IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

T.B. by and through his parents THOMAS BOYCE and MARGARET BOYCE, **Q.G.** by and through his parents MICHAEL GOLDBERG and MAYUMI GOLDBERG, **M.K.** by and through her parents BRADLEY KISH and MARY KISH, **X.N.** by and through his parents FRANCISCO NEVAREZ and LISETTE NEVAREZ, **S.P.** by and through her parents FRANK PETERSON and CORELYN PETERSON, **O.W.** by and through his parents, JEFFREY WELLMAN and AMY WELLMAN, individually and on behalf of a class,	)	No. 12-5356
Plaintiffs,	)	Judge: Robert W. Gettleman
vs.	)	Magistrate: Sidney I. Schenkier
JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	
Defendant.	)	

PLAINTIFFS'
MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Now comes the Plaintiffs, by and through their attorneys, Robert H. Farley, Jr. Ltd., Cahill and Associates, and Michelle N. Schneiderheinze and files this Memorandum of Law in support of their Motion for Temporary Restraining Order and Preliminary Injunction, as follows:

I. INTRODUCTION

This is an action under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act and the Medicaid Act. The Plaintiffs and Class members, are medically

fragile disabled persons who currently receive funding from the Defendant for skilled nursing services and Medicaid benefits at their residence so that they do not have to be institutionalized or hospitalized. The Plaintiffs and Class members funding from the Defendant comes from the State of Illinois "Medicaid Home and Community-Based Services (HCBS) Waiver for Children that are Medically Fragile, Technology Dependent" program (MF/TD) and Medicaid.

The Plaintiffs and Class members medical fragile condition will remain unchanged when the State of Illinois eliminates or reduces Medicaid benefits to them effective September 1, 2012. The elimination or reduction in funding will result in the Plaintiffs and Class members becoming institutionalized (hospitalized) or if they remain in their family home without sufficient skilled nursing care, then they face a strong possibility death or a life threatening episode.

Prior to the filing of this litigation (*Hampe v. Hamos,* No. 10-3121), the Defendant has been successfully challenged by individual plaintiffs in 5 separate lawsuits over its practice and policy of reducing medical funding which results in a reduction of medical services when there has been no change in their medical condition as they are placed at risk of institutionalization.[1]

The Plaintiffs and Class members now seek a Temporary Restraining Order and a Preliminary Injunction to maintain intact their current MF/TD Waiver and/or Medicaid benefits so that they are not forced to move to an institution (hospital), pending a final judgment in this case.

As shown below, the Plaintiffs and Class members meet the standards for issuance of a

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[1] See *Radaszewski v. Maram,* 2008 U.S. Dist. LEXIS 24923 (N.D. Ill.)(March 26, 2008); *Grooms v. Maram,* 563 F.Supp.2d 840 (N.D.Ill. 2008); *Jones v. Maram,* 373 Ill.App.3d 184, 867 N.E.2d 563 (3rd Dist. 2007); *Sidell v. Maram,* 2009 U.S. Dist. LEXIS 131324 (C.D. Ill. 2009); and *Fisher v. Maram,* 06 C 4405 (N.D. Ill.)(January 8, 2009).

preliminary injunction. First, at the very least, they have "some likelihood" of prevailing on their claim that Defendant's actions, which was admittedly was not based upon, and is not supported by medical evidence, violates Title II of the ADA and Section 504. These laws require that a public entity administer its programs and activities in the most integrated setting appropriate to the needs of the individual with a disability. Under the governing law in this Circuit, an unjustified reduction in benefit levels needed to avoid institutionalization violates this integration mandate and thus constitutes unlawful discrimination under the ADA. *Radaszewski v. Maram,* 383 F.3d 599, 608, 616 (2004).

The Plaintiffs and Class members have a medical need for skilled nursing care, and they will suffer irreparable harm if the Defendant either eliminates their oMedicaid benefits or reduces their Medicaid benefits below their current level (prior to September 1, 2012). The elimination or reduction of Medicaid benefits by the Defendant will force the Plaintiffs and class members to leave community based care and reside in an institution. The Plaintiffs and Class members have no adequate remedy at law to compensate them for having to move to an institution to receive needed skilled nursing care, if a temporary restraining order and/or preliminary injunction is not entered against the Defendant to maintain intact the current level of Medicaid and/or MF/TD Waiver benefits.

II. ARGUMENT

A. Preliminary Injunction Standard.

In *Abbott Laboratories v. Mead Johnson & Co.,* 971 F.2d 6, 11 (7th Cir. 1992), the Court of Appeals set forth the standard for the issuance of a preliminary injunction. As a "threshold matter" a party seeking emergency relief must demonstrate (1) "some likelihood of succeeding

on the merits", and (2) that it has " ' no adequate remedy at law' and will suffer 'irreparable harm' if preliminary relief is denied." If the moving party can meet those prerequisites, the court is then to consider (3) the irreparable harm to the non-moving party if the relief is denied, balancing it against the irreparable harm to the moving party if the relief is denied and finally, (4) the public interest, "meaning the consequences of granting or denying the injunction to non-parties." *Promatek Industries, LTD v. Equitrac Corp.,* 300 F.3d 808, 811 (7th Cir. 2002). A "sliding scale approach is properly utilized so that the greater the balance of irreparable harm is to the moving party over the non-moving party, the less is the burden on the plaintiff to demonstrate probability of success on the merits." *Abbott Laboratories,* 971 F.2d at 12.

As shown below, these standards are clearly met in this case.

B. Plaintiffs and Class Members Are Likely To Prevail On Their Claims That Defendant's Actions Are In Violation Of The ADA; Rehabilitation Act; Medicaid and EPSDT.

Since 1985 and prior to the passage of the Americans with Disabilities Act (ADA), the State of Illinois has been able to successfully provide through the MF/TD Waiver and Medicaid, home and community-based services for children who are medically fragile, technology dependent "to allow eligible children to remain in their own homes rather than in an institutional setting."[2]

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[2] See Exhibit "5" at Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. The development of community based services for medically fragile children, also known as the "Katie Beckett Waiver" was championed by President Ronald Reagan in 1981. Katie Beckett was 3 years old at that time and had been hospitalized almost since birth and qualified for Medicaid. Katie's parents wanted to manage her care at home with a ventilator, but under existing Medicaid rules, if she had been taken home, her parents' income would have counted against her, and would have lost eligibility for Medicaid. Her hospital care was costing six times as much as home care would have cost. President Reagan cited Katie's case as an example of irrational federal regulation that caused "tremendous expense to the taxpayers." The

However, effective September 1, 2012, "Illinois is making several significant changes to the state's Medicaid program for children who are technology dependent" because "[t]he Medicaid program is on the brink of collapse."[3] The Defendant is capping the skilled nursing care to the Plaintiffs and Class members based on a nursing facility level of care as opposed to a hospital level of care which will reduce the level of skilled nursing hours by approximately 50% even though the child's medical condition remains unchanged. The Defendant is eliminating Medicaid benefits to medically fragile children with families whose income exceeds 500% of the federal poverty rate ($95,450 for a family of 3) even though the yearly average cost of the care is $188,000. The net effect of these major changes is to place the medically fragile children at risk of institutionalization, in violation of Title II of the ADA and Section 504 of the Rehabilitation Act.

Title II of the ADA prohibits public entities from discriminating against persons with disabilities:

> No qualified individual with a disability 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. Sec. 12132.

A "qualified individual with a disability" is a person who "with or without reasonable

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rules, he said, forced her to stay in the hospital even though she would be better off at home. In 1982, Medicaid policy fundamentally shifted to allow people with significant health care needs and disabilities to receive care at home. See www.nytimes.com/2012/05/23/us/katie-beckett-who-inspired-health-reform-dies-at-34.html. See also, www.hhs.gov/news/press/2012pres/05/20120519a.html.

[3] See Exhibit "7" at Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

modifications to rules, policies or practices" 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. Sec. 12131(2).[4] Similarly, Section 504 of the Rehabilitation Act prohibits recipients of federal funds from discriminating based on disability.

The Attorney General of the United States has promulgated regulations to implement both these statutory prohibitions. Under 28 C.F.R. Sec. 35.130(d), a public entity must administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. This regulation was based on the virtually identical regulation previously promulgated by the Attorney General to implement the Rehabilitation Act, 28 C.F.R. Sec. 41.51(d), known as the "integration mandate," requiring that recipients of federal funds administer their programs and activities in the "most integrated setting appropriate to the needs of qualified handicapped persons." *Radaszewski v. Maram,* 383 F.3d 599, 607 (7th Cir. 2004). The above-described provisions of the ADA and the Rehabilitation Act, and these integration mandate regulations promulgated under them, are construed and applied in the same manner. *Radaszewski v. Maram,* 383 F.3d at 607.

In 1999, the United States Supreme Court addressed and interpreted the integration mandate in its landmark decision *Olmstead v. L.C.,* 527 U.S. 581 (1999). The Court affirmed that integration into community life was a central aspect of the legislation prohibiting

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[4] The Plaintiffs and Class members are "qualified individuals," because they are eligible to receive services through the State's program of services for persons with - - - - - disabilities. See *Townsend v. Quasim,* 328 F.3d 511, 516 (9th Cir. 2003) (concluding that plaintiff was a "qualified individual with a disability" for purposes of Title II because he was eligible to receive services through State's Medicaid program, he preferred to receive such services in a community-based setting, and community-based services were appropriate for his needs).

discrimination against persons with disabilities. The *Olmstead* plaintiffs, who had developmental disabilities and mental illness, wished to live in the community, and treatment professionals agreed that community care was appropriate for them. Nevertheless, they were confined in Georgia's psychiatric hospitals due to limited funding for community care in the state budget. They claimed that Georgia's funding of institutional care, but not of community based care, violated the integration mandate of Title II of the ADA. The Supreme Court held that policies or practices imposing unjustified isolation of persons of disabilities in institutions are "properly regarded as discrimination based on disability." 527 U.S. at 597.

The Court in *Olmstead* set out the elements of a discrimination claim based on the integration mandate. The plaintiff must allege and ultimately show that (1) treating professionals have found that the person can handle and benefit from a community setting; (2) that the person wants to be in the community setting: and (3) that community-based services can be reasonably accommodated taking into account the resources of the state and the needs of others with comparable disabilities. 527 U.S. at 601-603. The public entity may defend by showing that a community setting cannot be accommodated without fundamental alteration to the entity's programs and services. 527 U.S. at 603.

It is very likely that the Plaintiffs and Class Members will be able to show that these elements are met in this case. This is particularly evident in light of the Seventh's Circuit application of *Olmstead* to a case involving a reduction of benefits solely to a Medicaid recipient aging out from one Medicaid Waiver program into another. In *Radaszewski v. Maram,* 383 F.3d 599, 608, 616 (2004), the Seventh Circuit held that Illinois' refusal to continue to fund the level of home skilled nursing services needed to avoid institutionalization may constitute the type of

unjustified institutional isolation *Olmstead* described as a form of discrimination. Eric Radaszewski received skilled nursing services at his home under the MF/TD program. The State authorized 16 hours per day of home nursing services for him under the MF/TD program as a cost-effective alternative to the institutional care he would otherwise have needed at State expense. When he (Eric R.) turned 21, however, he was transferred to the Home Services Program (HSP), whereupon the agency, that is the Defendant in this case, imposed a funding cap which in effect reduced the hours of home nursing services he could receive at home from 16 to 5 hours per day. The reduced level of home services was too low to allow him to remain at home. The State acknowledged, however, that it would fund the level of care he needs in an institutional setting that would meet his needs in order to survive. Eric's mother filed suit, claiming that the State violated the integration mandate of the ADA and the Rehabilitation Act and their implementing regulations by failing to provide services in the most integrated setting appropriate for Eric, his home, when he could handle and benefit from the services in his home, and the State could readily accommodate this delivery of services since the cost to the State would be less than the cost to the State of the institutional care he would need. 383 F.3d at 602-605. The State contended that it would be a fundamental alteration to provide the benefit sought by Eric.

The District Court entered a judgment of the pleading for the defendant. The Seventh Circuit reversed, holding that the facts alleged in the complaint, similar to those here, permitted the inference that the home placement remained appropriate for Eric, that he and his family wanted services in the home, and that home-based services could be reasonably accommodated taking into account the resources available to the State and the needs of other with comparable

disabilities, the criteria for a claim under *Olmstead.* 383 F.3d at 614-615. Additionally, the court held that the complaint did not permit an inference that the injunctive relief the plaintiff sought was unreasonable or would call for a fundamental alteration of the State's program or services for similarly-situated disabled persons. *Id.*

In reaching these conclusions, the court held the fact that Eric had received home-based care in the MF/TD program for years before he turned 21, showed that home care was appropriate for him, and that he could handle and benefit from home care. 383 F.3d at 612. The court found highly relevant and plausible that continued adequate home nursing services could be reasonably accommodated given that the State had already found the 16 hours of home nursing services it had approved for Eric prior to aging out of the program, cost the State less than the institutional care he would require. 383 F.3d at 613-614. The court noted that if the cost of institutional placement "equaled or exceeded the cost of caring for him at home, then it would be difficult to see how requiring the State to pay for at-home care would amount to an unreasonable, fundamental alteration of its programs and services." 383 F.3d at 614.

The elements of an *Olmstead* claim as set out in *Radaszewski* are met in this case. The Plaintiffs and Class members wants to remain at home and that their care at home is appropriate and safe for them at the level of skilled nursing care currently being provided. Their request for continued home-based skilled nursing level of services can reasonably be accommodated given that these services at home would cost substantially less than if they were hospitalized at a monthly cost of $55,000. Accordingly, the Plaintiffs and Class have a substantial likelihood of success on the merits of their claims under the integration mandate of the ADA and the Rehabilitation Act.

Within the last four years, three Federal Courts in Illinois have ruled against the State of Illinois in their attempt to reduce funding in cases similar to the Plaintiffs and Class, with respect to the State attempting to reduce funding to a nursing facility level of care when the plaintiffs required a hospital level of care to remain in the community. See *Radaszewski v. Maram,* 2008 U.S. Dist. LEXIS 24923 (N.D. Ill. 2008)(March 26, 2008); *Grooms v. Maram,* 563 F.Supp.2d 840 (N.D. Ill. 2008) and *Sidell v. Maram,* 2009 U.S. Dist. LEXIS 131324 (C.D. Ill. 2009).

In *Radaszewski v. Maram,* 2008 U.S. Dist. LEXIS 24923, after the case was remanded from the U.S. Court of Appeals, the District Court found that the State of Illinois violated the ADA and Rehabilitation Act when Eric Radaszewsli exited the MF/TD program and the State of Illinois reduced the level of funding to a nursing facility level of care which would not adequately fund skilled nursing care for Eric to remain in his home. The Court found that providing the funding would not result in a fundamental alteration of the Illinois disability programs. The Court stated:

> Allowing Eric to remain in the community can be readily accommodated, taking into account Illinois resources and the needs of others with similar disabilities. Illinois can approve an HSP plan for Eric that exceeds the nursing home rate. If otherwise necessary, Illinois could also modify or alter the waiver from the federal government, which encourages the states to use home and community- based waivers to meet the community integration contemplated by *Olmstead.* Illinois could act in cooperation with the federal government to achieve community-based integration which may otherwise be impeded by existing rules or requirements. Thus, there is no need to adapt existing institutional-based services to a community-based setting that would impose unreasonable burdens or fundamentally alter the nature of Illinois' services and programs.
>
> Illinois has not demonstrated that providing the requested accommodation to Eric would impose an unreasonable burden on the state or fundamentally alter the nature of its programs and services. The evidence offered by the state, . . . has not shown that Eric's healthcare needs cannot be reasonably accommodated by community placement considering the state's resources

and the needs of others similarly situated. *Id.* at *40-41.

In *Grooms v. Maram,* 563 F.Supp.2d 840 (N.D. Ill. 2008), the plaintiff, David Grooms was dependent upon a ventilator and relied on others for virtually all his care and he was funded under the MF/TD program and he received approximately $17,000 per month for home base skilled nursing funding. When he turned 21, the State would only approve an exceptional care rate (nursing facility rate) of $8,517 per month. For the same reasoning as in all other cases litigated against the State of Illinois for persons exiting the MF/TD program, the Court entered a Permanent Injunction Order against the State of Illinois and in favor of David Groom, so that the State is required to restore the level of approved skill nursing services which he had prior to his 21st birthday.

In *Jones v. Maram,* 373 Ill.App.3d 184, 867 N.E.2d 563 (3rd Dist. 2007), the Illinois Appellate Court upheld the Circuit Court's entry of a preliminary injunction against the State of Illinois to prevent the State from reducing the funding for the plaintiff who had aged out of the MF/TD program. The plaintiff, Michael Jones "is completely ventilator dependent" and "requires skilled nursing services in order to survive." *Id.,* at 185-186. Under the MF/TD program, Michael received home nursing services at a cost of $17,000 per month and if he was to be hospitalized, the cost of the care would be approximately $49,400 per month. The Court stated:

> . . .Michael's condition has not changed, only his age has changed. It seems likely the Department can accommodate the needs of Michael and others like him with reasonable modification to existing programs. The cost of caring for Michael at home would not exceed the cost of the comparable facility capable of meeting his needs, the intensive care unit of a hospital. *Id.,* at 197.

Actions that place individuals with disabilities who receive services from the state at serious risk of unjustified institutionalization violate Title II of the ADA and the Rehabilitation Act. *Fisher v. Oklahoma Health Care Auth.,* 335 F.3d 1175, 1181 (10th Cir. 2003).

For the above reasons, the Plaintiffs and Class members, like other similar plaintiffs described above, are likely to prevail on their claim that the Defendant's action is in violation of the ADA and the Rehabilitation Act.

C. State Must Administer Medicaid Services In Accordance with the ADA and Rehabilitation Act

Once a state has elected to provide services (whether mandatory or optional under the Medicaid Act), the state must administer those services in accordance with the ADA and Rehabilitation Act. See *Doe v. Childes,* 136 F.3d 709, 714 (11th Cir. 1998) (when a state chooses to provide an optional Medicaid service, it must do so in accordance with the requirements of federal law); *Fisher v. Okla. Health Care Auth.,* 335 F.3d 1175, 1182 (10th Cir. 2003) (even though a waiver program is optional, a state may not, under Title II of the ADA, amend optional programs in such a way as to violate the integration mandate).

Even if Centers for Medicare and Medicaid Services (CMS) approves the State Medicaid Plan or the State Medicaid Waiver, "[a] state's obligation under the ADA are independent from the requirements of the Medicaid program." (See Exhibit "A" - Statement of the Department of Justice at page 3, paragraph 7). Moreover, "budget cuts can violate the ADA and *Olmstead* when significant funding cuts to community services create a risk of institutionalization or segregation." *Id.* at page 3, paragraph 9.

D. Preliminary Injunction Appropriate To Prevent Violation of ADA

Courts have entered a preliminary injunction to prevent the violation of the ADA. See *Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 638-39 (E.D.N.C. 2010) (termination of services in community settings which will cause the plaintiffs to be provided services in less integrated settings is a violation of the ADA that will support entry of preliminary injunctive relief) *V.L. v. Wagner,* 669 F.Supp.2d 1106, 1119 (N.D. Cal. 2009) (changing Medicaid eligibilty criteria for home delivered services that results in the risk of institutionalization violates the integration mandate); *Crabtree v. Goetz,* 2008 WL 5330506 at *82 (M.D. Tenn. 2008) ("Plaintiffs have demonstrated a strong likelihood of success on the merits of their [ADA] claims that the Defendants' drastic cuts of their home health care services will force their institutionalization in nursing homes.")

E. Plaintiffs and Class Members Have No Adequate Remedy At Law And Will Suffer Irreparable Harm If A Preliminary Injunction Does Not Issue.

A plaintiff has no adequate remedy at law when an award of damages at the end of trial will be "seriously deficient as a remedy for the harm suffered." *Roland Machintery v. Dresser Industries,* 749 F.2d 380, 386 (7th Cir. 1984). The requirement of irreparable harm is met when the moving party will suffer harm during the pendency of the case "that cannot be prevented or fully rectified by the final judgment after trial." 794 F.2d at 386. These elements are clearly present here.[5]

The Plaintiffs and Class members have no adequate remedy at law as they will be forced to move to an institution (hospitalization) to receive nursing care services if an injunction does

[5] "The denial of medical benefits, and resultant loss of essential medical services, constitutes an irreparable harm. . . ." *Edmonds v. Levine,* 417 F.Supp.2d 1323, 1342 (S.D. Fla. 2006).

not issue which will result in the unjustified isolation of the Plaintiff in an institution which the American with Disabilities Act (ADA) sought to remedy. The Supreme Court best summarized the harm which the Plaintiffs and Class members will likely suffer if they are placed in an institution to receive services which are being denied them in the community. In *Olmstead,* 527 U.S. at 600-601, the Supreme Court stated:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday activities of individuals including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with . . . disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without [such] disabilities can receive the medical services they need without similar sacrifice.

If an injunction does not issue in this case and if the Plaintiffs and Class members remain in the community without medically necessary skilled nursing services, they face a serious risk of death or of a life threatening episode. Thus, they will suffer irreparable injury for which there is no adequate remedy at law.

F. The Balance Of Equities Supports Entry Of A Preliminary Injunction In This Case.

As has been shown, the Plaintiffs and Class members will suffer harm if an injunction will not issue. The Defendant, however, will only be required to do what they were willing and able to do before the State of Illinois made recent changes or proposals to Medicaid and the MF/TD Waiver. A temporary or preliminary payment of benefits to the Plaintiffs and Class

members will have no serious fiscal impact on the State, and any inconvenience is far outweighed by the harm to the Plaintiffs and Class if forced to move to an institution or face the risk of a life threatening episode by remaining at home with insufficient nursing services.

G. The Public Interest Favors The Issuance Of Interim Injunctive Relief.

The granting of a Temporary Restraining Order / Preliminary Injunction - continuing to maintain the existing Medicaid benefits during the course of these proceedings and not eliminate or reduce Medicaid benefits as the State of Illinois proposes effective September 1, 2012, would have no detrimental effect on the public. No widespread change to non-parties would result from payments equivalent to the amounts paid prior to the proposed elimination or reduction of benefits for similar persons with disabilities. Finally, based upon the showing the Plaintiffs and Class have made regarding the merits of this case, this Court should conclude that the public interest favors interim enforcement of the integration mandate of the ADA.

III. CONCLUSION

For the foregoing reasons, the Plaintiffs and Class Members, respectfully requests that this Court enter a Temporary Restraining Order and/or a Preliminary Injunction to maintain the same level of Medicaid benefits to the Plaintiffs' and Class members and enjoin the Defendant from reducing or denying the Plaintiffs and Class members from their existing benefits of the MF/TD waiver and Medicaid, pending final judgment in this action or until further order of Court.[6]

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[6] This Court should waive or excuse the posting of a bond. See *Scherr v. Volpe,* 466 F.2d 1027, 1035 (7th Cir. 1972) (the matter of requiring a security is within the discretion of the District Court and considering this as well as the strong likelihood of success on the merits which the plaintiffs have demonstrated, the Circuit Court found that the District Court did not abuse its discretion in failing to require the plaintiffs to post a security).

Respectfully submitted,

/s/ Robert H. Farley, Jr.
One of the Attorneys for
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CERTIFICATE OF SERVICE

I, Robert H. Farley, Jr., one of the Attorneys for the Plaintiffs, deposes and states that he caused the foregoing Plaintiffs' Memorandum of Law in support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction to be served by electronically filing said document with the Clerk of the Court using the CM/ECF system, this 9th day of July, 2012, and will cause the foregoing Plaintiffs' Memorandum of Law in support of Plaintiffs'Motion for Temporary Restraining Order and Preliminary Injunction, to be served on the named Defendant, by hand delivering a copy to the office of the Defendant, Julie Hamos at 401 S. Clinton, Chicago, Illinois on July 10, 2012.

EXHIBIT "A"

U.S. Department of Justice
Civil Rights Division

Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*

In the years since the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), the goal of the integration mandate in title II of the Americans with Disabilities Act – to provide individuals with disabilities opportunities to live their lives like individuals without disabilities – has yet to be fully realized. Some state and local governments have begun providing more integrated community alternatives to individuals in or at risk of segregation in institutions or other segregated settings. Yet many people who could and want to live, work, and receive services in integrated settings are still waiting for the promise of *Olmstead* to be fulfilled.

In 2009, on the tenth anniversary of the Supreme Court's decision in *Olmstead*, President Obama launched "The Year of Community Living" and directed federal agencies to vigorously enforce the civil rights of Americans with disabilities. Since then, the Department of Justice has made enforcement of *Olmstead* a top priority. As we commemorate the 12th anniversary of the *Olmstead* decision, the Department of Justice reaffirms its commitment to vindicate the right of individuals with disabilities to live integrated lives under the ADA and *Olmstead*. To assist individuals in understanding their rights under title II of the ADA and its integration mandate, and to assist state and local governments in complying with the ADA, the Department of Justice has created this technical assistance guide.

The ADA and Its Integration Mandate

In 1990, Congress enacted the landmark Americans with Disabilities Act "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." [1] In passing this groundbreaking law, Congress recognized 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." [2] For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities:

[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 services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. [3]

As directed by Congress, the Attorney General issued regulations implementing title II, which are based on regulations issued under section 504 of the Rehabilitation Act. [4] The title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." [5] The preamble discussion of the "integration regulation" explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . ." [6]

In *Olmstead v. L.C.*, 527 U.S. 581 (1999),the Supreme Court held that title II prohibits the unjustified segregation of individuals with disabilities. The Supreme Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. [7] The Supreme Court explained that this holding "reflects two evident judgments." First, "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." Second, "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." [8]

To comply with the ADA's integration mandate, public entities must reasonably modify their policies, procedures or practices when necessary to avoid discrimination. [9] The obligation to make reasonable modifications may be excused only where the public entity demonstrates that the requested modifications would "fundamentally alter" its service system. [10]

In the years since the passage of the ADA and the Supreme Court's decision in *Olmstead*, the ADA's integration mandate has been applied in a wide

variety of contexts and has been the subject of substantial litigation. The Department of Justice has created this technical assistance guide to assist individuals in understanding their rights and public entities in understanding their obligations under the ADA and *Olmstead*. This guide catalogs and explains the positions the Department of Justice has taken in its Olmstead enforcement. It reflects the views of the Department of Justice only. For questions about this guide, you may contact our ADA Information Line, 800-514-0301 (voice), 800-514-0383 (TTY).

Date: June 22, 2011

Questions and Answers on the ADA's Integration Mandate and *Olmstead* Enforcement

1. What is the most integrated setting under the ADA and *Olmstead*?

A: The "most integrated setting" is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." [11] Integrated settings are those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities. Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible. Evidence-based practices that provide scattered-site housing with supportive services are examples of integrated settings. By contrast, segregated settings often have qualities of an institutional nature. Segregated settings include, but are not limited to: (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for daytime activities primarily with other individuals with disabilities.

2. When is the ADA's integration mandate implicated?

A: The ADA's integration mandate is implicated where a public entity administers its programs in a manner that results in unjustified segregation of persons with disabilities. More specifically, a public entity may violate the ADA's integration mandate when it: (1) directly or indirectly operates facilities and or/programs that segregate individuals with disabilities; (2) finances the segregation of individuals with disabilities in private facilities; and/or (3) through its planning, service system design, funding choices, or service implementation practices, promotes or relies upon the segregation of individuals with disabilities in private facilities or programs. [12]

3. Does a violation of the ADA's integration mandate require a showing of facial discrimination?

A: No, in the *Olmstead* context, an individual is not required to prove facial discrimination. In *Olmstead*, the court held that the plaintiffs could make out a case under the integration mandate even if they could not prove "but for" their disability, they would have received the community-based services they sought. It was enough that the state currently provided them services in an institutional setting that was not the most integrated setting appropriate. [13] Additionally, an *Olmstead* claim is distinct from a claim of disparate treatment or disparate impact and accordingly does not require proof of those forms of discrimination.

4. What evidence may an individual rely on to establish that an integrated setting is appropriate?

A: An individual may rely on a variety of forms of evidence to establish that an integrated setting is appropriate. A reasonable, objective assessment by a public entity's treating professional is one, but only one, such avenue. Such assessments must identify individuals' needs and the services and supports necessary for them to succeed in an integrated setting. Professionals involved in the assessments must be knowledgeable about the range of supports and services available in the community. However, the ADA and its regulations do not require an individual to have had a state treating professional make such a determination. People with disabilities can also present their own independent evidence of the appropriateness of an integrated setting, including, for example, that individuals with similar needs are living, working and receiving services in integrated settings with appropriate supports. This evidence may come from their own treatment providers, from community-based organizations that provide services to people with disabilities outside of institutional settings, or from any other relevant source. Limiting the evidence on which *Olmstead* plaintiffs may rely would enable public entities to circumvent their *Olmstead* requirements by failing to require professionals to make recommendations regarding the ability of individuals to be served in more integrated settings.

5. What factors are relevant in determining whether an individual does not oppose an integrated setting?

A: Individuals must be provided the opportunity to make an informed decision. Individuals who have been institutionalized and segregated have often been repeatedly told that they are not capable of successful community living and have been given very little information, if any, about how they could successfully live in integrated settings. As a result, individuals' and their families' initial response when offered integrated options may be reluctance or hesitancy. Public entities must take affirmative steps to remedy this history of segregation and prejudice in order to ensure that individuals have an opportunity to make an informed choice. Such steps include providing information about the benefits of integrated settings;

facilitating visits or other experiences in such settings; and offering opportunities to meet with other individuals with disabilities who are living, working and receiving services in integrated settings, with their families, and with community providers. Public entities also must make reasonable efforts to identify and addresses any concerns or objections raised by the individual or another relevant decision-maker.

6. Do the ADA and *Olmstead* apply to persons at serious risk of institutionalization or segregation?

A: Yes, the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent. For example, a plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.

7. May the ADA and *Olmstead* require states to provide additional services, or services to additional individuals, than are provided for in their Medicaid programs?

A: A state's obligations under the ADA are independent from the requirements of the Medicaid program. [14] Providing services beyond what a state currently provides under Medicaid may not cause a fundamental alteration, and the ADA may require states to provide those services, under certain circumstances. For example, the fact that a state is permitted to "cap" the number of individuals it serves in a particular waiver program under the Medicaid Act does not exempt the state from serving additional people in the community to comply with the ADA or other laws. [15]

8. Do the ADA and *Olmstead* require a public entity to provide services in the community to persons with disabilities when it would otherwise provide such services in institutions?

A: Yes. Public entities cannot avoid their obligations under the ADA and *Olmstead* by characterizing as a "new service" services that they currently offer only in institutional settings. The ADA regulations make clear that where a public entity operates a program or provides a service, it cannot discriminate against individuals with disabilities in the provision of those services. [16] Once public entities choose to provide certain services, they must do so in a nondiscriminatory fashion. [17]

9. Can budget cuts violate the ADA and *Olmstead*?

A: Yes, budget cuts can violate the ADA and *Olmstead* when significant funding cuts to community services create a risk of institutionalization or segregation. The most obvious example of such a risk is where budget cuts require the elimination or reduction of community services specifically designed for individuals who would be institutionalized without such services. In making such budget cuts, public entities have a duty to take all reasonable steps to avoid placing individuals at risk of institutionalization. For example, public entities may be required to make exceptions to the service reductions or to provide alternative services to individuals who would be forced into institutions as a result of the cuts. If providing alternative services, public entities must ensure that those services are actually available and that individuals can actually secure them to avoid institutionalization.

10. What is the fundamental alteration defense?

A: A public entity's obligation under *Olmstead* to provide services in the most integrated setting is not unlimited. A public entity may be excused in instances where it can prove that the requested modification would result in a "fundamental alteration" of the public entity's service system. A fundamental alteration requires the public entity to prove "that, in the allocation of available resources, immediate relief for plaintiffs would be inequitable, given the responsibility the State [or local government] has taken for the care and treatment of a large and diverse population of persons with [ ] disabilities." [18] It is the public entity's burden to establish that the requested modification would fundamentally alter its service system.

11. What budgetary resources and costs are relevant to determine if the relief sought would constitute a fundamental alteration?

A: The relevant resources for purposes of evaluating a fundamental alteration defense consist of all money the public entity allots, spends, receives, or could receive if it applied for available federal funding to provide services to persons with disabilities. Similarly, all relevant costs, not simply those funded by the single agency that operates or funds the segregated or integrated setting, must be considered in a fundamental alteration analysis. Moreover, cost comparisons need not be static or fixed. If the cost of the segregated setting will likely increase, for instance due to maintenance, capital expenses, environmental modifications, addressing substandard care, or providing required services that have been denied, these incremental costs should be incorporated into the calculation. Similarly, if the cost of providing integrated services is likely to decrease over time, for instance due to enhanced independence or decreased support needs, this reduction should be incorporated as well. In determining whether a service would be so expensive as to constitute a fundamental alteration, the fact that there may be transitional costs of converting from segregated to integrated settings can be considered, but it is not determinative. However, if a public entity decides to serve new individuals in segregated settings ("backfilling"), rather than to close or downsize the segregated settings as individuals in the plaintiff class move to integrated settings, the costs associated with that decision should not be included in the fundamental alteration analysis.

12. What is an *Olmstead* Plan?

A: An *Olmstead* plan is a public entity's plan for implementing its obligation to provide individuals with disabilities opportunities to live, work, and be served in integrated settings. A comprehensive, effectively working plan must do more than provide vague assurances of future integrated options or describe the entity's general history of increased funding for community services and decreased institutional populations. Instead, it must reflect an analysis of the extent to which the public entity is providing services in the most integrated setting and must contain concrete and reliable commitments to expand integrated opportunities. The plan must have specific and reasonable timeframes and measurable goals for which the public entity may be held accountable, and there must be funding to support the plan, which may come from reallocating existing service dollars. The plan should include commitments for each group of persons who are unnecessarily segregated, such as individuals residing in facilities for individuals with developmental disabilities, psychiatric hospitals, nursing homes and board and care homes, or individuals spending their days in sheltered workshops or segregated day programs. To be effective, the plan must have demonstrated success in actually moving individuals to integrated settings in accordance with the plan. A public entity cannot rely on its *Olmstead* plan as part of its defense unless it can prove that its plan comprehensively and effectively addresses the needless segregation of the group at issue in the case. Any plan should be evaluated in light of the length of time that has passed since the Supreme Court's decision in *Olmstead*, including a fact-specific inquiry into what the public entity could have accomplished in the past and what it could accomplish in the future.

13. Can a public entity raise a viable fundamental alteration defense without having implemented an *Olmstead* plan?

A: The Department of Justice has interpreted the ADA and its implementing regulations to generally require an *Olmstead* plan as a prerequisite to raising a fundamental alteration defense, particularly in cases involving individuals currently in institutions or on waitlists for services in the community . In order to raise a fundamental alteration defense, a public entity must first show that it has developed a comprehensive, effectively working *Olmstead* plan that meets the standards described above. The public entity must also prove that it is implementing the plan in order to avail itself of the fundamental alteration defense. A public entity that cannot show it has and is implementing a working plan will not be able to prove that it is already making sufficient progress in complying with the integration mandate and that the requested relief would so disrupt the implementation of the plan as to cause a fundamental alteration.

14. What is the relevance of budgetary shortages to a fundamental alteration defense?

A: Public entities have the burden to show that immediate relief to the plaintiffs would effect a fundamental alteration of their program. Budgetary shortages are not, in and of themselves, evidence that such relief would constitute a fundamental alteration. Even in times of budgetary constraints, public entities can often reasonably modify their programs by re-allocating funding from expensive segregated settings to cost-effective integrated settings. Whether the public entity has sought additional federal resources available to support the provision of services in integrated settings for the particular group or individual requesting the modification – such as Medicaid, Money Follows the Person grants, and federal housing vouchers – is also relevant to a budgetary defense.

15. What types of remedies address violations of the ADA's integration mandate?

A: A wide range of remedies may be appropriate to address violations of the ADA and *Olmstead*, depending on the nature of the violations. Remedies typically require the public entity to expand the capacity of community-based alternatives by a specific amount, over a set period of time. Remedies should focus on expanding the most integrated alternatives. For example, in cases involving residential segregation in institutions or large congregate facilities, remedies should provide individuals opportunities to live in their own apartments or family homes, with necessary supports. Remedies should also focus on expanding the services and supports necessary for individuals' successful community tenure. *Olmstead* remedies should include, depending on the population at issue: supported housing, Home and Community Based Services ("HCBS") waivers, [19] crisis services, Assertive Community Treatment ("ACT") teams, case management, respite, personal care services, peer support services, and supported employment. In addition, court orders and settlement agreements have typically required public entities to implement a process to ensure that currently segregated individuals are provided information about the alternatives to which they are entitled under the agreement, given opportunities that will allow them to make informed decisions about their options (such as visiting community placements or programs, speaking with community providers, and meeting with peers and other families), and that transition plans are developed and implemented when individuals choose more integrated settings.

16. Can the ADA's integration mandate be enforced through a private right of action?

A: Yes, private individuals may file a lawsuit for violation of the ADA's integration mandate. A private right of action lies to enforce a regulation that authoritatively construes a statute. The Supreme Court in *Olmstead* clarified that unnecessary institutionalization constitutes "discrimination" under the ADA, consistent with the Department of Justice integration regulation.

17. What is the role of protection and advocacy organizations in enforcing *Olmstead*?

A: By statute, Congress has created an independent protection and advocacy system (P&As) to protect the rights of and advocate for individuals with disabilities. [20] Congress gave P&As certain powers, including the authority to investigate incidents of abuse, neglect and other rights violations; access to individuals, records, and facilities; and the authority to pursue legal, administrative or other remedies on behalf of individuals

with disabilities. [21] P&As have played a central role in ensuring that the rights of individuals with disabilities are protected, including individuals' rights under title II's integration mandate. The Department of Justice has supported the standing of P&As to litigate *Olmstead* cases.

18. Can someone file a complaint with the Department of Justice regarding a violation of the ADA and *Olmstead*?

A: Yes, individuals can file complaints about violations of title II and *Olmstead* with the Department of Justice. A title II complaint form is available on-line at www.ADA.gov and can be sent to:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Disability Rights Section - NYAV
Washington, DC 20530

Individuals may also call the Department's toll-free ADA Information Line for information about filing a complaint and to order forms and other materials that can assist you in providing information about the violation. The number for the ADA Information Line is (800) 514-0301 (voice) or (800) 514-0383(TTY).

In addition, individuals may file a complaint about violations of Olmstead with the Office for Civil Rights at the U.S. Department of Health and Human Services. Instructions on filing a complaint with OCR are available at http://www.hhs.gov/ocr/civilrights/complaints/index.html.

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[1] 42 U.S.C. § 12101(b)(1).

[2] 42 U.S.C. § 12101(a)(2).

[3] 42 U.S.C. § 12132.

[4] *See* 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Executive Order 12250, 45 Fed. Reg. 72995 (1980), *reprinted in* 42 U.S.C. § 2000d-1. Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."). Claims under the ADA and the Rehabilitation Act are generally treated identically.

[5] 28 C.F.R. § 35.130(d) (the "integration mandate").

[6] 28 C.F.R. Pt. 35, App. A (2010) (addressing § 35.130).

[7] *Olmstead v. L.C.*, 527 U.S.at 607.

[8] *Id.* at 600-01.

[9] 28 C.F.R.§ 35.130(b)(7).

[10] *Id.*; *see also Olmstead*, 527 U.S. at 604-07.

[11] 28 C.F.R. pt. 35 app. A (2010).

[12] *See* 28 C.F.R. § 35.130(b)(1) (prohibiting a public entity from discriminating "directly or through contractual, licensing or other arrangements, on the basis of disability"); § 35.130(b)(2) (prohibiting a public entity from "directly, or through contractual or other arrangements, utilizing criteria or methods of administration" that have the effect of discriminating on the basis of disability").

[13] *Olmstead*, 527 U.S. at 598; 28 C.F.R. 35.130(d).

[14] *See* CMS, Olmstead Update No. 4, at 4 (Jan. 10, 2001), available at https://www.cms.gov/smdl/downloads/smd011001a.pdf.

[15] *Id.*

[16] 28 C.F.R. § 35.130.

[17] *See* U.S. Dept. of Justice, ADA Title II Technical Assistance Manual § II-3.6200.

[18] *Olmstead*, 527 U.S. at 604.

[19] HCBS waivers may cover a range of services, including residential supports, supported employment, respite, personal care, skilled nursing, crisis services, assistive technology, supplies and equipment, and environmental modifications.

[20] 42 U.S.C. §§ 15001 *et seq.* (Developmental Disabilities Assistance and Bill of Rights Act, requiring the establishment of the P&A system to protect and advocate for individuals with developmental disabilities); 42 U.S.C. § 10801 *et seq.* (The Protection and Advocacy for Individuals with Mental Illness Act, expanding the mission of the P&A to include protecting and advocating for individuals with mental illness)

[21] 42 U.S.C. §§ 10805, 15043.
