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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)

SECOND SUPPLEMENTAL STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Date:	October 6, 2016
Time:	10:00 a.m.
Courtroom:	22
Judge	Hon. Fernando M. Olguin
Trial Date:	November 29, 2016
Action Filed:	October 16, 2014

SECOND SUPPLEMENTAL STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

In connection with the Plaintiffs' renewed motion for summary judgment, ECF No. 193, the United States hereby incorporates by reference and supplements its Statement of Interest filed on March 29, 2016, ECF No. 112 ("SOI"), and its Supplemental Statement of Interest filed on August 4, 2016. ECF No. 171 ("Supplemental SOI").

In this case, Plaintiffs argue that Defendants have imposed cost limits on the operative Waiver "significantly below what [Defendants] pay[] for comparable institutional care," have only an "arbitrar[y]" policy for making exceptions to those limits, and consequently violate Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. Jt. Mem. Mot. Summ. J. 1:21-2:1, ECF No. 194. In its SOI, the United States observed that California's operation of these limits and exceptions processes would not meet the State's obligations under the ADA if the State did not otherwise "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." SOI at 6 (internal quotations omitted).

In the months since Plaintiffs first moved for summary judgment and the United States filed its SOI, Defendants have taken some steps to modify the applicable cost limits. The United States noted in its Supplemental SOI that such steps in and of themselves might not bring the Defendants into ADA compliance. Supplemental SOI at 2. Defendants now contend, among other arguments, that this Court should not examine the waiver at issue because where "there is evidence that [the] state has in place a comprehensive deinstitutionalization scheme, which, in light of existing budgetary constraints and competing demands of other services that the State provides, is 'effectively working,' courts should not tinker with that scheme." Jt. Mem. Mot. Summ. J. 12:12-25 (citing *Sanchez v. Johnson*, 416 F.3d 1051, 1067-68 (9th Cir. 2015)). But

Defendants have proffered little evidence of an effectively working plan that addresses the risk of institutionalization in this case and have misinterpreted the relevant law. To be sure, *Sanchez* did affirm that a court should not impose a judicial remedy against an ADA violation if doing so would inappropriately interrupt a comprehensive, effectively working, plan for deinstitutionalization – i.e. a fundamental alteration defense. However, neither *Sanchez* nor other case law insulates a defendant from judicial scrutiny of the Waiver identified as the basis for that defense. To the contrary, courts frequently examine states' Medicaid programs, including waiver programs, to determine whether the state's administration of its programs unnecessarily institutionalizes individuals or places individuals at risk of unnecessary institutionalization. *See, e.g.*, *Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016) (examining Title II ADA claim related to waiver eligibility requirements); *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003) (examining financial eligibility for waiver services); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175 (10th Cir. 2003) (examining availability of certain services through a waiver). Accordingly, in this Second Supplemental Statement of Interest the United States clarifies the scope of the fundamental alteration defense and the burden a state must meet in order to successfully assert that defense.

The Supreme Court has articulated the fundamental alteration defense to mean that a public entity need not make an otherwise reasonable modification to its service system if it establishes that to do so would be "inequitable, given the responsibility the State has taken for the care and treatment of a large and diverse population of persons with [] disabilities." *Olmstead v L.C.*, 527 U.S. 581, 604 (1999); *see also* 28 C.F.R. § 35.130(b)(7) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

However, the defense's availability is limited. For instance, it cannot be used by

public entities generally seeking to avoid making changes which foster integration. *See, e.g.*, *Pa Protection & Advocacy Inc. v. Pa Dep't of Pub. Welfare*, 402 F.3d 374, 380-381 (3d Cir. 2005) ("a state cannot meet an allegation of noncompliance simply by replying that compliance would be too costly or would otherwise fundamentally alter its noncomplying programs"); *Townsend*, 328 F.3d at 518-19 ("policy choices that isolate the disabled cannot be upheld solely because offering integrated services would change the segregated way in which existing services are provided"). Nor is the defense available to public entities pointing solely to increased expenditures or general budget concerns. *Fisher*, 335 F.3d at 1182-83 ("the fact that Oklahoma has a fiscal problem, by itself, does not lead to an automatic conclusion that preservation of unlimited medically necessary prescription benefits for participants in the Advantage program will result in a fundamental alteration").

Further, a public entity asserting the affirmative defense[1] must demonstrate 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." *Frederick L. I*, 364 F.3d at 498 (quoting *Olmstead*, 527 U.S. at 605-06). The Third Circuit has stressed the importance of a State's demonstration that it has a "plan for the future." *Id.* at 500. This plan must do more than reflect past progress but rather must clearly demonstrate a commitment to future action. *Id.* Furthermore, this commitment must not be "a vague assurance of the individual patient's future deinstitutionalization" and should instead contain "measurable goals for community integration for which [the defendant] may be held accountable." *Frederick L. v. Pa Dep't of Pub. Welfare*, 422 F.3d 151, 156 (3d Cir. 2005) (*Frederick L. II*); *see also Day v. Dist. of Columbia*, 894 F. Supp. 2d 1, 28 (D.D.C. 2012) ("one essential component of an 'effectively working' plan

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[1] Defendants bear the burden of proving a fundamental alteration defense. *Frederick L. v. Pa Dep't of Pub. Welfare*, 364 F.3d 487, 492, n.4 (3d Cir. 2004) (*Frederick L. I*).

is a measurable commitment to deinstitutionalization") (citing 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")); *Jensen v. Minn. Dep't of Human Servs.*, No. 09-1775, 2014 WL 4670898, at *2 (D. Minn. Sept. 18, 2014) (*Olmstead* plan "must contain concrete, reliable and realistic commitments, accompanied by specific and reasonable timetables, for which the public agencies will be held accountable."). If there is an effectively working plan with the requisite components, the court should examine whether the proposed remedy "would so disrupt the implementation of the plan as to cause a fundamental alteration." DOJ *Olmstead* Statement at Question 13; *Benjamin v. Pa Dep't of Pub. Welfare*, 768 F. Supp. 2d 747, 755 (M.D. Pa. 2011) ("the existence of the Plan does not, however, automatically defeat liability").

In determining whether an effectively working plan exists, courts have regularly rejected purported plans which did not meet these rigorous criteria. *Cruz v. Dudek*, No. 10-23048, 2010 WL 4284955 (S.D. Fla. Oct. 12, 2010) challenged Florida's waiver for individuals with spinal cord injuries. The plaintiffs there were on the waiting list for that waiver and could only gain admission to the waiver off of the lengthy and slow-moving wait list by entering a nursing facility for at least two months. *Id.* at *13. The court rejected the argument that the state had an effectively working plan. The court noted that defendants in that case had not shown that the waiver at issue had "been expanded or adjusted to reduce the lengthy waiting list, or that there [was] a basis for not seeking such an expansion." *Id.* at *14. In addition, the waiver was not operating at authorized capacity, and the State had not proffered information about "the average amount of time on the waiting list, the rate of turnover, or when, if ever Plaintiffs can expect to move off the waiting list." *Id.* at *15. Given this stagnation, the court held the state had not shown they had a "plan or commitment to avoid unnecessary" institutionalization. *Id.*

In *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1305-06 (M.D. Fla. 2010), another challenge to the spinal cord waiver, Florida pointed to the fact that some of its waivers, though not the spinal cord waiver, had "increased in size and expenditure." *Id.* But evidence related to other waivers did not demonstrate the "effectiveness" of the spinal cord waiver. *Id.* The court found the state's effectively working plan arguments particularly weak because the state did not proffer evidence that its institutionalized population had declined, and because the state's own representation to the plaintiffs was that "moving individuals off the waiting list into these programs does not occur frequently." *Id.*; *see also Benjamin*, 768 F. Supp. 2d at 756 ("Considering the absence of concrete benchmarks for deinstitutionalization in the contingency-ridden Plan, no record of actual implementation of the Plan, and a history of unnecessary segregation of and discrimination against institutionalized persons, we cannot conclude that [defendant] has complied with or will comply with the integration mandates of the ADA and [Rehabilitation Act].").

The Ninth Circuit similarly demands a measurable commitment to deinstitutionalization. In *Sanchez* the court affirmed the District Court's finding that California's "commitment to [] deinstitutionalization…[was] genuine, comprehensive, and reasonable." 416 F.3d at 1067. This finding had been based on a number of factors, which included: increased expenditures on community-based services, an increased caseload of individuals served in community-based settings, a decrease in institutional populations, and budget allocations for additional community-based settings. *Id.*; *see also Arc of Washington State Inc. v. Braddock*, 427 F.3d 615, 620 (9th Cir. 2005) ("the state had repeatedly applied for an increase in the size of the waiver program, state expenditures for integrated community-based treatment had consistently increased over the prior decade, and the state's institutionalized population had decreased by twenty percent over the prior four years.").

Relying on *Sanchez*, the court in *Arc of Washington* held that compelling the state

to increase the number of individuals served on a particular waiver would be a fundamental alteration under the facts of that case: the waiver was "sizeable, with a cap that ha[d] increased substantially over the past two decades;" was "full;" was "available to all Medicaid-eligible disabled persons as slots bec[a]me available, based only on their mental-health needs and position on the waiting list;" had "already significantly reduced the size of the state's institutionalized population;" and had "experienced budget growth in line with, or exceeding, other state agencies." 427 F.3d at 621-22.

Defendants assert they have an effectively working plan to *de*institutionalize Californians with disabilities, but do not explain how the existence of such a plan is relevant here, where the Plaintiffs claim they are placed *at risk* of institutionalization by the very operation of that plan. Assuming that the existence of such a plan is relevant, it is Defendants' burden to demonstrate the existence of a comprehensive, effectively working plan that reflects a genuine and reasonable commitment to community integration of individuals with disabilities. In support of this burden, the Defendants have pointed to a single fact: that the NF/AH Waiver at issue serves 3,084 beneficiaries, with 439 in intake status.[2] Jt. Mem. Mot. Summ. J. 12:20-23. This fact, alone,[3] cannot demonstrate a "genuine, comprehensive, and reasonable" commitment to

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[2] Defendants also vaguely allude to "competing budgetary restraints." Jt. Mem. Mot. Summ. J. 12:21. As discussed *supra*, budgetary constraints alone are not sufficient evidence that requested relief is a fundamental alteration. DOJ *Olmstead* Statement at Question 14; *see also Frederick L. I*, 364 F.3d at 495 ("a singular focus upon a state's short-term fiscal constraints will not suffice to establish a fundamental-alteration defense" (citing *Fisher*, 335 F.3d at 1177-78)). Although budgetary constraints may be one of many relevant factors, specific cost concerns must be brought to the Court's attention in order for that factor to have meaning. *Cf.*, *Sanchez*, 416 F.3d at 1063 (noting district court's finding that relief "would represent a forty percent increase in the State's budget for developmentally disabled services.").

[3] For context, as of 2012 there were more than 200 1915(c) waivers serving more than 1 million individuals around the country. The Kaiser Commission on Medicaid and the Uninsured, Medicaid *Home and Community-Based Services Programs: 2012 Update* 7-8 (November 2015), http://files.kff.org/attachment/report-medicaid-home-and-community-based-services-programs-2012-data-update. However, the existence of those waivers and the number of individuals receiving services through those waivers does not, without more, shed light on whether states have effectively deinstitutionalized individuals with disabilities.

deinstitutionalization, and the record is virtually silent on any plans for the future. *See Sanchez*, 416 F.3d at 1067; *Frederick L. I*, 364 F.3d at 500. The NF/AH Waiver is an aspect of California's broader plan to promote deinstitutionalization and integration, to be sure. Jt. Statement of Uncontroverted Facts P27, ECF No. 195 (undisputed that "the NF/AH waiver is one of the things in California's *Olmstead* plan"). But, in pointing only to the number of individuals served on that Waiver, Defendants have not demonstrated how the existence of the Waiver is part of an effectively working plan to reduce Plaintiffs' risk of institutionalization. Defendants' showing is particularly insufficient here, where Plaintiffs argue that the cost limitations contained within this purportedly effective plan are the very mechanism placing them at risk of institutionalization. *Cf. Steimel*, 823 F.3d at 917 (state could not assert fundamental alteration defense because "instead of moving people with disabilities to more integrated settings, the state's plan is making their living arrangements *less* integrated") (emphasis in original).

The United States encourages the Court to assess Plaintiffs' motion in light of the principles set forth above and those set forth in its SOI and Supplemental SOI.

Dated: September 16, 2016

Respectfully submitted,

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