

10-235-cv(L), 10-251-cv(CON), 10-767-cv(CON), 10-1190-cv(CON)

United States Court of Appeals

for the

Second Circuit

DISABILITY ADVOCATES, INC., UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

– v. –

NEW YORK COALITION FOR QUALITY ASSISTED LIVING, EMPIRE
STATE ASSOCIATION OF ASSISTED LIVING,

Movants-Appellants,

– and –

DAVID A. PATERSON, in his official capacity as Governor of the State of New
York, RICHARD F. DAINES, in his official capacity as Commissioner of the
New York State Department of Health, MICHAEL F. HOGAN, in his official
capacity as Commissioner of the New York State Department of Mental Health,
NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE
OFFICE OF MENTAL HEALTH,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF FOR AMICI CURIAE ON BEHALF OF AMERICARE
CERTIFIED SPECIAL SERVICES, INC., NEW HORIZON
COUNSELING CENTER, INC. AND NEW YORK PSYCHOTHERAPY
AND COUNSELING CENTER, INC. IN SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Americare Certified Special Services, Inc., New Horizon Counseling Center, Inc. and New York Psychotherapy and Counseling Center, Inc. certifies that Americare Certified Special Services, Inc. is a privately held corporation, and New Horizon Counseling Center, Inc. and New York Psychotherapy and Counseling Center, Inc. are not-for-profit corporations. The following is a list of their corporate parents and/or public held companies that own 10% or more of its stock:

None

S/ E. Christopher Murray
E. Christopher Murray

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STATEMENT OF INTEREST AND INTRODUCTION

Plaintiff Disability Advocates, Inc. (“DAI”) brought this action on behalf of persons with mental illness who reside in privately owned adult homes in New York City. The adult homes that are the subject of this action are ones that have a large percentage of residents suffering from mental illness. DAI alleges that these adult homes do not provide a sufficiently “integrated setting” to satisfy the requirements of the Americans With Disabilities Act (“ADA”) as set forth by the Supreme Court in *Olmstead v. L.C. ex rel. Zemring*, 527 U.S. 581 (1999).¹

After a bench trial in which the Court found for the plaintiff, and after the Court provided the parties with the opportunity to make remedial proposals, the United States District Court for the Eastern District of New York (Garufis, J.) issued a Remedial Order and Judgment requiring the defendants - the Governor, the Department of Health (“DOH”), the Office of Mental Health (“OMH”) and the agency commissioners - to guaranty supported housing and related professional services for approximately 4,300 individuals currently residing in the subject adult homes. The State of New York appealed the final judgment and that appeal has been consolidated with three other appeals by adult home associations that were denied intervention.

¹ None of the parties, the proposed intervenors, nor their counsel drafted any portion of this brief or contributed financially to its preparation. The only entities that contributed financial resources for the preparation of this brief are Americare, New Horizon and NYPCC.

Americare Certified Special Services, Inc. (“Americare”) provides home care to the mentally ill and the developmentally disabled, as well as for general population patients. Americare is a certified home health agency whose services are covered by Medicare, Medicaid, managed care and other insurance plans. Americare provides home care services to individuals residing in the adult homes that are the subject of this action.

New Horizon Counseling Center, Inc. (“New Horizon”) is a not-for-profit community mental health clinic certified by the New York State Office of Mental Health. New Horizon provides diagnostic evaluation, psychotherapeutic and aftercare services to those experiencing depression, anxiety, phobias, schizophrenia, psychosomatic illness or other emotional stresses. New Horizon provides services both at clinical locations and at homes, schools, workplaces and adult homes, including the adult homes that are the subject of this action, and provides a case management program to evaluate whether individuals should be moved from adult homes to supported housing.

New York Psychotherapy and Counseling Center Inc. (“NYPCC”) is a not-for-profit corporation founded in 1974 as a community oriented mental health clinic licensed by the New York State Office of Mental Health. NYPCC provides mental health services to individuals, including seriously and persistently mentally

ill adults, and seriously emotionally disturbed children and adolescents in Brooklyn and Queens. NYPCC operates three clinics located at adult homes.

The interest in this action of these mental health service providers, whose chief executive officers have authorized the filing of this brief, is to provide the Court with assistance in addressing the legal issue raised on the appeal from the Remedial Order and Judgment from the perspective of the service providers for the individuals residing in the subject adult homes. Specifically, as explained below, the District court erred in granting DAI standing to assert the purported ADA claims of approximately 4,300 individuals, and as a result of granting DAI standing and the Remedial Order and Judgment, specific individuals who are best served by receiving mental health services in adult homes may be placed at risk if they are transferred to supported housing.

RELEVANT FACTS

A. Adult Homes

Adult homes are licensed by the State to provide “long-term residential care, room, board, housekeeping, personal care and supervision to five or more adults”. 18 NYCRR §485.2(b). They are meant for individuals who do not need the level of care provided by hospital or nursing home, but who are nonetheless “unable or substantially unable to live independently”. *Social Service Law* §2(21). Adult homes typically provide housing, meals, assistance with personal care and

medication management. 18 NYCRR §487.7(e)-(f). Adult homes contract with providers for assistance with the assessment of mental health needs, the supervision of general mental health care, and the provision of related case management services. SPA 101-2. The adult homes at issue in this action are homes within New York City with at least 120 residents, at least 25% of whom have a mental health disability. SPA 77.

Adult homes are highly valuable for providing residents with personal care, medication oversight and a safe environment. JA836:3202-03. Further, the State is responsible for appropriate enforcement measures to make sure that individual homes meet State regulatory standards. SPA 167. Adult homes are often the most appropriate setting for individuals who require services from third party providers, such as Americare, New Horizon and NYPCC, and adult homes permit these providers to deliver services efficiently to groups of in need individuals who otherwise may not receive the same quantity and quality of service.

For example, individuals who have serious mental health illness such as schizophrenia, manic depression or are psychotic need continual supervision to assure that they have and take the appropriate medication, and the ability to provide this service is facilitated by the adult home setting. And, although while medicated, these individuals may be sufficiently functional to live in supported housing, if they cease to take their medication, which will be a risk if they are

living in supported housing, they will no longer be functional and may pose a danger to themselves and others.

B. Supported Housing

Although “supported housing” does not have a statutory or regulatory definition, the term is generally understood to be housing situations where individuals with mental illness live in their own apartments with supporting services. JA504:1441-42. New York began to develop permanent supported housing for persons with mental illness in the early 1990s. JA232-33.

Residents of supported housing range from those requiring limited visits from case workers (JA405:1443-44, JA696:2642-43), to those that receive state funded intensive services, which involve frequent visits by a multidisciplinary team of specialists in psychiatry, nursing, psychology, social work, substance abuse and vocational rehabilitation (JA101:228-29, JA258:855-57). These intensive services are in high demand statewide by many groups of individuals with mental illness. JA101:228-290, JA258:855-57.

C. Remedial Order and Judgment

By its Remedial Order and Judgment (SPA 232-242), the District Court directed that the defendants ensure that within four years “all Current Adult Home Residents who desire placement in supported housing have been afforded such placement if qualified” and that after four years “any individual with mental illness

who is qualified for supported housing” may not be offered placement in an Adult Home, unless he or she declines placement in supported housing after being “fully informed”.

Defendants are also required to develop a minimum of 1,500 supported housing beds for “DAI Constituents” per year, and must enter into contracts with providers for the necessary support services. In the Memorandum and Order dated March 1, 2010 issued in connection with the adoption of the Remedial Order and Judgment (SPA 218-232), the amount of supported housing beds to be developed was based on the Court’s finding that “virtually all” of DAI’s constituents are qualified for supported housing.

ARGUMENT

GRANTING DAI STANDING WAS IN ERROR AND RESULTED IN AN INAPPROPRIATE GENERALIZED DETERMINATION THAT DEFENDANTS VIOLATED THE ADA RIGHTS OF 4,300 INDIVIDUALS

By the District Court allowing DAI standing to bring the ADA claim that the adult homes are not the appropriate setting for 4,300 individuals, the District Court ignored that these individuals have very specific and varied needs, and while supported housing may be a more appropriate living arrangement for some of the individuals who reside at the adult homes that are the subject of this action, for

others, the adult home they reside in may be a more appropriate and beneficial living arrangement.

Adult homes provide a structured environment which allows outside providers the means to oversee the delivery of necessary mental health services for in need individuals. Of particular concern is medication management because while some individuals may be functional enough for supported housing if medication is being appropriately taken, if they fail to take the medication they will no longer be functional enough to reside in supported housing. In addition, adult homes permit mental health service providers with the ability to efficiently provide clinical services to a number of individuals who may not receive the same quality and quantity of help if they were scattered in assisted housing throughout New York City.

The District Court determined the DAI had standing to assert the ADA claim, and the District Court found that “virtually all” of the approximately 4,300 individuals are not appropriately housed in adult homes. And, while the Remedial Order and Judgment provides for an individualized assessment, only three categories of individuals will be deemed to be appropriate for adult home placement, i.e. those with severe dementia, high level of skilled nursing needs or those likely to cause imminent danger to themselves or others.

The District Court's generalized assessment as to the appropriate housing needs for approximately 4,300 individuals, which was undertaken only after hearing from a handful of individuals who were situated in the adult homes, is demonstrative of the real life trouble raised by granting standing to DAI.

As both the State, as well as the representations of the adult homes effected by this action point out, DAI is not a traditional membership organization, nor does DAI meet the requirements for being deemed a membership organization for purposes of standing because the individuals DAI purportedly represent do not participate in DAI's activities or litigation decisions (see discussion in Brief for New York Coalition for Quality Assisted Living, Inc., PP28-32). Accordingly, the propolytic purpose of requiring standing has not been met in this action, and the consequences are very real. Without the involvement of the individuals who are purportedly represented by DAI, there are no assurances that their needs are paramount, as opposed to this action simply being intended to advance DAI's policy agenda.

Thus, as the defendants-appellants point out, other circuits have specifically held that standing was not appropriate for organizations like DAI for this "kind of litigation in bulk". For example, in *Missouri Protection & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007), associative standing was rejected "without the participation of one or more individual wards with specific claims

based on a particular incapacity”. By requiring specific plaintiffs, as opposed to a generalized “constituency”, the risk of overbroad and incorrect assessments as to the appropriate housing needs of individuals with varied needs is diminished (see discussion in Defendants-Appellees Brief at PP.74-81).

An adult home setting provides the opportunity to make available intensive mental health services to a number of patients who may not have the same access if scattered in individual apartments throughout the City of New York. And while there may be individuals in adult homes who would be better served by being placed in supported housing, it is hard to fathom how the District Court, even on the extensive record before it, came to the determination that “virtually all” of the 4,300 individuals in question are better served by being in supported housing instead of adult homes.

Further, if the result of the Remedial Order and Judgment is the closure of the adult homes, the individuals who require this type of setting will be harmed. The population of individuals with various types and severity of mental illness cannot be served only by supported housing, and if the result of this action is to eliminate the availability of adult homes there will be real harm to a number of individuals that DAI purports to represent. *See* Brief for New York Coalition for Quality Assisted Living, Inc. PP.36-39. *See also Maryland Highways Contractors Association, Inc. v. State of Maryland*, 933 F.2d 1246, 1252 (4th Cir.), cert. den.,

502 U.S. 939 (1991) (representative standing denied because, *inter alia*, of actual and potential conflicts among members of the association); *Associated General Contractors of North Dakota v. Otter Tail Power Company*, 611 F.2d 684 (8th Cir. 1979).

An individual, or even specific identifiable groups of individuals, clearly have recourse under the ADA to assert that they are being wrongly housed in a non integrated setting, but the District Court, in granting DAI standing to speak for 4,300 individuals who have a wide spectrum of needs, clearly erred. Simply put, the District Court's error in granting standing to DAI has now resulted in a broad determination that "virtually all" of 4,300 individuals currently residing in the effected adult homes should not be placed in adult homes, which from the perspective of the providers of mental health services is troubling and inaccurate. Many of the 4,300 individuals receive better mental health services because of their placement in adult homes, and the District Court's granting DAI standing to litigate a change in the housing placement of 4,300 individuals should be reversed.

CONCLUSION

The Court should vacate the injunction and enter judgment in defendants' favor.

Dated: Uniondale, New York
July 29, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, E. Christopher Murray, a Partner at the firm of Ruskin Moscou Faltischek, P.C., hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2,175 words, and complies with the type-volume limitations of Rule 32 (a)(7)(B).

S/ E. Christopher Murray

E. Christopher Murray

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.: **AFFIDAVIT OF
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I, Natasha S. Johnson, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On

deponent served the within: **Brief for *Amici Curiae* on Behalf of Americare Certified Special Services, Inc., New Horizon Counseling Center, Inc. and New York Psychotherapy and Counseling center, Inc. in Support of Appellants**

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