UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD DAY, et al., Plaintiffs, v. DISTRICT OF COLUMBIA, et al., Defendants.	Case No. 1:10-cv-02250-ESH Judge Ellen Segal Huvelle

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

I. INTRODUCTION

The United States files this Statement of Interest, pursuant to 28 U.S.C. § 517,[1] because this litigation implicates the proper interpretation and application of title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). In particular, this case involves title II's integration mandate, 28 C.F.R. § 35.130(d). *See Olmstead v. L.C.*, 527 U.S. 581, 607 (1999). The Department of Justice has authority to enforce title II, and to issue regulations implementing the statute. 42 U.S.C. §§ 12133-34. The United States therefore has a strong interest in the resolution of this matter.

This lawsuit alleges that the District of Columbia ("District") administers its program of long-term care services for persons with disabilities in a manner that unnecessarily confines them to segregated nursing facilities. (First Amended Complaint ("Compl.") at ¶¶ 82, 84, 99, 101, ECF No. 17, March 30, 2011.) The District continues to fund costly, unnecessary institutional

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

placements in violation of the integration mandate of title II of the ADA, as interpreted by the Supreme Court in the *Olmstead* decision, when it could provide appropriate community-based services and supports at the same or even lower cost. (Compl. at ¶¶ 3-4, 6-9, 50, 55, 76, 79-80, 106-112.)

The United States respectfully urges this Court to deny the Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment. First, a public entity's financing and administration of its long-term care system can constitute a violation of title II. Second, a determination by the public entity's treatment professionals regarding the appropriateness of community placement is one method of establishing this element of an *Olmstead* claim, but is not the only way to do so. Third, in order to prevail on a fundamental alteration defense, a public entity must demonstrate that it has a comprehensive, effectively working plan for placing qualified persons with disabilities in integrated community settings and that the relief requested would fundamentally alter that plan or the entity's programs.

II. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It 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). For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities:

> [N]o 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.

As directed by Congress, the Attorney General issued regulations implementing title II, which are based on regulations issued under section 504 of the Rehabilitation Act of 1973.[2] *See* 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Exec. Order 12250, 45 Fed. Reg. 72995 (1980), *reprinted in* 42 U.S.C. § 2000d-1. The title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The preamble discussion of the "integration regulation" explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . ." 28 C.F.R. Pt. 35, App. B at 673 (2011). This integration mandate advances one of the principal purposes of title II of the ADA—ending the isolation and segregation of persons with disabilities. *See Olmstead*, 527 U.S. at 588-89 (citing 42 U.S.C. §§ 12101(a)(2), (3), (5)).

Twelve years ago, the Supreme Court applied these authorities and held that title II prohibits the unjustified segregation of individuals with disabilities. *Olmstead*, 527 U.S. at 597. The Court held that public entities are required to provide community-based services for persons with disabilities when: 1) such services are appropriate; 2) the affected persons do not oppose such services; and 3) the community-based placement can be reasonably accommodated, taking

[2] Section 504, like title II, prohibits disability-based discrimination. 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."). In all ways relevant to this discussion, the ADA and Section 504 of the Rehabilitation Act are generally construed to impose similar requirements. *See, e.g., Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1261 n.2 (D.C. Cir. 2008); *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999). This principle follows from the similar language employed in the two acts. It also derives from the Congressional directive that implementation and interpretation of the two acts "be coordinated to prevent[ ] imposition of inconsistent or conflicting standards for the same requirements under the two statutes." *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-69 (4th Cir. 1999) (citing 42 U.S.C. § 12117(b)) (alteration in original).

into account the resources available to the entity and the needs of others who are receiving disability services from the entity. *Id.* at 607.

The Court explained that this holding "reflects two evident judgments." *Id.* at 600. "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." *Id*. "Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 601. *Olmstead* thus clarifies that unnecessary institutionalization violates the ADA's integration mandate.

To comply with the integration requirement of title II of the ADA, a public entity must reasonably modify its policies, procedures, or practices when necessary to avoid discrimination, unless the public entity demonstrates that making the modifications would fundamentally alter the entity's programs or services. 28 C.F.R. § 35.130(b)(7); *see also Olmstead*, 527 U.S. at 603-06.

III. SUMMARY OF FACTS

A. The Plaintiffs

Each of the five named Plaintiffs (Bonita Jackson, Vietress Bacon, Roy Foreman, Edward Day, and Larry McDonald) is a person with a disability whose care in nursing facilities is or was funded by the District's Medicaid program. (Plaintiffs' Opposition to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment ("Opp.") Ex. B, ¶¶ 2-4, ECF No. 28, Sept. 1, 2011; Opp. Ex. C, ¶¶ 3-5, 9; Opp. Ex. D, ¶¶ 2-3, 7-8; Opp. Ex. E, ¶¶ 3-4, 8-9; Opp. Ex. F, ¶¶ 3-4, 9.) Each named Plaintiff would prefer to live in the community and could do

so with appropriate supports and services. (Opp. Ex. A, ¶ 16; Opp. Ex. B, ¶ 5; Opp. Ex. C, ¶¶ 11, 21; Opp. Ex. D, ¶¶ 10, 21; Opp. Ex. E, ¶¶ 11-13; Opp. Ex. F, ¶ 14.)

Bonita Jackson is 53 years old and lived at Washington Nursing Facility for more than four years. (Opp. Ex. B, ¶¶ 1-2.) She has depression and equilibrium problems that require her to use a walker for mobility. (Opp. Ex. B, ¶ 3.) She was very unhappy living in a nursing home, and spent more than two years informing nursing facility staff that she wanted to be discharged to live in the community. (Opp. Ex. B, ¶¶ 5-6.) She was finally discharged while the parties were briefing the District's Motion. (Opp. Ex. B, ¶ 10.)

Vietress Bacon is 47 years old and lived at Washington Nursing Facility for three years. (Opp. Ex. C, ¶¶ 1, 4.) She has a mobility impairment, brain injury, depression, and bipolar disorder. (Opp. Ex. C, ¶¶ 2, 5.) She has repeatedly told nursing facility staff that she wants to live in the community. (Opp. Ex. C, ¶ 11.) She would like to attend the church she used to go to routinely. (Opp. Ex. C, ¶ 8.) According to Plaintiffs' counsel, Ms. Bacon was discharged on September 13, 2011.

Roy Foreman is 66 years old and has lived at Washington Center for Aging Services for five years. (Opp. Ex. D, ¶¶ 1, 3.) He has diabetes, depression, orthopedic limitations that require him to use a wheelchair for mobility, and pressure ulcers. (Opp. Ex. D, ¶ 7.) He misses socializing with friends and family and attending football games. (Opp. Ex. D, ¶¶ 5-6.) Mr. Foreman is eager to leave the nursing facility and return to life in the community, and he has been trying to get out of the nursing facility since he was admitted. (Opp. Ex. D, ¶¶ 11, 14.)

Edward Day is a 76-year-old Air Force veteran who has lived at Unique Residential Care Center for five years. (Opp. Ex. E, ¶¶ 1-2, 4.) He has diabetes, seizures, kidney disease, depression, and anemia, and has had both of his legs amputated. (Opp. Ex. E, ¶ 8.) He wants to

get prostheses, leave the nursing facility, and return to the community. (Opp. Ex. E, ¶¶ 11-12.) He would like to be able to talk to his friends in private, outside of visiting hours. (Opp. Ex. E, ¶ 7.)

Larry McDonald is a 57-year-old Army veteran who has lived at Unique Residential Care Center for more than five years. (Opp. Ex. F, ¶¶ 1-2, 4.) He has a seizure disorder and mild dementia. (Opp. Ex. F, ¶ 9.) He wants to leave the nursing facility so that he can help his family, attend community events and family gatherings, and live near his siblings. (Opp. Ex. F, ¶¶ 7-8, 15.)

The individually named Plaintiffs seek to represent a class of similarly situated individuals who 1) have a disability; 2) receive services in nursing facilities located in the District of Columbia or funded by Defendants; 3) could live in the community with appropriate supports and services; and 4) prefer to live in the community rather than in nursing facilities. (First Amended Complaint ("Compl.") at ¶ 96, ECF No. 17, March 30, 2011.) The putative class includes between 500 and 2,900 members. (Compl. at ¶ 97.)

B. The District of Columbia's Long Term Care System

The District's long term care system includes institutional care such as nursing facilities, as well as community-based services. The District's Medicaid state plan funds nursing facility care.[3] There are nineteen nursing facilities in the District of Columbia, two of which are owned by the District. (Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment

[3] D.C. Department of Health Care Finance, State Plan Under Title XIX of the Social Security Act, Section 3.1, Attachment 3.1A at 2, ¶ 4a; Attachment 3.1B at 1, ¶ 4, available at http://dhcf.dc.gov/dhcf/cwp/view,A,1413,Q,609171.asp (last visited Sept. 19, 2011). Medicaid is a medical assistance program cooperatively funded by the federal and state governments. *See* 42 U.S.C. § 1396 *et seq.*; *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985).

("Motion"), Ex. 5, ¶ 6, ECF No. 19, Apr. 27, 2011; Ex. AA, 96:18-97:4; Opp. Ex. I, ¶ 8.[4]) According to the most recent data reported by the Centers for Medicare and Medicaid Services ("CMS"), 2,516 people lived in nursing facilities in the District in the third quarter of 2010,[5] and 70.5% of these individuals had their nursing facility care funded by Medicaid.[6] The District also funds out-of-state nursing facility placements for approximately 200 individuals. (Opp. Ex. G, 118:9-119:1.)

The District provides community-based services for individuals with disabilities, including services through its Medicaid state plan and the Medicaid Home and Community Based Services Waiver Program for the Elderly and Physically Disabled ("EPD Waiver"). Through its Medicaid state plan, the District provides community-based services, including home health services, physical and occupational therapy, skilled nursing services, case management, assertive community treatment, crisis intervention, and personal care services for assistance with activities of daily living. (Opp. Ex. G, 69:2-21; Ex. BB, 70:1-11; Opp. Ex. H, 18:18-21:18; Ex. CC, 17:11-19:19, 29:2-30:12, 33:20-35:4, 36:6-18; Opp. Ex. L, 39:18-40:4.)

Through the EPD Waiver, the District provides community-based services to some Medicaid recipients who would otherwise be eligible to receive care in nursing facilities. *See* Motion Ex. 4; 42 U.S.C. §§ 1396n(c), 1396n(d). For a waiver to be approved by CMS, it must

[4] Exhibits referred to by numbers were filed with the District's Motion. Exhibits referred to by single letters were filed with Plaintiffs' Opposition. Exhibits referred to by double letters were filed with this Statement of Interest.

[5] CMS, MDS Active Resident Count Report: Sept. 30, 2010, http://www.cms.gov/MDSPubQIandResRep/04_activeresreport.asp?isSubmitted=rescnt&date=32 (last modified May 2, 2011).

[6] CMS, MDS Active Resident Information: Third Quarter 2010, A7a: Identification and Background Information - Current Payment Sources for N.H. Stay - Medicaid per diem, http://www.cms.gov/MDSPubQIandResRep/04_activeresreport.asp?isSubmitted=res3&var=A7a&date=32 (last modified May 2, 2011).

be cost-neutral, meaning that it costs the same amount of money or less to provide the waiver services in the community than it would to provide services in an institution. (Motion Ex. 2, ¶ 9; Opp. Ex. M, 53:19-54:14.) Participants in the EPD Waiver can receive up to sixteen hours of personal care assistance per day, as well as homemaker services, chore aide services, case management, and other services. (Motion Ex. 2, ¶ 5; Opp. Ex. H, 21:19-23:5, 134:1-20; Opp. Ex. DD, 133:19-21.) The waiver is approaching capacity, and the District has announced its intention to establish a waiting list instead of increasing the capacity of the waiver to serve more individuals. (Ex. G, 63:4-16, 67:2-68:6; 58 D.C. Reg. 7592 (Aug. 19, 2011).) No slots in the waiver are set aside for individuals transitioning out of nursing facilities, and individuals in nursing facilities will not be given priority on the waiver waiting list. (Opp. Ex. G, 54:12-56:18; 58 D.C. Reg. 7592 (Aug. 19, 2011).)

The District receives additional funding through the federal Money Follows the Person Rebalancing Demonstration Program ("MFP") to transition individuals from institutions to the community. MFP provides enhanced federal funding to assist states in transitioning currently institutionalized individuals into the community. *See* 42 U.S.C. 1396a, Pub. L. 109-171, tit. VI, § 6071, 120 Stat. 102 (Feb. 8, 2006). Under the program, the federal government reimburses at least 85% of the District's costs for providing the first year of community-based services to individuals with disabilities who transition from institutions. (Motion Ex. 3, ¶ 5; Opp. Ex. H, 51:14-53:3.) CMS authorized $26,377,620 in MFP funds to facilitate these transitions. (Opp. Ex. H, 14:18-15:18.)

IV. ARGUMENT

To survive a motion to dismiss, a complaint must state a plausible claim for relief, contain a short and plain statement of the claim showing that the pleader is entitled to relief, and

give the defendant fair notice of what the claim is and the grounds upon which it rests. *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1108 (D.C. Cir. 2008); *Dean v. Walker*, 756 F. Supp. 2d 100, 102 (D.D.C. 2010). The plaintiff is granted the benefit of all inferences that can be derived from the facts alleged in the complaint. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). A motion for summary judgment should only be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see Breeden v. Novartis Pharm. Corp.*, 646 F.3d 43, 49-50 (D.C. Cir. 2011). Because the Plaintiffs have stated a plausible claim for relief, there are genuine disputes as to material facts, and the District is not entitled to judgment as a matter of law, the District's Motion to Dismiss, or in the Alternative, for Summary Judgment should be denied.

A. A Public Entity Can Violate the Integration Mandate Through Its Funding and Administration of Programs and Services.

The District incorrectly argues that it only violates the ADA's integration mandate if it directly places individuals with disabilities in nursing facilities. (Motion at 10-11.) To the contrary, a public entity violates the integration mandate when it finances the segregation of individuals with disabilities in public or private facilities or promotes the segregation of individuals with disabilities in such facilities through its planning, system design, funding choices, or service implementation. *See* 28 C.F.R. § 35.130(b)(3)(i) (stating that a public entity may not "directly or through contractual or other arrangements, utilize criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability"); *Disability Advocates, Inc. v. Paterson* (*DAI I*), 598 F. Supp. 2d 289, 316-19 (E.D.N.Y. 2009) (finding that the defendants' planning, funding, and administration of a service system was sufficient to support an *Olmstead* claim and rejecting the argument that public entities could not be held liable when services were provided in privately-

operated facilities); *Martin v. Taft*, 222 F. Supp. 2d 940, 981 (S.D. Ohio 2002) (finding that liability does not depend on whether the public entity owns or runs institutional settings).

Courts have consistently applied title II's integration mandate in cases brought by individuals unnecessarily institutionalized in private nursing homes. *See, e.g., Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Conn.*, 706 F. Supp. 2d 266, 276-277 (D. Conn. 2010) (denying motion to dismiss although plaintiffs resided in privately-operated nursing homes); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 286-87, 293 (E.D.N.Y. 2008) (denying motion to dismiss where defendant funded nursing home placements); *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 WL 4571904, at *3 (N.D. Fla. Oct. 14, 2008) (certifying class of Medicaid-eligible individuals who resided in nursing homes that receive Medicaid funding); *Colbert v. Blagojevich*, No. 07 C 4737, 2008 WL 4442597, at *1, *10 (N.D. Ill. Sept. 29, 2008) (granting motion for class certification when plaintiffs were housed in private nursing facilities that received state and federal funding); *Rolland v. Cellucci*, 52 F. Supp. 2d 231, 237 (D. Mass. 1999) (finding it immaterial to a motion to dismiss that plaintiffs resided in private nursing facilities).

B. There Are Many Ways to Establish That Community Placement Is Appropriate for an Individual.

As part of an *Olmstead* case, an individual must show that community placement is "appropriate" for his or her needs. 527 U.S. at 607. The District argues that Plaintiffs' claim should be dismissed because "Plaintiffs . . . have failed to allege that the District has determined community-based services are appropriate for their needs." (Motion at 11.) The District further, and incorrectly, states that, "[i]f Plaintiffs expect the District to fund their community-based services, Plaintiffs are subject to the District's determination of whether or not such services are appropriate to meet their needs." (Motion at 11-12.) Contrary to Defendants' assertions, the Plaintiffs are not required to allege that the District has determined that community placement is

appropriate in order to plead or prove an *Olmstead* claim.

Nothing in the ADA or its implementing regulations requires an individual to show a determination by a state treatment professional as to whether community care is appropriate. An individual may rely on a variety of evidence to establish the appropriateness of an integrated setting, and a reasonable, objective assessment by a public entity's treatment professional is only one way of doing so. *See Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 290-91 (E.D.N.Y. 2008) (rejecting the argument that the state's treatment professionals must be the ones to make an appropriateness determination). If the District were correct in its interpretation of the law, a public entity would be able to indefinitely retain individuals with disabilities in institutions by either failing to evaluate them for community placement or by refusing to recommend community placement. Allowing the public entity to hold ultimate control over individuals' rights would contradict the spirit and purpose of the *Olmstead* decision and the ADA.[7] *See, e.g.*, *Disability Advocates, Inc. v. Paterson* (*DAI II*), 653 F. Supp. 2d 184, 258-59 (E.D.N.Y. 2009) (finding that plaintiffs need not provide determinations from state treatment professional to demonstrate that they are qualified for community placement and noting that holding otherwise would "eviscerate the integration mandate"); *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (noting that the right to receive services in the community would become illusory if the state could deny the right by refusing to acknowledge the appropriateness of community placement); *Frederick L. v. Dep't of Pub. Welfare*, 157 F.

[7] *Olmstead*'s statements on this issue do not mandate a different result. *See* 527 U.S. at 602, 607 (noting that "the State generally may rely on the reasonable assessments of its own professionals" in determining whether community placement is appropriate and stating that community-based treatment is required when "the State's treatment professionals determine that such placement is appropriate"). The *Olmstead* Court did not need to address this issue because, as it noted, in that case the State's treatment professionals had already determined that community placement would be appropriate for the plaintiffs. *Id.* at 602-03. Thus, the Court in *Olmstead* simply acknowledged one set of facts, but did not establish a legal standard that was confined solely to those facts.

Supp. 2d 509, 540 (E.D. Pa. 2001) (finding that states cannot avoid the integration mandate by failing to make recommendations for community placement).

The District incorrectly relies on *Boyd v. Steckel*, 753 F. Supp. 2d 1163 (M.D. Ala. 2010), to assert that, as a matter of law, only a public entity's treatment professional can determine appropriateness for community services. (Motion at 11-12.) In fact, the District Court for the Middle District of Alabama considered the plaintiff's own declaration regarding his appropriateness for community placement, as well as an affidavit by the State's treatment professional to the contrary. *Boyd*, 753 F. Supp. 2d at 1173-74. The court did not hold that only a public entity's treatment professional may opine as to whether community placement is appropriate, but rather found that the plaintiff had not met the high burden necessary to obtain a preliminary injunction. *Id.* at 1168-69, 1174.

C. To Defeat an *Olmstead* Claim, A Public Entity Must Demonstrate that the Relief Requested Would Be a Fundamental Alteration.

Under title II of the ADA, public entities must make reasonable modifications to programs, services, or activities when necessary to prevent discrimination on the basis of disability, unless they are able to demonstrate that those modifications would be a fundamental alteration. 28 C.F.R. § 35.130(b)(7). This is also true in the *Olmstead* context. 527 U.S. at 596-97, 603-06; *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 379-80 (3d Cir. 2005). It is the defendants' burden to demonstrate that the requested relief would fundamentally alter its system of services. *Olmstead*, 527 U.S. at 603-06; *Frederick L. v. Dep't of Pub. Welfare* (*Frederick L. I*), 364 F.3d 487, 492 n.4 (3d Cir. 2004).

A public entity can establish that the relief requested on an *Olmstead* claim would be a fundamental alteration by demonstrating that it has a "comprehensive, effectively working plan for placing qualified persons with . . . 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." 527 U.S. at 605-06. The defense is only applicable when the requested relief would so disrupt the orderly implementation of a comprehensive, effectively working *Olmstead* plan as to cause a fundamental alteration of that plan.[8] *See* 28 C.F.R. 35.130(b)(7); *Olmstead*, 527 U.S. at 605-06.

A public entity can also assert a fundamental alteration defense if "in the allocation of available resources, immediate relief would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with . . . disabilities." *Olmstead*, 527 U.S. at 604. Public entities may not avail themselves of this defense unless they can first demonstrate that they have a comprehensive, effectively working plan to comply with the *Olmstead* mandate. *See, e.g.*, *Frederick L. v. Dep't of Pub. Welfare of Pa.* (*Frederick L. II*), 422 F.3d 151, 157 (3d Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051, 1067-68 (9th Cir. 2005); *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381-82.

[8]The District appears to argue that a comprehensive, effectively working plan is the sole requirement it must meet to comply with *Olmstead*. Motion at 13. This is incorrect. *Olmstead's* central holding is that unnecessary institutionalization violates the ADA. *Olmstead*, 527 U.S. at 597. The Court made clear that a comprehensive, effectively working plan does not constitute a public entity's integration obligation; rather, it enables an entity to establish a fundamental alteration defense. *Olmstead*, 527 U.S. at 605-06 (linking this language to the fundamental alteration defense and noting that if this standard is met, a court would have no warrant to order injunctive relief); *see also Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 619-20 (9th Cir. 2005) (noting that state must demonstrate that remedy would constitute a fundamental alteration); *Sanchez v. Johnson*, 416 F.3d 1051, 1063-64 (9th Cir. 2005) (describing a comprehensive, effectively working plan as a state defense); *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381-82 (noting that agency must establish fundamental alteration defense); *Radaszewski v. Maram*, 383 F.3d 599, 611 (7th Cir. 2004) (providing the state the opportunity to show that relief would be a fundamental alteration); *Frederick L. I*, 364 F.3d at 492 & n.4 (noting that the defendant has the burden of establishing a fundamental alteration defense); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003) (stating that fundamental alteration can serve as a defense to the requirements of the integration regulation); *Pitts v. Greenstein*, No. 10–635–JJB-SR, 2011 WL 1897552, at *3 (M.D. La. May 18, 2011) (state can satisfy its obligations by demonstrating that it has a comprehensive, effectively working plan); *Haddad v. Dudek*, No. 3:10-cv-414-J-34TEM, 2011 WL 1892322, at *15 (M.D. Fla. March 16, 2011) (characterizing a comprehensive, effectively working plan as the defendants' affirmative defense).

1. To Successfully Assert a Fundamental Alteration Defense, a Public Entity Must Have a Comprehensive, Effectively Working Plan.

There are unresolved questions of fact about whether the District even has an *Olmstead* plan,[9] or if it does, whether this plan constitutes a "comprehensive, effectively working plan," as required by *Olmstead*. While the Court of Appeals for the District of Columbia Circuit has not had the occasion to enunciate what constitutes a comprehensive, effectively working plan, the District has not established, as a matter of law, that its plan meets the standard of either of the circuit courts that have considered this issue. The Third Circuit has properly required a public entity to prove that it has developed and is implementing an *Olmstead* plan that demonstrates a specific and measurable commitment to action by the public entity, including goals, benchmarks, and timeframes for which the entity can be held accountable.[10] *Frederick L. II*, 422 F.3d at 156-59. The Third Circuit has also rejected a public entity's vague, general assurances and good faith intentions of future community placement because such assurances may change, and has properly found that past progress in deinstitutionalization alone is insufficient to establish a comprehensive, effectively working *Olmstead* plan. *Id.*; *Frederick L. I*, 364 F.3d at 499-501; *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 383-85. Although the Ninth Circuit, incorrectly in the

[9] Twelve years after the Olmstead decision, the District of Columbia has never finalized a written *Olmstead* plan, and is no longer even having interagency meetings to attempt to do so. (Opp. Ex. H, 213:19-214:8.) It is not clear that what the District of Columbia has done is sufficient to be considered an *Olmstead* plan at all. However, for purposes of this Statement, the United States will refer to the District's inchoate efforts as an *Olmstead* plan.

[10] The Third Circuit held that:

> 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 the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.

Frederick L. II, 422 F.3d at 160.

Department's view,[11] has not required public entities' *Olmstead* plans to include the same level of specificity, jurisdictions must still be able to show a past successful record of deinstitutionalization and other evidence of their ongoing commitment to integration. *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 619-21 (9th Cir. 2005); *Sanchez*, 416 F.3d at 1067-68.

The District has not demonstrated, as a matter of law, that it has a comprehensive, effectively working *Olmstead* plan that can support a fundamental alteration defense because questions of fact remain about whether: 1) the District's systems for transitioning individuals with disabilities out of nursing facilities are effectively working; 2) its plan has specific timeframes, concrete and reliable commitments, or measurable goals for which it may be held accountable; and 3) it has demonstrated success in actually moving individuals with disabilities to integrated settings.

a) A Comprehensive, Effectively Working Plan Includes Effectively Working Systems for Achieving Successful Transitions.

The testimony of the District's own representatives raises questions of fact about whether its systems for transitioning individuals with disabilities out of nursing facilities are effectively

[11] The Department of Justice, pursuant to a Congressional mandate, promulgated the title II integration regulation at issue. 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980), *reprinted in* 42 U.S.C. § 2000d-1. As such, its interpretation of its own regulation is entitled to substantial deference. *See Olmstead*, 527 U.S. at 597-98 (Justice Department's views warrant respect because it is the agency directed by Congress to issue regulations implementing title II of the ADA); *Bragdon v. Abbott*, 524 U.S. 624, 642, 646 (1998) (granting the Justice Department's views on the ADA deference because "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its regulations "controlling unless plainly erroneous or inconsistent with the regulation"); *Fiedler v. Am. Multi-Cinema, Inc.*, 871 F. Supp. 35, 39 (D.D.C. 1994) (as "the author of the [ADA] regulation, the Department of Justice is also the principal arbiter as to its meaning").

working. The director of the District's only program to assist individuals seeking to leave nursing facilities (Opp. Ex. G, 42:16-21, 127:8-12) stated, "I think we need to consider if there's a systemic mechanism by which people transition, and I would say the answer is no." (Opp. Ex. H, 86:7-11.)

Furthermore, the District's Medicaid agency has refused to allow any additional transitions beyond the 27 that are currently planned because, according to the agency's own assessment, there is not an appropriate mechanism in place to assist individuals with establishing community living arrangements. (Ex. DD, 64:16-65:21; Opp. Ex. H, 66:1-19, 232:1-20.) Plaintiffs have submitted evidence indicating that the District's Medicaid agency lacks policies, procedures, or guidance for transitioning people from nursing homes into the community. (Opp. Ex. G, 45:13-16.) Plaintiffs also submitted evidence raising disputes of fact about whether there is a comprehensive process for assessing individuals in nursing facilities for community placement – even when these individuals affirmatively contact the District (Ex. DD, 64:19-65:17, 81:5-21; Opp. Ex. H, 82:1-12; 97:7-98:10; 231:17-233:3) – and whether the District is monitoring nursing facilities to ensure that they properly identify and assist individuals with community placement. (Opp. Ex. H, 86:14-21). Though the District has several lists of individuals who expressed an interest in leaving nursing facilities, or were identified by nursing facilities as ideal candidates for transition, the Plaintiffs have submitted evidence suggesting that the District is not working to transition these individuals. (Opp. Ex. H, 96:4-11, 97:2-99:5.)

Plaintiffs' evidence concerning Bonita Jackson's transition also raises material disputes of fact about the effectiveness of the District's systems for transitioning individuals out of nursing facilities. Plaintiff Jackson, who the District counts as one of its "successful" transitions, was discharged from Washington Nursing Facility on June 13, 2011, during the

briefing of this Motion. (Opp. Ex. B, ¶ 10.) Her case manager reportedly did not even know she was being discharged. (Opp. Ex. B, ¶ 9.) She had no money. (Opp. Ex. B, ¶ 12.) Her apartment was not furnished. (Opp. Ex. B, ¶ 16.) Her medications were placed in one unmarked bag, and she was not given dosage instructions. (Opp. Ex. B, ¶¶ 11, 14, 18.) For five days following her discharge, Ms. Jackson did not have the home health care services she needed for bathing, meal preparation, housekeeping, and medication management. (Opp. Ex. B, ¶¶ 3, 4, 9, 13.)

Plaintiffs' evidence concerning Plaintiffs Roy Foreman and Vietress Bacon's attempts to transition from nursing facilities into the community raises additional questions of fact about the effectiveness of the District's systems. With the D.C. Housing Authority's help, Plaintiff Roy Foreman was able to secure wheelchair accessible public housing, and he signed a lease for his own apartment in March 2011. (Opp. Ex. D, ¶¶ 12-13.) He requested assistance from both the District's Aging and Disability Resource Center and his social worker at Washington Center for Aging Services, which is owned by the District (Opp. Ex. I, ¶ 8), in finding home health services to help him with transferring into his wheelchair, bathing, dressing, and toileting. (Opp. Ex. D, ¶¶ 8-9, 11, 16.) Mr. Foreman's social worker terminated his lease instead of assisting him to access the personal care assistance services he needed to live in the apartment he had already obtained. (Opp. Ex. D, ¶ 17.) As of August 16, 2011, he was still living in the nursing facility. (Opp. Ex. D, ¶ 3.) Plaintiff Vietress Bacon's discharge from Washington Nursing Facility was scheduled for July 1, 2011. (Opp. Ex. C, ¶¶ 4, 14.) She is one of the few participants in MFP, and was able to secure a wheelchair accessible apartment and sign a lease. (Opp. Ex. C, ¶ 13.) However, her discharge was postponed because District case managers and program coordinators did not complete and process her applications for needed home health services. (Opp. Ex. C,

¶¶ 14-17.) As of August 29, 2011, she was still living in the nursing facility (Opp. Ex. C, ¶ 12.), though she appears to have been discharged on September 13, 2011.

Finally, the District asserts that it has a comprehensive, effectively working *Olmstead* plan because some individuals could receive services in the community through the MFP and EPD Waiver programs. (Motion at 16-21.) However, the mere existence of some community-based *programs* does not demonstrate, as a matter of law, that the District has a comprehensive, effectively working *plan* to ensure that individuals with disabilities receive services in the most integrated setting appropriate for their needs. To the contrary, the existence of these programs, as well as the fact that the District already provides the services in the community that individuals would need once they transition, indicate that the requested relief would not fundamentally alter the District's programs.

b) A Comprehensive, Effectively Working Plan Must Include Meaningful Transition Goals for Which a Public Entity May Be Held Accountable.

Because the District has no consistent, measurable benchmarks for nursing home transitions for which it may be held accountable, questions of fact persist regarding whether it has a comprehensive, effectively working *Olmstead* plan. *See Frederick L. II*, 422 F.3d at 156-57. In the *Frederick L.* cases, the court refused to allow the fundamental alteration defense in situations involving transition goals that were more concrete than the District of Columbia's. In *Frederick L. I*, the State of Pennsylvania had planned 33 community placements for the next year, but the court found that this fell "far short of the type of plan . . . the Court referred to in *Olmstead*" and did not provide sufficient assurance to the court that there would be ongoing progress toward community placement. 364 F.3d at 499-500. In *Frederick L. II*, the court again rejected the State's fundamental alteration defense where the State had set a vague goal of

closing up to 250 institutional beds per year. 422 F.3d at 157-58.

The District's constantly shifting and decreasing benchmarks for transitioning individuals with disabilities out of nursing facilities precludes a finding that, as a matter of law, it has a comprehensive, effectively working *Olmstead* plan. The District points to its MFP program as evidence that it has a comprehensive, effectively working *Olmstead* plan. (Motion at 17-21.) However, it is undisputed that the District's transition target for individuals with physical disabilities and mental illness under MFP keeps changing: first 960 individuals by the end of 2011, then 0, then 70, then 80, then 26, finally landing on 27. (Opp. Ex. H, 14:18-15:18 (target of 960), 43:15-20 (only transitioning people with intellectual and developmental disabilities), 34:16-20 (target of 30 in 2010 and 40 in 2011), 36:12-38:7 (target of 80 in 2011); Motion Ex. 3, ¶ 25 (target of 26 by September 2011), ¶ 28(a) (target of 80 by December 2011); Opp. Ex. H, 85:5-8 (target of 27 by December 2011).) Moreover, the District is in the process of lowering its benchmarks yet again, based on its "history of setting benchmarks [it] cannot attain" and its desire "to set a target that [it] will achieve." (Opp. Ex. H, 38:21-40:2.) The District's current best estimate of transitions is as amorphous and non-specific as the plan the *Frederick L.* court rejected. *Compare* Motion Ex. 3 ¶ 25 ("all pilot participants *should be* transitioned by September 2011 *barring any unanticipated barriers*") (emphasis added) *with Frederick L. II*, 422 F.3d at 158 ("The final plan substituted the more amorphous, i.e., non-specific, goal of closing '*up to* 250 [institutional] beds a year.'").

Given the District's acknowledgments that it sets goals that it cannot attain, that these goals continue to shift, and that it is still in the process of formulating its latest target, the District's "failure to articulate [its] 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." *See Frederick L. II* at 158-59.

c) A Comprehensive, Effectively Working Plan Includes Demonstrated Success in Transitioning Individuals Out of Nursing Facilities.

The Third Circuit and the Ninth Circuit both consider a jurisdiction's past progress in deinstitutionalization when evaluating whether a public entity has a comprehensive, effectively working *Olmstead* plan. Even when jurisdictions have demonstrated significant progress, the Third Circuit has correctly refused to allow the fundamental alteration defense, absent a detailed plan for the future. *Frederick L. I*, 364 F.3d at 490-91, 499-501 (over 400 new community placements in five years and an over 90% reduction in the state mental hospitals' population), *Frederick L. II*, 422 F.3d at 160 (describing necessary plan components). The court noted that that it was "unrealistic (or unduly optimistic) [to] assum[e] past progress is a reliable prediction of future programs." *Frederick L. I*, 364 F.3d at 500. Instead, there must be a "plan for the future." *Id*. Even under the Ninth Circuit standard, public entities must prove that they are "genuinely and effectively in the process of deinstitutionalizing disabled persons 'with an even hand'" before they can assert the fundamental alteration defense. *Arc of Wash. State, Inc.*, 427 F.3d at 619, 621-22 (quoting *Olmstead*, 527 U.S. at 605-06) (permitting Washington State to assert the defense when it had "significantly reduced" the size of its institutionalized population, by 20% over seven years); *accord Sanchez*, 416 F.3d at 1067-68 (permitting California to assert the defense where it had a "reasonable rate of deinstitutionalization," with a 20% decrease in its institutional population over five years).

The District's minimal progress in transitioning persons with disabilities out of nursing facilities prevents its *Olmstead* plan from being considered a comprehensive, effectively working plan under either Circuit's standard. Even the cases in which the Ninth Circuit has permitted a

fundamental alteration defense involve significantly more progress than the District has demonstrated. The District does not dispute that there are at least 526 individuals with disabilities living in nursing facilities in the District of Columbia who do not object to community placement, and in fact would prefer to live in the community. (Compl. at ¶ 69; Opp. Ex. H, 32:5-33:16.) Yet, as of July 2011, the District had not moved a single individual with mental illness from a nursing home into the community. (Opp. Ex. L, 52:2-53:4.) And the District only transitioned a total of two individuals with physical disabilities out of nursing facilities into the community between 2007 and August 2011. (Opp. Ex. H, 67:3-68:10.) Considering the lowest possible number of persons with disabilities who wish to leave nursing facilities, the District had only transitioned 0.38% according to its plan at the time this Motion was filed. (Compl. ¶ 69 (District nursing facilities' reports show that 526 individuals would prefer to live in the community); Opp. Ex. H, 67:3-68:10 (two individuals with physical disabilities have been transitioned as of July 27, 2011).) Even taking into consideration the period before the District's plan was in place, the actual number of nursing home occupants in the District has dropped by just 45 individuals (1.7%) between 1995 and 2009. (Ex. BB, 158:8-159:8.) Unlike California in *Sanchez* and Washington in *Arc of Washington*, the District has not significantly reduced its relevant institutionalized population.

2. A Public Entity Can Successfully Assert an Affirmative Defense if the Relief Requested Would Be So Inequitable Given Available Resources as to Cause a Fundamental Alteration of Its Programs.

Disputes of fact also remain about whether "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable . . . ." *Olmstead*, 527 U.S. at 604. The District's own calculations provide support for Plaintiffs' claim that providing services to the putative Plaintiff class in the community instead of in nursing facilities would not be so costly

that it would require a fundamental alteration of the District's programs. In order to receive approval for the EPD Waiver, the District was required to submit cost estimates to CMS demonstrating that it costs the same amount of money or less to provide the waiver services in the community than it would to provide services in an institution. (Motion Ex. 2, ¶ 9; Opp. Ex. M, 53:19-54:14.) The District estimates that it would save between $19,970 and $32,875 per person every year by providing services to an individual in the community instead of in a nursing facility. (Motion Ex. 4 at 172; *see also* Opp. Ex. M, 61:6-63:14 (explaining factors utilized in calculations); 63:15-19 (noting that it costs less money to provide services for recipients through the waiver program than to provide institutional care).) Because the District has not established, as a matter of law, that the relief requested would be so costly as to constitute a fundamental alteration of its service system, it is not entitled to summary judgment.

V. CONCLUSION

For the reasons stated above, the Court should deny Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment. With the Court's permission, counsel for the United States will be present and prepared to argue the present Statement at any upcoming hearings regarding the Motion, should such argument be helpful to the Court.

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Respectfully submitted,

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