the work force, and the extent to which the accommodation may fundamentally alter the nature of the business.

N. Partnership with the Private Sector

Programs and services are designed to encourage private sector support of the Agreement. Private providers, such as employment and residential providers, are included in planning and implementation. Local physicians and hospitals are apprised of the Agreement and cooperative arrangements have been made to serve the class members' medical needs.

One promising and analogous approach for enhancing partnerships in the private sector with regard to the implementation of the ADA has been undertaken by the National Center for Disability Services, Human Resources Center. The Center sponsors a not-for-profit Industry-Labor Council that conducts conferences and training for employers, employees, and labor unions focusing on hiring and retaining persons with disabilities.[43] This initiative represents an attempt to foster working partnerships in support of the goals of the ADA.

O. The Agreement Is Capable of Ending

The Agreement ends when the state has complied with its goals and objectives. Because the Agreement is not open-ended, state officials may plan for future appropriations and programs in responsible ways. The aim of the Agreement is to provide lasting programs for citizens with mental retardation. The Agreement also provides assurances to the clients and their families, to the public and private sector providers, and to the Wyoming Protection and Advocacy System of the state's long-term commitment to serving and integrating its citizens with mental retardation.[44]

IV. FUTURE CHALLENGES: WYOMING, THE ADA AND ADR

The potential innovations resulting from the Agreement are substantial. The previous section also highlighted several possible applications of the Agreement to the implementation of the ADA. Many practical difficulties exist, however, in developing programs in support of the

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[42] Id. at 135-36 (discussion of concept of undue hardship).

[43] Id. at 226-27 (more detailed description of Industry-Labor Council).

[44] See R. Burt, Taking Care of Strangers 124 (1979) ("The touchstone for court interventions [in public law disputes] is to foster and provoke prolonged conversation between the immediate parties--not to offer an apparently definitive resolution of the dispute which effectively shuts it off."). Cf. Halderman v. Pennhurst State School & Hosp., 784 F.Supp. 215, 220 (E.D.Pa.1992) ("as long as one member of the class is being denied the habilitative services to which he or she is entitled pursuant to the [consent decree], there [is] not substantial compliance.").

integration of persons with mental retardation and with other disabilities covered under the ADA. Several difficulties are discussed in this section, but they are by no means the only ones expected to be encountered; rather, they are representative of some of the challenges to be faced.

A. On-going Fiscal Pressures

In these fiscally difficult times, continued funding for the programs covered by the Agreement is required.[45] To meet this challenge, Wyoming is exploring ways to enhance funding sources, with particular emphasis on the use of matching federal funds to support community programs. The development of alternative fiscal supports for services will need to be addressed in the coming years. Alternative sources of funding will likewise need to be developed to support the goals of the ADA. Federal, state, and private funding sources supporting programs for persons with and without disabilities will be needed to implement the Act. The funding of ADA support programs will likely result in reduced societal costs over time, as more persons with disabilities become consumers of goods and productive members of the work force.

B. Educational and Training Needs

The provision of educational and training programs for persons with disabilities, their families, employers, co-workers, and support staff is required. These programs are important in Wyoming for enhancing client, family, and private sector morale at a time when many fundamental changes are being made in the health care delivery system. Likewise, educational programs are warranted to ensure that individuals understand their rights guaranteed by the ADA.

C. Enhancing Communication

Enhancing communication among all parties covered by the Agreement is an ongoing concern. Many day-to-day disputes arise, whether in regard to individual or systemic problems in service delivery. The advisory board's role is to foster communication and resolve problems efficiently and expeditiously. Nevertheless, any distrust or discomfort among the parties will take time to dissipate. In the end, the state's actions in serving its citizens with disabilities must speak louder than the words set forth in the Agreement.

The same is true for the public's attitudes about persons with disabilities covered under the ADA. A 1991 Harris Poll explored the general public's attitudes about persons with disabilities.[46] As communication and interaction between persons with and without disabilities increases, a larger percentage of the public will likely become sensitive to the needs of persons of differing abilities. Providing basic information to employers and individuals covered by the Act could eliminate much of the unfounded anxiety associated with the Act and allow employers to comply

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[45] Cf. Rufo v. Inmates of Suffolk County Jail, 112 S.Ct. 748, 764 (1992) (noting that financial constraints may not be used to justify perpetuation of constitutional violations but may be a legitimate concern of government defendants in institutional reform litigation and appropriately considered in tailoring consent decree modification).

[46] See **Blanck,** The Emerging Work Force: Empirical Study of the Americans with Disabilities Act, 16(4) J.Corp.Law 695 (1992) (discussion of 1991 Harris Poll, also discussing relevance of Civil Rights Act of 1991 to ADA).

with it before legal action is brought.[47]

D. Nature of Alternative Dispute Resolution

In the Agreement, the advisory board was conceived as a moderating and neutral force. It represents an attempt at ADR with regard to the complex issues in public law litigation. Because each party selected one board member, the members must remain vigilant not to become over-identified on any particular issue with their respective nominating party. This task is more difficult than it may seem, particularly because the parties may tend to raise issues related to compliance with the advisory board member they nominated or with whom they believe is more sensitive to their position.[48] To retain its neutral role, once the advisory board has been engaged in the compliance process over a particular issue, ex parte communication with either party is limited to formal channels. The advisory board encourages each party, families, staff, and other interested persons to contact either member directly. The advisory board, whose members reside outside of Wyoming, maintains an office in the state that serves as a point of contact for any interested party.

Similar ADR procedures will likely be explored in the context of the ADA. Negotiation and mediation techniques that allow employer and employee to meet face-to-face will help enable the development of flexible models to settle disputes. A neutral third party may also be used to facilitate dialogue between the parties. Finally, another ADR technique that may prove useful is the mini-trial, in which parties are able to present their positions to determine the potential for successful settlement of disputes.

E. Developing Lasting Solutions

Through the development of trust between the parties to the Agreement and among the citizens with disabilities, their families, service providers, and other interested citizens, a long-term solution may arise to the complex issue of integrating persons with mental retardation into the mainstream of society. Long after the Agreement has ended, continued commitment, coordination, and fiscal support will be necessary to ensure the Wyoming experience is lasting. Only time will allow a true evaluation of the effectiveness of the Agreement. But the Agreement illustrates a useful model for providing the parties, the advisory board, and the court an opportunity to direct their resources and energies toward the citizens with and without disabilities they are empowered to serve.

V. CONCLUSION

This article has presented an example of "law in action." The Agreement, and its ADR procedures and innovations, represents one model for resolving federal anti-discrimination litigation, whether brought under the ADA or other civil rights laws. Anti-discrimination

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[47] See Stein, supra note 3, at 14.

[48] Cf. Menkel-Meadow, Pursuing Settlement in an Adversarial Culture: A Tale of Innovation Co-opted or "The Law of ADR", 19 Fla.St.U.L.Rev. 1 (1991) (noting tension between adversary culture and values of ADR); McEwen, Pursuing Problem-Solving or Predictive Settlement, 19 Fla.St.U.L.Rev. 77 (1991) (suggesting the need for a balance by lawyers of advocacy and problem solving through ADR).

statutes, like the ADA, are designed to eliminate the segregation of formerly disenfranchised groups in society.[49] Often, legal scholars are concerned more with defining the doctrinal limits of social reform legislation, like the ADA, rather than exploring the actual workings of the "law in action." Much has been said about how the ADA will be a nightmare for employers and a "lawyers' employment act." More needs to be discussed about how disputes may be avoided and resolved in fair, timely, and effective ways within the spirit of the social reforms embodied in the Wyoming Agreement and the ADA.

[49] See Halderman v. Pennhurst State School & Hosp., 784 F.Supp. 215 (E.D.Pa.1992) (concluding that the ADA prohibits unnecessary segregation and requires reasonable accommodations to provide opportunities for the integration of persons with mental retardation); P.D. **Blanck,** Integrating Persons with Mental Retardation: Wyoming Year Two (manuscript in preparation 1992).