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Health

L-3 *Olmstead*—Institutional and Community Placement Decisions

The Supreme Court Decision

In 1999, the U.S. Supreme Court heard the case *Olmstead v. L.C.*, 527 U.S. 581. This case is now used as the basis for what is required when caring for individuals with disabilities and determining whether to place them in institutional settings or community settings.

In the *Olmstead* case, two unrelated women with mental illness and developmental disabilities from the State of Georgia were in the state hospital system. One woman was deemed stable enough to move into community care in 1993. She was not transitioned into a community setting until 1996. The other woman was deemed able to be treated in the community in 1996. She was not moved into a community setting until several months into 1997. Both women argued the delay in transitioning them into the community constituted discrimination.

On June 22, 1999, the U.S. Supreme Court held in *Olmstead* that unjustified segregation of persons with disabilities is discrimination in violation of Title II of the Americans with Disabilities Act (ADA). See 42 U.S.C. §12101(a)(2) and (5). The United States Department of Justice (DOJ) summarizes the Court's decision in the case as requiring public entities to provide community-based services to persons with disabilities when these three conditions are present: such services are appropriate; the affected individual is not opposed to community-based treatment; and the community-based services can be reasonably accommodated, when considering the public entity's available resources and the needs of others receiving disability services from the public entity.

The Supreme Court, in a 6-3 decision, said “[t]he State’s responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless.” The reasonable-modifications regulation allows States to resist modifications that entail a fundamenta[l] alter[ation]” of the States’ services and programs by instead requiring “reasonable modifications” when necessary to avoid discrimination. The Court also stated that there is no “requirement that community-based treatment be imposed on patients who do not desire it.”

However, if the patient does qualify for community-based treatment, and that individual desires to be placed in a community setting, the State would be asked to “demonstrate that it had 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."

The Role of the Department of Justice

The DOJ accepts complaints from individuals who believe that they are being discriminated against in violation of the Supreme Court's ruling in *Olmstead*. These complaints can be made directly to the DOJ by mail or e-mail to ADA.complaint@usdoj.gov.

Following investigations into the complaints, the DOJ may issue a findings letter to a State citing the ADA and *Olmstead* violations found and suggesting remedial measures. The DOJ may work with a State on a settlement agreement to remedy the violations, file a lawsuit against the State, or seek to become involved in a previously filed lawsuit against a State as an intervening party, or by filing a statement of interest or an *amicus curiae* brief.

In 2009, President Barack Obama issued a proclamation declaring it the "Year of Community Living." See http://www.whitehouse.gov/the_press_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities/. Since that time, the DOJ has been pursuing *Olmstead* violations as a top priority.

The DOJ also has posted a technical assistance guide on its website to give some guidance to individuals in understanding their rights and to states in implementing the requirements of the *Olmstead* ruling. See http://www.ada.gov/olmstead/q&a_olmstead.htm.

Olmstead-Related Developments in Kansas

In Kansas, complaints have been filed with the U.S. Department of Health and Human Services (HHS) by individuals with disabilities. The Department of Social and Rehabilitation Services officials (currently the Department for Children

and Families) met with HHS officials on February 29, 2012, to discuss the complaints regarding the state's waiting list for services for individuals with disabilities. Subsequently, as reported in a March 29, 2012, Kansas Health Institute (KHI) article entitled "Civil rights enforcers meet with governor on waiting list issue," four officials from the HHS Office for Civil Rights (OCR) privately met on that date with Governor Sam Brownback and other State officials to discuss the waiting lists for services to individuals with disabilities. The KHI article indicated the Governor had asked for the March 29 meeting to better explain the state's position and describe upcoming policy changes expected to help reduce the waiting list.

A KHI article from April 23, 2012, entitled "Justice Department takes over waiting list case," quotes Barry Grissom, U.S. Attorney for the District of Kansas, as saying: "There has been a referral made from the HHS Office of Civil Rights to the Department of Justice, and Department of Justice is now consulting with the U.S. Attorney for the District of Kansas to decide the next appropriate step toward the enforcement of *Olmstead*."

Further, a letter with an April 19, 2012, date stamp and addressed to an individual who had filed an *Olmstead* complaint with HHS, was linked to the April 23 KHI article. The letter explained that the OCR had consolidated the complaints received into a compliance review. The letter further states, in part,

Since December 21, 2011, OCR has been involved in a series of meetings, phone calls, and exchanges of information with Kansas State officials to discuss the results of our investigation and the remedial actions that would be necessary to address these issues. This has included three meetings with State officials, including a meeting with Governor Brownback and his leadership team on March 29, 2012.

After these meetings, the Office for Civil Rights has concluded that voluntary resolution of the issues

will not be possible. Based on that determination, we have decided to refer our ADA compliance review to the Department of Justice for further investigation and proceedings. Subsequent to the referral, OCR will close our compliance review, but will provide information from our investigation to DOJ and serve as a resource as DOJ moves forward.

Subsequently, a letter was sent on April 25, 2012, by Governor Brownback to Leon Rodriguez, Director of the Office of Civil Rights, expressing regret at HHS's decision to terminate participation in assisting Kansas in finding solutions and "instead make this a matter for litigation that will be costly and will do nothing to provide more services." The Governor's letter refers to a May 2009 letter received by the State from the HHS Office for Civil Rights, notifying the state that an investigation was being opened on the Physical Disability (PD) Waiver and waiting list. The Governor's letter cites "virtually no communication" from HHS with Kansas officials during the more than two years since the May 2009 letter. The letter also refers to an April 17 letter from HHS indicating the only solution was to force the State to spend money the State does not have by adding enough waiver slots to eliminate the waiting list.

The DOJ has not issued a findings letter as of November 26, 2013. No letter from DOJ addressed to the state could be found on the DOJ website to indicate the DOJ has begun a formal investigation into this matter.

On September 11, 2013, Governor Brownback announced the release of \$18.5 million in savings gained from KanCare (Kansas' Medicaid managed care program) to reduce the waiting lists for home and community-based services. According to testimony provided by Kansas Aging and Disability Services Secretary Shawn Sullivan before the Robert G. (Bob) Bethell Joint Committee on Home and Community Based Services and KanCare Oversight on October 7, 2013, these funds would remove 418 individuals off the Physical Disability waiting list and 235 individuals off the Developmental Disability waiting list.

DOJ *Olmstead* actions are provided below alphabetically by state, beginning with states that were issued DOJ findings letters, followed by states for which no DOJ findings letters were issued but with DOJ involvement in litigation, and *amicus curiae* briefs filed by the United States. The information used to compile this summary of DOJ *Olmstead* actions was obtained from the U.S. Department of Justice website: www.ada.gov/olmstead.

States Issued DOJ Findings Letters

DELAWARE

DOJ FINDINGS LETTER

The DOJ filed a findings letter on November 9, 2010, citing violations, including the provision of mental health services in a manner which results in prolonged institutionalization for individuals who could be served in the community, and placement of individuals in the community at risk of unnecessary hospitalization and institutionalization.

Recommended remedial measures: The recommendations included requiring individual assessments prior to psychiatric hospital admission to ensure proper placement; revising the treatment and discharge planning process to formulate detailed transition plans; developing sufficient community support services; monitoring those in psychiatric hospitals to ensure safety; revising the discharge assessment process; developing a statewide crisis system; and instituting a risk management program and a quality management system.

OTHER ACTION BY DOJ

On July 6, 2011, the U.S. filed a complaint in U.S. District Court in *U.S. v. Delaware*, 11-CV-591 and a simultaneous settlement agreement to address concerns arising out of a DOJ investigation into whether individuals with mental illness were being served in the most integrated settings in accordance with their needs and to address concerns related to conditions of confinement at the Delaware Psychiatric Center.

Subsequently, on July 18, 2011, the Court signed the order entering the settlement agreement. Among the provisions of the agreement, the State is required to create: a community crisis system; intensive case supports; integrated supported housing in the form of vouchers or subsidies for 650 persons; supported employment for 1,100 persons; rehabilitation services for 1,100 persons; family and peer supports for 1,000 persons; a statewide quality management system; and to establish a monitor with the authority to hire staff to assist in the implementation of the agreement. The independent reviewer issued reports to the U.S. District Court in the settlement agreement between the parties on January 30, 2012, September 5, 2012, March 8, 2013, and September 24, 2013.

FLORIDA

DOJ FINDINGS LETTER

A DOJ findings letter was issued on September 5, 2012, concluding Florida's system of care had led to unnecessary institutionalization of children with disabilities, including medically complex and medically fragile children in nursing facilities and limited access to medically necessary services and supports that would allow children to transition to community-based settings.

Recommended remedial measures: The recommendations included an increase in community capacity by allotting additional waiver slots, making changes in existing policies, and increasing community services for children in or at risk of entry into nursing facilities.

OTHER ACTION BY DOJ

On July 7, 2013, the U.S. filed a lawsuit against the State of Florida in U.S. District Court, *U.S. v. State of Florida*, 0:13-cv-61576 (S.D. Fla. 2013), to correct ADA violations for the State's failure to provide services and supports to children with disabilities in the most integrated setting appropriate to their needs. The lawsuit alleges the manner in which Florida administers its service

system for children with significant medical needs results in the unnecessary segregation of children with disabilities in nursing facilities when they could be served in their family homes or other community-based settings. Further, the lawsuit alleges that the State's policies and practices place other children with significant medical needs at serious risk of institutionalization in nursing facilities. [The private litigation in which the U.S. previously filed two Statements of Interest (*T.H. et al. v. Dudek et al.*) is related to this lawsuit.]

Earlier cases:

On April 10, 2013, the U.S. filed a statement of interest in *T.H. v. Dudek*, No. 12-cv-60460 (S. D. Fla. 2012) requesting the Court deny Defendants' motion to dismiss for lack of subject matter jurisdiction because of mootness, grant Plaintiff's motion for class certification, and permit the U.S. to participate in any argument the Court may hear on either motion. The U.S. previously filed a statement of interest on June, 28, 2012, in this case, opposing Florida's motion to dismiss. The Plaintiffs allege the State unnecessarily institutionalizes medically fragile Medicaid-eligible children in nursing facilities, or places them at risk by limiting access to medically necessary services in integrated settings. The complaint also alleges a violation of the Pre-Admission Screening and Resident Review (PASRR) provisions of the Nursing Home Reform Amendments to the Medicaid Act for failure to fully evaluate children prior to nursing facility admittance.

On December 20, 2012, the U. S. filed a statement of interest in *Lee v. Dudek*, 4:08-CV-26 (N.D. FL 2008) in opposition to the Defendant's motion for summary judgment. The class of Plaintiffs allege the State's refusal to provide community services to individuals unnecessarily confined to a nursing facility violated the ADA's integration mandate. The case went to trial in February 2011 after the Court denied the parties' cross motions for summary judgment on January 20, 2011. The Court's ruling is pending.

MISSISSIPPI**DOJ FINDINGS LETTER**

The DOJ filed a findings letter on December 22, 2011, concluding the State failed to provide services to persons with developmental disability and mental illness in an integrated setting appropriate to their needs.

Recommended remedial measures: The recommendations directed the State to focus on community-based services; expand waiver slots; ensure intensive community services in all regions of the State; provide adequate medically necessary treatment services to children under Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) and ensure that children with disabilities are identified for special education services; and institute a quality assurance system.

OTHER ACTION BY DOJ

The State developed and submitted an *Olmstead* Plan [Mississippi Access to Care (MAC)] to the Legislature in September 2001 which included expansion of waiver slots. The *Olmstead* Plan was never implemented because it was not funded by the Legislature.

On April 8, 2011, the U.S. filed a statement of interest in *Troupe v. Barbour*, 10-CV-00153 (S.D. MS 2010) in opposition to Mississippi officials' motion to dismiss. Plaintiffs allege the State fails to provide medically necessary services to Medicaid-eligible children with significant behavioral disorders in the most integrated setting appropriate to their needs, in violation of ADA and Medicaid EPSDT provisions. The Court ruled in favor of the State in recommending dismissal of the Medicaid EPSDT claim. Plaintiffs filed an objection. Subsequently, on September 9, 2013, the U.S. filed a statement of interest in U.S. District Court to clarify the meaning of the EPSDT statute. The objection is pending before the Court.

NEW HAMPSHIRE**DOJ FINDINGS LETTER**

On April 7, 2011, the DOJ filed a findings letter stating “[s]ystemic failures in the State’s system place qualified individuals with disabilities at risk of unnecessary institutionalization now and going forward.”

Recommended remedial measures: The DOJ recommended, in part, that the State develop and implement plan areas of need and weakness in the State’s mental health system, provide a variety of supports and services, expand community placements and capacity, expand community and supported housing, create assertive community treatment (ACT) teams, and develop and implement a discharge plan.

OTHER ACTION BY DOJ

On February 2, 2012, the Plaintiff filed a complaint in *Lynn E. v. Lynch*, 1:12-CV-53-LM (D. N.H. 2012), alleging the State fails to provide mental health services in community settings to persons with a disability, forcing them to go to segregated institutions, in violation of the ADA and Section 504 of the Rehabilitation Act of 1973.

On April 4, 2012, the U. S. District Court granted the DOJ’s motion to intervene in *Amanda D. v. Wood Hassan*, 1:12-CV-53-LM (D. N.H. 2012) (formerly *Lynn E. v. Lynch*). The U.S. filed a memorandum in support of Plaintiffs’ motion for class certification on April 20, 2012. Subsequently, the DOJ filed a reply to the State’s opposition to and in support of Plaintiffs’ renewed motion for class certification on March 21, 2013.

NORTH CAROLINA**DOJ FINDINGS LETTER**

The DOJ filed a findings letter on July 28, 2011, concluding the State’s administration of its mental health system results in unnecessary

institutionalization of individuals with mental illness in adult care homes.

Recommended remedial measures: The recommendations included the development of enough supported housing to allow for receipt of services to those unnecessarily confined and those at risk of entry into adult care homes; realignment of state funds from institutional adult care homes to a priority on integrated community settings; scattered site supported housing with no more than ten percent of a residential setting allocated to persons with disabilities; and development and implementation of individual service plans and individual assessments to determine services needed for transition to and living in supported housing.

OTHER ACTION BY DOJ

On August 23, 2012, the U.S. filed a complaint in U.S. District Court in *U.S. v. North Carolina*, 5:12-cv-557 (E.D. N.C. 2012) and entered an eight-year settlement agreement with the State which includes, in part,: increasing access to community-based supported housing to 3,000 individuals currently residing in, or at risk of entry into, adult care homes; ensuring access to critical community-based mental health services to thousands of individuals; expanding integrated employment opportunities by providing supported employment services to 2,500 individuals with mental illness; developing a crisis service system; and appointing an independent reviewer to assist with and evaluate compliance.

Earlier case:

In 2010, *Clinton L., et al. v. Cansler, et al.*, 10-CV-00123 (M.D. NC 2010) was filed on behalf of individuals with developmental disability and mental illness challenging the State's proposed reduction in reimbursement rates for in-home services and alleging such reductions would eliminate providers that offer medically necessary services that enable individuals to live in the community and place them at risk of institutionalization. Subsequently, on February 16, 2010, the U.S. filed a statement of

interest supporting Plaintiffs' motion for preliminary injunction. The Court denied the motion, but required the State to provide appropriate community-based services while the lawsuit was pending.

OREGON

DOJ FINDINGS LETTER

In June 2012, the DOJ issued a findings letter that concluded the State provides employment and vocational services to individuals with intellectual and developmental disabilities (I/DD) primarily in segregated sheltered workshops, instead of integrated community employment settings, in violation of the ADA's integration mandate.

Recommended remedial measures: The recommendations included providing enough supported employment services to allow those unnecessarily segregated in sheltered workshops to receive services in integrated settings appropriate to their needs, and implementation of a transition plan for supported employment services in more integrated settings.

OTHER ACTION BY DOJ

On April 20, 2012, the U.S. filed a statement of interest in *Lane v. Kitzhaber*, 12-CV-00138 (D. OR 2012) in opposition to the Defendant's motion to dismiss. The Plaintiffs allege the State unnecessarily segregates individuals with I/DD in sheltered workshops. The U.S. also filed a statement of interest on June 18, 2012, in support of Plaintiffs' motion for class certification to include thousands of individuals in, or referred to, sheltered workshops. The U.S. District Court certified the Plaintiff class on August 6, 2012.

Subsequently, on March 27, 2013, the U.S. filed a complaint in intervention as a Plaintiff-Intervenor against the State of Oregon, and the U.S. District Court granted the motion to intervene on May 22, 2013.

RHODE ISLAND

DOJ FINDINGS LETTER

From January 14, 2013, through March 4, 2013, the DOJ investigated Rhode Island's employment, vocational, and day services for individuals with I/DD to determine if *Olmstead* violations existed. As part of the investigative process, the DOJ participated in two meetings with the State in February and March. On March 20, 2013, the DOJ communicated its findings, to the State, and subsequently shared its findings with the City of Providence on April 9, 2013, and April 29, 2013. The DOJ met with the State and City a number of times in May 2013 to resolve these findings. The DOJ findings were sent to the State and City on June 7, 2013, memorializing its oral findings.

OTHER ACTION BY DOJ

On June 13, 2013, the U.S. filed a complaint and simultaneously entered a court-enforceable interim settlement agreement with the State of Rhode Island and the City of Providence in *U.S. v. Rhode Island and City of Providence*, 1:13-cv-00442, (D.R.I. 2013) to resolve DOJ findings as part of an ADA *Olmstead* investigation that individuals with I/DD were unnecessarily segregated in a sheltered workshop and segregated day activity service program and public school students with I/DD were at risk of placement in the same program.

The agreement provides relief for approximately 200 individuals with I/DD by providing currently segregated individuals an opportunity to receive integrated supported employment and integrated daytime services. The State will no longer provide services or funding for the sheltered workshop and segregated day program provider (Training Thru Placement—TTP), and the City will no longer provide services or funding to the Birch Vocational Program (a special education program which has run a segregated sheltered workshop inside a Providence high school serving as a pipeline to TTP). Over the next year, adults at TTP and youth transitioning from Birch will be provided with “robust and person-centered career development planning, transitional day services,” supported employment placements, and integrated services.

The agreement requires individuals to “receive sufficient service to support a normative 40-hour work week,” with the expectation the individuals (on the average) will work in a supported environment job at competitive wages at least 20 hours per week.

VIRGINIA

DOJ FINDINGS LETTER

On February 10, 2011, the DOJ filed a findings letter concluding the State unnecessarily institutionalized more than 1,000 individuals with developmental disabilities and placed others at the risk of institutionalization (including more than 3,000 on an urgent wait list for community services).

Recommended remedial measures: The recommendations included an increase in waivers and expansion of community services to serve individuals in or at risk of entering training centers; and implementation of a clear plan to increase the pace of transitions to the community and discharge planning to begin at the time of admission.

OTHER ACTION BY DOJ

On January 26, 2012, the DOJ filed a complaint and simultaneous settlement agreement in U.S. District Court in *U.S. v. Virginia*, 3:12CV059 (E.D. VA 2012). The court-enforceable agreement is aimed at preventing unnecessary institutionalization of persons with developmental disabilities who are living in the community, including thousands on waiting lists for community-based services, and providing those currently in institutions the opportunity to receive services in the community. A group of disabled individuals, who believe the proposed consent decree would require they be moved from the training centers they consider to be their homes, was granted a motion to intervene.

On August 23, 2012, the U.S. District Court approved and made the settlement agreement, with modifications, the final order. Some provisions of the settlement include the creation of: 4,170 additional HCBS waivers by June 30, 2021,

and receipt of case management services for waiver service recipients under the agreement; a statewide crisis response system and crisis stabilization programs; an \$800,000 fund for housing; and the appointment of an independent reviewer responsible for reporting to the Court on the progress of implementing the decree. The Court indicated individuals desiring continued residence in training centers could not be forced to move into community settings. On December 6, 2012 and June 6, 2013, the independent reviewer issued reports to the U.S. District Court in the settlement agreement between the parties.

States Not Issued DOJ Findings Letters

ALABAMA

ACTION BY DOJ

In 2010, *Boyd v. Mullins*, 2:10-CV-688 (M.D. AL 2010) was filed by an individual with quadriplegia living in a nursing home and wanting to receive services in a more integrated setting. The Plaintiff alleged the State administers the Medicaid program in a manner resulting in unnecessary institutionalization. On October 12, 2010, the DOJ filed a statement of interest in support of Plaintiff's motion for preliminary injunction. On November 12, 2010, the Court denied primary injunctive relief. The case is pending.

ARKANSAS

ACTION BY DOJ

On May 6, 2010, *U.S. v. Arkansas*, 10-CV-327 (E.D. AR 2010), was filed by the DOJ in U.S. District Court alleging the State's failure to provide services to individuals with developmental disabilities "in the most integrated setting appropriate to their needs" and community service options for 1,400 persons on waiting lists at risk of institutionalization. On January 24, 2011, the complaint was dismissed by the Court without prejudice due to procedural error. Dismissal of a case without prejudice allows the case to be re-filed.

Earlier Case:

The DOJ filed *U.S. v. Arkansas*, 4:09-CV-00033 (E.D. AR 2009) in U.S. District Court on January 16, 2009, alleging, among other arguments, the failure to provide facility residents with developmental disabilities with services "in the most integrated setting appropriate to their needs." On June 8, 2011, the U.S. District Court dismissed the case with prejudice (case cannot be re-filed) stating the evidence did not support such findings. The Court cited the *Olmstead* case to support the position that there is no requirement that community-based treatment be imposed on those who do not want it. The Court relied on evidence that no resident had been denied community placement when requested by the parent or guardian.

CALIFORNIA

ACTION BY DOJ

On November 18, 2011, the U.S. filed comments in support of final approval of the proposed settlement agreement in *Katie A. v. Douglas*, CV-02-05662 AMH (SHX) (C.D. CA 2011)—formerly *Katie A. v. Bonta*. The settlement agreement relates to the manner in which the State will provide intensive, community-based mental health services to Medi-Cal eligible foster children or children at risk on entering into the foster care system. The U.S. indicated the agreement, which was reached after nine years of litigation, was "fair and reasonable."

Earlier case:

On January 9, 2012, the U.S. filed a statement of interest in *Oster v. Lightbourne*, 09-CV-4468 (N.D. CA 2009)—formerly *Oster v. Wagner*. Plaintiffs challenged a 20-percent reduction in personal care in-home support services which allow elderly individuals and individuals with disabilities to avoid hospitalization and institutionalization. The U.S. District Court granted Plaintiff's motion for preliminary injunction on January 19, 2012.

Earlier case:

On July 12, 2011 and October 31, 2011, the U.S. filed statements of interest in support of Plaintiffs' claim in *Darling v. Douglas*, 09- CV-3798 (N.D. CA 2009)—formerly *Cota v. Maxwell-Jolly*. The Plaintiffs challenged the State plans to eliminate Adult Day Health Care (ADHC), which enable elderly individuals and individuals with physical and mental disabilities to receive services to live in the community. On January 10, 2012, the U.S. filed comments in support of final court approval of the parties' proposed settlement agreement. The settlement agreement would require the State to submit an application to amend the State's existing Section 1115 demonstration waiver to establish a new Medi-Cal program to provide an "out-patient facility based service program that delivers skilled nursing care, social services, therapies, personal care, family and caregiver training and support, meals, and transportation to eligible Medi-Cal beneficiaries." Subsequently, on January 21, 2012, the U.S. District Court granted final approval of the settlement agreement.

DISTRICT OF COLUMBIA**ACTION BY DOJ**

On October 3, 2011, the U.S. filed a statement of interest in *Day et al. v. District of Columbia et al.*, 1:10- cv-02250-ESH (D. D.C. 2010) opposing the Defendant's motion to dismiss or for summary judgment. The Plaintiffs allege the unnecessary segregation of individuals with disabilities in nursing facilities.

On June 26, 2013, the U.S. filed a statement of interest supporting the Plaintiff's renewed motion for class certification in *Thorpe et al. v. District of Columbia*, 1:10-cv-02250-ESH (D.D.C. 2010)—formerly *Day et al. v. District of Columbia*. The Plaintiffs allege the District of Columbia unnecessarily segregates individuals with physical disabilities in nursing homes in violation of the ADA and Section 504 of the Rehabilitation Act.

GEORGIA**ACTION BY DOJ**

On March 14, 2013, the U.S. filed a statement of interest in *Hunter v. Cook*, 1:08-cv-02930-TWT (N.D. Ga. 2013) in opposition to Georgia's argument that serious risk of institutionalization is not a viable claim under Title II of the ADA. The Plaintiffs allege that Georgia's administration of the Department of Community Health and the Medicaid program denies, limits and reduces nursing services such that it places Plaintiffs at risk of unnecessary confinement or out of home care in violation of the ADA.

Earlier case:

The U.S. filed a statement of interest for preliminary injunction on October 6, 2010, in *Knipp v. Perdue*, 10-CV-2850 (N.D. GA 2010). The Plaintiff alleged the State's plan to eliminate services for individuals with mental illness without offering sufficient alternative support services necessary to prevent hospitalization and institutionalization violated *Olmstead*. On October 7, 2010, the Plaintiff's motion for a preliminary injunction was granted. The case is pending.

Earlier case:

In 2010, the U.S. filed a complaint in U.S. District Court, *U.S. v. Georgia*, 10-CV-249 (N.D. GA 2010) alleging individuals with mental illness and developmental disabilities in State hospitals were unnecessarily institutionalized.

On October 19, 2010, the DOJ and the State entered into a settlement agreement. Subsequently, on October 29, 2010, the Court adopted the settlement agreement, as revised, to provide for an independent reviewer and with the Court retaining jurisdiction to enforce the revised agreement. The agreement contains provisions for individuals with developmental disabilities which include: expanding community services; ceasing all admissions to State-operated institutions; transitioning all individuals to the most integrated setting appropriate to their needs by July 1, 2015;

and creating more than 1,100 HCBS waivers. With regard to individuals with mental illness, the agreement included requiring service in the community for 9,000 individuals with serious and persistent mental illness currently being served in State Hospitals, frequently readmitted to State Hospitals, frequently seen in emergency rooms, chronically homeless, and/or being released from jails or prisons. A statewide quality management system for community services also was required.

The independent reviewer issued reports to the U.S. District Court in the settlement agreement on October 5, 2011, September 20, 2012, and September 19, 2013. On September 20, 2013, the DOJ issued a letter regarding year three settlement agreement compliance and commending the State for its improvement.

ILLINOIS

ACTION BY DOJ

On April 15, 2013, the U.S. filed a statement of interest in *ILADD v. DHS*, 13-CV-01300 (E. D. IL 2013) opposing the Plaintiffs' request for a preliminary injunction to stop the planned closure of two state-run centers for persons with developmental disabilities. The U.S. argued Title II of the ADA, regulations, and case law do not support the position that "the ADA gives persons in state-run centers a right to remain in those institutions and to stop the State's efforts to move its service system toward community based care." The U.S. maintained the *Olmstead* statement that there is no "federal requirement that community-based services be imposed upon those who do not desire them" did not create a right to institutionalization. The U.S. argued the ADA would have to unambiguously confer a right to institutionalization, which it did not do, as that would have "turn[ed] the ADA and its integration mandate on its head and impermissibly create[d] a new right under the ADA that was never intended by Congress."

Earlier Case:

On July 16, 2010, the U.S. filed a statement of interest in *Hempe v. Hamos*, 10-CV-3121 (N.D. IL 2010) in support of Plaintiffs' motion for class certification. The Plaintiffs sought the Court to permit young adults to challenge a State policy placing medically fragile individuals with disabilities at risk of institutionalization upon turning 21 years of age. On November 22, 2010, class certification was granted. The case is pending.

LOUISIANA

ACTION BY DOJ

On April 7, 2011, the U.S. filed a statement of interest supporting the Plaintiffs' allegations that the State's reduction in the maximum number of Medicaid Personal Care Services hours per week would place individuals at risk of institutionalization and urging the U.S. District Court to deny the State's motion for summary judgment. On May 16, 2011, the U.S. District Court denied the State's motion to dismiss the lawsuit.

NEW JERSEY

ACTION BY DOJ

The U.S. filed a statement of interest in *Sciarrillo v. Christie*, 2:13-cv-03478-SCR-CLW (D. NJ 2013) on September 13, 2013, stating the Plaintiffs failed to assert a claim under the ADA. The Plaintiffs oppose the State's deinstitutionalization plan for facilities for individuals with developmental disability.

NEW YORK

ACTION BY DOJ

On July 23, 2013, in *U.S. v. State of New York*, 13-cv-4165 (E.D. N.Y. 2013), the U.S., individual Plaintiffs, and the State of New York filed a settlement agreement in the U.S. District Court for the Eastern District of New York, which is subject to the court's approval. [Issues remedied by this court-enforceable agreement were litigated in

Disability Advocates, Inc. v. Paterson, which was dismissed for lack of jurisdiction.] The agreement addresses discrimination by the State in the administration of its mental health service system and ensures that individuals with mental illness who reside in 23 privately-owned, large adult homes (120 or more beds) in New York City and in which at least 25 percent or more of the resident population has a mental illness, receive services in the most integrated setting appropriate to their needs. Approximately 4,000 individuals with mental illness reside in these adult homes. Over a five-year period, the State must provide at least 2,000 community-based, scattered site apartments with rental assistance and housing-related support services and continue to create additional units to ensure availability of supported housing to all eligible adult care home residents with mental illness who desire such an opportunity; provide the community-based mental health services needed to succeed in supported housing; implement a person-centered planning process to help people transition into the community; and provide quarterly reports tracking the State's progress to the independent reviewer and the parties. An independent reviewer will monitor compliance with the agreement and report to the U.S. and private Plaintiffs.

Earlier case:

In 2009, the Plaintiff filed a complaint in *Disability Advocates, Inc. v. Paterson*, 03-CV-3209 (E.D. NY 2009). After a trial on the merits, the U.S. District Court for the Eastern District of New York ruled thousands of persons with mental illness had been segregated and were denied the opportunity to "receive services in the most integrated setting appropriate to their needs." On November 25, 2009, the DOJ, having intervened in the remedy phase of the case, filed a brief supporting the Plaintiff's proposed remedial plan.

On March 1, 2010, a remedial order was issued by the U.S. District Court, which adopted most of the Plaintiff and DOJ proposals and required the State to ensure that within four years all present and future adult care home residents with mental illness were given an opportunity for services in a community-based housing program, and only

individuals eligible for community services who denied such services were placed in an adult care home. Subsequently, on April 6, 2012, the remedial order and judgment was vacated by the Second Circuit Court and the action dismissed for lack of jurisdiction.

TEXAS

ACTION BY DOJ

On December 20, 2010, the Plaintiff filed an initial complaint in *Steward v. Perry*, 5:10-CV-1025 (W.D. TX 2010) alleging the State unnecessarily segregates individuals with developmental disabilities in nursing facilities. The U.S. filed a request to intervene on June 22, 2011 and filed, as an exhibit, a proposed complaint in intervention citing individuals on waiting lists for an average of almost nine years with waiting lists, as of March 31, 2011, of over 50,000 names for about 22,800 currently filed slots.

On November 30, 2011, the U.S. filed a Supplemental statement of interest opposing the State's motion to dismiss the Plaintiffs' amended complaint. Then, on September 10, 2012, the U.S. filed a statement of interest in support of Plaintiff's amended motion for class certification for a Plaintiff class of 4,500 adults with developmental disability in or at risk of placement in nursing facilities. On September 20, 2012, the U.S. District Court granted the United States' June 2011 request to intervene.

Subsequently, on August 19, 2013, the U.S., private Plaintiffs, and the State of Texas filed an Interim settlement agreement, which is subject to the Court's approval. The settlement agreement requires the State to expand community-based services through Medicaid waivers and individual supports for at least 635 people with I/DD currently residing in nursing facilities or at risk of having to enter a nursing facility, while the parties pause ongoing litigation and negotiate a comprehensive settlement agreement on remaining issues in the case.

WASHINGTON**ACTION BY DOJ**

On January 26, 2011, the U.S. filed a statement of interest in *M.R. v. Dreyfus*, 10-CV-2052 (W.D. WA 2011) in support of Plaintiff's motion for preliminary injunction. Plaintiffs allege the State's cuts to personal care services place almost 45,000 individuals with disabilities at risk of institutionalization in violation of the ADA. In February 2011, the U.S. District Court denied the Plaintiff's motion for a preliminary injunction.

On December 16, 2011, the Ninth Circuit Court of Appeals reversed the U.S. District Court's judgment and granted the Plaintiffs injunctive relief. The Court considered the DOJ's statement of interest in reversing the U.S. District Court.

Subsequently, on October 22, 2012, a DOJ letter was issued in response to the State's letter of October 8, 2012, regarding the State's March 2011 reduction in personal care services, proposed changes to the Exception to the Rule (ETR) process to ensure individuals with disabilities are not placed at a serious risk of institutionalization and other negative outcomes, and requesting clarification regarding the State's compliance with ADA obligations, as interpreted in *Olmstead*. In clarifying the State's obligation under the ADA, the DOJ noted that the U.S. has never held that states may not reduce community services to individuals with disabilities. However, if service reductions cause serious risk of institutionalization, public entities must make "reasonable modifications" when implementing reductions to avoid institutionalization. The letter notes, a "state's obligation under the ADA to make modifications that are reasonable, but do not fundamentally alter the state's programs, services or activities, enables the state to comply with the ADA while still maintaining control of the program budgets."

AMICUS CURIAE BRIEFS FILED BY DOJ

Amicus curiae ("friend of the court") briefs were filed by the Department of Justice in the following cases:

Pennsylvania

Amicus curiae briefs were filed in *Benjamin et al. v. Pennsylvania Department of Public Welfare*, 09-CV-1182 (M.D. PA) in July 2010 and again in April 2012 in support of the settlement agreement. Representatives of individuals who live in state institutions and desire to remain but are unable to express placement preferences appealed the settlement agreement. In December 2012, the Third Circuit Court ruled in favor of the representatives and reversed the U.S. District Court's order approving the settlement agreement, sending the case back to the District Court with the ruling that the representatives must be permitted to participate in the remaining stages of the lawsuit. At this time, the case is back before the U.S. District Court.

New Jersey

An *amicus* brief was filed in June 2010 in *Disability Rights New Jersey, Inc. v. Velez*, 05-CV-4723 (D. NJ 2005). In September 2010, the U.S. District Court denied both parties' motions for summary judgment and set the proceeding for trial. The case is pending.

Connecticut

An *amicus* brief was filed in *Connecticut Office of Protection and Advocacy v. State of Connecticut*, 3:06-CV-179, (D. CT 2006) in November 2009. In March 2010, the State's motion to dismiss was denied and the Court granted in part the Plaintiffs' motion for class certification. The case is pending.

(Florida 11th Circuit Court of Appeals case)

The U.S. filed an *amicus* brief in support of the Appellee in *Long v. Benson*, 08-16261 (11th Cir. 2010) in April 2009. This Appellee is a member of the class in *Lee v. Dudek* (Florida case), who successfully sought a preliminary injunction requiring the State to provide him with community-based services through the Medicaid program, instead of requiring him to stay in a nursing home.

The Court of Appeals affirmed the District Court's grant of Plaintiff's request for preliminary injunctive relief.

North Carolina

In December 2009, the U.S. Filed an *amicus* brief in *Marlo M. v. Cansler*, 09-CV-535 (E.D. NC 2009).

Virginia

In November 2009, the U.S. filed an *amicus* brief in *ARC of Virginia, Inc. v. Kaine*, 09-CV-686 (E.D. VA 2009).

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