IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	1:10-CV-249-CAP
THE STATE OF GEORGIA, et al.,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Defendants State of Georgia, et al., administer Georgia's mental health services in a manner that warehouses individuals with mental illness, developmental disabilities, and addictive diseases in dangerous institutions—where they are subjected to homicide, rapes, suicides, assaults, and grievous harm—that are not the most integrated setting appropriate to those individuals' needs. In the Complaint, the United States properly pleaded claims of serious, systemic discrimination by the State in its administration of its mental health system, claims upon which relief can and should be granted. Accordingly, Defendants' Motion to Dismiss, Doc. No. 28, should be denied.

Defendants blithely mischaracterize the United States' efforts at enforcing federal law as a "hostile takeover" due to a "recent change of policy and priorities." Mot. Dismiss, Doc. No. 28, at 1, 28. The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131–12134, was enacted more than 20 years ago, and the Supreme Court decided Olmstead v. L.C., 527 U.S. 581 (1999), interpreting the ADA more than 10 years ago. Yet Defendants, who operate the same hospital at issue in Olmstead, have failed to comply with the law's mandate. Furthermore, Defendants' motion to dismiss misreads the United States' Complaint, misconstrues precedent, conflicts with prior positions taken before this Court, and demonstrates a fundamental lack of understanding by Defendants of their duties under federal law.

Remarkably, Defendants also attempt to bar the Complaint by citing to an agreement in the related case of United States v. Georgia, No. 1:09-cv-119-CAP (N.D. Ga.), despite a lack of a meeting of the minds over material terms in the agreement, Defendants' failing to abide by this Court's orders to address concerns with the agreement, and Defendants' complete

lack of willingness or ability to comply with the agreement. No agreement exists to bar the Complaint.

Discussion

Defendants argue that the Court should dismiss the United States' Complaint in this action because the Complaint fails to state a claim for which relief may be granted, the United States lacks Article III standing, and a settlement agreement bars the Complaint in this action. None of Defendants' arguments has merit.

A. The United States Pleaded Claims Under the ADA for Which Relief Can Be Granted

In deciding a motion to dismiss, a court "take[s] the factual allegations in the complaint as true and construe[s] them in the light most favorable to the plaintiffs." Edwards v. Prime Inc., 602 F.3d 1283, 1291 (11th Cir. 2010). "Dismissal for failure to state a claim is proper if the factual allegations are not enough to raise a right to relief above the speculative level. . . . Stated differently, the factual allegations in the complaint must possess enough heft to set forth a plausible entitlement to relief." Id. (internal quotation marks omitted).

Here, the United States alleged that Defendants administer Georgia's mental health services in a manner that unjustifiably segregates individuals with mental illness, developmental disabilities, and addictive diseases in dangerous institutions, Compl. ¶¶ 11–76—where they are subjected to homicide, rapes, suicides, suicide attempts, questionable medical deaths, assaults by peers, regression and loss of skills from inadequate treatment and services, harm from excessive restraint and administration of sedating medications, harm from inadequate medical and nursing care, harm from the lack of services to persons with specialized needs, and harm from inadequate discharge planning, Compl. ¶¶ 11–76; Am. Compl., No. 1:09-cv-119-CAP, Doc. No. 53, Ex. A, at ¶¶ 32–189 (N.D. Ga. Jan. 28, 2010)—that are not the most integrated setting appropriate to those individuals' needs, Compl. ¶¶ 25–76, in violation of the ADA, Compl. ¶¶ 77–80. A fundamental cause of the needlessly prolonged institutionalization of individuals in the State Hospitals and the attendant harm suffered there is Defendants' failure to administer community-based supports and services adequately. Compl. ¶¶ 30, 33–37, 51–66, 72–74. The United States alleged claims upon which relief can and should be granted.

Defendants argue that the United States' Complaint fails to state a claim under which relief can be granted because 1) reinstitutionalization is not a cognizable injury under the ADA, 2) an appropriate remedy cannot be fashioned, and 3) the United States' requested remedy would fundamentally alter the State's mental health system. Defendants are wrong on all three counts.

1. Defendants discriminate against individuals with mental illness, developmental disabilities, and addictive diseases, in violation of the ADA.

Defendants argue that the United States failed to allege a cognizable injury under the ADA because "[n]either the text of the ADA, the integration mandate, nor the Olmstead decision supports the DOJ's new re-hospitalization theory of liability." Mot. Dismiss at 13. Defendants reason that "a person not receiving State services has no claim under the ADA" and that "[t]he quality, quantity, or sufficiency of services needed to prevent unjustified isolation for persons in the community is not a relevant inquiry under the ADA." Id. at 13–14. Defendants' argument defies all logic and precedent.

As an initial matter, Defendants leave unstated and unchallenged the gravamen of the United States' Complaint: individuals are institutionalized and remain institutionalized in the State Hospitals often for months and years past any legitimate need for hospitalization because Defendants fail to provide adequate services both in the Hospitals and in the community to enable these individuals to be served in the most integrated setting appropriate to their needs—the community. See Compl. ¶¶ 28–47. This alone warrants denying Defendants' motion to dismiss the United States' Complaint.

The argument that Defendants actually make displays a fundamental lack of understanding about the ADA. Congress enacted the ADA in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA prohibits discrimination in access to public services by requiring that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

In Olmstead, 527 U.S. at 582, 600–01, the Supreme Court held that the discrimination forbidden under the ADA includes "unnecessary segregation" and "[u]njustified isolation" of individuals with disabilities. "Unjustified isolation of the disabled" amounts to discrimination because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." Id. at 560–61.

The ADA's integration mandate specifies that persons with disabilities receive services in the "most integrated setting appropriate to their needs." 28 C.F.R. § 35.130(d). The "most integrated setting" is "'a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.'" Olmstead, 527 U.S. at 592 (quoting 28 C.F.R. pt. 35 app. A). This mandate advances one of the principal purposes of Title II of the ADA—"ending the isolation and segregation" of people with disabilities. Arc of Wash. State Inc. v. Braddock, 427 F.3d 615, 618 (9th Cir. 2005).

Contrary to Defendants' unsupported assertions, the risk of institutionalization itself is sufficient to demonstrate a violation of the ADA.[1] "Olmstead does not imply that disabled persons who . . . stand imperiled with segregation, may not bring a challenge to . . . state policy under the ADA's integration regulation without first submitting to institutionalization." Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1182 (10th Cir. 2003). The protections of the integration mandate "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation." Id. at 1181. In an opinion issued just last week in this Circuit, a district court granted a preliminary injunction where "Plaintiff ha[d] provided ample evidence that she will have to enter an institution in order to receive the in-home services that would allow her to

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[1] Defendants erroneously simplify the United States' Complaint as alleging an injury of "reinstitutionalization." See Mot. Dismiss at 12. Although the Complaint does allege discrimination against those subjected to repeated institutionalizations, see, e.g., Compl. ¶ 41 (discussing an individual "admitted more than 100 times to a State Hospital"), the Complaint also alleges discrimination against those at risk of institutionalization due to Defendants' discriminatory administration of Georgia's mental health system, Compl. ¶¶ 72–78.

remain in the community." Haddad v. Arnold, No. 3:10-cv-414, Doc. No. 49, at 30 (M.D. Fla. July 9, 2010); see also Marlo M. v. Cansler, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010) (granting a preliminary injunction where "[t]ermination of funding by Defendants will force Plaintiffs from their present living situations, in which they are well integrated into the community, into group homes or institutional settings"); V.L. v. Wagner, 669 F. Supp. 2d 1106, 1119 (N.D. Cal. 2009) ("[P]laintiffs who currently reside in community settings may assert ADA integration claims to challenge state actions that give rise to a risk of unnecessary institutionalization."); Brantley v. Maxwell-Jolly, 656 F. Supp. 2d 1161, 1170 (N.D. Cal. 2009) ("[T]he risk of institutionalization is sufficient to demonstrate a violation of Title II." (emphasis in original)); Ball v. Rogers, No. 00-67, 2009 WL 1395423, at *5–6 (D. Ariz. April 24, 2009) (holding that the state's "actions discriminated against Plaintiffs based upon their disabilities in violation of the ADA" because of the state's "failure to provide adequate services to avoid unnecessary gaps in service and institutionalization"); M.A.C. v. Betit, 284 F. Supp. 2d 1298, 1309 (D. Utah 2003) (concluding that the ADA's integration mandate applies equally to those individuals already institutionalized and to

those at risk of institutionalization); Makin v. Hawaii, 114 F. Supp. 2d 1017, 1034 (D. Haw. 1999) (allowing an ADA challenge where the "statute could potentially force Plaintiffs into institutions"); Mental Disability Law Clinic v. Hogan, No. 06-cv-6320, 2008 WL 4104460, at *15 (E.D.N.Y. Aug. 28, 2008) (unpublished decision) ("[E]ven the risk of unjustified segregation may be sufficient under Olmstead."); Crabtree v. Goetz, No. 3:08-0939, 2008 WL 5330506, at *30 (M.D. Tenn. Dec. 19, 2008) (unpublished decision) ("Plaintiffs have demonstrated a strong likelihood of success on the merits of their [ADA] claims that the Defendants' drastic cuts of their home health care services will force their institutionalization in nursing homes.").

Defendants' citations to Buchanan v. Maine, 469 F.3d 158 (1st Cir. 2006), and Lincoln CERCPAC v. Health & Hospitals Corp., 147 F.3d 165 (2d Cir. 1998), are inapposite. Buchanan, by its express terms, "was not about discriminatory denial of services, but rather about the adequacy of treatment" provided to an individual with mental illness who was killed in an unfortunate encounter with the police. 469 F.3d at 173. The question of risk of institutionalization simply was not presented. And Lincoln, decided pre-Olmstead, based its holding on the proposition that, to establish a

violation of the ADA, individuals with disabilities must allege disparate treatment compared to individuals who are not disabled, 147 F.3d at 167–68, a proposition that the Supreme Court squarely rejected in Olmstead, 527 U.S. at 598 ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA."). Consequently, Defendants advance no applicable legal support for their argument.

In short, the Complaint alleges cognizable violations of the ADA regarding both individuals institutionalized in the State Hospitals and individuals at risk of institutionalization in the State Hospitals. Defendants' motion to dismiss for failing to state a cognizable injury under the ADA should be denied.

2. The United States requests an adequate remedy.

Defendants next challenge the remedies sought by the United States and this Court's authority to order them. Mot. Dismiss at 15–21. This argument, like many of the others raised by Defendants, is inappropriate for a motion to dismiss.

As an initial matter, the demand for relief in a complaint need not be lengthy or detailed. Indeed, the Federal Rules of Civil Procedure mandate

only that a demand for relief be "short," "plain," and "concise." Fed. R. Civ. P. 8. The precise relief sought can be set forth later in the proceedings, and the Federal Rules of Civil Procedure permit the demand for relief to be amended at a later date if necessary. See Kenny A. v. Perdue, 218 F.R.D. 277, 286 n.5 (N.D. Ga. 2003) (noting that, on motion to dismiss, the relief sought by plaintiffs included declaratory relief and an injunction enforcing constitutional and statutory rights without detailing the precise contours of the relief, but that "the Court is confident that, if plaintiffs prevail on their claims, specific relief can be crafted"); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1255 (3d ed. 2004) ("The liberal policies reflected in Rules 15(a) and 15(b) permit the demand to be amended either before or during trial.").

Perhaps more importantly, the Court may grant any relief to which the party is entitled, "even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c); see also 5 Wright & Miller, Federal Practice and Procedure § 1255 & n.8 (3d ed. 2004) (collecting cases). Thus, even if the United States' prayer for relief is somehow infirm, and it is not, the

appropriate remedy would not be to dismiss the complaint, but to grant the relief to which the United States is entitled based on the evidence at trial.

In any event, the relief requested by the United States is not impermissible. The United States has alleged that the State unnecessarily isolates and segregates hundreds of individuals with disabilities, see Compl. ¶¶ 31–32, that these individuals make up the vast majority of the residents in the State Hospitals, see id.,[2] and that a fundamental cause of this segregation is the dearth of community resources, see Compl. ¶¶ 30, 33–37, 51–66, 72–74. A request that the Court order the State to develop additional community supports and services—community supports and services already provided by the State, see Compl. ¶¶ 51, 57, 59, 61, 63, 65–66, but not in sufficient quantity, quality, or geographic diversity—so that Defendants

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[2] Once these individuals transition to the community, the population in the State Hospitals will be greatly reduced, so the United States' request that the Hospitals serve as a last resort for those for whom community services have been exhausted is appropriate. See Compl. at Prayer for Relief. Notably, this is not a request that the Court order the State to "phase out" institutions as Defendants allege, but rather to reduce the Hospitals to their proper function. See Olmstead, 527 U.S. at 600–02 (stating that "institutional placement of persons who can handle and benefit from community settings" is discrimination under the ADA, but the ADA does not require "termination of institutional settings for persons unable to handle or benefit from community settings").

"administer behavioral health services in the most integrated setting appropriate to the needs of the individuals with disabilities," Compl. at Prayer for Relief, is precisely the appropriate relief to remedy the violations of federal law alleged in the Complaint. Cf. 28 C.F.R. § 35.130(d) (1998) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."). Indeed, other courts have ordered relief similar to that requested by the United States. See, e.g., Disability Advocates, Inc. v. Paterson, 653 F. Supp.2d 184, 312–14 (E.D.N.Y. 2009); Marlo M., 679 F. Supp. 2d at 638; Ball, 2009 WL 1395423, at *5–6.[3]

The very cases cited in the Motion to Dismiss recognize that the Court has the authority to order the relief requested by the United States. Milliken v. Bradley (Milliken II), 433 U.S. 267 (1977), see Mot. Dismiss at 17, is the seminal case on the broad authority granted to federal courts to order measures necessary to remedy past discrimination. As that case recognized, if state and local authorities "'fail in their affirmative obligations'" as the

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[3] These were not mere "obey the law" injunctions, and the United States is confident that the relief crafted in this case will similarly be specific and enforceable. Cf. Mot. Dismiss at 20–21.

United States has alleged here, "'judicial authority may be invoked.'" 433 U.S. at 281 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)). "Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" Id. In Milliken II, the Supreme Court upheld the District Court's remedial order designed to ameliorate the effects of racial segregation in the Detroit Public Schools. 433 U.S. at 279. The order included, among other things, the transportation of over 50,000 students; the provision of magnet schools and vocational high schools; several remedial programs, including training for teachers and administrators, guidance and counseling programs, revised testing procedures, and a reading program; and that the cost of the programs would be borne equally by the school district and the State. 433 U.S. at 272–77.

Similarly, Rogers v. Lodge, 458 U.S. 613 (1982), see Mot. Dismiss at 17, upheld the District Court's order requiring that the county institute single-member districts to elect members to the Board of Commissioners to remedy past discrimination. 458 U.S. at 627–28. Rather than suggesting that the Court lacks the authority to order the relief requested by the United States

as Defendants contend, these cases instead support the Court's broad authority to remedy the discrimination alleged in the United States' Complaint.

Defendants' remaining assertions regarding the United States' requested relief misconstrue the Complaint and dispute facts alleged therein. As an initial matter, on a motion to dismiss, the United States prevails if Defendants' arguments merely dispute facts which, if true, state a claim. See Edwards, 602 F.3d at 1291. And, as previously established, the failure to address the risk of institutionalization is cognizable under Title II of the ADA, so this argument fails. Moreover, Defendants' failure to provide community services that are sufficient in quantity and quality does state a discrimination claim under the ADA, cf. Mot. Dismiss at 19, if the failure to provide the quantity and quality of community services results in unjustified isolation and segregation. See Olmstead, 527 U.S. 600–01. The unreported case cited by Defendants in support of their contention explicitly recognizes this point. See Johnson v. Murphy, No. 8:87-CV-369-T-24TBM, 2001 U.S. Dist. LEXIS 24013, at *55 (M.D. Fl. June 28, 2001) ("[W]hile the plaintiffs offered evidence that community services and facilities could be different and

in some instances better, they have failed to prove that the defendants' mental health program, as administered, results in unnecessary isolation of patients into segregated settings." (emphasis added)). Of course, that is precisely what the United States alleges here: that the insufficient quantity, quality, and geographic diversity of the State's community services have resulted in unnecessary and unlawful segregation. See Compl. ¶¶ 30–37, 51–66, 72–74. Because the allegations of the Complaint must be taken as true at this stage in the proceedings, Defendants' argument is without merit.

Likewise, Defendants misconstrue the Complaint when they assert that the United States seeks to require the State to provide new and additional services, purportedly in violation of the Court's ruling in Olmstead. See Mot. Dismiss at 18–19. The Complaint plainly asserts, however, that the State already in fact provides these services, see Compl. ¶¶ 51, 57, 59, 61, 63, 65–66, but not in sufficient quantity, quality, or geographic diversity in the community; cf. Olmstead, 527 U.S. at 603 n.14 ("States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide." (emphasis added)). Indeed, many of the services that Defendants provide in the State Hospitals could easily be

provided in the community. See, e.g., Compl. ¶ 49. As with L.C. and E.W.—the plaintiffs in Olmstead who were unnecessarily segregated in one of the State Hospitals at issue here—the individuals with disabilities addressed in the Complaint suffer discrimination when they are unnecessarily segregated because Defendants do not have community services in sufficient quantity, quality, or geographic diversity, even though Defendants provide the services to other individuals with disabilities. See id. at 597–603.[4]

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[4] Defendants also assert that, "In the wake of Olmstead, Circuit courts also have opined against attempts to use the ADA as a tool to require states to provide additional behavioral health services." Mot. Dismiss at 18–19. None of the cases cited by Defendants stand for this proposition. Three of the cases cited by Defendants predate the decision in Olmstead, and they each plainly conflict with Olmstead's holding. Lincoln, 147 F.3d 165, and Doe, 148 F.3d 73, both decided the year before the Olmstead decision, base their holdings on the proposition that, to establish discrimination in violation of the ADA, individuals with disabilities must allege disparate treatment compared to individuals who are not disabled. See Lincoln, 147 F.3d at 167–68; Doe, 148 F.3d at 83-84. Olmstead flatly contradicts this holding; indeed, it is the precise issue upon which the dissent is based. Olmstead, 527 U.S. at 598 & n.10. Connor v. Branstad, 839 F. Supp. 1346 (S.D. Ia. 1993), also predates Olmstead and, curiously, holds that nothing in the ADA's legislative history calls for "deinstitutionalization of mentally disabled individuals." Connor, 839 F. Supp. at 1357–58. As the decision in Olmstead recognized, the legislative findings for the ADA explicitly identify the unjustified segregation of individuals with disabilities as a form of discrimination. Olmstead, 527 U.S. at 600. Buchanan, 469 F.3d 158, is inapposite. Buchanan concerned an individual with mental illness who was killed in a

Because the allegations in the Complaint and the prayer for relief are adequate, particularly at this stage in the proceedings, Defendants' motion to dismiss should be denied.

3. The United States does not seek a fundamental alteration of Defendants' services.

Defendants argue that the Complaint is barred because it seeks a fundamental alteration of Defendants' mental health services. Motion to Dismiss at 21–24. Defendants reason that the Complaint "seek[s] to require the State to increase and enhance community services" and that "the breadth of DOJ's requested remedy . . . is facially a fundamental alteration to Georgia's mental health system."[5] Id. at 23–24. Once again, Defendants

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tragic encounter with the police. It was uncontested that the individual was receiving services from the State, and the dispute was over whether the services the individual received were adequate. 469 F.3d at 175. The plaintiff presented no evidence that the additional services were required, and the individual refused some of the services. Id. at 176.

[5] Defendants also note that, "[b]y raising the fundamental alteration defense, Plaintiff put the defense before this Court for consideration on a motion for dismiss" and imply that the Court can dismiss the Complaint merely because of "'the existence of an affirmative defense.'" Motion to Dismiss at 23 (quoting Fortner v. Thomas, 983 F.2d 1024, 1028 (11th Cir. 1993)). Defendants' quotation of Fortner is misleading. "[G]enerally, the existence of an affirmative defense will not support a rule 12(b)(6) motion to dismiss for failure to state a claim." Fortner, 983 F.2d at 1028. When a complaint indicates the existence of an affirmative defense, a court still "must

advance an argument that defies logic and precedent, has no legal support, and presents a factual dispute inappropriate in a motion to dismiss.

"[P]ublic entities are required to 'make reasonable modifications in policies, practices, or procedures' in order to avoid the discrimination inherent in the unjustified segregation of the disabled." Fisher, 335 F.3d at 1181 (quoting 28 C.F.R. § 35.130(b)(7)). As alleged in the Complaint, "the State already provides the services that the Patients require to live in a more integrated setting," and "[p]roviding supports and services in the community to Patients with developmental disabilities, mental illness, or substance abuse diagnoses can generate significant cost savings compared to the cost of institutionalizing Patients in the State Psychiatric Hospitals." Compl. ¶¶ 52, 79. Under those facts, which must be accepted as true and construed in the light most favorable to the United States, Edwards, 602 F.3d at 1291, the United States requests, at most, a reasonable modification of Defendants' services. Thus, Defendants' argument must fail.

A state's obligation to provide services in the most integrated setting may be excused only where a state can prove that the relief sought would

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examine the complaint . . . under the most favorable version of the facts alleged." Id. (internal quotation marks omitted).

result in a "fundamental alteration" of the state's service system. See Olmstead, 527 U.S. at 601–03. Fundamental alteration is a defense that Defendants have the burden of establishing. See Olmstead, 527 U.S. at 603; Frederick L. v. Dep't of Pub. Welfare, 364 F.3d 487, 492 n.4 (3d Cir. 2004); Disability Advocates, 653 F. Supp. 2d at 301 n.890. "[W]hether an accommodation causes a fundamental alteration is an intensively fact-based inquiry." Lentini v. Cal. Ctr. for the Arts, Escondido, 370 F.3d 837, 845 (9th Cir. 2004).

Defendants rest their entire argument on the observation that they would have to modify their provision of community services in order to comply. This specious argument has been rejected by the courts:

> [P]olicy choices that isolate the disabled cannot be upheld solely because offering integrated services would change the segregated way in which existing services are provided. . . . [P]recisely that alteration was at issue in Olmstead, and Olmstead did not regard the transfer of services to a community setting, without more, as a fundamental alteration.

Townsend v. Quasim, 328 F.3d 511, 519 (9th Cir. 2003).

Notably, although Defendants mention that a state might comply with the ADA by having 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,'" Motion to Dismiss at 22 (quoting Olmstead, 527 U.S. at 605–06), Defendants do not assert that they have either a comprehensive, effectively working plan, or a waiting list that moves at a reasonable pace. Any such argument would raise a factual dispute inappropriate for a motion to dismiss and, ultimately, would fail. As alleged in the Complaint, all of the nearly 800 individuals with developmental disabilities in the State Hospitals can be served successfully in a more integrated setting in the community and yet remain institutionalized. Compl. ¶ 32. Because Defendants cannot show that they have a comprehensive, effectively working plan, any fundamental alteration defense must fail. See Pa. Prot. & Advocacy, Inc. v. Dep't of Pub. Welfare, 402 F.3d 374, 381 (3d Cir. 2005) ("[T]he 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 . . . .").

Defendants also do not raise a cost-based fundamental alteration argument, which also would fail. See id. at 380 (3d Cir. 2005) ("[B]udgetary constraints alone are insufficient to establish a fundamental alteration

defense."); Fisher, 335 F.3d at 1183 ("If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed."); see also Disability Advocates, 653 F. Supp. 2d at 308 (concluding that, because the relief requested would save the state money, it would not interfere with the state's ability to serve others with mental illness).

In short, the United States requests a reasonable modification of Defendants' mental health services. Defendants' motion to dismiss under a fundamental alteration defense should be denied.

B. The United States Has Article III Standing

Defendants argue that the United States lacks Article III standing. Mot. Dismiss at 24–28. To establish Article III standing, a plaintiff "must demonstrate: 1) an injury in fact or an invasion of a legally protected interest; 2) a direct causal relationship between the injury and the challenged action; and 3) a likelihood of redressability." Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1223 (11th Cir. 2004) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). "Redressability is established . . . when a favorable decision 'would amount to a significant increase in the

likelihood that the plaintiff would obtain relief that directly redresses the injury suffered,'" Harrell v. Fla. Bar, No. 09-11910, 2010 WL 2403344, at *14 n.7 (11th Cir. June 17, 2010) (quoting Utah v. Evans, 536 U.S. 452, 464 (2002)), as opposed to "a significantly more speculative likelihood of obtaining ultimate relief," Evans, 536 U.S. at 464.

Defendants do not dispute that the United States' Complaint properly demonstrates an injury in fact, nor do they clearly articulate whether they challenge the causality and/or redressability of the allegations in the United States' Complaint. See Mot. Dismiss at 25–28. Regardless, the United States' Complaint demonstrates both causality and redressabilty to establish Article III standing.

As alleged in the Complaint, Defendants administer Georgia's mental health services, Compl. ¶¶ 11–24, and they administer those services in a manner that unjustifiably segregates individuals with mental illness, developmental disabilities, and addictive diseases in dangerous institutions. See Compl. ¶¶ 11–76; Am. Compl., No. 1:09-cv-119, at ¶¶ 32–189 (N.D. Ga. Jan. 28, 2010). The Complaint further alleges that the institutions are not the most integrated setting appropriate to those individuals' needs, see

Compl. ¶¶ 25–76, in violation of the ADA, see Compl. ¶¶ 77–80, and that a fundamental cause of the needlessly prolonged institutionalization of individuals in the State Hospitals and the attendant harm suffered there is Defendants' failure to administer community-based supports and services adequately. Compl. ¶¶ 30, 33–37, 51–66, 72–74.

Defendants attempt to disclaim responsibility by relying on the fact that they utilize third parties to provide mental health services in the community, but this reliance betrays Defendants' fundamental misunderstanding of their obligations under federal law to administer those services in a nondiscriminatory manner.[6] See Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289, 317–18 (E.D.N.Y. 2009) ("Discrimination, in

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[6] This reliance is also both improper and incorrect. In deciding a motion to dismiss, a court "take[s] the factual allegations in the complaint as true and construe[s] them in the light most favorable to the plaintiffs." Edwards, 602 F.3d at 1291. Defendants attempt to introduce facts about the State's relationship with these third parties that were not alleged in the United States' Complaint and construe them in the light most favorable to Defendants. Moreover, Defendants' statement that "the State only funds community services that are provided by third parties," Mot. Dismiss at 25, is incorrect. Under Georgia law, "community service boards may enroll and contract . . . to become a provider of mental health, developmental disabilities, and addictive diseases services . . . . Such boards shall be considered public agencies. Each community service board shall be a public corporation and an instrumentality of the state." O.C.G.A. § 37-2-6(a).

the form of unjustified segregation of individuals with disabilities in institutions, is thus prohibited in the administration of state programs. . . . The State cannot evade its obligation to comply with the ADA by using private entities to deliver some of those services." (emphasis in original)); 28 C.F.R. § 35.130(d) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." (emphasis added)).

Georgia law bestows upon Defendants the authority and responsibility to administer Georgia's mental health system, in direct contravention of their suggestion that they are powerless to rectify the alleged discrimination because of the involvement of third parties and, thus, that any court order would lack redressability. Defendants "[e]stablish, administer, and supervise the state programs for mental health, developmental disabilities, and addictive diseases," O.C.G.A. § 37-1-20(1), "[h]ave authority to contract for services with community service boards, private agencies, and other public entities for the provision of services within a service area so as to provide an adequate array of services and choice of providers for consumers and to comply with the applicable federal laws and rules and regulations," id. § 37-1-

20(5), "[e]stablish, operate, supervise, and staff programs and facilities for the treatment of disabilities throughout th[e] state," id. § 37-1-20(12), "adopt and promulgate written rules, regulations, and standards as may be deemed necessary . . . and which shall be the basis of state financial participation in mental health, developmental disabilities, and addictive diseases programs," id. § 37-1-22, "enter into contracts . . . with any hospital, community service board, or other public or private providers," id. § 37-2-5.2(5), "[s]upervise the administration of contracts with any hospital, community service board, or any public or private providers," id. § 37-1-20(16), "allocate funds available for services so as to provide an adequate disability services program," id. § 37-2-11(a), and "ensure that all providers, public or private, meet minimum standards of quality and competency," id. Given the scope of authority Defendants exercise over every aspect of Georgia's mental health system, a court order regarding Defendants' administration of Georgia's mental health services in compliance with the ADA and Olmstead would redress the injuries alleged in the United States' Complaint.[7]

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[7] Defendants charge that the United States "set up an artificial and baseless definition of a term 'supported housing,' and then allege that

Defendants also state that "the type of relief that could be available is limited to that which compels the State to move persons in the State Psychiatric Hospitals into the community at a reasonable pace," and that "[t]he Complaint does not allege that Georgia is not moving persons out of institutions at a reasonable pace." Mot. Dismiss at 25. As previously discussed in Section A, the type of relief under the ADA is not so limited, but even if it were, Defendants misread the Complaint. For example, as alleged, all of the nearly 800 individuals with developmental disabilities in the State Hospitals can be served successfully in a more integrated setting in the community and yet remain institutionalized. Compl. ¶ 32. By definition, those individuals are not moving into the community at a reasonable pace. In any event, Defendants can introduce evidence to this Court if they believe

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Georgia does not provide sufficient housing services." Mot. Dismiss at 28. The United States notes that the term supported housing is a common and understood term in the field, see Disability Advocates, 653 F. Supp. 2d at 218–19 ("Supported housing . . . is a setting in which individuals live in their own apartment and receive services to support their success as tenants and their integration into the community."), and Defendants' own documents recognize the paucity of this service in Georgia, see Governor Sonny Perdue's Mental Health Service Delivery Commission Final Report 7, 15–18 (Dec. 4, 2008), cited by Compl. ¶ 55, available at Mot. Immediate Relief, No. 1:09-cv-119-CAP, Doc. No. 55-28 (Jan. 28, 2010).

that they are moving individuals into the community at a reasonable pace, but this defense is a factual matter inappropriate for a motion to dismiss.

The United States' Complaint demonstrates an injury in fact, a direct causal relationship between the injury and the challenged action, and a likelihood of redressability. Defendants' motion to dismiss for lack of Article III standing should be denied.

C. No Agreement Exists to Bar the Complaint

Defendants extensively discuss an agreement entered into between the United States and the State of Georgia in a related case, United States v. Georgia, No. 1:09-cv-119-CAP (N.D. Ga.).[8] Mot. Dismiss at 3–10. Defendants then argue that the "Court must enforce the Settlement Agreement and dismiss the Complaint, which was filed in breach of the Settlement

[8] The United States filed a motion to consolidate the two cases, see No. 1:09-cv-119-CAP, Doc. No. 54 (N.D. Ga. Jan. 28, 2010), which remains pending, and which Defendants do not oppose, see No. 1:09-cv-119-CAP, Doc. No. 69 (N.D. Ga. Feb. 22, 2010).

Agreement."[9] Mot. Dismiss at 28. However, no valid agreement exists to bar the Complaint.

Defendants state that "[s]ound policy supports the strong preference for enforcing settlement agreements" and note that "settlement agreements are better for achieving the results sought by Plaintiff; when an agreement is reached by consent, voluntary compliance is rendered more likely, and the government may have expeditious access to the court for appropriate sanctions if compliance is not forthcoming." Id. at 31–32. The United States

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[9] To the extent Defendants argue res judicata, their argument is misplaced. "Under res judicata, . . . a final judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action." Kaiser Aerospace & Elecs. Corp. v. Teledyne Indus., Inc. (In re Piper Aircraft Corp.), 244 F.3d 1289, 1296 (11th Cir. 2001). "An order granting a plaintiff's motion for voluntary dismissal pursuant to Rule 41(a)(2) qualifies as a final judgment," McGregor v. Bd. of Comm'rs, 956 F.2d 1017, 1020 (11th Cir. 1992), and "a judgment of dismissal pursuant to Rule 41 should be given the same res judicata effect as any other judgment," Norfolk S. Corp. v. Chevron, U.S.A., Inc., 371 F.3d 1285, 1288 (11th Cir. 2004). Here, however, there is no final judgment in the related case. As Defendants themselves have noted, "this Court has not dismissed Plaintiff's complaint." Mot. Enforce, No. 1:09-cv-119-CAP, Doc. No. 62-2, at 19 (N.D. Ga. Feb. 15, 2010). In any event, "[r]es judicata does not bar a suit based on claims that accrue after a previous suit was filed." Smith v. Potter, 513 F.3d 781, 783 (7th Cir. 2008). "The filing of a suit does not entitle the defendant to continue or repeat the unlawful conduct with immunity from further suit." Id. (citing Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 328 (1955)).

does not disagree with these hortatory statements, which is why it spent the last four months extensively negotiating with Defendants and the amici curiae over a resolution to the United States' Motion for Immediate Relief, Amended Complaint in the related case, and Complaint in this case. See Doc. No. 26.

As briefed more fully in the United States' Response to Defendants' Motion to Dismiss in the related case, No. 1:09-cv-119-CAP, Doc. No. 83 (N.D. Ga. July 15, 2010), the arguments of which the United States hereby incorporates by reference, Defendants' exhortations belie a lack of a meeting of the minds over material terms in the agreement, Defendants' failing to abide by this Court's orders to address concerns with the agreement, and Defendants' complete lack of willingness or ability to comply with the agreement.

Indeed, in the months since the United States filed its Motion for Immediate Relief, while the United States attempted to negotiate a positive resolution with Defendants, grievous harm has continued unabated in the State Hospitals. For example, the United States has received allegations that, in February 2010, a 73-year-old patient who could have been served in

the community instead was boiled to near death in a hospital. The woman was scalded by hot water while being bathed by a State employee who was responsible for seven other women at the time, including one patient on line-of-sight observation. The State had had longstanding knowledge of problems with the water temperature in the showers. The burns resulted in 40% of the woman's skin sloughing off, including along her feet, legs, buttocks, and genital area. And, in May 2010, a patient almost died from an adverse drug reaction despite having informed his State Hospital treatment team that he did not want to take the drug because he almost died while on that drug during his last hospitalization. See also additional examples No. 1:09-cv-119-CAP, Doc. No. 83, at 11–13. The State Hospitals remain dangerous institutions for the patients confined therein, and many of the institutional conditions that present dangers to those patients do not exist in community settings.

After expressly denying to this Court and to the United States that they must comply with the ADA and Olmstead under the agreement, see, e.g., No. 1:09-cv-119-CAP, Doc. No. 36, at 17 ("Olmstead is not part of the Settlement Agreement."), Defendants now state that, "for the purposes of this

Motion to Dismiss," "ADA claims are part of the agreement." Mot. Dismiss at 29. The Court should not countenance Defendants' legal gamesmanship "according to the exigencies of the moment." New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (internal quotation marks omitted). Implicit in Defendants' statement is their abiding belief that, unless they are arguing for the Court to dismiss the United States' ADA Complaint, they have no ADA and Olmstead responsibilities under the agreement.

In short, Defendants have failed to come to a meeting of the minds with the United States over material terms in the agreement, have failed to abide by this Court's orders to address concerns with the agreement, and have demonstrated their complete lack of willingness or ability to comply with the agreement. No valid agreement exists to bar the Complaint. Defendants' motion to dismiss for breach of the agreement should be denied.

Conclusion

For the foregoing reasons, the United States respectfully requests that the Court deny Defendants' Motion to Dismiss.

Respectfully submitted, this 15th day of July, 2010.

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Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Century Schoolbook, 13-point font in compliance with Local Rule 5.1B.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2010, I electronically filed the foregoing UNITED STATES' RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT with the Clerk of Court using the CM/ECF system which automatically serves notification of such filing to all counsel of record.

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