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18 UNITED STATES DISTRICT COURT

19 FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

23 Plaintiffs,

24 v.

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

28 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

1 The United States files this Statement of Interest, pursuant to 28 U.S.C. § 517,¹ because this
2 litigation implicates the proper interpretation and application of Title II of the Americans with
3 Disabilities Act, 42 U.S.C. § 12131 *et seq.* (the “ADA”) and Section 504 of the Rehabilitation Act, 29
4 U.S.C. § 794(a).² As the federal agency charged with enforcement and implementation of Title II of
5 the ADA, 42 U.S.C. §§ 12133-12134, the Department of Justice has an interest in supporting the proper
6 and uniform application of the ADA, in furthering Congress’ intent to create “clear, strong, consistent,
7 enforceable standards addressing discrimination against individuals with disabilities,” *id.* § 12101(b)(2),
8 and in furthering Congress’ intent to reserve a “central role” for the federal Government in enforcing
9 the standards established in the ADA. *Id.* § 12101(b)(3).
10

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

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

22 ² Plaintiffs’ Motion for Summary Judgment, ECF No. 100 (Mar. 10, 2016) (“Mot.”) also addresses a
23 claim under the Due Process Clause of the Fourteenth Amendment. The United States takes no position
24 with respect to that claim and addresses only Plaintiffs’ ADA and Rehabilitation Act claims, which are
25 analyzed identically for all relevant purposes. *M.R. v. Dreyfus*, 697 F.3d 706, 733 (9th Cir. 2011); U.S.
26 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”).

27 ³ In addition to opposing Plaintiffs’ Motion for Summary Judgment, Defendants filed a Motion to
28 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

1
2 The Social Security Act permits States, with the approval of the Centers for Medicare and
3 Medicaid Services (“CMS”),⁴ to provide Medicaid services in community-based settings instead of
4 institutions. 42 U.S.C. § 1396n(c); *see also* Centers for Medicare and Medicaid Services, 1915(c)
5 Home & Community-Based Waivers, [https://www.medicaid.gov/medicaid-chip-program-](https://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/home-and-community-based-1915-c-waivers.html)
6 [information/by-topics/waivers/home-and-community-based-1915-c-waivers.html](https://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/home-and-community-based-1915-c-waivers.html) (last visited March
7 23, 2016). These waiver programs must be cost-neutral to the alternative of providing care in an
8 institution. 42 U.S.C. § 1396n(c)(2)(D); 42 C.F.R. § 441.302(e). In the Waiver at issue here,
9 participants may receive services through the Waiver if they require a level of care otherwise available
10 in an institution – e.g. a hospital or nursing facility; the cost of services available to an individual under
11 the Waiver is then capped according to that individual’s designated level of care. P52-53.⁵ Although
12 the caps correspond to the type of institution in which the individual would otherwise receive services,
13 the Waiver caps are lower than the average cost of providing care in the corresponding institution. P53,
14 P55-61. Defendants have no written policy or process for authorizing exceptions to the cost ceilings.
15 P93-95. Yet on an *ad hoc* basis the Defendants have administered treatment plans for individuals on
16 the waiver with costs in excess of the applicable limit. P106, 109. Plaintiffs are three men with
17 significant physical disabilities. P116-128, 190-196, 236-242 (describing Plaintiffs’ undisputed
18 Plaintiffs, regardless of the cost limitations. The United States takes no position with respect to the
19 mootness of Plaintiffs’ claims.

20 ⁴ CMS approval of a Medicaid waiver, as Defendants acknowledge, P28, does not address States’
21 independent obligations under the ADA. *See, e.g., Radaszewski v. Maram*, 383 F.3d 599, 601 (7th Cir.
22 2004) (allowing the plaintiffs’ claims to proceed without regard to federal approval of the state’s
23 Medicaid plan and waiver programs); *Grooms v. Maram*, 563 F. Supp. 2d 840, 844, 863 (N.D. Ill.
24 2008) (same). The two statutes impose independent legal obligations. *Davis v. Shah*, No. 14-cv-543,
25 slip op. at 74 (2d Cir. Mar. 24, 2016) (“A state’s duties under the ADA are wholly distinct from its
26 obligations under the Medicaid Act”); *Townsend v. Quasim*, 328 F.3d 511, 518 n.1 (9th Cir. 2003);
27 *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003) (“the failure to provide
28 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.

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

4 **II. ARGUMENT**

5 **A. The ADA Prohibits Unjustified Institutionalization**

6 Public entities must provide services to individuals with disabilities in the most integrated
7 setting appropriate to their needs. *Townsend*, 328 F.3d at 517 (“Because DSHS does not allow Mr.
8 Townsend to receive the services for which he is qualified in a community-based, rather than nursing
9 home, setting, Mr. Townsend can prove that the Secretary has violated Title II of the ADA”); *Joseph S.*
10 *v. Hogan*, 561 F. Supp. 2d 280, 285 (E.D.N.Y. 2008) (the ADA prohibits “discrimination in the form of
11 unnecessary segregation of those with disabilities in nursing homes and other institutions”). Congress
12 enacted the ADA in order to provide a “clear and comprehensive national mandate for the elimination
13 of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). Congress noted that
14 society has “tended to isolate and segregate individuals with disabilities,” and that discrimination,
15 including by institutionalization, “continue[s] to be a serious and pervasive social problem.” *Id.*
16 §§ 12101(a)(2), (3). Congress therefore prohibited discrimination by public entities, including states
17 and state instrumentalities, against individuals with disabilities, providing that “no qualified individual
18 with a disability shall, by reason of such disability, be excluded from participation in or be denied the
19 benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by
20 any such entity.” 42 U.S.C. § 12132.

21 In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court confirmed that Title II requires
22 states to provide community-based services for individuals with disabilities when “such placement is
23 appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably
24 accommodated....” *Id.* at 607. That holding, the court explained, reflected “two evident judgments.”
25 *Id.* at 600. “Institutional placement of persons who can handle and benefit from community settings
26 perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating
27 in community life.” *Id.* Second, “confinement in an institution severely diminishes the everyday life
28

1 activities of individuals, including family relations, social contacts, work options, economic
2 independence, educational advancement, and cultural enrichment.” *Id.* at 601.

3 The Attorney General’s regulations implementing the ADA⁶ require public entities to
4 “administer services, programs, and activities in the most integrated setting appropriate to the needs of
5 qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). The “most integrated setting” is one
6 which “enables individuals with disabilities to interact with nondisabled persons to the fullest extent
7 possible.” 28 C.F.R. pt. 35 App. B (2011). The regulations prohibit the use of “criteria or methods of
8 administration” that have the “effect of subjecting qualified individuals with disabilities to
9 discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(3)(i). Finally, the regulations require
10 public entities to “make reasonable modifications in policies, practices, or procedures when the
11 modifications are necessary to avoid discrimination on the basis of disability.”⁷ *Id.* § 35.130(b)(7).

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

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

20 ⁶ Congress directed the Attorney General to promulgate regulations implementing the anti-
21 discrimination directive of § 12132. 42 U.S.C. § 12134. Given this delegation, the Department of
22 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
23 regulations implementing Title II, [internal citation omitted] its views warrant respect.”).

24 ⁷ Defendants have not raised, and the United States does not address, the affirmative defense available
25 to public entities in an ADA case. A public entity may be excused from making modifications to its
26 service system when it can prove that the change would be a “fundamental alteration.” “A fundamental
27 alteration requires the public entity to prove ‘that, in the allocation of available resources, immediate
28 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).

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

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

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

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

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

5 Here, Defendants admit that they have no written policies or procedures to meet the needs of
6 individuals whose care costs exceed the applicable cost limitation. P93 (Defendants’ response
7 acknowledges “there is no written policy or criteria”). Even assuming that individual supervisors do
8 indeed have the discretion to authorize exceptional levels of care, *id.*, without any demonstration of *how*
9 the state exercises that discretion, Defendants have not “implement[ed] any means of *ensuring*” that
10 individuals who need that exceptional care to avoid institutionalization actually receive it. *Brantley*,
11 656 F. Supp. 2d at 1174 (internal quotations omitted) (emphasis added). And because the funding
12 source for these additional services is not clear in the record,⁹ it is also unclear whether these exceptions
13 comply with the Waiver. An opaque and unwritten policy, P93, implemented without an effort by
14 Defendants to track its use, P102-103, and triggered for these Plaintiffs only after a year of litigation in
15 federal court, P315, 321-322, does not “ensure” that individuals who require additional care to remain
16 in the community will have the necessary alternative services identified and put in place to avoid
17 unnecessary institutionalization. *Brantley*, 656 F. Supp. 2d at 1174.

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

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

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

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

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

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

20 ¹⁰ *See also Davis v. Shah*, No. 14-cv-543, slip op. at 70-74 (2d Cir. Mar. 24, 2016); *Oster v.*
21 *Lightbourne*, No. 09-cv-4668, 2012 WL 691833, at *16 (N.D. Cal. Mar. 2, 2012) (granting preliminary
22 relief where “the evidence also shows that Plaintiffs are likely to succeed in demonstrating that the loss
23 of IHSS hours will compromise the health and well-being of IHSS recipients such that they will be at
24 serious risk of institutionalization”); *Peter B. v. Sanford*, No. 10-cv-767, 2010 WL 5912259, at *7-8
25 (D.S.C. Nov. 24, 2010) *report and recommendation adopted* 2011 WL 824584 (Mar. 7, 2011); *Cruz*,
26 2010 WL 4284955, at *12-13; *G. v. Hawaii*, No. 08-cv-551, 2010 WL 3489632, at *9 (D. Haw. Sept.
27 3, 2010) (“A state’s reduction in services may violate the integration mandate where it unjustifiably
28 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.

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

11 Although the cases described above arose when the state took steps to reduce the medically
12 necessary care it had been providing, a state can violate the ADA even when it maintains the status quo.
13 The plaintiff in *Townsend* challenged the state of Washington's Medicaid system, which provided
14 categorically needy¹² residents the option of receiving long-term medical care and living assistance
15 either in nursing home settings, their own homes, or adult family homes. 328 F.3d at 514. Medically
16 needy residents were given only one option: nursing homes. *Id.* The plaintiff had been receiving
17 services in a family home, but when his income increased beyond the threshold established by the state
18 and he became medically needy, he was faced with a choice: "move to a nursing home within 30 days
19 or lose his Medicaid benefits." *Id.* at 514. The court did not consider *Townsend's* then-current medical
20 situation, except to observe that his success in the community clearly demonstrated the propriety of
21 continuing to receive community-based services. *Id.* at 516. Instead, the court considered whether

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

28 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.

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

5 **III. CONCLUSION**

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

9
10 Dated: March 29, 2016

Respectfully submitted,

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