UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DISABILITY ADVOCATES, INC.,

Plaintiff,

v.

ELIOT SPITZER, in his official capacity as Governor of the State of New York, RICHARD F. DAINES, in his capacity as Commissioner of the New York State Department of Health, MICHAEL F. HOGAN, in his 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.

03 Civ. 3209 (NGG) (MDG)

MEMORANDUM OF LAW IN SUPPORT OF DISABILITY ADVOCATES, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

August 10, 2007

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Pursuant to the Court's Aug. 2, 2007 Order, exhibits will be filed in hard copy no later than Aug. 31, 2007

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Plaintiff Disability Advocates, Inc. ("DAI") respectfully submits this memorandum of law in support of its motion for partial summary judgment striking the defendants' affirmative defense of "fundamental alteration."

Preliminary Statement

This case arises out of years of unlawful segregation and isolation of individuals with mental illness in large institutions in New York State, commonly referred to as adult homes.

In the landmark decision *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), the Supreme Court held that the unnecessary institutionalization of people with mental illness violates Title II of the Americans with Disabilities Act (the "ADA"). The Court declared that "unjustified isolation [of people with mental illness] . . . is properly regarded as discrimination based on disability" under the ADA. *Id.* at 597.

Accordingly, *Olmstead* requires states to provide services to people with mental disabilities in the most integrated setting appropriate to their needs unless the individuals are opposed to such placement. *Id.* at 607. The "most integrated" setting is "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. § 35.130(d) App. A (1998).

Olmstead's integration requirement may be excused *only* where a state demonstrates that it would result in a "fundamental alteration" of the state's services and programs. *Id.* at 603. This affirmative defense, commonly referred to as the "fundamental alteration defense," is not available, however, to states that have not even bothered to develop a plan to comply with the *Olmstead* mandate. *Frederick L.* v. *Dep't of Pub. Welfare of Pa.*, 422 F.3d 151, 158-59 (3d Cir. 2005). The Supreme Court in *Olmstead* described such a plan as a "comprehensive, effectively working plan for

placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." 527 U.S. at 605-06.

For decades, New York State's mental health programs, services and activities have run afoul of the anti-discrimination mandates of the ADA and the Rehabilitation Act (the "RA") by segregating people with mental illness in large, institutional, group-living facilities, populated almost entirely by people with mental illness. These custodial institutions foster dependence and isolation, and provide little or no opportunity for rehabilitation and community integration. Residents are forced to relinquish their privacy, autonomy and connection to the community, and to abide by regimented schedules for eating, taking medication, receiving public benefits, having visitors and other aspects of their daily lives.

The failings of the adult home system have been repeatedly acknowledged by the State. As recently as May of 2007, New York's Office of Mental Health acknowledged that people with mental illness languish in adult homes that are ill-suited to their needs, stating:

> As a consequence of poor access to community housing, inadequate levels of mental health housing, and clinical programs that do not support people in getting/keeping housing successfully, many people with a mental illness are poorly housed or institutionalized. Thus, many people with a mental illness are 'stuck' in: homelessness and the shelter system; *institutional settings* (nursing homes, adult homes, state psychiatric centers) . . .

(Declaration of Anne S. Raish ("Raish Decl.") Ex. 33 (emphasis added).)

Notwithstanding the existence of other mental health housing and support programs in New York's system that are integrated in the community, people with mental

illness who reside in adult homes are not afforded any meaningful access to those programs. The State lacks any plan under *Olmstead* to ensure that people with mental illness who reside in adult homes are afforded the opportunity to move to those integrated settings.

In fact, the State has taken the position in this case that it does not need to have a plan to move adult homes residents to more integrated settings, as required by *Olmstead*, because it believes that adult homes are already fully integrated in the community. The State's position has no merit and is contrary to the documents and testimony produced thus far in this case, all of which establish that people with mental illness in adult homes are segregated from the community. DAI is, however, cognizant that this issue is one of fact on which a trial is needed. Thus, DAI is not, by this motion, seeking summary judgment on its claims.

DAI has no doubt that it will ultimately prevail on this issue at trial. The evidence that has been uncovered to date and the evidence that will be presented at trial will show that, far from being integrated, adult homes are settings in which people with mental illness are isolated, segregated and subjected to significant barriers to community integration. But there is more.

Discovery in this case has also demonstrated that there are numerous adult home residents with mental illness whose mental health and other needs could be met by supported housing programs funded by the State—programs in which housing is provided to people with severe and persistent mental illness in apartments scattered throughout the community with appropriate case management and other supports. Documents produced by the State confirm that numerous adult home residents are

appropriate for supported housing and desire to live in supported housing. Indeed, the *State's own expert* has testified that numerous people with mental illness residing in adult homes are appropriate for the State's supported housing program. Moreover, the State's own estimates are overly conservative. DAI's experts, all of whom have experience running public mental health systems, will demonstrate that virtually all people with mental illness who reside in adult homes can live in supported housing.

Discovery has also established that the State has no *Olmstead* plan for people with mental illness residing in adult homes. One after the other, defendants' witnesses confirmed this fact during their depositions.

It was not until the State was pressed during discovery to confirm—as its employees and officials had testified—that it has no *Olmstead* plan for people with mental illness in adult homes, that defendants attempted to cobble together certain disparate state activities to present as a "plan." But the asserted components of their so-called plan are not enough under *Olmstead*.

The undisputed facts establish that defendants have no *Olmstead* plan for people with mental illness who live in adult homes. As a result, the State is precluded, under the law, from asserting the affirmative defense of fundamental alteration. DAI is therefore entitled to summary judgment striking defendants' affirmative defense of fundamental alteration.

Statement of Facts

In Section A of this Statement of Facts, DAI sets forth the relevant factual background in order to assist the Court. The facts pertinent to this motion are summarized in Section B of this Statement of Facts. They are also set forth in the

complaint, answer, the accompanying declaration of Anne S. Raish, and the Statement of Undisputed Facts submitted herewith pursuant to Local Rule 56.1.

A. Background

1. Plaintiff

DAI is a protection and advocacy organization that is authorized under the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. § 10801, to bring suit on behalf of individuals with mental illness. DAI's constituents in this case are persons with mental illness who reside in, or are at risk of entry into, impacted adult homes in New York City with more than 120 beds. The defendants define an "impacted" adult home as one in which 25% of the residents have a mental illness. (Raish Decl. Ex. 1 at 71:14-18.) In most impacted homes with more than 120 beds, however, 95% or more of the residents have a mental illness. (Raish Decl. Ex. 31.)

2. Defendants[1]

Defendant New York State Department of Health ("DOH") is an agency of New York State. (Answer ¶ 14.) Defendant Richard F. Daines is the Commissioner of DOH. DOH licenses and monitors adult homes, and enforces the laws and regulations applicable to adult homes. (Raish Decl. Ex. 3 at 11:9-19; Raish Decl. Ex. 4 at 39:18-20; Raish Decl. Ex. 5 at 38:5-10.)

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Eliot Spitzer, Richard F. Daines and Michael F. Hogan have been substituted for former defendants George Pataki, Antonia C. Novella and James Stone, respectively. DAI refers to defendants Eliot Spitzer, Richard F. Daines, Michael F. Hogan, the New York State Department of Health and the New York State Office of Mental Health, collectively, throughout this Memorandum of Law as "defendants" or "the State."

State regulations provide that DOH and the Commissioner of DOH are responsible for promoting the "development of sufficient and appropriate residential care programs for dependent adults." (Raish Decl. Ex. 34 §§ 485.3(a)(1), 487.1(b).)

Defendant New York State Office of Mental Health ("OMH") is also an agency of New York State. (Answer ¶ 16.) Michael F. Hogan is the Commissioner of OMH. OMH funds, oversees, licenses and credentials mental health care providers who provide services in adult homes for people with mental illness. (Raish Decl. Ex. 1 at 18:2-24, 167:8-11; Raish Decl. Ex. 35 at 237:17-242:15.) Jointly with DOH, OMH monitors and inspects impacted adult homes. (Answer ¶¶ 16, 17; Raish Decl. Ex. 1 at 71:14-18.)

OMH funds and oversees an array of mental health housing and support programs state-wide, (Answer ¶ 40), including supported housing programs which provide people with mental illness with their own apartments in the community, along with support services that the individual resident requires. (Raish Decl. Ex. 4 at 10:21-11:7.)

Defendant Eliot Spitzer, sued in his official capacity, is the Governor of the State of New York. He is ultimately responsible for ensuring that New York operates its service systems in conformity with the Americans with Disabilities Act and the Rehabilitation Act.

New York State's Mental Hygiene Law states:

> [I]t shall be the policy of the state . . . to develop a comprehensive, integrated system of treatment and rehabilitative services for the mentally ill. Such a system . . . should assure the adequacy and appropriateness of residential arrangements . . . and it should rely upon . . . institutional care only when necessary and appropriate . . . .

(Raish Decl. Ex. 36 § 7.01.)

Section 7.07(b) of the Mental Hygiene Law states that OMH "shall advise and assist the governor in developing policies designed to meet the needs of the mentally ill and to encourage their full participation in society." (*Id.* § 7.07(b).) It further states that OMH has "the responsibility for assuring the development of comprehensive plans, programs, and services in the areas of research, prevention, and care, treatment, rehabilitation, education, and training of the mentally ill." (*Id.* § 7.07(a).)

3. Adult Homes

Adult homes were created more than 35 years ago to provide room and board, housekeeping, personal care and supervision to elderly persons. (Raish Decl. Ex. 37 at 10:10-23.) Like many states in the 1960s and 1970s, New York underwent a movement to move persons with mental illness out of state-run psychiatric hospitals. (*Id.* at 11:2-10.) During this deinstitutionalization process, the number of people with mental illness residing in adult homes grew significantly as patients from psychiatric hospitals were discharged to adult homes. (*Id.* at 10:10-11:10.)

Unfortunately, instead of developing enough appropriate, community-based housing for persons with mental illness, New York opted to rely heavily on adult homes. As former OMH Commissioner James L. Stone stated:

> Adult homes developed in response to a need—lack of community based housing resources. For some individuals coming out of State hospitals, adult homes were a housing option. . . . Deinstitutionalization happened and the community resources weren't up to speed with state operated bed reductions.

(Raish Decl. Ex. 38 at 1.)

Adult homes were never designed or adapted for addressing the needs of persons with disabilities, particularly mental illness. (Raish Decl. Ex. 37 at 289:4-15.)

They did not and still do not offer any meaningful or effective rehabilitative treatment, skills training, or discharge planning. (*Id.* at 10:10-11:10, 289:4-15.)

Each of the adult homes at issue in this case houses more than 120 individuals with disabilities. Many homes, however, are much larger. As of the end of 2006, Queens Adult Care Center, for example, housed 360 people, 97% of whom have a mental illness. (Raish Decl. Ex. 31.)

The daily activities of adult home residents are highly regimented. Most daily activities are provided in one place, in the company of large numbers of other people with mental illness, and subject to restrictive rules and policies. (Raish Decl. Ex. 39 at 34:2-19; Raish Decl. Ex. 40.) In most homes, residents have no choice in what they eat, when they eat, or where in the common dining area they may sit. (Raish Decl. Ex. 4 at 140:5-141:17; Raish Decl. Ex. 1 at 217:2-219:22; Raish Decl. Ex. 41 at 26:24-28:13.) Medications are distributed at specific times in the common areas and, in many homes, residents have to line up at a medication window to receive them. (Raish Decl. Ex. 42 at 202:13-203:7; Raish Decl. Ex. 39 at 38:4-24; Raish Decl. Ex. 41 at 28:14-29:14.) In many homes, loudspeakers blare out residents' names for, among other things, medications, meals and phone calls. (Raish Decl. Exs. 42 at 70:12-73:15; Raish Decl. Ex. 41 at 24:9-25:15.)

Residents of adult homes have very little privacy or autonomy. (Raish Decl. Ex. 44 at 129:8-130:23; Raish Decl. Ex. 45 at 128:5-129:3, 264:3-265:4; Raish Decl. Ex. 46 at 152:18-24.) Hundreds of people share access to few common areas, and in some homes, access to those areas is restricted to certain times. (Raish Decl. Ex. 47 at 57:3-58:15) In many homes, there are visitor hours as well as restrictions on where

visitors may be received in the homes. (Raish Decl. Ex. 40.) The residents live in bedrooms shared with other people with mental illness. Additionally, adult home staff frequently enter the residents' rooms with little or no advance notice. (Raish Decl. Ex. 45 at 237:16-239:5; Raish Decl. Ex. 46 at 166:9-20.)

In a recent announcement posted on its website, OMH described adult homes as "institutional" and likened them to nursing homes and state hospitals. *See* Raish Decl. Ex. 33 ("As a consequence of poor access to community housing, inadequate levels of mental health housing, and clinical programs that do not support people in getting/keeping housing successfully . . . many people with a mental illness are 'stuck' in . . . institutional settings (nursing homes, adult homes, state psychiatric centers).")

Defendants' own expert, Dr. Jeffrey Geller, agrees that adult homes at issue in this case have institutional characteristics; that they foster learned helplessness; and that residents of adult homes are not afforded the opportunity to develop the skills to help them live independently. (Raish Decl. Ex. 48 at 75:3-6, 157:6-166:5.)

4. Supported Housing

In stark contrast to adult homes, the New York State Office of Mental Health funds, oversees and operates supported housing programs, which afford people with mental illness the opportunity to live in their own apartments that are integrated in the community and supported with the services that are tailored to the individual's needs. (Raish Decl. Ex. 1 at 216:6-18; Raish Decl. Ex. 4 at 10:21-11:7, 230:10-17; Raish Decl. Ex. 49.) The individuals these programs serve have severe and persistent mental illness. (Raish Decl. Ex. 50 at 4.) In New York, supported housing is increasingly viewed as a residential option that "when coupled with non-residential services such as Intensive or

Supportive Case Management, Assertive Community Treatment, etc., can meet the needs of persons who have high service needs." (Raish Decl. Ex. 51 at 1-2.)

Supported housing programs are run by not-for-profit organizations and are subsidized by the Office of Mental Health. (Raish Decl. Ex. 49 at 10.) Participants in the program typically receive Supplemental Security Income and pay 30% of that income in rent. (*Id.*; Raish Decl. Ex. 51 at 18.)

Case managers provide support to the residents on an as-needed basis, but residents have access to staff who are on call at all times in order to assist with any issues or emergencies. (Raish Decl. Ex. 1 at 216:6-21; Raish Decl. Ex. 52 at 94:5-96:24.) In general, housing providers visit residents about four times per month, but some providers, such as Pathways to Housing, will visit residents more frequently. (Raish Decl. Ex. 52 at 97:22-98:2; Raish Decl. Ex. 53 at 94:2-13.)

The level of assistance and support provided to residents varies according to their needs, but staff ensure that residents are assimilating to their new surroundings and learning how to live independently; they may assist residents by helping them organize their mail, grocery shop and cook, set up a bank account, budget their income, or learn how to use nearby laundry facilities. (*See* Raish Decl. Ex. 52 at 96:1-21; Raish Decl. Ex. 54 at 187:2-21, 191:4-20, 192:3-195:19; Raish Decl. Ex. 55 at 288:13-19; Raish Decl. Ex. 53 at 104:7-105:22.)

In some programs, the supported housing provider may become actively involved in assisting residents with the management of their finances, for instance by allowing residents to deposit their money with the organization; writing checks, as directed by the residents, in order to pay their bills; and providing small portions of

spending money. (Raish Decl. Ex. 54 at 190:4-193:2; Raish Decl. Ex. 53 at 98:5-99:16.) If needed, supported housing providers also assist residents with medication management and the utilization of community mental health services. (Raish Decl. Ex. 55 at 289:19-290:6); Raish Decl. Ex. 53 at 170:16-172:25.) Providers also offer vocational assistance so that residents can acquire work in the community and generate additional income. (Raish Decl. Ex. 53 at 52:7-53:25; Raish Decl. Ex. 55 at 326:3-327:16.)

Defendants' *own* expert testified that residents of adult homes could reside in apartments with varying degrees of support. (Raish Decl. Ex. 48 at 79:16-22.)

5. Adult Care Facilities Work Group

In 2002, after articles were published in *The New York Times* about shocking neglect and abuse in adult homes, Governor Pataki and the Commissioners of Health and Mental Health began an initiative to review the Adult Care Facilities' policies and programs by appointing the Adult Care Facilities Workgroup (the "Workgroup"). (Raish Decl. Ex. 57 at ii.) Members of the Workgroup estimated that thousands of people with mental illness living in adult homes could benefit from smaller, more private supported housing and other community-based housing programs with appropriate supports. (Raish Decl. Ex. 37 at 114:7-117:15.)

The Workgroup issued a report in the fall of 2002 in which it recommended, among other things, that the State conduct assessments of adult home residents and develop housing for people who are able and interested in living elsewhere. (Raish Decl. Ex. 37 at 11:20-12:1; Raish Decl. Ex. 57 at iii-vi.) It also proposed a timetable for moving at least 6,000 residents with psychiatric disabilities from adult homes into community settings by 2009. (Raish Decl. Ex. 57 at 32.) That

recommendation and timetable was never implemented. (Raish Decl. Ex. 37 at 179:15-183:6.)

B. The Undisputed Facts Establish That There is No *Olmstead* Plan for People with Mental Illness Living In Adult Homes

The undisputed facts establish that the State has no *Olmstead* plan for people with mental illness who reside in adult homes.

In early 2003, DOH entered into a $1 million contract with New York Presbyterian Hospital ("NYPH") to conduct assessments of adult home residents. (Raish Decl. Ex. 6 at 20:19-21:24, 123:25-124:3.) The data collected in connection with the assessments of 2611 residents showed that a large percentage of people with mental illness in the adult homes could live in more integrated settings and that a large percentage of people would choose to do so. (*Id.* at 72:22-73:2, 94:23-95:6, 103:13-22, 111:8-25; Raish Decl. Ex. 58; Raish Decl. Ex. 9 at 100:21-33 (reporting the percentage of residents wanting their own apartment as 44%).)

While one of the tasks NYPH agreed to undertake for the State under the terms of the contract was to develop an additional assessment tool to use in relocating adult home residents to different housing programs, that tool was never developed. (Raish Decl. Ex. 6 at 38:21-39:21; Raish Decl. Ex. 59; Raish Decl. Ex. 9 at 106:16-107:9.) The plan to use NYPH's work to move residents to settings more appropriate to their needs was never implemented. (Raish Decl. Ex. 3 at 95:3-17.) The State also instructed the director of the project not to conduct further research or publish anything relating to the assessments because of this litigation. (Raish Decl. Ex. 6 at 54:8-16.)

The fact that the State has no *Olmstead* plan for people with mental illness who live in adult homes is confirmed by the testimony of the eight individuals listed below, who were designated, pursuant to Fed. R. Civ. P. 30(b)(6), to testify on behalf of defendants regarding various aspects of the State's purported *Olmstead* plan for adult home residents.

1. Deputy Commissioner and Medicaid Director at DOH. Defendants designated the testimony of Kathryn Kuhmerker, the Deputy Commissioner and Medicaid Director at DOH, concerning the activities of the Most Integrated Settings Coordination Council ("MISCC"), as Fed. R. Civ. P. 30(b)(6) testimony.[2] Ms. Kuhmerker was the DOH Commissioner's designated representative on MISCC. (Raish Decl. Ex. 14 at 11:23-12:10.) As Ms. Kuhmerker testified, MISCC has not developed a comprehensive plan for providing services to adult home residents with mental illness in the most integrated setting. (*Id.* at 29:7-30:3.) MISCC has not done anything to address individuals who reside in adult homes. (*Id.* at 31:4-7.) MISCC excluded adult home residents from its data collection and planning efforts. (*Id.* at 29:24-31:7.)

2. Deputy Commissioner for Planning at OMH. Defendants designated Keith Simons, the Deputy Commissioner for Planning at OMH, to provide testimony, pursuant to Fed. R. Civ. P. 30(b)(6), on the subject of OMH's strategic

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[2] The stated purpose of the MISCC is "to develop and implement a New York State plan to reasonably accommodate the desire of people of all ages with disabilities to avoid institutionalization and be appropriately placed in the most integrated setting possible." (Raish Decl. Ex. 13; *see also* Raish Decl. Ex. 11 at No. 10.)

planning process.[3] (Raish Decl. Ex. 15.) As Mr. Simons testified, OMH has not specifically considered, as part of its planning process, alternative housing needs for people with mental illness who reside in adult homes. (Raish Decl. Ex. 12 at 152:7-153:20.) No formal mechanism exists for the incorporation of the efforts of the Adult Home Workgroup into OMH's strategic planning process. (*Id.* at 162:2-15.)

3. Director of the Office of Health Systems Management at DOH. Defendants designated testimony of Lisa Wickens, Director of the Office of Health Systems Management at DOH, concerning New York Adult Homes Assessments as Fed. R. Civ. P. 30(b)(6) testimony. (Raish Decl. Ex. 22.) Ms. Wickens testified that she is unaware of whether anyone at DOH has participated in developing an *Olmstead* plan. (Raish Decl. Ex. 3 at 18:14-18.) She further testified that there is no process for assessing adult home residents' desire and ability to live in more integrated settings, as there is for nursing home residents. (*Id.* at 15:20-18:13.) While DOH collects comprehensive data on nursing home residents and their impairments, need and progress, no such data is collected on adult home residents. (Raish Decl. Ex. 3 at 20:2-24:7.)

4. Senior Deputy Commissioner for Adult Services at OMH. Defendants designated Robert Myers, Senior Deputy Commissioner for Adult Services at OMH, to provide testimony, pursuant to Fed. R. Civ. P. 30(b)(6), concerning defendants' *Olmstead* planning regarding community based services. (Raish Decl. Ex. 20.) Mr. Myers testified that it is not necessary to track how many individuals move from adult

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[3] Pursuant to state law, OMH issues each year a Statewide Comprehensive Plan (the "5.07 Plan") for the provision of state and local services for the mentally ill over a five-year period. (Raish Decl. Ex. 17.)

homes to supported housing because "adult homes are housing in the community, like other sources of housing." (Raish Decl. Ex. 21 at 20:19-21:10.) While there is an "expectation [that] the system of care would work with" the adult home resident who desires to move to alternative housing, the State does not do any analysis confirming that such expectation is being met. (Raish Decl. Ex. 21 at 22:1-24:5.)

Earlier in the litigation, Mr. Myers had been described by defendants as "having knowledge about *Olmstead* planning." (Raish Decl. Ex. 18 at No. 11.) When asked whether OMH has an *Olmstead* plan, Mr. Myers testified that "[i]n terms of a specific plan[,] I'm not aware of one." (Raish Decl. Ex. 19 at 39:12-40:2.) When asked whether he knows why he was identified in interrogatories as one of the most knowledgeable people about *Olmstead* planning at OMH, Myers responded, "no." (*Id.* at 41:20-42:4.)

5. Director of OMH's Hudson River Field Office and Special Assistant for Adult Homes. Defendants designated the testimony of Joseph Reilly, the Director of OMH's Hudson River Field Office and Special Assistant for Adult Homes, concerning the assessments in the Adult Home Assessment Project, as testimony on defendants' behalf under Fed. R. Civ. P. 30(b)(6). As Mr. Reilly testified, OMH did not do anything with respect to residents who had expressed dissatisfaction with their housing in the assessments. (Raish Decl. Ex. 4 at 283:4-284:6.) The assessment forms used in the Adult Homes Assessment Project were provided to certain case managers for adult home residents. (*Id.* at 280:22-281-7.) OMH expected that case managers would work with such individuals but has "no way of knowing whether that happened or not." (*Id.* at 282:18-284:6.) OMH has not tried to assemble information about how many

residents are qualified for other forms of housing. (*Id.* at 179:14-180:2.) OMH has not done anything to determine what portion of the population of adult home residents would be more appropriately served in another housing program. (*Id.* at 174:15-22.)

6. **Director for the Bureau of Adult Care Facilities, Quality Assurance and Surveillance at DOH**. Defendants designated testimony of Mary Hart, Director for the Bureau of Adult Care Facilities, Quality Assurance and Surveillance at DOH, concerning licensure and oversight of adult homes, as those subjects related to defendant's *Olmstead* plan for adult home residents, as Fed. R. Civ. P. 30(b)(6) testimony. (Raish Decl. Ex. 22.) Ms. Hart testified that she is unaware of any studies or analysis on discharge patterns from adult homes. (Raish Decl. Ex. 24 at 215:12-216:6.) When asked to explain how a resident would go about moving out of an adult home, Ms. Hart responded that the "expectation would be" that the resident's case manager would provide assistance. (Raish Decl. Ex. 24 at 216:11-25.) She further testified that she did not know how frequently this actually occurs, and has "no idea" whether case managers follow up with residents who expressed an interest in moving, or how many adult home residents move from an adult home on an annual basis through this process. (Raish Decl. Ex. 24 at 217:12-24.)

7. **Supervisor in Bureau of Narcotics Enforcement at DOH**. Defendants retroactively designated testimony of Catherine Lennon, a supervisor in the Bureau of Narcotics Enforcement at DOH, concerning licensure and oversight of adult homes, as those subjects as Fed. R. Civ. P. 30(b)(6) testimony. (Raish Decl. Ex. 22.) When asked whether DOH would assist an adult home resident who has expressed an interest in living elsewhere to secure another type of housing, Ms. Lennon responded that

"[w]e don't generally do placements. That's not our function." (Raish Decl. Ex. 23 at 199:8-9.)

8. Executive Director for the Capitol District Psychiatric Center at OMH. Defendants designated Lewis Campbell, Executive Director for the Capitol District Psychiatric Center at OMH, to provide testimony, pursuant to Fed. R. Civ. P. 30(b)(6), on the subject of discharge planning from the State's psychiatric facilities. (Raish Decl. Ex. 26 at 64:8-65:18, 139:4-10.) As Mr. Campbell testified, psychiatric centers are obligated by regulation to facilitate the discharge of patients to one of five "community-based settings," which he described as community residences, nursing homes, adult homes, their own homes, and family homes. (Raish Decl. Ex. 26 at 16:9-20:8 (citing to Raish Decl. Ex. 27.) Mr. Campbell testified that adult homes are "pretty much equal" to one's own home or family home with respect to being the "least restrictive setting" available for an individual with mental illness. (Raish Decl. Ex. 26 at 20:4-21:17.) There is no mechanism by which OMH, or a particular psychiatric facility, is made aware in the event a patient is discharged to a setting, such as an adult home, that is inappropriate for his or her needs. (*Id.* at 116:3-132:23.)

The defendants also identified David Wollner, the Director of Office of Health Systems Management at DOH, as knowledgeable about "[t]he 2002 Adult Care Facilities Workgroup" and "[t]he Governor's initiatives relating to adult homes." (Raish Decl. Ex. 28 at 8.) When asked to define "New York's *Olmstead* plan for residents of adult homes in New York City with mental illness," he responded, "[a]s far as I know, we do not have a specific Olmstead plan." (Raish Decl. Ex. 29 at 154:2-3.)

Defendants also described Michael Newman, Director of the Housing Services Unit in the Division of Adult Services at OMH as someone who is knowledgeable about OMH housing and residential programs for people with mental illness. (Raish Decl. Ex. 28 at 7).) Mr. Newman stated that he is unaware of any comprehensive OMH plan to develop community housing. (Raish Decl. Ex. 30 at 180:19-181:17.) Mr. Newman further testified that he is unaware of any assessment procedures to identify adult home residents who could benefit from services in a more integrated setting. (*Id.* at 176:7-180:11.) He is also unaware of any effort by OMH to conduct a review of funding sources available to increase the availability of community-based services or to create and manage a waiting list for such services that moves at a reasonable pace. (*Id.* at 178:1-179:21.)

Consistent with the foregoing testimony, the defendants admit that:

- they do not perform any type of ongoing assessments of adult home residents to determine whether they are appropriate for placement in more integrated settings;
- they maintain no waiting lists for residents of adult homes seeking to move to more integrated settings;
- the MISCC is not developing a plan to move residents of adult homes; and
- they have not used the data gathered in the New York Adult Home Assessments to place adult home residents in more integrated settings.

(Raish Decl. Ex. 11 at Nos. 14, 8, 10, 15, 21, respectively.)

The undisputed facts also show that virtually no one in recent years has moved from adult homes to the State's more integrated housing programs. There are approximately 4000 adult home residents with mental illness residing in New York City. (Raish Decl. Ex. 31.) During the period from 2001 to 2005, at total of 19 adult home residents moved from adult homes to supported housing in New York City. (Raish Decl. Ex. 32.)

Argument

Summary judgment is appropriate where, as here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is 'no genuine issue for trial.'" *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When the moving party has "carried its burden under Rule 56(c) . . . the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Id.* at 586-87 (citation omitted) (emphasis in original) (quoting Fed. R. Civ. P. 56(e)). Partial summary judgment striking an affirmative defense is appropriate where there is no issue of fact as to that defense. *See, e.g., Ocean Walk, Ltd., et. al.* v. *Those Certain Underwriters at Lloyd's of London*, 2006 U.S. Dist. LEXIS 66939 (E.D.N.Y. Sept. 19, 2006); *Northwestern Mut. Life. Ins. Co.* v. *Fogel*, 78 F. Supp. 2d 70 (E.D.N.Y. 1999).

Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131, 12132, prohibits discrimination against individuals with disabilities, including those with mental illness. Similarly, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides that no person with a disability, including those with mental illness, shall: "solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

Federal financial assistance."[4] The regulations promulgated under Title II of the ADA by the Department of Justice require that "a public entity shall administer services, programs, and activities *in the most integrated setting appropriate to the needs* of qualified individuals with disabilities." *See* 28 C.F.R. § 35.130(d) (1998) (emphasis added). Further, public entities must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). This obligation holds "unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.*

In *Olmstead, et al.* v. *L.C., et al.*, 527 U.S. 581 (1999), the Supreme Court held that the ADA's integration mandate requires states to place individuals with mental disabilities in the most integrated setting appropriate to their needs, unless the individuals are opposed to such placement. *Id.* at 607. This integration requirement may be excused only where it would result in a "fundamental alteration" of the state's mental health system. *Id.* at 603. This affirmative defense, commonly referred to as the "fundamental alteration defense," is not available, however, to states that do not have an "*Olmstead* Plan," that is, a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings." *Frederick L.* v. *Dep't of Pub. Welfare of Pa.*, 422 F.3d 151, 157 (3d Cir. 2005) (quoting *Olmstead*, 527 U.S. at 605-606).

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[4] Aside from "subtle differences" between Section II of the ADA and Section 504 of the Rehabilitation Act, "the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under Section 504 of federally assisted programs and activities." *Henrietta D., et al.* v. *Bloomberg, et al.*, 331 F.3d 261, 272 (2d Cir. 2003) (citation omitted). Courts thus "treat claims under the two statutes identically." *Id.*

Because the undisputed facts establish that defendants lack an *Olmstead* plan for people with mental illness who reside in adult homes, DAI is entitled to summary judgment striking defendants' affirmative defense of fundamental alteration.

I.

AN *OLMSTEAD* PLAN IS A NECESSARY COMPONENT OF A FUNDAMENTAL ALTERATION DEFENSE

The Supreme Court held in its landmark *Olmstead* decision that unnecessarily institutionalizing individuals with disabilities is a form of disability-based discrimination barred by the ADA. 527 U.S. at 597-602. *Olmstead* requires states to ensure that individuals with disabilities receive services in the most integrated setting appropriate to their needs unless doing so would fundamentally alter their services, programs and activities. *Id.* at 603. A state may establish a fundamental alteration defense by demonstrating that it has "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moves at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." *Id.* at 605-06.

The Third Circuit has held that states lacking such a plan may not avail themselves of the fundamental alteration defense. As that Court explained, any alternative interpretation of *Olmstead* would swallow the ADA's anti-discrimination mandate whole. *Pa. Protection & Advocacy, Inc.* v. *Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 381 (3d Cir. 2005). Indeed, a state cannot demonstrate that providing plaintiffs with services in a more integrated setting would fundamentally alter its service system without having engaged in a planning process to identify how many individuals could live in

more integrated settings and would choose to do so, and how much it would cost to move those individuals to more integrated settings. *Id.*

A. *Olmstead* Requires States to Serve Individuals with Disabilities in the Most Integrated Setting Appropriate to their Needs Unless Doing so Would be a Fundamental Alteration of Their Services, Programs and Activities

Under *Olmstead*, states must take steps to move people with mental illness to more integrated settings. In that case, two mentally disabled women, one with a diagnosis of schizophrenia and the other with a diagnosis of personality disorder, receiving treatment in the psychiatric unit of Georgia Regional Hospital, brought suit against Georgia state officials challenging their placement in a segregated environment under Title II of the ADA and 42 U.S.C. § 1983. *Id.* at 593. Although their treating psychiatrists determined that their needs could be appropriately met in a State-supported community-based program, both individuals remained institutionalized. *Id.* In 1995, the women filed suit charging state officials with violation of Title II of the Americans with Disabilities Act. *Id.* at 594.

The district court granted partial summary judgment to the plaintiffs, holding that the State's failure to place L.C. and E.W. in an appropriate community-based program violated the ADA and could not be justified by a lack of funding. *Id.* The Court of Appeals for the Eleventh Circuit affirmed the district court's holding that unnecessary institutionalization violates the ADA but remanded for a reassessment of the State's cost-based defense. *Id.* at 595. The Supreme Court, in an opinion by Justice Ginsberg and joined by Justices Stevens, O'Connor, Souter, and Breyer, affirmed in part, vacated in part, and remanded to the district court.

The Court affirmed the lower court's determination that unjustified institutionalization constitutes discrimination based on disability. *Id.* at 597. In so holding, the Court noted that the Department of Justice, charged with interpreting and enforcing the ADA, has adopted a regulation requiring that a "public entity shall administer services . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities." *Id.* at 596 (quoting 28 C.F.R § 35.130(d) (1998)).

The Court articulated two bases underlying its decision:

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . . Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

Id. at 600-01 (citations omitted).

The Court held that states are required to provide community-based treatment for persons with mental disabilities when (1) such placement is appropriate; (2) the affected persons do not oppose such treatment; and (3) the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. *Id.* at 607

The third prong of the Court's holding relied on a Department of Justice regulation under Title II of the ADA providing that:

> "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."

28 C.F.R. § 35.130(b)(7) (1998). The Court held that:

> [T]he fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

Olmstead, 527 U.S. at 604.

Noting that the "State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless," *id.* at 603, the Court ruled that a state met its obligations under the ADA's integration mandate if it demonstrated that "it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated," *id.* at 605-06.

B. A State May Not Avail Itself of the Fundamental Alteration Defense Unless it has an *Olmstead* Plan

The Third Circuit has properly interpreted *Olmstead* "to mean that a comprehensive working plan is a necessary component of a successful 'fundamental alteration' defense." *Frederick L.* v. *Dep't of Pub. Welfare*, 422 F.3d 151, 157 (3d Cir. 2005). As the Third Circuit has explained, *Olmstead* does not allow the fundamental alteration defense to "swallow the integration mandate whole." *Pa. Protection & Advocacy, Inc.* v. *Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 381 (3d Cir. 2005). A state may not use the defense as a talisman against the dictates of the ADA by insisting that, with respect to any subset of people with mental illness, providing them services in the most integrated setting would fundamentally alter the way in which it currently administers its programs. Rather, in order to avail itself of the fundamental alteration defense, a state must demonstrate a commitment to "take all reasonable steps" to achieve

"on-going progress toward community placement" for all qualified individuals with mental illness. *Frederick L.* v. *Dep't of Pub. Welfare*, 364 F.3d 487, 500 (3d Cir. 2004).

In *Pennsylvania Protection and Advocacy*, plaintiff PP & A bought suit on behalf of residents of South Mountain Restoration Center ("South Mountain"), a psychiatric transitional facility run by the Department of Public Welfare ("DPW"), claiming that the residents were "systematically denied" participation in programs that would enable them to live productively in their communities or other integrated settings. 402 F.3d at 378. Granting summary judgment to plaintiff on the insufficiency of defendant's fundamental alteration defense, the court held that "[a]dmissions made by DPW during the course of [the] litigation foreclose the genuine contention that it has made a commitment to bring South Mountain into compliance with the ADA and RA." *Id.* at 383. In particular, DPW had admitted that it does not require regional offices to plan for or develop community-based services for South Mountain residents, thus effectively "excluding them from participation in its varied, successful community treatment programs." *Id.* at 385. The court reasoned:

> [T]he fundamental alteration defense cannot be read to exempt *in toto* noncomplying agencies. A state cannot meet an allegation of noncompliance simply by replying that compliance would be too costly or would otherwise fundamentally alter its noncomplying programs. *Any* program that runs afoul of the integration mandate would be fundamentally altered if brought into compliance. Read this broadly, the fundamental alteration defense would swallow the integration mandate whole. . . . Instead, the only sensible reading of the integration mandate consistent with the Court's *Olmstead* opinion allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA and RA. . . . It would make no sense to exempt a state from liability under the ADA and RA in a particular case on the basis of its need to fulfill its larger obligation to the mentally disabled as a whole while at the same time relieving the state of its larger obligation. Any interpretation of the

> fundamental alteration defense that would shield a state from liability in a particular case without requiring a commitment generally to comply with the integration mandate would lead to this bizarre result.

Id. at 381 (emphasis in original). Defendants have demonstrated no such commitment. On the contrary, they present this Court with the defense that they need not include adult home residents in an *Olmstead* plan because they are already "in the community."

II.

NEW YORK STATE HAS NO *OLMSTEAD* PLAN FOR PEOPLE WITH MENTAL ILLNESS WHO RESIDE IN ADULT HOMES

The undisputed facts establish that the State has no *Olmstead* plan for people with mental illness in adult homes. The testimony of numerous state officials establishes that there is no such plan. When DAI requested that the State admit that fact, it resisted doing so, in the course of a lengthy discovery dispute, by maintaining simultaneously (1) that there is no need for an *Olmstead* plan for people in adult homes because adult homes are in the community, and (2) that the State does indeed have an *Olmstead* plan for adult home residents. It was only after the State was pressed during discovery to provide a complete description of its *Olmstead* plan for adult home residents, that the State cobbled together a list of activities that it claims constitute its plan. As a matter of law, however, the State's purported plan comes nowhere near to satisfying *Olmstead* and its progeny.

A. The State Has No *Olmstead* Plan for Adult Home Residents

The testimony of numerous State employees as well as the facts to which defendants admitted during discovery establish that the State has no comprehensive *or* effectively working plan to enable people with mental illness in adult homes to receive

services in the most integrated settings. State employees testified, one after the other, that they are unaware of an identifiable plan to ensure that adult homes residents are in the most integrated setting appropriate to their needs. (*See, e.g.*, Raish Decl. Ex. 29 at 154:2-3 ("As far as I know, we do not have a specific Olmstead plan."); Raish Decl. Ex. 19 at 39:23-40:2 ("In terms of [a] specific plan[,] I'm not aware of one."); Raish Decl. Ex. 14 at 30:3 ("I'm unaware of such a plan.").)

The State also *admits* that (1) it does not perform any type of ongoing assessments of adult homes residents to determine whether they are appropriate for placement in more integrated settings; (2) it maintains no waiting lists for residents of adult homes seeking to move to more integrated settings; (3) the MISCC is not developing a plan to move residents of adult homes; and (4) it has not used the data gathered in the New York Adult Home Assessments to place adult home residents in more integrated settings. (Raish Decl. Ex. 11 at Nos. 14, 8, 10, 15, 21, respectively.)

Thus, the undisputed facts establish that the State has no *Olmstead* plan for people with mental illness living in adult homes.

B. The "Plan" Offered by Defendants Is Insufficient As a Matter of Law

During discovery, DAI requested that the State confirm the testimony of its witnesses that it has no *Olmstead* plan for people with mental illness in adult homes. Instead of responding to the question directly, the State repeatedly responded by (1) denying that there is a need for an *Olmstead* plan for people in adult homes because adult homes are in the community, and (2) asserting that the State does indeed have an *Olmstead* plan for adult home residents. Accordingly, DAI requested that the State describe the components of its alleged plan.

For months defendants refused to identify the complete components of its so-called plan. All the while, the State both maintained that a plan is not required and asserted that various amorphous activities, "among other things," constituted a plan.[5]

It was only after the State was directed by the Court to identify all of the components of its *Olmstead* plan that the State finally provided DAI with a full list of the purported elements of its plan and designated several witnesses to testify about it pursuant to Fed. R. Civ. P. 30(b)(6). But this "plan" comes nowhere near to satisfying the elements of an *Olmstead* plan.

Defendants' purported *Olmstead* plan, as it pertains to adult home residents, is patently deficient. A plan must communicate a commitment to integration "for which [the state] can be held accountable by the courts." *Frederick L.*, 364 F.3d at 500. "General assurances" and expressions of "good faith intentions" are not enough. *Frederick L.* v. *Dep't of Pub. Welfare*, 422 F.3d 151, 158 (3d Cir. 2005) ["*Frederick L. II*"]. Instead, an *Olmstead* plan must set forth "reasonably specific and measurable targets for community placement." *Id.* It must, "at a bare minimum," specify four things: (1) the time-frame or target date for placement in a more integrated setting; (2) the approximate number of patients to be placed each time period; (3) the eligibility for placement; and (4) a general description of the collaboration required between the local

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[5] *See, e.g.*, Raish Decl. Ex. 60 ("[D]efendants' response to request 6 clearly states defendants' position that no 'Olmstead' plan is required for adult home residents . . . ."); Raish Decl. Ex. 61 ("Moreover, defendants state that there is no need for an *Olmstead* plan for adult home residents because adult homes are in the community . . . ."); Raish Decl. Ex. 28 at 2-3 ("Defendants object to the interrogatory on the ground that there is no need for an Olmstead plan for adult home residents because adult homes are in the community and adult home residents receive services in an integrated setting . . . .").)

authorities and the housing, transportation, care, and education agencies to effectuate integration into the community." *Id.* at 160.

Defendants identified a variety of processes or documents that, they claimed, together constituted an Olmstead plan. (Raish Decl. Ex. 22.) However, defendants never articulated the plan itself or identified "reasonably specific and measurable targets for community placement" of adult home residents. *Frederick L.*, 422 F.3d at 158.

Ultimately, at the direction of the Court, defendants produced "a final and complete list of the components of defendants' *Olmstead* plan or system as it relates to adult home residents." (Raish Decl. Ex. 22.) They purport to be:

1. Downsizing and/or closure of State Psychiatric Centers and the reinvestment of funds related thereto.

2. Development and implementation of discharge planning standards for State Psychiatric Centers.

3. Development and oversight of discharge planning standards and discharge activities at psychiatric hospitals and inpatient psychiatric units licensed by OMH.

4. Development of OMH licensed and/or funded housing and residential programs.

5. Actions to ensure that community-based mental health treatment and services, case management, ACT teams, clubhouses, clinic treatment programs, continuing day treatment programs, intensive psychiatric rehabilitation treatment programs, AOT programs, and supported employment programs are available.

6. Certification or licensure of and/or oversight of the community-based services and programs listed in #5 above.

7. Steps taken to engage in and support research into mental illness and treatments and medications for mental illness.

8. Development of and enforcement of standards governing adult homes, and the rights of adult home residents, and the services which adult homes are required to provide to adult home residents.

9. The licensure and oversight of adult homes.

10. The Do Not Refer List.

11. The assessments conducted under contract with NY Presbyterian Hospital.

12. The case management and peer support programs funded by OMH.

13. The EnAble program funded by DOH.

14. The addition of adult home residents as target populations in requests for proposals for the development of housing programs issued by OMH.

15. The process of developing OMH's Statewide Comprehensive Plans for Mental Health Services under MHL § 5.07.

16. The activities of the Most Integrated Settings Coordinating Council and the Coalition to Promote Community Based Care.

A review of this material, along with the testimony of the eight witnesses defendants designated under Fed. R. Civ. P. 30(b)(6) to testify on their behalf about these various items,[6] compels the conclusion that the 16 components defendants proffer are not "a comprehensive, effectively working plan for placing [adult home residents] with mental disabilities in less restrictive settings." *Olmstead*, 527 U.S. at 604-06.

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[6] *See* (Raish Decl. Exs. 3, 4, 12, 14, 21, 23, 24, 26.) Not one of these eight witnesses, who testified for defendants pursuant to Federal Rule of Civil Procedure 30(b)(6), was able to describe how defendants' *Olmstead* "plan" assists adult home residents with mental illness to transition into a more integrated setting. Indeed, no one was even aware of such a plan.

Remarkably, defendants claim that part of their *Olmstead* plan is the activities of the Most Integrated Settings Coordinating Council (MISCC). However, defendants have *admitted* that the MISCC *specifically excluded* adult home residents in developing its recommendations for bringing New York into compliance with the *Olmstead* decision. (Raish Decl. Ex. 11 at No. 10 ("Defendants admit that the MISCC is not developing a plan to move residents of adult homes, and deny that there is an obligation to do so.").)

Kathryn Kuhmerker, the Director of the Office of Medicaid Management for DOH and the Commissioner's designated representative to the MISCC, testified that the MISCC did not develop a plan to ensure that services are provided to adult home residents in the most integrated setting appropriate. (Raish Decl. Ex. 14 at 29:24-31:7.) When asked what MISCC has done "regarding adult home residents," she responded that the MISCC is not "charged with specifically looking at specific individuals who reside in specific settings." (*Id.* at 30:18-23; *see also id.* at 53:24-54:2 ("I think the MISCC has not . . . specifically looked, nor do I believe it's charged to look specifically at adult home residents.").) Yet Ms. Kuhmerker's subsequent testimony revealed that the MISCC did, in fact, collect data on *other* specific settings, including nursing homes and state hospitals, and decided not to collect such data on adult homes. (*Id.* at 61:8-62:6.)

Equally disingenuous is defendants' inclusion of the Adult Home Assessment Project on their list of *Olmstead* plan components. The assessments, which indicated that many adult home residents wanted to and were capable of moving, were completed several years ago. Yet as of today, the state has failed to make any use of this data to place adult home residents in more integrated settings and directed the New York

Presbyterian Hospital not to further analyze the data. Indeed, the defendants *admit* that they have not used the data gathered in the Adult Home Assessment Project to move adult home residents to more integrated settings. (*See supra* p. 28; *see also* Raish Decl. Ex. 3 at 95:7-96:2 (testifying that defendants have not incorporated the data gathered by the study "into efforts to do Olmstead planning"); Raish Decl. Ex. 11 at No. 15.)

The first three elements listed, by their very terms, bear no relation to enabling adult home residents to move to more integrated settings, addressing instead the needs of state psychiatric center patients. Another three listed components pertain to adult home oversight—the "Development of and enforcement of standards governing adult homes," the "licensure and oversight of adult homes," and "The Do Not Refer List"—and have little if any relation to furthering the placement of residents in more integrated settings.[7]

The remaining components defendants identify as part of their *Olmstead* plan are relevant, but do not amount to a plan. Defendants refer, for example, to the development of new housing and the addition of adult home residents as a "target population" to RFPs for such new housing. (Raish Decl. Ex. 22.) Yet they provide no evidence detailing how much new housing will be developed over the next year, two years, or 10 years, what portion of the budget will be devoted to the effort, or how they

[7] The "do not refer" list is a list of facilities to which individuals should not be referred because such facilities have been cited for "systemic endangerment," or their operating certificated has been revoked, limited or denied. (Raish Decl. Ex. 24 at 182: 17-183: 21.)

will ensure access to the housing by adult home residents or track the numbers of adult home residents seeking, and ultimately obtaining, supported housing.[8]

Defendants also refer to "[a]ctions to ensure that community-based mental health treatment and services" and other programs "are available." (Raish Decl. Ex. 22.) They do not define what these actions are, how they will further the integration of adult home residents, or how the defendants will determine if they are effective in promoting integration of adult home residents. Such vague assurances are not an effective plan, and to date such efforts have certainly not produced significant movement of adult home residents to supported housing.

Another aspect of defendants' purported *Olmstead* plan is "the process of developing OMH's Statewide Comprehensive Plans for Mental Health Services under MHL § 5.07." (*Id.*) However, it is undisputed that these documents are not part of a comprehensive plan to place qualified adult home residents with mental disabilities into more integrated settings. Keith Simons, a Deputy Commissioner of at OMH, was designated by defendants to testify concerning OMH's 5.07 Plans and the process that produced them. (*Id.*) As he made clear, to the extent that these plans address adult home residents, they operate under the assumption that "[a]dult homes are residences in the

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[8] Even for those few supported housing beds for which adult home residents are a "priority population," there is no assurance that any of the adult home residents will ever receive a placement. (*See* Raish Decl. Ex. 4 at 171:16-173:3). Adult home residents are not guaranteed an absolute number or percentage of such beds. (*Id.*) This is in part because OMH authorizes New York City mental health officials to set their own priorities, which may exclude adult home residents. (Raish Decl. Ex. 52 at 161:4-20, 174:9-175:8; Raish Decl. Ex. 4 at 172:10-173:3, 261:9-22; Raish Decl. Ex. 37 at 90:1-91:14.) The numbers prove the point. OMH reported that, during 2001 to 2005, only 19 residents moved from adult homes to supported housing in all of New York City. (Raish Decl. Ex. 32.)

community." (*See* Raish Decl. Ex. 62 at 69; Raish Decl. Ex. 56 at 69.) Although OMH's current "5.07 Plan" references development of a "comprehensive service package to support adult home residents, improve service access for residents with mental illness, and help them meet their recovery goals" (Raish Decl. Ex. 63 at 70) the plan envisions little, if any, focus on assisting adult homes residents to move to more integrated settings.[9]

Moreover, OMH's "5.07 Plan" is merely "strategic" in nature, "not tactical or operational." (Raish Decl. Ex. 12 at 40:18-41:18.) For example, OMH might "make a strategic decision that investment in housing is necessary and appropriate," but the plan does not address such issues as how to distribute that housing across regions of the state, how the housing will be procured, and whether to identify particular populations as a priority. (*Id.* at 43:13-44:5.) In other words, the plan contains no concrete, "measurable goals for community integration for which [defendants] may be held accountable."[10] *Frederick L. III*, 422 F.3d at 156.

Defendants' fundamental position is that no plan is required of them. Consistent with that, to the extent they actually have a plan for housing adult home residents, it is essentially to let them stay where they are.

The inadequacy of defendants' *Olmstead* plan is placed in stark relief when measured against the standard set forth in *Frederick L. II.* The plaintiffs in *Frederick L.* were individuals with a mental illness institutionalized at a state hospital.

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[9] The sole reference to "housing" with respect to adult home residents in any of the three plans defendants produced speaks of efforts to assist residents in homes that are going out of business. (*See* Raish Decl. Ex. 56 Appendix 7 at A64.)

[10] Mr. Simons testified that it is not a "major function" of the plan to evaluate whether previous years' goals have been achieved. (Raish Decl. Ex. 12 at 12:19-13:3.)

They brought a class action against Pennsylvania's Department of Public Welfare ("DPW") and the Secretary of Public Welfare, claiming that DPW failed to provide services to them in the most integrated setting appropriate to their needs and had developed no plan to assure that this would be done in the future. *Frederick L. I*, 364 F.3d at 489-90. The district court found in favor of defendants, holding that plaintiffs' requested relief would have required a fundamental alteration of the commonwealth's programming and budgetary allocations. *Id.* at 491. The Third Circuit reversed, finding that the district court had given undue weight to the State's past progress in deinstitutionalization as a predictor of its commitment to future efforts. *Id.* at 499-500.

On remand, the district court once again ruled in defendants' favor, finding that they had "submitted detailed accounts and evidence regarding the complex and comprehensive statewide planning process." *Frederick L.* v. *Dep't of Pub. Welfare*, 2004 WL 1945565, at *7 (E.D. Pa. Sept. 1, 2004). The court devoted several pages of its opinion to describing this process: A statewide "Integration Plan" set forth general goals and provided "broad parameters for future actions in the provision of mental health services in the Commonwealth." *Id.* at *2 (internal quotation marks and citation omitted). One of these goals was to "[m]aintain a commitment to re-orienting the focus of the mental health system away from reliance on large institutions to community care, including utilizing up to 250 Community/Hospital Integration Projects Program beds per year as a vehicle for decreasing use of state hospitals." *Id.* The Office of Mental Health and Substance Abuse Services ("OMHSAS"), an agency within DPW, created nine "Service Area Planning" groups ("SAPs"), requiring each to submit a formal five-year plan to implement DPW's goals, and committing to "use the plans submitted by each

county/region to develop its annual budget request to the department." *Id.* at *3. The court also noted that defendants "provided data outlining deinstitutionalization trends and demonstrating declines in hospital admissions and length of stay," a result accomplished "through creative funding solutions." *Id.* Finally, the court found it significant that "DPW officials have emphasized OMHSAS's commitment to continue this progress." *Id.* at *4.

On appeal, the Third Circuit once again vacated the district court's opinion, criticizing DPW's post-remand submission for its "failure to set forth reasonably specific and measurable targets for community placement" for which "DPW may be held accountable." *Frederick L.*, 422 F.3d at 156, 158. Instead of concrete target bed closures, DPW's initial Integration Plan contained the "amorphous, *i.e.*, non-specific" goal of closing "up to 250" institutional beds per year. *Id.* at 158. While promising that there would be "no reversal" of its commitment to deinstitutionalization, DPW "failed to demonstrate in reasonably measurable terms how it will comply with this commitment." *Id.* The court explained:

> DPW remains silent as to when, if ever, eligible patients . . . can expect to be discharged. Instead, DPW proffers general assurances and good-faith intentions to effectuate deinstitutionalization. General assurances and good-faith intentions neither meet the federal laws nor a patient's expectations. Their implementation may change with each administration or Secretary of Welfare, regardless of how genuine; they are simply insufficient guarantors in light of the hardship daily inflicted upon patients through unnecessary and indefinite institutionalization." *Id.* at 158.

Having determined that DPW's failure to articulate a comprehensive plan precluded its assertion of a fundamental alteration defense, the court remanded to the district court to craft the appropriate relief. Acknowledging its responsibility to provide

some guidance, the Third Circuit stated that a viable plan should, "at a bare minimum," specify four things: (1) the time-frame or target date for placement in a more integrated setting; (2) the approximate number of patients to be placed each time period; (3) the eligibility for placement; and (4) a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community." *Id.* at 160.

In the case at bar, defendants have provided *no* time frame for moving adult home residents with mental illness into community settings; *no* target numbers of individuals to be moved in any particular time period; *no* criteria for assessing residents' eligibility for such a transition; and *no* description of the kind of collaboration necessary to achieve this goal. They contend that they need not have a plan, and they do not.

III.

BECAUSE THE STATE HAS NO OLMSTEAD PLAN, ITS AFFIRMATIVE FUNDAMENTAL ALTERATION DEFENSE MUST BE STRICKEN

As a matter of law, the State's failure to articulate a plan that "adequately demonstrates a reasonably specific and measurable commitment" to integrating adult home residents into the community places the fundamental alteration defense beyond their reach. *Frederick L.*, 422 F.3d at 157.

The State has made *no* commitment to assist adult home residents with mental illness in living and receiving services in the most integrated appropriate setting. In fact, its system does entirely the opposite—it fosters dependence on large impersonal institutions that isolate and stigmatize these individuals. The State's position in this case is consistent with its unfortunate history of simply ignoring the people with mental illness who reside in adult homes.

Conclusion

For the foregoing reasons, DAI respectfully requests entry of partial summary judgment striking the defendants' affirmative defense of fundamental alteration.

Dated: New York, New York
August 10, 2007

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

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