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

FRANKLIN BENJAMIN, by and through his next friend, Andree 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**
Plaintiffs	:	
	:	**Civil Action No. 1:09-cv-1182-JEJ (Jones, J.)**
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,	:	**Class Action**
Defendants	:	

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. PROCEDURAL HISTORY

Plaintiffs Franklin Benjamin, Richard Grogg, Frank Edgett, Wilson Sheppard, Sylvia Baldwin, and Anthony Beard initiated this action with the filing of a Complaint on June 22, 2009. With leave, all of the above-named Plaintiffs but Wilson Sheppard (collectively, "Plaintiffs") filed an Amended Complaint on July 14, 2009.

Plaintiffs are persons with intellectual disabilities who live in and receive services in Pennsylvania's State-operated intermediate care facilities for persons with mental retardation ("ICFs/MR"). Plaintiffs assert that Defendants' failure to offer and provide Plaintiffs community alternatives, where appropriate, violates Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA") and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504" or "RA").

On September 2, 2009, the Court granted Plaintiffs' unopposed Motion to Certify a Class, and certified a class of 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. The named Plaintiffs, Benjamin, Grogg, Edgett, Baldwin, and Beard, were named as class representatives.

Defendants filed a Motion to Dismiss on September 24, 2009, which this Court denied on January 25, 2010. Thereafter, Defendants filed an Answer to the Amended Complaint and discovery proceeded.

Plaintiffs filed a Motion for Summary Judgment on June 23, 2010. Subsequently, the United States filed an amicus brief in support of that motion. This brief is filed in opposition to Plaintiffs' Motion.

II. STATEMENT OF THE FACTS

Many of the material facts in this case are undisputed. One fact which appears to be disputed however is whether Defendants have a plan for moving individuals presently receiving services in state centers into community placements.[1] Whether it is an adequate plan is, of course, a legal question but the Plan's existence is not – it is a matter of indisputable fact.

On June 18, 2010, Defendants, after due consideration of Plaintiffs' comments regarding an earlier Plan,[2] adopted a new Plan for relocating State center residents who do not oppose, and whose guardians, if any, do not oppose community care, entitled the Plan for Supporting People Who Currently Reside in State Centers Who Want to Move to the Community.

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[1] In their motion and supporting documents, Plaintiffs have simply ignored the existence of the Plan.

[2] DPW had adopted an earlier Plan on January 29, 2010. DSUF II, II,¶1.

Defendants Statement of Undisputed Facts in Opposition to Plaintiffs' Motion for Summary Judgment (DSUP II), ¶2.[3]

This Plan has benchmarks for implementation. Annually, Defendants will request that the Governor to ask the General Assembly for funds sufficient to place at least 50 State ICF/MR residents in community placements through the Consolidated waiver. DSUF II, ¶3. Defendants will move the number of residents for whom funding is provided by the General Assembly. The Plan contains no deadline for completing the process because it is unknown at this time how many people will be moved. DSUF II, 3.

Given current financial conditions, it would not be realistic to commit to a higher number. DSUF II, ¶4. Pennsylvania had a $1.2 billion deficit in 2009-10. DSUF II, II, ¶5. Overall, the total amount appropriated in the 2010-11budget is only 1% more than the amount appropriated in the 2009-10 budget. DSUF II, II, ¶6. The Governor's proposed budget for fiscal year 2010-11 provided less money for community placements than had been appropriated by the General Assembly in the 2009-10 fiscal year. DSUF II, ¶7. Recognizing that economic conditions will change, the Plan provides

[3] Contrary to Plaintiffs' assertion in its Brief in Opposition to Defendants' Motion for Summary Judgment, Plaintiffs were specifically advised that the Plan had been adopted by email dated June 18, 2010. DSUF II, ¶38.

that this number of placements to be requested will be reconsidered as financial conditions change. DSUF II, ¶8.

The Plan then sets forth a process for identifying and prioritizing among those who do not oppose community placement, planning for their placement and moving them into the community as money becomes available. DSUF II, ¶9. Finally, it provides for the development and implementation of educational programs directed at educating residents and their families about the benefits of community placement. DSUF II, ¶10.

The commitment to move people into the community is conditioned upon the availability of the funding necessary to make such placements and a finding by professionals that the resident will benefit from such a placement. DSUF II, ¶11. Additionally, in order to avoid a fundamental alteration to State programs which would favor State center residents over other intellectually disabled people in greater need of services, the Plan gives DPW's Deputy Secretary for the Office of Developmental Programs the power to direct that money otherwise available to move persons presently residing in State centers into community settings may be used to place other eligible and more needy persons into such settings. This reallocation would only be done if the Deputy Secretary determines (1) that such a person requires such a placement in order to avoid risk of physical or

mental injury or to avoid placement in a State center and (2) that there is no other money available to make such a placement. DSUF II, ¶12.

The first condition recognizes that DPW cannot spend money that is not appropriated. The second condition is based on the need to provide services fairly to all those persons with mental retardation, given the limited funding available to provide those services.

In this regard, funding is limited because all funds available for both State ICF/MR care and community care are expended for services to persons with mental retardation but those funds have not even been sufficient to provide services for all those in immediate need of services. DSUF II, ¶14, 15. Thus, there is a long waiting list for services. DSUF II, ¶16.

Persons who apply for services are evaluated using an instrument known as "Prioritization of Urgency of Need for Services for Persons with Mental Retardation" (PUNS). DSUF II, ¶17. PUNS places applicants in three categories: emergency (immediate or within the next six months); critical (need within two years); and Planning (need within five years). DSUF II, ¶18. The emergency category includes about 3200 persons. DSUF II, ¶19. In fiscal year 2008-09, the General Assembly appropriated amounts sufficient to fund services for only about 274 persons in the emergency category. DSUF II, ¶20.

When a community vacancy occurs, it has long been DPW's policy to give priority to those on the PUNS emergency waiting list over those in State ICFs/MR. DSUF II, ¶21. That is because persons residing in State ICFs/MR are safe and have all their basic needs met while many persons who are categorized as in "emergency" need are generally without needed services and at risk of mental or physical harm if they do not receive services. DSUF II, ¶22. Those on the emergency waiting list include those who are in danger of (1) having no care provided at all (as when family care-givers die) or (2) having grossly deficient care (as when family care-givers become disabled). DSUF II, ¶23.

The Governor's proposed budget for FY 2010-2011 includes a request for funding to serve an additional 150 people on the waiting list. DSUF II, ¶24. Those services can be provided in a residential setting or in day programs. DSUF II, ¶25. Only 50 of the placements included in the Governor's proposed budget are residential. DSUF II, ¶26. Since almost all those presently residing in State centers will need residential community placements, the remaining 100 are irrelevant to the Plaintiff class. DSUF II, ¶27. Moreover, it is anticipated that all of the residential slots will be needed to meet the emergency needs of persons in the community who are at risk of harm if they do not receive services. DSUF II, ¶27.

While moving people out of State centers into the community may save money in the long run, it does require the expenditure of additional money for the first several years. DSUF II, ¶28. After a move, DPW incurs the full cost of providing services in the community, but does not realize significant savings at the State center until sometime after the move has been made. DSUF II, ¶¶ 28-29. Even Plaintiffs' experts concede that it will be at least two years before DPW realizes net savings. DSUF II, ¶30. They estimate that DPW will be required to spend anywhere from $3-6 million in each of the first two years after beginning the process of moving State center residents into the community. DSUF II, ¶31. How long it will actually take before DPW realizes any savings is hotly disputed among the experts. DSUF II, ¶32. [4]

[4] Plaintiffs' experts assume that DPW will save the full average cost of each person moved out of a State center within six months after that person is moved. Defendants' Exhibit 7. Plaintiffs' expert strongly disagrees. Exhibit 8.

III. STATEMENT OF QUESTIONS PRESENTED

1. Whether Pennsylvania's Plan for Supporting People Who Currently Reside in State Centers Who Want to Move to the Community satisfies the requirements of the Americans with Disabilities Act and the Rehabilitation Act as set forth in Olmstead v. L.C., 527 U.S. 581 (1999).
2. Whether the relief requested by Plaintiffs violates the requirements of the Americans with Disabilities Act and the Rehabilitation Act as set forth in Olmstead v. L.C., 527 U.S. 581 (1999) insofar as Plaintiffs seek to require Defendants to use limited funds to place people who are safe and receiving appropriate services in a State center into a community placement ahead of other persons with mental retardation who are without services and, therefore, at risk of physical or mental injury.

IV. ARGUMENT

A. Introduction

Plaintiffs' claims are governed by Olmstead v. L.C., 527 U.S. 581 (1999), in which the United States Supreme Court held, in a plurality opinion, that a State is required to provide community-based services for persons with mental disabilities when "(1) the State's treatment professionals determine that such placement is appropriate, (2) the affected persons do not oppose such treatment, and (3) the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others." Id. at 606. However, the Court noted that the integration mandate "is not boundless" and is limited by "reasonable modifications" and "fundamental-alteration" clauses. Id. at 603. Therefore, if a State can prove that integration or modification of its policies and practices would require a fundamental alteration of its services, programs, or activities, it can avoid liability under the mandate for the State's alleged insufficient integration. *See* Olmstead, 527 U.S. at 603-607. Olmstead requires that, in evaluating the reasonableness of modification, a court must consider the State's available resources and responsibilities to other persons with intellectual disabilities. See id. at 604.

Typically, and in this case, the question is whether the State has an "Olmstead Plan:"

> If, for example, the State were to demonstrate that it had a comprehensive, effectively working Plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. . . . In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions.

Id. at 605-06. DPW has such a plan.

B. Pennsylvania's Plan for Supporting People Who Currently Reside in State Centers Who Want to Move to the Community satisfies the requirements of the Americans with Disabilities Act and the Rehabilitation Act as set forth in Olmstead v. L.C., 527 U.S. 581 (1999)

In Frederick L. v. Dep't of Public Welfare, 364 F.3d 487 (2004), the Third Circuit stated that an Olmstead Plan 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 the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.

Id. at 500. DPW's Plan for Supporting People Who Currently Reside in State Centers Who Want to Move to the Community meets these criteria.

Specifically, DPW has a Plan in which DPW commits that it will seek funding sufficient to move at least 50 persons who are State center residents into community placements every year. The Plan goes on to commit to provide education about community options, opportunities and benefits to individuals living at the centers and to their families and guardians. The Plan then sets forth a process for identifying and prioritizing among those who do not oppose community placement, planning for their placement and moving them into the community as money becomes available. Finally, it provides for the development and implementation of educational programs directed at educating residents and their families about the benefits of community placements.

There are two provisos to these commitments. First, nobody will be moved from a State center into a community placement if it is determined that that person would not benefit from such a placement as opposed to staying in the State center. Second, the Deputy Secretary for the Office of Developmental Programs may direct that money otherwise available to move persons presently residing in State centers into community settings be used to place other persons into such settings under the following conditions: if the Deputy Secretary determines (1) that such person requires such a placement in order to avoid risk of physical or mental injury or to avoid

placement in a State center and (2) that there is no other money available to make such a placement.

These two provisos simply recognize two principles clearly established in Olmstead. The first is that the Olmstead requirements do not apply unless the State's treatment professionals determine that a community placement is appropriate. To say, as Plaintiffs and Defendants agree, that all State center residents can be served in the community is not to say that a State center resident will benefit from a particular placement. The intent and effect of that provision is to ensure that a particular placement will benefit the person being placed. It is not intended to repudiate Defendants' admission that all persons in State centers can be served in the community.

The second Olmstead principle is that "[a]ny effort to institute fund-shifting that would disadvantage other segments of the mentally disabled population would thus fail under Olmstead. 527 U.S. at 604-06." Frederick L., 363 F.3d at 497. Using limited funds to place a person from a State center into a community placement ahead of another person with mental retardation who is at risk of physical or mental injury or placement in a State center[5] would most certainly disadvantage another segment of the mentally

[5] Apparently Plaintiffs want DPW to move State center residents into community placements even if the necessary result would be the placement of other persons with mental retardation into State centers in their stead.

disabled population. It would also cause a fundamental alteration in DPW's current policy of giving priority to individuals who are at risk in the community priority over those safely residing in State centers.[6] Olmstead does not require Defendants to do that.

Unfortunately, because the present Plan was only adopted on June 18, 2010, there is no history of implementation. However, as noted above, DPW has a long history of moving people from State centers into community placements. From 1995 to 2009, the census at State ICFs/MR has decreased from 3164 to1224. DSUF II, ¶35. Today, fewer than 1200 individuals receive services in State centers. DSUF II, ¶36. Since 2000, Defendants have closed four State ICFs/MR, and four MR units on the grounds of State hospitals. DSUF II, ¶37. Thus, there is no reason to question DPW's commitment to action.

Over the past several years, DPW has focused on providing services to those with immediate needs who were previously without services. However, the Plan commits DPW to bringing the residents of State centers into a community placement process which involves both the creation of

[6] Plaintiffs argue that Defendants are not entitled to assert a "fundamental alteration" defense because they do not have a Plan. That, of course, is no longer true.

new placements and the filling of vacancies, to the extent appropriate vacancies can be found.[7]

It is also true that the Plan anticipates that DPW will not have funding for new community placements for those in State centers until July of 2011. However, that simply recognizes the reality that the 2010-11 budget has been enacted and includes only limited funds for the kinds of residential placements that those presently in State centers will require – only 50 community residential slots are funded. DSUH II, 27. It is anticipated that all of those slots will be needed to meet the emergency needs of persons in the community who are without services. DSUH II, 28. To change that policy to the detriment of others in greater need of services is not a reasonable modification.

There is no serious dispute that for at least the first 2 or 3 years, DPW would have to expend additional money to move State center residents into the community. However, even if that were not the case, the Third Circuit has rejected exactly these kinds of price comparisons. Frederick L. v. Dep't of Public Welfare, 364 F.3d at 497.

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[7] The complexity and the extent of the services required by most of those persons remaining in State centers far exceed the services required by most of those already in community placement. Thus, it is generally difficult to match persons in State centers with vacancies in the community. DSUF II, ¶29.

To the extent *amicus* and Plaintiffs argue that seeking money for 50 placements from State centers is an inadequate commitment, they ignore several realities. First, DPW cannot spend money that has not been appropriated by the General Assembly. Shapp v. Sloan, 480 Pa. 449, 391 A.2d 595 (1978). Accordingly, since DPW is already using all the money that has been appropriated, it cannot promise to make additional placements for which there is no money appropriated.

Second, given current financial conditions, it would not be realistic to commit to seek money for more than 50 residential placements. DSUF II, ¶¶4-7. Pennsylvania had a $1.2 billion deficit in 2009-10 Overall, the total amount appropriated in the 2010-11budget is only 1% more than the amount appropriated in the 2009-10 budget. The governor's proposed budget for fiscal year 2010-11 provided less money for community placements than had been appropriated by the General Assembly in the 2009-10 fiscal. DSUF II, ¶4-7. Under the Plan, the amount of money requested will increase as those guidelines change and economic conditions improve. DSUH II, ¶8.

Amicus and Plaintiffs place too much reliance on Frederick L. v. Dep't of Public Welfare, 422 F.3d 151 (2005) (Frederick L. II). In that

case, the Third Circuit found that DPW had **no** written commitment – a Plan – to moving people from State Hospitals into community placements. The Third Circuit told the lower court to require DPW to prepare such a written commitment. Nothing in that decision suggested that a district court can impose a particular plan upon the State. Here, DPW has made the necessary commitment. That is all that is required and all that this Court could order.

It is notable that Plaintiffs have also filed for summary judgment and the Olmstead Plan which they request this Court to impose upon DPW looks very much like the Plan which DPW has adopted. It would require DPW to identify those who are not opposed to placement in the community and start planning for that move. It would require DPW to develop programs to educate State center residents about the benefits of community placement. Plaintiffs seek to require DPW to form a committee to design that educational program. Plaintiffs also ask that DPW be required to seek funding sufficient to place a certain number of class members each year, albeit 100, rather than the 50 set forth DPW's Plan. The Plan adopted by DPW commits DPW to do each of these things. It, therefore, satisfies DPW's Olmstead obligations. Frederick L. II, 422 F.3d 151 (2005).

C. The relief requested by Plaintiffs violates the requirements of the Americans with Disabilities Act and the Rehabilitation Act as set forth in Olmstead v. L.C., 527 U.S. 581 (1999) insofar as they seek to require Defendants to use limited funds to place people who are safe and receiving appropriate services in a State center into a community placement ahead of other mentally retarded persons who are without services and, therefore, at risk of physical or mental injury.

DPW has significant, but limited, funding available to provide services to persons with mental retardation to provide those services. That money is not adequate to provided services to all that need them. While it is likely that, in the long term, DPW will save money moving people from State centers into the community, there is no serious dispute that it will take several years to do so. Thus, for at least two years, DPW would have to find millions of dollars to fund those placements. That means that, if no additional funding is appropriated by the General Assembly, DPW would have to ignore the needs of persons who are currently receiving no services and are at serious risk of physical or mental harm. That would be contrary to the clear holding of Olmstead that:

> [s]ensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and

> treatment of a large and diverse population of persons with mental disabilities.

Olmstead v. L.C. ex rel Zimring, 527 U.S. 581, 604 (1999) (plurality opinion). As the Third Circuit noted in Frederick L. I:

> Olmstead explains that the ADA does not compel states to provide relief where the requested relief would require the state to neglect the needs of other segments of the mentally disabled population who are not litigants before the court.

Frederick L. v. Dep't of Public Welfare, 422 F.3d at 494.

DPW serves over 52,000 persons with mental retardation. DSUH II, ¶13. Approximately 3200 more receive no services, most of those are in greater need than the Plaintiff class members. DSUH II, ¶¶ 19, 22. Obviously, it would be inequitable to deny them services in order move people who are safe and receiving adequate services in State centers into community placements. To do so would, therefore, violate the dictates of Olmstead.

V. CONCLUSION

Over the years, DPW has reduced the population of its State centers at an impressive rate. Over the past several years, it has focused its limited resources on persons at risk of physical or mental harm who live in the community but who are receiving few or no services.

In its Plan for Supporting People Who Currently Reside in State Centers Who Want to Move to the Community, DPW has committed itself to seek funding and initiate procedures directed at refocusing its efforts at de-institutionalization while, at the same time, preserving its ability to avoid harm to other mentally retarded persons. That is wholly consistent with the Olmstead mandate and requires that Summary Judgment be entered in favor of the Defendants.

Respectfully Submitted,

Date: July 14, 2010

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LOCAL RULE 7.8(b)(2) CERTIFICATE

I certify under penalty of perjury that Defendants' Brief in Support of their Motion for Summary Judgment contains 3752 words (excluding the Table of Contents and Table of Citations) based on the processing system used to prepare the Brief (Word 2007).

Respectfully Submitted,

Date: July 14, 2010

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