THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division
United States Department of Justice
By: RICHARD J. FARANO
Senior Trial Attorney
950 Pennsylvania Avenue, NW, PHB Room 5020
Washington, DC 20530
(202) 307-3116
Attorney for *Amicus Curiae,*
United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DISABILITY RIGHTS NEW JERSEY, INC.; ALLISON HARMON, by and through her guardians, Valerie Harmon and Linda Lemore; and FREDRENA THOMPSON,	)	
Plaintiffs,	)	
v.	)	Civ. No.: 05-CV-4723 (AET)
JENNIFER VELEZ, in her official capacity as Commissioner for the Department of Human Services for the State of New Jersey; and the STATE OF NEW JERSEY,	)	
Defendants.	)	

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND REGULATIONS

LEGISLATIVE MATERIALS

INTEREST OF THE UNITED STATES

The United States appears as *amicus curiae* to urge the Court to grant Plaintiffs' Motion for Summary Judgment on their claims brought under the Americans with Disabilities Act of 1990 ("ADA") and to deny Defendants' Motion for Summary Judgment on Plaintiffs' claims.

For reasons set forth in greater detail in the accompanying memorandum in support of the United States' motion for leave to file a limited brief as *amicus curiae*, the United States is in a unique position to aid the Court in addressing the ADA issues, as the Department of Justice enforces Title II of the ADA. See 42 U.S.C. § 12133. As a result, the United States has a special interest in the subject matter and how courts construe the statute's protections. An *amicus* filing from an agency charged with enforcement of the statute at issue can be particularly useful and can "contribute to the court's understanding" of the issues involved in a particular lawsuit. Harris v. Pernsley, 820 F.2d 592, 603 (3d Cir. 1987).

Moreover, the issues raised in the parties' cross motions for summary judgment are issues of great public interest and importance as they implicate the constitutional and legal rights of often vulnerable institutionalized persons with intellectual and other developmental disabilities. There is a strong public interest in eliminating the harm that attends unnecessary and inappropriate institutionalization. Pursuant to its statutory enforcement authority, and the

inherent public interest providing that authority, the Department of Justice has an obligation to work to protect and vindicate the rights of persons with developmental disabilities and, therefore, has a demonstrated interest in this matter.

PRELIMINARY STATEMENT

This case is appropriate for summary judgment, as there are no genuine issues of material fact with respect to the arguments contained in the parties' cross motions. The Court is presented with a purely legal question: Does defendants' unnecessary segregation of individuals with disabilities in its public institutions constitute discrimination under Title II of the ADA?

The Court has before it a substantial accumulation of years of admissions by defendants, as well as other undisputed evidence, that individuals with disabilities currently are inappropriately institutionalized in New Jersey's public institutions and would be better served in integrated community programs. The State admits that the vast majority of the individuals residing in its public developmental centers are qualified for integrated community placement and do not oppose moving to the community. In defiance of the long-standing community placement recommendations of the State's own treating professionals, defendants have unnecessarily segregated these individuals in institutions and away from society and have failed to provide care in the most integrated setting appropriate to their needs – in this case, community-based programs. Specifically, the State

acknowledges that at the time the State published its community placement Olmstead Plan in May 2007, approximately 2,457 institutionalized persons residing at one of the State's developmental centers (81 percent of the total number of residents), had a recommendation for community placement by one of the State's interdisciplinary teams. Moreover, the State admits that out of these 2,457 persons, 2,303 affected individuals did not oppose community placement. Undisputed facts, therefore, reveal that the State provides services to far too many individuals with disabilities in the most segregated setting imaginable – its large, congregate institutions. Indeed, there are admittedly hundreds of institutionalized residents (at least 2,303 as of May 2007) who meet ADA and Olmstead criteria for community integration. Yet, these qualified and unopposed residents remain inappropriately segregated in the State's institutional facilities.

As a result, the State fails to serve individuals confined in its public institutions in the most integrated setting appropriate to their needs in violation of federal law. This unnecessary segregation is a form of discrimination prohibited by the ADA and its implementing regulations. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d); Olmstead v. L.C. ex rel Zimring, 527 U.S. 581, 601-02 (1999).

The State's defense of its discrimination is without merit. Community placement from the State's developmental centers has slowed to a trickle, while the State is continuing to admit new persons to its segregated institutions. Moreover,

the State can now provide nothing more than very vague assurances that additional limited placements will occur at some point in the unspecified future. As a result, the State does not have in place either the capability or the commitment to implement a comprehensive, effectively working Olmstead Plan. Without a realistic, effectively working plan or the stated commitment or ability to implement a plan, the State's efforts at establishing a fundamental alteration defense must fail. In the instant matter, placing individuals in the community would only work a reasonable modification of the State's program – one that even the State acknowledges will save it several hundred million dollars. Because the State may utilize existing community programs to meet outstanding needs, it cannot make out a successful fundamental alteration defense.

ARGUMENT

I. THE UNNECESSARY SEGREGATION OF INDIVIDUALS WITH DISABILITIES IN INSTUTITONS IS A FORM OF DISCRIMINATION PROHIBITED BY THE ADA AND ITS IMPLEMENTING REGULATIONS

As plaintiffs have demonstrated in their submissions in support of their summary judgment motion, this Court already has before it a substantial amount of undisputed evidence that individuals with disabilities have long been inappropriately institutionalized in New Jersey's public institutions and would be

better served in integrated community programs.[1] Over two thousand of these individuals are not opposed to moving to the community and are qualified for placement, in part, because defendants' own professionals have indicated that community placement is the professionally justifiable course of action for them. As we set forth below, by failing to serve qualified individuals with a disability in the most integrated setting appropriate to their needs, defendants are violating the ADA's prohibition on disability-based discrimination. The relief that plaintiffs are seeking under the ADA merely requires the State of New Jersey to fulfill its own judgments and deliver services to people with disabilities in the most integrated setting appropriate to their needs.

[1] Community-based programs are integrated services both because they are physically located in the mainstream of society and because they provide opportunities for people with mental disabilities to interact with their non-disabled peers in all facets of life. An institutional setting, on the other hand, is a segregated environment because individuals living in such facilities are separated from the community and walled off from the mainstream of society, isolated and apart from the natural community where all of us live, work, and engage in life's many activities. Wyatt by and through Rawlins v. King, 773 F. Supp. 1508, 1512 (M.D. Ala. 1991). Institutionalization stigmatizes individuals and prevents them from building lives in the community, forming personal relationships, and obtaining employment.

A. Ending the Discrimination of Segregation and Isolation Through Unnecessary Institutionalization Is a Specific Purpose of the ADA

Nearly twenty years before enacting the ADA, Congress recognized that society historically has discriminated against people with disabilities by unnecessarily segregating them from their family and community, and in response, enacted Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The sponsors of that legislation condemned the "invisibility of the handicapped in America," and introduced bills responding to the country's "shameful oversights" that caused individuals with disabilities to live among society "shunted aside, hidden, and ignored." Alexander v. Choate, 469 U.S. 287, 296 (1985) (internal quotation marks omitted). Almost twenty years later, Congress acknowledged that the Rehabilitation Act has not fulfilled the "compelling need … for the integration of persons with disabilities into the economic and social mainstream of American life," S. Rep. No. 116, 101st Cong., 1st Sess. 20 (1989). It was the purpose of the ADA to "continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life." H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 49-50 (1990), reprinted in 1990 U.S.C.C.A.N. 472-73.[2]

[2] In the ADA, Congress set forth prohibitions against discrimination in employment (Title I, 42 U.S.C. §§ 12111-12117), public services furnished by governmental entities (Title II, 42 U.S.C. §§ 12131-12165), and public accommodations provided by private entities (Title III, 42 U.S.C. §§ 12181-

The ADA begins with congressional findings and purposes that detail the reasons why the statute was necessary. Congress specifically found that "institutionalization" is one of the "critical areas" in which discrimination against individuals with disabilities persists. 42 U.S.C. § 12101(a)(3). It further found that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). These discriminatory practices continue today through "outright intentional exclusion" and "segregation." 42 U.S.C. § 12101(a)(5). Congress, therefore, recognized that the isolation, segregation, and exclusion represented by unjustifiable institutionalization constitute disability-based discrimination. Indeed, it was in the ADA that Congress, for the first time, referred expressly to "segregation" of persons with disabilities as a form of "discrimination," and to discrimination that persists in the area of "institutionalization."

Consistent with the goal of comprehensive integration, the ADA prohibits public entities from discriminating by reason of disability. 42 U.S.C. § 12132.

12189). The statute as a whole is intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

Title II of the ADA forbids state and local governments to discriminate against people with disabilities, and is divided into two parts. Part A, 42 U.S.C. §§ 12131-12134, contains the general prohibition against disability-based discrimination by public entities and other generally applicable provisions. (Part B applies to public transportation and is, therefore, not applicable to this case.)

Part A of Title II mandates that "no qualified individual with a disability[3] shall, by reason of such 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 such entity." 42 U.S.C. § 12132.

In 42 U.S.C. § 12134, Congress directed the Attorney General to promulgate regulations implementing this general mandate. See H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 52 (1990), reprinted in 1990 U.S.C.C.A.N. 475 ("Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited.").

[3] A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

Congress did specify, however, that (except with regard to program accessibility and communication issues) the Attorney General's Title II ADA regulations "shall be consistent with [the ADA] and with the coordination regulations under part 41 of title 28, Code of Federal Regulations … applicable to recipients of Federal financial assistance under section 794 of Title 29 [Section 504 of the Rehabilitation Act of 1973]." 42 U.S.C. § 12134(b). This citation refers to the Section 504 coordination regulations of the former Department of Health, Education, and Welfare ("HEW").[4] Most pertinent here, the specified coordination regulations contain an express, stand-alone, integration requirement which mandates that "[r]ecipients [of federal financial assistance] shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d).[5]

---

[4] HEW was originally the agency designated to coordinate Section 504 regulations promulgated by the various federal agencies. It promulgated such coordination regulations on January 13, 1978. Pursuant to an Executive Order on August 11, 1981, responsibility for these coordination regulations was transferred to the Department of Justice, which adopted the regulations *in toto* and transferred them to 28 C.F.R part 41. The regulations remain there today, despite the fact that other Section 504 regulations, including regulations for the Department of Health and Human Services, are found in other parts of the Code of Federal Regulations.

[5] The congressional choice, made in Title II of the ADA, to ratify the Section 504 coordination regulations, not any other specific set of Section 504 regulations, is important; other Section 504 regulations did not contain a stand-alone integration requirement. See Metro Broad., Inc. v. FCC, 497 U.S. 547, 563 (1990)

B. The ADA's Legislative History Affirms that One of Its Major Purposes Is to Remove the Barriers of Unnecessary Segregation

The ADA's legislative history confirms that Congress intended the ADA to end the unnecessary segregation of people with disabilities from the community because "[o]ne of the most debilitating forms of discrimination is segregation imposed by others." S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989). In introducing the legislation, Senator Tom Harkin declared that '[f]or too long, individuals with disabilities have been excluded, segregated, and otherwise denied equal, effective, and meaningful opportunity to participate in the economic and social mainstream of American life. It is time we eliminate these injustices." 135 Cong. Rec. S19801 (1989). The House and Senate Reports emphasize that the purpose of the Act is to end the isolation, exclusion, and segregation of individuals with disabilities, as well as the discrimination that "persists in such critical areas as … institutionalization." S. Rep. No. 116, 101st Cong., 1st Sess. 8 (citing findings of the U.S. Commission on Civil Rights). See also id. at 20 ("compelling need" for the "integration of persons with disabilities into the economic and social mainstream of American life"); H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 22

("overriding significance" must be attached to the congressional ratification of administrative regulations). Unlike the stand-alone integration requirement in the Section 504 coordination regulations, the integration requirement in other Section 504 regulations is specifically linked to differences in services provided to individuals with disabilities and those without disabilities.

(1990), reprinted in 1990 U.S.C.C.A.N. 304 (purpose of the ADA is to "bring persons with disabilities into the economic and social mainstream of American life"); id. at 28, reprinted in 1990 U.S.C.C.A.N. 310 (noting the historic "isolation" of individuals with disabilities); H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 26 (1990), reprinted in 1990 U.S.C.C.A.N. 448-49 (finding that "segregation for persons with disabilities 'may affect their hearts and minds in a way unlikely ever to be undone,'" (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)); H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 49-50 (1990), reprinted in 1990 U.S.C.C.A.N. 472-73 ("purpose of title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life").

Unnecessary and unjustifiable institutionalization was also specifically identified in congressional testimony by a number of sponsors and supporters of the ADA as one of the forms of segregation and discrimination that the ADA was intended to eliminate. For example, former Senator Lowell Weicker, an original sponsor of the ADA, testified about the need for the ADA to eliminate the unnecessary isolation and segregation that institutionalization represents: "For years, this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and in segregated educational settings. It is that isolation and segregation that has become

the basis of the discrimination faced by many disabled people today. Separation is not equal. It was not for blacks; it is not for the disabled." ADA: Hearing Before the Sen. Comm. on Labor and Human Res. and the Subcomm. on the Handicapped, 101st Cong., 1st Sess. 215 (1989). See also 135 Cong. Rec. S4993 (daily ed. May 9, 1989) (Senator Ted Kennedy testifying that the ADA "will roll back the unthinking and unacceptable practices by which disabled Americans today are segregated, excluded, and fenced off from fair participation in our society by mindless biased attitudes and senseless physical barriers"); 136 Cong. Rec. H2447 (daily ed. May 17, 1990) (Representative Miller attesting that "[s]ociety has made [people with disabilities] invisible by shutting them away in segregated facilities").

As summed up by then-Attorney General Richard Thornburgh, "many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence." S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989); H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 32 (1990), reprinted in 1990 U.S.C.C.A.N. 313. Nowhere is the state of isolation and dependence more intolerable than when it occurs, as in this case, because of unnecessary and unjustified segregation in institutions.

C. ADA Regulations Require States to Provide Services in the Most Integrated Setting Appropriate to the Needs of People with Disabilities

The regulations issued by the Attorney General to comply with Congress's mandate in 42 U.S.C. § 12134, promulgated pursuant to congressional delegation only after public comment, particularize Congress's broad language. Following Congress's explicit directions, the Title II provision relevant here, known as the "integration regulation," adopts the precise language of the Section 504 coordination regulation on integration, requiring states to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." Compare 28 C.F.R. § 35.130(d) (ADA Title II integration provision) with 28 C.F.R. § 41.51(d) (Section 504 coordination regulation).

The Department of Justice has consistently maintained that undue institutionalization qualifies as discrimination by reason of disability, and because the Department is the agency directed by Congress to issue regulations implementing Title II, the Supreme Court has determined that "its views warrant respect" and that the courts may properly look to the agency's views for "guidance." Olmstead, 527 U.S. at 597-98.

With the integration regulation, the Attorney General established that a state's provision of services in an unnecessarily segregated setting constitutes

unlawful disability-based discrimination. Id. at 592. The Attorney General has explained that "the most integrated setting appropriate to the needs of qualified individuals with disabilities" means "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35 app. A at 452 (Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services) (1994). People with disabilities who are segregated behind institutional walls are not integrated within society at large and are unable to interact with non-disabled persons to the fullest extent possible.

In the preamble to the Title II regulations outlining general prohibitions against disability-based discrimination, the Attorney General appreciates that integration is the antidote to segregation: "Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status." Id. at 449-50; accord H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 56 (1990), reprinted in 1990 U.S.C.C.A.N. 479. Particularly where, as here, a state has admitted that an integrated, community setting is more appropriate than a segregated, institutional one, the ADA's mandate against unnecessary segregation should be given full effect.

The Attorney General has underscored the fact that the overarching intent behind selecting the various forms of discrimination delineated in the regulations is to forbid practices that exclude and unnecessarily segregate. Moreover, the Attorney General has emphasized that it is individual need that must drive the decisions of state agencies, not stereotypic and erroneous presumptions about classes of disabilities: "Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do." 28 C.F.R. pt. 35 app. A at 449.

Accordingly, based on the record in this case that the individuals at issue in plaintiffs' motion require placement in integrated community programs, continued segregation is unjustifiable. Such continued segregation constitutes unlawful disability-based discrimination under the ADA and must be remedied.

The Title II integration regulation accords with the ADA's statutory framework, congressional findings, legislative history, and Congress's directives. It recognizes that in the case of individuals with disabilities, discrimination takes

many different forms, including practices that perpetuate the false assumption that people with disabilities must be segregated from the rest of society in institutions. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (requiring special use permit for operation of group home for persons with developmental disabilities lacked rational basis and violated the Fourteenth Amendment). The Attorney General's integration regulation reflects Congress's determination that to achieve the Act's purposes, services must be provided in the most integrated setting appropriate to each individual's needs. Surely, where, as here, the State itself has determined that a segregated setting is inappropriate, an integrated setting is mandated.

II. THE COURTS HAVE AFFIRMED THAT STATES ARE OBLIGATED TO PROVIDE SERVICES TO QUALIFIED INDIVIDUALS IN THE MOST INTEGRATED SETTING APPROPRIATE TO THE INDIVIDUAL'S NEEDS

A. Unjustified Isolation Is Discrimination Based on Disability that Is Prohibited by the ADA and Its Implementing Regulations for Qualified Individuals Who Do Not Oppose Community Placement

As set forth above, the ADA requires that the State here provide services to qualified individuals with disabilities in the most integrated setting appropriate to their needs. See 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the service, programs, or activities of a public entity, or be subjected

to discrimination by any such entity."), and its implementing regulation, 28 C.F.R. § 35.130(d).

In construing the anti-discrimination provision contained within the ADA, the Supreme Court held that "[u]njustified isolation … is properly regarded as discrimination based on disability." Olmstead, 527 U.S. at 597. The Court recognized that unjustified institutional isolation of persons with disabilities is a form of discrimination because the institutional placement of persons who can handle and benefit from community settings "perpetuates unwarranted assumptions that persons so isolated are incapable or untrustworthy of participating in community life" and because "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." Id. at 600-01. The Court noted the dissimilar treatment persons with disabilities must endure just to obtain needed services: "In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice." Id. at 601.

A violation of the integration mandate is made out if the institutionalized individual is "qualified" for community placement – that is, he or she can "handle

or benefit from community settings," and the affected individual does not oppose community placement. Id. at 601-03. Indeed, the Court stressed that states "are required" to provide community-based treatment for qualified persons who do not oppose unless the State can establish an affirmative defense. Id. at 607. (As we discuss below, the State may interpose a defense that community placement would work a fundamental alteration. Id. (plurality opinion).)

The reasonable assessment of state professionals is one way, but not the only way, to make such a qualification determination. Id. at 601-02. For example, although Olmstead itself involved two plaintiffs whose treatment professionals had determined community placement was appropriate, the integration mandate is not limited to that narrow fact setting. The regulation that creates the integration mandate does not refer to treating professionals; it simply requires services to be administered "in the most integrated setting appropriate to the needs of" the individual. 28 C.F.R. § 35.130(d). The regulation does not in any way purport to limit the evidence on which a plaintiff may rely in showing that a more integrated setting is appropriate. Indeed, a requirement that Olmstead plaintiffs come to court armed with the recommendations of a state's treating professionals would "allow States to avoid the integration mandate by failing to require professionals to make recommendations regarding the service needs of institutionalized individuals with mental disabilities." Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184,

258-59 (E.D.N.Y. 2009) (hereinafter, "DAI II") ("The court does not read Olmstead as creating a requirement that a plaintiff alleging discrimination under the ADA must present evidence that he or she has been assessed by a 'treatment provider' and found eligible to be served in a more integrated setting … [t]o find otherwise would render the ADA's integration mandate effectively unenforceable"); Joseph S. v. Hogan, 561 F. Supp. 2d 280, 291 (E.D.N.Y. 2008) ("[I]t is not clear whether Olmstead even requires a specific determination by any medical professional that an individual with mental illness may receive services in a less restrictive setting or whether that just happened to be what occurred in Olmstead.").

In any event, for purposes of the instant cross motions for summary judgment, it is sufficient to know that the State here admits that literally hundreds of individuals in its public institutions are "qualified," in that they can "handle or benefit from community settings." Olmstead, 527 U.S. at 601-02. Specifically, the State readily acknowledges that at the time the State published its Olmstead Plan, entitled "Path to Progress," in May 2007, there were 2,457 institutionalized persons residing at one of the State's developmental centers who had a recommendation for community placement by one of the State's interdisciplinary teams. Brief on Behalf of New Jersey Defendants, Mar. 25, 2010 at 7 (hereinafter, "Defs.' Brief"). The State informs us that this represents approximately 81 percent

of the total number of developmental center residents at the time. Id. Moreover, the State admits that out of these 2,457 persons, 2,303 affected individuals did not oppose community placement. Id.

As a result, the undisputed facts here reveal that there are hundreds and hundreds of institutionalized residents (at least 2,303 as of May 2007) who meet ADA and Olmstead criteria for community integration. Yet, the vast majority of these qualified and unopposed affected individuals remain inappropriately segregated in the State's institutional facilities.

B. The State's Fundamental Alteration Defense Fails Because It Cannot Demonstrate the Commitment to Implement a Comprehensive, Effectively Working *Olmstead* Plan and Because It Cannot Establish that Community Placement Would Fundamentally Alter the State's Ability to Properly Care for the Individuals

As referenced above, the State may interpose a defense that community placement cannot be reasonably accommodated in that it would "entail a fundamenta[l] alter[ation] of [its] services and programs." Olmstead, 527 U.S. at 603 (plurality opinion). Indeed, the State here contends that requiring it to place institutionalized persons in the community as plaintiffs suggest would constitute a fundamental alteration of the State's system for serving persons with developmental disabilities. Defs.' Brief at 1, 34.

1. Comprehensive, Effectively Working Olmstead Plan

The Olmstead plurality explained that a state can establish a fundamental alteration defense by demonstrating that it has a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." Olmstead, 527 U.S. at 605-06. Indeed, as we discuss below, the Third Circuit *requires* a state to develop and implement an adequate Olmstead integration plan in order to establish a fundamental alteration defense. See Pennsylvania Prot. & Advocacy, Inc. v. Dep't of Pub. Welfare, 402 F.3d 374, 381 (3d Cir. 2005) ("the Court's Olmstead opinion allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA and [the Rehabilitation Act]").

Defendants claim that the State has a comprehensive, effectively working Olmstead Plan – the "Path to Progress" document – for transitioning eligible individuals from developmental centers to the community. Defs.' Brief at 44. The State even points out that there are time frames and numbers for discharge in its Plan. Id. at 46. But, the defendants then admit that "the fiscal crisis has prevented the Division from making the amount of placements projected in the Path to Progress to date." Id. at 49, 53. The State admits that it only placed 112

individuals from developmental centers to the community in FY 2009, even though the State's Plan specified 250 placements. Id. at 49, 54. The State acknowledges that it will only place a total of 62 persons from developmental centers by the end of the current fiscal year, even though, again, the State's Plan specified 250 placements. Id. at 50. The State further admits that it will not have placed into the community the 600 individuals specified in its Plan by the end of FY 2010. Id. at 55. More ominously, with regard to future efforts, the State admits that placements will be made at a "slower pace than anticipated in the Path to Progress." Id. at 56.

Furthermore, it is important to remember that in recent years, Defendants have admitted significant numbers of people to the State's segregated developmental centers. Defendants acknowledge that there were 104 institutional admissions in calendar year 2007, that there were 91 institutional admissions in calendar year 2008, and that there were 43 institutional admissions in calendar year 2009. Id. at 53. These institutional admissions, which counter-balance whatever limited progress the State had managed in effecting the already reduced number of community placements, effectively diminish the State's overall deinstitutionalization effort in these years.

At this point, the ever-dwindling pace and very vague assurances going forward render the numbers in the State's Plan virtually meaningless. Even assuming that the State ever had an adequate plan on paper, New Jersey can now

no longer be said to have an "effectively working plan" for placing institutionalized residents in more integrated settings. Given defendants' current stated posture, there is, in essence, no plan now, and certainly no tangible or meaningful commitment to implement any semblance of a plan.

Without a realistic "effectively working" plan or a stated commitment or ability to implement a plan, the State's efforts at marshalling a fundamental alteration defense must necessarily fail. Defendants have not and cannot meet their burden here. See, e.g., DAI II, 653 F. Supp. 2d at 271 (rejecting defendants' fundamental alteration defense where they "do not have a comprehensive or effective plan to enable [segregated] residents to receive services in more integrated settings, but are instead committed to maintaining the status quo.") Unfortunately for the institutionalized plaintiffs in the instant case, the State's current posture now virtually guarantees that most residents will spend their entire lives confined in a segregated institution.

In recent years, the Third Circuit has repeatedly vacated district court rulings that a state had established a fundamental alteration defense, typically given the lack of tangible assurances and/or progress by the jurisdiction. See Frederick L. v. Dep't of Pub. Welfare, 422 F.3d 151 (3d Cir. 2005) (vacating district court ruling in favor of state defendants where fundamental alteration defense was premised on vague assurances of future deinstitutionalization rather than a meaningful

commitment with measurable goals for community integration for which the state may be held accountable); Pennsylvania Prot. & Advocacy, 402 F.3d 374 (3d Cir. 2005) (vacating district court ruling in favor of state defendants where fundamental alteration defense was premised solely on the basis of its analysis of budgetary constraints and failed to require state defendants to demonstrate a reviewable commitment to action); Frederick L. v. Dep't of Pub. Welfare, 364 F.3d 487 (3d Cir. 2004) (vacating district court ruling in favor of state defendants where fundamental alteration defense was premised on the state's limited economic resources and did not demonstrate a commitment to action with regard to community placement in a manner for which the state can be held accountable by the courts).

Taken together, to establish a fundamental alteration defense in executing an Olmstead Plan, the Third Circuit requires a specific and measurable commitment to action by the state, in a working plan with measurable goals and accountability to the courts, where there is ongoing progress in implementing the plan to effect the deinstitutionalization of institutionalized persons. See, e.g., Frederick L., 422 F.3d at 157 ("We interpret the Supreme Court's [Olmstead] opinion to mean that a comprehensive working plan is a necessary component of a successful 'fundamental alteration' defense"; a state may not avail itself of the fundamental alteration defense to relieve its obligation to deinstitutionalize eligible patients

without establishing a plan that "adequately demonstrates a reasonably specific and measurable commitment to deinstitutionalization for which [the state] may be held accountable."); Pennsylvania Prot. & Advocacy, 402 F.3d at 382, 383 (quoting Frederick L., 364 F.3d at 500) (the state must demonstrate 'that there will be ongoing progress toward community placement' under the general plan"; and the state must demonstrate a "reviewable commitment to action."); Frederick L., 364 F.3d at 500 (a state agency asserting a fundamental alteration defense must "be prepared to make a commitment to action in a manner for which it can be held accountable by the courts."). The Third Circuit has rejected as inadequate a state's vague assurances of future community placement and has instead required measurable goals for community integration for which the state may be held accountable. Frederick L., 422 F.3d at 156.

Implementation of an Olmstead Plan is critical to the Third Circuit. Pennsylvania Prot. & Advocacy, 402 F.3d at 381 ("The only sensible reading of the integration mandate consistent with the Court's Olmstead opinion allows for a fundamental alteration defense only if the accused agency has developed *and implemented* a plan to come into compliance with the ADA and [the Rehabilitation Act].") (emphasis added). See also Frederick L., 422 F.3d at 158 (vacating judgment for the state where the state "inexplicably *failed to implement* any plan for the first designated year … [the state's] post-remand submissions *lacked any*

commitment to implement the [plans].") (emphasis added). In the instant case, Defendants' demonstrated inability to implement its Olmstead Plan, and now, even to commit to implement it in a specific and measurable way, is beyond problematic, both practically and legally.

The Third Circuit has found fault with a state defendant when it "remains silent as to when, if ever, eligible [residents] can expect to be discharged." Id. In requiring more tangible and measurable steps, the court concluded: "General assurances and good-faith intentions neither meet the federal laws nor a patient's expectations … they are simply insufficient guarantors in light of the hardship daily inflicted upon patients through unnecessary and indefinite institutionalization." Id. As referenced above, the State now offers only the vague promise of a slower pace of placements and now claims cryptically that its Olmstead Plan demonstrates nothing more than a commitment to "future planning" for deinstitutionalization. Defs.' Brief at 34. Given recent developments, residents living at any of New Jersey's institutional developmental centers, in effect, have nothing but general assurances from the State, without the realistic prospect of anything remotely approaching a date-certain for a promised discharge from their segregated setting.

The State here touts its interdisciplinary team and other reviews while the individuals reside in one of the institutions awaiting placement. Id. at 28.

However, the Third Circuit has determined that the routine, individualized review of segregated residents does not amount to a sufficient deinstitutionalization plan, notwithstanding any past success a jurisdiction may have had in discharging residents. Pennsylvania Prot. & Advocacy, 402 F.3d at 384. Moreover, policies and procedures on discharge utilized for ongoing review of residents, as well as individualized quarterly team reassessments on discharge were also not deemed sufficient on their own to constitute implementation of a working plan. Id.

2. Fundamental Alteration Cost-Based Arguments

Defendants contend that the State cannot meet its community placement commitments due, in part, to "the worst economic climate since the Great Depression." Defs.' Brief at 50, 54, 55. Though clearly relevant, budgetary constraints alone are insufficient to establish a fundamental alteration defense. Pennsylvania Prot. & Advocacy, 402 F.3d at 380-81 ("it would have been legal error for the District Court to find a fundamental alteration solely on the basis of budgetary constraints"); Frederick L., 364 F.3d at 496 (concluding appellants cannot sustain a fundamental alteration defense based "solely upon the conclusory invocation of vaguely-defined fiscal constraints"). See also Townsend v. Quasim, 328 F.3d 511, 520 (9th Cir. 2003) (explaining that budgetary considerations are insufficient to establish a fundamental alteration defense and focusing instead on "whether [the asserted] extra costs would, in fact, compel cut-backs in services to

other [benefits] recipients"); Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175, 1182-83 (10th Cir. 2003) ("the fact that [a state] has a fiscal problem, by itself, does not lead to an automatic conclusion that [the provision of integrated treatment] will result in a fundamental alteration … If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed.").

Indeed, a court should be wary of a jurisdiction looking to excuse discrimination and segregation of vulnerable persons with disabilities based primarily on fiscal considerations. Pennsylvania Prot. & Advocacy, 402 F.3d at 381 ("A state cannot meet an allegation of noncompliance simply by replying that compliance would be too costly or would otherwise fundamentally alter its noncomplying programs. *Any* program that runs afoul of the integration mandate would be fundamentally altered if brought into compliance. Read this broadly, the fundamental alteration defense would swallow the integration mandate whole … Any interpretation of the fundamental alteration defense that would shield a state from liability in a particular case without requiring a commitment generally to comply with the integration mandate would lead to this bizarre result."); Frederick L., 364 F.3d at 500 (emphasizing that the plaintiffs in this case "are perhaps the most vulnerable. It is a gross injustice to keep these disabled persons in an institution notwithstanding the agreement of all relevant parties that they no longer

require institutionalization. We must reflect on that more than a passing moment. It is not enough for [the state] to give passing acknowledgment of that fact."). See also Townsend, 328 F.3d at 518-19 ("[P]olicy choices that isolate the disabled cannot be upheld solely because offering integrated services would change the segregated way in which existing services are provided … [S]uch a broad reading of fundamental alteration would render the protection against isolation of the disabled substanceless.").

If the State of New Jersey is committed to integrating individuals with disabilities into the community as required under the ADA, then it should not be a fundamental alteration of its services and programs to act on that commitment. See Messier v. Southbury Training Sch., 562 F. Supp. 2d 294, 345 (D. Conn. 2008) (finding the State's fundamental alteration claim to be "entirely inconsistent with its public commitment to further enhancing a system of community placement programming, which, it claims, was already robust in early 1999.").

At times, the State asks the Court to look backwards, pointing to its past efforts to place people out of developmental centers. Defs.' Brief at 2-3. However, the Third Circuit has determined that it is unrealistic (or unduly optimistic) to assume past progress is a reliable prediction of future progress. Pennsylvania Prot. & Advocacy, 402 F.3d at 384; Frederick L., 364 F.3d at 500. See also Frederick L., 422 F.3d at 156 (discounting importance of past state efforts

to deinstitutionalize and concluding that it is insufficient assurance of needed future deinstitutionalization efforts).

In the final analysis, placing qualified institutionalized individuals here in appropriate community settings would work only a "reasonable modification" of the State's program. Olmstead, 527 U.S. at 603. The State already provides to individuals in the community services of the type the individuals in the institutions would need to live in the community. But those services are simply inadequate right now to meet the needs of those individuals. The plaintiffs' claim rests on the demand that those services already in limited supply be made available in sufficient supply to enable individuals who are currently inappropriately segregated in an institution to be discharged from that setting into the community and provided appropriate services there. It is a reasonable modification per Olmstead to expand existing community programs to include currently institutionalized individuals. See DAI II, 653 F. Supp. 2d at 269 (quoting Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289, 335 (E.D.N.Y. 2009) (hereinafter, "DAI I")) (concluding that "[w]here individuals with disabilities seek to receive services in a more integrated setting – and the state already provides services to others with disabilities in that setting – assessing and moving the particular plaintiffs to that setting, in and of itself, is not a 'fundamental alteration.'"); Messier, 562 F. Supp. 2d at 345 (holding that where community

placement can be accommodated through existing programs, it would not be a fundamental alteration to require the state to assess class members for a determination of whether they were appropriate for those programs).

Moreover, the State admits that implementation of its Olmstead Plan will result in "a total decrease of $207.02 million over the length of the plan" with regard to the State's salary expenditures. Defs.' Path to Progress, at 60. This is important given that a court, in conducting a fundamental alteration analysis, must consider not just short-term outlays and transition costs, "but also savings that will result if the requested relief is implemented." DAI II, 653 F. Supp. 2d at 269.

The court in DAI endorsed the cost-neutral notion that the state could meet its ADA obligations by re-directing funds currently being spent on institutional care to serve those same individuals in integrated community settings. Id. at 308. The court there addressed the Third Circuit's concerns with regard to cost-shifting that would disadvantage other segments of the population of persons with mental disabilities. Id. (concluding that because the relief requested there would "actually save the State money, it will not interfere with Defendants' ability to serve other individuals with mental illness").

It is relevant in any fundamental alteration analysis, therefore, to determine whether providing services to support a person with a developmental disability in the community costs substantially less than providing services in an institutional

setting. See Id. at 282, 285-86, 291-94, 301 (rejecting defendants' fundamental alteration defense where serving the constituents in community homes would not increase costs to the state, holding defendants had not proven that the requested relief would increase costs to the state; instead, the court determined that it would "actually cost less" to serve the institutionalized constituents in the community).

Fortunately, the parties seem to agree that the State is capable of effecting quality placements and expanding community resources. Even the State contends that it has the proven ability to safely and effectively transition qualified persons from institutional settings to integrated community settings. Defs.' Brief at 20-21, 50. The State just needs to make a more meaningful commitment to increase the pace of these placements so as to come into compliance with federal law.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment on Plaintiffs' claims. Defendants' unjustifiable and unnecessary segregation of individuals with disabilities constitutes discrimination under Title II of the ADA.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

SAMUEL R. BAGENSTOS
Principal Deputy Assistant Attorney General
Civil Rights Division

JUDY C. PRESTON
Acting Chief
Special Litigation Section

s/ Richard J. Farano
RICHARD J. FARANO [DC Bar #424225]
Senior Trial Attorney
U.S. Department of Justice
Civil Rights Division
Special Litigation Section, PHB Room 5020
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 307-3116