

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PAULA SMITH, individually and)	
on behalf of similarly situated persons)	
)	
Plaintiff,)	
v.)	Civil Action No. 2:13-CV-5670-AB
)	
DEPARTMENT OF PUBLIC)	
WELFARE OF THE COMMONWEALTH)	
OF PENNSYLVANIA; BEVERLY)	
MACKERETH, in her official)	
capacity as Secretary of the Department)	
of Public Welfare of the Commonwealth)	
of Pennsylvania,)	
)	
Defendants.)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States files this Statement of Interest, pursuant to 28 U.S.C. § 517, because this litigation implicates the proper interpretation and application of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 (“ADA”). The Department of Justice has authority to enforce Title II and to issue regulations implementing the statute. 42 U.S.C. §§ 12133, 12134. This case involves a public entity’s obligation, under the ADA’s integration regulation, to provide services to individuals with disabilities in the most integrated setting appropriate to their needs and to avoid placing individuals at risk of institutionalization. *See* 28 C.F.R. § 35.130(d); *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999). Therefore, the United States has an interest in ensuring the appropriate and consistent interpretation of Title II and the integration regulation.

I. INTRODUCTION

The Plaintiff and the putative class (“Plaintiffs”) allege that the Pennsylvania Department of Public Welfare (“DPW”) unnecessarily places them at serious risk of institutionalization in nursing facilities by failing to provide them with attendant care services in the community. (Pls.’ 2d Am. Compl. 13-15, ¶¶ 57-62, April 11, 2014, ECF No. 11.)¹ DPW has already determined that Plaintiffs are in need of, and eligible for, its existing community-based attendant care program. (Virginia Brown Dep. 2, 88:13-23, March 25, 2014, ECF No. 45-7.) Plaintiffs allege that, even though it is less expensive to provide attendant care services in the community, DPW places them at risk of institutionalization in nursing facilities by limiting their access to attendant care services in the community. (See Gov.’s Exec. Budget FY2014-2015 7, April 11, 2014, ECF No. 45-8; Gov.’s Exec. Budget, 46, ECF No. 45-8.) Plaintiffs request that DPW provide them with community-based attendant care services that DPW already provides to individuals with similar disabilities; and they claim that otherwise, they may suffer from a serious decline in health that would likely necessitate nursing facility admission. (Pls.’ Mot. Summ. J., 36-38, April 11, 2014, ECF No. 45.)

DPW denies that it has placed Plaintiffs at serious risk of institutionalization and argues that, even if Plaintiffs were at risk, any change it could make to address the violation would fundamentally alter the nature of its attendant care services. (Defs.’ Mem. Law Supp. Mot. Summ. J. 29-64, May 9, 2014, ECF No. 51-1.) The United States offers this Statement of Interest as a means of clarifying the applicable law so as to assist the Court in deciding the motions before it.

¹ Throughout this Statement of Interest, the references to page numbers in the record refer to the ECF page numbers.

II. STATEMENT OF FACTS

The Commonwealth of Pennsylvania offers community-based attendant care services to individuals with physical disabilities who need hands-on assistance with activities of daily living, such as dressing, taking medication, eating, and bathing. (Decl. Virginia Brown 3, ¶¶ 6-12, May 9, 2014, ECF No. 53-1.) These services are funded one of two ways: (1) through the state- and federally-funded Attendant Care Waiver (“the Waiver”), which is available to those who are both clinically eligible to receive the services and financially eligible for Medicaid; or (2) through the state-funded Act 150 program, which is intended for individuals such as Paula Smith, who are clinically eligible to receive services, but ineligible for Medicaid because their income exceeds 300% of the Federal Benefit Rate paid for Supplemental Security Income benefits (\$2163 per month).² (Decl. Brown 3-4 ¶¶ 10-19, ECF No. 53-1; Anne Henry Dep. 5, 11:7-11, Apr. 11, 2014, ECF No. 45-3; Def.’s Mem. Law at 10, ECF 51-1.)

Prior to 2009, the Act 150 program served all eligible individuals; however, since 2009, there has been a waitlist for Act 150 attendant care services, and it has grown to 283 individuals, seven of whom are currently in nursing facilities. (Decl. Brown 8 ¶ 44, ECF No. 53-1; Decl. Henry 4 ¶¶ 16-17, 5 ¶ 22, May 9, 2014, ECF No. 53-2; Defs’ Mem. Law at 22-23, ECF No. 51-1.) The creation of the Act 150 waitlist coincided with the Commonwealth’s reduction of funding for the program, which was approximately \$45 million for fiscal year 2007 to 2008, but now stands at approximately \$26 million. (See Pls.’ Stmt. Undisp. Facts Supp. Pls.’ Mot. Summ. J. 30-31, ¶¶ 111-12, April 11, 2014,

² Pennsylvania created the Act 150 program under the Attendant Care Services Act in 1987. See 62 Pa. Stat. Ann. §§ 3051-3058.

ECF No. 45-1.) DPW has no plan for transitioning Act 150 applicants off the waitlist. (See Decl. Henry 5 ¶ 20, ECF No. 53-2.)

The putative class includes individuals who have been found eligible for Act 150 services, but remain on the waitlist. (Pls.' 2d Am. Compl. at 12-13, ECF No. 11.) One individual who has been waiting for services since 2012 was briefly hospitalized, and she informed DPW that her husband can no longer care for her. (Act 150 Waitlist 6, April 11, 2014, ECF No. 45-13.) A man with quadriplegia who is also waiting for services is "in dire need of services," and DPW noted that he "MUST have additional help at home." (Act 150 Waitlist 8, ECF No. 45-13) (emphasis in original). This man also required surgery for skin/pressure wounds, a condition that is commonly associated with insufficient care and assistance. (See Act 150 Waitlist 8, ECF No. 45-13.) The doctor of a 55-year-old man on the waitlist indicated that his decreased ambulatory function and ability to transfer himself put him at risk of hospitalization. (Act 150 Waitlist 6, ECF No. 45-13.)

DPW has already determined that Plaintiffs are clinically eligible for nursing facility care and for services through the Waiver and Act 150. (NFCE Clarification 40, April, 4, 2014, ECF No. 45-8; Brown Dep. 2, 88:13-23, ECF No. 45-6.) DPW's guidance provides the following with respect to individuals who need attendant care services outside of a nursing facility:

[A]n individual who only needs personal care services to remain at home or in a community setting may be [nursing facility eligible] if, absent those personal care services, the individual's condition would deteriorate to the point that he or she would be institutionalized in a nursing facility in the near future (that is, a month or less).

(NFCE Clarification 40, ECF No. 45-8.)

The cost of serving individuals through the Act 150 program (\$27,408 per year) is slightly less than the Commonwealth's cost for serving the same person in a nursing facility through Medicaid (\$27,878 per year); and it is half the combined cost to the state and federal government. (Gov.'s Exec. Budget FY2014-2015 7, April 11, 2014, ECF No. 45-8) (stating that the cost of Act 150 attendant care services is \$2284 per month, per user); (Gov.'s Exec. Budget, 46, ECF No. 45-8) (stating that the yearly average cost of nursing facility care, including the federal and state shares, is \$58,080).³

Individuals who do not qualify for Medicaid because their income exceeds \$2163 per month may still meet the income criteria for attendant care under Medicaid (either in a nursing facility or through the Waiver) by using the Commonwealth's "spend down" process. 55 Pa. Code §§ 181.1(b), 181.1(f)(7), 181.14(c); Pa. Operations Mem. #13-11-01, 2-3, April 11, 2014, ECF No. 45-17. With respect to nursing facility care, the "spend down" process is generally available if the cost of medical care over a six-month period exceeds an individual's income during that time, in which case the person may enter the nursing facility and pay most of his or her income to the nursing facility. 55 Pa. Code

³ The state portion of the nursing facility cost changes yearly based upon the federal share, referred to as Federal Medical Assistance Payment (FMAP). The Commonwealth's current FMAP is 53.52%, which drops to 51.82% on October 1, 2014. *See Federal Financial Participation In State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2013 Through September 30, 2014*, 70 Fed. Reg. 231, 71422 (Nov. 30, 2012); *Federal Financial Participation In State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2014 Through September 30, 2015*, 79 Fed. Reg. 13, 3387 (Jan. 21, 2014).

DPW approximates the FMAP at 52%, presumably because the FMAP changes during the Commonwealth's fiscal year. (*See Defs.' Mem. Law at 5*, ECF No. 51-1.) Using the Commonwealth's FMAP rate of 52% and the Governor's budgetary projection for the total yearly nursing facility cost of \$58,080, the state cost to serve each person in a nursing facility under Medicaid is \$27,878 per year.

§§ 181.1(b), 181.1(f)(7), 181.14(c). The average per person cost for all nursing facilities is approximately \$4840 per month (that is, \$26,040 every six months and \$58,080 a year). (Gov.'s Exec. Budget, 46, ECF No. 45-8). Therefore, on average, individuals will only be eligible to enter a nursing facility and use the "spend down" process if they have a yearly income lower than approximately \$58,080 a year.

III. LEGAL AUTHORITY AND ANALYSIS

A. Unnecessary Segregation

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue[d] to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). For those reasons, in Title II of the ADA, Congress prohibited discrimination by public entities against individuals with disabilities, providing that "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. § 12132.

As directed by Congress, the Attorney General issued regulations implementing Title II. 42 U.S.C. § 12134(a). Central to this case are two regulations, the first of which articulates the "integration mandate" of the ADA and provides that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR § 35.130(d).

The “most integrated setting” is “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.” 28 C.F.R. pt. 35 app. A (2009); *cf. Helen L. v. DiDario*, 46 F.3d 325, 333 (3d Cir. 1995) (holding that “the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled”). The second regulation provides that public entities are required to “make reasonable modifications in policies, practices, or procedures” to avoid unjustified segregation of individuals with disabilities; however, public entities are not required to make such modifications if “the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).

B. Risk of Institutionalization

Individuals who are at risk of entering an institution because of a state policy need not wait until they enter the institution in order to assert an ADA integration claim. *Pashby v. Delia*, 709 F.3d 307, 322-23 (4th Cir. 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1118 (9th Cir. 2011), *amended by* 697 F.3d 706 (9th Cir. 2012); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003). In *Fisher*, the Tenth Circuit held that “disabled persons who . . . stand imperiled with segregation” could bring a claim “under the ADA’s integration regulation without first submitting to institutionalization.” *Id.* at 1182. The court reasoned that “there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized.” *Id.* at 1181. The court concluded that 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.” *Id.* Moreover, the plaintiffs in *Fisher* “face[d] a substantial risk of harm” because they were “at high risk for premature entry” to an institution due to the state policy at issue in the case. *Id.* at 1184 (internal quotation marks omitted).

Serious risk of institutionalization may be established by evidence that the lack of sufficient state-sponsored community-based services will likely cause a decline in a plaintiff’s health, safety, or welfare that would lead to her eventual placement in an institution. *M.R. v. Dreyfus*, 697 F.3d 706, 734 (9th Cir. 2012) (citing, with approval, the statement by the Department of Justice that serious risk of institutionalization is demonstrated when insufficient services cause plaintiffs “to enter an institution immediately, or . . . causes them to decline in health over time and eventually enter an institution in order to seek necessary care”).⁴

C. Reasonable Accommodations

The plaintiff’s prima facie burden in articulating a reasonable accommodation is “not a heavy one.” *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003) (internal quotation marks omitted). As the Second Circuit Court of Appeals explained in *Henrietta D.*, “it is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits,” and that

⁴ See also *Fisher*, 335 F.3d at 1185 (finding the fact that many of the plaintiffs would remain in their homes “until their health ha[d] deteriorated” and would “eventually end up in a nursing home” was sufficient to show the plaintiffs were at risk of institutionalization); *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1120 (N.D. Cal. 2009) (concluding that plaintiffs may establish a violation of the integration mandate by showing that the denial of services could lead to an eventual “decline in health” that puts them at “risk [of] being placed in a nursing home”); *Crabtree v. Goetz*, No. 3:08-0939, 2008 WL 5330506, *3-*12 (M.D. Tenn. Dec. 19, 2008) (unpublished) (granting a preliminary injunction to reinstate plaintiffs’ home health services based on evidence of the plaintiffs’ deteriorating health and likely placement in nursing facilities); *Hiltibran v. Levy*, No. 10-4185, 2010 WL 6825306, *4-*6 (W.D. Mo. Dec. 27, 2010) (unpublished) (ordering the state to provide plaintiffs incontinence briefs to prevent their eventual placement in nursing facilities).

“once the plaintiff has done this, she has made out a prima facie showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant.”⁵ 331 F.3d at 280 (internal quotation marks and alterations omitted); *see also Frederick L. v. Dept. of Public Welfare of Commonwealth of Pa.*, 364 F.3d 487, 492 n.4 (3d Cir. 2004) (*Frederick L. I*) (stating that a plaintiff in an *Olmstead* action bears the burden of articulating a reasonable modification that the state may make in order to comply with the ADA).

DPW has not violated the ADA simply because it has a waitlist for Act 150 services, nor does the ADA require the Commonwealth to provide a certain level of benefits to nursing facility eligible individuals,⁶ however, as noted above, the ADA does require public entities to avoid placing individuals at serious risk of unnecessary state-sponsored institutionalization. *Frederick L.I*, 364 F.3d at 492. Moreover, where individuals are placed at serious risk of such institutionalization and an accommodation is available to prevent such institutionalization, the public entity bears the burden of showing that accommodating those individuals will fundamentally alter its provision of services. *Pa. Prot. and Advocacy, Inc. v. Pa. Dept. of Public Welfare*, 402 F.3d 374, 379 (3d Cir. 2005). If this Court determines that Plaintiffs have established that they are at risk of needing state-sponsored nursing facility services and have “suggest[ed] the

⁵ *See also Duffy v. Velez*, No. 09-5539, 2010 WL 503037, at *3 (D.N.J. Feb. 8, 2010) (unpublished) (holding that a “[p]laintiff need only allege facts showing that an accommodation could be made which would allow” him or her to receive integrated services).

⁶ *See Olmstead*, 527 U.S. at 603 n.14 (stating, “We do not in this opinion hold that the ADA imposes on the States a standard of care for whatever medical services they render, or that the ADA requires States to provide a certain level of benefits to individuals with disabilities”) (internal quotation marks omitted).

existence of a plausible accommodation,” *Henrietta D.* 331 F.3d at 280 (for example, by making a request for attendant care services in the community), DPW must meet its burden with respect to whether it can properly assert a fundamental alteration defense.⁷

Courts have routinely recognized that a request to receive services in the community when an individual is entitled to those same services in an institution is a reasonable modification and not a fundamental alteration of a state’s program. For instance, in *Townsend v. Quasim*, the court stated that *Olmstead* controls where the issue centers on “what location these services will be provided. Mr. Townsend simply requests that the services he is already eligible to receive under an existing state program (assistance in dressing, bathing, preparing meals, taking medications, and so on) be provided in the community-based adult home where he lives, rather than the nursing home setting the state requires.” 328 F.3d 511, 517 (9th Cir. 2003). Similarly, in the pre-*Olmstead* case of *Helen L.*, the Third Circuit Court of Appeals determined that DPW had violated the ADA’s integration mandate by failing to provide state-funded attendant care services for the plaintiff in her own home, rather than in a nursing facility. 46 F.3d at 337-39. *See also Radaszewski v. Maram*, 383 F.3d 599, 611 (7th Cir. 2004) (stating that “the integration mandate may well require the State to make reasonable modifications to the form of existing services in order to adapt them to community-integrated settings.”). Accordingly, DPW must provide attendant care services in the community to the same group of individuals whom the Commonwealth has already determined it would

⁷ Contrary to DPW’s argument that Plaintiffs’ other suggested modifications are irrelevant because their “allegations . . . center on the Act 150 program” and should therefore be limited to that program (Defs.’ Mem. Law at 55-56, ECF No. 51-1), nothing in *Olmstead* or other case law indicates that states can meet their *Olmstead* obligations only by providing the services through the very same program in which an individual is currently participating, or is on a waiting list to receive services from, or that provided the services to the individual in the past.

otherwise serve through its Medicaid program in nursing facilities, unless it can establish that doing so will cause a fundamental alteration.⁸

D. Fundamental Alteration Defense

DPW argues that any change to its current approach to attendant care services would constitute a fundamental alteration. For summary judgment purposes, DPW bears the burden of demonstrating such a fundamental alteration based on undisputed facts. *See, e.g., Pa. Prot. and Advocacy, Inc.*, 402 F.3d at 379-81 (stating that it is error for a district court, on summary judgment, “to find a fundamental alteration solely on the basis of budgetary constraints”). A public entity can establish a fundamental alteration defense if, “in the allocation of available resources, immediate relief would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with . . . disabilities.” *Olmstead*, 527 U.S. at 604.

DPW argues that any accommodations that would require it to change its attendant care system would impermissibly interfere with its discretion to administer its Medicaid program. (Defs.’ Mem. Law at 49-50, 55-56, ECF No. 51-1.) This is legally incorrect. A state’s obligations under the ADA are not defined by the scope of the federal-state Medicaid program—Title II of the ADA is an independent legal obligation on states to operate programs, services, and activities in ways that do not discriminate on

⁸ Contrary to DPW’s assertion that “one could have millions, or even tens-of-millions, of dollars of assets to pay privately for community-based care and still” receive attendant care services from the DPW (Defs.’ Mem Law at 11, ECF No. 51-1), the Commonwealth’s obligation to provide community-based services does not extend to an unlimited group of individuals. As noted above, the Commonwealth only provides nursing facility services to Medicaid-eligible individuals whose income, on average, is less than \$58,080 a year; and therefore, the Commonwealth’s obligation to provide attendant care services is limited to individuals making less than \$58,080 per year *and* who are at serious risk of institutionalization. *See* 55 Pa. Code §§ 181.1(b), 181.1(f)(7), 181.14(c); (Gov.’s Exec. Budget, 46, ECF No. 45-8); (Pa. Operations Mem. #13-11-01, 2-3, ECF No. 45-17).

the basis of disability. *Townsend*, 328 F.3d at 518, n.1. Therefore, complying with the Medicaid Act does not equate to complying with the ADA; therefore, courts have routinely held that a state may run afoul of the ADA even while carrying out CMS-approved state plans, waiver services, and amendments. *See e.g., Radaszewski*, 383 F.3d at 601 (allowing the plaintiffs' claims to proceed without regard to federal approval of the state's Medicaid plan and waiver programs); *Crabtree v. Goetz*, No. Civ. A. 3:08-0939, 2008 WL 5330506, at *2, *30-*31, (M.D. Tenn. Dec.19, 2008) (unpublished) (same); *Grooms v. Maram*, 563 F. Supp. 2d 840, 844, 863 (N.D. Ill. 2008) (same).

DPW's assertion that budget constraints prevent it from providing community-based services does not square with the fact that the cost of providing community-based attendant care services to Plaintiffs is slightly less than the cost of providing these services in a nursing facility. (*See Gov.'s Exec. Budget FY2014-2015 7*, ECF No. 45-8; *Gov.'s Exec. Budget, 46*, ECF No. 45-8.) In addition, the Third Circuit has held that "budgetary constraints alone are insufficient to establish a fundamental alteration defense." *Pa. Prot. and Advocacy*, 402 F.3d at 380.

The Third Circuit has also held that public entities may not avail themselves of the fundamental alteration defense unless they can first demonstrate that they have a comprehensive, effectively working plan to comply with the *Olmstead* mandate. *Id.* at 381 (holding that the "only sensible reading of the integration mandate consistent with the Court's *Olmstead* opinion allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA"); *Frederick L. v. Dept. of Public Welfare of Pa.*, 422 F.3d 151, 157 (3d Cir. 2005)

(“*Frederick L. II*”) (holding that the existence of an *Olmstead* plan is a “necessary element” of a successful fundamental alteration defense).

More specifically, the Third Circuit requires a public entity to prove that it has developed and is implementing an *Olmstead* plan that demonstrates a specific and measurable commitment to action by the public entity, including goals, benchmarks, and timeframes for which the entity can be held accountable.⁹ *Frederick L. II*, 422 F.3d at 156-59. The Third Circuit has rejected a public entity’s vague, general assurances and good faith intentions of future community placement, because such assurances may change; and it has further held that past progress in deinstitutionalization alone is insufficient to establish a comprehensive, effectively working *Olmstead* plan.¹⁰ *Id.*; *Frederick L. I*, 364 F.3d at 499-501; *Pa. Prot. and Advocacy, Inc.*, 402 F.3d at 383-85; *see also* U.S. Dept. of Justice, Statement of the Department of Justice on the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, http://www.ada.gov/olmstead/q&a_olmstead.htm (last updated June 22, 2011) (providing guidance for ADA and *Olmstead* enforcement).

⁹ In *Frederick L. II*, the Third Circuit held:

[A] viable integration plan at a bare minimum should specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.

422 F.3d at 160.

¹⁰ DPW applies the standard articulated by the Ninth Circuit Court of Appeals (Defs.’ Mem. Law at 51-52, ECF No. 51-1), which is less exacting than that of the Third Circuit; however, even if it were applicable, the Ninth Circuit still requires that the state be “genuinely and effectively in the process of deinstitutionalizing disabled persons.” *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 619-21 (9th Cir. 2005).

The Commonwealth claims to have an unwritten *Olmstead* plan to move some individuals out of institutions and into community-based settings. (Defs.’ Mem. Law at 44-47, ECF No. 51-1.) Plaintiffs claim that unwritten plan lacks the specificity required by *Frederick II*. (Pls.’ Mot. Summ. J., 51-53, ECF No. 45.) However, resolution of this disputed issue is not essential to defeat the Commonwealth’s fundamental alteration argument. Both parties acknowledge that the Commonwealth does not have a plan to ensure that individuals on the Act 150 waitlist are not placed at serious risk of institutionalization. (See Decl. Henry 4 ¶ 20, ECF No. 53-2; Pls.’ Mot. Summ. J., 51-53, ECF No. 45.) That alone is fatal to DPW’s fundamental alteration defense in this case. DPW incorrectly argues that it can avoid liability for placing Plaintiffs at risk of institutionalization because it has established a comprehensive, effectively working *Olmstead* plan to move some other individuals out of institutions. (Defs.’ Mem. Law at 54, ECF No. 51-1.) However, a state may not place one group of individuals at serious risk of institutionalization, without any plan to address the alleged violation, solely because it is working towards remedying unnecessary institutionalization as to another group of individuals. See U.S. Dept. of Justice, Statement of the Department of Justice on the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, http://www.ada.gov/olmstead/q&a_olmstead.htm (last updated June 22, 2011) (stating that a public entity’s *Olmstead* “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”). Permitting such a result would contradict *Olmstead*’s

holding that a state must consider the needs of a “large and diverse population” of individuals with disabilities served by the state. *See Olmstead*, 527 U.S. at 604. That is, 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.¹¹

IV. CONCLUSION

The United States offers this Statement of Interest as a means of clarifying the applicable law in this action so as to assist the Court in deciding the motions before it. If the Court so desires, counsel for the United States will be present and prepared to argue the present Statement of Interest at any upcoming hearings regarding the Motion.

¹¹ DPW also argues that *Olmstead* plans are only applicable to individuals in institutions. (*See* Defs.’ Mem. Law at 53 (stating that “an integration plan is a plan to move people out of institutions and into the community”).) The purpose of an *Olmstead* plan is for a state to correct its noncompliance with the ADA, not insulate itself from its ADA obligations to people who are facing institutionalization. Further, DPW’s position would effectively push people into institutions in order to benefit from an *Olmstead* plan, a result plainly at odds with the ADA. *Cf. Fisher*, 335 F.3d at 1182 (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”).

Respectfully submitted,

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DATED: June 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2014, a copy of foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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