

# When the P&A is the Plaintiff: Issues Related to Standing

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# P&A Standing: Background

- What is associational standing?
- What standard applies?
- How can P&As assert standing?
- What are the pros/cons?
- What other considerations apply?

# Article III Standing

- Constitution limits the power of the federal courts to deciding only actual “cases” and “controversies.” U.S. Const., art. III, § 2, cl. 1.
- A plaintiff must demonstrate: (1) an injury-in-fact; (2) a causal connection between that injury and the challenged conduct; and (3) the likelihood that a favorable decision by the court will redress the alleged injury.

*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)

# Associational standing

- Organization's members would otherwise have standing to sue in their own right;
- Interests organization seeks to protect are germane to its purpose; and
- Neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Adver. Comm'n,  
432 U.S. 333, 343 (1977)

# Indicia of Membership for P&As

Guided by persons with disabilities

- Governing Board
- Advisory Counsels

Input from persons with disabilities

- Priority setting process
- Grievance process

Key question – are constituents the “functional equivalent” of members?

*Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003)

# Case Examples

- ***Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999)**(P&A had standing because its constituents, “[m]uch like members of a traditional association, . . . possess the means to influence the priorities and activities the [organization] undertakes.”)
- ***Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003)**(the organization is sufficiently identified with and subject to the influence of those it seeks to represent as to have a ‘personal stake in the outcome of the controversy.’”)

# Case examples

- ***Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012)**(P&A contractor did not have associational standing, since it was not bound by the protection and advocacy agency’s statutory requirements.)
- As a result, the court concluded that there was “no evidence that the individuals with mental illness on behalf of whom DAI brought this case have anything approaching the indicia of membership that is required under *Hunt*.” *Id.* at 159.

# Case examples

- **Ass'n for Retarded Citizens v. Dallas County, 19 F.3d 241 (5th Cir. 1994)**(affirming dismissal and holding that organization had neither organizational nor associational standing to maintain suit)
- **Disability Rights Wisconsin Inc. v. Walworth City Board of Supervisors, 522 F.3d 796 (7th Cir 2008)**(amended pleadings failed support organizational or associational standing)

# Legal Arguments for P&A Standing

- Statutory authority
  - PAIMI Act 42 U.S.C. § 10805(a)(1)(B)
  - PADD 42 U.S.C. §15043(a)(2)(A)(i)
- Congressional Intent (Amending DD Act)
  - “the current statute is clear that P&A systems have standing to pursue legal remedies...”
    - S. Rep. No. 120, 103 Cong., 1<sup>st</sup> session 39-40 (1993)
- Case law precedent
  - Favorable Circuit decisions: 7<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>
  - Mixed / unfavorable 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup>
- Department of Justice
  - Statement on Enforcement of Integration Mandate of Title II

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# Important Considerations

## Advantages

- Protects against mootness
- Avoids reliance on class certification
- May reduce potential conflicts with guardians
- May help protect privacy of clients and mitigate risk of retaliation
- In prison, jail & JJ cases, avoids many PLRA restrictions

## Disadvantages

- P&A is a party, so subject to interrogatories, requests for admissions, depositions
- Discovery on standing may be intrusive
- Complicated attorney/client issues
- Still want/need individual exemplar(s) who is a constituent “member”

# Before you decide

- Examine law within your jurisdiction / circuit
- Assess legal claims / setting / affected individuals
- Draft detailed pleading on indicia of membership
- Weigh risks discovery (depositions staff; budgets; policies and personnel records)
- Ensure availability of outside co-counsel/partners
- Consider issues of exhaustion
- Explore alternatives: using standing and class; adding another organizational plaintiff (not P&A)

## CONSIDERATIONS IN BRINGING A CLASS ACTION CASE VS. USING P & S STANDING: WHY CLASS MAY BE A BETTER CHOICE

- A class case avoids issues surrounding discovery of the P & A
  - 30(b)(6) depositions of an organization representative
    - Who, how much information with a lawyer not on the case know
    - Discovery about funding, rationale for bringing the case
  - Interrogatories under FRCP 26
  - Subpeona for written materials
    - Electronically stored information
- A class claim may provide broader relief than what is available using P & A standing alone.

# CONSIDERATIONS IN BRINGING A CLASS ACTION CASE VS. USING P & S STANDING: WHY CLASS MAY BE A BETTER CHOICE

A class claim may provide broader relief than what is available using P & A standing alone.

P & A are generally limited to providing advocacy for individuals with disabilities.

Generally measure by ADA definition of a disability

Class claim may be broader and allow relief to individuals who do not meet this definition.

subclass of individuals with disabilities within a more broad case.

Braggs  
voting case

- Resolving a P & A standing case does not require direct input from affected individuals.
  - No fairness hearing under FRCP 23
  - P & A staff, nor governing body or advisory counsels may contain individuals who have been directly impacted by challenged conduct
    - Prison, long term placement in a mental health hospital, specific medical issues
  - Scepticism of the Court in approving a settlement without direct input from affected individuals
    - Collusion
    - Buy in from affected individuals

- Since resolution of a class settlement requires notice, and the right to object, it forces individuals who may not agree with all aspects of a settlement to raise the issue
  - Does not force the P & A to unilaterally balance competing issues in resolving aspects of the settlement
    - Bragg: Counsel who represent inmates under a sentence of death objected to IQ testing which was the gateway to rights under the ADA for inmates with purported ID issues
      - Death Penalty Counsel was required to affirmatively weigh the benefits of ADA protections and accommodations against the potential 8<sup>th</sup> Amendment issues
      - The P & A was not required to choose between providing a path to ID ADA accommodations vs. the affect that additional IQ testing may have had to pending Atkins claims

- In some circumstances, an agreed settlement of a class claim may be easier for defendants than the same resolution of a P & A claim.
  - Resolution of a class claim binds the class during the duration of the settlement period
  - Resolution of a P & A claim only binds the P & A
    - Individuals, or other entities affected by the claim are not foreclosed from bringing claims on the same issues during the duration of the settlement period.

- Conflict with co-counsel when the interests of the co-counsel may differ from the interests of the P & A
  - In many large systematic cases, a P & A may lack the attorney resources, or monetary resources to bring a case
    - P & A limited only to “small” cases or;
    - Risk of loss of message and autonomy is co-counsel if the lead attorneys
  - Can this be resolved by the fact that the P & A is the client
    - What about the circumstance where the message or priority that co-counsel want to do does not directly implicate the core issues of the lawsuit
    - Co-counsel want so advocate for something which affects the ability to negotiate a settlement of the lawsuit but is not a direct part of the lawsuit.

# THE DECISION TO BRING A CLASS ACTION LAWSUIT AND BRINGING A SUIT USING P & a STANDING ARE NOT MUTUALLY EXCLUSIVE

- ADAP has alleged both in our two most recent major cases
  - Hunter v. Beshear: waiting list for evaluation of individuals thought, or found to be incompetent to stand trial.
    - Settled as a class case
  - Braggs v. Dunn: Case brought against the Alabama Department of Corrections for ADA claims and constitutionally inadequate mental health care.
    - ADA issues resolved as a class case
    - Mental health case proceeded to trial on liability
      - Court from P & A associational standing on behalf of all inmates
      - Court found class only for Male inmates
      - Relief will be identical
    - Without bring both class claims and P & A standing claims female inmates would not have been entitled to relief and substantial remedies for mental health care deficiencies.

## IN PRAISE OF P&A STANDING, Part 1: P&A-ness Benefits

- Fulfills the mission and mandate of the P&A
  - Uses “the authority to ...pursue administrative, legal, and other appropriate remedies”
- Utilizes the full power of the P&A
  - The twin “superpower” to access authority
- Builds the capacity and perception of the P&A as an enforcement entity with the right and power to seek systemic remedies

## IN PRAISE OF P&A STANDING, Part 2: Strategic Benefits

- Maintaining case focus on defendant's conduct/violations, not individual manifestations of harm
  - Serves the goal of properly framing the systemic relief
  - Eliminates distraction of “sub-class” harm, etc.
- Avoiding mootness
  - So long as one constituent is being harmed, the case is never moot
- Avoiding exhaustion
  - Systemic relief is not available through individual claims

## IN PRAISE OF P&A STANDING, Part 3: Constituent Benefits

- Reduces exposure to retaliation (e.g. constituents in facilities, prison, etc.)
- Reduces exposure to invasive discovery of individuals
- Ensures equity in remedy

IN PRAISE OF P&A STANDING, Part 4:  
Practical Benefits v. Class Action Claims

- No class cert battle or class management
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## Limiting a 30(b)(6) deposition: Standing facts v. Substantive facts

- A Rule 30(b)(6) deposition as to the basis for associational standing is usually fair game for *Hunt* analysis – e.g. mission, composition of the board, etc.
- A Rule 30(b)(6) deposition of the P&A about the facts of the case is likely improper
  - the P&A has generally gathered facts through attorney investigation and/or client presentation
  - a substantive fact deposition is effectively a deposition of counsel
  - deposition of counsel implicates work product

Limiting a 30(b)(6) deposition:  
The P&A as law firm, not fact witness

- Substantive facts known to the P&A based on investigation by attorneys are likely protected from disclosure
  - [SEC v. Rosenfeld](#), 1997 U.S. Dist. LEXIS 13996 (SDNY 1997)
  - [EEOC v. McCormick & Schmick's Seafood Rest., Inc.](#), 2010 U.S. Dist. LEXIS 61603 (D. Md. 2010)
  - [Sierra Club v. BNSF Ry. Co.](#), 2016 U.S. Dist. LEXIS 116716 (WD Wash. 2016)
  - <https://www.naag.org/publications/nagtri-journal/volume-1-number-5/pitfalls-in-rule-30b6-depositions-of-law-enforcement-authorities.php>

## Limiting a 30(b)(6) deposition: Motion for a protective order

- Rule 26(c) motion: prohibiting or limiting discovery, prescribing a different method of discovery
- Rule 26(b)(3) standard for work product
  - Requesting party must show substantial need and inability to obtain substantial equivalent – e.g. through interrogatories, documents, etc.
  - Mental impressions, opinions, conclusions, and legal theories of counsel are immune from discovery

Questions?