Excerpt taken from 2010 U.S. Department of Justice Findings Letter to the State of Delaware beginning at page 8.

https://www.ada.gov/olmstead/olmstead_cases_list2.htm#de

Formatting Changed

Orchid Notes added

3. Expansion of Services Would Not Require A Fundamental Alteration Of Delaware's Community Service System

A state's obligation to provide services in the most integrated setting may be excused only where a state can prove that the relief sought would result in a "fundamental alteration" of the state's service system. Olmstead, 527 U.S. at 603-4.

Because it is not a fundamental alteration to expand existing community programs to include currently institutionalized individuals, see, e.g., DAI, 653 F. Supp.2d at 305, Delaware cannot meet its burden of proving the fundamental alteration defense.[1]

Within their service array, Delaware's existing community system is already providing services such as Assertive Community Treatment programs ("ACT") and scattered site supported housing that are essential to achieving the requirements of Olmstead.

[1] Moreover, general allegations of short-term costs or budgetary constraints alone are insufficient to establish the defense. Pa. Prot. and Advocacy, 402 F.3d at 380; Frederick L., 364 F.3d at 495.

Thus, in most respects, what is needed is not new to the system, but rather a phasing out of dated models to be consistent with appropriate practices and bringing to scale those community programs that are already providing effective integrating services.

Accordingly, providing community services individuals in or at risk of entering DPC would work only a Areasonable modification@ of the State=s program. Olmstead, at 603.

The State already provides to individuals in the community services of the type the individuals in or at risk of entering the hospitals would need to live successfully in the community.

Funded services include supported housing, crisis stabilization, substance abuse treatment, supported employment, peer support, mental health mobile crisis, transportation, psycho-social rehabilitation and more. But those services are inadequate to meet the needs of those individuals.

We found existing community services to be inadequate and not available in sufficient supply to enable individuals who are currently inappropriately segregated in DPC to be discharged from that setting into the community and provided appropriate services there. As a direct result of Delaware's actions and inactions, state-funded community health service providers fail to provide adequate community services necessary to avoid needless institutionalization.

For example, case managers' case loads have risen dramatically, rendering this core service unable to provide needed attention to each client. ACT teams have been reduced or diluted.

Currently, there are no ACT teams specializing in co-occurring disorders for mentally ill persons with specialized needs. [Orchid Note: Colorado has ACT Teams – but ACT is not an entitlement under Colorado Medicaid and is severely rationed given the scale of the need]

In addition, we found an inadequate crisis system, with too few mobile crisis teams and crisis stabilization programs spread out geographically throughout the State. The result is that individuals in crisis are now seen in DPC and local emergency rooms. **[Orchid Note: Colorado has focused on Crisis Services a lot but that has often been to the detriment of permanent residential services --- meaning Colorado has a lot of crises that we believe are largely unnecessary.]**

There is also a shortage of residential services for individuals with mental illness, including an inadequate supply of integrated, permanent supported housing.

Other core community mental health programs are inadequate.

Only some of the regional mental health centers operate residential programs and some of these have reduced services.

Inadequate resources has limited mobile crisis and diversion programs.

The result is that many individuals with severe mental illness are provided with insufficient supports to remain in the community and find themselves institutionalized or at risk of institutionalization.

Moreover, a state cannot prove this affirmative defense unless it can show that is has developed and is implementing a comprehensive and effective plan to move individuals with disabilities into the community, with any individuals waiting for services moving at a reasonable pace. Olmstead, 527 U.S. at 584; Frederick L. v. Dept. of Public Welfare, 422 F.3d 151 (3rd Cir. 2005)("[A] comprehensive working plan is a necessary component of a successful 'fundamental alteration' defense."); Pa. Prot. and Advocacy, Inc. v. Dept. of Public Welfare, 402 F.3d 374, 381 (3rd Cir. 2005) ("[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 a plan to come into compliance with the ADA.").

Delaware's own admission that individuals languish for years longer than necessary at DPC, Delaware Memorandum of Agreement Compliance committee Report at 8, is evidence that it is not implementing a working Olmstead plan, with a waiting list moving at a reasonable pace. Accord DAI, 563 F. Supp.2d at 302-305.

Both Delaware leadership and community providers report a positive cultural change within DPC and DDHSS, and a new emphasis on community integration that could move Delaware's public mental health system substantially toward compliance with ADA.

However, notwithstanding this stated goal, the State has failed to provide sufficient community-based services to ensure that Delaware citizens with mental illness are served in the most integrated setting appropriate to their needs in violation of the ADA.