IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

A.A., *et al.*, Plaintiffs, v. KIM BIMESTEFER, Defendant.	Case No. 1:21-cv-2381

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States of America respectfully submits this Statement of Interest under 28 U.S.C. § 517 to provide its view on the application of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.[1] Specifically, the United States clarifies that: (1) plaintiffs who are segregated or at serious risk of segregation due to a lack of medically necessary community-based services can establish they have an injury in fact sufficient to confer standing, and (2) unnecessary segregation constitutes discrimination on the basis of disability under the ADA and the Rehabilitation Act.[2] Since Plaintiffs allege that they are segregated or are at serious risk of segregation due to Defendant's failure to provide or arrange for medically necessary mental health services, Plaintiffs have adequately alleged a violation of the ADA and the Rehabilitation Act.

[1] The Attorney General is authorized "to attend to the interests of the United States" in any case pending in federal court. 28 U.S.C. § 517.
[2] Aside from these issues, the United States takes no position on other issues before the Court.

INTEREST OF THE UNITED STATES

The United States submits this Statement of Interest because this litigation implicates the proper interpretation and application of Title II of the ADA and Section 504 of the Rehabilitation Act. As the federal agency charged with enforcement and implementation of Title II of the ADA, the Department of Justice has an interest in supporting the proper and uniform application of the ADA, in furthering Congress's intent to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," and to reserve a "central role" for the federal Government in enforcing the standards established in the ADA. 42 U.S.C. §§ 12133-12134, 12101(b)(2), 12101(b)(3).

The United States also has responsibility for enforcing and implementing Section 504 of the Rehabilitation Act. Congress directed all federal agencies to issue regulations implementing Section 504 with respect to the programs or activities to which they provide federal financial assistance. *See* 29 U.S.C. § 794(a). The Department of Justice is charged with coordinating federal agencies' implementation and enforcement of Section 504. *See* 28 C.F.R. pt. 41; Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); *see also* 28 C.F.R. § 0.51(b)(3). The Department of Justice also has authority to enforce Section 504. *See* 29 U.S.C. § 794(a).

PLAINTIFFS' FACTUAL ALLEGATIONS

Plaintiffs A.A., B.B., and C.C. are children with mental health disabilities, who allege they have experienced a revolving door of institutionalization due to Defendant's failure to arrange for and provide appropriate care. Compl. ¶¶ 1-4, 12, 23, 105. Plaintiffs are enrolled in Colorado's Medicaid program and depend on Medicaid for their mental health services. *Id*. ¶¶ 19-21. Specifically, they need Intensive Home and Community-Based Services ("IHCBS") in order to reside at home and avoid unnecessary institutionalization in hospitals or other facilities.

IHCBS include intensive outpatient services and other services designed to enable children with significant mental health needs to "live in community settings and participate fully in family and community life." *Id.* ¶¶ 49-55. They include intensive care coordination, family and youth peer support services, intensive in-home services, and mobile crisis response and other crisis intervention services. *Id.* ¶¶ 50-52, 54-56, 59-62, 64-65. These services are family-centered and do not include care in institutional or group settings. *Id.* ¶¶ 84-85. Under the Medicaid Statute, states must provide such medically necessary services to Medicaid-eligible children under 21.[3] *Id.* ¶¶ 13, 39-46 (citing Medicaid's Early and Periodic Screening, Diagnosis and Treatment (EPSDT) provisions).

Plaintiffs allege that Defendant fails to arrange for and provide these services to them in the frequency and amount necessary for them to live in the community. *Id.* ¶¶ 2, 19-21. As a result, Plaintiffs A.A. and B.B. were hospitalized at the time of filing the Complaint and could not get the services they need in their homes. *See, e.g.*, *id*. ¶¶ 106-16 (alleging that at the time of the complaint, A.A. had been confined at Children's Hospital Colorado since March 9, 2021); ¶¶ 117-28 (alleging that B.B. has cycled through multiple institutions, including a long-term stay at a hospital emergency room, and at the time of the complaint, Defendant was searching for an out-of-state placement, away from B.B.'s family and community). Plaintiff C.C. has cycled in and out of segregated settings for the past several years and is again at serious risk of

[3] A state must provide "early and periodic screening, diagnostic, and treatment [(EPSDT)] services (as defined in subsection (r)) for individuals who are eligible under the [State Medicaid] plan and are under the age of 21." 42 U.S.C. § 1396d(a)(4)(A). Such services are defined to include screening services and "[s]uch other necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by screening services, whether or not such services are covered under the State [Medicaid] plan." 42 U.S.C. § 1396d(r)(5). States must "provide for . . . arranging for (directly or through referral . . .) corrective treatment the need for which is disclosed by such health screening services." 42 U.S.C. § 1396a(a)(43)(C). Ultimately, as Defendant acknowledges, "any service a state is permitted to cover that is necessary to treat or ameliorate a defect, physical and mental illness, or a condition identified by a screen, must be provided to EPSDT participants regardless of whether the service or item is otherwise included in the state's Medicaid plan." Mot. at 3-4.

institutionalization. *Id*. ¶¶ 21, 130, 134-36 (alleging that C.C. has been psychiatrically hospitalized three times and required five other in-patient mental health residential placements since March 22, 2021).[4]

STATUTORY AND REGULATORY BACKGROUND

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It found that "historically, society has tended to isolate and segregate individuals with disabilities" and that "individuals with disabilities continually encounter various forms of discrimination, including . . . segregation." *Id.* §§ 12101(a)(2), (5). Congress determined that the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, *independent living*, and economic self-sufficiency for such individuals." *Id.* § 12101(a)(7) (emphasis added). Title II of the ADA prohibits disability discrimination in public services: "[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." *Id.* § 12132.

Congress directed the Attorney General to promulgate regulations to implement Title II. *Id.* § 12134. These regulations require public entities, *inter alia*, to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) ("the integration mandate"). The "most

[4] Defendant makes a factual attack on Plaintiffs' standing and asserts, with the support of a document filed under seal, that Plaintiffs are receiving at least some of the services that they seek. Mot. at 7-14. Plaintiffs have filed their own declarations in support of their response to the Motion, and dispute Defendant's characterization of the facts. Opp. at 7-12. The United States takes no position on the factual disputes raised by the parties.

integrated setting" is one which "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. B (2020). The regulations also require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.* § 35.130(b)(7).

In *Olmstead*, the Supreme Court held that, under the ADA and its regulations, "unjustified institutional isolation of persons with disabilities is a form of discrimination." *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999) (plurality opinion). The Court reasoned that "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." *Id.* The Court concluded that individuals with disabilities are entitled to community-based services when such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with disabilities. *Id.* at 607.

Congress enacted Section 504 of the Rehabilitation Act to "enlist[] all programs receiving federal funds in an effort 'to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted.'" *School Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 277 (1987) (quoting 123 Cong. Rec. 13515 (1977) (statement of Sen. Humphrey)). Section 504 provides that "[n]o 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[.]" 29 U.S.C. § 794(a). The

Department of Justice's regulations coordinating the implementation of Section 504 require recipients of federal funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d).

The integration mandates of the ADA and Section 504 of the Rehabilitation Act are not limited to people who are currently institutionalized, but also apply to people with disabilities who are at serious risk of segregation, as the Tenth Circuit and every other court of appeals to squarely address the issue has decided. *See, e.g.*, *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (observing that the protections of *Olmstead* and the integration mandate "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation"); *see also Waskul v. Washtenaw Cty. Cmty. Mental Health*, 979 F.3d 426, 460-61 (6th Cir. 2020); *Steimel v. Wernert*, 823 F.3d 902, 912 (7th Cir. 2016); *Davis v. Shah*, 821 F.3d 231, 263 (2d Cir. 2016); *Pashby v. Delia*, 709 F.3d 307, 321-22 (4th Cir. 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1116-17 (9th Cir. 2011), *amended by* 697 F.3d 706 (9th Cir. 2012).

DISCUSSION

I. Plaintiffs Who Are Segregated or at Serious Risk of Segregation Due to a Lack of Medically Necessary Community-Based Services Can Allege an Injury in Fact Sufficient to Confer Standing

Defendant argues that Plaintiffs lack an injury in fact sufficient to establish standing. Specifically, Defendant claims Plaintiffs are already receiving the services they seek and that Defendant did not deny requests for services or claims for payment for services. Mot. at 2, 9-15. The Complaint alleges that Plaintiffs are not receiving IHCBS. Compl. ¶¶ 2, 5, 14, 19-21, 103, 114, 126, 134-36. And, in their opposition, Plaintiffs reassert that they are not receiving the

services and submit declarations in support of this contention. Pl.'s Opp. at 2-3. While the United States does not take a position on the factual dispute between the parties, it notes that Defendant's argument fails to address standing in the context of claims brought under Title II's integration mandate, in which the injury is the unnecessary segregation itself or the lack of medically necessary community-based services that puts Plaintiffs at serious risk of segregation. *See M.J. v. D.C.*, 401 F. Supp. 3d 1, 10 (D.D.C. 2019) (holding that allegations that defendants failed to provide requested intensive home and community-based services that led to unnecessary institutionalization is sufficient to meet the injury in fact requirement).

To establish standing, Article III requires plaintiffs to show that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal citation omitted). Defendant only disputes that Plaintiffs do not meet the first element of standing – injury in fact. An injury in fact must be "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The Complaint here meets these requirements. Plaintiffs allege they have suffered a concrete and particularized injury because they need IHCBS to address their significant mental health conditions, Compl. ¶¶ 1-4, and that Defendant has failed to provide or arrange for these services so that Plaintiffs can receive them in their homes or communities, *id*. ¶¶ 32, 46, 84-86. As a result, in order to receive the services they need, Plaintiffs must either be institutionalized in hospitals or other highly restrictive settings. *Id*. ¶¶ 19-21, 32, 105, 113-14, 118-25, 130-36. These allegations of unnecessary institutionalization are sufficient to establish a specific, tangible harm to meet the injury in fact requirement for Article III standing.

With respect to the named plaintiffs, the Complaint and Plaintiffs' declarations assert that A.A. and B.B. are currently institutionalized. Compl. ¶¶ 106, 117; Declaration of G.A., D.E. 37-1 ¶ 15; Declaration of P.B., D.E. 37-2 ¶ 15. Their institutionalization is an injury in fact sufficient to confer standing. *Cf. Olmstead*, 527 U.S. at 593 (construing the claims of two institutionalized individuals); *see also, e.g.*, *State Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 284 (D. Conn. 2010) (finding that individuals segregated in nursing facilities alleged an injury in fact); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 310 (E.D.N.Y. 2008) (finding that institutionalized plaintiffs had standing).

Similarly, C.C. is at serious risk of institutionalization and therefore has also suffered an injury in fact. Courts have broadly recognized that individuals with disabilities have an injury in fact when the lack of medically necessary community-based care places them at serious risk of segregation. In *Fisher*, the plaintiffs alleged that a state policy or practice – the imposition of a five prescriptions per month cap for Medicaid recipients receiving home and community-based services – would force them into nursing facilities in order to obtain medically necessary care. 335 F.3d at 1177-78. The Tenth Circuit reversed the district court's grant of summary judgment in favor of defendants, holding that individuals who could only access medically necessary services in an institution and were thus at risk of segregation could pursue an *Olmstead* claim. *Id.* at 1181-82. As the *Fisher* Court concluded, individuals "imperiled with segregation" because of state action may bring a challenge to that action "without first submitting to institutionalization." *Id.* at 1182. Likewise, other courts that have directly addressed a challenge to the standing of at-risk plaintiffs have explicitly held that plaintiffs in such situations suffered an injury in fact. *See, e.g.*, *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 979 F.3d 426, 437-39, 441 (6th Cir. 2020) (plaintiffs at serious risk of segregation alleged current and ongoing harm

when they were not receiving all services that had been deemed medically necessary as part of their plan of service); *Guggenberger v. Minnesota,* 198 F. Supp. 3d 973, 991-92 (D. Minn. 2016) (plaintiffs had established injury in fact when they alleged that they were "lacking necessary supports and services that could enable him or her to live independently in the community").

As in *Fisher*, C.C. and the other similar plaintiffs allegedly are at risk of segregation because of the state's failure to provide medically necessary services in integrated settings. Compl. ¶ 12 (children like C.C. who are not currently segregated but are not receiving services "find themselves thrown back into a crisis, forced to repeat the cycle of [passing through hospitals, emergency rooms and other acute care facilities, without obtaining any long-term relief]"). All of the named Plaintiffs and putative class members, including C.C., have behavioral or emotional disorders and allegedly need IHCBS to address their conditions. C.C. in particular has a history of self-injurious behavior and is allegedly at increased risk of self harm and institutionalization because of the failure to receive IHCBS. *Id.* ¶ 135.

Defendant relies on cases that are materially different from the facts alleged here and do not involve Title II's integration mandate or the provision of services under Medicaid's EPSDT provisions. Mot. at 14. In *Cunningham v. Birch*, No. 16-cv-02353-NYW, 2017 WL 1243020 (D. Colo. Feb. 17, 2017), the plaintiff sued the state Medicaid agency for denying him coverage of a particular medication for his Hepatitis C because he did not meet the eligibility criteria for the medication. The Medicaid agency subsequently revised its criteria, but the plaintiff did not attempt to seek coverage under the new criteria. Because the policy at issue was no longer in effect and the plaintiff did not attempt to obtain coverage under the operative policy, the court found his injury speculative such that he did not have standing to sue. Here, plaintiffs do not challenge particular eligibility criteria and need not show, therefore, that the use of such criteria

caused their injury. Moreover, unlike the Medicaid provisions at issue in *Cunningham*, the EPSDT provisions of Medicaid require states to do more than merely pay for services when requested – a state has an obligation to "provide (or ensure the provision of) services not merely to pay for them." *O.B. v. Norwood*, 838 F.3d 837, 843 (7th Cir. 2016). Given that plaintiffs allege unnecessary institutionalization caused by the Defendant's failure to provide services to which they are entitled under EPSDT, they have adequately alleged actual or imminent injury sufficient to confer standing.

Defendant also relies on *Doe v. Blum*, 729 F.2d 186, 188-90 (2d Cir. 1984). In that case, the plaintiffs sued the state Medicaid agency for denial of reproductive health services due to its practice of giving a Medicaid identification card only to the head of a household. The plaintiffs there alleged that the practice prevented them from privately obtaining those services without the knowledge of their head of household. Because the plaintiffs did not, however, allege that they ever attempted to obtain reproductive health services without a Medicaid identification card, the court found their injury too speculative to confer standing. In this case, however, there is nothing speculative about Plaintiffs' injuries. Plaintiffs here allege a current and ongoing injury tied to the policy or practice they challenge. *See, e.g.*, Compl. ¶ 2 (Plaintiffs "have experienced unnecessary institutionalization and other serious harms as a result of Defendant's failure to provide or arrange for medically necessary mental health-behavioral health services . . . ."). As a result, they have adequately alleged an injury sufficient for standing.

II. Unnecessary Segregation Constitutes Discrimination on the Basis of Disability Under the ADA and the Rehabilitation Act

Defendant also argues that Plaintiffs' ADA and Rehabilitation Act claims should be dismissed because Plaintiffs do not allege "that their disabilities were a but-for cause of the purported discrimination under the ADA or the sole cause under the [Rehabilitation Act]." Mot.

at 29-30. Defendant's argument ignores that Plaintiffs bring their claim under the integration regulations of Title II of the ADA and Section 504 of the Rehabilitation Act. The Supreme Court has squarely held that unnecessary segregation constitutes discrimination on the basis of disability under Title II of the ADA. *Olmstead*, 527 U.S. at 597 ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability.").

In *Olmstead*, the Supreme Court specifically rejected an argument similar to the one Defendant advances here. The defendant in *Olmstead* argued that plaintiffs "encountered no discrimination 'by reason of' their disabilities because they were not denied community placement on account of those disabilities." *Id.* at 598. Rejecting that argument, the Court explained, "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA," and explicitly identified the segregation of persons with disabilities as a form of discrimination in the statute. *Id.* at 598-600; 42 U.S.C. § 12101(a)(2) (identifying the isolation and segregation of individuals with disabilities as a form of discrimination). The Court also noted that dissimilar treatment between people with and without disabilities exists "in this key respect: in order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice." 527 U.S. at 601.

Contrary to Defendant's assertion, Plaintiffs have adequately alleged claims under the ADA and Rehabilitation Act because unnecessary segregation is a form of discrimination on the basis of disability under Title II of the ADA and Section 504. [5] In this case, all Plaintiffs have

[5]Title II of the ADA prohibits public entities from subjecting a qualified individual with a disability to discrimination "by reason of such disability." 42 U.S.C. § 12132. The Rehabilitation Act states that no qualified individual with a disability "shall, solely by reason of her or his disability . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). In the context of claims

mental health disabilities and allege they need IHCBS to avoid unnecessary institutionalization. Compl. ¶¶ 1, 2, 27. Without the mental health services they need to remain in their communities, the Plaintiffs in this case, because of their disabilities, will be segregated in institutions where such services are available. Accordingly, their allegations state a claim for discrimination on the basis of disability under the ADA and the Rehabilitation Act.

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alleging unnecessary segregation, courts interpret the statutes' requirements similarly. The Tenth Circuit in *Fisher* construed the plaintiffs' claims alleging the risk of unnecessary segregation under both statutes as "essentially the same," 335 F.3d at 1179 n.3, as have numerous other courts. *See, e.g., Waskul v. Washtenaw Cty. Cmty. Mental Health*, 979 F.3d 426, 459 n.13 (6th Cir. 2020) (stating that the Rehabilitation Act claim is to be read "in parallel" with the ADA integration mandate claim and rejecting defendants' argument that they did not violate the Rehabilitation Act because "discrimination was not the sole motivation for their actions"); *Steimel v. Wernert*, 823 F.3d 902, 909 (7th Cir. 2016) (construing the claims consistently); *Davis v. Shah*, 821 F.3d 231, 259 (2d Cir. 2016) (treating the ADA and Rehabilitation Act claims identically).

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court consider this Statement of Interest in this litigation.

Date: January 14, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of such filing to all counsel of record.

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