IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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| FRANKLIN BENJAMIN, by and through his next friend, Andreé Yock; RICHARD GROGG and FRANK EDGETT, by and through their next friend, Joyce McCarthy; SYLVIA BALDWIN, by and through her next friend, Shirl Meyers; ANTHONY BEARD, by and through his next friend, Nicole Turman, on behalf of themselves and all others similarly situated, | Filed via ECF System |
| Plaintiffs, | Civil Action No. 1:09-cv-1182-JEJ |
| v. | Class Action |
| DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA and ESTELLE B. RICHMAN, in her official capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania, | (Judge Jones) |

**PLAINTIFFS' BRIEF IN OPPOSITION TO**
**DEFENDANTS' MOTION TO DISMISS**

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## COUNTERSTATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are individuals with mental retardation who are institutionalized in public intermediate care facilities for persons with mental retardation (ICFs/MR), large institutions operated by Defendants Department of Public Welfare and Estelle B. Richman (collectively, DPW). Am. Compl. ¶¶ 1, 8-14, 55. Plaintiffs, who are appropriate for discharge to the community and not opposed to discharge, filed this lawsuit to challenge DPW's failure to offer them appropriate community supports and services. *See id.* ¶¶ 2, 4, 23-26, 29-32, 35-37, 41-43, 46-49, 72, 86, 92.

Plaintiff Franklin Benjamin has been institutionalized at Ebensburg Center for more than 40 of his 49 years. Am. Compl. ¶ 22. The congregate, institutional nature of Ebensburg Center undermines his capacity to benefit from treatment there since he is extremely sensitive to noise and light. *Id.* ¶ 23. Plaintiffs Richard Grogg and Frank Edgett have been institutionalized in Selinsgrove Center for 20 years each. *Id.* ¶¶ 27, 33. Messrs. Grogg and Edgett are both very independent and social. *Id.* ¶¶ 28, 35. Mr. Grogg holds jobs at Selinsgrove Center and in the community and does not even need a representative payee for his federal benefits. *Id.* ¶ 29. Plaintiff Sylvia Baldwin has been institutionalized at Polk Center for approximately 20 of her 33 years, and is generally independent. *Id.* ¶¶ 38, 40. Plaintiff Anthony Beard has been institutionalized at Ebensburg Center for about

42 of his 49 years. *Id.* ¶ 44. All of the named Plaintiffs are appropriate for discharge to integrated, community-based placements, and they and their involved family members are not opposed to discharge. *Id.* ¶¶ 25, 26, 32, 32, 37, 38, 42, 43, 48, 49, 53, 54.

The five named Plaintiffs are not alone. There currently are approximately 1,272 individuals residing in five state-operated ICFs/MR in Pennsylvania. Am. Compl. ¶¶ 54-55. All of these individuals, with appropriate services and supports, could live in more integrated community settings. *Id.* ¶ 65. Indeed, the Commonwealth has embraced the principle of "normalization," i.e., the right of individuals with mental retardation to live a life "which is as close as possible in all aspects to the life which any member of the community might choose." *Id.* ¶ 67 (citing 55 Pa. Code § 6400.1). Neither Defendant Richman, the Secretary of Public Welfare, nor Kevin Casey, the Deputy Secretary for DPW's Office of Developmental Programs, disputes that people with mental retardation can reside in the community with appropriate supports and services. *Id.* ¶ 68. Moreover, many residents of state-operated ICFs/MR and their families are not opposed to discharge to the community, provided that appropriate supports and services are offered. *Id.* ¶ 69. Nevertheless, DPW has failed to offer these state-operated ICF/MR residents community alternatives. *Id.* ¶ 72.

The provision of community supports and services to Plaintiffs and class members would be far less costly to Pennsylvania than is their continued institutionalization in state-operated ICFs/MR. Am. Comp. ¶ 77. DPW currently pays an average of approximately $228,000 per year to serve each resident of a state-operated ICF/MR. *Id.* ¶ 58. In contrast, the average per person cost of community-based residential and non-residential mental retardation services is less than $100,000. *Id.* ¶ 61.[1]

Although there is a waiting list for community-based mental retardation services in Pennsylvania, Plaintiffs and class members either are not on waiting lists for community-based mental retardation services or are not likely to be removed from the waiting lists regardless of their level of need. Am. Compl. ¶¶ 62, 63, 73.

- Defendants have never completed the form necessary to secure Plaintiff Benjamin with a place on the waiting list. *Id.* ¶¶ 63, 73(a).

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[1] Although the federal government, through the Medical Assistance program, pays more than half of the costs of services for both the state ICFs/MR and community services, *see* Am. Compl. ¶¶ 53(b), 60(e), Pennsylvania could secure an even greater federal funding match for the development of community services for state-operated ICF/MR residents under its "Money Follows the Person" Rebalancing Demonstration Project. *Id.* ¶ 78. DPW, however, has not taken advantage of that opportunity. *Id.*

- Plaintiff Grogg has actually been *removed* from the waiting list on the basis that the institution is meeting all of his needs, even though he is extremely independent and capable of living in the community with appropriate services and supports. *Id.* ¶¶ 27-29, 73(b).

- Plaintiff Edgett is identified as being the lowest level priority for the waiting list, even though he is very independent and with appropriate supports and services can live in the community. *Id.* ¶¶ 34-36, 62, 73(c).

- Even those individuals in the state-operated ICFs/MR who are placed in higher priority categories are unlikely to be provided with community services over individuals in the same categories who currently live in the community and are not institutionalized. *Id.* ¶ 73(f). Despite Pennsylvania's appropriation of funding to provide community services to nearly 5,000 people with mental retardation in the last two fiscal years (FY 2007-2009) (including approximately 1,000 who have received residential services in the community), only about 23 residents of state-operated ICFs/MR received community-based services during that period. *See id.* ¶¶ 56, 74-76.[2] The rest

[2] In contrast, approximately 76 residents of state-operated ICFs/MR died during the same period. *See* Am. Compl. ¶ 56.

were individuals who already were living in the community. *See id.* ¶¶ 75-76.

Thus, DPW does not have a waiting list to provide community alternatives to Plaintiffs and class members that moves at a reasonable pace. Am. Compl. ¶ 80. DPW has not even developed a viable integration plan -- with specific time lines and discharge benchmarks -- to develop community alternatives for residents of state-operated ICFs/MR. *Id.* ¶ 79.

Plaintiffs allege that DPW's failure to offer community supports and services to Plaintiffs and class members violates the integration mandates of Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (RA), which require public entities to provide services in the most integrated settings appropriate to their needs. Am. Compl. ¶¶ 86, 92. Plaintiffs also allege that DPW violates the ADA and RA by using methods of administration that subject them and class members to discrimination through continued unnecessary segregation and institutionalization, including, inter alia,:

- failing to effectively assess Plaintiffs and class members to determine their community support needs;
- excluding some state-operated ICF/MR residents (including Plaintiffs Benjamin and Grogg) from the waiting list for community mental retardation services and not giving the highest priority to people, like

Plaintiffs and class members, who are unnecessarily institutionalized over those who are already living in the community;

- failing to assure that state-operated ICF/MR residents have access to effective case management services (known as supports coordination);
- failing to provide state-operated ICF/MR residents and their families with adequate information about community options; and
- failing to develop and implement a viable integration plan to provide community alternatives for state-operated ICF/MR residents.

*Id.* ¶¶ 62-64, 70, 71 73, 85, 87, 93. Plaintiffs seek declaratory and injunctive relief. *Id.* ¶ 94.

The Court granted Plaintiffs' unopposed Motion for Class Certification, certifying this case to proceed on behalf of the following class:

> All persons who: (1) currently or in the future will reside in one of Pennsylvania's state-operated intermediate care facilities for persons with mental retardation; (2) could reside in the community with appropriate services and supports; and (3) do not or would not oppose community placement.

Order dated Sept. 2, 2009 at 4 (Docket # 17).

DPW has now filed a Motion to Dismiss Plaintiffs' Amended Complaint.[3] Although DPW seeks to dismiss all of Plaintiffs' ADA and RA claims, it in fact addresses only Plaintiffs' claims that DPW violated the ADA's and RA's integration mandates. These are not Plaintiffs' only ADA and RA claims. Plaintiffs also assert that DPW violates the ADA and RA by using discriminatory methods of administration. *See* discussion, *supra*, at 5-6; Am. Compl. ¶¶ 87, 93. DPW does not assert any challenge to these ADA and RA claims and, accordingly, they should not be dismissed.

## ARGUMENT

### I. STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quotation omitted); *accord Fowler v. UPMC Shadyside*, ___ F.3d ___, 2009 WL 2501662 at *4 (3d Cir. Aug. 18, 2009) (Att. A). In other words, accepting as true a plaintiff's factual allegations and all reasonable factual inferences (and excluding mere legal conclusions), a court must assess whether the plaintiff has shown a plausible claim

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[3] A class of individuals with mental retardation institutionalized in DPW's psychiatric hospitals have filed similar claims against DPW under the ADA and RA in *Jimmie, et al. v. Dep't of Public Welfare, et al.*, Civil Action No. 3:09-cv-1112-TIV (M.D. Pa.). DPW recently filed a motion to dismiss the *Jimmie* plaintiffs' ADA and RA claims on the identical grounds raised in this Motion.

for relief and not " 'the mere possibility of misconduct.'" *Fowler*, 2009 WL 2501662 at *5 (citing *Iqbal*, 129 S. Ct. at 1950); *Turner v. Pennsylvania*, Civil Action No. 07-273, 2009 WL 1858253 at *1 (W.D. Pa. June 29, 2009) (Att. B). Even after *Iqbal*, the Third Circuit has emphasized that "standards of pleading are not the same as standards of proof." *Fowler*, 2009 WL 2501662 at *8.[4] Plaintiffs in this case readily establish plausible claims for relief.

## II. PLAINTIFFS HAVE STATED ACTIONABLE CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT.

DPW contends that the Court should dismiss Plaintiffs' claims under the ADA's integration mandate. To establish a claim under the integration mandate, Plaintiffs must demonstrate that they are appropriate for and not opposed to

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[4] Notably, the *Fowler* Court interpreted the plaintiff's allegations that she had a "disability" covered by the RA and that she was subject to disability " discrimination" as factual assertions -- not legal conclusions -- that must be accepted as true. The Court had "no trouble" concluding that the plaintiff had adequately alleged a claim for employment discrimination on the basis of her disability based solely on allegations that: she had a disability; she requested a transfer to an open position; the defendant did not transfer her or contact her about that or any other open position; and she "believed [defendant's] actions were based on her disability." *Fowler*, 2009 WL 2501662 at *6. The court did not require the plaintiff, for example, to allege that a non-disabled person was given the position or any other specific evidence to support the claim that the defendant's actions were discriminatory. The court also rejected the defendant's assertion that the plaintiff had failed to adequately plead that she had a "disability." *Id.* at *7-*8. The court held that -- even after *Iqbal* -- the plaintiff was "not required, at this early pleading stage, to go into particulars about the life activity affected by her alleged disability or detail the nature of her limitations." *Id.* at *8. It was enough that she simply pleaded she was a person with a disability. *Id.* at *7.

discharge. *See* *Olmstead v. L.C.*, 527 U.S. 581, 602, 607 (1999); *Frederick L. v. Dep't of Public Welfare*, 364 F.3d 492 (3d Cir. 2004) (*Frederick L. I*). DPW concedes that the Amended Complaint satisfies these elements. DPW's Br. at 5.

A state can avoid liability under the integration mandate if it asserts and proves that the provision of community services to Plaintiffs would constitute a "fundamental alteration" of its services, programs, or activities. *See* *Olmstead v. L.C.*, 527 U.S. at 603-07; *Frederick L. I*, 364 F.3d at 492. It is well-settled in this Circuit and elsewhere that it is the state's burden to plead and prove a fundamental alteration defense once the plaintiff articulates a reasonable accommodation. *Frederick L. I*, 364 F.3d at 492 n.4. Plaintiffs have articulated a reasonable accommodation, *i.e.*, the provision of more cost-efficient community services. *See* Compl. ¶¶ 91-97, 104. DPW's primary challenges to Plaintiffs' ADA integration claim -- queue-jumping and costs -- relate solely to the fundamental alteration defense, as articulated in *Olmstead*, 527 U.S. at 603-06, and its progeny. In other words, DPW seeks to use the Complaint to definitively establish a *defense* it has not yet even pleaded. It would be inappropriate to dismiss Plaintiffs' integration mandate claims at the pleadings stage since it is DPW's burden to plead and prove a fundamental alteration defense. *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 293 (E.D.N.Y. 2008). Even assuming that the validity of this defense should be judged based on the Amended Complaint, however, DPW's arguments not persuasive.

### A. DPW's "Queue-Jumping" Argument Is Unavailing.

DPW initially contends that Plaintiffs seek to jump ahead of the existing waiting list for community mental retardation services. DPW's Br. at 5. In *Olmstead*, the Supreme Court advised that, *if certain circumstances are met*, a court should not displace unnecessarily institutionalized individuals at the top of a waiting list for community services to provide services to individuals lower on the waiting list simply because the former individuals commenced litigation. *Olmstead*, 527 U.S. at 606.[5] Although there is a general waiting list for individuals with mental retardation who live in the community, *see* Am. Compl. ¶ 62, Plaintiffs assert specific facts that demonstrate that the queue-jumping the *Olmstead* Court sought to foreclose is simply not at issue in this case. *See id.* ¶ 113(b).[6]

First, contrary to DPW's representations, Plaintiffs have alleged that the "waiting list" process is, in many ways, a sham for individuals with mental

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[5] The *Olmstead* Court was concerned about queue-jumping on a waiting list for individuals who are unnecessarily institutionalized. Unlike Plaintiffs and class members, however, almost all of the individuals on the waiting list for community mental retardation services currently live in the community and are not institutionalized. *See* Am. Compl. ¶ 73(f), 74-76. As such, Plaintiffs and class members are not seeking to jump ahead of others who are unnecessarily institutionalized.

[6] Notably, too, *Olmstead* involved only two women; in contrast, the Plaintiffs in this case are representing a now-certified class of over 1,200 individuals.

retardation who are institutionalized in state-operated ICFs/MR. Although there is a waiting list for community-based mental retardation services in Pennsylvania, Plaintiffs and class members either are not on that waiting list or are not likely to be removed from that list regardless of their level of need. Am. Compl. ¶¶ 62, 63, 73. As detailed above, DPW has never completed the form necessary to secure Plaintiff Benjamin with a place on the waiting list; Plaintiff Grogg has actually been *removed* from the waiting list on the basis that the institution is meeting all of his needs, even though he is extremely independent and capable of living in the community with appropriate services and supports; and Plaintiff Edgett is identified as being the lowest level priority for the waiting list, even though he, too, is very independent and with appropriate supports and services can live in the community. *See* discussion, *supra*, at 3-4. Even those individuals in the state-operated ICFs/MR who are placed in higher priority categories are unlikely to be provided with community services over individuals in the same categories who currently live in the community and are not institutionalized. In the last two fiscal years, DPW has provided community-based services to thousands of individuals on the waiting list, but only 23 residents of state-operated ICFs/MR have received those services during that period; the rest were individuals who already were living in the community. *See* discussion, *supra*, at 4.

Second, the existence of a waiting list *per se* is not sufficient to insulate DPW from liability. In discussing the fundamental alteration defense, the *Olmstead* Court suggested that the Court should not disrupt a waiting list *only* if the state has demonstrated that it has "a comprehensive, effectively working plan" to provide community alternatives to unnecessarily institutionalized individuals and a "waiting list that moves at a reasonable pace ...." *Olmstead*, 527 U.S. at 605-06. Plaintiff has specifically alleged that DPW does *not* have either a viable integration plan or a waiting list that moves at a reasonable pace. Compl. ¶¶ 105-106. These factual allegations -- which must be taken as true -- foreclose DPW's reliance on the mere existence of the waiting list as sufficient, in and of itself, to establish its fundamental alteration defense at the pleadings stage.[7]

**B. DPW's Cost Assertions Do Not Justify Dismissal of the Complaint.**

DPW also contends that Plaintiffs' ADA claims must be dismissed because the cost-savings alleged by Plaintiffs, *see* Compl. ¶¶ 58, 61, 77-78, do not take into account "transition" costs and because DPW cannot shift appropriations from "one line" in the budget (*e.g.*, institutional) to another (*e.g.,* community). DPW Br. at 5-6. There are several legal and factual flaws in this assertion.

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[7] Moreover, as discussed, *infra*, at 14-15, the Third Circuit has plainly established that DPW cannot escape liability without a viable integration plan, even if it ultimately establishes that immediate relief would impose a fundamental alteration.

First, there is no *evidence* or even formal allegations in this case to support DPW's factual assertions in its Brief. The Complaint alleges that it will ultimately be less costly to serve Plaintiffs and class members in the community. This is sufficient to survive a motion to dismiss. DPW cannot offer mere speculation about transition costs to definitively establish its fundamental alteration defense at the pleadings stage. In *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004), the court overturned the entry of judgment on the pleadings for the state in an ADA integration mandate case, holding, *inter alia*, that issues of costs cannot be assessed on the pleadings. *Id.* at 613-14. Similarly, in *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003), the court overturned the entry of *summary judgment* for the state on its fundamental alteration defense in an ADA integration mandate case because it could not tell "on the present record" if the state's cost concerns were valid. *Id.* at 520.[8] Surely, if an assessment of the relative costs of institutional versus community care cannot be made on summary judgment or judgment on the pleadings, it cannot be made on a motion to dismiss.

Second, any prohibition on DPW's shifting budget funds from institutional to community services would govern only DPW's actions during the current fiscal

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[8] DPW's reliance on *Williams v. Wasserman*, 164 F. Supp. 2d 591, 634 (D. Md. 2001), DPW's Br. at 5, is misplaced. *Williams* was decided after a 32-day trial on the merits -- not on a motion to dismiss. *Id.* at 595. In reaching its conclusion, the court looked to a number of factors based on extensive evidence presented by the parties and did not rely on mere *allegations* about "transitional costs."

year. As the Third Circuit observed, this does not foreclose DPW from shifting the allocation of funding in future budget years to end the unnecessary institutionalization of Plaintiffs and the class. *Helen L. v. DiDario*, 46 F.3d 325, 338 n.24 (3d Cir.), *cert. denied*, 516 U.S. 813 (1995).

Third, even assuming that DPW can ultimately prove that it will incur some costs in providing community alternatives to Plaintiffs and class members, the Third Circuit has established in a trio of cases -- all of which involved DPW -- that such cost issues are not, by themselves, sufficient to establish a fundamental alteration defense.

In *Frederick L. I*, the Court held in 2004 that cost considerations alone were not enough for DPW to establish a fundamental alteration defense. Although the Court concluded that the evidence supported a fundamental alteration defense, 364 F.3d at 500, it recognized that "[i]t is a gross injustice to keep these disabled persons in an institution notwithstanding the agreement of all relevant parties that they no longer require institutionalization." *Id.* As such, the Court required DPW to "make a commitment to action in a manner for which it can be held accountable by the courts."[9]

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[9] Indeed, as the Third Circuit and other courts have recognized, the fact that some higher costs are involved in compliance with the ADA does not necessarily excuse compliance. *Pennsylvania Protection and Advocacy, Inc. v. Pennsylvania Dep't of Public Welfare*, 402 F.3d 374, 380 (3d Cir. 2005); *Frederick*

The following year, in *Pennsylvania Protection and Advocacy, Inc. v. Pennsylvania Dep't of Public Welfare*, 402 F.3d 374 (3d Cir. 2005), the Third Circuit wrote:

> A state cannot meet an allegation of noncompliance [with the ADA's integration mandate] 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.

*Id.* at 381 (emphasis in original).

Subsequently, on appeal following the remand of *Frederick L. I*, the Court elaborated on the type of "commitment" that DPW must make to avoid liability under the ADA's integration mandate. The Court held that DPW must adopt a "viable integration plan" that specifies "the time-frame or target date for patient discharge" and the "approximate number of patients to be discharged each time period ...." *Frederick L. v. Dep't of Public Welfare*, 422 F.3d 151, 160 (3d Cir. 2005) (*Frederick L. II*). The Court explained:

> DPW may not avail itself of the "fundamental alteration" defense to relieve its obligation to deinstitutionalize eligible patients without establishing a plan that adequately demonstrates a reasonably specific and

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*L. I*, 364 F.3d at 495-96; *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1183 (10th Cir. 2003); *Messier v. Southbury Training School*, 562 F. Supp. 2d 294, 323, 345 (D. Conn. 2008).

> measurable commitment to deinstitutionalization for which DPW may be held accountable.
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> * * *
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> DPW's failure to articulate this commitment in the form of an adequately specific comprehensive plan for placing eligible patients in community-based programs by a target date places the "fundamental alteration defense" beyond its reach.

*Id.* at 157, 158-59.

Four years after *Frederick L. II*, DPW still has no viable integration plan for Plaintiffs and class members. Am. Compl. ¶ 79. This factual allegation -- which must be accepted as true -- wholly undermines DPW's speculative assertions about the costs of compliance with the integration mandate.

### C. Plaintiffs Can Enforce the Integration Mandate.

DPW contends -- in a single sentence -- that Plaintiffs cannot rely on the integration regulation in the ADA, 28 C.F.R. § 35.130(d). DPW's Br. at 7 (citing *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001)). This argument, too, is unavailing for a number of reasons.

Plaintiffs need not rely on the ADA's integration regulation to challenge DPW's failure to provide them with services in the most integrated settings appropriate to their needs. In enacting the ADA, Congress recognized that, historically, "society has tended to isolate and segregate individuals with disabilities" and that "discrimination against individuals with disabilities persists in

such critical areas as ... institutionalization ...." 42 U.S.C. § 12101(a)(2)-(3). Given these broad findings, the *Olmstead* Court recognized that the "discrimination" prohibited by Title II of the ADA, 42 U.S.C. § 12132, is sufficiently expansive to encompass a state's failure to provide community services to individuals who are unnecessarily institutionalized, such as Plaintiffs and class members. *Olmstead*, 527 U.S. at 598, 600-01.

Moreover, the Supreme Court made clear that, when Congress intends a statute to be enforced through a private cause of action, it intends the authoritative regulatory interpretations of that statute to be enforced as well. *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001). Congress intended Title II of the ADA to be enforced through private rights of action. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002). Thus, authoritative, regulatory interpretations of Title II of the ADA can be enforced as well. The Third Circuit has explained that the ADA's integration regulation, 28 C.F.R. § 35.130(d), not only is an authoritative interpretation, but that Congress intended it to have the "force of law." *Helen L. v. DiDario*, 46 F.3d at 332-33. Congress directed the Department of Justice (DOJ) to promulgate regulations under Title II of the ADA and specifically directed DOJ to model those ADA regulations on specific regulations promulgated under the RA. *Id.* at 331-32 (citing 42 U.S.C. § 12134). The integration regulation that DOJ promulgated under Title II of the ADA, 28 C.F.R. § 35.130(d), is "almost identical to the section

504 regulation" (called the "coordi nation regulations") that Congress instructed DOJ to follow. *Id.* at 332. "As Congress voiced i ts approval of that coordinati on regulation, 28 C.F.R. § 35.130(d) has the force of law." *Id.*

Moreover, the Third Circuit has explained that, even after *Sandoval*, federal regulations that "define or flesh out the c ontent of a specific right" under a statute can be relied on to enforce that statutory right. *South Camden Citizens in Action v. New Jersey Dep't of Environmental Protection* , 274 F.3d 771, 790 (3d Cir. 2001), *cert. denied*, 536 U .S. 939 (2002) . At the very least, the integration mandate fleshes out the ADA' s statutory prohibi tion on "discrim ination" given the broad scope of "discrim ination" that Congress s ought to address, including unnecess ary segregation and institutionalization. *See Olmstead*, 527 U.S. at 598, 600-01; *Helen L.*, 46 F.3d at 332-33; 42 U.S.C. §§ 12101(a)(2)-(3).

Finally, virtually every court th at has addressed the issue post- *Sandoval* has agreed that Plaintiffs can enforce the ADA's integration mandate. *See Brantley v. Maxwell-Jolly*, Civil Action No. C09-3798 SBA, 2009 WL 2941519 at *11-*12 (N.D. Cal. Sept. 10, 2009) (Att. C); *Crabtree v. Goetz*, Civil Action No. 3:08-0939, 2008 WL 5330506 at *24 (M.D. Tenn. Dec. 19, 2008) (Att. D); *Grooms v. Maram*, 563 F. Supp. 2d 840, 852 & n.2 (N.D. Ill. 2008) ; *Frederick L. v. Dep't of Public Welfare*, 157 F. Supp. 2d 509, 538-39 (E.D. P a. 2001). *Contra Zatuchni v. Richman*, Civil Action No. 07-cv-4600, 2008 WL 3408554 at *11-*12 (E.D. Pa.

Aug. 12, 2008) (Att. E) (without analyzing the regulatory language, the court held that the integration mandate did not construe a "personal right" so as to be enforceable, even though the language is directed explicitly and specifically at individuals with disabilities). DOJ, too, has opined that the ADA's integration regulation is enforceable. *See* Brief of United States as *Amicus Curiae* at 8-20, *Long v. Benson*, No. 08-16261-AA (11th Cir. Apr. 2, 2009), *available at* http://www.usdoj.gov/crt/briefs/longbenson.pdf.

## III. PLAINTIFFS HAVE STATED ACTIONABLE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT.

DPW's challenges to Plaintiffs' integration mandate claim under Section 504 of the RA, 29 U.S.C. § 794, appear trapped in a time warp, relying primarily on cases that were decided prior to *Olmstead* and that, most importantly, did not clearly address the scope of the RA's integration regulation, 28 C.F.R. § 41.51(d). DPW's Br. at 7. DPW's arguments simply do not reflect the current state of the law in this Circuit and elsewhere.

The Third Circuit in *Clark v. Cohen*, 794 F.2d 79, 85 n.3 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986), indicated that Section 504 of the RA did not require states to provide community services, but the Court subsequently explained the narrow nature of that ruling. In *Helen L.*, the Third Circuit noted that *Clark* was not "concerned with the integration mandate of the ADA *or the Rehabilitation*

*Act*." *Helen L.*, 46 F.3d at 334 (emphasis added).[10] DPW inexplicably does not cite *Clark*, but the cases on which it does rely are inapposite because, like *Clark*, those cases did not clearly involve the RA's integration regulation. *See Phillips v. Thompson*, 715 F.2d 365, 368-69 (7th Cir. 1983) (failing to identify what, if any, RA regulations plaintiffs relied upon); *Kentucky Ass'n for Retarded Citizens v. Conn*, 674 F.2d 582, 585 (6th Cir.) (relying on provision concerning discriminatory employment tests), *cert. denied*, 459 U.S. 1041 (1982).[11]

While DPW dwells on decisions from long ago, it ignores more recent jurisprudence in this Circuit and elsewhere that explicitly allows use of the integration mandate of Section 504 of the RA to secure community alternatives for people who are unnecessarily institutionalized. In *Frederick L. I*, the Court, in a case filed under the integration mandates of the ADA *and RA*, wrote: "We have construed the provisions of the RA and ADA in light of their close similarity of

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[10] DPW cites *Helen L.*, 46 F.3d at 331, for the position that the Third Circuit recognized that Section 504 is "practically a dead letter as a remedy for segregated public services." DPW Br. at 8. In fact, this quote is from a law review article to which the Circuit cited to indicate that the ADA was enacted due to perceived shortcomings in the RA. *Helen L.* did not decide whether the RA could ever be used as a vehicle to secure community alternatives for people who are unnecessarily institutionalized.

[11] DPW's citation to *Connor v. Branstad*, 839 F. Supp. 1346, 1356 (S.D. Iowa 1993), DPW's Br. at 7, also is unavailing. The court in that case rejected not only the plaintiffs' Section 504 integration mandate claims, but also those asserted under the ADA, *id.* at 1357-58 -- a decision that was repudiated by *Olmstead*. Plainly, the court's analysis in *Connor* is questionable.

language and purpose." *Frederick L. I*, 364 F.3d at 491 (citing *Helen L.*, 46 F.3d at 330-32). Thus, "where appropriate for the patient, *both the ADA and RA* favor integrated, community-based treatment over institutionalization." *Id.* at 491-92. This conclusion has been embraced by other appellate courts. *See Radaszewski*, 383 F.3d at, 607; *Fisher*, 335 F.3d at 1179 n.3. The Third Circuit's ruling definitively establishes Plaintiffs' right to proceed with their integration mandate claims under Section 504 of the RA.

DPW also contends that Congress did not intend to make Section 504 of the RA equivalent to Title II of the ADA since Congress amended the RA to incorporate the employment provisions of Title I of the ADA, but did not incorporate into the RA the provisions of Title II of the ADA. DPW's Br. at 8 (citing 29 U.S.C. § 794(d)). Congress, however, had no need to take special steps to make Section 504 equivalent to Title II of the ADA since it had already done so. In directing that DOJ's Title II regulations must follow specific RA regulations, Congress assured that the rights under those statutes are equivalent. *See* 42 U.S.C. § 12134; *Helen L.*, 46 F.3d at 331-33.

In a footnote and again relying on *Sandoval*, DPW asserts that Plaintiffs cannot rely on the RA's Section 504 regulation, 28 C.F.R. § 41.51(d). DPW Br. at 8 n.2. For the same reasons discussed previously with respect to the ADA's

integration regulation, the RA's integrat ion mandate is enforceable as well. *See* discussion, *supra*, at 16-19.

The RA's statutory prohibiti on on "di scrimination," like the ADA's, is sufficient to establish an integration m andate claim regardless of any regulation. As in the ADA, the RA includes specific findings that people with disabilities "continually encounter various forms of discrim ination in such critical areas as ... institutionalization" and that the "goals of the Nation properly include " assuring that people with disabilities have "full in clusion and integration in society ...." 29 U.S.C. §§ 701(a)(5)-(6) . These findi ngs were added to the RA following enactment of the ADA to further assure t hat they would be construed consistentl y. Rehabilitation Act Amendments of 1992, Pub. L. 102-569, § 101, 106 Stat. 4344 (1992). Even prior to these amendments to the RA, the Supreme Court recognized that in enacting the RA Congress attempte d to reach disabi lity-based discrimination that is based on "thoughtlessness a nd indifference -- of benign neglect," including "'shameful oversights,' which caused the handicapped to li ve among society 'shunted aside, hidden, and ignore d.'" *Alexander v. Choate*, 469 U.S. 287, 295-96 (1985). Thus, since the conduct which is the subject of Plaintiffs' Complaint -- unnecessary institutionalization -- is precisely the sort of conduct that Congress intended to reach, Plaintiffs' RA claim is va lid, and the RA regulation does not expand the scope o f the stat utory prohibition on discrimination. *See*

*Frederick L.*, 157 F. Supp. 2d at 537-38 (rejecting *Sandoval* challenge to RA integration mandate claim).[12]

## CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

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[12] In addition, both the Supreme Court and Third Circuit have emphasized that the RA's regulations are entitled to controlling weight in interpreting the statute. *See* *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170-71 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998).

**LOCAL RULE 7.8(b)(2) CERTIFICATE**

I certify under penalty of perjury that Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss complies with Local Rule 7.8(b)(2) because it contains 4,786 words (excluding the Table of Contents and Table of Citations) based on the processing system used to prepare the Brief (Word 2003).

/s/ *Robert W. Meek*
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**CERTIFICATE OF SERVICE**

I, Robert W. Meek, hereby certify that Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, Attachments, and proposed Order were filed with the Court's ECF system on September 30, 2009 and are available for viewing and downloading from the ECF system by the following counsel who consented to electronic service:

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