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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK**

ROSEMARY SCIARRILLO, by and	:	Honorable Stanley R. Chesler
through her guardians,	:	U.S.D.J.
Joanne St. Amand and Anthony	:	
Sciarrillo, <u>et al.</u>,	:	CIV. NO.: 2:13-cv-03478
	:	
Plaintiffs,	:	STATEMENT OF INTEREST OF THE
	:	UNITED STATES OF AMERICA
v.	:	
	:	
CHRISTOPHER CHRISTIE,	:	
Governor of the State of New	:	
Jersey, <u>et al.</u>,	:	
	:	
Defendants.	:	

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INTRODUCTION

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517,¹ regarding Plaintiffs' Complaint, [Docket No. 1], in order to clarify to the Court the proper scope and application of the integration mandate of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132. The statute, regulations, and established precedent do not support the Plaintiffs' claim that the ADA gives them a right to remain in a particular institution and prevent the State from integrating persons with disabilities into a community setting as mandated by Olmstead v. L.C., 527 U.S. 581, 591-592 (1999).

In 1990, 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). Congress recognized 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." Id. § 12101(a)(2). For these 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.

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."

Id. § 12132. In passing the ADA, Congress sought to create strong national standards to address discrimination and to ensure that the federal government played a “central role” in creating and enforcing those standards. 42 U.S.C. § 12101(b)(2) & (3).

Congress instructed the Attorney General, in 42 U.S.C. § 12134, to issue regulations to implement the ADA’s broad mandate to end the pervasive and ongoing segregation of persons with disabilities in all facets of life. See 42 U.S.C. §12101(a)(2). Title II’s integration regulation requires 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).² The “most integrated setting” means 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.

The Supreme Court in Olmstead interpreted these regulations to mean that “[u]njustified isolation” of individuals with disabilities “is properly regarded as discrimination based on disability.” Olmstead, 526 U.S. at 596-597. The Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. Olmstead, 527 U.S. at 607.

The Department has interpreted the integration regulation to prohibit the unnecessary provision of such services to persons with disabilities in segregated institutional settings, in

² Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, contains a nearly identical regulation issued by the Attorney General. 28 C.F.R. § 41.51(d). These regulations have been read in tandem to provide similar protections to persons with disabilities. See Olmstead v. L.C., 527 U.S. at 590-592.

which persons with disabilities have little to no opportunity to interact with non-disabled persons. See, e.g., “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.” at 3 (June 22, 2011), available at: http://www.ada.gov/olmstead/q&a_olmstead.htm.

As the agency charged by Congress with enforcing and implementing regulations under Title II, the Department’s interpretation of both Title II and the integration regulation has been accorded substantial deference. See Olmstead, 527 U.S. at 597-98; (“Because the Department is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect.” (citation omitted)); Pashby v. Delia, 709 F.3d 307, 322 (4th Cir. 2013) (“Because Congress instructed the DOJ to issue regulations regarding Title II, we are especially swayed by the DOJ’s [interpretation of] ‘the ADA and the Olmstead decision’”) (internal citation omitted); M.R. v. Dreyfus, 663 F.3d 1100, 1117 (9th Cir. 2011), opinion amended and superseded on other grounds, 697 F.3d 706 (9th Cir. 2012). The Department’s interpretation of the integration regulation must be upheld “unless plainly erroneous or inconsistent with the regulation.” Auer v. Robbins, 519 U.S. 452, 461 (1997) (citations omitted).

II. ARGUMENT

The ADA Does Not Create a Right to Remain in a Particular Institution

In June 2011, the State enacted a statute creating a task force to evaluate the State’s seven developmental centers and issue recommendations with respect to closing one or more of those centers. Act establishing "Task Force on the Closure of State Developmental Centers," P.L. 2011, Chapter 143 (available at http://www.njleg.state.nj.us/2010/Bills/S3000/2928_I1.HTM). On August 1, 2012, the task force issued a final report with a binding recommendation to close the North Jersey Developmental Center (NJDC) and the Woodbridge Developmental Center

(WDC) within the next five years. Final Report as Submitted to Governor Chris Christie and the New Jersey Legislature (available at <https://dspace.njstatelib.org/xmlui/handle/10929/21105>).

Plaintiffs oppose such recommendations, essentially contending that the ADA, an integration statute enacted to end the pervasive segregation of persons with disabilities, conveys a right to remain in a segregated institution, as opposed to a right to live in the community. See Plaintiffs' Complaint at 40-44. Yet, nothing in the ADA or its regulations, the Supreme Court's decision in Olmstead, or any other case law supports this interpretation of the ADA and its integration mandate. Nothing in the ADA statute or regulations or the Olmstead decision supports Plaintiffs' concept that moving people with disabilities to appropriate integrated settings is similarly discriminatory or raises similar civil rights concerns. Rather, the inverse is true.

In Olmstead, the Supreme Court concluded that the unjustified institutionalization and isolation of persons with mental disabilities violates the ADA. Olmstead, 527 U.S. at 581, 597. The Supreme Court reached this conclusion based upon two "evident judgments." Id. at 600. First, the Court observed that "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. at 600. Second, the Court noted that "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.

Plaintiffs make much of Olmstead's statement that there is no "federal requirement that community-based services be imposed upon those who do not desire them." Olmstead, 527 U.S. at 602. That statement means it is not an ADA *requirement* to place a person in a community based setting if he or she opposes placement. It does not mean integration or placement in

another institution is an ADA violation. Moreover, to read that sentence in Olmstead as creating a right to institutionalization would turn the ADA and its integration mandate on its head and impermissibly create a new right under the ADA that was never intended by Congress. Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (Congress must “unambiguously confer a right” to support a cause of action under §1983 or an implied right of action.). The ADA does not confer a civil right to remain in any given institution.

In fact, Plaintiffs’ argument contradicts established precedent that the ADA’s purpose is to prevent unnecessary institutionalization, *not* to require continued operation of a state institution in which an individual plaintiff currently resides. Courts have found that it does not violate federal law for states to close their institutions. See generally Ricci v. Patrick, 544 F.3d 8, 21 (1st Cir. 2008); Illinois League of Advocates for the Developmentally Disabled v. Patrick Quinn, Civ. No. 1:13-cv-01300, 9-10 (N.D. Ill. filed June 20, 2013) (Attached as Exhibit A) (memorandum opinion holding that placing individuals in the community is no basis for an Olmstead case).³ This is particularly true when a state is rebalancing its system of supports for people with disabilities away from expensive institutional care towards community care to use its resources to serve more people. See Ricci, 544 F.3d at 8, 17-18 n.8, 21 (recognizing a State’s ability to close its state-operated facilities, particularly when “allocating its resources to ensure equitable treatment of its citizens,” and noting the ADA’s preference for community integration under the Olmstead decision) (internal citations omitted); Richard C. v. Houstoun, 196 F.R.D.

³ Medicaid law also does not require that States operate a particular institution. States, like New Jersey, that participate in Medicaid’s home and community-based waiver program must offer participants the choice of community-based or institutional services, but those institutional services can be offered in a public institution (like a State Developmental Center) or a private institution at the option of the state, 42 C.F.R. § 441.302(d). Here, the State has provided Plaintiffs who wish to receive services in another State Developmental Center the option to do so, which accords with their rights under Medicaid to choose a type of placement.

288, 291-292 (W.D. Pa. 1999) (rejecting plaintiffs' interpretation of Olmstead to require continued institutionalization when the three Olmstead factors are not met and denying intervention); see also Baccus v. Parrish, 45 F. 3d 958, 961 (5th Cir. 1995) (State may close its public institutions for individuals with intellectual and developmental disabilities); Lelsz v. Kavangauh, 783 F. Supp. 286, 298 (N.D. Tex. 1991), aff'd 983 F. 2d 1061 (5th Cir. 1993)(same).⁴

III. CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court find that the Plaintiffs have no claim under the Americans with Disabilities Act.

Dated: September 13, 2013

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RESPECTFULLY SUBMITTED,

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⁴ The Third Circuit has addressed, on a case-by-case basis, efforts by persons residing in state institutions to intervene in proceedings affecting those institutions. See Benjamin v. Dep't of Public Welfare of the Commonwealth of Pa., 432 F. App'x. 94, 98 (3d Cir. 2011) (affirming denial of intervention motion where relief sought caused no "direct jeopardy" to plaintiffs' current form of institutional care); Benjamin ex rel. Yock v. Dep't of Public Welfare of the Commonwealth of Pa., 701 F.3d 938, 954-57 (3d Cir. 2012) (holding intervention warranted under Fed. R. Civ. P. 24(a)(2) to permit challenge to proposed settlement addressing institutional discharges). But a protectable interest permitting intervention does not equate to a court-enforceable federal right, Benjamin, 432 F. App'x. at 98 (citing Kleissler v. U.S. Forest Service, 157 F.3d 964, 970 (3d Cir. 1998)), and the Third Circuit has not held that people living in a state-operated facility have a right to remain there.

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CERTIFICATE OF SERVICE

I certify that on this day, September 13, 2013, I have electronically filed the foregoing STATEMENT OF INTEREST OF THE UNITED STATES with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties in this matter via electronic notification:

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