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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JERRY THOMAS, by and through his Guardian ad Litem BEVERLY THOMAS, SEAN BENISON, and JUAN PALOMARES,

Plaintiffs,

v.

JENNIFER KENT, Director of the Department of Health Care Services, State of California DEPARTMENT OF HEALTH CARE SERVICES,

Defendants.

2:CV14-08013-FMO (AGRx)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Date:	April 14, 2016
Time:	10:00 a.m.
Courtroom:	22
Judge	Hon. Fernando M. Olguin
Trial Date:	July 12, 2016
Action Filed:	October, 16, 2014

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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. § 12131 *et seq*. (the "ADA") and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a).[2] As the federal agency charged with enforcement and implementation of Title II of the ADA, 42 U.S.C. §§ 12133-12134, the Department of Justice has an interest in supporting the proper and uniform application of the ADA, in furthering Congress' intent to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," *id.* § 12101(b)(2), and in furthering Congress' intent to reserve a "central role" for the federal Government in enforcing the standards established in the ADA. *Id.* § 12101(b)(3).

Plaintiffs, three individuals with significant physical disabilities requiring substantial medical care, allege that California maintains unnecessarily low limits on the cost of services authorized under California's Nursing Facility/Acute Hospital Transition and Diversion Home and Community-Based Services Waiver program (the "Waiver"). According to Plaintiffs, Defendants have not implemented a formal process for granting exceptions to these limits when necessary to avoid institutionalization, leaving Plaintiffs and others like them subject to *ad hoc* determinations by an unguided bureaucracy. Plaintiffs have moved for summary judgment, arguing that this situation places them at serious risk of unnecessary institutionalization in violation of the ADA. The United States submits this Statement of Interest to clarify Defendants' obligations under the ADA.[3]

[1] Pursuant to 28 U.S.C. § 517, the Attorney General may send any officer of the Department of Justice to "attend to the interests of the United States in a suit pending in a court of the United States."

[2] Plaintiffs' Motion for Summary Judgment, ECF No. 100 (Mar. 10, 2016) ("Mot.") also addresses a claim under the Due Process Clause of the Fourteenth Amendment. The United States takes no position with respect to that claim and addresses only Plaintiffs' ADA and Rehabilitation Act claims, which are analyzed identically for all relevant purposes. *M.R. v. Dreyfus*, 697 F.3d 706, 733 (9th Cir. 2011); U.S. Dep't of Justice, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.* n.4 (June 22, 2011), http://www.ada.gov/olmstead/q&a_olmstead.htm (the "DOJ *Olmstead* Statement").

[3] In addition to opposing Plaintiffs' Motion for Summary Judgment, Defendants filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1), ECF No. 99 (Mar. 8, 2016), arguing that this case has become moot by virtue of Defendants' decision to authorize all medically necessary services for

(footnote cont'd on next page)

I. FACTUAL BACKGROUND

The Social Security Act permits States, with the approval of the Centers for Medicare and Medicaid Services ("CMS"),[4] to provide Medicaid services in community-based settings instead of institutions. 42 U.S.C. § 1396n(c); *see also* Centers for Medicare and Medicaid Services, 1915(c) Home & Community-Based Waivers, https://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/home-and-community-based-1915-c-waivers.html (last visited March 23, 2016). These waiver programs must be cost-neutral to the alternative of providing care in an institution. 42 U.S.C. § 1396n(c)(2)(D); 42 C.F.R. § 441.302(e). In the Waiver at issue here, participants may receive services through the Waiver if they require a level of care otherwise available in an institution – e.g. a hospital or nursing facility; the cost of services available to an individual under the Waiver is then capped according to that individual's designated level of care. P52-53.[5] Although the caps correspond to the type of institution in which the individual would otherwise receive services, the Waiver caps are lower than the average cost of providing care in the corresponding institution. P53, P55-61. Defendants have no written policy or process for authorizing exceptions to the cost ceilings. P93-95. Yet on an *ad hoc* basis the Defendants have administered treatment plans for individuals on the waiver with costs in excess of the applicable limit. P106, 109. Plaintiffs are three men with significant physical disabilities. P116-128, 190-196, 236-242 (describing Plaintiffs' undisputed

Plaintiffs, regardless of the cost limitations. The United States takes no position with respect to the mootness of Plaintiffs' claims.

[4] CMS approval of a Medicaid waiver, as Defendants acknowledge, P28, does not address States' independent obligations under the ADA. *See, e.g.*, *Radaszewski v. Maram*, 383 F.3d 599, 601 (7th Cir. 2004) (allowing the plaintiffs' claims to proceed without regard to federal approval of the state's Medicaid plan and waiver programs); *Grooms v. Maram*, 563 F. Supp. 2d 840, 844, 863 (N.D. Ill. 2008) (same). The two statutes impose independent legal obligations. *Davis v. Shah*, No. 14-cv-543, slip op. at 74 (2d Cir. Mar. 24, 2016) ("A state's duties under the ADA are wholly distinct from its obligations under the Medicaid Act"); *Townsend v. Quasim*, 328 F.3d 511, 518 n.1 (9th Cir. 2003); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003) ("the failure to provide Medicaid services in a community-based setting may constitute a form of discrimination"); *see also* DOJ *Olmstead* Statement at Question 7 ("A state's obligations under the ADA are independent from the requirements of the Medicaid program"). Thus, federal approval of a waiver application does not address the existence of a violation of the ADA.

[5] Cites to "PXX" or "DXX" refer to the Parties' Statement of Uncontroverted Facts, ECF No. 102 (Mar. 10, 2016), submitted in connection with Plaintiffs' Motion for Summary Judgment.

medical conditions). The cost of the care each man requires in order to avoid unnecessary institutionalization exceeds the ceiling applicable to each man. P173, 179, 220-221, 229, 291, 293, 298 (undisputed that October 2015 letters authorized services in excess of the applicable limit).

II. ARGUMENT

A. The ADA Prohibits Unjustified Institutionalization

Public entities must provide services to individuals with disabilities in the most integrated setting appropriate to their needs. *Townsend*, 328 F.3d at 517 ("Because DSHS does not allow Mr. Townsend to receive the services for which he is qualified in a community-based, rather than nursing home, setting, Mr. Townsend can prove that the Secretary has violated Title II of the ADA"); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 285 (E.D.N.Y. 2008) (the ADA prohibits "discrimination in the form of unnecessary segregation of those with disabilities in nursing homes and other institutions"). Congress enacted the ADA in order to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress noted that society has "tended to isolate and segregate individuals with disabilities," and that discrimination, including by institutionalization, "continue[s] to be a serious and pervasive social problem." *Id.* §§ 12101(a)(2), (3). Congress therefore prohibited discrimination by public entities, including states and state instrumentalities, against individuals with disabilities, providing 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 *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court confirmed that Title II requires states to provide community-based services for individuals with disabilities when "such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated…." *Id.* at 607. That holding, the court explained, reflected "two evident judgments." *Id.* at 600. "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.

The Attorney General's regulations implementing the ADA[6] 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 "most integrated setting" is one which "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35 App. B (2011). The regulations prohibit the use of "criteria or methods of administration" that have the "effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(3)(i). Finally, the regulations require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability."[7] *Id.* § 35.130(b)(7).

B. Defendants Cannot Administer the Medicaid Waiver Without Accounting for Individual Needs

When limitations on Waiver services place individuals at serious risk of unnecessary institutionalization, the State must make a reasonable modification to those limitations. *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 996 (N.D. Cal. 2010) (new law limiting availability of adult day care services likely violated ADA because "the new eligibility criteria likely will result in the termination of [adult day care] services for a large number of persons with disabilities, *without regard to the individual's particular need for such services*") (emphasis added); *Radaszewski*, 383 F.3d at 609-

[6] Congress directed the Attorney General to promulgate regulations implementing the anti-discrimination directive of § 12132. 42 U.S.C. § 12134. Given this delegation, the Department of Justice's interpretation of the ADA and of its own implementing regulations is entitled to deference. *Olmstead*, 527 U.S. at 597-98. ("Because the Department is the agency directed by Congress to issue regulations implementing Title II, [internal citation omitted] its views warrant respect.").

[7] Defendants have not raised, and the United States does not address, the affirmative defense available to public entities in an ADA case. A public entity may be excused from making modifications to its service system when it can prove that the change would be a "fundamental alteration." "A fundamental alteration requires the public entity to prove 'that, in the allocation of available resources, immediate relief for plaintiffs would be inequitable, given the responsibility the State [or local government] has taken for the care and treatment of a large and diverse population of persons with [ ] disabilities.'" DOJ *Olmstead* Statement at Question 10 (quoting *Olmstead*, 527 U.S. at 604) (alterations in original).

10. Limitations on waiver services – for example waiting lists or cost caps – can violate the ADA if they do not accommodate an individual placed at serious risk of unnecessary institutionalization because of those limitations. *See, e.g.*, *Cruz v. Dudek*, No. 10-cv-23048, 2010 WL 4284955, at *13 (S.D. Fla. Oct. 12, 2010) (Florida's spinal cord injury waiver violated ADA where plaintiffs were "required to enter a nursing home for at least 60 days before they are eligible to receive these services because they are too far down on the waiting list").

To be sure, limitations on services are not *per se* discrimination. But when the state does impose limitations, the ADA may nonetheless require the state to modify those limitations to avoid serious risk of institutionalization, unless doing so would be a fundamental alteration.[8] *B.N. v. Murphy*, No. 09-cv-199, 2011 WL 5838976, at *7 (N.D. Ind. Nov. 16, 2011) (cap on respite care services discriminated against 14 individuals who were unable to secure alternative services and were at risk of institutionalization without additional respite care); DOJ *Olmstead* Statement at Question 7 ("the fact that a state is permitted to 'cap' the number of individuals it serves in a particular waiver program under the Medicaid Act does not exempt the state from serving additional people in the community to comply with the ADA or other laws").

For instance, the court in *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009), observed that the challenged state-wide reductions in adult day care services could have been ADA-compliant if the state had "implement[ed] any means of *ensuring* that, if and when the cuts take effect, the necessary alternative services will be identified and in place for Plaintiffs." *Id.* at 1174 (emphasis added). Because the state could not demonstrate the existence of any such means, the court rejected the state's argument that "Plaintiffs [could] avoid the risk of institutionalization by availing themselves of other, largely unspecified Medi-Cal or other community services." *Id.*; *see also V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1122 (N.D. Cal. 2009) (noting that the state could establish "individualized measures" to reduce In-Home Supportive Services ("IHSS") where those services were provided for "convenience or improved quality of life rather than need"); *Crabtree v. Goetz*, No. 08-cv-0939, 2008 WL 5330506, at *25, (M.D. Tenn. Dec. 19, 2008) (noting plaintiffs' evidence that the state was "forcing Plaintiffs

[8] In this case, Defendants could reasonably modify the cost limitations by, for example, seeking authorization from CMS to increase the limits.

into nursing homes *without any mechanisms to determine whether their medical needs can be met in the community or the nursing home*" and rejecting a "categorical approach") (emphasis added); DOJ *Olmstead* Statement at Question 9 ("In making…budget cuts, public entities have a duty to take all reasonable steps to avoid placing individuals at risk of institutionalization").

Here, Defendants admit that they have no written policies or procedures to meet the needs of individuals whose care costs exceed the applicable cost limitation. P93 (Defendants' response acknowledges "there is no written policy or criteria"). Even assuming that individual supervisors do indeed have the discretion to authorize exceptional levels of care, *id.*, without any demonstration of *how* the state exercises that discretion, Defendants have not "implement[ed] any means of *ensuring*" that individuals who need that exceptional care to avoid institututionalization actually receive it. *Brantley*, 656 F. Supp. 2d at 1174 (internal quotations omitted) (emphasis added). And because the funding source for these additional services is not clear in the record,[9] it is also unclear whether these exceptions comply with the Waiver. An opaque and unwritten policy, P93, implemented without an effort by Defendants to track its use, P102-103, and triggered for these Plaintiffs only after a year of litigation in federal court, P315, 321-322, does not "ensure" that individuals who require additional care to remain in the community will have the necessary alternative services identified and put in place to avoid unnecessary institutionalization. *Brantley*, 656 F. Supp. 2d at 1174.

C. The Integration Mandate Protects Individuals Currently Receiving Community-Based Services Who are at Serious Risk of Institutionalization

Although Defendants suggest that Plaintiffs are not at risk of institutionalization because they are "doing well at home and have received the medically necessary care to remain safely in their homes," Mot. at 3, the at-risk inquiry is not focused on a plaintiff's past or immediate circumstances, in isolation, but rather on the ultimate question of the likelihood of a *future* institutionalization. As the Department of Justice's regulatory guidance makes clear, a state violates the integration mandate of the

[9] It is undisputed that Defendants "intend to use state-only dollars to fund Waiver costs over individual cost limits attributable to IHSS and [Waiver Personal Care Services] overtime rather than reduce services to Waiver participants," P45. However the record does not specify the funding source for excess services other than overtime costs. P109.

ADA "if a public entity's failure to provide community services or its cut to such services will likely *cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution*." DOJ *Olmstead* Statement at Question 6 (emphasis added); *see also Radaszewski*, 383 F.3d at 609 ("A State may violate Title II when it refuses to provide an existing benefit to a disabled person that would enable that individual to live in a more community-integrated setting").[10]

At times, the inquiry can focus on a plaintiff's past or current stability in the community. Those circumstances are not dispositive, however. Instead, past circumstances are relevant to the extent they inform the assessment of whether an individual is at serious risk of entering an institution. For instance, in determining that a plaintiff in *Cruz* was at risk of institutionalization, the Court noted that he had been hospitalized three times in 10 months "either directly or indirectly [as] a result of not receiving adequate in-home health care services." *Cruz*, 2010 WL 4284955, at *3.

Consistent with this settled law, and with the DOJ *Olmstead* Statement, courts have frequently intervened when a state's Medicaid services are insufficient to ensure that individuals would continue to receive services in the most integrated setting appropriate – even when those individuals were "doing well at home" as Defendants allege is the situation for Plaintiffs here. *Fisher* addressed a decision by Oklahoma to impose a cap of five medically necessary prescriptions on participants receiving community-based care through Oklahoma's waiver program "while continuing to provide unlimited prescriptions to patients in nursing facilities." 335 F.3d at 1178-79. Without discussing plaintiffs' then-current medical situation, and agreeing that the new regulation would lead to unnecessary

[10] *See also Davis v. Shah*, No. 14-cv-543, slip op. at 70-74 (2d Cir. Mar. 24, 2016); *Oster v. Lightbourne*, No. 09-cv-4668, 2012 WL 691833, at *16 (N.D. Cal. Mar. 2, 2012) (granting preliminary relief where "the evidence also shows that Plaintiffs are likely to succeed in demonstrating that the loss of IHSS hours will compromise the health and well-being of IHSS recipients such that they will be at serious risk of institutionalization"); *Peter B. v. Sanford*, No. 10-cv-767, 2010 WL 5912259, at *7-8 (D.S.C. Nov. 24, 2010) *report and recommendation adopted* 2011 WL 824584 (Mar. 7, 2011); *Cruz*, 2010 WL 4284955, at *12-13; *G. v. Hawaii*, No. 08-cv-551, 2010 WL 3489632, at *9 (D. Haw. Sept. 3, 2010) ("A state's reduction in services may violate the integration mandate where it unjustifiably forces or will likely force beneficiaries from an integrated environment into institutional care"); *Brantley*, 656 F. Supp. 2d at 1170-17 ("Plaintiffs have sufficiently demonstrated for purposes of the instant motion that the proposed reduction in [adult day care] services will place them at serious risk of institutionalization"); *V.L.*, 669 F. Supp. 2d at 1119-20 ("Elderly and disabled individuals with unmet in-home care needs will likely suffer falls which will lead to hospitalization and subsequent institutionalization"); *Grooms*, 563 F. Supp. 2d at 850.

institutionalization,[11] the Tenth Circuit reversed the grant of summary judgment in defendants' favor, holding that the plaintiffs survived summary judgment by showing that the state did not allow them "to receive services for which they are qualified unless they agree to enter a nursing home." *Id.* at 1182. In another case, plaintiffs in *V.L.* challenged a California law changing eligibility rules for in-home supportive services, passed in response to the state's budget crisis. Again engaging in a forward-looking inquiry, the court found that plaintiffs would likely succeed on the merits of their ADA claim, because they would "face a severe risk of institutionalization as a result of losing the services that [the new law] would eliminate." 669 F. Supp. 2d at 1119-20; *see also Cota*, 688 F. Supp. 2d at 994-995 (preliminarily enjoining implementation of new, more restrictive, eligibility criteria for adult day care services).

Although the cases described above arose when the state took steps to reduce the medically necessary care it had been providing, a state can violate the ADA even when it maintains the status quo. The plaintiff in *Townsend* challenged the state of Washington's Medicaid system, which provided categorically needy[12] residents the option of receiving long-term medical care and living assistance either in nursing home settings, their own homes, or adult family homes. 328 F.3d at 514. Medically needy residents were given only one option: nursing homes. *Id.* The plaintiff had been receiving services in a family home, but when his income increased beyond the threshold established by the state and he became medically needy, he was faced with a choice: "move to a nursing home within 30 days or lose his Medicaid benefits." *Id.* at 514. The court did not consider Townsend's then-current medical situation, except to observe that his success in the community clearly demonstrated the propriety of continuing to receive community-based services. *Id.* at 516. Instead, the court considered whether

[11] The Oklahoma defendants argued that, because the plaintiffs stated they would "rather die than be placed in a nursing home" or would refuse to go to a nursing facility, the plaintiffs could not show any harm and were not entitled to injunctive relief. *Id.* at 1184. The court rejected this argument, noting "that they have emphatically stated their desire to remain in the community does not mean that they do not face a substantial risk of harm." *Id.* Defendants' reference in this case to Plaintiffs' steadfast desire to remain in the community, D41-42, is similarly misplaced.

[12] States participating in Medicaid must provide Medicaid coverage to the categorically needy, those with incomes below a certain threshold, and have the option of providing coverage to individuals with slightly higher incomes: the medically needy. *See, e.g.*, *Schweiker v. Hogan*, 457 U.S. 569, 572-73 (1982); 42 U.S.C. § 1396a(a)(10); 42 C.F.R. § 435.4.

Townsend could *remain* in the community given the state's policy of limiting community-based services to only the categorically needy – and answered in the negative. *Id.* at 518. Here, as in *Townsend*, the question is whether Plaintiffs are at risk of unnecessarily entering an institution by virtue of Defendants' *ad hoc* practice regarding cost limitation exceptions.

III. CONCLUSION

The United States respectfully encourages the Court to assess Plaintiffs' motion in light of the principles set forth above. The United States will be present and prepared to argue the matters addressed in this Statement of Interest at any hearing regarding Plaintiffs' motion.

Dated: March 29, 2016

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