UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

HELEN PITTS, KENNETH ROMAN, DENISE HODGES, and RICKII AINEY, on behalf of themselves and all others similarly situated, **Plaintiffs**	**Civil Action No. 3:10-cv-00635-JJB-SCR**
v.	**Judge James J. Brady**
BRUCE GREENSTEIN, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, and LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS, **Defendants.**	**Magistrate Judge Stephen C. Riedlinger** **CLASS ACTION**

DEFENDANTS' RESPONSE
TO THE STATEMENT OF INTEREST OF THE UNITED STATES

In 1999, the Supreme Court declined to adopt the expansive interpretation of the Americans with Disabilities Act ("ADA") advanced by the Department of Justice ("DOJ") in *Olmstead v. L.C.*, 527 U.S. 581 (1999). While the *Olmstead* Court affirmed that "undue institutionalization" is a form of discrimination, *id.* at 597, the Court expressly disavowed a construction of the ADA that would require States to "provide a certain level of benefits to individuals with disabilities," *id.* at 603 n. 14; acknowledged that individuals may have to wait for a community placement or have to seek institutional services from time to time, *id.* at 605-06; declined to address the validity of the DOJ's "integration regulation," *id.* at 592 ("We recite these regulations with the caveat that we do not here determine their validity."); and rejected as "unacceptable" the "fundamental alteration" test of the court below (which DOJ urged the Court

to affirm), *id.* at 603, because it did not leave States with sufficient "leeway" "to maintain a range of facilities and to administer services with an even hand," *id.* at 605.

Twelve years later, the DOJ's Civil Rights Division has attempted to rewrite the Supreme Court's *Olmstead* decision in its own image, through a series of "Statements of Interest" filed in cases, like this one, where States have attempted to implement changes to their home and community-based services ("HCBS") programs for individuals with disabilities. While some district courts have accepted the position advanced, others (not mentioned by DOJ) have rejected it as not consistent with the statute or the governing case law. *See M.R. v. Dreyfus*, 2011 WL 588511, at *12-15 & n.42 (W.D. Wash. Feb. 9, 2011) (to be published); *Boyd v. Steckel*, 2010 WL 4683997, at *10-12 & n.19 (M.D. Ala. Nov. 12, 2010) (to be published). A careful reading of the *Olmstead* decision confirms that DOJ's interpretation of the statute cannot be sustained. Like the district courts in Washington and Alabama, this Court should decline the DOJ's invitation to read into the ADA requirements that the Supreme Court has already said are not there.

I. There Is No Sound Basis For Holding That An Individual "At Risk Of Institutionalization" Has Been Subjected To Discrimination Under The ADA.

The DOJ contends that the ADA requires States to offer all individuals with disabilities a level of home- and community-based services ("HCBS") adequate to ensure that none faces any risk of institutional placement. (DOJ Br. at 10-17) This argument is inconsistent with Supreme Court precedent and has no foundation in the ADA: Recognition that "unjustified institutional isolation of persons with disabilities" is a form of discrimination does not mean that there is an affirmative obligation to provide services to eliminate any risk of institutional placement, however temporary. Persons at risk of institutionalization, by definition, are living in their homes and communities and are not isolated. DOJ fails to provide a rationale for how

individuals who are *not* isolated have a claim for discrimination simply because there is some degree of "risk" that they may in the future require institution-based services for a limited time.

As previously argued, Supreme Court precedent forecloses the argument that the general discrimination prohibitions in the ADA or the Rehabilitation Act require States to provide a certain level or type of services to individuals with disabilities. (Reply Br. at 12-14 (discussing *Olmstead*, 527 U.S. at 603 & n.14, and *Alexander v. Choate*, 469 U.S. 287, 302-03, 309 (1985))). In fact, DOJ's own rules expressly state that they do not require "a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or *services of a personal nature including assistance in eating, toileting, or dressing*." 28 C.F.R. § 35.135 (2010) (emphasis added). This provision "serves as a limitation on all of the requirements of the regulation," 56 Fed. Reg. 35,694, 35,707 (July 26, 1991), and expressly applies to the rule requiring reasonable service modifications, *id.* (citing § 35.130(b)(7)).

While DOJ purports to agree that the ADA does not require a minimum level of services, it contends that a State discriminates when it fails to provide sufficient HCBS to eliminate the risk that an individual with a disability will require institutional care. (DOJ Br. at 10 n.10) That response completely fails to acknowledge that the DOJ's rule in fact establishes a minimum level of services—the amount needed to avoid institutionalization— a result that is in no way consistent with the governing Supreme Court precedent.

Moreover, the DOJ's proposed standard—that a State has discriminated against any individual who is "at risk of institutionalization"—is as vague as it is sweeping.[1] As the DOJ

[1] The DOJ's standard is also shifting. Just a year ago, the DOJ was telling courts that discrimination required a "*serious* risk of being institutionalized." Brief for the United States as Amicus Curiae (continued…)

recognizes, an individual must be "at risk of nursing facility placement" to receive LT-PCS services in the first place – it is one of the eligibility criteria for the program. (DOJ Br. at 7) The population served by LT-PCS, the ADHC and EDA waivers, and similar programs in other States is comprised of people who are elderly and disabled. Whether or not they receive personal care assistance, everyone in that population is "at risk of institutionalization" to some degree. A short stay in a hospital or rehabilitation in a nursing home is not uncommon, and often unavoidable. HCBS programs can mitigate the "risk" that institutional services will be needed. They can postpone the need for institutional placement. But they cannot eliminate the "risk." Indeed, two of the persistent difficulties of administering an HCBS program for the elderly and individuals with adult-onset disabilities are gauging who is likely to require institutional care and assessing the relative needs of a diverse group of individuals, all of whom are to some extent vulnerable. *See* Pls.' Exh. 1, Deposition of Hugh Eley at 137 (line 4) to 138 (line 13) (ECF No. 38-3, pages 138-139 of 455). That a recipient of LT-PCS is "at risk of institutionalization" does not mean that she has a meritorious ADA claim; it simply means she is like everyone else being served in one of the programs administered by OAAS.

Defendants' Reply Brief explained why most cases cited by the DOJ are off-point or wrong, but the DOJ relies on two district court cases (one unpublished) from the Ninth Circuit that warrant a response here. Specifically, the DOJ asks this Court to follow *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009), *appeal docketed*, No. 10-15635 (9th Cir. Mar. 24, 2010), and *Ball v. Rogers*, No. 00-cv-0067, 2009 WL 1395423 (D. Ariz. Apr. 24, 2009) (ECF No. 394), *appeal docketed*, No. 09-16022 (9th Cir. May 19, 2009). The *Brantley* court held

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Supporting Plaintiffs-Appellees at 13, *Oster v. Wagner*, No. 09-17581 (9th Cir. Mar. 2, 2010) (emphasis added).

that California's decision to provide only three days of ADHC services instead of the previous five, 656 F. Supp. 2d at 1164, was discriminatory because the State did not have "any measures in place to ensure that the transition from ADHC service to alternative [HCBS] services is seemless [sic]," *id.* at 1175. The *Ball* court similarly held that Arizona's "failure to provide adequate services to avoid unnecessary gaps in service and institutionalization was discriminatory." 2009 WL 1395423, at *5.

Neither *Brantley* nor *Ball* is sound authority, if for no other reason than because neither court applied *Olmstead*'s test for unjustified institutionalization. *See Brantley*, 656 F. Supp. 2d at 1169-75; *Ball*, 2009 WL 1395423, at *4. Both relied instead on *Townsend v. Quasim*, 328 F.3d 511, 519 (9th Cir. 2003), for the proposition that an "integration mandate claim" should be analyzed "under the traditional test applicable to ADA claims brought under Title II." *Brantley*, 656 F. Supp. 2d at 1170 & n.3; *see also Ball*, 2009 WL 1395423, at *4. They did so even though *Olmstead* is controlling Supreme Court precedent and even though Ninth Circuit decisions after *Townsend* have correctly applied *Olmstead*, *see, e.g.*, *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005). Although the *Brantley* court also stated that "Plaintiffs have made a sufficient showing under either formulation," 656 F. Supp. 2d at 1170 n.3, the court never explained how its decision squared with *Olmstead*, and the *Ball* court's analysis was even more summary. This Court should adhere to *Olmstead* and not adopt the amorphous "risk of institutionalization" standard of *Brantley* and *Ball*.

The DOJ further suggests that an individual who is at risk of requiring nursing facility care even for a short period before the State offers her a slot in an HCBS waiver program has been discriminated against no less than an individual who endures prolonged institutionalization despite the availability of appropriate waiver slots. (DOJ Br. at 12)

Defendants previously explained (Reply Br. at 13, 20-21) that the ADA's prohibition of "unjustified isolation of individuals with disabilities," *Olmstead*, 527 U.S. at 597, is limited to cases of "continued confinement in a segregated environment," *id.* at 593. The *Olmstead* Court recognized as much when it observed that individuals who are qualified for HCBS "may need institutional care from time to time" when their needs exceed the level of care available in the community. *Id.* at 605. Given the opportunity to respond to Defendant's reliance on this language in *Olmstead*, the DOJ only notes that three district courts have concluded otherwise. Defendants submit that the Supreme Court is the better authority.

Based on its finding that, "historically, society has tended to isolate and segregate individuals with disabilities," 42 U.S.C. § 12101(a)(2), Congress prohibited "unjustified institutionalization" as a form of discrimination under the ADA, *Olmstead*, 527 U.S. at 597. DOJ's leap from "unjustified institutionalization" to a "risk of institutionalization," especially when any institutional stay is likely to be temporary, is simply another means of arguing that the statute requires a minimum level of services; that leap is not supported by the language of the statute and should be rejected.

II. It Is Not Disputed That At Least Three Of The Four Named Plaintiffs Could Access ADHC Services.

Plaintiffs have indicated that they cannot supplement their LT-PCS hours with services provided through the ADHC waiver because there are not ADHC facilities in every corner of the State and because there is a wait of five months for some individuals. (Opp'n at 15-16) Defendants presented undisputed evidence that three of the four plaintiffs live no more than 10 miles away from an ADHC facility that will provide them with the necessary transportation, SUF ¶¶85-88, and that Plaintiffs would have already been offered ADHC services had they applied when they filed this lawsuit, SUF ¶¶93-94.

The DOJ acknowledges these facts only in a footnote, and it has little to say. (DOJ Br. at 16 n.12) There it notes that there may not be an ADHC facility that will provide transportation to and from the current residence of Kenneth Roman, and it says that the availability of ADHC services is a "disputed fact." It is not clear whether the DOJ thinks this fact is disputed as to all Plaintiffs or only as to Kenneth Roman. If the former, there is no basis in the record for that contention, and the DOJ cites nothing to support its statement. If the latter, DOJ does not explain why the location of a single plaintiff is material in light of the Supreme Court's admonition, in *Olmstead*, that the proper focus of the ADA inquiry is not on the immediate relief sought by individual plaintiffs but on the "responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with . . . disabilities." 527 U.S. at 604.

III. The DOJ Has Wrongly Argued The "Comprehensive Plan" Defense Out of Existence.

The DOJ argues that "[c]ourts have strictly interpreted the requirement that a state demonstrate it has in place a comprehensive, effectively working plan in offering an alleged fundamental alteration defense." (DOJ Br. at 18 n.15) This is not correct. In *Olmstead*, the Supreme Court explained that the fundamental-alteration defense gives States "more leeway" than the courts below (and the DOJ as amicus) allowed, 527 U.S. at 605, and that any construction of the defense that "would leave the State virtually defenseless" is "unacceptable," *id.* at 603. Lower courts have explained that States bear only a "minimal burden," *Pa. Protection & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 382 (3d Cir. 2005), and that courts must "be sympathetic to fundamental alteration defenses," *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005) (holding that a State's HCBS program was comprehensive and effectively working).

The DOJ not only strictly construes the "comprehensive plan" defense; it argues the defense is entirely unavailable in cases where HCBS recipients challenge a service reduction. (Br. at 18-19) This argument gets things precisely backwards, and the DOJ cites no judicial decision that endorses it. Adopting the DOJ's rule would be counter-productive. The rule requires a State to devote unlimited resources to individuals already receiving HCBS even when those resources could otherwise help other persons at risk of institutionalization or already institutionalized persons leave nursing facilities. It makes it harder for a State that *does* provide HCBS to mount a defense than it is for a State that offers none. And it discourages States from creating state plan services like LT-PCS, which (unlike waiver services) are not subject to enrollment caps. No wonder no court has agreed with this position.[2]

Once it turns to the merits of Louisiana's comprehensive plan, the DOJ offers only a tepid endorsement of Plaintiffs' position. (DOJ Br. at 19-20) The DOJ does not support Plaintiffs' primary argument (that Louisiana lacks a "comprehensive, effectively working plan" because no single piece of paper sets forth the State's policies for providing HCBS to individuals with adult-onset disabilities). Instead, the DOJ summarily states that Plaintiffs "have raised a number of factual issues." (DOJ Br. at 19) The DOJ does not suggest which of the dozens of "factual issues" raised by Plaintiffs are actually material or whether a trial would need to explore all of them. Nor could the DOJ provide significant insight on this question given its position that the "comprehensive plan" defense is inapplicable to States that have successful HCBS programs.

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[2] Employment discrimination cases arising under the ADA confirm that the fundamental-alteration defense is available even when a plaintiff seeks to maintain the status quo or to regain services that were provided voluntarily in the past. *See, e.g.*, *Myers v. Hose*, 50 F.3d 278, 284 (4th Cir.1995) ("A particular accommodation is not necessarily reasonable, and thus federally mandated, simply because the [employer] elects to establish it as a matter of policy."). These cases provide important guidance in the *Olmstead* context. *See* 527 U.S. at 606 n.16.

The upshot of the DOJ's position is that, in its view, a State discriminates under the ADA if it does not provide HCBS adequate to ensure that no individual with a disability risks even a temporary institutional placement. Once an individual shows that she is "at risk of institutionalization," the State either has no defense to that individual's ADA claim or has to defend every aspect of its entire Medicaid program in a lengthy and open-ended trial. This is not what Congress intended when it prohibited discrimination against individuals with disabilities or what the Supreme Court anticipated when it agreed that such discrimination includes unjustified isolation. Indeed, the *Olmstead* Court emphasized that a "State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless." 527 U.S. at 603.

IV. The DOJ's "Most Integrated Setting" Regulation Does Not Create A Right To HCBS Beyond What *Olmstead* Requires.

Defendants have argued that Plaintiffs lack a private right of action to enforce the DOJ's integration regulation, 28 C.F.R. § 35.130(d), *to the extent the regulation imposes requirements not contained in the ADA itself*. (Reply Br. at 34-35) The DOJ's response misunderstands either Defendants' argument or the relevant Supreme Court precedent.

The DOJ apparently believes that if its integration regulation is "valid and reasonable," then it is enforceable through a private right of action. (DOJ Br. at 20) This is plainly wrong. In *Alexander v. Sandoval*, the Supreme Court considered whether there was a private right of action to enforce DOJ regulations promulgated under Title VI and prohibiting activities that had a disparate impact on the basis of race. 532 U.S. 275, 278 (2001). The Court assumed that the disparate-impact regulations were a valid and reasonable interpretation of the statute, *id.* at 281-82, but went on to hold that the regulations were not privately enforceable, *see id.* at 284-93.

Under *Sandoval*, the question is not whether the integration regulation is "valid and reasonable" but whether it "applies" the ADA's prohibition on discrimination. "We do not doubt that regulations *applying* § 601's ban on intentional discrimination are covered by the cause of action to enforce that section," *id.* at 284 (emphasis added), the Court explained in *Sandoval*, but "[i]t is clear now that *the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits*—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations." *Id.* at 285 (emphasis added). Thus, the holding of *Sandoval* is that the private right of action to enforce a statute does not include a private right to enforce its implementing regulations (even valid and reasonable ones) when the regulations prohibit conduct not prohibited by the statute itself.

Defendants' real disagreement with the DOJ is about what the text of the ADA itself does or does not require. As Defendants have explained, the ADA's prohibition of the unjustified isolation and segregation of individuals with disabilities in institutions is not so broad as to require the State to provide HCBS adequate to ensure that no individual with a disability ever sets foot in an institution, even for a temporary stay. The DOJ's argument to the contrary is inconsistent with governing precedent, has been adopted by no court of appeals, and "would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she seeks." *Olmstead*, 527 U.S. at 603. As the Supreme Court explained when it disagreed with the DOJ's endorsement of the Eleventh Circuit's decision in *Olmstead*, that argument "is unacceptable." *Id.*

V. Conclusion

The DOJ offers no sound basis for denying the motion for summary judgment, and Defendants respectfully request that the motion be granted.

Dated: April 13, 2011 Respectfully submitted,

/s/ Kimberly Humbles

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CERTIFICATE OF SERVICE

I certify on this 13th day of April, 2011, that a true and correct copy of the foregoing **Defendants' Response to the Statement of Interest of the United States** was filed electronically using the CM/ECF system. Notice of this filing will be sent via operation of the Court's electronic filing system to the following:

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