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 Thurman, on behalf of themselves and all others similarly situated, Plaintiffs, 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, Defendants.	Filed via ECF System Civ. No. 1:09-cv-1182 (JEJ) Class Action Complaint filed June 22, 2009 Judge Jones

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF THE UNITED STATES

The United States appears as *amicus curiae* to urge the Court to grant Plaintiffs' Motion for Summary Judgment on their claims brought under the Americans with Disabilities Act of 1990 ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), and to deny Defendants' Motion for Summary Judgment on Plaintiffs' claims.

The United States is in a unique position to aid the Court in addressing the ADA and Rehabilitation Act issues, as the Department of Justice enforces Title II of the ADA and Section 504. As set forth more fully in the accompanying memorandum in support of the United States' motion for leave to file a limited brief as *amicus curiae*, the United States has a special interest in the enforcement of the ADA and Section 504, and in how courts construe the statutes' protections. Moreover, an *amicus* filing from an agency charged with enforcement of the statutes at issue can be particularly useful and can "contribute to the court's understanding" of the issues involved in a lawsuit. Harris v. Pernsley, 820 F.2d 592, 603 (3d Cir. 1987).

Additionally, the issues raised in the parties' cross motions for summary judgment are of great public interest and importance as they implicate the rights of often vulnerable institutionalized persons with intellectual and other developmental disabilities. There is also a strong public interest in eliminating the harm that

attends unnecessary and inappropriate institutionalization. The Department of Justice is charged with protecting and vindicating the civil rights of persons with developmental disabilities pursuant to the statutes. It therefore has a demonstrated interest in this matter.

PRELIMINARY STATEMENT

This case is appropriate for summary judgment, as there are no genuine issues of material fact with respect to the arguments contained in the parties' cross motions. The Court is presented with a purely legal question: Does Defendants' unnecessary segregation of individuals with disabilities in its public institutions constitute discrimination under Title II of the ADA and Section 504?

The Court has before it a record composed of admissions by Defendants and other undisputed evidence demonstrating that individuals with disabilities are inappropriately institutionalized in Pennsylvania's intermediate care facilities for persons with developmental disabilities ("ICFs/MR" or "state centers"). Defendants Department of Public Welfare ("DPW") and DPW Secretary Harriet Dichter (collectively "Defendants"), admit that all individuals currently institutionalized in the state ICFs/MR are qualified for community placement. Plaintiffs' Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment ¶ 45 (Dkt. #49(2)) ("Pl. SUF"). The named plaintiffs, five individuals who have been institutionalized in Pennsylvania's ICFs/MR for periods

of between twenty and forty-four years, and class members (collectively "Plaintiffs"), do not or would not oppose a community placement if offered. Id. ¶¶ 1-6 (defining class as all persons who "(1) currently or in the future will reside in one of Pennsylvania's [ICFs/MR]; (2) could reside in the community with appropriate services and supports; and (3) do not or would not oppose community placement"). Indeed, it is undisputed that at least three of the named plaintiffs affirmatively wish to live in the community, and their involved family members support that choice. Id. ¶¶ 53-60.

In contravention of the Commonwealth's stated policy to provide individuals with developmental disabilities services in the community, id. ¶ 50, Defendants have unnecessarily segregated Plaintiffs in institutions and have failed to provide care in the most integrated setting appropriate to their needs: community-based programs. Id. ¶ 52. Specifically, Defendants currently institutionalize approximately 1,200 individuals with developmental disabilities in five state-operated ICFs/MR, while Defendants simultaneously admit that *all* of these individuals could live in the community, if provided the appropriate supports and services. Id. ¶¶ 17, 45; Defendants' Statement of Undisputed Facts in Support of Defendants' Motion for Summary Judgment ¶ 6 (Dkt. #51(2)) ("Def. SUF").

Defendants have failed to offer community services to Plaintiffs. Instead, Defendants provide services in the most segregated setting imaginable: large, congregate institutions. Pl. SUF ¶ 52. Moreover, the plaintiff class, by definition, does not or would not oppose community placement. Id. ¶ 6. Accordingly, the entire plaintiff class meets the ADA's criteria for community integration, as announced by the Supreme Court in Olmstead v. L.C. ex rel Zimring, 527 U.S. 581, 601-03 (1999) (plurality opinion). Yet, these qualified and unopposed individuals remain segregated in the Commonwealth's institutional facilities in violation of federal law.

This unnecessary segregation is a form of discrimination prohibited by Title II of the ADA, Section 504, and their implementing regulations. See 42 U.S.C. § 12132; 29 U.S.C. § 794; 28 C.F.R. §§ 0.51, 35.130(d), 41, 41.51(d); Olmstead, 527 U.S. at 598-01.

Defendants' attempt to justify their unlawful discrimination is without merit. DPW funds an array of community-based services and supports for individuals with developmental disabilities. Pl. SUF ¶ 28. Yet individuals institutionalized in state centers are significantly more likely to leave those centers through death than through community placement. Id. ¶¶ 20, 22 (noting that, in fiscal years 2004-09, 200 residents died while only 54 received community placements). Less than two weeks before filing their own motion for summary

judgment, Defendants adopted "The Plan – Supporting People Who Currently Reside in State Centers Who Want To Move To the Community" ("Plan"). Even Defendants acknowledge that their eleventh-hour Plan contains almost none of the hallmarks that the Supreme Court and Third Circuit deem necessary for an adequate Olmstead Plan, and an adequate Plan is a prerequisite to asserting a defense to the State's discrimination. See Section II.B.1, infra; Def. Mem., Exh. 4 (Dkt. #51(6)) ("Plan"). Moreover, despite Defendants' admission that all individuals institutionalized in the state centers could live in the community, the Plan raises a new barrier to deinstitutionalization that is conspicuously absent from the law: a determination that an individual "benefit from such a [community] placement as opposed to staying in the state center." Defendants' Memorandum of Law In Support of Defendants' Motion for Summary Judgment at 14 (Dkt. # 51(7)) ("Def. Mem."); Plan at 4; Pl. SUF ¶ 43.

Because the Commonwealth excludes individuals institutionalized in state centers from community services and has failed to adopt and implement a realistic, effectively working Olmstead plan, any fundamental alteration defense must fail.

ARGUMENT

I. THE UNNECESSARY SEGREGATION OF INDIVIDUALS WITH DISABILITIES IN INSTUTITONS IS A FORM OF DISCRIMINATION PROHIBITED BY TITLE II OF THE ADA, SECTION 504, AND THEIR IMPLEMENTING REGULATIONS

It is undisputed that individuals with developmental disabilities have long been inappropriately institutionalized in Pennsylvania's state centers and have a right to be served in the most integrated settings appropriate to their needs.[1] Defendants concede that each of the approximately 1,200 individuals institutionalized in the state centers is qualified for placement in the community, and that many of these individuals either are not opposed to moving to the community or would not be opposed if fully informed about community programs. As set forth infra, by failing to serve qualified individuals with disabilities in the most integrated setting appropriate to their needs, Defendants are violating the ADA and Rehabilitation Acts' prohibition on disability-based discrimination. The relief Plaintiffs are seeking under the ADA and Rehabilitation Act merely requires Defendants to act on their own stated policies and serve individuals with developmental disabilities in the most integrated setting appropriate to their needs.

[1] Community-based programs are the most integrated settings because they are physically located in the mainstream of society and provide opportunities for people with disabilities to interact with their non-disabled peers in all facets of life. In contrast, institutional settings are segregated environments because residents are separated from the community and walled off from the mainstream of society.

Nearly four decades ago, Congress recognized that society historically has discriminated against people with disabilities by unnecessarily segregating them from their family and community; in response, Congress enacted Section 504. The sponsors of that legislation condemned the "invisibility of the handicapped in America," and introduced bills responding to the country's "shameful oversights" that caused individuals with disabilities "to live among society 'shunted aside, hidden, and ignored.'" Alexander v. Choate, 469 U.S. 287, 296 (1985) (citation omitted). The purpose of the statute was "to maximize" the "inclusion and integration [of individuals with disabilities] into society." 29 U.S.C. § 701(b).

Following the passage of the Rehabilitation Act, President Carter directed the Attorney General to issue regulations coordinating the implementation of Section 504 by executive agencies. Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980). One of those regulations mandated that recipients of federal financial assistance "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d).

Wyatt ex rel. Rawlins v. King, 773 F. Supp. 1508, 1512 (M.D. Ala. 1991); see also Disability Advocates, Inc., 653 F. Supp. 2d 184, 199-203, 207 (E.D.N.Y. 2009) ("DAI"); Pl. SUF ¶¶ 51-52, 135-39.

More than fifteen years later, Congress acknowledged that the Rehabilitation Act had not fulfilled the "compelling need . . . for the integration of persons with disabilities into the economic and social mainstream of American life." S. Rep. No. 116, 101st Cong., 1st Sess. 20 (1989). In response, in 1990, Congress passed the ADA to "continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life." H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 49-50 (1990), reprinted in 1990 U.S.C.C.A.N. 472-73.

The ADA begins with congressional findings and purposes detailing the reasons for the statute. Specifically, Congress found that "institutionalization" is one of the "critical areas" in which discrimination against individuals with disabilities persists. 42 U.S.C. § 12101(a)(3). It further found that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). These discriminatory practices continue today through "outright intentional exclusion" and "segregation." 42 U.S.C. § 12101(a)(5). In the ADA, Congress first expressly recognized that the "segregation" of persons with disabilities constitutes "discrimination." 42 U.S.C. § 12101(a)(3), (a)(5).

Individuals with disabilities who are segregated behind institutional walls are not integrated within society at large and are unable to interact with non-

disabled persons to the fullest extent possible. Indeed, segregation of individuals into institutions "relegates persons with disabilities to second-class status." 28 C.F.R. pt. 35 app. A at 449-50 (Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services) (1994); accord H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 56 (1990), reprinted in 1990 U.S.C.C.A.N. 479.

Consistent with the goal of comprehensive integration, Title II of the ADA prohibits state and local governments from discriminating against people with disabilities in the provision of public services. 42 U.S.C. § 12132. Specifically, Title II mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

In 42 U.S.C. § 12134, Congress directed the Attorney General to promulgate regulations implementing this general mandate. See H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 52 (1990), reprinted in 1990 U.S.C.C.A.N. 475. Congress specified that the Attorney General's Title II ADA regulations "shall be consistent with this act [the ADA] and with the coordination regulations . . . applicable to recipients of Federal financial assistance" under Section 504. 42 U.S.C. § 12134(b). Most pertinent here, this included the requirement that state and local

governments receiving federal financial assistance "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d).

With the integration regulation, the Attorney General established that a state's provision of services in an unnecessarily segregated setting constitutes unlawful disability-based discrimination. 28 C.F.R. § 35.130(d); Olmstead, 527 U.S. at 592. The Attorney General has explained that "the most integrated setting appropriate" means "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35 app. A at 452.

Pursuant to these statues and regulations, the Department of Justice has consistently maintained that unnecessary institutionalization qualifies as discrimination by reason of disability. Because the Department is the agency directed by Congress to issue regulations implementing Title II, the Supreme Court has determined that "its views warrant respect" and that the courts may properly look to the agency's views for "guidance." Olmstead, 527 U.S. at 597-98.

In Olmstead, the Supreme Court affirmed the Attorney General's construction of the ADA's anti-discrimination provision, holding that "[u]njustified isolation . . . is properly regarded as discrimination based on disability." Id. at 597. The Court recognized that such segregation is a form of

discrimination because the institutionalization of persons who can benefit from community settings "perpetuates unwarranted assumptions that persons so isolated are incapable or untrustworthy of participating in community life" and because "confinement in an institution severely diminishes the everyday life activities of individuals." Id. at 600-01.

A violation of the integration mandate occurs where the institutionalized individual is "qualified" for community placement – that is, he or she can "handle or benefit from community settings," and the affected individual does not oppose community placement. Id. at 601-03. The Court stressed that states "are required" to provide community-based treatment for qualified persons who do not oppose such treatment unless the state can establish an affirmative defense. Id. at 607.

Particularly where, as here, a state has admitted that all individuals currently institutionalized in segregated institutions could be served in integrated, community-based settings, the ADA's mandate against unnecessary segregation should be given full effect. The Commonwealth's continued segregation of these individuals, particularly in light of the undisputed facts in this case, constitutes unlawful disability-based discrimination and must be remedied.

II. DEFENDANTS' UNJUSTIFIED SEGREGATION OF PLAINTIFF CLASS MEMBERS VIOLATES THE ADA AND SECTION 504

A. Plaintiff Class Members Are Qualified for Community Services

It is undisputed that *all* of the individuals institutionalized in the Commonwealth's state centers are qualified for community integration. Further, all members of the plaintiff class, by definition, do not oppose a community placement.[2] Pl. SUF ¶ 6. The entire class therefore meets the ADA and Olmstead criteria for community integration. Yet, these qualified individuals who do not oppose placement remain inappropriately institutionalized and segregated in Pennsylvania's state centers.

B. Defendants Can Make a Reasonable Modification to Their Service Systems Without Fundamentally Altering Defendants' Programs

The ADA and Section 504's integration mandate requires public entities to make reasonable modifications to their service systems to enable individuals with disabilities to receive services in integrated, community-based settings unless

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[2] The exact number of class members is unclear in the record. The Department of Justice has learned from years of experience enforcing the ADA and integration mandate, however, that, as individuals with disabilities and their family members learn about community-based services and supports, initial apprehension about community placements often disappears. See also Pl. SUF ¶ 70; Plaintiffs' Motion for Summary Judgment, Exhibit 5 (Dkt. #48) (acknowledging that it is "possible to overcome opposition of many family members to discharge of their relatives in state ICFs/MR through effective education about community programs").

doing so would constitute a fundamental alteration of the entities' programs. Olmstead, 527 U.S. at 595-97, 603; Frederick L. v. Dep't of Pub. Welfare, 422 F.3d 151, 157 (3d Cir. 2005) ("Frederick L. II"); Frederick L. v. Dep't of Pub. Welfare, 364 F.3d 487, 492 n.4 (3d Cir. 2004) ("Fredrick L. I"); Benjamin v. Dep't of Pub. Welfare, No. 09-1182, 6-7 (M.D. Pa. Jan. 25, 2010 Order Denying Motion to Dismiss) (Dkt. #38) ("Order Denying Motion to Dismiss"); Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184, 268-69 (E.D.N.Y. 2009) ("DAI"); 28 CFR § 35.130(b)(7). The burden of establishing a fundamental alteration is on the defendant. Olmstead, 527 U.S. at 603; Frederick L. I, 364 F.3d at 492 n.4; Order Denying Motion to Dismiss at 6-7; DAI, 653 F. Supp. 2d at 301, n.890.

Here, it is undisputed that Defendants can make a reasonable modification to their existing services by providing the institutionalized class members with access to community services, just as Defendants already provide access to those same services to non-institutionalized individuals with similar needs. Defendants cannot assert a fundamental alteration defense to this reasonable modification because they do not have a comprehensive, effectively working Olmstead plan. In any event, any cost-based fundamental alteration defense must fail.

1. Defendants May Not Assert a Fundamental Alteration Defense Because They Have No Comprehensive, Effectively Working Olmstead Plan

Defendants may not assert a fundamental alteration defense because they have no comprehensive, effectively working Olmstead plan. As the Olmstead plurality explained, a state can establish a fundamental alteration defense by demonstrating that it has "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." Olmstead, 527 U.S. at 605-06. Indeed, the Third Circuit definitively *requires* a state to develop and implement an adequate Olmstead integration plan, with specific time frames and benchmarks for discharge, to establish a fundamental alteration defense. Pennsylvania Prot. & Advocacy, Inc. v. Dep't of Pub. Welfare, 402 F.3d 374, 381 (3d Cir. 2005) ("[T]he 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[Rehabilitation Act].") (emphasis added); Frederick L. II, 422 F.3d at 157-58 (requiring time frames and benchmarks). Five years after these rulings involving DPW, and eleven years after the Supreme Court decided Olmstead, Defendants still have no comprehensive, effectively working Olmstead plan.

Defendants argue that their Plan, hastily assembled at the eleventh hour, amounts to an adequate Olmstead plan, enabling them to avail themselves of the fundamental alteration defense. Def. Mem. at 11-16. Defendants' Plan, however, does not come close to the comprehensive, effectively working plan required by Olmstead and the Third Circuit. As discussed below, Defendants' Olmstead Plan fails because: (1) on its face, the Plan lacks even the minimal required components; (2) the Plan fails to demonstrate the requisite commitment to integration; and (3) Defendants have not implemented the Plan.

First, the Third Circuit requires that, on its face:

> a viable integration plan at a bare minimum should specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between [agencies] . . . to effectuate integration into the community.

Frederick L. II, 422 F.3d at 157.

At the outset, as Defendants readily acknowledge, the Plan lacks any time frames or target dates for discharge – critical elements of an adequate Olmstead plan. See id.; Def. Mem. at 7, 13 n.4; Def. SUF ¶ 38. Instead, the Plan provides just the opposite – a target starting date of July 2011 – more a year after adoption, before which *no* discharges will occur under the Plan. Plan at 2, 5. Indeed, the Third Circuit previously found fault with DPW when DPW:

> remain[ed] silent as to when, if ever, eligible [residents] can expect to be discharged . . . . General assurances and good-faith intentions neither meet federal law nor a patient's expectations . . . . [T]hey are simply insufficient guarantors in light of the hardship daily inflicted upon patients through unnecessary and indefinite institutionalization.

Frederick L. II, 422 F.3d at 156, 158 (vacating district court ruling in favor of DPW where, as here, Defendants "refuse[d] to accept verifiable benchmarks or timelines as necessary elements of an acceptable plan").[3]

Additionally, and again contrary to the Third Circuit's minimal requirements, the Plan fails to provide a general description of the collaboration required between agencies to effectuate community integration. See Frederick L. II, 422 F.3d at 157, 160. At most, the Plan envisions coordination between several entities for the creation of budget plans, but it altogether fails to address any coordination regarding the integration of institutionalized individuals into the community. See Plan at 4.

Second, as evidenced by this lack of specificity on the face of the Plan and broad exceptions that render the Plan meaningless, Defendants have failed to

[3] Defendants' assertion that they have not included timelines for discharge because they do not know how many institutionalized residents will move to the community defies logic because, in the same Plan, Defendants state that they will attempt to place 50 institutionalized residents in the community annually. See Def. Mem. at 13 n.4; Def. SUF ¶ 38; Plan at 2-3, 5.

demonstrate any commitment to integration. In recent years, the Third Circuit repeatedly has emphasized the critical importance of this element. That court has repeatedly vacated district court rulings holding that DPW had established a fundamental alteration defense, where, as here, Defendants failed to show a tangible commitment to action toward deinstitutionalization for which they can be held accountable. Frederick L. II, 422 F.3d at 156-57 (vacating district court ruling in favor of DPW where the fundamental alteration defense was premised on vague assurances of future deinstitutionalization rather than "a plan that adequately demonstrates a reasonably specific and measurable commitment to deinstitutionalization for which DPW may be held accountable"); Pennsylvania Prot. & Advocacy, 402 F.3d at 381, 382-83 (vacating district court ruling in favor of DPW and other Commonwealth defendants where the Commonwealth's fundamental alteration defense was premised solely on the basis of its analysis of budgetary constraints and failed to require the Commonwealth to demonstrate "'ongoing progress toward community placement' under the general plan" and "a reviewable commitment to action"); Frederick L. I, 364 F.3d at 500-01 ("Frederick I") (vacating district court ruling in favor of DPW where Defendants did not demonstrate "a commitment to action in a manner for which it can be held accountable by the courts.").

In direct contravention of these standards, Defendants' last-minute Plan is riddled with exceptions and loopholes. The Plan explicitly: continues DPW's current discriminatory practice of prioritizing non-institutionalized individuals for placement; conditions community placement upon the availability of funding; provides DPW with broad authority to direct that the money actually obtained for placing institutionalized residents in the community instead be used to support non-institutionalized individuals in community settings; and provides that DPW merely will "ask the Governor to seek funding" to place 50 institutionalized residents in the community, rather than actually committing to place those residents in the community. See Plan at 1, 3-5; Def. Mem. at 14-15; Def. SUF ¶¶ 45-46. These provisos render the Plan effectively meaningless.

Inexplicably, Defendants argue that eliminating these loopholes would result in a fundamental alteration of their current scheme of discrimination. See Def. Mem. at 8-9, 14-15; Def. SUF ¶ 46. As the Third Circuit has cautioned Defendants previously, however, this disingenuous argument wholly undermines the purpose of the integration mandate:

> A state cannot meet an allegation of noncompliance simply by replying that compliance would be too costly or would otherwise fundamentally alter its noncomplying programs. *Any* program that runs afoul of the integration mandate would be fundamentally altered if brought into compliance. Read this broadly, the fundamental

> alteration defense would swallow the integration mandate whole.

Pennsylvania Prot. & Advocacy, 402 F.3d at 381.

Finally, DPW has failed to implement its Plan, despite the fact that *implementation* of an Olmstead Plan is critical to the Third Circuit. See Pennsylvania Prot. & Advocacy, 402 F.3d at 381 ("[T]he only sensible reading of the integration mandate consistent with the Court's Olmstead opinion allows for a fundamental alteration defense only if the accused agency has developed *and implemented*" an Olmstead plan) (emphasis added); Frederick L. II, 422 F.3d at 158 (vacating judgment for the Defendants where "DPW inexplicably failed to implement any plan for the first designated year" and DPW's "post-remand submissions lacked any commitment to implement the [plans] in whole or in part").

Defendants not only acknowledge that they have failed to implement their Plan thus far, but they also announce that they have no intention of implementing it until at least July 2011. Def. Mem. at 15; Plan at 2, 5. Defendants instead point to what they call their "long history" of moving individuals into community placements. Def. Mem. at 15. Defendants' own numbers, however, establish that Defendants' history of moving individuals into the community is strikingly lacking; indeed, they have placed only 54 institutionalized residents – not even 5%

of their current population – in community settings in the past five fiscal years. Def. Mem. at 15; Plan at 2. Moreover, even if Defendants could proffer a significant history of deinstitutionalization, the Third Circuit has determined that "'it [is] unrealistic (or unduly optimistic) [to] assume past progress is a reliable prediction of future programs.'" Pennsylvania Prot. & Advocacy, 402 F.3d at 384 (quoting Frederick L. I, 364 F.3d at 500) (alterations in original)); see also Frederick L. II, 422 F.3d at 156.

2. Any Cost-Based Fundamental Alteration Argument Must Fail

Because Defendants have failed to establish a commitment to action in a comprehensive, effectively working Olmstead plan, they cannot make out, let alone prevail on, a fundamental alteration defense. Accordingly, any budgetary considerations for a fundamental alteration defense are irrelevant. See Pennsylvania Prot. & Advocacy, 402 F.3d at 384 n.9 ("[A] commitment to action is a precondition to the assertion of a fundamental alteration defense. . . . Only when DPW can demonstrate this does its budgetary argument become a relevant factor in the consideration of its fundamental alteration defense."). Notably, Defendants agree that a cost-based fundamental alteration defense is beyond their reach; despite devoting significant pages in their Motion for Summary Judgment and supporting documentation to the costs of community services versus institutionalization, Defendants make no attempt to assert a fundamental alteration

argument based on cost. See generally Def. Mem., Def. SUF, and accompanying exhibits. This is because any such argument must fail.

Even if the Court were to consider a cost-based fundamental alteration argument, Defendants cannot establish that providing the institutionalized class members with access to community services would result in a fundamental alteration of Defendants' programs based on cost. Indeed, though relevant, budgetary constraints alone are insufficient to establish a fundamental alteration defense. Pennsylvania Prot. & Advocacy, 402 F.3d at 380-81; Frederick L. I, 364 F.3d at 495-96.

In conducting a fundamental alteration analysis, a court should determine whether providing community services costs substantially less than providing services in an institution, and should consider not only short-term and transition costs, "but also savings that will result if the requested relief is implemented." See DAI, 653 F. Supp. 2d at 269, 282, 285-86, 291-94, 301 (rejecting defendants' fundamental alteration defense where serving individuals in the community would not increase costs to the state, and determining that community services would in fact cost less). In DAI, the court endorsed the cost-neutral notion that the state could meet its ADA obligations by redirecting funds currently being spent on institutional care to serve those same individuals in integrated community settings. Id. at 308 (concluding that, because the relief requested would save the state

money, it would not interfere with the state's ability to serve others with mental illness).

Under this analysis, any cost-based fundamental alteration argument here must fail. First, it is undisputed that the costs of providing services in the community are significantly lower than the costs of providing services in the Commonwealth's institutions.[4] See Pl. Brief at 27-28; Pl. SUF ¶ 24; Def. Mem. at 6; Def. SUF ¶¶ 26, 28. Second, Defendants acknowledge that they will realize net savings even under their own inadequate Plan beginning in Fiscal Year 2014. Def. Mem. at 7; Def. SUF ¶ 36. Finally, as Plaintiffs note, Defendants could use a cost-neutral budget process to fund the development of community alternatives for at least some institutionalized residents. Pl. Brief at 27; Pl. SUF ¶¶ 106-07, 110, 111.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment on

[4] The parties agree that the annual cost of providing services to each institutionalized resident is $240,000, Pl. Brief at 28; Pl. SUF ¶ 24; Def. Mem. at 6; Def. SUF ¶ 26, compared to a maximum annual average of approximately $166,000 for each resident most recently discharged from the institutions. Pl. Brief at 28; Pl. SUF ¶ 113; see also Def. SUF ¶ 28 (acknowledging that the average cost of providing services in the community is "much lower than $240,000"); Def. Mem. at 6. Plaintiffs also assert, and Defendants do not dispute, that the cost of institutional care is expected to increase to $256,000 next year. Pl. Brief at 28; Pl. SUF ¶ 24; see generally Def. Mem; Def. SUF.

Plaintiffs' claims. Defendants' unjustifiable and unnecessary segregation of individuals with disabilities constitutes discrimination under Section 504 and Title II of the ADA.

Respectfully submitted,

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LOCAL RULE 7.8(b)(2) CERTIFICATE

I certify under penalty of perjury that the Brief of the United States as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment contains 4,872 words (excluding the Caption, Table of Contents, and Table of Authorities) based on the processing system used to prepare the Brief (Word 2007).

Executed this 7th day of July, 2010.

/s/ *Samantha Trepel*
Samantha Trepel

CERTIFICATE OF SERVICE

I, Samantha Trepel, hereby certify that the United States' Motion for Leave to File a Limited Brief as *Amicus Curiae*, Memorandum in Support of United States' Motion for Leave to File a Limited Brief as *Amicus Curiae*, Brief of the United States as *Amicus Curiae*, proposed Order, and Certificate of Concurrence were filed with the Court's ECF system on July 7, 2010 and are available for viewing and downloading from the ECF system by the following counsel:

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