UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD DAY, *et al.*,	)	
	)	
Plaintiffs,	)	Civil Action No.1:10-cv-02250
)		Judge Ellen S. Huvelle
v.	)	
	)	
DISTRICT OF COLUMBIA, *et al.*	)	
	)	
Defendants.	)	
_____	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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I. INTRODUCTION.

Defendants assert that they are, as a matter of law, not in violation of the Integration Mandate of the Americans with Disabilities Act ("ADA") because they provide long-term care services in the community. But there are material disputes as to what Defendants actually provide and, moreover, what they provide falls woefully short of meeting their legal obligations.

The ADA, its implementing regulations, and the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), require far more than simply offering some community services. They require that the District have a comprehensive, effectively working plan to affirmatively and systematically transition institutionalized individuals with disabilities from nursing facilities to the community. Defendants have no process to identify people who want to be reintegrated into the community from nursing facilities or to assess the needs of those individuals. They do not assist nursing facility residents who want to be deinstitutionalized in making the transition from nursing facilities to the community with the services and supports they need. They do not even know how many individuals institutionalized in nursing facilities have transitioned to the community. In fact, despite Defendants' recognition that between 526 and 580 nursing facility residents desire community placement, Defendants can identify just ***two*** individuals with disabilities whom they have ever transitioned from nursing facilities. In addition, while Defendants claim that their existing programs are robust, material disputes of fact exist as to the extensiveness and effectiveness of those programs in transitioning people from nursing facilities to the community. Accordingly, Defendants are not entitled to summary judgment.

Furthermore, Plaintiffs have sufficiently pled Defendants' role in causing Plaintiffs' injuries, including why each of the Defendants should remain in this matter. Defendants' arguments for dismissal thus also fail.

II. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT.

A. Summary Judgment Standard.

Summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "In considering a motion for summary judgment, the 'evidence of the non-movant is to be believed, and all justifiable inferences drawn in his favor.'" *Alston v. Wash. Metro. Area Transit Auth.*, 571 F. Supp. 2d 77, 81 (D.D.C. 2008) (Huvelle, J.) (quoting *Anderson*, 477 U.S. at 255). As set forth below, there are genuine issues of material fact in dispute, and Defendants cannot show that they are entitled to judgment as a matter of law.

B. The ADA Requires a Comprehensive and Effective Working Plan.

The isolation and segregation of individuals with disabilities in institutions is a form of discrimination under the ADA. 42 U.S.C. §§ 12101(a)(2), (5). Title II of the ADA prohibits discrimination in the provision of public services: "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." 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act similarly provides that no person with a disability may "solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

The Department of Justice regulations implementing these provisions require a "public entity [to] administer . . . programs . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).[1] This requirement – known as the "Integration Mandate" – cannot be satisfied simply by the existence of community-based services. Rather, when appropriate, a state must take proactive steps to successfully transition individuals from more restrictive settings, like nursing facilities, to less restrictive ones, like ordinary housing.

In *Olmstead*, the Supreme Court clarified the contours of the Integration Mandate, holding that unjustified institutionalization of individuals with disabilities constitutes illegal discrimination on the basis of disability. 527 U.S. at 597. The Court held that Title II of the ADA requires a state agency to place an individual with disabilities in a community-based setting when each of three basic elements is met: First, community placement must be appropriate for the individual. *Id.* at 587. Second, community placement cannot be opposed by the affected individual. *Id.* Third, community placement must be a reasonable accommodation, when taking into account the resources available to the state and the needs of others with the same type of disabilities. *Id.* The accommodation is reasonable *unless* the state can show that it already has in place a "comprehensive, effectively working plan for placing qualified persons . . . in less restrictive settings," and accommodating individuals further would "fundamentally alter the nature of the service, program, or activity." *Id.* at 596-97, 605-06. When these elements are met, the state has a legal duty to provide community-based treatment, rather than subjecting individuals to the segregated environment of nursing facilities. *Id.* at 607.

[1] The "most integrated setting appropriate" is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 56 Fed. Reg. 35,694, 35,705 (July 26, 1991).

C. Defendants Do Not Comply With the Requirements of the ADA, the Integration Mandate, and *Olmstead.*

There is ample evidence that the first two elements of *Olmstead*'s requirements are satisfied. But material disputes of fact abound as to what Defendants' existing programs accomplish with respect to deinstitutionalizing people with disabilities from nursing facilities, as well as whether those programs comply with the Integration Mandate, thus precluding a finding of summary judgment in Defendants' favor.

1. Community placement is appropriate and Plaintiffs do not oppose it.

There is no dispute that community placement is appropriate for Plaintiffs. Defendants admit that Plaintiffs "appear to be eligible" for community-based services. Mem. of Points and Authorities in Supp. of Defs.' Mot. to Dismiss, or in the Alternative, for Summ. J. ("Defs.' Mem.") at 16. This is consistent with the opinions of medical professionals, who have concluded that Plaintiffs are eligible for community placement. Declaration of Kenneth S. Duckworth, M.D. (attached hereto as Ex. A) ¶ 16.

There also is no dispute that Plaintiffs do not oppose community placement. All five named Plaintiffs state that they affirmatively desire to move to the community with transition assistance and appropriate community-based supports and services from Defendants. Am. Compl. ¶¶ 28, 32, 40, 43, 47; Declarations of Bonita Jackson (attached hereto as Ex. B) ¶ 5, Vietress Bacon (attached hereto as Ex. C) ¶ 11, Roy Foreman (attached hereto as Ex. D) ¶ 10, Edward Day (attached hereto as Ex. E) ¶¶ 11-13, and Larry McDonald (attached hereto as Ex. F) ¶ 14; Ex. A ¶ 16. Defendants further admit that there are between 526 and 580 individuals who have expressed a desire to transition from nursing facilities, but Defendants have not followed up or assisted these individuals in making the transition to the community. Deposition Transcript of

Ericka Bryson-Walker (attached hereto as Ex. G) at 48:4-12, 96:6 – 97:10 & Exs. 3 & 9; Deposition Transcript of Leyla Sarigol (attached hereto as Ex. H) at 32:12 – 33:16. The only dispute in this regard may be whether there are hundreds, or even thousands, of additional prospective Plaintiff class members receiving District Medicaid-funded services in nursing facilities who desire community placement but have not been identified by Defendants. Because the District does not provide information about available community-based services to nursing facility residents, Ex. H at 103:11-15; Ex. G at 43:1-10, 44:5-17, 121:2-16, there may be many more than 526 to 580 residents who would prefer to be served in the community.

2. The District fails to establish that it complies with the Integration Mandate.

The dispute in this matter ultimately hinges on *Olmstead*'s final element, whether community placement is a reasonable accommodation. To refute the reasonableness of the accommodation, Defendants must demonstrate that they have a comprehensive, effectively working Integration Plan and that the requested change to that plan would constitute a fundamental alteration. Defendants cannot satisfy this burden because they do not have an effectively working Integration Plan. *See Olmstead*, 527 U.S. at 596-97, 605-06.

Defendants' papers both misrepresent the factual contours of the programs they have in place and misconstrue the legal requirements governing those programs. Defendants admit that *Olmstead* requires the District to have a "comprehensive, effectively working plan for placing qualified persons with . . . disabilities in less restrictive settings." Defs.' Mem. at 13. But Defendants seem to misunderstand what that means. Defendants assert that they comply with *Olmstead* because they have sufficient community-based programs and services in place. Defs.' Mem. at 24-27. But the mere existence of (1) a Medicaid Waiver Program for People who are

Elderly and/or have Physical Disabilities ("EPD Waiver Program") that provides community-based services; (2) a fledgling Money Follows the Person Program ("MFP Program") designed by the Federal government to transition individuals out of institutions that has transitioned only two individuals from District-funded nursing facilities; and (3) use of the federally mandated Pre-Admission Screening and Resident Review ("PASRR") process (a screening tool to determine whether individuals have a mental illness or cognitive disability), are *not* sufficient to constitute a comprehensive and effective *Olmstead* Plan. Yet this is all that Defendants identify – without a single case citation in support – to bolster their assertion that they have already implemented an acceptable *Olmstead* Plan. *See generally* Defs.' Mem. at 12-27.

Preliminarily, the District lacks a crucial starting point for *Olmstead* compliance – a written *Olmstead* Plan. Because *Olmstead* requires states to ensure that people with disabilities are not unnecessarily segregated, most states have spear-headed their efforts to comply with *Olmstead* by developing and formally adopting a written *Olmstead* Plan. Terence Ng, MA, Alice Wong, MS and Charlene Harrington, PhD, "A Table of State Olmstead plans and related state activity," *available at* http://www.pascenter.org/olmstead/downloads/olmstead_plans_table.pdf (Aug. 2009). While Defendants admit that the District must have an *Olmstead* Plan, Defs.' Mem. at 13, the District has not taken the basic step of adopting or implementing any written plan. Indeed, the District ceased trying to formally adopt an *Olmstead* Plan after attempts during the previous administration failed. Declaration of Gerald Kasunic (attached hereto as Ex. I) ¶¶ 15, 18; Ex. H at 213:19 – 214:8.[2]

[2] Even if the District formalized a written *Olmstead* Plan today, it would still be lacking in compliance with *Olmstead*, as the examination of compliance requires concrete evidence of a commitment to deinstitutionalization. *See Benjamin v. Dep't of Pub. Welfare of Pa.*, 768 F. Supp. 2d 747, 755-56 (M.D. Pa. 2011) ("The existence of the Plan does not, however, automatically defeat liability because we do not read *Olmstead*, *Frederick L. I.*, or

Without a formal plan or policy, Defendants maintain that three of their existing efforts – the EPD Waiver Program, the MFP Program, and use of the PASRR screening tool – constitute a comprehensive and effectively working *Olmstead* Plan. These programs fall far short of what the law requires. Whether Defendants have a comprehensive, effectively working plan involves a fact-intensive inquiry into a state's efforts to make reasonable modifications to policies, practices, and procedures to avert unjustified, discriminatory institutional isolation, taking into account the resources available to the state and the needs of others with the same type of disabilities. *See Olmstead,* 527 U.S. at 607; *ARC of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004); *Fisher v. Maram*, No. 06-4405, 2006 WL 2505833, at *3-4 (N.D. Ill. Aug. 28, 2006). In short, the court must evaluate a state's plans and processes to avoid segregation, along with – if those plans and processes are insufficient – the state's ability to better serve individuals under existing programs or expand its systems.

A comprehensive, effectively working plan under the ADA, Rehabilitation Act, and implementing regulations "must do more than provide vague assurances of future integrated options . . . ." U.S. Department of Justice, Statement of the Dept. of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, at 6-7, *available at* http://www.ada.gov/olmstead/q&a_olmstead.htm (June 22, 2011) ("DOJ *Olmstead* Statement") (attached hereto as Ex. J).[3]

Frederick L. II., or any of their progeny to stand for the proposition that a written document purporting a commitment to deinstitutionalization alone satisfies the requirements of those cases.").

[3] The Department of Justice ("DOJ") has the authority to promulgate regulations implementing Title II, *see* 42 U.S.C. § 12134, and it was DOJ that issued the ADA's Integration Mandate. *See* 28 C.F.R. § 35.130(d) (public entities must administer services and program in "the most integrated setting appropriate to the needs of qualified individuals with disabilities."). An agency's interpretation of its own regulations, such as DOJ's *Olmstead*

The public entity's plan must:

a. "[R]eflect an analysis of" the current needs of the population, and "the extent to which the public entity is providing services in the most integrated setting;"

b. "[H]ave specific and reasonable timeframes and measurable goals for which the public entity may be held accountable;"

c. Include interagency collaboration;

d. Be appropriately funded; and

e. "[H]ave demonstrated success in actually moving individuals to integrated settings in accordance with the plan."

Id. at 7. *Accord Sanchez v. Johnson*, 416 F.3d 1051, 1066 (9th Cir. 2005) (increased spending on community based programs and actual success at moving individuals is evidence of compliance); *ARC of Wash. State Inc.*, 427 F.3d at 620 (state must show "commitment to deinstitutionalization"); *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 422 F.3d 151, 157, 160 (3d Cir. 2005) ("*Frederick L. II*") (plan must "demonstrate[] a reasonably specific and measurable commitment to deinstitutionalization for which [the state] may be held accountable"; and should include "a general description of the collaboration required" between agencies); *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 269 (E.D.N.Y. 2009) ("*DAI II*") (budget and spending are relevant considerations); *Williams v. Quinn,* 748 F. Supp. 2d 892, 897-98 (N.D. Ill. 2008) (consent decree approved requiring individualized analysis of needs and specific timeframe for transition); *M.A.C. v. Betit*, No. 2:02CV1395, at 19 (D. Utah Feb. 28, 2006)

Statement, is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Olmstead*, 527 U.S. at 598 (citing *Bragdon v. Abbott,* 524 U.S. 624, 642 (1998); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (same); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008) (same).

(attached hereto as Ex. K) (progress toward deinstitutionalization is evidence of effective plan). As set forth below, Defendants fail to demonstrate compliance with each of these requirements.

a. Defendants have not evaluated the current needs of the population in nursing facilities.

A public entity cannot create a comprehensive, effectively working integration plan without knowing how many individuals are in nursing facilities, how many individuals seek to move back to the community, and what kind of community-based services and supports they would need in order to make that transition. *See Sanchez*, 416 F.3d at 1066 (finding California's efforts to identify and resolve gaps in services and needs were central to its comprehensive plan); *see also Williams*, 748 F. Supp. 2d at 897-98 (approving settlement that required assessment of the needs of all nursing facility residents within two years). Defendants must demonstrate that they have taken proactive steps to identify appropriate individuals interested in accessing services under a waiver for community services. *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 338 (D. Conn. 2008). The Integration Mandate thus requires the District to:

> take affirmative steps to remedy [its] history of segregation and prejudice in order to ensure that individuals have an opportunity to make an informed choice. Such steps include providing information about the benefits of integrated settings; facilitating visits or other experiences in such settings; and offering opportunities to meet with other individuals with disabilities who are living, working and receiving services in integrated settings.

DOJ *Olmstead* Statement at 4.

For example, in *Sanchez v. Johnson*, the Ninth Circuit found that California's identification of individualized needs and creation of services to assist such individuals to be an important element of a well-working *Olmstead* Plan, including assessments that were then

utilized for "enhancing and developing the local resources needed to move the consumer from a Developmental Center into the community." 416 F.3d at 1066.

In contrast to California's plan in *Sanchez*, the District of Columbia does not have a plan based on an actual needs assessment of individual nursing facility residents, because the District of Columbia does not conduct such assessments and inquiries. Defendants do not provide information about community-based alternatives to nursing facility residents unless the residents affirmatively request it. Ex. G at 121:12-16. Defendants do not identify or follow up with people in nursing facilities who wish to transition to the community. Ex. H at 86:14-21, 96:4-98:11; Ex. G at 47:8-12. There is no systematic way for those with physical disabilities or mental illness to transition from nursing facilities, nor are there policies, procedures, or practices in place for transitioning people from nursing facilities other than through the MFP Program. Ex. H at 85:9-86:13, 87:21-88:7; Ex. G at 42:16-21, 45:13-16, 120:16-121:7, 127:8-12.

Indeed, Defendants acknowledge that they do not provide any transition assistance to nursing facility residents except for the few people designated to participate in the MFP Program pilot demonstration program. Ex. G at 42:7-21. The MFP Program therefore is the only District of Columbia program Defendants can identify through which they assess the needs of, and affirmatively assist, a limited number of designated individuals in nursing facilities to access services and supports in the community. But the MFP Program, as discussed further below, has transitioned only two individuals to the community, which is insufficient as a matter of law. *See* Section II.C.2.e, *infra*.

On one hand, Defendants' witnesses state that the MFP Program must not be the primary way in which individuals transition to the community from nursing facilities because Defendants

have transferred so few individuals under that program and it is "not ready to transition . . . everyone who is interested." Ex. H at 17:20-18:14, 85:9-86:13, 99:12-15. While on the other hand, Defendants do not know the number of people, who transitioned from nursing facilities to the community through means other than the MFP Program. Ex. G at 45:7-12, 59:14-17, 77:10-78:5. This leaves Defendants pointing in their briefs to the MFP Program as their prime mechanism for compliance with *Olmstead*, while admitting in reality that it is not the primary tool and has failed to transition more than two people to date.

Furthermore, and contrary to Defendants' representations, Defs.' Stmt. of Mat'l Facts ¶¶ 11, 15, 23, Defendants do not use the EPD Waiver Program to identify opportunities for, and facilitate, transitions of people from institutions to the community. While the EPD Waiver Program provides community-based supports to individuals with physical disabilities who are able to obtain slots in the program, Defendants do not use it to transition individuals from nursing facilities to the community. Indeed, Defendants' designated witness testified that Defendants have no idea how many current EPD Waiver Program recipients transitioned from nursing facilities. Ex. G at 45:7-12, 59:14-17, 77:10-78:5. Defendants have filled hundreds of EPD Waiver Program slots with people who were already in the community receiving State Plan personal care assistant ("PCA") services. *Id.* at 59:18-60:18.[4] To make matters worse, the Department of Health Care Finance ("DHCF") does not reserve any EPD Waiver Program slots for people transitioning from institutions such as nursing facilities. *Id.* at 54:12-17. Once the remaining 240 available EPD Waiver Program slots are filled, Defendants do not plan to increase

[4] *Compare* Ex. H at Ex. 18 (2,179 EPD Waiver Program participants as of April 5, 2010) *with* Ex. G at 59:8-13 (3,700 EPD Waiver participants as of July 29, 2011 using all but 240 slot of the 3,940 total allotted EPD Waiver Program slots for 2011). By proposing to cut the State Plan PCA services, the District actively urged PCA users in the community with minimal service needs to apply for the EPD Waiver Program, thereby limiting the availability of the remaining waiver slots for individuals seeking to leave nursing facilities.

the number of slots; instead, they will establish a waiting list of people seeking to access EPD Waiver Program services. Ex. G at 66:5-68:6; D.C. Register (Aug. 19, 2011), *available at* http://www.dcregs.org/Gateway/NoticeHome.aspx?noticeid=1560844.

Similarly, Defendants have no idea which individuals may be eligible for DMH housing or need other *readily available* DMH supports to transition back to the community. Although Defendants estimate that between ten and twenty percent of nursing facility residents have a serious mental illness, Defendants do not know specifically how many individuals with serious mental illness are in nursing facilities. Deposition Transcript of Elspeth Cameron Ritchie, M.D. (attached hereto as Ex. L) at 170:18-171:19. In fact, the Department of Mental Health's ("DMH's") policy of disenrolling from DMH services people with mental illness upon their admission to nursing facilities explicitly prevents nursing facility residents from accessing housing and mental health services, including transitional services, through DMH and its core service agency providers. *Compare id.* at 39:18-40:13 *with* Defs.' Stmt. of Mat'l Facts ¶¶ 28, 31-32. No one keeps a list of individuals who have been disenrolled. Ex. L at 168:20-169:21. And DMH has not utilized the Minimum Data Set information available to identify which individuals with serious mental illness would like to transition from nursing facilities. *Id.* at 175:9-177:5.

Finally, Defendants assert that they rely on the PASRR process to ensure that individuals are identified for transition. Defs.' Mem. at 21-22. PASRR is a federal Medicaid requirement. To comply, DMH must screen individuals who may have a mental illness prior to entering a nursing facility and when there is a change in mental status after nursing facility placement. 42 C.F.R. § 483.100 *et seq*. Although PASRR should be used as a "powerful tool for diversion . . .

[and] transition," Ex. L at Ex. 6, the District has misused that process. Much of DMH's outreach to nursing facilities was pursuant to federal directives regarding technical requirements for gathering accurate PASRR information, *id.* at 79:1-12 & Ex. 5, and Defendants admit that they have actually used the PASRR process to *encourage* nursing facilities to accept *more* people with serious mental illness. *Id.* at 88:19 – 90:14. Defendants have not used PASRR to reasonably assess the transition needs of individuals in nursing facilities, *id.* at 75:8 – 78:4 & Ex. 4, and only recently started tracking what happens to individuals who received PASRR II screenings.[5] *Id.* at 167:15-168:15. Indeed, Defendants cannot identify *a single* individual who was diverted or transitioned from a nursing facility through the PASRR process. *Id.* at 159:2-162:13.

The District is operating in an information vacuum. It cannot create a comprehensive, effectively working *Olmstead* Plan because it has no reliable data on which to base it. District officials have no idea how many individuals have transitioned or seek their assistance to transition from nursing facilities, what services they need in order to do so, or what barriers they face. Without such basic assessment, information, and outreach to the individuals in nursing facilities, Defendants cannot plausibly argue that they have a comprehensive, effectively working plan that is responsive to Plaintiffs' needs.

b. <u>There is no effective interagency collaboration in the District.</u>

Interagency collaboration is an essential component of an effectively working *Olmstead* Plan:

> To alleviate the concerns articulated in *Olmstead*, we believe that a viable integration plan at a bare minimum should specify . . . a

[5] All individuals should receive a PASRR I screening, and those with a positive screen go on to the more in-depth PASSR II screening. Ex. L at 65:5-9.

> general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.

Frederick L. II, 422 F.3d at 160; *see also DAI II*, 653 F. Supp. 2d at 301-02. Defendants lack *any* policy, procedure, or practice to address the inter- and intra-agency collaboration necessary to facilitate the community transition of nursing facility residents. Ex. G at 45:13-16; Ex. H at 85:9 – 86:13, 87:21 – 88:7.

As a result of the lack of intra- or inter-agency coordination between the MFP Program and DHCF, Defendants delayed and, in some cases, prevented MFP Program participants from transitioning to the community. Ex. H at 48:16 – 51:13, 233:4 – 235:15. The MFP Program and the District of Columbia Office on Aging ("DCOA") fail to provide transportation for residents of nursing facilities to search for potential facilities in the community. *Id.* at 170:17-173:11. Furthermore, despite an award of 200 federally-funded housing vouchers earmarked for non-elderly people with disabilities, Defendants failed to coordinate among the MFP Program/DHCF, the D.C. Housing Authority, and DMH to secure sufficient housing vouchers for people transitioning from nursing facilities. *Id.* at 42:6-17, 202:4 -203:20. As a result, only ten vouchers were allocated for people leaving nursing facilities and other institutions. *Id.*

Defendants' MFP Program consultant specifically cited the Defendants' lack of a process for people to access housing subsidy vouchers as a barrier to transitions, as well as the separate "silos" in which Defendants operate, which are significant barriers precluding successful community transitions for those in nursing facilities. *Id.* at 210:2-20, 211:1-10 & Ex. 21. The failure of District agencies to work effectively internally or externally undermines any attempt by Defendants to comply with the ADA.

Moreover, there is little or no coordination between DMH and DHCF, the Directors of which are Defendants here. Despite the fact that data confirms that ten to twenty percent of nursing facility residents have a diagnosis of schizophrenia, *id.* at 118:2-119:21; Ex. L at 170:18-171:19; Ex. I ¶ 29, DMH has no mechanism, policy, or protocol regarding how to assist individuals in nursing facilities who seek to return to the community with necessary services and supports. Ex. L at 194:13-196:15; Ex. H at 120:1-18. District agencies do not provide printed materials describing the community-based mental health services available to people in nursing facilities, or conduct outreach to residents of nursing facilities with psychiatric disabilities to inform them of existing community-based services and how to access them. Ex. H at 108:2-7.

c. <u>There is a material dispute as to whether Defendants have specific, measurable, and reasonable timeframes and goals.</u>

An effective plan must have "specific and measurable" targets for transitioning individuals into the community. *Frederick L. II*, 422 F.3d at 157. An *Olmstead* Plan must demonstrate a state's commitment to community placement for "which it can be held accountable by the courts." *Pa. Prot. & Advocacy Inc. v. Dep't of Pub. Welfare*, 402 F.3d 374, 381 (3d Cir. 2005); *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 364 F.3d 487, 500 (3d Cir. 2004) ("*Frederick L. I*"). Courts require specific measures that track the states' successful movement of people from institutions into the community. *See, e.g.*, *Frederick L. II*, 422 F.3d at 157; *DAI II*, 653 F. Supp. 2d at 305 (*Olmstead* Plan "at the very least . . . requires a 'reasonably specific and measurable commitment to deinstitutionalization' for which the State 'may be held accountable.'"). At a minimum, the Plan must "specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, [and] the eligibility for discharge." *Frederick L. II*, 422 F.3d at 160. For example, in *Frederick L.*, the

Third Circuit was troubled that the state's integration plan lacked any defined standard by which to measure the state's success in moving individuals into the community. *Id.* at 158. The court held that a plan's "general assurances and good faith intentions" is not enough to satisfy federal laws or the expectations of people with disabilities. *Id*. Instead, a working *Olmstead* Plan must be "adequately specific." *Id.*; *see also Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1174 (N.D. Cal. 2009) (finding that the state "bear[s] the burden of ensuring more than a 'theoretical' availability" of alternative services in the community).

Defendants purport to have specific goals, but the only targets they offer have changed continuously as Defendants inevitably fail to meet them, even in the few months since Defendants filed their Motion. Defendants' assertions in their papers are thus not only insufficient as a matter of law, but also conflict with Defendants' own witnesses' testimony. Defendants slashed the targeted slots in the MFP Program over a five-year period for people who are elderly or have physical and/or psychiatric disabilities, from 960 to 80. Ex. H at 36:12 – 37:4. Defendants then advised this Court that they planned to transition 80 individuals to the community by September 2011 and an additional 80 individuals each year for two years thereafter. Defs.' Mem. at 26. Yet, contrary to Defendants' assertions, they now plan to transition a total of 12 people from nursing facilities by September 30, 2011, Ex. H at 74:10-19, and an additional 15 people by December 31, 2011, for a total of 27, only one-third of the 80 people they pledged to transition. *Id.* at 85:2-8.

To date, Defendants cannot demonstrate that they are meeting even these meager goals. Four years after the commencement of the MFP Program, and twelve years after *Olmstead*, Defendants have transitioned only two people with physical disabilities from nursing facilities to

the community. Defendants recognize that there are 526 to 580 prospective Plaintiff class members who have expressed a preference to receive services in the community rather than in nursing facilities. Ex. H at 32:12-33:16; Ex. G at 48:4-12, 96:6-97:10 & Exs. 3 & 9.

The law requires more than illusory targets. There are disputes of material fact as to whether – more than twelve years since the *Olmstead* decision – Defendants have meaningful, measurable targets for transitioning people from nursing facilities or whether they will meet such goals within specific, reasonable timeframes.

d. <u>There is a material dispute as to whether Defendants have rebalanced their long-term care spending from institutional care to community-based services.</u>

An *Olmstead* Plan should result in an increase in community-based waiver budgets for a particular population *along with* a decrease in the number of institutionalized individuals who can be adequately served by the community-based services. Put simply, expenditures alone – even increases in expenditures – cannot demonstrate an effectively working Integration Plan when there is no corresponding decrease in institutionalization. For instance, the Ninth Circuit acknowledged that the state of Washington's integration plan involved a doubling of its budget for community-based programs "despite significant cutbacks or minimal budget growth for many state agencies. . . . During the same period, the budget for institutional programs remained constant, while the institutionalized population declined by 20%." *ARC of Wash. State Inc.*, 427 F.3d at 621. An increase in community-based spending for the relevant population of individuals with disabilities, absent a decrease in institutionalization, does nothing to remedy a plaintiff's injury.

Plaintiffs remain unnecessarily institutionalized, and Defendants have failed to demonstrate that they cannot accommodate Plaintiffs in the community. Unlike Washington's experience, Defendants' nursing facility occupancy rate has remained consistently above ninety percent for the last eleven years. Ex. G at 150:15-151:4, 151:18-152:2. Defendants can point to no evidence that they are rebalancing their long-term care expenditures for the relevant population of people with disabilities in favor of community-based services.

Defendants assert that they have spent large sums on community-based services in a proportion that is nearly equal to spending on institutional services. Defs.' Mem. at 25-27. But these claims are skewed by Defendants' inclusion of expenditures for services for people with intellectual and developmental disabilities which are both immaterial to Plaintiffs' claims and disputed. The only valid comparison for Plaintiffs is between the costs under an EPD Waiver and the costs of nursing facility services. Contrary to Defendants' contention, Defendants' expenditures for the proposed Plaintiff class are severely lopsided toward institutions: When considering only the EPD Waiver Program, and excluding individuals with intellectual disabilities who are not part of this case,[6] the current balance of institutional versus home and community-based services ("HCBS") in the District for Plaintiffs is weighted heavily toward institutional care in that Defendants expended only about twenty-six percent of the total fiscal year 2010 Medicaid long-term care budget (for nursing facilities and the EPD Waiver Program) on EPD Waiver Program services. Deposition Transcript of Darrin Shaffer (attached hereto as

[6] People with intellectual and developmental disabilities (IDD) in institutions called intermediate care facilities are eligible for community-based Medicaid Waiver services under an entirely separate waiver program administered by the D.C. Department on Disability Services with an entirely separate range of services. These individuals are not part of the prospective Plaintiff class in this case.

Ex. M) at 38:4-39:9 & Ex. 2.[7] While the ratio of nursing facility placements to community-based waiver services may appear inflated if individuals eligible for the Medicaid Waiver Program for those with intellectual and developmental disabilities are included in this count, when appropriately separating out individuals who are eligible for the EPD Waiver Program, a genuine issue of material fact exists regarding whether the District is rebalancing its budget to allow for increased investment in community-based programs.

Moreover, if Defendants were to effectively rebalance long-term care spending in favor of community services, Defendants' own evidence suggests that they would *save* money. Defendants ultimately spend substantially more on average per person in nursing facilities than they do on average per person in the EPD Waiver Program. For example, in 2007, the average annual cost of services in the District's nursing facilities was $62,633 as compared with the average annual cost in the EPD Waiver Program of $46,186. Ex. M at 66:10-21 & Ex. 4. In 2008, nursing facilities cost $58,957 on average per person as compared to $21,849 for EPD Waiver Program services. Ex. G at 135:2-138:12 & Ex. 15.

Making matters worse, Defendants are losing millions of dollars in federal matching funds by not transitioning individuals from nursing facilities to the community. *Id.* at 57:19-59:7 & Ex. 5 at i. Defendants have lost out on a substantial ninety percent federal subsidy match for community-based services as a result of their failure to transition people from nursing facilities under the MFP Program. Defs.' Stmt. of Mat'l Facts ¶ 10; Ex. H at 52:5-9. Defendants have squandered multiple opportunities to save millions of dollars in federal subsidies by their failure to provide Plaintiffs and prospective class members with community-based alternatives to

[7] Defendants admit that there are only a few persons with Intellectual and Developmental Disabilities ("IDD") in nursing facilities (five as of this year), and persons who are elderly and/or disabled but without an IDD tag are ineligible for Intermediate Care Facilities or IDD Waiver services. Defs.' Stmt. of Mat'l Facts ¶ 8.

services in nursing facilities. In addition to the factual disputes identified above, Defendants cannot show that they have, as a matter of law, effectively invested in community-based long-term care while deinstitutionalizing individuals and lowering expenditures on institutional care.

e. Defendants cannot show success in actually transitioning individuals from nursing facilities into the community under an integration plan or process.

To prove the existence of a comprehensive, effectively working *Olmstead* Plan, a state must show that it has actually transitioned people from institutions to the community. *See* DOJ *Olmstead* Statement at 7. In *ARC of Washington State Inc.*, for example, the court found that Washington had a comprehensive, effectively working integration plan because the state could show an increase in community services coupled with a twenty percent drop in its institutionalized population. 427 F.3d at 621. *Accord Sanchez*, 416 F.3d at 1066 (California's actual success at moving individuals provided evidence of compliance); DOJ *Olmstead* Statement at 7.

The evidence is clear that Defendants have utilized the MFP Program to transition only two people with physical disabilities from nursing facilities to the EPD Waiver Program. Ex. H at 68:3-11. Defendants have not transitioned *any* individuals with mental illness from nursing facilities. Ex. L at 62:1-64:1. The transition of only two people does not demonstrate that Defendants have an effective plan in place. Courts require much more to establish a state's commitment to and actual track record of integration. *See, e.g.*, *ARC of Wash. State Inc.*, 427 F.3d at 621 (20% drop in institutionalized population); *Williams v. Wasserman*, 164 F. Supp. 2d 591, 634 (D. Md. 2001) (state's institutionalized population decreased from 7,114 in 1970 to 1,200 in 1997).

In addition to Defendants' failure to show the requisite track record of success transitioning individuals from nursing facilities, several disputes of material fact exist as to Defendants' efforts to meet this requirement. Contrary to Defendants' assertions, Defendants fail to make basic information about the EPD Waiver Program and other community-based services readily available to nursing facility residents and staff. Defendants rely on various internet postings that include minimal information that, in any case, most nursing facility residents cannot access. *Compare* Ex. H at 108:8-18 *with* Defs.' Stmt. of Mat'l Facts ¶ 7. Defendants admit that they have not visited nursing facilities to give presentations or distribute updated printed materials about the EPD Waiver Program or community mental health services in the past *four to five years*. *Compare* Ex. G at 43:1-10, 44:12-17, 121:2-11 *with* Defs.' Stmt. of Mat'l Facts ¶¶ 7, 11, 15, 16. Instead, Defendants provide information about the EPD Waiver Program only when they receive specific requests from nursing facility staff or residents. Ex. G at 41:19-42:6, 121:12-16.

The MFP Program staff does not provide specific printed materials about the EPD Waiver Program. *Compare* Ex. H at 103:16-104:2 *with* Defs.' Stmt. of Mat'l Facts ¶¶ 9, 11, 15, 16, 18, 19. With the exception of the MFP Program demonstration pilot involving only 27 people, Defendants fail to conduct outreach targeted to those people who express an interest in transitioning out of nursing facilities, or to follow up by providing transitional assistance to help nursing facility residents apply for and obtain identification documents and housing. *Compare* Ex. G at 42:7-21, 44:12-17, 121:2-11; Ex. H at 98:7-10 *with* Defs.' Stmt. of Mat'l Facts ¶ 7.

Moreover, Defendants have slashed transition goals repeatedly, *see* Section II.C.2.c, *supra*, and in spite of increased federal money available to support efforts to deinstitutionalize

nursing facility residents, the District delayed by two years its submission to CMS of the necessary operational protocol to secure such funding, leaving nursing facility residents to languish.[8] In addition, as of July 29, 2011, there were 240 EPD Waiver Program slots available until December 2011, but Defendants do not plan to increase the number of slots by submitting a request to CMS, or to reserve slots for people in nursing facilities. Ex. G at 62:15-21, 63:4-16, 66:21-67:18; D.C. Register (Aug. 19, 2011), *available at* http://www.dcregs.org/Gateway/NoticeHome.aspx?noticeid=1560844. This will prolong individuals' unnecessary segregation in nursing facilities.

Rather than establishing a track record of successfully transitioning people from nursing facilities, Defendants have created enormous barriers that obstruct access to community services and supports for Plaintiffs and prospective class members. For example, DHCF is responsible for resolving delays in the prior authorization process for EPD Waiver Program services, but has failed to ensure the timely processing or authorization of waiver services, thereby delaying nursing facility residents' discharge to the community. Ex. G at 108:6-12, 111:19-113:4, 116:7-21 & Exs. 10 & 11; Defs.' Stmt. of Mat'l Facts ¶¶ 2-5.

Defendants have also failed to process essential payments in a timely manner for housing applications, security deposits and other transition costs to ensure that the few individuals designated for MFP Program participation have basic furnishings and supplies once they leave nursing facilities. Ex. H at 48:19-50:3. Defendants' actions have delayed the successful

[8] Defendants contend that the Centers for Medicare and Medicaid Services (CMS) tied their hands from implementing the MFP Program for nursing facility residents prior to October 2010. *See* Defs.' Mem. at 7. But Defendants' own evidence calls that contention into doubt. Ex. H at 34:5-20, 35:20 – 36:2, 44:6 – 45:18, 229:4-19 & Ex. 23; Defs.' Stmt. of Mat'l Facts ¶ 12 (confirming that CMS would allow the District to include nursing facility residents in its Money Follows the Person Program as early as October 2008, rather than October 2010, when Defendants finally submitted their operational protocol). Defendants have still not submitted the protocol to CMS necessary to implement the MFP Program for people with psychiatric disabilities. Ex. H at 111:6-10.

transition of some people and seriously thwarted the transition prospects of others. In the case of named Plaintiff Bonita Jackson, Defendants failed to coordinate her transitional services, or develop a comprehensive individualized service plan, or ensure home health aide or nursing services for her in her home for five days after her discharge. *Id.* at 142:17 – 144:6; Ex. B ¶¶ 9-18. In the case of named Plaintiff Roy Foreman, Defendants failed to assist him or his social worker in setting up services under the EPD Waiver Program and as a result, Mr. Foreman's social worker terminated his lease on a wheelchair-accessible subsidized apartment in a building for seniors. Ex. H at 180:10-15, 181:16-20, 182:17 – 183:19, 184:5-7, 184:12 – 185:12; Ex. D ¶¶ 11-17. Defendants have also failed to coordinate transitional services for named Plaintiff Vietress Bacon, forcing her to remain in the nursing facility for months after her accessible apartment was available. Ex. C ¶¶ 13-14, 18-19. At the time of filing this Opposition, it is still unclear when she will be able to leave, as her services are still pending approval by Defendants. *Id.* ¶¶ 17-19.[9]

All of this demonstrates that Defendants fail to transition institutionalized individuals into the community. In fact, Defendants' failure to inform nursing facility residents about the available personal care and waiver services, facilitate their access to those services, reserve EPD Waiver Program slots for people in nursing facilities, timely authorize waiver services, request additional EPD slots, and engage in inter- and intra-agency cooperation *prevents* nursing facility residents from transitioning to the community. Accordingly, as is the case for each of the other requirements of a comprehensive, effectively working plan, Defendants cannot show that they

[9] Even if Ms. Bacon were transitioned to the community, she could remain a plaintiff in this action because she may remain at risk of returning to an institution. DOJ *Olmstead* Statement at 5 ("[T]he ADA and *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings.").

meet this legal requirement. In addition, disputes of material fact exist as to Defendants' efforts to comply, which preclude a grant of summary judgment for Defendants.

D. Defendants Cannot Raise a Fundamental Alteration Defense.

If an individual who may be appropriately served in the community requests that the state provide the reasonable accommodation of community-based services, the state must modify existing programs unless it can show that doing so would constitute a "fundamental alteration." *See, e.g.*, *Martin v. Taft*, 222 F. Supp. 2d 940, 971-72 (S.D. Ohio 2002); *M.A.C. v. Betit*, No. 2:02CV1395, at 15 (D. Utah Feb. 28, 2006); *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"). The Justice Department explains:

> The obligation to make reasonable modifications may be excused only where the public entity demonstrates that the requested modifications would "fundamentally alter" its service system.

DOJ *Olmstead* Statement at 2; *accord Olmstead*, 527 U.S. at 604-07.

This Court should not entertain Defendants' argument that transitioning Plaintiffs from nursing facilities to community-based services would fundamentally alter their programs for three independent reasons. First, the existence of "[a] comprehensive working plan is a necessary component of a successful 'fundamental alteration' defense." *Frederick L. II*, 422 F.3d at 157; *Benjamin*, 768 F. Supp. 2d at 754; DOJ *Olmstead* Statement at 7. "General assurances and good-faith intentions neither meet the federal laws nor a patient's expectations." *Frederick L. II*, 422 F.3d at 158. As discussed above, Defendants do not have a comprehensive,

effectively-working *Olmstead* Plan in place, despite the passage of twelve years since the Supreme Court's *Olmstead* decision.

Second, the "fundamental alteration" analysis is a "complex fact-intensive inquiry" that is not appropriate for resolution at the summary judgment stage. *Martin*, 222 F. Supp. 2d at 986; *accord Disability Advocates Inc. v. Paterson*, 598 F. Supp. 2d 289, 335 (E.D.N.Y. 2009) ("*DAI I*"); *Frederick L. I*, 364 F.3d at 497-98; *Crabtree v. Goetz*, No. 3:08-0939, 2008 WL 5330506, at *28 (M.D. Tenn. Dec. 19, 2008). Evaluation of the fundamental alteration defense requires courts to focus on the likely cost of the requested relief in light of the state's obligations to serve additional individuals with the same disabilities. Courts must consider the "allocation of available resources" and the duty to provide "the care and treatment of a large and diverse population of persons with mental disabilities." *Olmstead*, 527 U.S. at 604. Consequently, lower courts require states to provide a "specific factual analysis" in order to determine whether the requested relief would be a "fundamental alteration." *See, e.g.*, *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1183 (10th Cir. 2003) (requiring the state to present specific evidence that the cost of providing the requested relief would "in fact, compel cutbacks in services to other Medicaid recipients" or be inequitable to others with disabilities); *accord Townsend*, 328 F.3d at 520.

Finally, even if the Court were to entertain Defendants' argument, Defendants cannot show that Plaintiffs' requests would be an inequitable use of their resources, necessitate cutbacks in services to others, or, for that matter, require increased spending. Defendants spend substantially more on average per person in nursing facilities than they do on average per person in the EPD Waiver Program. Ex. M at 63:15-19, 66:6-21 & Ex. 4; Ex. G at 134:3-15 & Ex. 14 at

1-2 & Ex. 15. For example, in 2007, the average annual cost of services in the District's nursing facilities was $62,633 as compared with the average annual cost in the EPD Waiver Program of $46,186. Ex. M at 66:10-21 & Ex. 4. In 2008, services in nursing facilities cost $58,957 on average per person as compared to $21,849 for EPD Waiver Program services. Ex. G at 135:2-138:12 & Ex. 15. By moving people from nursing facilities to the community under the EPD Waiver Program, the District stands to save thousands, if not millions of dollars. *Id.* at 58:7-59:7 & Ex. 5 at i.[10] Consequently, acceding to Plaintiffs' requests for transition to the community would actually free up resources to allow Defendants to serve scores of additional people with physical or psychiatric disabilities in the community, rather than fundamentally alter existing programs.

Plaintiffs have requested that Defendants develop and implement a comprehensive, effective *Olmstead* Plan, Am. Compl. ¶ 82; take steps necessary to inform, identify, and serve Plaintiffs and prospective class members in the most integrated community settings appropriate to their needs, *id.* ¶ 27; and assist nursing facility residents in transitioning to the community with necessary services and supports, *id.* ¶¶ 71-72. Defendants simply cannot meet their burden to establish that the accommodations Plaintiffs request would fundamentally alter Defendants' programs.

III. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED.

As an alternative to their meritless motion for summary judgment, Defendants have contrived a series of arguments for dismissal of Plaintiffs' Complaint.[11] Each is without merit,

[10] Similarly, community-based mental health rehabilitation services cost on average $4,200, which is a fraction of the cost of these services in nursing facilities. Ex. L at 226:17 – 227:5.

[11] All references to Plaintiffs' Complaint are to the Amended Complaint filed by Plaintiffs on March 30, 2011.

and their Motion should be denied. As another federal court acknowledged for similar *Olmstead* plaintiffs, Plaintiffs will

> prevail [on their motion to dismiss] if the complaint alleges, with sufficient factual detail to render their claims plausible, that individuals are placed in nursing facilities even though (1) a determination has been made that a particular individual's needs may be met in a more integrated setting, (2) the individual consents to reside in a more integrated setting, and (3) the state can reasonably accommodate a placement in a more integrated setting.

Joseph S. v. Hogan, 561 F. Supp. 2d 280, 290 (E.D.N.Y. 2008). Plaintiffs' Complaint makes the requisite allegations and includes sufficient detail for each allegation.

A. Standard for Motion to Dismiss.

To withstand a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), "a plaintiff need only plead 'enough facts to state a claim to relief that is plausible on its face to nudge[ ] [his or her] claims across the line from conceivable to plausible.'" *Bryant v. Pepco*, 730 F. Supp. 2d 25, 28 (D.D.C. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted). This requires more than labels and conclusions, but detailed factual allegations are not necessary. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Twombly*, 550 U.S. at 555. "So long as the pleadings suggest a plausible scenario to show that the pleader is entitled to relief, a court may not dismiss." *Owens v. D.C.*, 631 F. Supp. 2d 48, 53 (D.D.C. 2009) (Huvelle, J.) (internal quotation marks and citation omitted). In considering a motion to dismiss, the Court accepts Plaintiffs' allegations as true and

construes all reasonable factual inferences in Plaintiffs' favor. *Ihebereme v. Capital One, N.A.*, 730 F. Supp. 2d 40, 46 (D.D.C. 2010) (Huvelle, J.).

B. *Olmstead*'s Requirements Apply to Plaintiffs in Nursing Facilities.

Defendants suggest without citing any legal precedent whatsoever that *Olmstead*'s requirements do not apply to nursing facilities. Defs.' Mem. at 14. However, every court to consider the issue disagrees, and federal courts consistently apply *Olmstead* to cases brought by plaintiffs in nursing facilities. *See, e.g.*, *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374 (3d Cir. 2005); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175 (10th Cir. 2003); *Conn. Office of Prot. & Advocacy for Persons With Disabilities v. Conn.*, 706 F. Supp. 2d 266 (D. Conn. 2010); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280 (E.D.N.Y. 2008); *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 WL 4571904 (N.D. Fla. Oct. 14, 2008); *Colbert v. Blagojevich*, No. 07 C 4737, 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008).

Defendants also assert that because Medicaid recipients living in nursing facilities require the level of care provided in facilities, their institutionalization cannot be "unjustified or unnecessary." Defs.' Mem. at 14. This is a non sequitur. The crux of Plaintiffs' Complaint is that, while Plaintiffs do require personal care assistance services, and therefore meet what is called the "nursing facility level of care,"[12] they need not be institutionalized and segregated in nursing facilities to receive the care they require. Whether *Olmstead* applies in the first instance is not based on the setting in which a person currently receives care, but on whether treatment in a more integrated setting is appropriate and can be reasonably accommodated. *See Olmstead*, 527 U.S. at 607; *DAI II*, 653 F. Supp. 2d at 223 (a plaintiff need not be institutionalized to

[12] The level of care eligibility criteria for the Medicaid home and community-based waiver is *the same* as that for services in a nursing facility. That is, the same level of need makes an individual eligible for both nursing facility care and home health care via the EPD Waiver Program. Ex. G at 20:9-15.

prevail on an ADA integration claim; he must simply show that his current setting does not enable interaction with nondisabled persons to the fullest extent possible). Accordingly, Defendants' argument that *Olmstead* is somehow inapplicable to plaintiffs in nursing facilities fails.

C. Plaintiffs Have Alleged a Relationship Between Defendants and Plaintiffs' Treatment in Nursing Facilities.

Defendants contend that dismissal is warranted because Plaintiffs failed to allege a sufficient connection between Defendants and Plaintiffs' treatment in nursing facilities. Defs.' Mem. at 10-11. Plaintiffs need only describe a causal connection between Defendants and their claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs satisfy this requirement through the many allegations in the Complaint addressing the relationship between Plaintiffs' injuries and Defendants' Medicaid Program, contracted and owned facilities, and provision of community-based services.

Plaintiffs' Complaint discusses at length "[t]he Medicaid-funded personal care services all Plaintiffs receive in . . . nursing facilit[ies]," Am. Compl. ¶ 79, and Plaintiffs' "claims that Defendants have failed to administer the District's mental health and long-term Medicaid programs to provide services in the most integrated setting appropriate to their needs," *id.* ¶ 101; *see also id.* ¶¶ 20-21, 49-52, 55-60, 69, 84, 90-91, 99. Plaintiffs assert that the putative class members "share a common need for Medicaid and locally-funded services." *Id.* ¶ 103. Plaintiffs further allege that the ADA applies in this case, and that Defendants have failed to honor their responsibilities in the provision and administration of public benefits and services. *See, e.g.*, *id.* ¶¶ 3-7, 108-110, 114-115, 118-119 (alleging that individuals with disabilities must not be excluded from public benefits or services due to discrimination, that public benefits and services

must be provided in "the most integrated setting appropriate," and that Defendants have failed to provide benefits covered under Title II of the ADA to Plaintiffs in the most integrated setting appropriate); ¶¶ 75, 87-89, 92 (alleging that Defendants have failed to meet the requirements of *Olmstead*, which apply to services administered, provided, or funded by a public entity).

Plaintiffs' allegations that the District provides, administers, and/or funds Plaintiffs' services in its role as a public entity provides, as a matter of law, an adequate nexus between Plaintiffs and Defendants. *See Conn. Office of Prot. & Advocacy*, 706 F. Supp. 2d at 276-77, 284 (state's administration of Plaintiffs' care through the Medicaid program provided sufficient causal relationship). For example, one district court concluded that, "[w]hile State officials do not require anyone to be in an adult home, Defendants plan, fund and administer the State's existing service system such that more than 12,000 adults are receiving the State's services in adult homes." *DAI I*, 598 F. Supp. 2d at 319. *Accord Joseph S.*, 561 F. Supp. 2d at 293 (rejecting defendant state's claim, on motion to dismiss, that plaintiffs had to show that the state was specifically responsible for their placement in nursing facilities); DOJ *Olmstead* Statement at 3("a public entity may violate the ADA's integration mandate when it: (1) directly or indirectly operates facilities and or/programs that segregate individuals with disabilities; (2) finances the segregation of individuals with disabilities in private facilities; and/or (3) through its planning, service system design, funding choices, or service implementation practices, promotes or relies upon the segregation of individuals with disabilities in private facilities or programs.").

Moreover, while Defendants assert that the District did not place Plaintiffs in nursing facilities, Def.' Mem. at 11, Defendants are, in fact, intimately involved in placing individuals with disabilities in nursing facilities. Defendants contract with The Delmarva Foundation to

determine whether people with disabilities seeking long-term care Medicaid services require a level of care that would justify their access to services either in nursing facilities or in the community. Ex. G at 19:19 – 20:20, 22:6 – 24:17 & Ex. 2.[13] In making the level of care determinations, Delmarva utilizes a tool developed by Defendants to measure the assistance needed in performing activities of daily living (*e.g.*, bathing, dressing, toileting, eating, mobility assistance) and instrumental activities of daily living (*e.g.*, medication management, meal preparation, housekeeping). Defendants' involvement in Plaintiffs' access to long-term care services is further reflected in their close monitoring of Delmarva's assessments, including their blanket authorizations for nursing facility admissions. *Id.* at 26:10 – 27:9, 28:15-20.

Defendants fund and administer Plaintiffs' care. Defendants thus are responsible for Plaintiffs' unjustified segregation in nursing facilities. Plaintiffs have pled a causal link, and Defendants' Motion to Dismiss should be denied.

D. The ADA Does Not Require Defendants' Medical Professionals to Assess Plaintiffs' Eligibility to Receive Care in a Community-Based Setting.

Defendants acknowledge that Plaintiffs "appear to be eligible" for community-based services, Defs.' Mem. at 16, but argue that the Complaint must be dismissed because Plaintiffs do not allege that *the District's* own professionals have determined community-based services appropriate to meet Plaintiffs' needs. *Id.* at 11-12. There is no requirement for such an allegation because it is not necessary as a matter of law that the District's own professionals

[13] The law is clear that Defendants cannot skirt their obligations under the ADA simply by contracting out their services to private third-parties. *See Conn. Office of Prot. & Advocacy*, 706 F. Supp. 2d at 277 ("The state cannot evade its obligation to comply with the ADA by using private entities to deliver some of those services."); *DAI I*, 598 F. Supp. 2d at 317 ("It is immaterial that DAI's constituents are receiving mental health services in privately operated facilities."); *Rolland v. Cellucci*, 52 F. Supp. 2d 231, 237 (D. Mass. 1999) (it is "immaterial, at this [motion to dismiss] juncture, that many Plaintiffs reside in private rather than public nursing facilities" because defendants "still have obligations in accordance with the ADA."); 28 C.F.R. § 35.130(b)(1) (public entity may not discriminate "directly or through contractual, licensing or other arrangements, on the basis of disability").

make the determination. In fact, every court to consider the issue has held as such. *See Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 539-40 (E.D. Pa. 2001) (denying defendants' motion to dismiss *Olmstead* claims and rejecting the argument that *Olmstead* "require[s] a formal recommendation for community placement."); *DAI II*, 653 F. Supp. 2d at 258-59 (requiring a determination by a state treatment provider "would eviscerate the integration mandate" and "condemn the placements of [individuals with disabilities] to the virtually unreviewable discretion" of the state and its contractors); *Joseph S.*, 561 F. Supp. 2d at 291 ("I reject defendants' argument that *Olmstead* requires that the state's mental health professionals be the ones to determine that an individual's needs may be met in a more integrated setting."); *Long*, 2008 WL 4571904, at *2 (refusing to limit class to individuals whom state professionals deemed could be treated in the community, because a state "cannot deny the [integration] right simply by refusing to acknowledge that the individual could receive appropriate care in the community. Otherwise the right would, or at least could, become wholly illusory."); *see also* DOJ *Olmstead* Statement at 4 ("the ADA and its regulations do not require an individual to have had a state treating professional make such a determination. . . . Limiting the evidence on which *Olmstead* plaintiffs may rely would enable public entities to circumvent their *Olmstead* requirements by failing to require professionals to make recommendations regarding the ability of individuals to be served in more integrated settings.").[14]

[14] Indeed, in *Olmstead*, neither party disputed the plaintiffs' eligibility for community-based services in light of the fact that the hospital at issue was state-run and its medical staff had already deemed the plaintiffs eligible for community services. Plaintiffs note that Defendants' reference to *Boyd v. Steckel*, 753 F. Supp. 2d 1163, 1174 (M.D. Ala. 2010), is inapposite. The court in *Boyd* denied a preliminary injunction based on evidence by the State that the plaintiff's needs could not be met in the existing community Medicaid waiver program. Plaintiffs' case is both procedurally and substantively distinguishable from *Boyd*.

Moreover, even if a determination by the District's treatment professionals were necessary before the District actually transitions an individual, Plaintiffs may appropriately seek an injunction to compel the District to comply with *Olmstead* and systematically and objectively evaluate their needs. *See, e.g.*, *Colbert*, 2008 WL 4442597, at *2-3 (plaintiffs appropriately sought injunction directing defendants to employ objective criteria in evaluating them for community placement); *Ligas v. Maram*, No. 05 C 4331, 2006 WL 644474, at *4 (N.D. Ill. Mar. 7, 2006) (same). Plaintiffs have requested such equitable relief. For the foregoing reasons, Plaintiffs have sufficiently pled that community-based care is appropriate.

Here, Plaintiffs' Complaint sufficiently alleges that the named Plaintiffs' needs can be served in the community according to healthcare professionals. *See* Am. Compl. ¶¶ 27, 31, 35, 39, 42, 46. And Defendants have not disputed that this is the case. Defendants' Motion to Dismiss thus should be denied.

E. The ADA Does Not Require Allegations of Cost Neutrality at the Pleading Stage.

Defendants argue that Plaintiffs have failed to allege that the cost of the community-based services they seek would be less than the cost of their care in nursing facilities. Defs.' Mem. at 12. Here, Defendants not only misstate the ADA's pleading requirement with respect to the cost neutrality of community services sought by Plaintiffs, but they also misrepresent the standard of the comparative cost analysis.

First, the ADA does not require Plaintiffs to allege at the pleading stage that the cost of community-based services would be less than the cost of care in the nursing facilities. The cost of services arises only if: (1) the State demonstrates that it has a comprehensive, effectively working plan to transition people with disabilities from institutions to integrated settings; and (2)

asserts a "fundamental alteration" defense, arguing that the cost of Plaintiffs' requested relief would constitute a fundamental alteration of the State's program. *Olmstead*, 527 U.S. at 603-04.

Second, the proper comparative cost standard is cost neutrality, i.e., whether the sought-after community services, *in the aggregate*, would cost the *same or less than* the services in the nursing facility. *Olmstead*, 527 U.S. at 601 & n.12. It is not, as Defendants assert, whether the cost of *individual care* in the community is *less than* the cost of care in nursing facilities. Defs.' Mem. at 12.[15] For EPD Waiver Program purposes, CMS is concerned with the aggregate costs of waiver services. One of the requirements for CMS approval of a § 1915(c) waiver is that the waiver be "cost neutral" – the cost of home and community-based services, combined with the other Medicaid "state plan" services, must be equal to or less than the cost of providing services to a comparable population in a nursing facility. 42 U.S.C. § 1396n(C)(2)(D); 42 C.F.R. § 441.303. The District of Columbia does not determine cost neutrality based on individual costs, but rather on the aggregate cost of care calculated based on the average annual cost of services in the community as compared to the average annual cost of services in nursing facilities. *See* Ex. G at Ex. 17; Ex. M at 53:1 – 55:6 & Exs. 4 & 6.

Even if Plaintiffs were required to plead cost neutrality, which they are not, the Amended Complaint includes sufficient allegations to establish cost neutrality of community-based services. Am. Compl. ¶¶ 80-81. As further explained *supra* at Section II.D, the evidence establishes that the cost of community-based services is consistently and substantially far below the cost of services in nursing facilities. Defendants' cost neutrality arguments accordingly cannot result in dismissal of Plaintiffs' Complaint.

[15] Defendants cite the Federal Medicaid statute which grants discretion to the states to adopt cost neutrality standards based on the expectation that the cost of Medicaid Waiver services to individuals will not exceed their cost of care in institutions. 42 U.S.C. § 1396n(c)(4)(A).

F. The Individual Defendants Are Appropriately Sued in Their Official Capacities.

Defendants additionally argue that the individuals sued in their official capacities – Mayor Vincent Gray, Director of DHCF Wayne Turnage, and Director of DMH Stephen Baron – must be dismissed from this suit because the claims against them are redundant of Plaintiffs' claims against the District. Defs.' Mem. at 27-28. But there are compelling reasons to keep the individual Defendants in this suit.

A suit against an individual acting in his official capacity may be the same as a suit against the entity he represents, but "there is no requirement that, because of the equivalence, the public official defendant must be dismissed." *Owens*, 631 F. Supp. 2d at 54 (Huvelle, J.). "In cases . . . where elected officials are alleged to have violated federal laws protecting a local constituency, public accountability is of utmost importance." *Chase v. City of Portsmouth*, 428 F. Supp. 2d 487, 490 (E.D. Va. 2006) (allowing suit against city and city council members). Accordingly, this Court has, on numerous occasions, allowed claims to proceed against both the District and individuals acting in their official capacities on behalf of the District. *See, e.g.*, *id.*; *Johnson v. D.C.*, 572 F. Supp. 2d 94, 111 (D.D.C. 2008); *Winder v. Erste*, No. Civ.A 03-2623(JDB), 2005 WL 736639, at *5 (D.D.C. 2005); *Dominion CoGen, D.C., Inc. v. D.C.*, 878 F. Supp. 258, 264 n.5 (D.D.C. 1995). *See also DAI I*, 598 F. Supp. 2d at 357 (declining to drop state governor as defendant in suit seeking relief under Title II of the ADA and *Olmstead*).[16]

This is not a case seeking damages, which would be paid by the entity instead of the individuals. Rather, Plaintiffs seek injunctive relief, and the named individuals – the Mayor, the

[16] Moreover, the Supreme Court, in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001), "explicitly recognized the right of a private plaintiff to assert an ADA claim for injunctive relief against a state official in federal court." *Radaszewski*, 383 F.3d at 606.

Director of DHCF, and the Director of DMH – will be integrally involved in implementing any such relief. An order directed to individual officials would increase their public accountability. The individuals named in Plaintiffs' Complaint are well aware that both federal and District law require them to adopt an *Olmstead* Plan and abide by the Integration Mandate. And yet, despite the passage of twelve years since *Olmstead* (and an independent D.C. statute requiring an *Olmstead* Plan be in place by 2008, *see* D.C. Code § 2-1431.04(8)(A),[17]) these officials continue to fail to meet their obligations. A court order directing these individual Defendants to take specific actions to satisfy their obligations to Plaintiffs is both appropriate and necessary to achieve long overdue compliance with the ADA and *Olmstead*.

IV. CONCLUSION.

The Federal requirement is clear. The District of Columbia lacks every one of the hallmarks of a comprehensive and effective integration plan. Defendants have: (1) no process for identifying people who want to be reintegrated into the community from a nursing facility or (2) for assessing the needs of those individuals; (3) no policies, procedures, or practice to assist nursing facility residents who want to be deinstitutionalized in making the transition from nursing facilities to the community with necessary services and supports; (4) no idea of how many individuals who are institutionalized in nursing facilities have transitioned to the community; or (5) whether the nursing facility census has decreased over time. In fact, despite their recognition that 526 nursing facility residents desire community placement, Defendants can identify only ***two*** individuals with physical disabilities who have been deinstitutionalized from nursing facilities with the District's assistance. This extraordinarily poor track record completely

[17] Plaintiffs do not assert a claim under this statute, despite Defendants' suggestion to the contrary. *See* Defs.' Mem. at 28-29. However, this provision illustrates that Defendants, though aware of their obligations, have failed to meet them.

undermines the Defendants' assertion that they are in compliance with *Olmstead*, and material disputes of fact abound relating to Defendants' current programs.

Neither summary judgment nor dismissal is warranted. Plaintiffs thus respectfully request that this Court allow them to continue to litigate their case without further delay.

Dated: September 1, 2011

Respectfully submitted,

/s/ Brian D. Schneider

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CERTIFICATE OF SERVICE

I certify that on September 1, 2011, a true copy of the foregoing was served on all counsel of record by filing with the Court's electronic filing system.

/s/ Brian D. Schneider

Brian D. Schneider