

H.R. 985 Would Devastate Cases that Improve the Lives of People with Disabilities

The Honorable Bob Goodlatte Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

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

Re: H.R. 985 - the Fairness in Class Action Litigation Act of 2017.

Dear Chairman Goodlatte and Ranking Member Conyers:

The disability rights organizations, individuals with disabilities, and their family members who have signed below strongly oppose H.R. 985, the Fairness in Class Action Litigation Act of 2017.

H.R. 985 would be devastating to the rights of people with disabilities. By severely limiting attorneys' fees in cases seeking only injunctive relief, it would remove class actions as an essential tool for those who seek to improve the systems that serve people with disabilities. In the paradoxically-named "Class Member Benefit" provision, attorneys' fees for injunctive cases – with no claim for damages -- are limited to "a reasonable percentage of the value of the equitable relief, including any injunctive relief." How can one put a value, however, on the important gains achieved through these class action lawsuits? Community living? Effective communication? Freedom from abusive conditions?

And ultimately, without the ability to pay the rent, pay their staff, and make a modest living, what lawyers or organizations will be able to bring these cases?

As you are aware, Rule 23(h) of the Federal Rules of Civil Procedure requires the court to review and approve any attorneys' fees awarded in a class action, and specifically requires that the Court "must find the facts and state its legal conclusions" supporting any award. Fed. R. Civ. P. 23(h)(3). Decades of precedent ensure that these awards are reasonable in amount -- reflecting reasonable hours actually worked multiplied by a reasonable rate -- and are fair to the class. As Justice Alito explained, writing for the majority in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), this "lodestar" rate is "presumptively sufficient" to achieve the goals of attorneys' fees provisions without providing a "windfall" to attorneys. *Id.* at 552.

Indeed, the attorneys' fees provision in section 1718(b)(3) will provide an incentive to defendants to prolong litigation with the goal of ensuring that the class incur fees and costs that exceed the value of injunctive relief sought by the class – directly contrary to the stated goal of this legislation to ensure "prompt" recoveries. Under this bill, class counsel would not be paid for those fees and costs, even though it was defendant's litigation strategy that made the expenditure of time and costs necessary. The Supreme Court addressed this precise situation in *City of Riverside v.*

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Rivera, 477 U.S. 561 (1986), upholding an award of attorney's fees and costs to the plaintiff's counsel that was more than seven times greater than the value of the relief obtained for the plaintiff, and noting that a defendant "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *Id.* 580 n.11

In light of this, respectfully, no further limits are required to ensure fairness to the class; the proposed limits -- far from being "class member benefits" -- would take from potential classes of disabled people this essential tool for improving their lives.

The undersigned are also concerned about the provision prohibiting a single individual or organization from being a named plaintiff in more than one class action. This provision overlooks the fact -- especially in the disability rights arena -- that the world is still very inaccessible, and that it is not unusual for individuals with disabilities to encounter discrimination in a variety of different contexts. It would also prohibit organizations such as the American Association of Retired Persons, the National Association of the Deaf, or the National Federation of the Blind from being a class representative more than once. This would significantly hobble their mission to advocate for people with disabilities and increase the accessibility and integration of such individuals.

The cases listed below are only a small sample of the many class actions that have sought to improve life for people with disabilities. Most if not all would be impossible under the proposed legislation.

- *Willits v. City of Los Angeles*, 2016 WL 4500781 (C.D. Cal. Aug. 26, 2016): Class of pedestrians with disabilities seeking accessible sidewalks.
- *National Organization on Disability v. Tartaglione*, 2001 WL 1258089 (E.D. Pa. Oct. 22, 2001): Class of people with visual and mobility impairments seeking to secure access to polling places.
- *Commonwealth of Mass. v. E*TRADE Access, Inc.*, 03-11206-MEL (D.Mass. Dec. 7, 2007): Class of blind people seeking to make automatic teller machines accessible.
- *Bates v. United Parcel Serv.*, 204 F.R.D. 440 (N.D. Cal. 2001): Class of deaf truck drivers seeking to secure job opportunities.
- *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334 (N.D. Cal. 2008): Class of people with mobility and vision disabilities seeking removal of barriers along outdoor designated pedestrian walkways.
- *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012): Class of individuals with intellectual or developmental disabilities seeking improved employment conditions.
- *Alexander A. ex rel. Barr v. Novello*, 210 F.R.D. 27 (E.D.N.Y. 2002): Class of children with psychiatric disabilities seeking to secure prompt treatment.
- *Bacal v. Southeastern Pennsylvania Transportation Authority*, 1995 WL 299029 (E.D. Pa. May 16, 1995): Class of people with disabilities seeking to secure access to paratransit.

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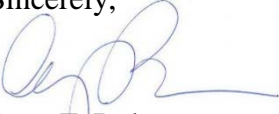
- *Dunakin v. Quigley*, 2017 WL 123011 (W.D. Wash. Jan. 10, 2017): Class of nursing home residents seeking to reform nursing home screening and referral to promote independence.
- *Boulet v. Cellucci*, 107 F. Supp. 2d 61 (D. Mass. 2000): Class of individuals with intellectual and developmental disabilities seeking reasonably prompt services.
- *Romano v. SLS Residential Inc.*, 298 F.R.D. 103 (S.D.N.Y. 2014): Class of psychiatric patients seeking to challenge mistreatment.
- *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001): Class of inmates and parolees with disabilities seeking accessible programs and services.
- *Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622 (S.D.N.Y. 1996): Class of deaf people seeking accessible alarm boxes.
- *Toney-Dick v. Doar*, 2013 WL 5295221 (S.D. N.Y. Sept. 16, 2013): Class of people with disabilities seeking to secure appropriate disaster planning.
- *Williams v. Conway*, 312 F.R.D. 248 (N.D. N.Y. 2016): Class of deaf inmates seeking effective communication.
- *Steward v. Abbott*, 189 F. Supp. 3d 620 (W.D. Tex. 2016): Class of individuals with intellectual and developmental disabilities seeking to receive services in the community.
- *Ball v. AMC Entm't, Inc.*, 246 F. Supp. 2d 17 (D.D.C. 2003): Class of deaf movie patrons seeking effective communication.
- *O.B. v. Norwood*, 170 F. Supp. 3d 1186 (N.D. Ill. 2016): Class of children with disabilities and chronic health conditions seeking adequate nursing services.
- *Lacy v. Dart*, 2015 WL 1995576 (N.D. Ill. Apr. 30, 2015): Class of inmates who use wheelchairs seeking accessible cells, transport, and access to court.
- *Benjamin v. Dep't of Pub. Welfare of Com. of Pennsylvania*, 2014 WL 4793736 (M.D. Pa. Sept. 25, 2014): Class of individuals with intellectual and developmental disabilities seeking to receive services in the community.
- *Harry M. v. Pennsylvania Dep't of Pub. Welfare*, 2013 WL 4500051 (M.D. Pa. Aug. 21, 2013): Class of deaf Medicaid recipients seeking effective communication.
- *V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009): Class of people with disabilities challenging cutbacks to in-home attendant care program that prevents out-of-home placement.
- *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal 2009): Class of seniors and people with disabilities challenging restrictive eligibility criteria for Adult Day Health Care that would have caused unnecessary placement in nursing homes.

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We urge that the Committee not move this bill forward. If the bill does move, we urge that hearings be convened so that this Committee may hear from the many people -- including people with disabilities -- whose lives this legislation will affect.

Thank you for your attention to this letter.

Sincerely,



Amy F. Robertson
Co-Executive Director
Civil Rights Education and Enforcement Center

cc: Members of the House Judiciary Committee (by fax)

Co-Signers

- American Council of the Blind
- Arizona Center for Disability Law
- Association on Higher Education And Disability (AHEAD)
- Autistic Self-Advocacy Network
- Center for Accessible Technology
- Center for Public Representation
- Colorado Cross-Disability Coalition
- Disability Independence Group
- Disability Law Center of Massachusetts
- disAbility Law Center of Virginia
- Disability Law Colorado
- Disability Rights Advocates
- Disability Rights Bar Association
- Disability Rights California
- Disability Rights Center – New Hampshire

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Disability Rights DC at University Legal Services

Disability Rights Education and Defense Fund

Disability Rights Florida

Disability Rights Iowa

Disability Rights Maryland

Disability Rights Mississippi

Disability Rights Nebraska

Disability Rights Pennsylvania

Disability Rights Tennessee

Disability Rights Texas

Disability Rights Vermont

Disabled Parent Rights

Helping Educate to Advance the Rights of the Deaf (HEARD)

Judge David L. Bazelon Center for Mental Health Law

Legal Aid at Work (formerly known as Legal Aid Society – Employment Law Center)

National Association of the Deaf

National Disability Rights Network

National Federation of the Blind

National Health Law Program

Paralyzed Veterans of America

The ARC

Washington Lawyers' Committee for Civil Rights and Urban Affairs