Docket No. 09-16022

In the

United States Court of Appeals

for the

Ninth Circuit

PEG BALL, JAMES CREE, a minor person by and through her grandfather and guardian Bennie James, JEANNE SPINKA, VENNETTA GRAHAM, COLIN PHELAN, a minor person by and through his mother Kim Bowman, JUDETH HINTON, VIRGINIA HASKELL, as individuals and as representatives of a class of persons similarly situated,

Plaintiffs-Appellees,

v.

ANTHONY D. RODGERS, Director of the Arizona Health Care Cost Containment System, THE ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM ADMINISTRATION and STATE OF ARIZONA,

Defendants-Appellants.

Appeal from a Decision of the United States District Court for Arizona (Tucson), No. 00-CV-00067 · Honorable Earl H. Carroll

REPLY BRIEF OF APPELLANTS

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RESPONSE TO PLAINTIFFS' STATEMENTS OF FACT

A number of statements in the Answering Brief ("Ans. Br.") are inaccurate. For example, the Brief repeatedly states that HCBS services in Arizona were demonstrated to be inferior or "grossly inferior" to institutional care, as part of an argument that HCBS recipients were given a false choice. There is no evidence whatsoever in this record about the quality of care in institutions or how it compares to HCBS.

The Brief states at page 43 that one of the named Plaintiffs, Grace Collier, was forced to enter a nursing facility because of problems with delivery of her HCBS services. Not only is there no foundation for this statement, but also the very document the Plaintiffs cite for this statement says nothing of the kind, only that Ms. Collier died in a nursing home. ER 372.

The Brief states three of the named Plaintiffs were affirmatively threatened with institutionalization. Ans. Br., pp. 13-14. Judge Carroll rejected their 2004 proposed finding of fact (based on the same testimony cited in the Answering Brief) that "HCBS beneficiaries were threatened with institutionalization when they asked for the services prescribed in their HCBS care plans but which were not being delivered". Appellees' Supplemental Excerpt of Record (hereafter "Appellees' Supp ER") 206, par. 151. Judge

Carroll also refused to adopt this argument in 2009. He has never found that any recipient was affirmatively threatened by anyone.

The Brief states Defendants took no "corrective action" when difficulties serving the expanding HCBS population began to be reported in 1998. The Brief then acknowledges that AHCCCS implemented rate increases in 2000 and 2001, but the Plaintiffs state these were ineffectual because the rates were not passed through to the caregivers. Ans. Br., p. 10. This is incorrect. Both the Director and Deputy Director of AHCCCS testified these rate increases were required to be passed through to the caregivers. Further Excerpts of Record ("Further ER") 33-34, 35-37.

The Plaintiffs' statement that there were no back-up workers and that, if a scheduled caregiver did not appear on time, the Defendants put the burden on the recipient to fend for herself (Ans. Br., p. 15, lines 9-11) misstates even the evidence they cite. Appellees' Supp ER 102 demonstrates that AHCCCS providers understood they "must provide the service by whatever means (i.e. subcontractor) for referrals they accept. . . . We expect our contracted agencies to provide workers in any way they can, including paying overtime." The AHCCCS Director and HCBS manager both testified they knew provider agencies had back-up workers. ER 61, 135-136.1.

Finally, as a point of clarification, since the Plaintiffs do not describe the "extensive" waiting lists Judge Carroll found, the waiting lists consisted of a list of 216 people in Pima County in 2001 (ER 415), lists of 166-205 people in Maricopa County in 1998-1999 (ER 383, 385, 389), and lists of 0-42 developmentally disabled recipients in 2001-02 (ER 446-47).

OBJECTIONS TO TWO SUPPLEMENTAL EXCERPTS OF RECORD

The Answering Brief cites Appellees' Supplemental Excerpts 203 and 206 as if they were evidence, but these are instead only (1) Plaintiffs' post-trial contention of what they thought the evidence was and why it was relevant (Supp ER 203) and (2) their proposed findings of fact, almost none of which were adopted by Judge Carroll (Supp ER 206). The Brief also refers at page 12 to documents not included in the Excerpts concerning gaps in services for certain individuals. The Brief incorrectly summarizes these documents as if they include only gaps for which the Defendants were at fault.[1] Though Plaintiffs apparently did not consider these documents necessary to the resolution of the issues herein; the Brief refers back to them repeatedly (pages 31, 32, 50, and 54) without further supporting evidence.

[1] *See* Defendants' Brief at fn. 7 for the variety of other reasons why gaps occur.

More importantly - and surprisingly - the Plaintiffs have filed, as Supplemental Excerpts 239 and 442, a 2005 brief and a 2009 appendix of exhibits they filed below in support of their characterization of *post-trial events*. Since the issues on remand were decided on the record of the 2003 trial, neither the arguments, the attachments to these documents, nor the events to which they refer were part of the decision below.[2] These Supplemental Excerpts and the argument based upon them at page 49 (n. 13) of the Answering Brief are outside the record Judge Carroll considered and should be disregarded. To the extent the Court may consider them, they invite response to demonstrate that the facts differ considerably from the Plaintiffs' account. *See* Section IV below.

STANDARD OF REVIEW

The predominant standard of review in this case is *de novo*. The Plaintiffs suggest, however, that "If the application of the law to the facts requires an inquiry that is essentially factual," review is for clear error. They cite *U.S. McConney*, 728 F.2d 1195 (9th Cir. 1984) in support. Ans. Br., p. 9.

[2] The Plaintiffs memorialized the parties' and Judge Carroll's agreement on this, for example, in their Memorandum in Support of Motion for Judgment on Remanded Issues: "The ADA and §504 claims should be decided on the trial record, in accordance with prior orders of the District Court [referring to Judge Marquez's ruling on cross-motions for summary judgment in 2002] and the remand order of the Ninth Circuit." Dkt. 334, p. 4.

That decision, however, makes clear that applying a clear error test to mixed questions of law and fact is the exception to the rule. When "the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed *de novo*." 728 F.2d at 1203.

To be sure, there are some questions to which the clearly erroneous standard applies, e.g. whether the Defendants had a policy to "deprive elderly and disabled persons of a feasible and available choice" to receive HCBS services. But the main issues are whether the failure to deliver all individual services as scheduled to a small percentage of recipients violates either freedom of choice or the ADA. These should be reviewed *de novo*.

ARGUMENT

In a nutshell, this case centers around the Plaintiffs' basic argument that, if not every person received all her services as scheduled, Arizona's HCBS program offered no "real" and meaningful choice to live in the community rather than in institutions. Factually, this argument ignores the benefits the HCBS program provided to thousands, including the named Plaintiffs, as a functioning alternative to institutional care, as well as the fact that the

overwhelming majority of recipients were served without complaint. The Plaintiffs contend they demonstrated "policies of the Arizona Health Care Cost Containment System that deprive elderly and disabled persons of a feasible and available choice to [receive] home care services they need to live in the community." Ans. Br., p. 2. This is mere rhetoric. The Plaintiffs have never produced any evidence of such a policy or policies.

Legally, the Answering Brief depends upon the specious theory that this case is the equivalent of those in which states either had no effective HCBS alternative to nursing care or were threatening to deny services to HCBS recipients while providing such services to others. Nothing of the sort happened in Arizona.

I. ARIZONA DID NOT VIOLATE FREEDOM OF CHOICE

In *Ball I*, the Court explained that the freedom of choice statutes, 42 U.S.C.§§1396n(c)(2)(C) and 1396n(d)(2)(C), set forth limited, "explicit rights," namely a right to be informed of alternatives to institutional care and a right to choose from among those alternatives. 492 F.3d at 1115. The Defendants' analysis of these provisions follows this Court's explanation of the nature of the State's obligations under freedom of choice. The Answering Brief dismisses

Defendant's analysis as "narrow" (Ans. Br., p. 22) but never mentions this Court's discussion of the issue.

A. The Undisputed Facts Demonstrate AHCCCS Complied with Freedom of Choice

At the time of trial, AHCCCS was providing HCBS services to 7,319 people in their own homes, and additional people received these services in other living arrangements. ER 28, par. 9, 11. The Plaintiffs proved problems were experienced by 30 (.004%) of these people. But no individual was identified who contended she had not been informed of the AHCCCS HCBS program or who had been denied the right to choose it instead of institutional care.

B. Plaintiffs' Theory of Freedom of Choice Has No Basis.

The Plaintiffs implicitly concede these rights have not been violated but argue that Congress also intended these statutes to govern how services are provided. The "plain language" the Plaintiffs attribute to the statutes, however, says nothing about provision of services. By their terms, the statutes do not require any particular level of care in *either* a nursing facility setting or the home. They do not set any standard of "feasibility" a state's HCBS services must meet. Because they contain no such criteria or requirements, these

statutes have only been applied when a state does something that makes its HCBS alternative illusory, as in *Cramer v. Chiles*, 33 F.Supp.2d 1342 (S.D.Fla. 1999); *Benjamin H. v. Ohl*, 1999 WL 34783552 (S.D.W.Va. 1999); and *Boulet v. Celluci*, 107 F.Supp.2d 91 (D.Mass. 2000).

This case is at the other end of the spectrum. AHCCCS increased participation in HCBS from 10% of its long-term care recipients in 1988 to 52% by 2003. ER 55.1-55.2. It provided services without complaint to the overwhelming majority of those eligible for HCBS. Like California in *Sanchez v. Johnson*, 416 F.3d 1051, 1068 (9th Cir. 2006), Arizona has a working plan to provide an effective alternative to institutionalization. The Arizona HCBS program was therefore a feasible, "real choice," and Plaintiffs' argument that it was not (Ans. Br., p. 32) is simply woodenheaded.

Stated differently, it is impossible to find a requirement in these statutes Arizona has violated. This is not meant to excuse or minimize the failure to provide individuals their services as scheduled. The point is such failure may have qualified as a violation of some other provision, but it does not violate freedom of choice.

The Plaintiffs offer no authority to the contrary. Aside from the untenable argument that this case presents the same kind of failure to provide a

"real choice" as in *Cramer*, *Benjamin H.,* and *Boulet*, where people stayed on waiting lists for years or where budget cuts made HCBS services completely unavailable, the Answering Brief offers very little. The legislative history it cites (Ans. Br., p. 21) speaks only of making choices available, not how the choices must thereafter be implemented or provided. Judge Marquez's denial of cross-motions for summary judgment because he found a triable issue adds nothing to the argument. *See* Appellees' Supp ER 101, p.15. Finally, Plaintiffs misstate *Martinez v. Ibarra*, 759 F.Supp. 664 (D.Colo.1991), as having some relevance to their theory. In that case the issue was whether HCBS was available at all because of eligibility issues, not problems with services once one began receiving HCBS services.

The one case most on point, aside from *Ball I,* is *Bertrand v. Maram*, in which the Seventh Circuit decided freedom of choice "does not *make* any particular option 'available' to anyone. It just requires the provision of information about options that *are* available." 495 F.3d 452, 459 (7th Cir. 2007)(emphasis in original). Plaintiffs dismiss the *Bertrand* analysis as "cursory" and "unhelpful" and ignore its similarity to the analysis in *Ball I.* Ans. Br., pp. 25-26. The fact is neither the Plaintiffs nor Judge Carroll have an answer to this Court's or the Seventh Circuit's analysis.

C. The Plaintiffs and Judge Carroll Offer a Vague and Amorphous Standard.

In *Ball I*, the Court warned against interpreting freedom of choice so expansively as to make it too vague and amorphous to enforce. The Plaintiffs' and Judge Carroll ignored this admonition. Both go far beyond the scope of the statutes as explained in *Ball I*. The Plaintiffs would have the courts decide what a "feasible" HCBS program must provide and how, determine how HCBS services compare to services in nursing homes, decide which gaps are "unnecessary" and whether they occur too often, establish payment rates sufficient to prevent gaps, dictate how contracts must be written, determine whether particular notice and appeal rights flow from the failure to receive a service as scheduled, and decide when administrative sanctions against contractors must be applied. The Plaintiffs suggest all this is relatively simple. This is because they focus only on the determination of whether a gap has occurred, rather than whether a gap demonstrates violation of the statutes. Ans. Br., p.27.

Judge Carroll merely added fuel to the fire by defaulting to his 2004 ruling that it was impermissible to force an individual to choose between "adequate health care" under HCBS and whatever might be available in a

nursing facility. ER 37, par. 18. He did not define "adequate" or explain how he tied such a standard to the statutes. The result is a vague and subjective analysis.

The Plaintiffs' explicit logic is that failure to provide any critical service to an individual creates a risk of institutionalization, and any risk of institutionalization means the HCBS program is not feasible. Ans. Br., p. 30. Under this theory, any and every programmatic or operational problem that delays or diminishes an individual's services may be challenged under freedom of choice. No language in the statutes and no decision construing them support this open-ended construction.

The freedom of choice statutes do not contain the operational guarantees against service gaps the Plaintiffs would read into them. These statutes only require AHCCCS to inform members of the available alternatives and offer them a choice among those alternatives. It did both.

II. ARIZONA DID NOT VIOLATE THE ADA.

Service gaps were not limited to disabled recipients, and disabled recipients were in no way targeted for less or inferior HCBS services. Thus, the Answering Brief does not dispute the fact there is no facial discrimination in this case.

There is also no evidence in this case of unjustified segregation in institutions. No person was identified who switched from the HCBS program to institutional care because of problems in the delivery of HCBS services, and no person was identified who elected to stay in institutional care rather than accept HCBS services. The plaintiffs did not identify *any* individuals who were, as this Court noted they had alleged, "unable to continue living in their homes". *See Ball I*, 492 F.3d at 1099.

The Plaintiffs' argument therefore depends upon demonstrating some other kinds of evidence that amount to violation of the integration mandate of the ADA. We will address the Plaintiffs' arguments as presented in the Answering Brief.

A. Failure to Provide All Authorized Care

First, they cite *Olmstead v. L.C.*, 527 U. S. 581 (1999), for the proposition that failing to deliver medically necessary services to recipients living in the community violates the integration mandate. Ans. Br., p. 36. *Olmstead* holds, however, that it is institutionalizing persons who are eligible for HCBS that violates the ADA. It does not address failure to deliver individual services to people who are receiving HCBS. "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'." 527 U.S. at 603, fn. 14.

B. Threatened Institutionalization

Plaintiffs summarize the evidence supporting Judge Carroll's conclusion that "AHCCCS' failure to provide Plaintiffs with necessary services threatened Plaintiffs with institutionalization" at pages 13-15 of the Answering Brief. They first cite a 1998 s tudy that merely found problems might develop if AHCCCS did not receive increased funding as demand for HCBS services grew. Appellees' Supp ER Ex. 131. They then make the same argument about active threats of institutionalization that Judge Carroll has twice refused to adopt. Supported by the same ambiguous, unattributed statements (not even alleged to be made by the Defendants) as presented to Judge Carroll, Plaintiffs contend three of them were threatened. Judge Carroll implicitly rejected this claim in both 2004 and 2009. *See*, pp. 1-2 above.

The Plaintiffs' theory seems to be that, HCBS is a " substitute" for nursing home care, and therefore any fault in the delivery of services, without more, constitutes threatened institutionalization. But the premise is incorrect. HCBS is not a substitute for nursing care. Nursing home care and HCBS are

two separate and distinct services. *See* 42 U.S.C.§§1396d(f) and 1396n(c). Moreover, the Plaintiffs' conclusion suffers from a lack of evidence that anyone considered going into, or staying in, an institution because HCBS services were not reliable.

"Threatened institutionalization," as conceived by Plaintiffs, is simply argument - for which there is no authority. It is an attempt to equate imperfect delivery of services with situations in which whole classes of individuals could not get covered services due to changes in state law or failure to fund HCBS. They cite *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003), in which Oklahoma threatened to violate the integration mandate of the ADA by providing unlimited prescriptions for those who lived in an institution but only five prescriptions per month for those who wanted the same services through HCBS. *Fisher* bears no relevance to this case, in which services were not terminated or made unavailable. The gaps at issue were not a matter of policy or statute but were mistakes that cut across all manner of recipients.

C. The "Policy" that Members Assume the Risk

As to Judge Carroll's finding that AHCCCS had a policy that "an HCBS beneficiary assumes the risk, by choosing to remain at home rather than be institutionalized, that services he or she is dependent upon will not be

delivered," the Plaintiffs argue this is not only well founded but undisputed. Neither is true.

To be clear, the Plaintiffs introduced no evidence of such a policy set forth either in writing or in anything stated by Defendants. Instead, Judge Carroll deduced such a policy by standing testimony about a policy that *did* exist, to provide recipients with emergency alert systems, on its head, transforming common sense precaution into a policy of indifference and neglect. As discussed in the Appellants' opening brief (pp. 28-30), there is no basis for this finding, and it is clearly erroneous.

The Plaintiffs' statement at page 40 of their Brief that Defendants "did not dispute [on remand] the finding that they had an 'assumption of risk' policy is hardly correct, as Defendants argued in the same document the Plaintiffs cite, "To read into this exchange any sort of 'policy' of carelessness or abandonment of people who choose to be, or find themselves temporarily, alone is surprising and unfounded". Dkt. 331, p. 6.

D. "Inferior" HCBS Services

The Answering Brief makes an argument never advanced before that HCBS care is inferior, indeed "grossly" inferior, to institutional care in Arizona and this "mitigates any meaningful choice between institutional and home

care". Ans. Br. p. 39; *see also* pp. 16, 31, and 59. This argument has no merit at all.

Factually, there is no basis of any sort for characterizing HCBS services as inferior (to anything). There was no evidence about the quality of care or the services provided in nursing facilities. The only support Plaintiffs offer is to state three times that the AHCCCS Director Phyllis Biedess admitted the inferiority of HCBS to institutional care. Ans. Br., pp. 16, 31, and 39. This is utterly incorrect. In the cited testimony, Ms. Biedess testified that, *if the recipient thought the description of what was available under HCBS sounded inferior* to nursing facility care, he or she had the right to choose the latter.[3] "If *they* feel it is insufficient, then they always have another choice, and that always choice [sic] is a nursing home facility." ER 59. (Emphasis added.) She did not in any way suggest that she or anyone else considered HCBS services to be inferior to nursing facility care. To suggest on this basis that the only choice Defendants offered was the "choice" of returning to an institution if their services were not reliable (Ans. Br., p. 40) is belied by the increasing thousands

[3] By definition, the two settings are not equivalent, among other things, in terms of round-the-clock care or on-premises back up. These are two threshold differences recipients and their providers must consider in determining whether HCBS is even an option for the individual.

of recipients who have been receiving these services and the failure of Plaintiffs to identify even one person who returned to institutional care.

Legally, the Plaintiffs' logic is also incorrect. They seem to be trying to analogize their case to *Townsend v. Quasim*, 335 F.3d 511 (9th Cir. 2003), in which this Court found that providing nursing services in nursing facilities but not in the community might be discrimination against the disabled. The Plaintiffs misstate *Townsend* as standing for the proposition that "once a state opts to provide community based services, failing to provide these services when plaintiffs qualify for them is discrimination." Ans. Br., p. 35. What this Court said was that *Olmstead, supra,* had held that "*institutionalizing* mentally disabled persons rather than providing them with community based treatment would violate the ADA" and that the plaintiff in *Townsend* would likely be able to prove a violation of the ADA because the state of Washington would only permit disabled individuals to receive nursing services in an institution, not in the community. 335 F.3d at 516, 517 (emphasis added). The discrimination against disabled persons was facial. *Id*. As noted before, there is no such discrimination involved in this case.

The Plaintiffs argue their inferiority theory by saying they are "merely asking that they face the same risks of living in the community as someone

without a disability". Ans. Br., pp. 41-42. It is unclear what Plaintiffs mean. Neither Medicaid nor the ADA eliminates the risks attendant to disability. If the implicit premise is gaps do not occur in the delivery of services to the non-disabled, it is unsupported. In this regard, Plaintiffs provided no evidence that millions of hours of critical services can be delivered without any gaps under any circumstances. As discussed in Section IV below, AHCCCS is consistently able to provide 99.9% of critical services without gaps but has yet to attain 100%. It bears noting "The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless." *Olmstead*, supra, 527 U.S. at 603.

E. Knowledge that Gaps Existed and Failure to Monitor

The Defendants knew that mistakes (rather than any policy) caused some individual services not to be delivered as scheduled. AHCCCS monitored its contractors and used corrective action when the agency deemed it appropriate (ER 134.1-134.3). It simply did not do these things in the way Judge Carroll and the Plaintiffs think relevant.[4] But neither general knowledge that mistakes

[4] For example, when one of the eight program contractors made a $10,000,000 profit in 2000, AHCCCS promptly reduced the percentage the Program Contractor could retain as its allowable administrative cost from 5% to 2% . Further ER 38. The Plaintiffs ignore this.

happen nor differences of opinion as to how to improve contractors' performance is evidence of violation of the ADA.

F. Underfunding

The Plaintiffs argue that "underfunding" of the HCBS program "negates a meaningful choice between home and institutional services, creates a risk of institutionalization, and violates the ADA integration mandate". Ans. Br., p. 37. They ignore the facts that once problems surfaced in 1998-99 the Defendants got the funding to increase their rates by 10% in 2000 and another 15% in 2001 (ER 54.1) and that these increases helped improve staffing, eliminate waiting lists, and speed transition into HCBS. ER 101.

The Plaintiffs' legal authority for the underfunding argument is easily distinguishable. *Cramer v. Chiles, supra,* involved legislation that would have eliminated funding in Florida for HCBS facilities while continuing it for state institutional facilities. This came against a backdrop of historic low funding for HCBS services that had already resulted in a situation where "thousands of individuals continue to live, involuntarily, in large institutions". 33 F. Supp.. 2d at 1350. The court found that the challenged legislation "*compels* institutionalization, thus negating a meaningful choice" between institutional care and HCBS. *Id*. at 1353 (emphasis added). Noting that institutionalization

of disabled individuals "against their will, where less confining programs will satisfy their needs" violates the ADA and that the proposed legislation would "effectively eliminate" any choice between institutional and HCBS care, the court had no trouble holding that the legislation violated the ADA.

In *Helen L. v. Didario,*46 F.3d 325 (3rd Cir. 1995), *cert. denied* sub nom. *Pennsylvania Secretary of Public Welfare v. Idell S.*, 516 U. S. 813 (1995), Pennsylvania required the disabled plaintiff to receive services in a nursing home though she qualified for services in her own home and though the services she needed could be provided in either setting. Her institutionalization was unnecessary and against her will. (The funding issue was a technical one about whether necessary funds already appropriated could be shifted from one program to another.)

The only "underfunding" in this case was not offering pay rates high enough to attract more caregivers. This did not eliminate HCBS as an alternative to nursing facility care, compel institutionalization of anyone, or render HCBS the empty alternative people in Florida experienced. Moreover, the increases in the rates AHCCCS paid in 2000-2001 quickly produced positive results according to Plaintiffs' own witness.

G. Waiting Lists

The mere existence of a waiting list is not evidence of segregation or violation of the ADA. As the Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 605-606 (1999) stated, "a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated" is permitted.

Judge Carroll found that the waiting lists that were proved (*See* p. 3 above) resulted from difficulty recruiting caregivers because of low wages, not from discriminatory policies. ER 30, FOF 33. The Plaintiffs did not even attempt to establish that these waiting lists moved at an unreasonable pace. To the contrary, the evidence was that no list had more than 216 people on it, they moved at a rate of 1-2 months, and during the waiting period most individuals received substitute services. ER 392.

Judge Carroll found that AHCCCS was working to meet its increased "consumer demand". ER 31, FOF 41. As discussed above, it increased its rates, and this resulted in, among other things, reducing ("eliminating") waiting lists. ER 101. At trial, the Plaintiffs could offer evidence of only 30 people with substantiated complaints about their HCBS services and only one person out of thousands served who claimed to have spent a short time in an institution as a

result of service problems. None of these complaints had to do with being on a waiting list.

The Answering Brief compares this case to *M.A.C. v. Betit*, 284 F.Supp.2d 1298 (D. Utah 2003), where the court decided plaintiffs stated a claim under the ADA because they alleged people had been on waiting lists for over ten years and were being forced to choose between institutionalization and "staying in the community *without any services*". 284 F.Supp.2d at 1303, 1309 (emphasis added). Once again, the Plaintiffs' argument is that not being provided all individual services is the equivalent of receiving no services. Again, it has no merit.

The Plaintiffs concede the Supreme Court in *Olmstead* stated, "it may be reasonable for the State to ask someone to wait until a community placement is available". They nevertheless argue it is unreasonable to ask someone who is enrolled in HCBS "to wait to receive the approved services". Ans. Br., p. 38. If they mean waiting for initial placement, they identified only one person, Judeth Hinton, who waited whatever short time it took her to accept personal care services as a temporary substitute for the attendant care services that were not immediately available. *See* Appellants' Brief, pp. 8-9 and 26-27. This was Ms. Hinton's initial placement, and *Olmstead* makes clear these need not

always be immediate. The Plaintiffs identified no one who, after her initial placement in HCBS, had to wait to receive services. Yet again, they engage in the fallacy of trying to equate a person who is receiving services, albeit not always as scheduled, with an individual who is receiving no services at all. Their conclusion that "Defendants' policies ensure that Plaintiffs are not getting the care they need while they wait for needed services to be delivered," is meaningless hyperbole. *Id.*, at 39.

In this case, there is no evidence to show waiting lists moved too slowly or were being used by the State to keep its nursing facilities populated. Nor was there any link between waiting lists and the existence of "gaps" in service for those already receiving HCBS services.

H. "Forced" Institutionalization

The Answering Brief inexplicably continues to assert that Grace Collier entered a nursing home "because of inconsistent and unreliable home care services". Ans. Br., p. 43. As discussed above at page 1, there is no basis for this statement. The allegation that Judeth Hinton had to enter a nursing home for these same reasons is also untrue.

Plaintiffs argue the testimony of Phil Pangrazio supported their argument of forced institutionalization, but it did not. He merely testified he was "aware"

there were unspecified "difficulties" in making initial HCBS placements in 2000. E R 94. T hey argue that Ann Meyer's testimony supported this allegation, but they fail to respond to the objection in the Defendants' opening brief that her vague testimony should not have been allowed because it was based solely on hearsay and lacked foundation. They simply say she could provide a "lay opinion," ignoring the fact that Federal Rule of Evidence 701 requires lay opinions to be " rationally based upon the perception of the witness". Her testimony was explicitly based on what she was told by others, lacked any detail, and should not have been allowed.

The Plaintiffs' argument therefore reduces to Peg Ball's one 10-day stay in a nursing facility when her roommate became too ill to provide volunteer services "beyond what was already covered" (ER221). In an attempt to make their legal theory fit the mold of *Fisher v. Oklahoma Health C are Authority*, *supra,* where the state was abou t to allow unlimited prescriptions to nursing home residents but limit HCBS recipients to five per month, the Plaintiffs argue Defendants have created a system in which disabled recipients "can get all their authorized care in nursing homes, but *only* reduced care in the community". Ans. Br., p. 45 (emphasis added). Once again, there is no basis for such a statement. Unlike *Fisher*, no HCBS service was terminated or reduced while

being provided in nursing facilities. No evidence was introduced comparing care in the two settings. The Plaintiffs would surely have cited it if there were any.

The Plaintiffs' insistence that only delivery of every single service as scheduled would have complied with the ADA is neither reasonable nor required by the statute or the case law construing them. No unjustified segregation of the Plaintiffs has been shown, and the mistakes that gave rise to this case were rare and did not discriminate against disabled recipients. Judge Carroll erred in deciding that the Defendants had violated the ADA or the Rehabilitation Act.

III. THE INJUNCTION IS OVERBROAD AND DOES NOT ADDRESS THE SURVIVING LEGAL THEORIES

It cannot be disputed that the injunction in this case (ER 23-26) originated as an attempt, above all, to remedy "equal access" issues that are no longer at issue due to *Ball I.*. The district court's 2004 decision (ER 27-39) and injunction were focused on eliminating gaps by assuring funding and monitoring. There was no discussion in either document about problems related to entry into the HCBS program or getting qualified members out of

institutions. Freedom of choice was mentioned in two paragraphs of the district court's 2004 decision, and the ADA was mentioned not at all.

On remand, Judge Carroll did not alter the injunction's requirements in any way. As a result, there is still nothing in the injunction that addresses the statutory requirements of freedom of choice, i.e. nothing that seeks to assure that recipients know of, and have, the opportunity to choose HCBS. As to the ADA, the injunction does not attempt to end any facial discrimination. Nor does it remedy any unjustified segregation.

Yet the Plaintiffs suggest the injunction is both "entirely reasonable" and narrowly tailored to the surviving legal theories. Ans. Br., p. 46. Their theory seems to be that gaps are the symptoms of every fault in a Medicaid program and therefore eliminating gaps serves all legal theories. Rather than explain or support this logic, the Answering Brief goes off on two irrelevant tangents. First, it argues Defendants should be estopped to argue prospective relief is inappropriate because of the discovery cut-off prior to trial. The Defendants made no such argument and, though Plaintiffs' recitation of history is once again quite inaccurate, there is no present point to such a debate. Second, the Answering Brief then provides an even lengthier diversion arguing about the

necessity of prospective relief because of the Plaintiffs' view of post-trial events. [5]

Only after these detours does the Answering Brief address the propriety of the injunction as a measure to enforce the ADA and freedom of choice. The Plaintiffs suggest the injunction is appropriate because AHCCCS is satisfied to "go through the motions, but not to reliably provide mandatory health services" and this "summarizes the problem at the heart of this lawsuit." Ans. Br., p. 57. The Plaintiffs are correct in the second statement. The problem with this lawsuit is the Plaintiffs' fascination with their own rhetoric and their obdurate refusal to accept the evidence that the huge majority of HCBS services were being delivered without complaint at the time of trial (30 complaints from 7,319 people) and continue to be delivered without gaps at a 99.9% rate, as discussed in Section IV below. The allegation that AHCCCS is not providing generally reliable services is nothing short of absurd.

[5] This argument apparently responds to Defendants' criticism of the injunction for not having been based upon conditions or threatened injury at the time of trial. The Defendants did *not* argue about post-trial events, much less offer evidence of them, but the Plaintiffs' argument and their Supplemental Excerpts now invite the response in Section IV below.

The Plaintiffs suggest that courts "routinely" order relief of the sort in the instant injunction. Yet they cite only one supposedly similar case, *Salazar v. District of Columbia*, 954 F.Supp. 278 (D.D.C. 1996). That case has nothing to do with the ADA or freedom of choice. The court found the defendants had for years deliberately not processed huge percentages of Medicaid applications within the deadlines specified by Medicaid statutes, had suspended the Medicaid eligibility of "countless" individuals without notice, and had regularly not provided whole categories of services under the children's EPSDT program. *Salazar* is hardly a comparable or "routine" situation. It does nothing to demonstrate Judge Carroll addressed ADA and freedom of choice issues, much less that he narrowly tailored his injunction to the requirements of these statutes.

Aside from this, the Plaintiffs simply posit that "denying individuals with disabilities a meaningful choice between institutional and home-based care by not delivering all authorized services makes the ordered relief "consistent with the ADA and §504" and "reasonable". Ans. Br., pp. 58-59. One more time, Plaintiffs depend upon a premise the facts belie, that they "have no meaningful choice" (*Id.*), and for which they cite only cases of facial discrimination or where individuals were segregated in institutions though they qualified for

HCBS. *Fisher, supra; Townsend, supra; Olmstead, supra;* and *Rodriguez v. City of New York*, 197 F.3d 611 (2nd Cir. 1999).

The injunction is not justified, but if it were, its requirement of perfection would be unreasonable. And its various provisions mandating how the State must operate its HCBS program are not designed to see that individuals are informed of HCBS and allowed to choose it without unjustified segregation. They are therefore an abuse of discretion.

IV. POST-TRIAL EVENTS

The Answering Brief includes post-trial events in its Statement of Facts (pp. 7-8) and then argues that these events are evidence of "continued failures by the Defendants" which they present with reference to the non-issue (here) of whether the Defendants have complied with the injunction. Ans. Br., p. 49, n.13. In addition, their Supplemental Excerpts 239 and 442 are a legal memorandum from 2005 and an appendix of exhibits attached to a 2009 motion that Judge Carroll has under advisement (along with Defendants' cross-motion to vacate the injunction). Dkt. 441. [6]

[6] Perhaps Plaintiffs misapprehend the argument at pages 47-48 of the Appellants' Brief to mean the Defendants are contending that *post-trial* events did not warrant maintaining the injunction. But this seems an unlikely

These arguments and Supplemental Excerpts improperly go outside the record from which Judge Carroll made the decision at issue and should be disregarded. In the meantime, they invite brief response, lest the Court think there is none.

First, the arguments in Plaintiffs' Supp ER 239 led to Plaintiffs' January 2006 Motion to Enforce Court Orders, in which the Plaintiffs argued that AHCCCS had "utterly failed to implement the requirement that services be provided to each eligible individual without gaps in service." Dkt. 264, at 5. Judge Carroll denied that motion on September 29, 2006. Dkt. 301. Their Supplemental Excerpt 442 is a 2009 compilation of various documents in support of a new version of the 2006 motion, in which Plaintiffs contend, among other things, the Defendants still "have not created a system without gaps in services". Dkt. 440, p. 12. Defendants have repeatedly disputed as inaccurate and misleading the facts Plaintiffs describe in these documents. E.g., Dkt. 267, 285, 377, 407, and 423. Defendants' Objections to the documents in Supp ER 442 are still pending. Further ER 11-32 (Dkt. 445).

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interpretation, since that is not what Defendants argued and Defendants mentioned no post-trial events.

Second, in June 2005, Judge Carroll ordered AHCCCS to file monthly reports setting forth the critical services it provided and listing any gaps in those services, with service logs that redacted the recipients' names. ER 26. AHCCCS has been filing monthly gap reports ever since. The most recent such report is for the month of September 2009, during which AHCCCS provided a total of 1,879,522 hours of "critical services". Of these, 751 hours had gaps in which, for whatever reason and regardless of fault, a service was not delivered as scheduled. Further ER 9. *Thus, contrary to Plaintiffs' arguments, AHCCCS is providing services without gaps 99.96% of the time.* Defendants also provide a chart demonstrating there is nothing atypical about September 2009. Further ER 10 (Ex. A to Dkt. 452).

In addition, since the 2003 trial, Plaintiffs have not identified any individual who alleged she could not move from a nursing facility to HCBS care or who claimed he had to give up on HCBS and go to a nursing facility because of problems with HCBS. Nor have they identified any person who alleges he or she had been threatened with institutionalization.

If post-trial events are to be considered, they demonstrate a continuing failure by Plaintiffs to support their allegations and an increasing willingness to overstate their case.

CONCLUSION

Neither freedom of choice nor the ADA requires that services, let alone tens of millions of hours of critical services, be delivered without mistake. This Court should reverse the decision below so that Arizona may run its HCBS program without the specter of every mistake being challenged as discrimination against the disabled or as a systemic failure to provide a meaningful alternative to institutional care.

RESPECTFULLY SUBMITTED this 4th day of December 2009.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,656 words, excluding the portions of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word 98 in Times New Roman type style and 14-point font.

s/ Logan Johnston
Attorney for Defendants/Appellants
Dated: December 4, 2009

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 20 09, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Elizabeth Hong