UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DISABILITY ADVOCATES, INC.,

Plaintiff,

- against -

ELIOT SPITZER, in his official capacity as Governor of the State of New York, RICHARD F. DAINES, in his official capacity Commissioner of the New York State Department of Health, and MICHAEL F. HOGAN, in his official capacity as Commissioner of the New York State Office of Mental Health, THE NEW YORK STATE DEPARTMENT OF HEALTH, AND THE NEW YORK STATE OFFICE OF MENTAL HEALTH,

Defendants.

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03 CV 3209 (NGG) (MDG)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND TO EXCLUDE TESTIMONY, REPORTS AND OPINIONS OF PLAINTIFF'S EXPERT WITNESSES

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Preliminary Statement

Plaintiff has now dropped its two claims based on New York's alleged "toleration" of poor conditions in adult homes. Pl. Mem. at 79.[1] While thus acknowledging that New York has performed its oversight of adult homes adequately, plaintiff nonetheless attempts to pursue its claim that the State is responsible for the residents of large, privately operated adult homes in New York City living in allegedly non-integrated settings. However, the undisputed evidence establishes that New York State does not operate the homes and DAI can point to no State rule or policy that requires anyone to live in or receive services in an adult home. Nor does DAI dispute that residents have extensive access to community activities and amenities. DAI has therefore not shown that the State government defendants are responsible for any disability discrimination or that the residents are not in the most integrated setting appropriate to their needs. Moreover, even assuming that DAI could meet these threshold requirements, DAI's experts admittedly failed to perform a clinical evaluation of even one adult home resident; DAI has therefore not shown that any resident is qualified for the supported housing plaintiff seeks. The facts DAI proffers in an attempt to avoid summary judgment show no more than that there are alleged problems in the conditions and services in some of these private facilities (which DAI apparently admits the defendants are addressing in their oversight capacity). In the end, this case is nothing more than an attempt to have the Court address complaints about the quality of the conditions and services at some adult homes under the guise of a disability discrimination lawsuit. There is no basis under the Americans with Disabilities Act for the Court to do so.

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[1] References to plaintiff's Memorandum of Law In Opposition To Defendants' Motion For Summary Judgment, dated December 3, 2007, will be to "Pl. Mem. at __." References to Memorandum of Law In Support of Defendants' Motion For Summary Judgment, dated August 10, 2007, will be to "Defs. Mem. at __."

ARGUMENT

POINT I

PLAINTIFF LACKS STANDING TO ASSERT ITS CLAIMS

DAI does not have standing to assert its claims because it has not established the constitutional standing requirements of having suffered an injury that is fairly traceable to defendants' allegedly unlawful action, which is likely to be redressed by a favorable decision. DAI claims that defendants have merged the standing analysis with an analysis of the merits, but that simply does not address DAI's fundamental problem here: like any other litigant, it must meet the constitutional standing requirements, and it has not done so. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Even if DAI were found to have standing in some capacity, its standing is limited and certainly not so broad as to permit the massive, systemwide relief it seeks here.

DAI has not established injury in fact because it has not shown that any resident is qualified to move and has been denied the opportunity to move because of some action of the State. DAI claims that it has submitted a list of residents who it claims are qualified to move to allegedly more integrated housing, see Pl. Mem. at 35-66, but, as discussed infra at Point IV, DAI has failed to come forward with any reliable evidence that any of these residents meet the minimum eligibility criteria of the non-party not-for-profit housing providers.

DAI also has failed to show that the State has caused any of its constituents injury or that a Court order against the State would redress any alleged injury. DAI claims that the State has injured its constituents through the manner in which the State administers its mental health system. Pl. Mem. at 36. As discussed further infra, DAI has failed to establish by anything more than mere speculation that qualified adult home residents, who want to move, have been denied

that opportunity by some action of the State.

Even if DAI could show that any of its constituents have standing, DAI does not have standing to pursue the systemwide relief it seeks here because it has not shown that thousands of its constituents have met the requirements of the standing analysis. See Small v. Gen. Nutrition Cos., Inc., 388 F. Supp. 2d 83, 97-98 (E.D.N.Y. 2005). For instance, DAI would only have standing to pursue claims on behalf of those residents who filed HRA 2000 applications. To establish standing, a plaintiff must meet the threshold requirement of showing that he has applied for a benefit, or make a substantial showing that such an application is futile, Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1096 (2d Cir. 1997), but DAI has not done so for the vast majority of its constituents. DAI's claim that filing an HRA 2000 application is futile, Pl. Mem. at 37, is belied by the fact that their own witnesses testified that they moved from adult homes to alternative housing after filing the application. See P.C. 15-16, 154-57; A.M. 6-7, 134-37.

DAI also cannot obtain the systemwide relief it claims here under the posture in which it has brought this case. DAI seeks class-action style relief for claims that necessarily involve individualized assessments about residents' qualifications. DAI seeks to shift its burden of establishing that its residents are qualified onto defendants, see Pl. Mem. at 27 n.16, ignoring that it is the plaintiff's burden to establish its case. Without a showing that thousands of its individual constituents have suffered injuries, DAI cannot obtain systemwide relief. See Lewis v. Casey, 518 U.S. 343, 359 (1996); City of Los Angeles v. Lyons, 461 U.S. 95, 97-100, 105-06 (1983); Rizzo v. Goode, 423 U.S. 362, 367-69, 380-81 (1976).

Finally, DAI does not have standing to obtain systemic relief because the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. §§ 10801 et seq., does not permit DAI to bring claims on behalf of many, if not all, of its constituents. Section

10805(a)(1)(C) of the Act permits organizations to bring claims "on behalf of" an individual only if, among other things, the matters involved "occurr[ed] within 90 days after the date of the discharge of such individual from a facility providing care or treatment . . . ." DAI can only bring cases on behalf of residents who meet these elements. See Autism Soc'y of Mich. v. Fuller, No. 05:05-CV-73, 2006 WL 1519966, at **10-11 (W.D. Mich. May 26, 2006). DAI's contrary reading of the statute - that it is entitled to bring claims pursuant to 10805(a)(1)(B), Pl. Mem. at 33-34 - must be rejected because it reduces section 10805(a)(1)(C) and its limitations on actions to mere surplusage and distorts the clear, plain meaning of the statute. See, e.g., TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (noting that the Court was "reluctant to treat statutory terms as surplusage in any setting," and reaffirming that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (citation omitted)); Tablie v. Gonzales, 471 F.3d 60, 64 (2d Cir. 2006) (accord).

POINT II

PLAINTIFF HAS FAILED TO SHOW THAT ANY STATE SERVICE, PROGRAM OR ACTIVITY IS CAUSING DISCRIMINATION

Plaintiff does not and cannot dispute that the legal relationship between New York State and adult homes is that New York licenses, inspects and, where appropriate, brings enforcement proceedings against adult homes. Yet plaintiff has withdrawn its two claims based on New York's allegedly "tolerating poor conditions" in impacted adult homes, thereby effectively conceding that there is no legal basis to challenge how New York is performing this oversight function. Pl. Mem. at 79. Rather than specifically pointing to an alternative state service, program or activity that is causing the alleged discrimination, plaintiff attempts to salvage its

case with the amorphous claim that the manner in which OMH is administering the entire mental health system leaves DAI's constituents no choice but to live in an adult home. This claim is woefully inadequate to meet plaintiff's burden of clearly enunciating the basis for its Title II claim against the State defendants, much less to raise a genuine issue of material fact. Plaintiff's theory that OMH's overall responsibility for regulating and overseeing the mental health system is a State service, program or activity rendering the State liable in this case is based on a misreading of Olmstead v. L.C., 527 U.S. 581 (1999). Moreover, as a simple matter of causation plaintiff must prove that something the State has done has resulted in disability discrimination. Here, plaintiff fails to identify the specific conduct that has forced DAI's residents to live in adult homes. In any event, plaintiff's theory lacks any factual support in the record. New York has done nothing that leaves individuals with mental disabilities no choice but to live in adult homes. To the contrary, in their role as licensing and regulatory agencies, defendants have taken many steps to support, fund and oversee the private providers who serve the residents, in an effort to ensure that those providers assist residents to have the best quality of life possible, including access to various programs, rehabilitative treatment and services, and housing.

In pressing its Title II claim against the defendants, plaintiff has specifically disavowed reliance on the only ways in which defendants have a direct relationship with adult homes or adult home residents - the inspection and enforcement system and the discharge of a small number of patients from State psychiatric centers to adult homes. Pl. Mem. at 48 n. 37, 79. Notwithstanding plaintiff's protestations that it is suing defendants for what they have done, and not what their licensees have or have not done, plaintiff's claim cannot be seen as anything but a complaint that the adult home operators and the various health providers who work with the residents have failed to ensure that residents live integrated lives and have access to various

services and alternative housing. As fully discussed in defendants' moving memorandum, governmental entities cannot be held liable for the alleged violations of their licensees, and the ADA does not guarantee the quality or efficacy of services. DAI's entire theory of its case flies in the face of these fundamental principles.

First, plaintiff's reliance on the overall manner in which OMH administers the mental health system is based on a fundamental misreading of Olmstead. Olmstead was not premised upon the State's general oversight responsibilities, and nothing in Olmstead indicates that a State's general responsibility to oversee the mental health system renders the State responsible for whether all disabled persons are living integrated lives. Rather, the ADA requires that in administering its own services, programs and activities, the State must provide those services in the most integrated setting appropriate to the person's needs, if doing so can be reasonably accommodated and would not work a fundamental alteration. When the State is neither providing the services nor dictating where they are provided through its own rules and policies, the ADA as interpreted by Olmstead is simply inapplicable. In Olmstead, the two specifically identified patients were in State custody, being treated by State professionals who had determined that they were ready for discharge. The State was responsible for arranging that discharge. To leap from the facts in Olmstead to an obligation to ensure that individuals voluntarily living in a private residence not only have opportunities to access services and activities in the community, but also that they avail themselves of those opportunities, is unwarranted from the language or reasoning of Olmstead. Such a reading of Olmstead would make the State responsible for the quality of life and the degree of de facto integration of every person in the State with a mental disability, since persons living in any number of settings, receiving services from any number of private providers, could become isolated and have very

little contact with non-disabled persons. Plaintiff correctly concedes that Olmstead has nothing to do with a public entity's failure to correct discriminatory conduct on the part of service providers it licenses. Pl. Mem. at 44. Plaintiff nonetheless seeks to impose liability on exactly that basis.

Second, plaintiff cannot establish a claim against governmental agencies simply by pointing to the State's general responsibility to plan for and oversee a mental health system - a system that includes many private providers that are licensed and regulated by the State. Rather, in order to prove that the State's actions are resulting in persons being unnecessarily segregated in non-integrated settings, plaintiff must identify a specific act or policy that causes that discrimination.[2] Under a parallel civil rights statute, the Supreme Court held that a plaintiff claiming employment discrimination under Title VII "must begin by identifying the specific employment practice that is challenged.... the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities [in the employment of minorities]." Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)). The Court went on to explain that plaintiffs "will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result

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[2] Plaintiff's reliance on MHL 7.01 and 7.07 is misplaced. Plaintiff does not and could not seek injunctive relief based on these State statutes from this federal court. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984). Moreover, these statutes "define the general mission, or goal of [OMH] and were not designed ... to vest particular rights in the public at large." Klostermann v. Cuomo, 126 Misc. 2d 247, 251, 481 N.Y.S. 2d 580, 584 (Sup. Ct. 1984).

in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'" Wards Cove, 490 U.S. at 657 (citation omitted).[3] Similarly, in this case plaintiff should not be permitted to simply allege that the totality of defendants' choices and policies in overseeing the entire system have rendered adult homes non-integrated settings and have left individuals with "no choice" but to reside in an adult home. In order for the defendants to respond to such a claim and for the Court to evaluate the claim, plaintiff must identify the specific acts or policies that have resulted in the alleged disability discrimination experienced by their constituents. They have utterly failed to do so.

Plaintiff argues that OMH determines what "settings" in which individuals live and receive services will be developed and funded. This is no more than a restatement of the argument based on the overall responsibility for the entire system, and is far too general to show that plaintiff's constituents have been injured by defendants' actions. It is also irrelevant to this case. Neither OMH nor DOH determine where adult homes are located; rather, an operator applies for licensure of an adult home at a location he or she has selected. To the extent that plaintiff relies upon OMH's planning for and licensure of community based services such as clinics or day treatment programs, this too is irrelevant. The State has done nothing to limit adult home residents' access to any of these services in any location of the residents' choice.

Contrary to plaintiff's argument, DOH could not simply close adult homes and "redirect" the funds that would allegedly be saved thereby to development of more supported housing. Not

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[3] Following the Ward's Cove decision, Congress enacted 42 U.S.C. 2000e-2 (k) (B)(I). This statute does not affect the reasoning by analogy under the ADA, as there is no such amendment to the ADA. In any event, the statute only excuses the requirement of identifying a particular practice if the elements of a decisionmaking process are not capable of separation for analysis, which is not true here.

only does this argument unduly intrude into a complicated area of public policy where the federal courts should defer to the State, it is unsupported on the undisputed facts in this case, because DOH's authority is contingent on adult homes not being needed. 18 NYCRR § 485.5 (m) provides that DOH may cancel an operating certificate when "such action would conserve resources by restricting the number of beds ... to those ... which are actually needed...." DAI has produced no evidence that adult home beds are not needed. There can be no dispute that there is a great need for affordable housing for individuals with mental disabilities and others with limited means in New York City. Moreover, it is inaccurate that defendants could simply "re-direct" funds from closed adult homes to supported housing. First, New York does not fund adult homes. The residents simply choose to use their SSI payments to pay their rent and board at the adult home. Second, it is entirely speculative that there would indeed be savings, see infra at 27-28, and plaintiff has put forth no evidence sufficient to raise a genuine issue of material fact on this issue.

Plaintiff's next argument that defendants are attempting to evade their ADA obligations by making use of private entities to deliver services is meritless. That private entities are part of the system that provides treatment and services for individuals with mental illness does not render the State responsible for the actions of these private entities. Many types of services, from hospitals to restaurants to taxis, are provided by private entities or individuals that are licensed and regulated by governmental entities. Plaintiff's argument would eviscerate the principle that the government is not responsible for the actions of its licensees unless the practices of licensees are "the result of requirements or policies established by the State." Ex. Hathaway - A (DOJ Technical Assistance Manual, II-3.7200).

Not only would imposition of liability on the State in this case contravene the well-settled

principle that the ADA does not render public entities responsible for the actions of their licensees, it would also conflict with the principles defining State action under the Constitution. In Monaco v. Stone, 2002 WL 32984617 (E.D.N.Y. Dec. 20, 2002), the court dismissed constitutional claims involving, inter alia, improper civil commitments to psychiatric hospitals, as against the directors of private inpatient psychiatric hospitals. Plaintiffs argued that OMH formed a comprehensive system for the treatment of persons with mental illness, licensed the private hospitals, undertook initiatives designed to increase the private hospitals' participation in civil commitments, and included the private facilities in its tallies of available providers. 2002 WL 32984617, at * 27. Despite all of these ways in which the State had oversight of and "relied upon" the private hospitals, the Court found that the private hospitals were not State actors. Id. Neither licensure and extensive regulation nor funding renders the actions of private entities attributable to the State. See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

In the final analysis, plaintiff has cited no case holding that the State is liable for the alleged non-integration of persons living in private facilities that are merely licensed and regulated by the State, when the State has neither placed limits on where the residents may receive services nor conditioned services on living in that setting. The cases on which plaintiff relies for the proposition that the ADA's integration mandate applies to persons who are segregated in private facilities, Pl. Mem. at 51 - 52. are wholly inapposite, and fully support defendants' position. They all concern specific, clearly identified State policies or practices that dictated where individuals could receive services. In none of these cases was liability premised simply on the State's general responsibility for oversight of the entire mental health system. For example, in Fisher v. Oklahoma Health Care Authority, 335 F.3d 1175 (10th Cir. 2003), the State

placed a cap of five prescriptions per month on individuals receiving treatment in the community, while continuing to provide unlimited prescriptions to Medicaid patients in nursing facilities. This State rule thereby forced persons to choose between moving to a nursing home and receiving needed medication. Similarly, in Townsend v. Quasim, 328 F.3d 511 (9th Cir. 2003), the State refused to provide community-based nursing services to one category of Medicaid recipients, including the plaintiff who resided in an adult family home, while it provided such community-based services to a different category of Medicaid recipients. The State thereby required the plaintiff to move to a nursing home or lose his Medicaid benefits. In Martin v. Taft, 222 F. Supp. 2d 940 (S.D. Ohio 2002), there was no dispute that the plaintiffs were institutionalized in State or private Intermediate Care Facilities or nursing homes. The plaintiffs had applied for community-based services in settings including foster care and group homes, and had been on a waiting list for extensive periods of time - ranging from three to seven years. Neither is true here. Moreover, the plaintiffs were legally unable to receive services in the location of their choice as a result of the State's alleged failure to use existing Medicaid waiver slots or to apply for additional waivers. Plaintiff has made no such showing in this case. See also Radaszewski v. Maram, 383 F.3d 599 (7th Cir. 2004) (State placed a cap on funding for at-home care, requiring plaintiff to enter a nursing home to receive the necessary care). Here, by contrast, there is simply no State rule or policy that requires residents to remain in an adult home in order to receive services - as evidenced by the number of adult home residents who have in fact moved.

In conclusion, plaintiff's attempt to shoehorn its complaints about the conditions and quality of services in private adult homes into a disability discrimination claim against the State is inconsistent with fundamental principles of the ADA. Plaintiff's amorphous claim that OMH

is responsible for the entire mental health system would, if accepted, render the State responsible for seeing that every person with a serious mental illness received services that enabled him or her to live rich, full lives in which they had some unspecified but sufficient amount of contact with non-disabled persons, irrespective of where they lived and whether any State policy or rule limited or directed where they could live or receive services. If any individual did not meet plaintiff's criteria of living an integrated life, the State would be obligated to conduct the treatment planning that is currently the responsibility of the individual's health providers and case managers, and to provide each person with an apartment and unlimited services to ensure a successful existence in that apartment. While defendants are, as regulatory agencies, concerned with whether persons with mental illness receive high quality and effective services from the providers that New York licenses and oversees, plaintiff's radical expansion of the reach of the ADA is unwarranted as a matter of law, logic and policy.

POINT III

ADULT HOME RESIDENTS LIVE IN INTEGRATED SETTINGS WHERE THEY HAVE VIRTUALLY UNLIMITED OPPORTUNITIES FOR CONTACT WITH NON-DISABLED PERSONS

There is no dispute that adult home residents leave the homes and take advantage of the many opportunities for interaction with nondisabled persons available in their communities or in the City at large, including using stores, restaurants, parks, libraries, entertainment facilities, religious institutions, boardwalks, beaches, public transportation and other neighborhood conveniences. See Pl. Resp. to Defs. 56.1 Stmnt. ¶¶ 24-26. The undisputed evidence also shows that, among other things, residents walk around the neighborhoods where they live, stay overnight with family and friends, speak with them on the phone, make friends in the community, vote, take GED classes, and hold jobs or volunteer positions. Id. at ¶¶ 25, 26.

Finally, the undisputed evidence shows that adult homes are located in residential areas near stores, restaurants, religious institutions and public transportation. Id. at ¶ 22. On these undisputed facts, defendants maintain that adult home residents clearly live in integrated, community-based housing, but DAI disagrees.

Rather than a genuine dispute over facts, the disagreement here is over the definition of the ADA's integration mandate and how integration is analyzed - a legal question fully amenable to determination on summary judgment. Defendants submit that integration turns on opportunities for contact with nondisabled persons, and that adult home residents are fully integrated in the community because they have ***nearly unlimited opportunities*** for these contacts, as shown by the fact that residents themselves have testified that they frequently avail themselves of these opportunities.[4] Defs. Mem. at 52-58. DAI does not appear to dispute that integration means opportunities for contact with the nondisabled. See Pl. Mem. at 56-57 ("Under the ADA, providing services in settings with some opportunities for interaction is unlawful if another appropriate setting would provide more opportunities . . . ."). But DAI argues that the integration mandate requires that persons with disabilities reside in the most integrated setting possible and that scattered site supported housing is more integrated than adult homes.[5] Pl. Mem. at 56, 58-

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[4] DAI plainly mischaracterizes Defendants' position, suggesting that defendants' argument is that adult homes are integrated because residents have "some" opportunities for contact with the nondisabled. Pl. Mem. at 54.

[5] In a preliminary section of its argument, DAI relies on a definition of integration from the National Council on Disability. See Pl. Mem. at 30. No deference is owed to this agency's interpretation of the integration mandate because it is not charged with administering Title II of ADA, for which Congress has delegated rule-making authority to the Attorney General. 42 U.S.C. § 12134(a); Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (U.S. 1990) ("A precondition to deference under Chevron is a congressional delegation of administrative authority."); cf. Sutherland v. Reno, 228 F.3d 171, 174 (2d Cir. 2000) ("In contrast to situations where a federal agency is interpreting a statute it is charged with administering, 'courts owe no deference to an

62. DAI has not and cannot establish, however, that supported housing is more integrated than adult homes because the record shows that both types of housing offer nearly unlimited opportunities for residents to have contact with nondisabled persons.

Adult homes and scattered site supported housing models offer equal opportunities for interaction with others in the community. As defendants have shown, the undisputed evidence here makes plain that adult home residents are neither isolated nor segregated because they have virtually unlimited opportunities for interaction with nondisabled persons and that residents take full advantage of these multiple opportunities. See Defs. Mem. at 53-58. Adult homes are located in the community, in residential neighborhoods near, among other things, stores, restaurants and public transportation. By law adult homes are required to permit residents to come and go as they please, subject to reasonable limitations for security, so that they can enjoy life in these community settings to the extent they desire. See 18 NYCRR § 487.5(a)(3)(xii).

The so called "facts" upon which DAI relies have nothing whatever to do with opportunities for contact with nondisabled persons. DAI claims that adult homes are less integrated than supported housing because adult homes are large, congregate care facilities, where residents are less independent than they are in supported housing units.[6] Pl. Mem. at 59-62. But as defendants have maintained, the size of the home and independence of the residents are irrelevant to opportunities for contact with nondisabled persons, which is measured by access

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agency's interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws.'" (citations omitted)).

[6] Neither Townsend v. Quasim or Helen L. v. DiDario, upon which DAI relies, stands for any different test for analyzing integration. Neither of these opinions established a standard by which to measure integration; instead, they apparently merely assumed that certain settings were not integrated. See, generally, Townsend, 328 F.3d 511 (9th Cir. 2003); Helen L, 46 F.3d 325 (3d Cir. 1995).

to the community. See Defs. Mem. at 60-61, 63. In fact, an unbounded integration mandate that focuses on the size of the home or the composition of its population could mean that persons with mental illness who reside in CR/SROs are in nonintegrated housing because CR/SROs may contain 100 beds; even in single-site apartment treatment apartments or single-site supported housing, all the residents are persons with mental illness. See Madan Aff. ¶¶ 6-10; Newman Aff. ¶¶ 28-33, 38 & Exs. H & J at 4; Ex. Tacoronti-B.

DAI also suggests that adult homes are not integrated because they are institutional and may artificially limit interaction by establishing meal times, medication lines, and by overusing loudspeaker announcements. Pl. Mem. at 59-61. DAI fails to establish that these factors affect opportunities for interaction; rather, it relies solely on conclusory statements rather than any empirical evidence. Any suggestion that these policies may have some marginal affect on opportunities for integration is belied by the overwhelming testimony from the adult home residents DAI designated as witnesses that they and their peers frequently leave the homes to use community accommodations.[7] See Defs. Mem. 54-58.

DAI also claims that supported housing clients are more integrated because they "leave their apartments for activities of daily living - to buy food and other necessaries, do laundry, and see a doctor, among other things. In other words, they interact routinely with non-disabled members of their community." Pl. Mem. at 62. But the undisputed testimony from DAI's adult home resident witnesses shows that adult home residents interact with nondisabled people by doing similar activities, including shopping, eating at restaurants, doing laundry, taking public

[7] Indeed, to the extent plaintiff relies on expert opinion that these factors somehow limit opportunities that relies on facts contrary to the record, those expert opinions are properly disregarded. See Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1142 (3d Cir. 1990).

transportation, visiting boardwalks, beaches, and libraries.[8] Pl. Resp. to Defs. 56.1 Stmnt. ¶¶ 24-26. Although there are some adult home residents who choose not to take advantage of these opportunities, it is undisputed that some individuals in supported housing can and do become isolated and segregated. Pl. Response to Defs. 56.1 Stmnt. ¶ 51; see also Duckworth 285; Lockhart 85-87; Tsemberis 112. Just as in adult homes, in supported housing the choice of whether to interact with others or participate in activities in the community must be left to the discretion of the resident. See Defs. Mem. at 61-62. Thus, supported housing and adult homes are equally integrated because both are community placements that offer substantially similar opportunities for access to nondisabled persons.

Finally, DAI suggests that the State has failed to offer adult home residents the "most" integrated setting possible. As discussed above, defendants maintain that the undisputed facts here show that adult homes and scattered site supported housing models are equally integrated. As a legal matter, however, the ADA's integration mandate simply cannot mean that the State has the responsibility to see that all residents live in the place that has the "most" opportunities for contact with nondisabled persons possible. Taken to its logical conclusion, such a definition would require the State to move persons with mental illnesses from family homes where - as was the case for B.J. - family members frustrate efforts for contact with nondisabled persons. See B.J. Dep. at 32, 57. It might also lead to a finding that apartment treatment housing or service-enriched SROs (CR/SROs) are not integrated because residents may have curfews and rules about visiting hours. See Madan Aff. ¶ 12 & Exs. A & B; Bear Dep. at 96 & Exs. 9, 11. An

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[8] Some adult home residents choose to do their laundry at local laundromats. S.B. 82; L.G. 88-89; A.M. 103-04; J.M. 101-02. Some also see doctors outside of the adult homes. G.H. 258-60; G.L. at 83-85.

unfettered integration mandate could even lead to a finding that residences in rural areas or suburbs are less integrated than those in the City, where there are theoretically additional opportunities to meet nondisabled persons due to the availability of public transportation and proximity of stores, restaurants and other community amenities. Instead, the integration mandate requires that a person not be isolated and segregated from his community by rules and policies that erect real barriers to accessing the community at large, such as the privilege restrictions at State psychiatric institutions. See Defs. Mem. at 60. Adult homes are integrated settings because by law they are required to permit residents to come and go as they please, subject to reasonable limitations for security, and allow residents to enjoy life in the community to the extent the residents desire. See 18 N.Y.C.R.R. § 487.5(a)(3)(xii).

In sum, the testimony of DAI's own adult home resident witnesses establishes that adult homes are fully integrated settings.

POINT IV

DAI HAS NOT ESTABLISHED THAT ANY RESIDENTS ARE QUALIFIED TO LIVE IN SUPPORTED HOUSING

As set forth in defendants' memorandum of law, Olmstead requires that the State move a person who is in State custody (unlike adult home residents) to a more integrated setting only if, among other requirements, the person is qualified to move into that setting. See Olmstead, 527 U.S. at 602. In opposition to defendants' motion, plaintiff argues that there is "substantial evidence that large numbers of residents" are qualified to move and that, at the very least, there is a genuine issue of material fact. Pl. Mem. at 63. To support its assertion that the residents are qualified, plaintiff relies on (1) its experts' bald assertions (indeed, their starting assumptions) that the residents are qualified, (2) the New York Presbyterian Hospital assessments ("NYPH

Assessment") and (3) the Adult Home Work Group report. Pl. Mem. at 63. However, each of these is legally deficient.[9] Instead of performing a clinical examination, necessary under the accepted professional standard for making such a determination, plaintiff simply assumes that all the residents are qualified to move. All plaintiff offers is a flawed syllogism: (a) all mentally ill people can live in supported housing ***if*** they are given enough support; (b) enough support exists ***if*** you provide additional, wrap-around services beyond those that are part of supported housing; therefore (c) all residents are qualified to move to supported housing. This faulty reasoning both begins with the premise it sets out to prove and transforms the eligibility standards of supported housing in order to prove the conclusion. Thus, there is no issue of material fact because plaintiff has failed to produce any competent evidence that any residents are qualified to move.

The Complaint alleges that at least half of the 4,000 residents on whose behalf DAI has brought this case are qualified to move to more integrated settings. Compl. ¶ 114. After initially identifying only two "qualified" residents (one of whom has moved), DAI finally produced a list of 1536 residents who they claim are qualified to move to purportedly more integrated settings. Its experts then went on to assert that "virtually all" residents are qualified. However, as demonstrated in defendants' Daubert motion, DAI has failed to establish that ***any*** of these individuals are qualified to live in allegedly more integrated settings because, among other

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[9]Plaintiff's reliance on the report of the Adult Care Facilities Work Group, Raish Decl. Ex. 57, for the assertion that half, or 6,000, of adult home residents could be served in supported housing, Pl. Mem. at 63, strains credulity, as it is contradicted by the Report itself. The Report states that this assumption is hypothetical and not based on any data. Moreover, two advocates who testified on plaintiff's behalf admitted that there was no data supporting the assumption that 6,000 individuals could move. See Rosenthal Dep. at 163-64; Schimke Dep. at 106-08. Plaintiff's reliance on the NYPH Assessments is likewise baseless. Dr. Bruce herself testified that the NYPH Assessment could not be used to make final determinations concerning housing placements. See Bruce Dep. at 55-56, 132, 203. See also Defs. Daubert Mem. at 10.

reasons, none of these residents has been clinically examined by treatment providers to determine whether he or she meets the minimum requirements for acceptance into these housing programs.

Although DAI's experts acknowledge that an in-person clinical examination is necessary to determine the supports that would be required for a person who moved to supported housing, they admit that they failed to conduct a clinical evaluation of a single adult home resident. DAI admits that Dr. Kenneth Duckworth simply interviewed some residents but did not conduct clinical examinations. Pl. Resp. to Defs. 56.1 Stmnt. ¶ 64. Ms. Jones admitted that she is not a clinician and did not perform any clinical examinations to determine whether any individual is qualified to move. In fact, she testified that "[m]y assumption is that each individual could live in supported housing if the proper support were available." Jones Dep. at 80. Plaintiff readily admitted that its other two experts, Dennis Jones and Dr. Ivor Groves, did not conduct clinical interviews of any adult home resident. Pl. Resp. to Defs. 56. 1 Stmnt. ¶¶ 67, 68. As demonstrated in defendants' Daubert motion, DAI's experts' methodology falls woefully below the standard accepted in the field.

Plaintiff's contention that a clinical assessment is not necessary to establish whether a resident is qualified to move to supported housing, but only to determine what services are necessary to live in that setting, is baseless. As demonstrated in defendants' Daubert motion, the accepted professional standard requires a clinical evaluation to determine whether an individual meets the criteria for a particular setting, such as supported housing. Rather than determine whether an individual is qualified, plaintiff posits that nearly everyone with a mental illness can live in supported housing if they are given the proper supports.

In support of its argument that its experts' findings are sufficient and that an in-person clinical examination is not required to establish whether a resident is qualified to move, DAI

refers to the findings and conclusions of defendants' expert, Dr. Jeffrey Geller. Pl. Mem. at 64. However, DAI's reliance on Dr. Geller for this assertion is misplaced. Dr. Geller made clear that he performed "a legal exercise and not a clinical exercise" and that in order to decide whether a resident is qualified to move the methodology that he, and other experts, would employ includes an interview of the individual. Geller Dep. at 139-40. Indeed, Dr. Geller stated that the method he used, review of records, was insufficient and inadequate to determine whether an individual is qualified. "[T]he standard in my field wouldn't go about evaluating any individual for transitional housing without more information than was available to me. That individual would interview or have conversations with collateral sources of information, perhaps other members of a treatment team ***and would interview the individual.***" Geller Dep. at 141 (emphasis added).

In an effort to overcome its utter lack of proof that any resident is qualified to move, DAI contends that any individual can live in supported housing if he or she has sufficient support. Pl. Mem. at 65-66. DAI is wrong because it mischaracterizes supported housing. As discussed in Point V infra, plaintiff turns the definition of supported housing on its head by claiming that virtually all individuals with mental illness can live in it. It is undisputed that supported housing is designed for the most independent individuals, who need only minimal support.[10] Supported housing is designed for individuals who are capable of living independently and taking care of their personal needs with minimal support. Newman Aff. ¶ 38 & Exs. H & J at 4. There is no on-site staff and there are no on-site programs in supported housing. A supported housing resident would typically be visited by a staff person only a few times per month, and possibly

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[10]"Supported Housing: The Residents: Exclusively for people with mental illness who are **able to live independently with minimal support services**." Supportive Housing Options NYC, Ex. Tacoronti-B at 7 (emphasis in original). See also Bear Dep. at 114-118 & Ex. 13; Lockhart Dep. at 40-42 & Ex. 11.

only once a month. Madan Aff. ¶ 10; Bear Dep. at 108; Pl. Mem. at 16. DAI ignores these eligibility requirements and argues that any individual can live in supported housing because Assertive Community Treatment ("ACT") teams are available to residents of supported housing which provide "a very intensive form of community support," and that this support as well as the other supports that case managers provide shows that individuals may participate in supported housing if they need more than "minimal support." Pl. Mem. at 65-66. However, supported housing does not include an ACT team. ACT teams provide additional services, i.e., they provide supports that are not available in supported housing. Although ACT teams can provide flexible services on a temporary basis to some clients, they would not be able to provide intensive services on an ongoing basis to many clients. See Wagner Dep. at 135 ("Certainly ... if ... there were a thousand people put into supported housing and all of them needing ACT, we wouldn't be able to meet that demand with the way things are currently done.") Moreover, ACT teams are not designed to provide regular assistance with personal hygiene, medication assistance, or many other activities. Finally, dedicating all ACT teams to residents of supported housing could deprive others who need ACT team services. In short, DAI has completely failed to show that any resident could safely be placed in supported housing as currently defined, or even in supported housing with an ACT team.

DAI also disputes that its constituents should have to submit an HRA application and be approved before being deemed qualified. DAI's assertion that "completing an HRA 2000 is not an essential precondition for obtaining OMH housing" is without merit. Pl. Mem. at 67. In order to be eligible for housing for persons with mental illness, an HRA 2000 must be filled out and submitted to the New York City Human Resources Administration. Tacoronti Aff. ¶ 28, Madan Aff. ¶ 11. Indeed, Suzanne Wagner, Director of the Center for Urban Community

Services, testified that "[a]ll the applications go to HRA first. This is the beginning of the process." Wagner Dep. at 26. DAI also argues that "even if the HRA 2000 were a precondition to obtaining housing, it is not an 'essential' eligibility requirement as that term is used by the ADA. It is but a bureaucratic process, unrelated to the characteristics of an individual that render him or her suitable for housing." Pl. Mem. at 67 (citation omitted). Again, DAI's argument is without merit. The HRA 2000 application states that HRA will review all applications to determine (1) an applicant's eligibility for placement in housing developed for individuals with serious mental health problems and (2) the level of supportive housing approved. Ex. Tacoronti-C. As part of the HRA packet, a current Comprehensive Psychosocial as well as a current Psychiatric Summary must be filled out. A review of the information submitted in and with the HRA 2000 permits an assessment of an individual's psychiatric requirements and his or her functioning level to determine eligibility for and the level of housing, and ensures that the housing goes only to those who have a qualifying mental illness. Thus, by its very terms, the HRA 2000 is a precondition to obtaining housing and is an essential eligibility requirement directly related to an individual's characteristics that render him or her suitable for supported housing or any other model of mental health housing.

Plaintiff's attempt to evade its burden of proof with experts who simply assumed that virtually all residents were qualified, instead of making this determination after careful review of each resident according to professional standards, should be rejected.

POINT V

DEFENDANTS HAVE ESTABLISHED THEIR FUNDAMENTAL ALTERATION DEFENSE

Plaintiff does not – because it cannot – set forth any material facts that contradict

defendants' extensive proof establishing defendants' fundamental alteration defense, including New York's comprehensive, effective system and plan to provide as many community programs and services, including OMH licensed and/or funded housing programs, to persons with disabilities Statewide, as feasible. See Defs. Mem. at 70-79 ; Myers Aff ¶¶ 97-98, 103-68 & Exs. B-HH; Simons Aff. ¶¶ 15-111 & Exs. A-F. Instead, plaintiff artfully tries to play the same few word games that it has tried to play throughout the course of the extensive discovery in this case.

1. Defendants Have A Legally Sufficient Olmstead Plan

The first word game is based on the phrase "Olmstead plan." In repeated requests to admit and when examining numerous witnesses from DOH and OMH who are unquestionably dedicated to doing the best job they can with limited resources and expansive responsibilities to all persons with disabilities in the State, plaintiff had one mission. Namely, to get a lay witness to admit that New York has no single document entitled an "Olmstead plan" specifically tailored for adult home residents - regardless of what facts the witness established regarding DOH's and OMH's support of many community programs and services. These programs include OMH licensed and/or funded housing programs, available to all persons with disabilities, including adult home residents. Plaintiff contends it should win this case because one straw man it has set up, i.e., the purported requirement of an Olmstead plan of plaintiff's own definition, was missing. Plaintiff's argument is deeply flawed in many respects.

Plaintiff's argument depends on the Court's accepting many untenable premises, e.g., that Olmstead applies to this case involving disabled adults living in privately owned and operated adult homes in which they are free to come and go and to move from; that Olmstead requires an "Olmstead plan" as interpreted by the Third Circuit in Frederick L. v. Department of Public

Welfare, 422 F.3d 151 (3d Cir. 2005), and applied by that Court in the context of disabled individuals residing in institutions owned and operated by the State of Pennsylvania; that the Court should take plaintiff's word that expensive and extensive wide-spread systemic relief is warranted because – unlike in Frederick L., where the PAIMI plaintiff met its initial burden of proof regarding the threshold question of whether and which of its constituents State treatment professionals had determined could appropriately live in the community – plaintiff does not actually have to prove standing for any of its purported thousands of alleged constituents other than to show that some problem "might" exist. Plaintiff's clever advocacy cannot convert legal arguments – whether Olmstead even applies in this case, whether the fundamental alteration defense requires an Olmstead plan at all, much less separate plans based on type of residence, and whether defendants' "Olmstead plan" is legally sufficient – into a factual dispute. These are clearly legal issues for the Court to decide. Moreover, defendants submit that Olmstead does not, and should not, make the State responsible to guaranty the entitlement of all disabled adults to a State-funded private apartment-style residence with as many State-funded wrap around services that such individuals require to live safely in such a setting.

2. Plaintiff's Relief Would Fundamentally Alter Many of Defendants' Programs

Plaintiff disingenuously claims that it seeks only to vindicate the alleged rights of adult home residents in New York City in this case and that its relief would not fundamentally alter defendants' programs. Plaintiff in fact asks this Court to expand Olmstead to require the State to guaranty the entitlement of all disabled adults to a State-subsidized private apartment-style residence with as many State-subsidized wrap around services as they would need to live safely in such a setting. While plaintiff's goal may be laudable, the law does not require all such ideals

to be mandated when the State's resources are limited and its responsibilities to its citizenry Statewide are extensive. Plaintiff's relief would create new programs and would fundamentally alter many of defendants' programs and policies. See Defs. Mem. at 75-79. As explained below, plaintiff's arguments confuse and redefine terms and mischaracterize facts.

A. Supported Housing As Now Defined Is Not "supported housing with unlimited wrap around services"

Defendants have submitted extensive admissible factual evidence regarding the Supported Housing Program, including from third parties who run the housing, establishing that supported housing is one of several models of OMH subsidized housing programs and is designed for individuals with a sufficiently high level of independent living skills to enable them to live safely with minimal supports. Myers Aff. ¶¶ 243-44; Newman Aff. ¶ 38. In the face of this evidence, plaintiff argues that "Supported Housing" is not the Supported Housing Program as currently defined, but rather a State-subsidized private apartment-style residence that is accompanied by whatever wrap around services a disabled individual would need to reside there without endangering himself or the other residents of his apartment and building. Plaintiff cannot create a genuine issue of material fact about the Supported Housing Program by ignoring the extensive facts in the record. Nor can plaintiff create an issue of material fact by trying to recharacterize the program by repeatedly describing it as "supported housing with wrap around services." Finally, plaintiff cannot create a genuine dispute of material fact by relying upon a witness who runs the controversial and unique "Pathways to Housing" program targeted primarily for the homeless, which is more expensive than Supported Housing (but still does not include all the services the residents here may need), or on purported expert witnesses who admitted they didn't even use the term "supported housing" as currently defined in their expert

reports, and that they failed to familiarize themselves with supported housing in New York before they rendered their expert reports in this case. See, e.g., Groves Dep. at 93-113. The relief sought here constitutes a fundamental alteration because it would change the nature of the Supported Housing Program.

B. Plaintiff's Attempt to Require the Court to Impose Radical Changes On Defendants' Programs Is a Fundamental Alteration

Plaintiff's attempted recharacterization of the Supported Housing Program, while legally unavailing, is necessary as the foundation for its attack on defendants' fundamental alteration defense in several other respects. Once that card is removed, more of plaintiff's house of cards collapses.

For example, plaintiff denies that it seeks to fundamentally alter OMH's programs, despite the evidence in the record that OMH licenses and funds a spectrum of housing programs that are designed as a matter of policy to vary, from model to model, in the amount of support offered to residents and in the corresponding degree of independent living skills that the residents are expected to have in order to live safely in the setting. However, plaintiff's director and one of plaintiff's experts have admitted that "supported housing with wrap around services" is the only model of housing that they believe to meet their interpretation of Olmstead's integration mandate. Groves Dep. at 93-113. In seeking to have the Court make mental health policy and require the State to move adult home residents to "supported housing with wrap around supports," as opposed to any existing model of mental health housing, plaintiff seeks to fundamentally alter OMH's policies and programs, and to engage the court in a public policy debate about what model is "better." Indeed, under DAI's theory, community residences and other models of mental health housing may be antithetical to Olmstead.

Plaintiff also denies that it seeks to take resources from disabled adults and children Statewide in order to finance "supported housing with wrap around services" for adult home residents in New York City. However, the record is clear that although New York has devoted extensive resources to developing supported housing, and is committed to developing more in the future, Defs. Mem. at 24-25, there are not sufficient beds for all State residents with mental disabilities who desire them. In this country, housing, especially housing of the particular type of one's choice, is not an entitlement. Therefore, the only way to meet plaintiff's goal of requiring the State to move all disabled adult home residents to State-subsidized apartment-style residences with wrap around services, without displacing other disabled individuals residing in other settings (including State hospitals) who would also like to live in "Supported Housing" or "supported housing with unlimited wrap around services," would be for OMH to spend an additional extensive amount of its resources to develop such housing and services for every such individual in the State who wants such a residence. This would constitute a fundamental alteration.[11] Myers Aff. ¶¶ 229-37; Simons Aff. ¶¶ 73-74.

C. Plaintiff's Alleged Medicaid Savings Are Speculative

Another word game that plaintiff has continued throughout the course of discovery in this case literally compares apples to oranges and then asks the Court to rely on purported differences between these two disparate groups. Plaintiff argues that hypothetical Medicaid savings would

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[11]Likewise, plaintiff's relief constitutes a fundamental alteration in that it seeks to require OMH and/or DOH directly to assess and move the adult home residents. Although the State's Olmstead plan includes oversight of a system in which private providers and mental health treatment professionals, among others, assess the residents' goals and potential, requiring State treatment professionals to go into the private adult homes and directly assess and move these individuals would indisputably constitute a fundamental alteration and the creation of a new program.

materialize if adult home residents moved to "supported housing," despite the evidence establishing that such an argument is wholly speculative. Ex. Saurack-14 at DAI 936-37; Lieberman Dep. at 63, 193-94; Kipper Aff. Ex. A at 11; Ex. Hathaway-Z. Again, plaintiff's argument requires playing fast and loose with the term "supported housing" because it depends on a table that compares the average Medicaid expenditures of residents of Supported Housing with those of residents of adult homes, and then ignores the evidence establishing that the populations in these two settings are obviously distinct, and any comparison of Medicaid costs, without value. This is because the record establishes that Supported Housing is designed for and operated by third party providers for disabled persons who have a high level of independent living skills and who can live safely in that setting with minimal supports. Lockhart Dep. at 40-42. Since adult homes offer more assistance, including assistance with bathing, house cleaning, medication and meals, it is perfectly logical to expect that a larger number of persons choosing to reside in such settings have fewer independent living skills and require more supports, including those funded by the Medicaid program, than residents of supported housing. Lockhart Dep. at 42-44; Schaefer-Hayes Aff. ¶¶ 117-18. Plaintiff has not shown the contrary.

Finally, while the record contains defendants' other detailed explanations as to how plaintiff's relief would constitute a fundamental alteration, two more are worthy of emphasis. As a matter of math, defendants' have proven plaintiff's relief would be more expensive. Kipper Aff. Ex. A. Plaintiff's critique of defendants' analysis as inadequate – contending that defendants should have calculated the exact cost of each individual's move, including the cost of the individual's required supports – is both ironic and specious. Plaintiff seeks to require defendants to assume plaintiff's burden of proof in identifying their own alleged constituents, i.e., the individuals that plaintiff claims are allegedly qualified and want to move, and proving the

elements of the claim for these constituents. As plaintiff has failed to meet this burden of proof, plaintiff's complaint should be dismissed outright. In any event, defendants have gone through extensive discovery and preparation of a comprehensive summary judgment motion based on the evidence, including that which plaintiff failed to produce in response to defendants' motion to compel disclosure of the names of all residents whom DAI alleges are qualified to live in supported housing. Defendants should not be penalized for plaintiff's failure to carry its burden of proof on this critical component of its case. Rather, defendants' extensive work in fully establishing the fundamental alteration defense in light of plaintiff's failure of proof should be recognized, and plaintiff's complaint dismissed.

POINT VI

GOVERNOR SPITZER SHOULD BE DISMISSED AS A PARTY TO THIS LITIGATION

Governor Spitzer should be dismissed as a party to this litigation because the other named defendants in this case could afford DAI full relief, if DAI were to prevail. See Comm. for Pub. Ed. & Religious Liberty v. Rockefeller, 322 F. Supp. 678, 686 (S.D.N.Y. 1971). In essence, DAI seeks an order compelling funding for the creation of thousands of scattered-site supported housing beds targeted solely for current residents of adult homes, additional funding for ACT and the various and sundry other supports the residents would require to function in supported housing, and an assessment of current adult home residents to determine who is qualified for this housing. Although defendants emphatically reject that this or any relief is required here, the other named defendants have authority to comply with court orders compelling this relief. The presence of Governor Spitzer confers no further advantage on DAI, regardless of whether the Governor's Office had some involvement in adult home issues. To conserve the limited resources of his important office, Governor Spitzer should be dropped as a party.

POINT VII

DOH AND COMMISSIONER DAINES SHOULD BE DISMISSED

DAI has withdrawn its claims based on defendants' failure to take adequate measures to redress poor conditions in impacted adult homes. Since plaintiff no longer challenges DOH's inspection and enforcement, and DOH is not necessary for complete relief, DOH and Commissioner Daines should be dismissed.

CONCLUSION

FOR THE FOREGOING REASONS, SUMMARY JUDGMENT SHOULD BE GRANTED FOR THE DEFENDANTS AND THE COMPLAINT SHOULD BE DISMISSED.

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Respectfully submitted,

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