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

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 Civil Action No. 1:09-cv-1182-JEJ Class Action Complaint Filed June 22, 2009
Plaintiffs,	Judge Jones
v.	
DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA and HARRIET DICHTER, in her official capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,	

BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

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PROCEDURAL HISTORY

Plaintiffs, individuals with mental retardation, are institutionalized in intermediate care facilities for persons with mental retardation (ICFs/MR) operated by Defendants, the Department of Public Welfare and the Secretary of Public Welfare (collectively, DPW).[1] Plaintiffs filed this lawsuit in June 2009 to challenge DPW's failure to offer them appropriate community supports and services in violation of Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (RA). Plaintiffs seek only declaratory and injunctive relief.

The Court certified this case to proceed on behalf of the following class pursuant to Federal Rule of Civil Procedure 23(b)(2):

> 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.

Class Certification Order (Sept. 2, 2009) (Docket # 17).

The Court denied Defendants' Motion to Dismiss, Memorandum and Order (Jan. 25, 2010), and a Motion to Intervene filed by families or guardians of nine state ICF/MR residents. Memorandum and Order (Mar. 10, 2010), app. pending.

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[1] Pursuant to Fed. R. Civ. P. 25(d), Harriet Dichter was automatically substituted for Defendant Richman, who she succeeded in office as Secretary of Public Welfare.

STATMENT OF FACTS

A. Plaintiffs' and Class Members' Unnecessary Institutionalization

The five named Plaintiffs are individuals with mental retardation ranging in age from 34 to 52 years old. Pls.' SUF ## 1-5.[2] The Plaintiffs have been institutionalized in state ICFs/MR (also known as state centers) for periods ranging from 20 to 44 years. *Id.* DPW's five state-operated ICFs/MR are licensed facilities funded through the Medical Assistance program, under which the federal government pays more than half the costs. Pls.' SUF ## 12-15. As of September 30, 2009, the five state ICFs/MR housed a total of 1,224 residents. *Id.* # 17.

DPW also funds an array of community-based mental retardation services, including residential services (such as group homes) and day programs (such as vocational training and socialization). Pls.' SUF # 28. Community-based mental retardation services in Pennsylvania are funded primarily through the Medical Assistance program, specifically two home and community-based waivers known as the Consolidated Waiver and the Person/Family Directed Support (P/FDS) Waiver. *Id.* # 30.[3] The federal government pays the same percentage of the costs

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[2] References to "Pls.' SUF" are to the Statement of Undisputed Material Facts filed in support of Plaintiffs' Motion for Summary Judgment, which includes citations to admissible evidence.

[3] Medical Assistance home and community-based waivers are authorized by 42 U.S.C. § 1396n(c). Waivers allow states to access Medical Assistance funding

of these waiver services as it does for services in state ICFs/ MR. *Id.* ## 32, 33. Although the Waivers lim it the num ber of individuals who can receive services, the federal government has readily approv ed Pennsylvania's requests to amend the Waivers to increase those caps. *Id.* # 37.

Residents of state ICFs/MR ar e more segregated than individuals with mental retardation who receive co mmunity-based services. Pl s.' SUF # 52. State ICFs/MR are locat ed in more rural parts of the state. *Id.* ## 12, 52. Most state ICF/MR residents live in units ranging fr om 16 to 20 people , usually receive day services on the grounds of the facilities, and do not have as m uch opportunity as those living in the comm unity to interact with a wide range of people and have access to community services. *Id.* # 52.

DPW's stated policy is to provide in dividuals with m ental retardation services in the co mmunity. Pls.' SUF # 50. Indeed, Pennsylvania has em braced the policy of "norm alization," which "def ines the right of the indivi dual with mental retardation to live a life which is as close as possible in all aspects to the life which any m ember of the community might choose." *Id.* # 48; 55 Pa. Code § 6400.1. Normalization is based on rese arch that shows tha t people with mental retardation do significantly better if they receive services in a "normal" environ-

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to provide services that could not othe rwise be funded under the state Medical Assistance plan. Pls.' SUF # 31.

ment, *i.e.*, the environment in which non-disabled people typically live. *Id.* # 49. Individuals who live in the state ICFs/MR cannot learn to live a normal life because institutions are abnormal settings, and individuals who live in them come to rely on the structures of the institutionalized routine. *Id.* # 51.

There are no types of services that DPW provides in its state ICFs/MR that are not currently provided to individuals with mental retardation who live in the community. Pls.' SUF # 46. According to DPW's Deputy Secretary for Developmental Programs, "although the average acuity in the state [ICF/MR] is significantly higher than the average acuity in the community, there is no person we are serving in the state [ICFs/MR] for whom we are not serving a very similar person in the community." *Id.* # 47.

Most significantly, Defendants have admitted that *all* persons with mental retardation who are institutionalized in the state ICFs/MR, including the named Plaintiffs, could live in more integrated community settings if they received appropriate services. Pls.' SUF ## 43-45. Accordingly, Plaintiffs and class members are unnecessarily segregated in institutional settings.

B. <u>Opposition to Discharge</u>

Plaintiffs and their involved families do not oppose discharge to community-based programs. Pls.' SUF ## 53-60. Indeed, they have expressed an affirmative desire to move to the community. *Id.* ## 54-58, 60. In many cases, this is based on

the desire of Plaintiffs and family members to live closer to each other, particularly as the Plaintiffs' family members age. *Id.* ## 54-56, 60, 137. There are also other state ICF/MR residents who have affirmatively asked to live in the community, particularly to be closer to their aging parents. *Id.* # 135.

After this lawsuit was filed, DPW reviewed the opinions of state ICF/MR residents and their families regarding community placement. Pls.' SUF ## 61-62. According to this review, nearly 1,100 state ICF/MR residents either expressed that they were not opposed or did not otherwise indicate any opposition to discharge. *Id.* # 63. The families of 331 state ICF/MR residents either expressed that they were not opposed or did not otherwise indicate opposition to discharge. *Id.* # 64. Thus, at least 27 percent of state ICF/MR residents' families are not opposed to discharge.

DPW's assessment likely overstated opposition by families. First, the assessment was based essentially on a paper review of existing documentation. Pls.' SUF # 62. Second, there are plainly instances in which DPW staff incorrectly concluded that family members were opposed to discharge. *Id.* ## 65-69. Third, it is impossible to assess with accuracy the number of state ICF/MR residents and their families who are opposed to discharge since they generally lack the information needed to make an informed choice. *Id.* ## 71, 72. Apprehension about community services is not uncommon, but experience and research have

demonstrated that most families are satisfied with community services after their relatives are discharged from state institutions. *Id.* # 70. Accordingly, Defendants admit that the opposition of many family members to the discharge of their relatives in state ICFs/MR could be overcome through effective education about community services. *Id.* # 71.

C. DPW's Failure to Develop and Implement an Integration Plan for State ICF/MR Residents and Its Effective Exclusion of Those Residents from the Community Mental Retardation System.

Defendants admit that they have failed to offer community services to Plaintiffs and other state ICF/MR residents who are appropriate for and not opposed to discharge. Pls.' SUF # 74. Defendants also admit that they have neither adopted nor implemented a plan to discharge to community placements any state ICF/MR residents who are not opposed to discharge that includes specific benchmarks to identify the number of state ICF/MR residents for whom DPW will provide community mental retardation services and the time lines in which those services will be provided. *Id.* # 100. Defendants further admit that they do not have a waiting list to provide community supports and services to residents of state ICFs/MR that moves at a reasonable place. *Id.* # 99. Indeed, in the five fiscal years between FY 2004-2005 and 2008-2009, inclusive, only 54 state ICF/MR residents were discharged to community-based services (while 200 died during the same time period). *Id.* ## 20, 22.

There is a waiting list for community mental retardation services in Pennsylvania. Pls.' SUF # 75. When individuals who are not institutionalized in ICFs/MR apply for community mental retardation services, DPW's agents complete a "Prioritization and Urgency for Need of Services (PUNS)" form to determine the person's waiting list category -- "emergency" (*i.e.*, needs services immediately); "critical" (*i.e.*, needs services within two years); or "planning" (*i.e.*, will need services in more than two but fewer than five years). *Id.* ## 75-77.

State ICF/MR residents, in contrast, do not automatically have PUNS forms completed to assess their waiting list category. *See* Pls.' SUF ## 80-81. To the contrary, only 113 of the approximately 1,200 state ICF/MR residents have had PUNS forms completed. *Id.* # 81. Of those 113 individuals, seven are on the emergency waiting list, six are on the critical waiting list, 65 are on the planning waiting list, and 35 have been determined to be fully served. *Id.*[4]

Individuals who have not had PUNS forms completed or whose PUNS forms conclude that they are "fully served" -- like 94 percent of state ICF/MR residents -- are not on the waiting list for community mental retardation services at

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[4] Plaintiff Benjamin has never had a PUNS form completed. Pls.' SUF # 83. Plaintiff Grogg, despite the undisputed fact that he is extremely independent and wants to be discharged, has been categorized on his PUNS form as "fully served" in the state ICF/MR. *Id.* # 82. Plaintiffs Edgett, Baldwin, and Beard have been placed, respectively, in the planning, critical, and emergency categories. *Id.* ## 84, 85.

all. Pls.' SUF # 78. Moreover, Defendants admit that even the very few state ICF/MR residents who have had PUNS completed and are placed on the waiting list are unlikely ever to be removed from the waiting list and provided with community services regardless of their level of need. *Id.* ## 84-86, 88.

While only 54 state ICF/MR residents were discharged between FY 2004-2005 and FY 2008-2009, inclusive, Pls.' SUF ## 22, 92, DPW received $316.4 million during that period to fund community services for 6,784 people with mental retardation who were on the waiting list. *Id.* # 89. This included funding to provide 2,488 individuals with residential services in the community. *Id.* # 90. DPW received additional funding to serve 793 individuals on the waiting list in FY 2009-2010. *Id.* # 93. In addition, the Governor has requested funding to serve an additional 150 individuals on the waiting list in FY 2010-2011. *Id.* # 94. It is not expected that the waiting list funding for FY 2009-2010 or 2010-2011 will be used to provide community services to any state ICF/MR residents. *Id.* # 95.

In allocating waiting list expansion funds, Defendants have consciously and continually chosen to use virtually all of those funds to provide services to non-institutionalized individuals rather than to use any portion of the money to provide community services for state ICF/MR residents. Pls.' SUF # 104.[5] This decision is

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[5] Community services for most of the state ICF/MR residents who have been discharged in recent years has been funded through non-waiting list

not based on budget constraints, since it was implemented even when DPW received significant funding to provide residential and non-residential services for thousands of individuals on the waiting list. *See id.* ## 89-90, 92-95, 103. Some of the more than $316 million that has been allocated since FY 2004-2005 to fund community mental retardation services for individuals on the waiting list have been used to provide community services to individuals who are in truly emergency situations, but many of the more than 7,500 individuals who have received community services were not in such situations. For example, 2,160 of the 6,200 individuals on the waiting list who received community services between FY 2006-2007 and FY 2009-2010, inclusive, were youngsters who were graduating from school, most of whom are not in imminent danger. *Id.* # 91.

Individuals on the waiting list can also be provided with community services when vacancies in existing services arise due to deaths or other reasons. *See* Pls.' SUF ## 97. Each year, approximately 700 to 750 vacancies in the Consolidated Waiver arise, about two-thirds of which are in residential programs. *Id.* # 96. DPW has instructed the Administrative Entities (the local agencies that contract with DPW to implement the Waivers) to consider only individuals who are on or would meet the criteria for the emergency waiting list when filling vacancies,

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expansion initiatives, such as the closure of Altoona Center. *See* Pls.' SUF # 92, 110.

which excludes almost all state ICF/MR residents. *Id.* ## 38, 81, 97. Defendants have been unable to provide any evidence that any state ICF/MR resident has been discharged to a vacancy in an existing community program in the last 10 years. *Id.* # 98.

D. The Costs and Savings of Providing Community Services to Plaintiffs and Class Members.

The average cost to provide services to each resident in a state ICF/MR in FY 2008-09 was $228,000 per resident. Pls.' SUF # 23. That cost will increase to $240,000 per person in FY 2009-2010 and is expected to further increase to $256,000 per person in FY 2010-2011 -- a 12 percent increase in just two years. *Id.* ## 23, 24.[6] The costs to operate the state ICFs/MR increase annually even though the population at those facilities continues to decline each year. *Id.* # 25.[7]

DPW currently does not have information concerning how much it would cost to provide community services to the remaining state ICF/MR residents. Pls.' SUF # 112. The average annual cost to serve the 58 individuals most recently

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[6] DPW also funds many privately-operated ICFs/MR that serve approximately 2,500 Pennsylvanians. Pls.' SUF # 26. The average annual cost to provide services to residents in the privately-operated ICFs/MR is about $138,000 per person -- over $100,000 per person less than the cost of the state ICFs/MR. Pls.' SUF # 27.

[7] The population at the state ICFs/MR is expected to fall to 1,190 by July 2010, due almost exclusively to resident deaths. Pls.' SUF ## 18, 21.

discharged from the state ICFs/MR is $166,000 per person. *Id.* # 113.[8] Further, the services for approximately 75 percent of those 58 individuals cost less than $169,000 per person annually. *Id.* # 116.

Although there can be no dispute that the average cost to provide community services to state ICF/MR residents is far lower than the average cost to continue to provide them with institutional care, Defendants have contended that DPW would incur "transition costs" when moving people to the community. Transition costs refer to the money spent during the short-term period when DPW must fund services to individuals in state institutions while at the same time it must fund the development of community services to enable their discharge (*e.g.*, finding a community home, hiring staff). Pls.' SUF # 120.

It is undisputed, though, that transition costs are followed by savings. *See* Pls.' SUF ## 123-124. Although DPW has no information about what, if any, transition costs it incurred when it previously closed state ICFs/MR, plans developed by DPW to provide community services to residents of Selinsgrove Center and Hamburg Center showed that DPW would incur some costs (in state

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[8] This figure may be somewhat inflated since it includes 18 residents from Philadelphia and 10 from Allegheny County, which have higher costs than elsewhere in Pennsylvania. Pls.' SUF # 114. Moreover, the average cost in FY 2008-2009 to provide community services to individuals discharged from the state ICFs/MR between 1999 and 2002 was $120,000 per person. *Id.* # 118.

dollars) in the first two years, but would begin realizing savings (of state dollars) in the third year, and those savings would continue to increase each year since the costs of state ICF/MR services are rising faster than the costs of community services. *Id.* ## 122-124. These ever-increasing savings could be used to expand funding to provide services to individuals on the waiting list who live in the community. *Id.* # 125. Nevertheless, DPW chose not to implement the Selinsgrove/Hamburg closure plans, in whole or in part, in favor of maximizing the funding available to expand services for people on the waiting list who live in the community, even though it would have cost only about $6 million in state dollars in FY 2008-2009 to do so, and DPW received $83 million that year to provide services to individuals on the waiting list. *Id.* ## 126, 127.

QUESTIONS INVOLVED

1. Does DPW violate the integration mandates of the ADA and RA by failing to offer community services to state ICF/MR residents who are not opposed to discharge?

2. Does DPW violate the ADA and RA by using methods of administration that have the effect of continuing to unnecessarily segregate state ICF/MR residents who are not opposed to discharge?

3. What permanent injunctive relief is appropriate to remedy Defendants' continued violations of the ADA and RA?

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Smith v. Johnson & Johnson*, 593 F.3d 280, 284 (3d Cir. 2010). Facts are "material" only if they might "affect the outcome of the case under governing law." *Id.* In assessing a summary judgment motion, the Court must view the facts in the light most favorable to the non-moving party. *Rite Aid of Pennsylvania, Inc. v. United Food and Commercial Workers Union*, 595 F.3d 128, 131 (3d Cir. 2010). "However, 'the mere existence of *some* factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.'" *Bjorgung v. Whitetail Resort, LP*, 550 F.3d 263, 268 (3d Cir. 2008) (emphasis in original; citation omitted).

II. DEFENDANTS VIOLATE THE INTEGRATION MANDATES OF THE ADA AND RA BY FAILING TO OFFER COMMUNITY SERVICES TO STATE ICF/MR RESIDENTS WHO ARE NOT OPPOSED TO DISCHARGE.

A. The ADA and RA Integration Mandates.

Title II of the ADA prohibits public entities, such as DPW, from excluding persons with disabilities from participating in or denying the benefits of services, programs, or activities, or otherwise discriminating against such individuals. 42 U.S.C. § 12132. This provision "largely mirrors Section 504 of the [Rehabilitation

Act (RA)]," 29 U.S.C. § 794(a), which applies to federally-funded programs, and thus the Third Circuit has "construed the provisions of the RA and the ADA similarly in light of their close similarity of language and purpose." *Frederick L. v. Dep't of Public Welfare*, 364 F.3d 487, 491 (3d Cir. 2004) (*Frederick L. I*); *accord Benjamin v. Dep't of Public Welfare*, slip op. at 8 (M.D. Pa. Jan. 25, 2010).[9]

"The ADA['s] and RA's anti-discrimination principles culminate in their integration mandates [28 C.F.R. §§ 35.130(d), 41.51(d)], which direct states to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." *Frederick L. I*, 364 F.3d at 491. The integration mandate requires the provision of services to persons with disabilities in " 'a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.' " *Id.* (quoting 28 C.F.R. pt. 35, App. A, p. 450 (1998)). "In short, where appropriate for the patient, both the ADA and RA favor integrated, community-based treatment over institutionalization." *Id.* at 492.

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court interpreted the ADA's integration mandate. It unequivocally held that unnecessary institutionalization and isolation of individuals with disabilities constitutes discrimination

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[9] Since the ADA and RA are construed similarly, Plaintiffs' subsequent references to the "ADA" will mean both the ADA and RA.

under the ADA. *Id.* at 600; *accord* *Helen L. v. DiDario*, 46 F.3d 325, 333 (3d Cir.), *cert. denied*, 516 U.S. 813 (1995). The Court concluded that the ADA's prohibition on discrimination may require that states provide services to persons with disabilities in community settings rather than in institutions. *Olmstead*, 527 U.S. at 587. The Court recognized, however, that the public entity's obligations are "not boundless." *Id.* at 603. Writing for a plurality, Justice Ginsburg noted that the integration mandate is qualified by the ADA's "reasonable modification" and "fundamental alteration" provisions, 28 C.F.R. § 35.130(b)(7), which provide that a public entity need not make modifications that would fundamentally alter the nature of the service, program, or activity. *Id.* at 603.

B. The Undisputed Facts Demonstrate that State ICF/MR Residents Are Unnecessarily Institutionalized, Many Are Not Opposed to Community Placement, and Reasonable Modifications Are Available.

Olmstead identified three elements in an integration mandate case: (1) that community placement is appropriate for the individual; (2) that the transfer to a more integrated setting is not opposed by the individual; and (3) that the placement in a more integrated setting can be reasonably accommodated. *Olmstead*, 527 U.S.

at 587, 607; *accord* *Frederick L. I*, 364 F.3d at 492. Plaintiffs readily establish each of the elements on which they have the burden of proof.[10]

1. Community Placement Is Appropriate.

The plain language of the integration mandates does not require proof that a person is receiving inappropriate or substandard services in the institutional setting. Congress made a determination that as between two appropriate settings -- an institution or the community -- the community is the better choice *per se* because people with disabilities should live in integrated settings just as do non-disabled people. As the *Olmstead* Court explained:

> Recognition that unjustified institutional isolation of persons with disabilities is discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. [citations omitted]. Second, *confinement in an institution severely diminishes the everyday life activities of individuals*, including family relations, social contacts, work options, economic

[10] It is undisputed that Plaintiffs and class members are qualified individuals with disabilities protected by the ADA and RA since they have an impairment, mental retardation, that substantially limits one or more major life activities and are eligible for community mental retardation services. Pls.' SUF ## 7, 29; 29 U.S.C. § 705(20)(B); 42 U.S.C. §§ 12102(1)(A), 12131(2). It also is undisputed that Defendant DPW, administered by Defendant Dichter, must comply with Title II of the ADA and Section 504 of the RA since it is a department of a state government that receives federal funding. Pls.' SUF ## 8, 10, 11; 29 U.S.C. § 794(b); 42 U.S.C. § 12131(1)(B).

> independence, educational advancement, and cultural enrichment.

Olmstead, 527 U.S. at 600-01 (emphasis added).

Defendants admit that all state IC F/MR residents could live in the community if they received appropriate services. *See* Pls.' SUF ## 43-45. There also is no dispute that community settings would be more integrated than the state ICFs/MR in which the Plaintiffs and class members reside. *See* Pls.' SUF # 12, 52. The undisputed material facts thus demonstrate that Plaintiffs and class members are unnecessarily segregated in institutional settings and that community placement is appropriate.[11]

2. Plaintiffs and Many State ICF/MR Residents Are Not or Would Not Be Opposed to Community Placement.

The *Olmstead* Court indicated that the integration mandate does not require the state to transfer from institutional to community-based services individuals who are "opposed" to such a transfer, 527 U.S. at 587, since there is no "federal requirement that community-based treatment be imposed on patients who do not

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[11] Although state ICF/MR residents have some opportunities to engage in community activities, the appropriate inquiry is whether a particular setting "'enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.'" *Frederick L. I*, 364 F. 3d at 491 (citation omitted); *accord Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 320 (E.D.N.Y. 2009). It is undisputed that state ICF/MR residents do not have as much opportunity as those living in the community to interact with a wide range of people and to have access to community activities. Pls.' SUF # 52.

desire it." *Id.* at 602. The undisputed facts demonstrate that the named Plaintiffs and their involved family members are not opposed to community placement. *See* Pls.' SUF ## 53-60. Moreover, an assessment of the views of state ICF/MR residents and their families toward community placement indicate that there was no opposition to community placement expressed by about 331 families. *See* Pls.' SUF ## 61-64. *Olmstead*'s language concerning opposition to community placement, therefore, does not foreclose relief on behalf of these individuals.

DPW's survey likely overstated opposition by family members. *See* Pls.' SUF ## 65-69, 70-72. Moreover, Defendants admit that opposition expressed by many state ICF/MR residents and families does not necessarily reflect an informed choice. Pls.' SUF # 71. It is undisputed that DPW does not provide state ICF/MR residents and their families with the information they need to understand their community options and that, if they received effective education about those options, they might not be opposed to discharge. *See* Pls.' SUF ## 71-73.

The *Olmstead* Court did not clarify what constituted "opposition" to community placement. At minimum, though, individuals with disabilities must be able to make *informed* choices. *See* HCFA, *Developing Comprehensive Effectively Working Plans - Initial Technical Assistance Recommendations* at 8 (Jan. 14, 2000), *available at* http://www.cms.gov/smdl/downloads/smd011400c.pdf. State ICF/MR residents and their families should be provided with "accurate information

and a meaningful choice" about community options before they are definitively determined to be opposed to discharge. *See* *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 267 (E.D.N.Y. 2009), *app. pending*. Individuals who are institutionalized and appropriate for discharge have the right to make informed choices, and Defendants cannot use uninformed or fear-based resistance to discharge as a shield against liability. Such individuals and their involved families must be provided with comprehensive education about community services, including the opportunity to visit specific community placements, in order to allow them to make an informed decision as to whether they oppose discharge. *See* *Disability Advocates, Inc. v. Paterson*, Civil Action No. 03-CV-3209, 2010 WL 786657 at *3 (E.D.N.Y. Mar. 1, 2010) (agreeing in integration mandate case that it was appropriate to provide unnecessarily segregated individuals with information about community placement in a comprehensive, in-depth, multi-faceted manner to assess their opposition to discharge), *app. pending*.[12]

[12] The Class in this case excludes individuals who do or would oppose community placement. Plaintiffs do not ask the Court to grant any relief that would force community placement on state ICF/MR residents who are opposed to discharge. Appropriate relief, however, must include the provision of necessary education about community options to enable state ICF/MR residents and their families to make an informed decision.

3. Reasonable Modifications Are Possible.

The third, and last, requirement for Plaintiffs to establish liability under the integration mandates is to articulate a possible reasonable modification. *Frederick L. I*, 364 F.3d at 492 n.4 ; *Benjamin*, slip op. at 7. Plaintiffs have articulated two potential reasonable modifications.

First, it would be a reasonable modification for Defendants to develop community services for Plaintiffs and class members. The undisputed facts demonstrate that it would be significantly less expensive to develop and provide services to Plaintiffs and class members in the community than in state ICFs/MR. *See* Pls.' SUF ## 23-25, 112, 113, 114, 116. Even assuming that there would be some short-term transition costs involved in developing community services for these individuals, DPW could realize significant -- and ever-increasing -- savings by developing community alternatives for Plaintiffs and class members. *See* Pls.' SUF # 122-124.

Second, it would be a reasonable modification for Defendants to assure that state ICF/MR residents have access to placements in existing community programs when vacancies arise. Most transition costs can be avoided if individuals are placed in existing community programs since they can be discharged immediately without delays, unlike new programs that require time to be developed. S*ee* Pls.' SUF # 120. Yet, Defendants have created a system in which state ICF/MR

residents have been effectively cut off from accessing vacancies in community placements. *See* Pls.' SUF ## 96-98.

C. Defendants Are Precluded From Asserting a Fundamental Alteration Defense.

A state can avoid liability under the integration mandate if it can establish that the provision of community services would constitute a "fundamental alteration" of its services, programs, or activities. *See* *Olmstead*, 527 U.S. at 603-07; *Frederick L. I.*, 364 F.3d at 492; *Benjamin*, slip op. at 6. Defendants have the burden of proving that the relief sought would be unduly burdensome or require a fundamental alteration of policy. *Frederick L. I*, 364 F.3d at 492; *Benjamin*, slip op. at 7. In this case, however, Defendants are barred from asserting a fundamental alteration defense for two independent reasons: (1) their failure to adopt and implement a viable integration plan for Plaintiffs and class members; and (2) their exclusion of Plaintiffs and class members from the community mental retardation system.

1. Defendants Have Not Adopted and Implemented a Viable Integration Plan.

The Third Circuit, as well as other courts, have stressed that states' non-compliance with the ADA's integration mandate cannot be excused merely because compliance may result in some higher costs. *See* *Pennsylvania Protection and Advocacy, Inc. v. Pa. Dep't of Public Welfare*, 402 F.3d 374, 380 (3d Cir. 2005);

Frederick 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). In holding that higher costs alone could not establish a fundamental alteration defense, the court in *Frederick L. I* stressed: "It 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." 364 F.3d at 500. 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." *Id.*

The following year, in *Pennsylvania Protection and Advocacy, Inc.*, the Third Circuit reversed the district court's decision that DPW had established a fundamental alteration defense in an ADA integration mandate case merely because it did not have sufficient funds to move the institution's residents to the community and provide services for others with mental health needs. 402 F.3d at 382. The court held that "this basis is insufficient as a matter of law under *Frederick L. [I]*." *Id.* The court explained:

> A state cannot meet an allegation of non-compliance [with the ADA's integration mandate] simply by replying that compliance would be too costly or would otherwise fundamentally alter its non-complying 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. [citation omitted]

> Instead, the only sensible reading of the integration mandate consistent with the Court's *Olmstead* opinion *allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA and RA.*

Id. at 381 (emphasis in original and added); *accord* Crabtree v. Goetz, Civil Action No. 3:08-0939, 2008 WL 5330506 at *29-*30 (M.D. Tenn. Dec. 19, 2008) (state statute was not "comprehensive plan" for community services since it was not operational and court was not persuaded it would be effectively implemented).

Subsequently, in *Frederick L v. Dep't of Public Welfare*, 422 F.3d 151 (3d Cir. 2005) (*Frederick L. II*), the Third Circuit held that DPW could not assert a fundamental alteration defense in the absence of any viable integration plan for the class of state hospital residents:

> *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 measurable commitment to deinstitutionalization for which DPW may be held accountable.
>
> * * *
>
> 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 (emphases added). A "viable integration plan," the Third Circuit held, must specify "the time-frame or target date for patient discharge" and the "approximate number of patients to be discharged each time period ...." *Id.* at 160.

In sum, the decisions in this trilogy of Third Circuit cases explicitly bar a state from even asserting, much less prevailing on, a fundamental alteration defense in an ADA integration mandate case when it has not adopted and implemented a viable integration plan that has specific discharge benchmarks and time lines. Remarkably, five years after *Frederick L. II* -- and one year after this lawsuit was filed -- DPW admits that it has *no* integration plan with specific discharge benchmarks and timelines for Plaintiffs and other state ICF/MR residents who are not opposed to discharge. *See* Pls.' SUF # 100. *A fortiori* it also has not implemented any such plan. As such, the fundamental alteration defense is simply "beyond [DPW's] reach," *Frederick L. II*, 422 F.3d at 158-59, and this Court should foreclose DPW from asserting it.

2. Defendants Have Effectively Excluded Plaintiffs and Class Members from Access to the Community Mental Retardation System.

In *Pennsylvania Protection and Advocacy*, the Third Circuit held that DPW could not demonstrate the type of "commitment to action" that, under *Frederick L. I*, is a prerequisite to any fundamental alteration defense in an ADA integration mandate case. As a result, the Court directed entry of summary judgment against DPW on the fundamental alteration defense. 402 F.3d at 383-85, 385-86. In that

case, DPW admitted that it did not consider the residents of the involved institution to be part of the community mental health system and did not require county offices to plan for or develop community mental health services for those individuals. *Id.* at 383. Since DPW excluded the institution's residents from its community mental health system, it could not possibly establish a "commitment to action" necessary for a fundamental alteration defense. *Id.* at 385. In this case, as in *Pennsylvania Protection and Advocacy*, DPW has effectively excluded almost all state ICF/MR residents from access to community mental retardation services in the following two respects and, thus, should be barred from asserting a fundamental alteration defense.

First, DPW's policies bar almost all state ICF/MR residents from the waiting list of persons who will be considered for community mental retardation services when funding to expand services for individuals on the waiting list is appropriated. Defendants admit that the named Plaintiffs and class members are either not on any waiting list for community mental retardation services or are unlikely ever to be removed from the waiting list, regardless of their level of need, when funding is appropriated to develop community services for people on the waiting list. *See* Pls.' SUF ## 82-85, 88. The evidence demonstrates that these policies have, in fact, excluded state ICF/MR residents from access to the community mental retardation system when waiting list expansion funds become available. While

Defendants have received approximately one-third of $1 billion to provide community mental retardation services to more than 7,500 individuals since FY 2004-2005, fewer than 60 state ICF/MR residents were afforded community services during that same period. Pls.' SUF ## 22, 89, 92-95. Defendants' policies and practices thus have effectively excluded state ICF/MR residents from access to the substantial waiting list expansion funding that has been appropriated. [13]

Second, Defendants have not afforded state ICF/MR residents access to vacancies in existing community mental retardation programs when they arise. Although DPW has about 700 to 750 vacancies in existing community mental retardation program each year, Defendants have no evidence that any state ICF/MR residents have been discharged to such vacancies in recent years. Indeed, it is unlikely that they could have been since Defendants' policies allow only individuals on the emergency waiting list to be considered for those vacancies while effectively excluding state ICF/MR residents from the waiting list in general and the emergency waiting list in particular. *See* Pls.' SUF ## 96-98.

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[13] DPW considers placement in state ICFs/MR so intrinsically harmful that the risk of institutionalization in such facilities will result in the placement of non-institutionalized individuals on the emergency waiting list. Pls.' SUF # 79. Yet, current state ICF/MR residents -- many of whom, like the Plaintiffs, have been institutionalized for decades -- are not considered to be at any risk of harm and thus cannot even gain access to the waiting list.

D. Even If Defendants Are Not Barred from Asserting a Fundamental Alteration Defense, the Undisputed Facts Preclude Them From Prevailing on that Defense.

1. Any Costs of Community Services Will Be Offset By Significant Savings.

Costs alone are not a sufficient basis to sustain a fundamental alteration defense. *See* discussion, *supra*, at 21-24. To the extent that costs have any bearing on the issue, the undisputed facts demonstrate that Defendants' cost concerns are exaggerated.

First, DPW has previously been able to fund the development of community services for some state ICF/MR residents using the carry-forward budget (*i.e.*, by reducing the funding provided to the state ICFs/MR) rather than seeking new, "expansion" funding. Pls.' SUF # 110. Since the carry-forward budget is simply used to maintain funding at existing levels, approval is easier than for expansion projects. *Id.* ## 106-107. The Director of the Bureau of Financial Management for DPW's Office of Developmental Programs testified that it would be possible to use this same process to develop community services for additional state ICF/MR residents. *Id.* # 111. Accordingly, DPW could use the cost-neutral carry-forward budget process to fund the development of community alternatives for at least some state ICF/MR residents.

Second, the evidence is undisputed that the average cost of providing community services to state ICF/MR residents is significantly less than the average

cost of continuing to provide them with institutional care. Although DPW has no information about the cost of providing community services to current state ICF/MR residents, the evidence indicates that it has cost an average of approximately $166,000 per year to serve the most recently discharged state ICF/MR residents (and that figure may be inflated by geographic disparities). *See* Pls.' SUF ## 112-114. In contrast, the cost to provide services in the state ICFs/MR is currently $240,000 per person annually and is expected to increase to $256,000 next year. *See id.* ## 23-24.

Third, although Defendants have contended that they would incur transition costs (*i.e.*, costs to fund continued institutional care while community services are developed), they have never undertaken any study of what, if any, actual transition costs were incurred in prior closings of state ICFs/MR. *See* Pls.' SUF # 22. The only evidence that DPW has on this subject relates to its abandoned proposals to close Selinsgrove and Hamburg Centers and to provide community services to residents of those institutions. Those plans demonstrated that DPW would begin to realize savings of state dollars after initial increased expenditures in the first two years of the plan. *See id.* # 124. Moreover, those savings would continue to grow each year due to the fact that the costs of services in state centers are growing faster than the costs of services in the community. *See id*.

In sum, the evidence demonstrates that, at worst, DPW would incur only short-term, limited costs to provide community services to Plaintiffs and class members. Those costs would not only be offset within a few years, but the savings would increase every year and provide a funding source to further expand community mental retardation services for non-institutionalized individuals.

2. Relief for Plaintiffs and Class Members Will Not Result in the Type of Queue-Jumping Criticized in *Olmstead*.

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 with individuals lower on the waiting list simply because the former individuals commenced litigation. *Olmstead*, 527 U.S. 606. Defendants cannot establish a fundamental alteration defense on the basis that Plaintiffs and class members, through this lawsuit, are engaging in the type of queue-jumping that *Olmstead* sought to foreclose.

First, *Olmstead* was concerned about queue-jumping on a waiting list to provide community services to individuals who are *all* unnecessarily institutionalized. Although DPW has a "waiting list" for community mental retardation services, virtually none of the individuals on that list are institutionalized in state ICFs/MR. *See* Pls.' SUF ## 75-88. As such, Plaintiffs and class members are not seeking to jump ahead of others who are unnecessarily institutionalized, and *Olmstead*'s instructions on that issue are inapposite.

Second, even if the queue-jumping concern is somehow applicable in this context, Plaintiffs and class members have been effectively excluded from the existing queue for community mental retardation services. Although DPW maintains a waiting list for community mental retardation services, Defendants admit that Plaintiffs and class members are not on that waiting list at all. As such, they are never considered when funding becomes available for community mental retardation services or when vacancies in existing programs arise. *See* Pls.' SUF ## 81-88. Accordingly, this lawsuit does not seek to place Plaintiffs and class members ahead of others in the queue, but to assure that they *are* in the queue so that their needs for community services are addressed.

Third, by developing community services for Plaintiffs and class members, DPW would realize increasing savings. These savings could be used to expand funding for non-institutionalized individuals who are on the waiting list. *See* Pls.' SUF # 125. As such, even if the provision of community services to Plaintiffs and class members would require delay in the provision of community services for some non-institutionalized persons on the waiting list, within a few years the savings realized will allow more non-institutionalized individuals to receive community services than otherwise would.

Finally, and most importantly, the existence of a waiting list *per se* is not sufficient to insulate DPW from liability under the ADA's integration mandates.

Olmstead 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 services to individuals who are unnecessarily institutionalized and a "waiting list that moves at a reasonable pace ...." *Olmstead*, 527 U.S. at 605-06. Defendants admit that they neither have a comprehensive, effectively working plan nor a waiting list that moves at a reasonable pace for state ICF/MR residents. *See* Pls.' SUF ## 99-100.

3. DPW's Current Alleged Budget Constraints Cannot Sustain a Fundamental Alteration Defense.

DPW contends that it is faced with budget constraints that require it to make difficult choices and that it has chosen to use its waiting list expansion funds for non-institutionalized individuals over state ICF/MR residents because the former are at higher risk of harm. For most of the same reasons discussed above, this argument is not viable factually or legally.

Factually, DPW has received about one-third of $1 billion since FY 2004-2005 to fund community services for more than 7,500 non-institutionalized individuals with mental retardation. *See* Pls.' SUF ## 89, 93. Moreover, some of this funding was used for individuals graduating from school, most of who would not be at imminent risk of harm without immediate community services. *See id.* # 91. There simply is no reason why Defendants could not have used some portion of this waiting list expansion funding to provide services for state ICF/MR

residents who Defendants admit are unnecessarily institutionalized. In addition, DPW decided against implementation of its plans to provide community services to residents of Selinsgrove and Hamburg Centers because it would have cost about $6 million in state dollars in FY 2008-2009, even though: (1) it received more than $83 million in waiting list expansion funding that year, and (2) within three years, DPW would realize ever-increasing savings that would enable it to increase funding for community services for non-institutionalized people on the waiting list. *See* Pls.' SUF ## 125-126. Finally, DPW officials admitted that it is not budget constraints that prevented Defendants from developing community services for state ICF/MR residents or, at the very least, creating and implementing a viable integration plan for those individuals. *See id.* ## 103-105.

Legally, this argument is flawed because budget constraints have been repeatedly held to be an inadequate basis to avoid compliance with the ADA's integration mandate. *See* discussion, *supra*, at 21-24. Recently, in *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980 (N.D. Cal. 2010), the court preliminarily enjoined California's decision to reduce services provided in an adult day health care program. Defendants argued that it did not violate the ADA's integration mandate because California's severe budget crisis led it to make "a policy determination to limit ... services to those individuals who need the services the most and who are risk of admission to a skilled nursing facility.'" *Id.* at 995.

Rejecting that argument, the court held that "a state defendant cannot rely on budgetary constraints alone as the basis for a fundamental alteration defense." *Id.*

III. DEFENDANTS VIOLATE THE ADA AND RA BY USING DISCRIMINATORY METHODS OF ADMINISTRATION.

The ADA and RA prohibit states from using methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability. 29 U.S.C. § 794 and 28 C.F.R. § 41.51(b)(3) (RA); 42 U.S.C. §§ 12131-12134 and 28 C.F.R. § 35.130(b)(3) (ADA). This provision prohibits explicit policies and actual practices that are neutral on their face, but deny individuals with disabilities effective opportunity to participate. *Cota*, 688 F. Supp. 2d at 995. Policies and practices that have a disparate impact on a particular class of persons with disabilities can violate this provision. *See id.* at 996.

Defendants have used methods of administration that have resulted in the continued, discriminatory, and unnecessary segregation of Plaintiffs and class members in state ICFs/MR. Specifically:

- Defendants have neither adopted nor implemented any plan to develop community services for Plaintiffs and class members. *See* Pls.' SUF # 100. "DPW's failure to adequately plan for the community placements needed by these class members has caused their continued, unnecessary segregation," which constitutes a discriminatory method of administration that violates the ADA and RA.

Kathleen S. v. Dep't of Public Welfare, 10 F. Supp. 2d 460, 473 (E.D. Pa. 1998).

- Defendants have adopted and implemented policies and practices that effectively exclude Plaintiffs and class members from access to community mental retardation services when expansion funding is appropriated or when vacancies arise in existing community programs. *See* Pls.' SUF ## 96-98. These policies and procedures constitute discriminatory methods of administration that violate the ADA and RA.

- Defendants have failed to provide state ICF/MR residents and their families with meaningful education about community options. With appropriate information, it is likely that many state ICF/MR residents and their families would not be opposed to discharge. *See* Pls.' SUF ## 70-73. As such, DPW's failure constitutes a discriminatory method of administration that violates the ADA and RA.

IV. THE DECLARATORY AND INJUNCTIVE RELIEF PLAINTIFFS REQUEST IS APPROPRIATE TO REMEDY DEFENDANTS' DISCRIMINATORY CONDUCT.

A. Plaintiffs and the Class Satisfy the Standard for Permanent Injunctive Relief.

In determining whether to issue a permanent injunction, the Court must consider whether: (1) the moving party has succeeded on the merits; (2) the moving party will be irreparably injured by denial of relief; (3) whether the entry of a permanent injunction will result in even greater harm to the Defendants; and (4) whether an injunction would be in the public interest. *See James ex rel. James v. Richman*, 465 F. Supp. 2d 395, 402 (M.D. Pa. 2006) (citing *Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001)), *aff'd*, 547 F.3d 214 (3d Cir. 2008). As discussed above, Plaintiffs have established that Defendants' actions violate the ADA and RA and, thus, have succeeded on the merits. The other elements required for permanent injunctive relief are satisfied as well.

"To establish irreparable harm, a party must demonstrate that the harm it will suffer is 'of a peculiar nature, so that compensation in money cannot atone for it.'" *Borough of Palmyra Bd. of Educ. v. F.C.*, 2 F. Supp. 2d 637, 644 (D.N.J. 1998) (quoting *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994)). The Supreme Court has recognized the harm of unnecessary institutionalization, writing that "confinement in an institution severely diminishes the everyday life activities of individuals ...." *Olmstead*, 527 U.S. at 601. DPW has conceded that

state ICF/MR residents are more segregated than other individuals with mental retardation since, *inter alia*, they do not have as much opportunity as those living in the community to interact with a wide range of people and to have access to community activities." Pls.' SUF # 52. DPW's Secretary of Developmental Programs also testified that individuals in institutions cannot learn to live a normal life. *Id.* # 51. Plaintiffs and other state ICF/MR residents have experienced harm due to their continued unnecessary institutionalization, including regression, increased hopelessness, and less opportunity for contact with aging family members. *Id.* ## 135-139. The harm of unnecessary institutionalization cannot be remedied by monetary damages and, thus, it is irreparable. *Cf.* *Deck v. City of Toledo*, 29 F. Supp. 2d 431, 434 (N.D. Ohio 1998) (irreparable injury based on improperly constructed curb ramps that, *inter alia*, "prevent Plaintiffs from engaging in normal life activities ...."); *Borough of Palmyra Bd. of Educ.*, 2 F. Supp. 2d at 645 (holding that loss of appropriate education constitutes irreparable injury).[14]

Irreparable injury also is established where, as here, the injuries Plaintiffs and class members "incur are 'the very type of injuries Congress tried to avoid.'" *Burriola v. Greater Toledo YMCA*, 133 F. Supp. 2d 1034, 1040 (N.D. Ohio 2001)

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[14] Even if the injuries to Plaintiffs and the class members could be completely remedied by monetary damages, the harm would be irreparable because the Eleventh Amendment precludes recovery of damages against DPW. *James ex rel. James*, 465 F. Supp. 2d at 407.

(citation omitted). "The anti-segregation laws upon which Plaintiffs rely reflect important public policy commitments to equality and access." *Lovely H. v. Eggleston*, 235 F.R.D. 248, 262 (S.D.N.Y. 2006). Actions that restrict integration of people with disabilities into the mainstream of society constitute irreparable harm. *See id.; cf. Spieler v. Mt. Diablo Unified School Dist.*, Civil Action No. C 98-0951 CW, 2007 WL 3245286 at *4 (N.D. Cal. Nov. 2, 2007) (segregation based on disability is, "by its very nature," irreparable harm).

Any harm to the Defendants from the issuance of injunctive relief will be far less than that suffered by Plaintiffs and class members who have been unnecessarily segregated in state institutions for years -- often for decades. The main requested relief is to require Defendants to seek funding from the Governor and Legislature to fund a viable integration plan for class members and to allow those individuals access to vacancies in existing community programs. Such relief will not create any significant hardship on Defendants.

The public interest also will be served by issuance of the requested injunctive relief. "There exists in this county a 'clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.'" *Community Services, Inc. v. Heidelberg Township*, 439 F. Supp. 2d 380, 399 (M.D. Pa. 2006) (citation omitted). In enacting the ADA and re-enacting the RA, Congress expressly found that discrimination persists "in such

critical areas as ... institutionalization ...." 42 U.S.C. § 12101(a)(3); 29 U.S.C. § 701(a)(5). Congress further stated that:

> [T]he goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to -- ... achieve ... full inclusion and integration in society ... [and] independent living ... for such individuals.

29 U.S.C. § 701(a)(6); *accord* 42 U.S.C. § 12101(a)(7). "'[T]he public has a strong interest in the prompt remediation of systemic discrimination against a vulnerable population.'" *Disability Advocates, Inc. v. Paterson*, Civil Action No. 03-cv-3209, 2010 WL 933750 at *3 (E.D.N.Y. Mar. 11, 2010) (citation omitted). Thus, the public interest is served by enforcement of the ADA's integration mandate. *Crabtree v. Goetz*, 2008 WL 5330506 at *30.[15]

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[15] Defendants cannot rely on Pennsylvania's purported budget constraints to demonstrate that an award of injunctive relief would not be in the public interest. "A budget crisis does not excuse ongoing violations of federal law, particularly when there are no adequate remedies available other than an injunction." *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3500 (U.S. Feb. 16, 2010) (No. 09-958). Moreover, the relief requested, over time, could yield significant cost savings that can be used to expand community services for persons on the waiting list. *See* Pls.' SUF # 125.

B. The Court Should Award the Requested Injunctive Relief.

The Court's equitable powers to fashion an appropriate remedy for Defendants' violations of Plaintiffs' and class members' rights under the ADA and RA are expansive:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> > The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between public interest and private needs ...."

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944)); *accord Disability Advocates, Inc. v. Paterson*, 2010 WL 786657 at *1; *Liberty Resources, Inc. v. Southeastern Pennsylvania Transportation Auth.*, Civil Action No. 99-4837, 2001 WL 1047061 at *3 (E.D. Pa. Aug. 30, 2001), *vacated as moot*, 54 Fed. Appx. 769 (3d Cir. 2002).

Plaintiffs have submitted a proposed Order that sets forth the relief they seek, including processes to identify class members and to provide appropriate and ongoing education about community options to state ICF/MR residents and their

involved families and guardians. *See* *Disability Advocates, Inc.*, 2010 WL 786657 at *3. The key substantive relief that Plaintiffs request is for the Court to require DPW to adopt and implement a viable integration plan with benchmarks for the number of state ICF/MR residents to be discharged and timelines in which to do so. Although the final class size at this point is unknown, Defendants' survey suggests that there are at least 300 state ICF/MR residents who are not opposed and whose families are not opposed for discharge and for whom they can develop a plan. Given that the discharges of state ICF/MR residents has been at a virtual standstill for a number of years, the plan should require DPW develop and implement a viable integration plan that provides community services for at least 100 class members annually for the first three years and, if there are additional class members at the end of the third year, for 75 class members a year thereafter until all have been discharged. To implement this plan, DPW should consider:

- requesting as one of DPW's top priorities in its budget proposals that the Governor seek appropriations to fund the development of community services to meet the plan's benchmarks;
- where possible, shifting funds from the carry-forward budget for state ICFs/MR to the Waiver budget; and

- modifying its vacancy system to allow access to state ICF/MR residents to have access to vacancies in existing community programs that match their needs.

Cf. Disability Advocates, Inc. v. Paterson, Civil Action No. 03-CV-3209, Remedial Order and Judgment at 5 (E.D.N.Y. Mar. 1, 2010) (Docket # 405) (requiring state to develop supported housing for at least 1,500 adult care home residents with mental illness annually until sufficient beds exist), *app. pending*.[16]

CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment and issue appropriate relief as requested.

Respectfully submitted,

Dated: June 23, 2010

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[16] In addition to these substantive requirements, procedural protections -- including reporting requirements and continuing jurisdiction by the Court -- are essential to assure that Defendants implement their obligations.

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LOCAL RULE 7.8(b)(2) CERTIFICATE

I certify under penalty of perjury that Plaintiffs' Brief in Support of their Motion for Summary Judgment contains 9,661 words (excluding the Table of Contents and Table of Citations) based on the processing system used to prepare the Brief (Word 2003). By Order dated June 11, 2010 (Document 47), the Court granted Plaintiffs' Motion for Leave to Exceed the Page Limitation of Local Rule 7.8(b)(2) so long as Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss did not exceed 10,000 words.

Executed this 23rd day of June, 2010.

/s/ *Robert W. Meek*
Robert W. Meek