UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DISABILITY ADVOCATES, INC.,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Civil Action No.
	)	03-CV-3209 (NGG) (MDG)
DAVID A. PATERSON, et al.	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF
UNITED STATES' MOTION TO INTERVENE

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INTRODUCTION

On September 8, 2009, this Court issued an order ruling on the merits of the case and setting forth a briefing schedule for the remedies phase. (Memorandum & Order Setting Forth Findings of Fact and Conclusions of Law, Sep. 8, 2009 [hereinafter, Memorandum & Order]) The United States now seeks to intervene at the remedy stage, and for any appeal should Defendants seek to challenge any of this Court's findings. Intervention by the United States is essential to ensure that the broader public interest is represented in this litigation.[1]

While the intervention sought is at the remedial phase, it will not prejudice the existing parties. Furthermore, the Justice Department has a strong interest in the remedial phase of this litigation as it implicates the proper interpretation and application of its regulations implementing the Americans with Disabilities Act (42 U.S.C. § 12101 et. seq.) ("ADA") and compliance with the mandate of community integration under Olmstead v. L.C, 527 U.S. 581 (1999). Due to the timing and significance of this important decision, which may serve as a model for other courts in similar cases, the United States has a compelling interest to participate in the remedial stage of this case and help develop the plan for compliance.

Accordingly, the United States moves herein to intervene as of right or, in the alternative, permissively, pursuant to Rule 24 of the Federal Rules of Civil Procedure for the purpose of participating in the crafting of an appropriate remedy. Plaintiff consents to the United States' intervention; Defendant does not.

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[1]The United States seeks to intervene rather than seek leave to participate as amicus at this stage because it does not believe that amicus status would sufficiently protect its interests, both at this stage and on appeal, if there is an appeal.

STATUTORY AND REGULATORY BACKGROUND

As this Court has found, Congress enacted the Americans with Disabilities Act ("ADA") in 1990 " 'to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities.' 42 U.S.C. § 12101(b)(1)." Memorandum & Order at 6. The Court noted the historical isolation and segregation of individuals with disabilities and recognized that despite some positive developments for these individuals, discrimination 'continue[s] to be a serious and pervasive social problem.' 42 U.S.C. § 12101(a)(2)." Id. Against this backdrop, the Court restated the ADA's prohibition of discrimination:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities or a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132.

Id.

Title II of the ADA, 42 U.S.C. 12131 et seq., prohibits public entities from discriminating against individuals with disabilities. Congress directed the Attorney General to issue a regulation implementing this general mandate consistent with the rest of the ADA, as well as the coordination regulation, 28 C.F.R. § 41, which implements Section 504 of the Rehabilitation Act. 42 U.S.C. § 12134(a). Both the Section 504 coordination regulation and the rest of the ADA make clear that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes, independent of the discrimination that arises when individuals with disabilities receive different services than those provided to others. Memorandum & Order at 8. The Attorney General thus issued 28 C.F.R. 35.130(d), requiring public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."

As the Court stated, the test for establishing violations of the ADA in this case, following Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d. Cir. 2003), is that: "a plaintiff must prove that (1) he or she is a 'qualified individual' with a disability; (2) that the defendants are subject to the ADA; and (3) that he or she was denied the opportunity to participate in or benefit from the defendants' services, programs, or activities, or was discriminated against by defendants, by reason of his or her disability." Disability Advocates, Inc. v. Paterson, 598 F.Supp.2d 289, 311 (E.D.N.Y. 2009). The Court noted that one recognized form of discrimination includes violation of the "integration mandate" of Title II of the ADA, found in the Attorney General's regulations implementing Title II and the Supreme Court's decision in Olmstead v. LC, 527 U.S. 581 (1999). This mandate requires that "when a state provides services to individuals with disabilities, it must do so 'in the most integrated setting appropriate to their needs.' 28 C.F.R. 35.130(d); 28 C.F.R. 41.51(d). Olmstead, 527 U.S. at 607." Memorandum & Order at 7-8.

The Court further explained the contours of the ADA's integration mandate, citing to Olmstead for the proposition that 'unjustified isolation...[is] discrimination based on disability.' Olmstead 527 U.S. at 597." Id. at 8. Such "unjustified isolation" includes "unjustified 'segregation', " and the " 'institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life...and institutional confinement severely diminishes individuals' every day activities.' Olmstead 527 U.S. at 600." Id. A state's obligation to provide services in the most integrated setting is limited, however, but may be "excused only when the state can demonstrate that the relief sought would result in a 'fundamental alteration' of the state's service system." Id.

FACTUAL AND PROCEDURAL HISTORY

As the factual and procedural history of this action were clearly set forth by this Court in its September 8, 2009, Order ruling on the merits of the case, the United States will not burden the Court with a recitation of those facts. See Memorandum & Order. In its opinion, the Court held that:

> DAI has proven that Defendants have discriminated against DAI's constituents in violation of the integration mandate of the Americans with Disabilities Act and the Rehabilitation Act. In carrying out their administration of New York's mental health service system, Defendants have denied thousands of individuals with mental illness in New York City the opportunity to receive services in the most integrated setting appropriate to their needs. DAI has proven that the large, impacted Adult Homes at issue are not the most integrated setting appropriate to the needs of DAI's constituents, especially compared to supported housing, in which individuals with mental illness live in apartments and receive flexible support services as needed. DAI has also proven that virtually all of DAI's constituents are qualified to receive services in supported housing and are unopposed to receiving services in a more integrated setting. Defendants have failed to prove that the relief DAI seeks would constitute a 'fundamental alteration' of the State's mental health service system. Accordingly, DAI is entitled to declaratory and injunctive relief. Following additional briefing from the parties, the court will issue a separate Order and Judgment once it determines the appropriate injunctive remedy.

Id. at 208.

Having resolved the merits of the case, the Court has set forth the briefing schedule for the remedial phase. The Court ordered the Defendants to propose a remedial plan consistent with the September 8, 2009 Memorandum & Order by October 23, 2009. Defendants' response will include written objections to any elements of Plaintiff's proposed relief (as set forth in the July 13, 2009 filing). Plaintiffs then have an opportunity to respond to Defendants' proposed remedial plan by November 8, 2009.

ARGUMENT

I. The United States Should Be Permitted To Intervene As of Right Because of the Department of Justice's Unique Regulatory and Enforcement Responsibilities Under Title II of the ADA

Rule 24(a)(2) of the Federal Rules of Civil Procedure sets forth the requirements for intervention as of right. As construed by the Second Circuit, a party moving for intervention as of right must:

> (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action.

See, e.g., Brennan v. New York City Bd. of Educ., 260 F.3d 123, 128-29 (2d Cir. 2001); D'Amato v. Deutsche Bank, 236 F.3d 78 (2d Cir. 2001); Catanzano by Catanzano v. Wing, 103 F.3d 223, 232 (2d Cir. 1996). While post-judgment interventions are generally disfavored, United States v. Yonkers Bd. of Educ., 801 F.2d 593, 596 (2d Cir. 1986); Farmland Dairies v. Commissioner of the New York State Dept. of Agric. and Mkts., 847 F.2d 1038, 1044 (2d Cir. 1988), intervention at the remedial stage is nonetheless appropriate where, as here, the requirements of Rule 24 are satisfied. Yonkers Bd. of Educ., 801 F.2d at 596 ("courts have held that intervention after the liability phase of a litigation can be timely when the remedy will affect the rights of the intervening third party").

Here, the United States' intervention request satisfies Rule 24(a)(2)'s requirements for intervention as of right. The United States is timely seeking to intervene in this action shortly after the issuance of the District Court's ruling on the merits and in advance of any remedial proceedings have been conducted by this Court. The United States' intervention will not disrupt the Court's briefing schedule or prejudice either party. Moreover, the United States Department of Justice – as the agency with primary regulatory and enforcement responsibilities under Title II

of the ADA – has direct and significant interests in this action that cannot be adequately protected by private parties. Taken together, these considerations strongly counsel in favor of granting the United States' motion to intervene as of right.

A. The United States' Motion for Intervention Is Timely

There are no precise chronological parameters to guide the court's Rule 24(a)(2) timeliness inquiry; instead, determinations as to timeliness are committed to the sound discretion of the district court based on the circumstances of each case. See, e.g., NAACP v. New York, 413 U.S. 345, 366 (1973); Farmland Dairies v. Comm'r of the New York State Dept. of Agric. and Mkts, 847 F.2d 1038, 1043-1044 (2d Cir. 1988). Factors considered by courts in the Second Circuit when assessing the timeliness of a motion to intervene include:

> (1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness.

United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir. 1994); Commack Self-Serv. Kosher Meats, Inc. v. Rubin, 170 F.R.D. 93, 100 (E.D.N.Y. 1996).

The United States' intervention motion, while occurring after the decision on the merits, is filed in advance of any substantive briefs on remedies by existing parties and will not prejudice the existing parties or delay the proceedings. The United States seeks no extensions of the briefing schedule for remedies and will rely on the record developed at trial and the Court's orders.[2] Further, for the reasons discussed below, the United States' interests will be impaired if

[2] This is not an instance in which intervention will seek to "unravel" or "derail[] a lawsuit within sight of the terminal." Reid L. v. Illinois Bd. of Ed., et al., 289 F.3d 1009, 1018

intervention is denied. See discussion infra pp. 9-11. In addition, the importance of the United States' participation in formulating a remedy militates for a finding of timeliness.

Courts have been particularly mindful of the distinct stages of the litigation in analyzing the party's legal interest in institutional reform litigation. The Third Circuit stated that while "some individuals may be held liable for the unlawful conduct, and thus have an interest in the determination of liability, a larger number of persons' interests may be infringed on at the remedial stage of the litigation.... [G]iven the complexity of much public law litigation, permitting courts to limit intervention as of right to discrete phases of the litigation may be necessary in some cases." Brody v. Spang, 957 F.2d 1108, 1116 (3d Cir. 1992).[3] In Caterino v. Barry, 922 F.2d 37 (1st Cir. 1990), the court acknowledged that the propriety of intervention may be analyzed at two junctures – the liability phase and the remedy phase – and noted that the proposed intervenor's voice in that case would be most important at the remedy stage. Id. at 43.

The Department of Justice plays a unique role in enforcing and interpreting Title II and its implementing regulations on behalf of the broad public interest. The United States seeks to intervene at this moment because of the significance and scope of the proposed remedy, which will help transform the lives of individuals with mental illness whom the Court found to be living in segregated communities. Indeed, in June of this year, the President proclaimed the

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(7th Cir. 2002). Instead, it is at the beginning of the remedial process where "input could [be] received without undoing the long and difficult process that all other parties to this litigation had been pursuing in good faith." Id.

[3] The Court in Brody went on to add: "The plaintiffs' underlying claims ask the straightforward, if nonetheless complex, question of whether or not the defendants' policies violate the Constitution, whereas the proposed remedy affects all the people involved in an entire institution. Moreover...the existing parties chose to enter a consent decree, and we are now concerned with the breadth of injunctive relief that is appropriate at the remedial stage." Id. at 1116.

Administration's commitment to enforcing the Olmstead decision and its goals of community integration, coining it the "Year of Community Living."[4] Further, the final judgment that this court will reach will likely implicate the United States' interests in the recently signed U.N. Convention on the Rights of Persons with Disabilities.[5]

Therefore, because the United States moves for intervention in the remedial stage of the case, shortly after the issuance of the District Court's rulings on the merits and at the earliest stage in the remedial phase, the motion for intervention should be deemed timely. See, e.g., Heaton v. Monogram Bank of Georgia, 297 F.3d 416, 422-25 (5th Cir. 2002) (finding FDIC motion to intervene in remand proceedings timely since motion was filed shortly after issuance of appellate mandate and agency's participation as a party was necessary to protect both its regulatory program and the public interest); see also Abondolo v. GGR Holbrook Medford, Inc., 285 B.R. 101, 109-10 (E.D.N.Y. 2002) (holding United States' intervention motion in third-party action timely, despite pendency of litigation for several years, since United States acted quickly to intervene after learning of alleged fraudulent conveyance and its participation was necessary to protect tax lien against property at issue in litigation); United States v. Covington Techs. Co., 967 F.2d 1391, 1395 (9th Cir. 1992) (finding post-judgment intervention six months after stipulation for dismissal approved by District Court timely because it was filed within the time

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[4] "President Obama Commemorates Anniversary of Olmstead and Announces New Initiatives to Assist Americans with Disabilities," June 22, 2009, Office of the Press Secretary, *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities/).

[5] This treaty was signed by President Obama on July 30, 2009 and is pending ratification in the Senate. Susan E. Rice, Permanent Representative to the United Nations, Remarks at the Signing of the UN Convention on the Rights of Persons with Disabilities (Jul. 30, 2009), available at http://paei.state.gov/usun.state.gov/usun/briefing/statements/2009/july/126836.htm.

allowed for the filing of an appeal); United States v. City of Chicago, 870 F.2d 1256, 1263 (7th Cir. 1989) (finding that a six week delay between approval of remedy and the filing by intervenors did not make intervention untimely); South v. Rowe, 759 F.2d 610, 612 (7th Cir. 1985) (finding motion for intervention timely even though motion was filed only a day before consent decree was set to expire).

B. The United States' Significant Interests In this Litigation Cannot Be Adequately Protected by the Existing Private Parties

Turning to Rule 24(a)(2)'s latter three requirements for intervention as of right, the United States has significant and legally cognizable interests in the remedy phase of this litigation given the United States' unique role in the administration and enforcement of Title II of the ADA. For an "interest" to be cognizable under Rule 24(a)(2), the Second Circuit has noted that such an interest must be " 'direct, substantial, and legally protectable.' " Brennan, 260 F.3d at 129 (quoting Washington Elec. Co-op., Inc. v. Massachusetts Municipal Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990)); see also Donaldson v. United States, 400 U.S. 517, 531 (1971) (finding that interest, for purposes of intervention as of right, must be "significantly protectable"). Beyond these broad parameters, however, the interest requirement defies more specific definition and depends on the facts and practicalities of each case. See Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc., 725 F.2d 871, 874-75 (2d Cir. 1984).

The United States has a substantial interest in the crafting of the remedy in this case as the Department of Justice is the agency with primary regulatory and enforcement authority under Title II of the ADA. The Department of Justice has an interest not only in the outcome of this particular litigation, but also in ensuring the proper and consistent application of its own ADA regulations. The United States is charged with representing the public interest on a national

scale, which does not necessarily align with the interests represented by private plaintiffs.[6] See, e.g., Heaton, 297 F.3d at 424 (reversing district court's denial of intervention request by FDIC under Rule 24(a)(2), noting that "[i]t cannot be assumed that the existing [private] parties to the litigation would protect the FDIC's and the public's interest" in the proper regulation of the federal deposit insurance system); Coal. of Arizona/New Mexico Counties, 100 F.3d 837, 845 (10th Cir. 1996) (distinguishing between public and private interests when assessing intervention motion under Rule 24(a)(2)); Ceres Gulf v. Cooper, 957 F.2d 1199, 1203 (5th Cir. 1992) (finding that Director of the Office of Workers' Compensation Programs' interest is not adequately represented by private parties and granting Director intervention; denying intervention would impair the Director's ability to provide his interpretation of the law that he is charged with administering).

Additionally, courts have applied the interest requirement less rigidly in cases that "implicate[] important issues of public law." Tachiona v. Mugabe, 186 F.Supp.2d 383, 395 (S.D.N.Y. 2002) (citing Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967).) The United States' interests in this litigation include ensuring that 1) appropriate relief be granted as the remedy for the Title II violations found by this Court; 2) the relief be consistent with the United States' interpretation of the integration mandate of the ADA; and 3) the framework for the remedy can be followed by other courts redressing similar injuries. For all of the foregoing reasons, the United States should be permitted to intervene as of right in the remedy phase of this litigation.

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[6] Further, the burden of establishing inadequacy of representation of interests is "minimal." Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972).

II. In the Alternative, This Court Should Grant the United States' Request for Permissive Intervention Pursuant to Rule 24(b)(2)

Rule 24(b) of the Federal Rules of Civil Procedure provides an alternative basis for the United States' permissive intervention in this action. Rule 24(b) provides that permissive intervention may be granted "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). Rule 24(b) also makes special provision for intervention by a federal agency in lawsuits concerning federal statutes or regulations within its administrative purview. This Rule provides that where, as here, a party rests a claim or defense on a federal statute or regulation, the federal officer or agency "upon timely application may be permitted to intervene in the action." Id. When assessing a motion for permissive intervention, the primary consideration is "whether the intervention will unduly delay or prejudice the existing parties." Commack Self-Service Kosher Meats, 170 F.R.D. at 106.

The United States' motion for intervention easily satisfies these requirements for permissive intervention. First, the United States' central claims in this action – namely, that a system-wide remedy to move individuals out of segregated settings and into more integrated community settings is appropriate based on this Court's findings of liability under Title II of the ADA and its regulations – share common legal and factual issues with the private plaintiff's claims in this action. Second, as discussed above, the United States' intervention motion will not unduly delay the proceedings on remedy because this motion was filed shortly after the Court's ruling on the merits and the United States seeks to comply with that briefing schedule and rely on the factual record already developed. Third, the private plaintiffs' claims plainly

concern the ADA and its implementing regulations, thereby providing a separate basis for the United States' permissive intervention.

Taken together, these considerations demonstrate the propriety of the United States' permissive intervention. The Department of Justice, as the agency charged with administering Title II of the ADA, has a vested interest in ensuring that this Court fashions a remedy consistent with the United States' interpretation of the integration regulation. This is precisely the scenario for permissive intervention by a federal agency contemplated by Rule 24(b). See, e.g., Metro Transp. Co. v. Balboa Ins. Co., 118 F.R.D. 423, 424 (E.D. Pa. 1987) (granting Public Utilities Commissioner's motion for permissive intervention in litigation concerning interpretation of PUC regulation and commenting: "The rule [24(b)] requires that intervention be granted liberally to governmental agencies because they purport to speak for the public interest."); Meyer v. Macmillan Pub. Co, Inc., 85 F.R.D. 149, 149-50 (S.D.N.Y. 1980) (granting EEOC motion for permissive intervention in light of Rule 24(b)'s " 'hospitable attitude' " towards intervention by federal agencies) (internal citation omitted); Sobel v. Yeshiva Univ., 438 F. Supp. 625, 626-27 (S.D.N.Y. 1977) (same).

CONCLUSION

For the foregoing reasons, the Court should grant the United States' intervention motion and order its intervention in this action (i) as a matter or right pursuant to Fed. R. Civ. P.

24(a)(2) or, in the alternative, (ii) permissively pursuant to Fed. R. Civ. P. 24(b). A Complaint in Intervention accompanies this memorandum.

Dated: October 23, 2009

Respectfully submitted,

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