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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF TRENTON

DISABILITY RIGHTS NEW JERSEY, INC., ALLISON HARMON, by and through her guardians, Valerie Harmon and Linda Lemore, and FREDRENA THOMPSON,	HON. ANNE THOMPSON, U.S.D.J.
Plaintiffs,	Civil Action No. 05-4723 (AET)
v.	NOTICE OF MOTION FOR SUMMARY JUDGMENT
JENNIFER VELEZ, in her official capacity as Commissioner for the Department of Human Services for the State of New Jersey, and STATE OF NEW JERSEY,	
Defendants.	

TO: CLERK OF THE COURT
United States District Court
Clarkson S. Fisher Federal Bldg. & U.S. Courthouse
402 E. State Street
Trenton, New Jersey 08608

John Kearney, Esq.
Ballard Spahr, LLP
Plaza 1000 - Suite 500, Main Street
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PLEASE TAKE NOTICE that on April 30, 2010, or as soon thereafter as counsel may be heard, the undersigned Paula T. Dow, Attorney General of New Jersey, by Gerard Hughes, Deputy Attorney General, on behalf of Defendants, Jennifer Velez, as Commissioner for the New Jersey Department of Human Services, and the State of New Jersey, shall move before the Honorable Anne E. Thompson, U.S.D.J., in the United States District Court for the District of New Jersey, Trenton, New Jersey, pursuant to Fed. R. Civ. P. 56 for an Order granting Defendants' Motion for Summary Judgment and dismissing Plaintiffs' complaint with prejudice. Defendants will rely on the Brief in Support of their Motion for Summary Judgment, Certifications of Kenneth Ritchey, Patricia Merk, Jonathan Seifried and Gerard Hughes with Attached Exhibits A through M, and Statement of Material Facts being filed simultaneously with this Notice of Motion.

A proposed form of Order is attached hereto.

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: s/Gerard Hughes
Gerard Hughes
Deputy Attorney General
Attorney for State Defendants

Dated: March 25, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF TRENTON

DISABILITY RIGHTS NEW JERSEY, INC., ALLISON HARMON, by and through her guardians, Valerie Harmon and Linda Lemore, and FREDRENA THOMPSON Plaintiffs, v. JENNIFER VELEZ, in her official capacity as Commissioner for the Department of Human Services for the State of New Jersey, and STATE OF NEW JERSEY, Defendants.	HON. ANNE THOMPSON, U.S.D.J. Civil Action Civil Action No. 05-4723 (AET)

BRIEF ON BEHALF OF DEFENDANTS, JENNIFER VELEZ IN HER OFFICIAL CAPACITY AS COMMISSIONER FOR THE DEPARTMENT OF HUMAN SERVICES AND THE STATE OF NEW JERSEY, IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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GERARD HUGHES
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

Plaintiffs, Disability Rights New Jersey, Inc. ("DRNJ"), A.H. and F.T., bring this action against Jennifer Velez, Commissioner of Human Services of New Jersey, in her official capacity, and the State of New Jersey, seeking declaratory and injunctive relief relating to the operation of the State's developmental centers and alleging inadequate efforts to transition individuals residing at the developmental centers to live in the community.

Defendants are entitled to summary judgment dismissing Plaintiffs' claims under the Americans with Disabilities Act and the Rehabilitation Act because Defendants have a comprehensive, effectively working plan to transition eligible individuals from developmental centers to the community. Requiring Defendants to place these individuals at a faster pace, given the allocation of the Division's resources and the current fiscal crisis, would fundamentally alter the State's system of providing services to other individuals with developmental disabilities.

Defendants are also entitled to summary judgment dismissing Plaintiffs' claims under the Medicaid Act because the Act does not require the State to provide home and community-based waiver services to all individuals who could benefit from these services. Rather, it requires the State to offer a choice of services, and to pay promptly and fairly for services that are already available. The State meets these requirements.

Defendants are entitled to summary judgment dismissing Plaintiffs' Fourth and Fifth Causes of Action because admission to

a developmental center is a voluntary act that the potential resident or his or her guardian can decline, and a plethora of due process protections are already provided.

Finally, Defendants are immune from Plaintiffs' claims under the Americans with Disabilities Act and the Rehabilitation Act because Congress failed to abrogate state sovereign immunity when it enacted Title II of the Americans with Disabilities Act and the Rehabilitation Act, and New Jersey did not waive sovereign immunity by accepting funds under the Rehabilitation Act.

STATEMENT OF MATERIAL FACTS

A. Background

Even before it published its plan for transitioning eligible individuals from developmental centers to the community in 2007, the Division of Developmental Disabilities ("the Division") had drastically reduced its use of developmental centers by shifting resources to the community. See Certification of Kenneth Ritchey ("Ritchey Cert.") at ¶2, Exhibit A (The Path to Progress) at p. 8. In 1980, 7,317 individuals resided in eleven State developmental centers. Ibid. By the beginning of 2007, 3,027 individuals resided in seven developmental centers. Ibid. While this shift to community placement occurred, the total number of individuals the Division served increased nearly threefold. Ibid. In 1986, the Division served 13,140 individuals. Ibid. By 2007, this number increased to 37,359 individuals. Ibid. With the decrease in the use of developmental centers and the increase in individuals

eligible for the Division's services, the proportion of individuals the Division served in the community had drastically increased to 92% by 2007. Ibid.

Today, the proportion of individuals the is even greater. The Division serves 37,425 individuals in the community, while serving 2,725 individuals in developmental centers. See Ritchey Cert. at ¶3. Unless they refuse services or move out of State, the Division serves individuals from the date of eligibility for services to death. See N.J.S.A. 30:4-25.2 et seq.

B. The State's Olmstead Plan

1. Development

In 2006, the New Jersey Legislature enacted P.L. 2006, c.61, which required the Division to develop a plan to transition out of developmental centers all individuals who expressed a preference to live in the community and whose interdisciplinary team recommended that they live in the community. See Ritchey Cert. at ¶4, Exhibit B (P.L. 2006, c.61). Specifically, the law required the Division to: (1) establish benchmarks to ensure that within eight years of implementation, each resident in a State developmental center who expresses a desire to live in the community and whose individual habilitation plan so recommends, is able to live in a community-based setting; (2) review and establish objective criteria to identify those persons with developmental disabilities who are appropriate candidates for living in community-based settings; (3) identify the resources needed to ensure that those persons can

reside in the community and receive needed community-based supports in a manner that enables them to live as independently as possible; (4) set forth how the necessary funding, services and housing will be provided; (5) solicit public input in developing a plan by conducting four public hearings at or in close proximity to the State's developmental centers in each of the Division's four regional service areas; and (6) provide the plan and a report of its findings and recommendations to the Governor and to the Senate Health, Human Services and Senior Citizens and Assembly Human Services committees no later than nine months after the effective date of the act. Ibid.

In January 2007, the Division conducted four hearings with stakeholders to gain input for its plan for deinstitutionalization. See Ritchey Cert. at ¶5, Exhibit A at p.10. Although the Division did not restrict the scope of the input, it asked stakeholders to address three areas: services and supports needed to successfully transition individuals from developmental centers; services and supports needed to successfully integrate and maintain individuals in the community; and concerns regarding accessing and receiving services in the community. Ibid.

The Division then released a draft plan to gather more input from the public. See Ritchey Cert. at ¶6, Exhibit A at p.11. It published the draft plan on its website and notified key stakeholders of its availability. Ibid. The Division received 31

comments regarding the draft plan from family members, organizations, and other agencies. Ibid.

2. Summary of the Plan

In May 2007, the Division published the Path to Progress ("the Path to Progress" or "the Plan"), its plan for transitioning eligible individuals from developmental centers to the community. See Ritchey Cert. at ¶7, Exhibit A. The Plan is organized into three sections: (i) an assessment to identify individuals with developmental disabilities who are appropriate to live in the community; (ii) an outline of the resources needed so that eligible individuals can transition from developmental centers to the community; and (iii) a description of how the plan will be implemented (i.e., the benchmarks, the steps necessary to achieve the benchmarks and the time-frames within which the benchmarks will be reached). Ibid.

a. Criteria for Placement

The Division uses the following criteria for determining eligibility for community placement: (1) the individual desires to move or does not oppose moving to the community;[1] (2) the individual's interdisciplinary team recommends that the individual be transitioned to the community; (3) there is no court order

[1] The Division considers as unopposed to community placement not only individuals who express a desire to live in the community, but also those who do not or cannot express a preference regarding community placement. See Ritchey Cert. at ¶8.

prohibiting the move;[2] and (4)the individual's guardian/family does not oppose community placement. See Ritchey Cert. at ¶8, Exhibit A at pp.20-21. The final requirement is currently being used to prioritize placement. See Ritchey Cert. at ¶8. The Division is first placing the individuals whose guardians/families do not oppose community placement. Ibid. At the same time, it has launched a campaign to educate opposing families about the merits of community placement. Ibid. The Division anticipates that more families will be unopposed to community placement as they become more knowledgeable about it, and it therefore plans to place more individuals than those who currently meet the eligibility criteria. Ibid. Ultimately, however, the Division cannot place individuals against the wishes of their legally appointed guardians who are vested with the authority to make residential decisions for their wards. See N.J.S.A. 3B:12-24.1.

To assess how many individuals meet these criteria, the Division uses the Developmental Disabilities Resource Tool ("DDRT"). See Certification of Jonathan Seifried ("Seifried Cert.") at ¶2. The DDRT assesses individuals in eight programmatic areas: social work, psychology, physical therapy, occupational therapy, habilitation, nursing, nutrition and speech. Id. at ¶3. In each programmatic area, the DDRT uses an informant who knows the individual and is trained in the use of the assessment. Ibid.

[2] The third criteria refers to individuals committed to developmental centers related to criminal proceedings and is not at issue in this lawsuit. See N.J.S.A. 30:4-25.14 et seq.

While the entire assessment surveys the individual's abilities and the services he or she needs, the social work section of the DDRT assesses whether the individual is recommended for community placement by his or her interdisciplinary team, whether the individual can express a preference about community placement and, if so, what that preference is, and whether the individual's guardian/family is opposed to community placement. Id. at ¶4.

b. Number of Individuals Requiring Placement, Pace of Placement and Education Efforts

At the time the Path to Progress was published, 2,457 individuals, approximately 81% of individuals residing at developmental centers, were recommended for community placement by their interdisciplinary teams. See Ritchey Cert. at ¶9, Exhibit A at pp.22-23. Out of these 2,457 individuals, 2,303 expressed a desire to move to the community, or did not or could not express a preference regarding community placement. Ibid. Out of these 2,303 individuals, 1,298 had guardians/family who were opposed to community placement, leaving 1,005 individuals who met the criteria for community placement. Ibid.

However, the Division planned to transition to the community more than the 1,005 individuals who met the criteria for community placement at the time the Path to Progress was published. See Ritchey Cert. at ¶10, Exhibit A at pp.24-25. It anticipated that

through education and the example set by other individuals living in the community, many individuals and guardians/families opposed to community placement would change their minds. Ibid. The Division launched an extensive campaign to educate guardians/families about community placement. See Seifried Cert. at ¶5. In association with the University of Medicine and Dentistry of New Jersey, the Division established the Community Living Education Project (formerly the "Family Education Project"). Ibid. The Project provides various educational services to families, including family forums, one-on-one education sessions, and newsletters and other information about community settings. Ibid. It also facilitates tours of community residences of individuals with developmental disabilities. Ibid.

The Division also anticipated that individuals would change their decisions about community placement. See Seifried Cert. at ¶6. The Division discusses community placement at each individual's annual Individualized Habilitation Plan meeting. Ibid. Individuals sometime change their minds about residing in the community at these meetings. Ibid. On rare occasions, individuals also change their decision about community placement as a move date approaches. Ibid.

Accounting for the likelihood that individuals and/or their guardians/families would change their decisions regarding community placement, the Division planned to place 1,850 individuals in the community over eight years, rather than just the 1,005 individuals

who met the eligibility criteria at the time the Path to Progress was published. See Ritchey Cert. at ¶11, Exhibit A at pp.24-25. Further, the Division indicated that it would continue to place individuals in the community after eight years if there were still individuals who met the eligibility criteria. Ibid. The Division did not intend for the 1,850 figure to be, nor was it possible for it to be, an exact or stagnant projection. See Ritchey Cert. at ¶11.

The Division began placement of the 1,005 eligible individuals immediately and planned to place those individuals who later became eligible after the initial 1,005 placements.[3] See Ritchey Cert. at ¶11, Exhibit A at p.46. Specifically, the Division planned to place 100 individuals in fiscal year ("FY") 2008,[4] and 250 individuals per year from FY 2009 through FY 2015. Ibid. Thereafter, the Division planned to place any additional individuals who later became eligible for community placement. Ibid.

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[3] The State operates a waiver under the Medicaid Home and Community Based Waiver program ("HCBS waiver"). See Ritchey Cert. at ¶13; 42 U.S.C. § 1396n(c). This allows the Division to serve a defined number of individuals, who would otherwise require institutional care, in the community. Ibid. Currently, this waiver is capped at 11,197. Ibid. The Division also maintains a number of spots for additional placements throughout the year. Ibid.

[4] FY 2008 in New Jersey runs from July 1, 2007 to June 30, 2008. See N.J.S.A. 52:5-1.

c. Cost of Implementation of Path to Progress

In the Path to Progress, the Division projected the annual costs of funding these placements. See Ritchey Cert. at ¶14, Exhibit A at pp.164-70. The projections included costs for infrastructure and family support; housing costs and service supports; annualized budgets for previous placements; Medicaid state plan increases; and staffing increases. Ibid. The costs also include offsets for contribution to care by individuals and reduction of staff at developmental centers. Ibid.

At the time the Path to Progress was issued, the Division projected costs as follows:

FISCAL YEAR	STATE FUNDS	FEDERAL FUNDS	TOTAL COST
2008	$23,294,842	$10,201,688	$33,615,114
2009	$65,596,021	$29,184,891	$95,457,953
2010[5]	$95,844,910	$42,252,051	$139,740,866
2011	$114,544,350	$48,383,088	$165,368,885
2012	$132,953,421	$54,055,469	$190,269,413
2013	$152,791,276	$59,801,070	$216,694,060
2014	$174,841,843	$66,536,967	$246,344,427
2015	$194,882,038	$71,672,387	$272,407,270
TOTAL COST	$954,748.702	$382,087,611	$1,359,897,989

See Ritchey Cert. at ¶15, Exhibit A at pp.164-70. The Division also projected that the cost of maintaining the 1,850 individuals already placed in the community would be approximately $207,390,454 ($155,513,490 State and $45,800,845 federal) per year after FY 2015. Ibid.

3. Implementation of the Path to Progress

In preparation for the placements it would make under the Path to Progress, the Division qualified agencies to provide services to individuals transitioning out of developmental centers to the community. See Certification of Patricia Merk ("Merk Cert.") at ¶2. In October 2006, the Division issued the "Olmstead Individualized Community Supports and Services" Request for

[5] While the amount of projected placements were to remain at 250 per year from FY 2009 through FY 2015, the costs increase every year because the Division continues to fund placements made in previous years.

Proposals ("RFP"). See Merk Cert. at ¶3. This RFP offered three open enrollment periods for agencies to become qualified providers of services in the following areas: housing development, residential supports, employment/day services, medical supports and behavior supports. Ibid. Through this RFP, the Division qualified 55 agencies to provide housing, 73 agencies to provide residential supports, 63 agencies to provide employment/day services, 38 agencies to provide medical supports and 47 agencies to provide behavior supports. Ibid.

In December 2007, the Division issued another RFP for "Olmstead Individualized Community Supports and Services." See Merk Cert. at ¶4. The RFP offered an open enrollment for all the categories contained in the October 2006 RFP, as well as a new category for providers of stand-alone behavior supports, which are temporary supports provided to an individual to maintain the individual in a community setting. Ibid.

In April 2008, the Division issued another RFP for community supports and services. See Merk Cert. at ¶5. The RFP offered open enrollment for all categories in the previous two RFPs. Ibid.

Through these RFPs, by August of 2008, the Division qualified 77 agencies to provide housing, 103 agencies to provide residential supports, 88 agencies to provide employment/day services, 65 agencies to provide medical supports and 71 agencies to provide behavior supports and 2 agencies to provide stand-alone behavior supports. See Merk Cert. at ¶6.

The Division issued a Request for Qualifications ("RFQ") for expansion of community supports in July 2009. See Merk Cert. at ¶7. The aim of the RFQ was to qualify providers of services for individuals with personal budgets. Ibid. This allowed providers to expand the populations they serve and the scope of services they provide. Ibid. The RFQ also afforded agencies the opportunity to offer services to individuals in their own homes. Ibid.

In addition to qualifying providers to serve individuals transitioning out of developmental centers, the Division also provided funding for agencies to develop and improve community housing to better serve individuals being transitioned from developmental centers. See Merk Cert. at ¶8. The federal government, through the HUD Section 811 program, provides funding to non-profit organizations to develop rental housing with supportive services for disabled individuals. See Merk Cert. at ¶9. The Division provides $5,000 to each agency that is awarded a HUD 811 grant to offer housing for individuals with developmental disabilities. Ibid. The agencies typically use this $5,000 for initial costs such as taxes, site cleaning and building permits. Ibid. To date, the Division has provided the $5,000 grant to 24 HUD projects in the State. Ibid.

The Division has also provided funding to make housing more accessible for individuals with physical disabilities. See Merk Cert. at ¶10. In FY 2007, the Division offered agencies between $30,000 and $90,000 each to make existing homes accessible for

individuals with ambulation difficulties who were transitioning out of developmental centers. Ibid. Five agencies were awarded these grants. Ibid.

By qualifying providers and improving infrastructure, the Division ensured that the necessary supports and services were in place before individuals were transitioned from developmental centers to the community. See Merk Cert. at ¶11. Once funding is available, the individual may choose the services that best fit his or her needs and the agency which will provide these services, rather than that provider selecting the individual it wishes to serve. Ibid. As noted in the Path to Progress, "[t[hese values provide the framework for [the Division] to assure that individuals with developmental disabilities, and their families have access to needed community services, individualized supports, and other forms of assistance that promote self-direction, independence, productivity, and integration and inclusion in all facets of community life including work." See Merk Cert. at ¶11, Exhibit A at p.12.

The parties in this matter retained experts to review the Path to Progress and its implementation. See Certification of Gerard Hughes ("Hughes Cert.") at ¶¶2,3. Both experts agree that the Plan, as written, contains all of the required elements of an Olmstead plan. Defendants' expert, Robert Gettings, opines that "[t]he Path to Progress offers a detailed, value-based roadmap to rebalancing New Jersey's system of services to persons with

developmental disabilities ... [and is] one of the most comprehensive, clearly articulated state DD system rebalancing plans in the nation." See Hughes Cert. at ¶2, Exhibit C (Report of Robert Gettings) at p.51. In his report, Tony Records, Plaintiffs' expert, refers to the Path to Progress as "a comprehensive document including nearly all of the necessary components of a plan to transition people out of developmental centers." See Hughes Cert. at ¶3, Exhibit D (Report of Tony Records) at p.10. While Mr. Records opined that the plan lacked components to curtail new admissions and to administer a waiting list that moves at a reasonable pace, Exhibit D at p.10, he clarified in his deposition that these elements are not lacking in the Plan itself but, rather, have not been fully funded. See Hughes Cert. at ¶4, Exhibit E (Deposition Transcript of Tony Records) at T:191-24 to T193:1.

4. **Funding of the Path to Progress and Placements Made**

The Legislature has appropriated significant funding to implement the Path to Progress. In FY 2007, the Legislature appropriated $3,000,000 to the Division for Olmstead-related services and capital improvements. See Ritchey Cert. at ¶17, Exhibit F (2007 Appropriations Handbook, Human Services section) at

p.B-106.[6] That same year, the Legislature appropriated to the Division $50,000,000 to be spent over three years for Olmstead-related residential and other support services and infrastructure for individuals transitioning from developmental centers to the community and from the community services waiting list. See Ritchey Cert. at ¶18, Exhibit G (Governor's Proposed Budget for FY 2008) at p. D-190.

Using part of the $50,000,000 it had been appropriated for three years and the additional $3,000,000 it received in FY 2007, the Division placed 86 individuals out of developmental centers into the community in FY 2007 and 121 individuals in FY 2008. See Ritchey Cert. at ¶19. The 207 placements far exceeded the projected placements in Path to Progress for FY 2008, which were 100 individuals at a cost of $33,615,114. See Ritchey Cert. at ¶19, Exhibit A at p.164.

During FY 2009, New Jersey, like other states, faced an international economic crisis described as "the worst economic downturn since the Great Depression." See Ritchey Cert. at ¶20, Exhibit H (Citizen's Guide to the Budget for FY 2010) at p.3. The

[6] The New Jersey budget and appropriations process is set forth in several documents. The Governor proposes a budget each year pursuant to N.J.S.A. 52:9H-1. One or more appropriations bills, which often are not identical to the Governor's proposed budget, are proposed, debated, and ultimately passed by the Legislature and signed by the Governor as the Appropriations Act, which is published in the Appropriations Handbook. In recent years, the Treasury Department has published a Citizens Guide to the Budget, which has detailed differences between the Budget as proposed and the Appropriations Act.

State confronted plunging revenues and increased demand for State services. Ibid. For FY 2009, the Legislature passed a $32.87 billion budget. See Ritchey Cert. at ¶20, Exhibit I (Citizen's Guide to the Budget for FY 2009) at p.5. During the course of the fiscal year, however, a budget shortfall of nearly $4.3 billion opened, which required substantial spending cuts. See Ritchey Cert. at ¶20, Exhibit H at pp.6-7.

Despite the budget shortfall, the Legislature appropriated to the Division $19,645,000 for FY 2009 to fund new placements out of developmental centers and to continue funding for existing placements. See Ritchey Cert. at ¶21, Exhibit J (Appropriations Handbook for FY 2009) at p.B-105. The Division also had approximately $21,616,000 left over from the $50,000,000 appropriated in FY 2007. See Ritchey Cert. at ¶21. This amount fell short of the $95,457,953 the Division projected it would need to fund 250 placements in FY 2009 as well as placements from previous years, and would only fund approximately 125 placements. See Ritchey Cert. at ¶21, Exhibit A at p.164. The Division placed 112 individuals from developmental centers into the community in FY 2009.[7] See Ritchey Cert. at ¶22. It also continued to fund all placements made in previous years. Ibid.

[7] The Division's efforts to place 125 individuals fell short because sufficient resources were not yet in place in the community to serve the other 13 individuals, and the transition period for individuals leaving developmental centers was longer than anticipated. See Ritchey Cert. at ¶22.

By FY 2010, the State's budget shortfall had grown to an unprecedented $8.2 billion, and the final budget passed for FY 2010 was $29 billion. See Ritchey Cert. at ¶23, Exhibit H at p.22.[8] In FY 2010, for the third straight year, operational budgets for State departments were reduced. Ibid. Confronted with the State's historical financial crisis, the Legislature cut the Department of Human Services' FY 2010 budget by $676,442,000, which was a 13.8% decrease from FY 2009. See Ritchey Cert. at ¶23, Exhibit H at p.33.

Despite these cuts, appropriations for the State's Olmstead initiatives continued, and in FY 2010, the Legislature appropriated $34,007,000 to the Division for Olmstead Residential Services. See Ritchey Cert. at ¶24, Exhibit L (Appropriations Handbook for FY 2010, Human Services section) at p. B-109. This amount fell short of the $139,740,866 the Division projected it would need to fund 250 new placements and continue to fund already existing placements. See Ritchey Cert. at ¶24, Exhibit A at p.164. The Division has placed 47 individuals out of developmental centers to

[8] Throughout FY 2010, actual and anticipated revenue collections by the State continued "to fall far below the amounts estimated in the FY 2010 Appropriations Act" resulting in an anticipated funding shortfall of $1.333 billion for FY 2010. See Hughes Cert. at ¶5, Exhibit K (Executive Order No. 14 of Governor Chris Christie). In his proposed budget for FY 2011, Governor Christie indicates that there is a $10.7 billion budget deficit for FY 2011. See Hughes Cert. at ¶6, Exhibit M (Governor's Proposed Budget for FY 2011) at p.1. He recommends a cut in the Department of Human Services' budget of $182,342,000, which is 3.9% decrease from the adjusted appropriation for FY 2010. Exhibit M at p. 68. Nevertheless, Governor Christie proposes a $14,028,000 increase in spending for community placements for the Division. Id. at p.95. Further, he recommends closure of the West Campus of Vineland Developmental Center. Id. at p.42.

date in FY 2010, and projects it will place a total of 62 by the end of the fiscal year. See Ritchey Cert. at ¶25. It has also continued to fund all placements made in previous years. Ibid.

Thus, to date, the Division has placed 366 individuals[9] out of developmental centers into the community under Path to Progress and anticipates placing approximately 15 more individuals by the end of the fiscal year. See Ritchey Cert. at ¶26. It has done so in spite of the worst economic climate since the Great Depression, which has forced approximately $676 million in cuts to the Department of Human Services' budget. Ibid. While the Division projected in the Path to Progress it would place 600 individuals by the end of FY 2010, the State's fiscal crisis has meant that the new funding contemplated by the Path to Progress has not been available. Id. at ¶27. The Division has faced reductions in the programs it offers, as well in administration, but has made every effort not to cut community services needed for the Path to Progress to be implemented. Ibid. The Division cannot transfer money from its other programs to fund additional placements out of developmental centers because doing so would mean reducing service for individuals receiving services from the Division. Ibid. At this point, any transfer of funds would result in another group of individuals with developmental disabilities being negatively impacted. Ibid.

[9] Plaintiff, F.T., was transitioned to the community on July 24, 2009. Plaintiff, A.H., still resides at Vineland Developmental Center. See Ritchey Cert. at ¶26.

5. **Quality of Placements**

The placements the Division has made have been successful. See Seifried Cert. at ¶7. The Division conducts follow-up reviews of placements 30 days, 60 days, 90 days, 180 days, one year, two years and three years after transition. Ibid. These face-to-face visits are conducted by a team consisting of staff at the developmental center who know the individual best and the community services case manager for the individual. Ibid. At the visits, team members report their overall impressions of the community placement. Ibid. Data collected on 344 reviews conducted in FYs 2008 and 2009 revealed that 69% of individuals were adjusting well to their placement and seemed happy; 25% of individuals were adjusting well, but had issues that needed to be addressed;[10] and 6% of individuals had experienced difficult transitions. Id. at ¶8. The review forms also include the individual's impression of his or her placement, as well as current staff's impressions. Id. at ¶10. Data collected on the 344 reviews showed that 91% of individuals and 94% of staff reported that the individuals like their new home; 95% of individuals and 97% of staff reported that the individuals like the staff at the new home; 89% of individuals

[10] On the current review form, responders indicate in which category, if any, there are issues. See Seifried Cert. at ¶9. This allows the Division to ensure that more in-depth discussions are being held by the review team, the individual and the provider so that issues are addressed. Categories of issues include equipment, health/medical, hygiene, behavioral, staffing, employment/day services, financial, social, and health insurance/health provider. Ibid.

and 92% of staff reported that the individuals liked their day program or job; and 91% of individuals and 97% of staff reported that the individuals liked the staff at their day program/job. Ibid. Consistent with this data, only 12 individuals have been re-admitted to developmental centers out of the 366 individuals placed in the community. Ibid.

6. **The Path to Progress Placement Process**

The success of the Division's placements to date is due in large part to the process the Division uses to transition individuals from developmental centers to the community. See Seifried Cert. at ¶11. As set forth in Path to Progress, this process consists of five phases. See Seifried Cert. at ¶11, Exhibit A at pp.14-19. Phase 1 involves educating the individual and his or her guardian/family about community placement and the services available. See Seifried Cert. at ¶11. It also includes the individual's and family's decision about community placement. Ibid. Phase 2 consists of planning for the individual's move to the community. Ibid. The Division now uses Essential Lifestyle Planning for individuals transitioning out of developmental centers, which is a service plan driven by the choices of the individual and his or/her family. Ibid. In phase 3 of the transition process, the Essential Lifestyle Plan is put into action. Ibid. The Division solicits qualified agencies which may be interested in serving the individual; it arranges for qualified, interested agencies to meet the individual and review the

individual's records and submit a proposal to serve the individual; the Division arranges for agencies that submitted a proposal to be interviewed by the individual and the individual's interdisciplinary team to explain how the agency will serve the individual; and then the individual chooses a placement. Ibid. In phase 4, the individual moves from the developmental center to his or her new home in the community. Ibid. Phase 5 consists of long term follow-up and quality assurance of the individual's placement. Ibid.

Throughout the transition process, the individual is assigned a support coordinator to facilitate his or her move to the community. See Seifried Cert. at ¶12. The Division has contracted with two agencies to provide support coordination for individuals transitioning out of developmental centers, as well as various other projects. See Seifried Cert. at ¶13. It has annual contracts with these agencies totaling approximately $2 million. Ibid.

While the Division estimated in the Path to Progress that an individual's transition to the community would take approximately six months, the process has taken on average about 15 months. See Seifried Cert. at ¶14. The Division employs a "get it right the first time approach," which emphasizes the quality of placement over the speed of transition. Ibid. The Division feels strongly that it is essential to find the right fit for the individual in the community, rather than rushing the placement. Ibid.

7. **Declining Admissions to Developmental Centers**

While transitioning individuals to the community under the Path to Progress, the Division has also reduced admissions to developmental centers. See Ritchey Cert. at ¶28. The Division maintains a lengthy waiting list for individuals seeking residential placement because its resources are not sufficient to meet the needs of the class of beneficiaries. See N.J.A.C. 10:46C; J.D. v. New Jersey Div. of Developmental Disabilities, 329 N.J. Super. 516, 522 (App. Div. 2000). The only way that an individual can be placed prior to the State reaching the date of his or her assignment to the waiting list is if there is an emergency, that is, a situation in which "the eligible person is homeless or in imminent peril." N.J.A.C. 10:46B-1.3. The Division does not admit individuals to developmental centers who are reached off of the waiting list for residential placements. See Ritchey Cert. at ¶29. The only new admissions to developmental centers are individuals receiving emergency placements, who will be homeless or in imminent peril if the Division does not provide them a place to live and support services, and for whom no community placement is available to meet the emergent needs of the individual. Ibid. Accordingly, the Division has invested resources in crisis management in the community to avoid admissions to developmental centers when possible. See Ritchey Cert. at ¶30.

The Division and the State Division of Mental Health Services ("DMHS") have a joint contract with Trinitas Regional Medical

Center to administer an emergency response/crisis counseling service called Statewide Clinical Consultation and Training ("SCCAT"). See Ritchey Cert. at ¶31. The Division's portion of this contract, which costs $841,619 per year, funds eight clinicians who provide emergency intervention, training and technical assistance to individuals who are dually diagnosed with mental illness and developmental disability ("dually-diagnosed individuals"). Ibid. SCCAT team members attempt to stabilize the individuals who experience behavioral crises, thus allowing the individual to remain in the community. Ibid. SCCAT team members also offer training and technical assistance in dealing with behavioral crises to family members and other providers. Ibid.

Trinitas Hospital also provides ten beds in its psychiatric unit for dually-diagnosed individuals. See Ritchey Cert. at ¶32. The increased short-term capacity for dually-diagnosed individuals in crisis has allowed the Division to divert admissions from developmental centers to the community hospital for short-term placement. Ibid.

The Division has also provided funding for agencies to develop emergency capacity in the community to avoid placements at developmental centers. See Ritchey Cert. at ¶33. It issued an RFP for emergency capacity beds in FY 2007. Ibid. The Division required that the beds be made available for referrals of emergency placements. Ibid. As a result of the RFP, the Division opened 16

new emergency capacity beds, 4 for adults who are ambulatory, 4 for adults who are non-ambulatory and 8 for children. Ibid.

In FY 2009, the Division created additional emergency beds in the community because of the demand for the already existing beds. See Ritchey Cert. at ¶34. It took the next successful bidders from the 2007 RFP and added 16 new emergency beds. Ibid. The Division now funds a total of 44 emergency beds in the community at an average annual cost of approximately $108,000 per bed. Ibid. The Division uses these beds for short-term stays while other planning is done for permanent community placement. Ibid.

The Division also contracts, at a cost of $713,725 per year, for specialized mental health case management with the Integrated Service Delivery Team ("ISDT"). See Ritchey Cert. at ¶35. The ISDT provides long-term services to dually-diagnosed individuals. Ibid. The Division identifies individuals for referral. Ibid. The ISDT may also be an ongoing support service after SCCAT stabilizes a crisis. Ibid. ISDT services include assessment, on-site intervention, behavioral skills training, social skills training, psychiatric treatment, clinical case management, staff training and crisis intervention. Ibid.

While increasing crisis support and emergency capacity for individuals in the community, the Division has also revamped its admission policy to developmental centers to ensure that individuals are only admitted if there are no available services in the community. See Ritchey Cert. at ¶36. When an individual in

the community is in need of an emergency placement, the Division sends an electronic mail message, called an "e-blast," to all qualified in-State providers under contract with the Division to determine if any can meet the emergency placement needs of the individual. Id. at ¶37. If the Division is aware of a provider that would be suitable to serve the individual, the Division sends a more detailed referral packet to that provider. Ibid. Providers that respond to the e-blast also receive the more comprehensive referral packet. Ibid. Only if all options are exhausted and none of the providers is able to serve the individual, will Division staff complete a placement request form for admission to a developmental center. See Ritchey Cert. at ¶38. The form includes documentation of staff's review of all available vacancies in the community and the reasons these vacancies were not appropriate for the individuals. Ibid. The form also includes a discharge plan for transitioning the individual out of the developmental center in the event he or she is admitted there. Ibid. Throughout the placement request form process, staff continue efforts to find a suitable placement in the community for the individual. Ibid.

The Division has also assigned a Placement Coordinator to review admission requests to ensure that staff have exhausted efforts to identify a community placement. See Ritchey Cert. at ¶39. In instances where a community placement was identified and failed, the Placement Coordinator calls a special case meeting to review the circumstances of the failed placement and to review all

other community placement options explored by staff. Id. at ¶40. The Placement Coordinator then reviews the admission request with the Division's Assistant Director over developmental centers. Ibid. In the event that an admission cannot be diverted, the Placement Coordinator requests updates from staff to ensure that there are ongoing efforts to return the person to an appropriate community placement. Ibid.

The individual and his or her guardian are given the opportunity to visit the developmental center prior to accepting the offer of placement. See Ritchey Cert. at ¶41. They must also be advised that they may request the assistance of a third party advocate to act on their behalf to obtain more information to challenge the placement. Ibid. Moreover, once admitted to a developmental center, the individual, his or her guardian/family members or the advocate may request to have the individual's case reviewed by the developmental center's Human Rights Committee. Ibid.

With the exception of court ordered placements, which are not the subject of the instant action, admissions to developmental centers are voluntary. See Ritchey Cert. at ¶42; N.J.S.A. 30:4-25.2, et seq. Nevertheless, an individual who is offered placement at a developmental center can appeal this offer of placement in accordance with N.J.A.C. 10:46B-5.1 and N.J.A.C. 10:48. Such appeals are considered to be contested matters. N.J.A.C. 10:48-2.2(a). A contested matter "means an adversarial proceeding, in

which legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations or orders, addressed to them or disposing of their interests after the opportunity for an agency hearing." N.J.S.A. 52:14B-2(b). While such appeals are typically first referred for a settlement conference, the appellant may request that the settlement conference be waived and the matter transmitted directly to the Office of Administrative Law for resolution, N.J.A.C. 10:48-2.2(b)&(d), and be expedited. N.J.A.C. 1:1-9.4. Following the OAL hearing and the final agency decision, further appeal may be made to the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 10:48-7.1(e); N.J. Ct. R. 2:2-3(a)(2).

After admission to a developmental center, the individual's interdisciplinary team holds a 5-day post admission meeting and a 30-day Individual Habilitation Plan meeting to ensure that plans are developed that address the reason for the individual's admission. See Ritchey Cert. at ¶43. Summaries of these meetings are submitted to the Placement Coordinator for review. Ibid. On a regular basis, the individual's case manager submits a status report to the Placement Coordinator that documents all of the efforts taken by the Division to return the individual to a community placement as soon as possible. Id. at ¶44. The Placement Coordinator in turn provides monthly reports to the

Assistant Commissioner regarding the status of all emergency admissions to developmental centers. Ibid.

The Division has also created an Admissions Review Panel that reviews emergency admissions to developmental centers. See Ritchey Cert. at ¶45. The Panel is composed of representatives from the Office of the Public Advocate, Disability Rights New Jersey, contracted service providers, and family members of the individual. Ibid. The Placement Coordinator provides quarterly status reports on individual cases to the Admissions Review Panel as part of the Panel's review and monitoring functions. Ibid.

The Division's development of community services and revamped admission procedures have resulted in fewer admissions to developmental centers since the Path to Progress was published. See Ritchey Cert. at ¶46. In calendar year 2007, there were 104 admissions to developmental centers. Ibid. In 2008, admissions decreased to 91. In 2009, the number of admissions decreased even further to 43.[11] Ibid. To date in 2010, there have only been 11 admissions to developmental centers. Ibid. With fewer admissions and increased community placements, the census at developmental centers has decreased from 3,027 in 2007 to 2,725 today. See Ritchey Cert. at ¶48.

[11] On average, the Division makes approximately 300 emergency placements per year. Thus, the percentage of emergency placements admitted to developmental centers has been steadily dwindling since 2007. See Ritchey Cert. at ¶47.

Although the State's fiscal crisis has prevented the Division from discharging individuals from developmental centers at the pace projected in the Path to Progress, the Division remains committed to transitioning into the community every individual who is eligible for community placement. See Ritchey Cert. at ¶49. The Division will continue to move these individuals into the community as quickly as possible, while ensuring that their community placements are safe and appropriate. See Ritchey Cert. at ¶49.

C. Plaintiffs' Amended Complaint

Plaintiffs' first cause of action alleges that Defendants have violated the anti-discrimination provision of the Americans with Disabilities Act ("the ADA") by: (i) offering only institutional care to institutionalized individuals with developmental disabilities, rather than community-based care, despite the fact that the provision of community-based services would not require a fundamental alteration of Defendants' program, services and activities for developmentally disabled individuals; (ii) failing to properly assess such individuals for community-based services and failing to advise them of community living options; and (iii) failing to implement "a comprehensive, effectively working plan for serving qualified people with developmental disabilities in the most integrated setting appropriate to their needs." See Amended Complaint at ¶¶86, 87, 88.

In their second cause of action, Plaintiffs allege that Defendants have violated Section 504 of the Rehabilitation Act of

1973 ("the RA"), by denying access to community-based services to residents of developmental centers who are appropriate for and desire such services, despite the fact that the provision of community-based services would not require a fundamental alteration of Defendants' program, services and activities for developmentally disabled individuals. See Amended Complaint at ¶93.

Plaintiffs' third cause of action asserts that Defendants have violated the Medicaid Act by denying residents of the developmental centers the opportunity to apply for and receive necessary home and community-based services with reasonable promptness, and failing to inform residents of developmental centers of non-institutional waiver alternatives and failing to offer "a meaningful choice between segregated institutional care and appropriately integrated community services . . . ." See Amended Complaint at ¶¶97, 98.

In their fourth cause of action, Plaintiffs allege a due process violation with respect to the procedures currently in place governing admission to, and continued placement in, developmental centers because potential residents are not provided with notice, a commitment hearing, representation, a decision by an impartial decision maker, and an annual review hearing. See Amended Complaint at ¶¶105, 107, 109, 110.

In their fifth cause of action, Plaintiffs contend that the admissions process and the failure to provide an annual review hearing constitutes unlawful discrimination in violation of the ADA, and violates their right to access to the courts guaranteed by

the 14th Amendment and the ADA. See Amended Complaint at ¶¶119, 126, 127, 128.

PROCEDURAL HISTORY

Plaintiffs filed their complaint on September 29, 2005. On February 1, 2007, Plaintiffs filed an amended complaint. Defendants filed an answer to Plaintiffs' amended complaint on June 4, 2007. Fact and expert discovery was completed. The Court's scheduling order, as amended, requires summary judgment motions to be filed by March 25, 2010.

STANDARD OF REVIEW

The summary judgment procedure is designed to expedite the resolution of cases by dismissing factually insufficient claims or defenses and avoiding unwarranted consumption of public and private resources. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Summary judgment is appropriate when, after a review of the record in the light most favorable to the non-moving party, there is no genuine issue of material fact to sustain the litigation. Lang v. New York Life Inc. Co., 721 F.2d 118, 119 (3d Cir. 1983). An issue is "genuine," however, only if the evidence proffered by the non-moving party is such that a reasonable fact finder could find for that party. Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). Whether or not a fact is material will be defined by reference to substantive law. Anderson, 477 U.S. at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary

judgment – [f]actual disputes that are irrelevant or unnecessary will not be counted." Ibid.

A movant in a motion for summary judgment need only establish that, based on the record before the court, the evidence proffered on behalf of the non-movant is insufficient to carry the non-movant's burden of proof at trial. Chippollini v. Spencer Gifts, 814 F.2d 893, 896 (3d Cir. 1987) (citing Celotex Corp. v. Catrett, supra, 477 U.S. at 323). Where the non-moving party has the burden of proof at trial, it must "'make a showing sufficient to establish the existence of [every] element essential to that party's case.'" Equimark Commercial Finance Company v. C.I.T. Financial Services Corporation, 812 F.2d 141, 144 (3d. Cir. 1987) (citing Celotex, supra, 477 U.S. at 322) (bracketed language in original). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, supra, 477 U.S. at 249 (citations omitted).

Here, as a matter of law, the Amended Complaint should be dismissed pursuant Fed. R. Civ. P. 56 because Plaintiffs do not state a viable claim against Defendants and there are no genuine issues of material fact to be litigated.

ARGUMENT

POINT I

PLAINTIFFS' CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT SHOULD BE DISMISSED BECAUSE DEFENDANTS HAVE A COMPREHENSIVE, EFFECTIVELY WORKING PLAN FOR PLACING ELIGIBLE INDIVIDUALS IN THE COMMUNITY, AND IT WOULD FUNDAMENTALLY ALTER DEFENDANTS' SERVICES FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES IF DEFENDANTS WERE FORCED TO PLACE THESE ELIGIBLE INDIVIDUALS AT A FASTER PACE.

Plaintiffs allege in their First and Second Causes of Action that Defendants have violated the anti-discrimination provisions of the ADA and Section 504 of the RA. As demonstrated below, however, the Division's Path to Progress constitutes a comprehensive, effectively working plan for transitioning eligible individuals from developmental centers to the community, and demonstrates a commitment to future planning for deinstitutionalization. Requiring Defendants to place these individuals at a faster pace, given the allocation of the Division's resources and the current fiscal crisis, would fundamentally alter the State's system for serving individuals with developmental disabilities. Because Plaintiffs cannot state a viable claim against Defendants under the ADA or the RA, and because there are no genuine issues of material fact to be litigated, Defendants are entitled to summary judgment dismissing Plaintiffs First and Second Causes of Action.

The non-discrimination provision of the ADA provides:

> Subject to the provisions of this subchapter, 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, or be subjected to discrimination by any such entity.
>
> 42 U.S.C. §12132.

The ADA's implementing regulations provide further guidance regarding what is required in order to prevent discrimination under the act. Specifically, Section 35.130(b)(7), which is referred to variously as the "fundamental alterations" provision or the "reasonable modifications" provision of the ADA, provides in pertinent part:

> 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.
>
> 28 C.F.R. §35.130(b)(7).

Similarly, Section 35.130(d) provides that "[a] public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."

Section 504 of the RA provides that:

> [n]o otherwise qualified individual with a disability in the United States, . . . shall, 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 or under any program or activity conducted by any

> Executive agency or by the United States Postal Service.
>
> 29 U.S.C. §794(a).

The United State Supreme Court, in Olmstead v. L.C., 527 U.S. 581 (1999), and subsequent Third Circuit case law interpreting Olmstead and the integration mandate of Title II of the ADA and the RA,[12] have set forth the parameters for when a state is required to move institutionalized persons to community placements. In addition, those cases set out the requirements for a state to successfully assert a "fundamental alterations" defense pursuant to the "reasonable modifications" provision of the ADA, 28 C.F.R. §35.130(b)(7), to a suit seeking to require a state to place people in the community.

In 1999, the United States Supreme Court addressed the issue of whether, under Title II of the ADA, a state is required to place persons with mental disabilities in community settings rather than in institutional settings. Olmstead v. L.C., 527 U.S. 581, 587 (1999). The Court, in a plurality opinion, found that under Title II of the ADA, specifically, 42 U.S.C. §12132, and 28 C.F.R. 35.130(d), if a State's treating professionals have determined that

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[12] The Olmstead plaintiffs did not bring suit under the Rehabilitation Act. See L.C. & E.W. v. Olmstead et al., Civil Action No. 1:95-cv-1210-MHS, 1997 WL 148674 (N.D. Ga. Mar. 27, 1997)) ("Olmstead District Court Opinion") at *2. The Frederick L. line of cases included a Rehabilitation Act claim. The Third Circuit noted that the ADA and the Rehabilitation Act are similarly structured and applied the ADA/Olmstead analysis to the Rehabilitation Act claim. See Frederick L. v. Dep't of Pub. Welfare of the Commonwealth of Pennsylvania, 364 F.3d 487, 497 (3d. Cir. 2004).

a person can be served in the community and the person does not oppose community placement, then the State is responsible to make such placement or show justification for why it need not under the ADA "fundamental alterations" provisions. Ibid.

The Olmstead plaintiffs had been institutionalized for some time, had been evaluated by their treatment teams and determined to be appropriate for community placement, but had not been moved to a community setting. Olmstead, supra, 527 U.S. at 593. The defendants, including Tommy Olmstead, Commissioner of the Georgia Department of Human Services, and other state and county officials, argued that the plaintiffs had not been placed in the community because of a lack of funds for community placements, rather than as a result of discrimination. Id. at 594. The District Court rejected the argument of the Georgia officials, entered partial summary judgment for plaintiffs and ordered defendants to place plaintiffs in the community, noting that the cost of care for plaintiffs was less in the community than in the institution. Id.; see also L.C. & E.W. v. Olmstead et al., Civil Action No. 1:95-cv-1210-MHS, 1997 WL 148674 (N.D. Ga. Mar. 27, 1997)) ("Olmstead District Court Opinion"); L.C. & E.W. v. Olmstead, et al., 138 F.3d 893, 896, petition for rehearing and rehearing en banc den'd, 149 F.3d 1197 (11th Cir. 1998)("Olmstead Circuit Court Opinion").

The Georgia officials appealed, arguing that the plaintiffs had failed to show "discrimination by reason of their disability," pursuant to the plain meaning of 42 U.S.C. §12132, and failed to

demonstrate that they were denied community placements available to other non-disabled individuals because of disability. Olmstead Circuit Court Opinion, 138 F.3d at 896. The Eleventh Circuit affirmed the District Court's grant of partial summary judgment, but remanded to the District Court for reassessment of the State's cost-based defense, interpreting the District Court decision to have erroneously ruled out cost of services as a reasonable modifications defense. Olmstead, supra, 527 U.S. at 595; Olmstead Circuit Court Opinion, 138 F.3d at 905. The Eleventh Circuit directed that the District Court consider "whether treating L.C. and E.W. would require additional expenditures and, if so, whether the State had met its burden of proving that those expenditures were unreasonable in light of the State's mental health budget." Olmstead Circuit Court Opinion, 138 F.3d at 905.

The Supreme Court took certiorari on the issue of the State's cost-based defense and held that if, in the allocation of available resources, placement of the individual would be inequitable, given the State's responsibilities "for the care and treatment of a large and diverse population of persons with mental disabilities," the State need not place the individual. Olmstead, supra, 527 U.S. at 604. Justice Ginsberg, who wrote for the plurality, found that the ADA does not require an individual to be placed in the community if he or she is not appropriate for community placement or opposes it, nor does the ADA impel states to phase out institutions such that patients in need of "close care" are placed at risk. Id. at 602.

The plurality provided guidance on how ADA compliance could be achieved, stating that the "reasonable modifications" provision of the ADA regulations is satisfied by a "comprehensive, effectively working plan for placing qualified persons in less restrictive settings" and "a waiting list that moves at a reasonable pace not controlled by a State's endeavors to keep its institutions fully populated." Id. at 605-06.

In several cases since the Olmstead decision, the United States Court of Appeals for the Third Circuit has provided a more detailed analysis of what constitutes a "fundamental alterations" defense under the ADA. See Frederick L. v. Dep't of Pub. Welfare of the Commonwealth of Pennsylvania, 364 F.3d 487 (3d Cir. 2004) ("Frederick II"); Frederick L. v. Dep't of Pub.c Welfare of the Commonwealth of Pennsylvania 422 F.3d 151 (3d Cir. 2005) ("Frederick III"); Pennsylvania Prot. & Advocacy v. Dep't of Pub. Welfare, 402 F.3d 374 (3d Cir. 2005)("PP&A Circuit Court Opinion").

In Frederick II, several psychiatric patients at a Norristown State Hospital ("NSH") brought a class action lawsuit against the Pennsylvania Department of Public Welfare ("DPW"). Frederick II, 364 F.3d at 489. Plaintiffs argued that DPW's failure to provide them with adequate community services violated the ADA and Section 504 of the Rehabilitation Act, 29 U.S.C. §794. Ibid. DPW raised the "fundamental alterations" defense, pursuant to Olmstead and 28 C.F.R. §351.30(b)(7), arguing that the modifications that plaintiffs sought would fundamentally alter its policy and budget.

Id. at 490. NSH did not have a formal plan to transition its patients to the community, but did hold monthly Hospital/County Discharge Planning Meetings. Ibid. The Third Circuit reversed the District Court's decision in DPW's favor and remanded the matter, finding that the state defendants could not satisfy the proofs necessary for a reasonable modifications defense based solely on the immediate costs of, and DPW's past progress in making, the community placements. Id. at 495, 500-01. The Third Circuit found that in the absence of a demonstrated "commitment to action" to move eligible patients into the community, the state officials' reasonable modification defense fails, and remanded the matter to the District Court. Id. at 500.

Notably, while remanding the matter for further proceedings, the Third Circuit also rejected several of plaintiffs' contentions concerning DPW's cost-based defense. First, relying on Olmstead, the Court held that plaintiffs could not argue that there would be a cost savings from their deinstitutionalization because that would ignore the costs of maintaining institutions with fixed overhead for patients who need them. Id. at 497. Second, the Third Circuit rejected plaintiffs' contention that the Court could require DPW to request additional funds from the legislature because the budgetary process is beyond judicial scrutiny. Ibid. The Court emphasized that federal courts should "accord deference to state policymakers' programmatic and political funding decisions regarding mental health funding." Id. at 500. Third, relying again on Olmstead,

the Court rejected plaintiffs' contention that DPW should shift funds in its current budget to cover the costs of increased community programs because moving money from other programs to fund more community placements would favor those who commence actions at the expense of others. Id. at 497.

In the final analysis, the Third Circuit accepted that DPW's fiscal constraints were sufficient and that it could not order, as plaintiffs sought, DPW to develop 60 community residential slots per year for NSH residents. Id. at 500. However, the Court interpreted the Olmstead four-Justice plurality opinion as requiring that a successful fundamental alterations defense contain two critical elements: a state must show "future planning for deinstitutionalization" and a "commitment to action." Id. at 500. The "commitment to action" must evidence an assurance that there will be ongoing progress toward community placement and it must be communicated in some manner. Id. at 500. The Third Circuit vacated the District Court's judgment and remanded the case to allow DPW to make a submission to the District Court so the court could evaluate whether the plan showed these two elements. Id. at 501.

On remand, the District Court found that DPW had a "commitment to action" and, thus, had established a fundamental alterations defense. See Frederick L., v. PA DPW, No. Civ.A. 00-4510, 2004 WL 1945565 (E.D. Pa. Sept. 1, 2004). It relied on DPW's "Pennsylvania Community/Hospital Integration Plan," a statewide planning document

that set out the general goals for the provision of mental health services, including: supporting the development of a comprehensive array of services in the least restrictive and least intrusive manner, continuing to reorient the focus of the mental health system away from large institutions toward community care, and ensuring that the system has a strong fiscal foundation. Id. at *2.

On appeal, the Third Circuit reversed the District Court's determination that DPW had an Olmstead Plan and again remanded the matter. It found that DPW's "general assurances" and "good faith intentions" that it would effectuate deinstitutionalization were insufficient to establish a fundamental alterations defense. Frederick III, supra, 422 F.3d at 158. The Court outlined the requirements of an Olmstead plan:

> To alleviate the concerns articulated in Olmstead, we believe that a viable integration plan at a bare minimum should specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.
>
> Id. at 160.

The Third Circuit further defined the parameters for the fundamental alterations defense in PP&A Circuit Court Opinion, supra, 402 F.3d 374. In that case, plaintiff, Pennsylvania Protection and Advocacy, Inc. ("PP&A"), brought suit on behalf of

residents of the South Mountain Restoration Center ("South Mountain"), a psychiatric and nursing transition facility run by DPW. Plaintiff alleged that defendants were violating the ADA and Section 504 by failing to include South Mountain residents in integrated treatment programs and instead, limiting them to institutionalized treatment at South Mountain. Id. at 377. Residents of South Mountain consisted primarily of elderly individuals who had been admitted from state psychiatric facilities. Ibid. In response to a request from the Statewide Community/Hospital Integration Planning Committee, staff at South Mountain had determined that 80 percent of residents "could function in the community now if the necessary community support services were in place and operational" and that none of the residents were precluded from leaving "due to serious medical problems." Id. at 378.

The District Court held that DPW had established a fundamental alterations defense because it had showed that to provide the relief requested, community placement for South Mountain residents, would cause DPW to shift resources from other patients with mental illness. Ibid. On appeal, however, the Third Circuit held that DPW's lack of a "commitment to action" was fatal to DPW's fundamental alteration defense. Id. at 381. It determined that DPW had excluded South Mountain residents from its system of community placements and services. Id. at 383. The Court held that, without a plan to transition these residents to the

community, DPW could not assert a fundamental alterations defense by solely relying on fiscal constraints. Id. at 381.

Thus, for Defendants to prevail in this case, they must establish that they have a comprehensive, effectively working plan to place eligible individuals from developmental centers into the community, that their plan demonstrates a commitment to action by providing time-frames for discharge, the number of individuals to be discharged within those time-frames, and the collaboration with community providers and other entities to effectuate integration into the community; and that it would fundamentally alter the State's system for providing services to other individuals with developmental disabilities if Defendants were forced to transition these individuals at a faster pace. As demonstrated below, Defendants have established all of the elements of a fundamental alterations defense, and Plaintiffs' ADA and RA claims should, therefore, be dismissed.

A. Defendants Have A Comprehensive, Effectively Working Plan For Transitioning Eligible Individuals From Developmental Centers To The Community.

In 2007, the Division released the Path to Progress, which sets forth a comprehensive, effectively working plan for transitioning eligible individuals from developmental centers to the community. See Ritchey Cert. at ¶7, Exhibit A. The Plan establishes eligibility criteria for determining whether an individual with developmental disabilities is appropriate for community placement: (1) the individual desires to move or does

not oppose moving to the community; (2) the individual's interdisciplinary team recommends that the individual be transitioned to the community; (3) there is no court order prohibiting the move; and (4) the individual's guardian/family does not oppose community placement. See Ritchey Cert. at ¶8, Exhibit A at pp.20-21. In addition, the Plan outlines the resources needed for eligible individuals to transition from developmental centers to the community, and describes how the plan is to be implemented, setting forth benchmarks, the steps necessary to achieve those benchmarks, and the time-frames within which the benchmarks will be reached. See Ritchey Cert. at ¶7, Exhibit A.

The Division uses the DDRT to assess how many individuals meet the eligibility criteria for community placement. See Seifried Cert. at ¶2. The DDRT surveys whether the individual is recommended for community placement by his or her IDT, whether the individual can express a preference about community placement and, if so, what that preference is, and whether the individual's guardian/family is opposed to community placement. Ibid. The DDRT is also used to ascertain the supports individuals will need in the community. Ibid.

Recognizing that some guardians and family members might not have the information necessary to make informed decisions regarding the merits of community placement, the Division launched a campaign to educate guardians and families about community placements. See Seifried Cert. at ¶5. The Division anticipates that more families

will consent to community placement as they become more educated, and therefore, plans to place more individuals than those who currently meet the eligibility criteria. See Ritchey Cert. at ¶10.

The Path to Progress sets forth time frames for the discharge of eligible individuals, as well as the projected number of individuals to be discharged within these time frames. See Ritchey Cert. at ¶11, Exhibit A at p46. Specifically, the Plan provided for the placement of 100 individuals in FY 2008, and 250 individuals per year from FY 2009 through FY 2015. Ibid. Thereafter, the Division planned to place any additional individuals who later became eligible for community placement. Ibid.

The Path to Progress describes in detail the resources the Division needs to meet the Plan's placement goals, and the action steps required to effectuate the Plan. See Ritchey Cert. at ¶14, Exhibit A at pp.164-170. The Plan comprehensively examines the costs for infrastructure and family support, housing costs and service supports, annualized budgets for previous placements, Medicaid state plan increases, and staffing increases. Ibid. It also includes offsets to costs for contribution to care by individuals and reduction of staff at developmental centers. Ibid. With projected costs increasing every year during the life of the Plan, the Division estimated that the total cost from FY 2008 to FY 2015 would be $1,359,897,989 ($954,748,702 State and $382,087,611 federal), and approximately $207,390,454 ($155,513,000 State and

$45,800,845 federal) per year after FY 2015. Ibid. The Plan also includes action steps that describe in detail everything the Division needs to do to effectuate the transition of individuals from developmental centers to the community. See Exhibit A.

There can be no question that the Division's Olmstead plan is "effectively working." The Division has qualified agencies to provide services to individuals transitioning out of developmental centers to the community in preparation for the placements it has made and will make under the Path to Progress. See Merk Cert. at ¶¶2-7. Through its RFP and RFQ process, the Division has qualified 77 agencies to provide housing, 103 agencies to provide residential supports, 88 agencies to provide employment/day services, 65 agencies to provide medical supports, 71 agencies to provide behavior supports and 2 agencies to provide stand alone behavior supports for individuals transitioning out of developmental centers. Ibid.

The Division has also provided $5,000 to each agency that is awarded a HUD 811 grant to offer housing for individuals with developmental disabilities, awarding the $5,000 grant to 24 HUD projects to date. See Merk Cert. at ¶9. In FY 2007, the Division also offered agencies between $30,000 and $90,000 to make existing homes accessible for individuals with ambulation difficulties who were transitioning out of developmental centers. Id. at ¶10.

By ensuring that the necessary supports and services are in place before an individual moves to the community, the individual

is now able to choose his or her provider of services, rather than the provider selecting the individual it wishes to serve. See Merk Cert. at ¶11. As noted in the Path to Progress, "[t]hese values provide the framework for [the Division] to assure that individuals with developmental disabilities, and their families have access to needed community services, individualized supports, and other forms of assistance that promote self-direction, independence, productivity, and integration and inclusion in all facets of community life including work." See Merk Cert. at ¶11, Exhibit A at p.12.

The Legislature has appropriated resources to the Division to fund the Path to Progress, despite the fact that the State has been suffering through a fiscal crisis over the last two years. In FY 2007, the Legislature appropriated $3,000,000 to the Division for Olmstead related services and capital improvements. See Ritchey Cert. at ¶17, Exhibit F at p.B-106. That same year, the Legislature appropriated to the Division $50,000,000 to be spent over three years for Olmstead-related residential and other support services and infrastructure for individuals transitioning from developmental centers to the community and from the community services waiting list. See Ritchey Cert. at ¶18, Exhibit G at p.D-90. Despite a budget shortfall, the Legislature appropriated to the Division $19,645,000 for FY 2009 to fund new placements out of developmental centers and to continue funding for existing placements. See Ritchey Cert. at ¶21, Exhibit J at p.B-105. The

Division also had approximately $21,616,000 left over from the $50,000,000 appropriated in FY 2007. See Ritchey Cert. at ¶21. In FY 2010, despite an even larger budget shortfall, the Legislature appropriated $34,007,000 to the Division for Olmstead Residential Services. See Ritchey Cert. at ¶24, Exhibit L at p.B-109. Although a portion of those funds were cut in FY 2010, substantial new resources were nonetheless committed to Path to Progress even as budget cuts occurred throughout State agencies. For FY 2011, Governor Christie, despite making additional cuts in all State funding and specifically to the Department of Human Services, has proposed new funds for the Path to Progress. See Hughes Cert. at ¶6, Exhibit M.

While the fiscal crisis has prevented the Division from making the amount of placements projected in the Path to Progress to date, the Division still has placed hundreds of individuals in the community, demonstrating not just a commitment to action, but real action in spite of the economic downturn. See Frederick II, supra, 364 F.3d at 500. The Division placed 86 individuals out of developmental centers into the community in FY 2007 and 121 individuals in FY 2008. See Ritchey Cert. at ¶19. These placements far exceeded the number projected in Path to Progress for FY 2008, which was 100 individuals. See Ritchey Cert. at ¶19, Exhibit A at p.164. The Division placed 112 individuals from developmental centers to the community in FY 2009, and also continued to fund placements from previous years. See Ritchey

Cert. at ¶22. The Division has placed 47 individuals to date in FY 2010, and projects that it will place a total of 62 by the end of the fiscal year. Id. at ¶25. It has also continued to fund all placements made in previous years. Ibid.

Thus, to date, the Division has placed 366 individuals out of developmental centers into the community under the Path to Progress and anticipates placing approximately 15 more individuals by the end of the fiscal year. See Ritchey Cert. at ¶26. It has done so in the face of the worst economic climate since the Great Depression, which has forced approximately $676 million in cuts to the Department of Human Services' budget and tens of millions more to other State agencies. Ibid.

The placements the Division has made have been successful. The Division conducts follow-up reviews of placements 30 days, 60 days, 90 days, 180 days, one year, two years and three years after transition. See Seifried Cert. at ¶7. At the visits, staff report their overall impressions of the community placement. Ibid. Data collected on 344 reviews overwhelmingly shows that the majority of individuals transitioned to the community are happy and well-adjusted. Id. at ¶¶8,10. For the smaller number of individuals who have experienced difficulties in adjusting to the community, the face-to-face visits ensure that staff are aware of and can address these issues. Id. at ¶9.

Significantly, during the same time the Division has been placing individuals in the community under the Path to Progress, it

has also decreased admissions to developmental centers. See Ritchey Cert. at ¶26. The Division does not admit individuals to developmental centers who are reached off the waiting list for residential placements. Id. at ¶29. The only new admissions to developmental centers are emergency placements, for individuals who will be homeless or in imminent peril if the Division does not provide them a place to live and support services and for whom no community placement is available to serve their emergent needs. Ibid.

To avoid admissions to developmental centers whenever possible, the Division has invested resources in crisis management in the community. See Ritchey Cert. at ¶30. The Division and DMHS jointly manage the SCCAT, the emergency response/crisis counseling service, made up of eight clinicians who provide emergency intervention, training and technical assistance to dually-diagnosed individuals and their caretakers in their existing community settings. Id. at ¶31. SCCAT teams work to stabilize individuals who experience behavioral crises, providing training and assistance to family or community providers to manage behavioral issues, thus allowing individuals who might otherwise be admitted to developmental centers to remain in the community. Ibid. Trinitas Hospital also provides ten beds in its community psychiatric hospital for dually-diagnosed individuals, which has allowed the Division to divert admissions for developmental centers to the community. Id. at ¶32.

The Division has increased emergency capacity in the community to avoid placements at developmental centers. See Ritchey Cert. at ¶33. In FY 2007, for example, the Division opened 16 new emergency capacity beds, 4 for adults who are ambulatory, 4 for adults who are non-ambulatory and 8 for children. Ibid. In FY 2009, it created an additional 16 new emergency beds. Id. at ¶34. With these increases, the Division now funds a total of 44 emergency beds in the community for individuals in crisis who might otherwise be admitted to developmental centers. Ibid.

The Division also offers specialized, long-term mental health case management through the ISDT to dually-diagnosed individuals. See Ritchey Cert. at ¶35. Services include assessment, on-site intervention, behavioral skills training, social skills training, psychiatric treatment, clinical case management, staff training and crisis intervention. Ibid. Better management of behavioral issues in community settings is intended to head off situations that might otherwise become emergency needs for placement in a developmental center. Ibid.

The Division has also revamped its admission procedures for developmental centers, to ensure that individuals are admitted to developmental centers only when there are no options for placement in the community. See Ritchey Cert. at ¶36. The import of this more fully discussed in Point III, infra. The Division's development of community services and revamped admission procedures have resulted in fewer admissions to developmental centers since

the onset of Path to Progress. See Ritchey Cert. at ¶46. In calendar year 2007, there were 104 admissions to developmental centers. Ibid. In 2008, admissions decreased to 91. Ibid. In 2009, the number of admissions decreased even further to 43. Ibid. To date in 2010, there have only been 11 admissions to developmental centers. Ibid. With fewer admissions and increased community placements, the census at developmental centers has decreased from 3,027 in 2007 to 2,725 today. Id. at ¶48.

Thus, there is no question that the State has a plan more moving developmental center residents to community placements that meets all the requirements of Olmstead and subsequent Third Circuit case law. While the economic crisis has prevented the Division from making the number of placements initially projected in the Path to Progress to date, the Plan demonstrates a real commitment to action, has resulted in 366 placements to date, has cut admissions to developmental centers and provides a proven blueprint for future deinstitutionalization.

B. It Would Fundamentally Alter The State's System For Providing Services To Individuals With Developmental Disabilities If Defendants Were Forced To Place Individuals In The Community At A Faster Pace.

Provided it has a plan, a state need not place individuals in the community if, in the allocation of available resources, placement would be inequitable given the State's responsibilities "for the care and treatment of a large and diverse population of persons with mental disabilities." Olmstead, supra, 527 U.S. at

604. Interpreting the ADA's fundamental alterations defense as described in Olmstead, the Third Circuit has held that a state human services agency need not shift funds in its budget used to provide services to other individuals with developmental disabilities in order to cover the costs of increased community programs because moving money from other programs to fund more community placements would favor those who commence actions at the expense of others. Frederick II, supra, 364 F.3d at 497. Further, the Third Circuit has held that courts cannot require Defendants to request additional funds from the legislature to fund community placement because the budgetary process is beyond judicial scrutiny. Ibid.

After appropriating sufficient funds to meet the Plan's placement targets through FY 2008, New Jersey, along with other states, faced an international economic crisis described as "the worst economic downturn since the Great Depression" during FY 2009. See Ritchey Cert. at ¶20, Exhibit H at p.3. The State confronted plunging revenues and increased demand for State services. Ibid. Despite the budget shortfall, the Legislature appropriated $19,645,000 to the Division in FY 2009 to fund new placements out of developmental centers and to continue funding existing placements. See Ritchey Cert. at ¶21, Exhibit J at p.B-105. This fell short of the amount the Division projected it would need to place 250 individuals in FY 2009, and the Division was only able to make 112 placements. See Ritchey Cert. at ¶22.

By FY 2010, the State's budget shortfall had grown to an unprecedented $8.2 billion, and the FY 2010 Appropriation Act appropriated a total of approximately $29 billion, which was nearly $4 billion less than the FY 2009 Appropriation Act. See Ritchey Cert. at ¶23, Exhibit H at p.22. Confronted with the State's unprecedented financial reverses, the Legislature cut the Department of Human Services' FY 2010 budget by $676,442,000, which was a 13.8% decrease from FY 2009. See Ritchey Cert. at ¶23, Exhibit H at p.33. Nonetheless, funding for Path to Progress continued. The Legislature appropriated $34,007,000 to the Division for Olmstead Residential Services, which will allow the Division to place approximately 62 individuals. See Ritchey Cert. at ¶24, Exhibit L at p.B-109.

Despite the State's fiscal woes, Defendants have placed 365 individuals in the community since Path to Progress was published, while spending over $100 million to initiate and continue these placements. See Ritchey Cert. at ¶26. Defendants have done so despite the worst economic climate since the Great Depression, which has forced approximately $676 million in cuts to the Department of Human Services' budget. Ibid. While the Division projected in the Path to Progress it would place 600 individuals by the end of FY 2010, the State's fiscal crisis has meant that the new funding contemplated by the Path to Progress has not been available. Id. at ¶27. The Division has faced reductions in the programs it offers, as well in administration, but has made every

effort not to cut community services needed for the Path to Progress to be implemented. Ibid. The Division cannot transfer money from its other programs to fund additional placements out of developmental centers because doing so would mean reducing service for individuals receiving services from the Division. Ibid. Thus, any transfer of funds would result in another group of individuals with developmental disabilities being negatively impacted, and that is not required. Ibid.; see also Frederick II, supra, 364 F.3d at 497.

Even if the budgetary process was not beyond the Court's scrutiny, an effort by the Division to petition the Legislature for more funding for community placements would be fruitless because the State has an anticipated budget deficit for FY 2011 of $10.7 billion. See Hughes Cert. at ¶6, Exhibit M at p.1. Consequently, Governor Christie is recommending a cut in the Department of Human Services' budget of $182,342,000, which is 3.9% decrease from the adjusted appropriation for FY 2010. Id. at p.68. Despite this, the Governor has still included funding to continue making placements, albeit at a slower pace than anticipated in the Path to Progress.

Thus, although the Division has been unable to meet its placement goals, its progress under the Path to Progress must be viewed in the context of the current, nationwide economic crisis. The Path to Progress was published in May 2007, well before the current economic crisis, and naturally, did not anticipate it. The

Division will have made approximately 380 placements under the Path to Progress by the end of FY 2010, and has received and spent approximately $117,000,000 in new funding to implement the Plan. The Division has unquestionably demonstrated a commitment to action on behalf of individuals in developmental centers who are eligible to live in the community. Because the Court cannot order the Division to do anything more than it is already doing without fundamentally altering the Division's services for other individuals with developmental disabilities, Defendants are entitled to summary judgment on Plaintiffs' claims under the ADA and the RA.

POINT II

PLAINTIFFS' CLAIMS UNDER THE MEDICAID ACT SHOULD BE DISMISSED BECAUSE THE ACT DOES NOT REQUIRE DEFENDANTS TO PROVIDE COMMUNITY-BASED SERVICES TO ALL INDIVIDUALS WHO COULD BENEFIT FROM THESE SERVICES, BUT RATHER TO OFFER A CHOICE OF SERVICES AND TO PAY PROMPTLY AND EVENHANDEDLY FOR SERVICES THAT ARE ALREADY AVAILABLE.

In their third cause of action, Plaintiffs allege that Defendants have violated the Medicaid Act because "qualified developmental center residents continue to be unnecessarily institutionalized." Plaintiffs' claims under the Medicaid Act lack merit because the Act does not require the State to provide home and community-based waiver services to all individuals who could benefit from these services. Rather, it requires the State to offer a choice of services and to pay promptly and fairly for

services that are already available. Because Plaintiffs cannot establish that Defendants have violated the Medicaid Act, the Court should dismiss Plaintiffs' third cause of action.

Plaintiffs' complaint cites 42 U.S.C. § 1396a(a)(8) for the proposition that residents of developmental centers must be offered home and community-based services with reasonable promptness. This section of the Medicaid Act states that "[a] State plan for medical assistance must provide that all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all individuals." 42 U.S.C. § 1396a(a)(8). Plaintiffs misread this statute. It does not command the State to provide services to all individuals who could benefit from the services, but rather to promptly and even-handedly pay for those services that are provided. See Mandy R. v. Owens, 464 F.3d 1139, 1143 (10th Cir. 2006); Westside Mothers v. Olszewski, 454 F.3d 532, 540 (6th Cir. 2006); Bruggeman v. Blagojevich, 324 F.3d 906, 910 (7th Cir. 2003). Indeed, the Medicaid Act defines "medical assistance" as "payment of part or all of the cost of the following care and services . . . ." 42 U.S.C. § 1396d(a)(emphasis added). Plaintiffs' claims under the Medicaid Act must fail because they are not suing to enforce the prompt payment for services; they are suing to compel the services themselves. The Medicaid Act does not provide for this, and if it "implicitly required the State to provide services, because it is something in

the best interests of the recipients, [there would be] no logical end." Mandy R., supra, 464 F.3d at 1144. In other words, the State would be obligated to promptly fund community services for every individual who resides in a developmental center no matter the number and the cost, and despite the fundamental alteration such payment would have on the State's services for other individuals with developmental disabilities.

Plaintiffs next rely on 42 U.S.C. § 1396a(a)(23)(A) and 42 U.S.C. § 1396n(c)(2)(C) for the same proposition. They again misread the Medicaid Act. 42 U.S.C. § 1396a(a)(23)(A) provides that "[a]ny individual eligible for medical assistance may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to provide the service or services required, who undertakes to provide him such services." 42 U.S.C. § 1396n(c)(2)(C) provides that

> [a] waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternative, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded.

Neither section of the Medicaid Act directs Defendants to provide community services to individuals residing at developmental

centers. First, 42 U.S.C. § 1396a(a)(23)(A) refers to "medical assistance," which again means payment for services, and not the provision of services themselves. See 42 U.S.C. § 1396d(a). Second, 42 U.S.C. § 1396n(c)(2)(C) directs the State to offer a choice of only those services that are "available under the waiver." It does not require the State to make the services themselves available. See Bertrand v. Patterson, 495 F.3d 452,459 (7th Cir. 2007)("[T]his subsection does not *make* any particular option 'available' to anyone. It just requires the provision of information about options that *are* available.")(emphasis in original).

This conclusion is further buttressed by the fact that the Medicaid Act, and its implementing regulations, require the State to cap the number of individuals who receive services under the home and community based-waiver. 42 U.S.C. § 1396n(c)(9) refers to the waiver containing "a limit on the number of individuals who shall receive home or community-based services;" 42 U.S.C. § 1396n(c)(10) prohibits the Secretary from capping this limit to fewer than 200 individuals in a State who may receive services under the home and community-based waiver. Similarly, 42 C.F.R. § 441.303(f)(6) requires the State to indicate the number of individuals it intends to serve under the waiver, and states that this figure will constitute a limit on the size of the waiver program. It would be illogical to read the Medicaid Act as requiring the provision of waiver services to all when the Act

explicitly permits the limitation of such services to the number of people the State chooses to serve.

Because Plaintiffs cannot demonstrate that Defendants have violated the Medicaid Act, Plaintiffs' third cause of action, which alleges that the State must provide services under the home and community-based waiver to all individuals residing in developmental centers no matter the cost and the size of its waiver, should be dismissed.

POINT III

THE PROCEDURES ALREADY IN PLACE RELATED TO ADMISSION AND CONTINUED PLACEMENT IN THE STATE'S DEVELOPMENTAL CENTERS DO NOT VIOLATE PLAINTIFFS' CONSTITUTIONAL OR STATUTORY RIGHTS.

A. Due Process.

In their fourth cause of action, Plaintiffs assert that their right to due process has been violated because the procedures currently in place governing admission to, and continued placement in, developmental centers do not provide potential residents with notice, a commitment hearing, representation, a decision by an impartial decision maker, or an annual review hearing. Plaintiffs' claim is both factually and legally without merit.

In the seminal case of Matthews v. Eldridge, 424 U.S. 319, 335 (1976), the Supreme Court set out the analytical framework for evaluating a procedural due process claim:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Application of these factors to the instant matter reveals that Plaintiffs' due process rights are not being violated by Defendants' procedures for admission to a developmental center. First, Plaintiffs' liberty interest is not curtailed by admission to a developmental center because such admissions are voluntary. See Ritchey Cert. at ¶42. Offers of placement in a developmental center are not "commitments," i.e., involuntary confinements requiring a judicial decision,[13] but rather are offers for voluntary placement. See N.J.S.A. 30:6D-25.2, et seq. (establishing the eligibility criteria applicants must meet for the Division's services); N.J.A.C. 10:46-1.1, et seq. (guidelines and criteria for eligibility for the Division's services). The individual and his or her guardian are given the opportunity to visit the developmental center prior to accepting the offer of placement. See Ritchey Cert. at ¶41. They must also be advised that they may request the assistance of a third party advocate. Ibid. Moreover, the individual, family members or advocate may ask to have their

[13] See by contrast N.J.S.A. 30:4-27.10 (court proceedings for involuntary civil commitments to mental institutions); N.J.S.A. 30:4-25.14 et seq. (criminal proceedings for commitment to the State's moderate security unit).

case reviewed by the developmental center's Human Rights Commission. Ibid. Finally, an individual is free to leave the developmental center at any time. See Torisky v. Schweiker, 446 F.3d 438 (3d Cir. 2006).

To the extent that Plaintiffs argue that being offered a developmental center placement rather than placement in the community where they would rather be is really an involuntary placement because they have nowhere else to go, the New Jersey Administrative Procedures Act ("APA") review process provides ample opportunity for due process. An individual who is offered placement at a developmental center can appeal that offer of placement in accordance with N.J.A.C. 10:46B-5.1 and N.J.A.C. 10:48. Such appeals are considered to be contested matters, entitling the individual to a hearing in the New Jersey Office of Administrative Law before an impartial administrative law judge. N.J.A.C. 10:48-2.2(a). In addition, the appeal can be expedited. N.J.A.C. 1:1-9.4. Following the final decision by the Assistant Commissioner, further appeal may be made to the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 10:48-7.1(e); N.J. Ct. R. 2:2-3(a)(2).

Moreover, there would be no value to judicial oversight of admissions to developmental centers because there is virtually no risk that an individual will be admitted to a developmental center when a community placement is available. The Division has revamped its admission policy to developmental centers to ensure that

individuals are only admitted if there are no available services in the community. See Ritchey Cert. at ¶36. Whenever an individual is in need of a community placement, the Division sends an electronic mail message out to all qualified in-State providers to determine if any can meet the emergency placement needs of the individual. Id. at ¶37. Only if all options are exhausted and none of the providers is able to serve the individual, will the individual be offered admission to a developmental center. Id. at ¶38. The placement request form includes a discharge plan for transitioning the individual out of the developmental center in the event he or she is admitted there. Ibid. Throughout the placement process, staff continue efforts to find a suitable placement in the community for the individual. Ibid.

After admission to a developmental center, the individual's interdisciplinary team holds a 5-day post admission meeting and a 30-day Individual Habilitation Plan meeting to ensure that plans are developed that address the reason for the individual's admission. See Ritchey Cert. at ¶43. Summaries of these meetings are submitted to the Placement Coordinator for review. Ibid. The individual's case manager submits a status report to the Placement Coordinator on a regular basis, documenting all of the efforts taken by the Division to return the individual to a community placement as soon as possible. Ibid.

The Division has also created an Admissions Review Panel that reviews emergency admissions to developmental centers. See Ritchey

Cert. at ¶45. The Panel is composed of representatives from the Office of the Public Advocate, Disability Rights New Jersey, contracted service providers, and family members of the individual. Ibid. The Placement Coordinator provides quarterly status reports on individual cases to the Admissions Review Panel as part of the Panel's review and monitoring functions. Ibid.

These procedures are more than sufficient to protect any private interest Plaintiffs may have in ensuring that any options for placement in the community are exhausted before admission to a developmental center is offered. Moreover, the Division has created and expanded specialized community services designed to prevent emergency placements in developmental centers. Consequently, the number of admissions to developmental centers has been steadily declining since Path to Progress was published. In light of this multi-faceted approach to implementing the Division's policy that individuals receiving emergency placement must be placed in the community wherever possible, judicial oversight would have no probative value.

Finally, requiring Defendants to provide an adversarial hearing in every instance of an offer of residential placement at a developmental center as a matter of course, even for those cases where the individual does not object, would be unduly burdensome and would provide no practical benefit to anyone. Indeed, if an individual does not want the placement, he or she is free to decline it. While Defendants acknowledge that, until the Path to

Progress is fully implemented, there is no available alternative placement in the community for new admissions to developmental centers, this is precisely the reason the individual is admitted to a developmental center. Defendants exhaust every community option before admitting an individual to a developmental center. Thus, requiring the State to construct an elaborate judicial mechanism to review voluntary, emergency admissions to developmental centers could not result in the grant of any meaningful relief, and would only create substantial and unnecessary costs. Scarce funds would be better spent on additional community resources to divert emergency admission by funding the Path to Progress. For these reasons, Plaintiffs' due process claim fails.

Plaintiffs also allege that a subset of residents, those who have guardians authorized to make residential decisions and who consent to either the initial or continued placements in a developmental center, have suffered a due process deprivation because the legally incompetent person did not personally agree to the placement. Amended Complaint, ¶102. To articulate this argument is to demonstrate its complete lack of merit. Appointment of a guardian requires that the alleged incapacitated person receive notice, counsel and a hearing before a Superior Court Judge. N.J.S.A. 30:4-165, et. seq.; N.J. Ct. R. 4:86-1 et seq. A person who has had a guardian appointed to make decisions for him or her, including residential decisions, has already been judicially declared incompetent to make those decisions for him or

herself, rendering any personal consent legally irrelevant. Whether a guardianship is required because of a person's minority or mental incapacity, a guardian has a fiduciary duty to act in his or her ward's best interests. See Heller v. Doe, 509 U.S. 312, 331 (1993)("Guardians have a legal obligation to further the interests of their wards . . . ."); N.J.S.A. 3B:12-36, et seq.

For these reasons, Plaintiffs' fourth cause of action should be dismissed.

B. Americans With Disabilities Act And Equal Protection.

In their fifth cause of action, Plaintiffs assert that they are being "discriminated" against by the procedures used to offer and maintain residential placements because they are not offered the same kind of adversarial judicial proceedings that are used for commitments to involuntary psychiatric hospitals or tuberculosis treatment facilities. This claim, too, is devoid of merit.

The ADA provides in pertinent part that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. §12132. Defendants do not dispute that it is a public entity or that it provides benefits, services and programs to qualified disabled individuals. However, Plaintiffs fail to identify any benefit, service or program that they are allegedly being denied access to because of a disability. Instead, they attempt to re-cast their

due process argument as a "denial of access to the courts" claim – first under the ADA (Amended Complaint, ¶¶121-25) and then under the 14th Amendment (Amended Complaint, ¶¶126-28), and cite Tennessee v. Lane, 541 U.S. 509 (2004), for support. Amended Complaint, ¶128. Lane, however, provides no support to Plaintiffs' claims.

The plaintiffs in Lane were two individuals with physical disabilities, a court reporter and a criminal defendant, who claimed that their rights to access to the courts were violated because of physical barriers that existed at the courthouse. The Lane plaintiffs' right to have a judicial proceeding was not at issue, as it is in the instant case. In Christopher v. Harbury, 536 U.S. 403 (2002), the Supreme Court identified two categories of "denial of access to courts" claims. The first type of claim involves "systematic official action [that] frustrates a plaintiff or plaintiff class from preparing and filing suits at the present time." Id. at 413. The second category of such claims are those in which a specific case "cannot now be tried (or tried with all material evidence), no matter what official action may be in the future" due to official action in the past. Id. at 414. "Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide vindication for a separate and distinct right to seek judicial relief for some wrong." Id. at 415. Here, as explained at length in this brief, Plaintiffs do have access to the courts after complying with an administrative process. Reduced

to its essence, Plaintiffs' access claim is really an attack on the procedure for resolving any disputes they have with respect to the propriety of a developmental center admission or retention. However, neither the Constitution nor the ADA require indulgence of Plaintiffs' procedural preferences.

The purpose of the ADA is to provide for enforcement of the Fourteenth Amendment's command that "all persons similarly situated should be treated alike." Lane, supra at 521. Thus, whether analyzed under the ADA or the Equal Protection Clause of the Fourteenth Amendment, the issue is the same – whether a "classification based on a disability lacks a rational relationship to a legitimate governmental purpose." Ibid.

A rational basis review does not authorize the courts to substitute their own judgment for the wisdom, fairness or logic of legislative choices. Heller v. Doe, 509 U.S. 312, 319 (1993). State classifications that do not affect fundamental rights are accorded a strong presumption of validity. Id. Moreover, a State has no obligation to articulate the purpose or rationale supporting the classification or produce any evidence in support of its determination. Id. at 320. Rather, the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Id.

Here, the State could have rationally determined that the inherent differences between an offer of a voluntary admission to a developmental center and an involuntary commitment to a

psychiatric hospital warranted judicial review for the latter and administrative review, followed by judicial appellate review, for the former. See Heller, supra, 509 U.S. at 324-25 (rejecting on this basis an equal protection challenge to different burdens of proof that Kentucky's statutory scheme provided for involuntary commitments of the mentally ill and mentally retarded). Thus, plaintiffs' ADA and Equal Protection claims must also be dismissed.

POINT IV

DEFENDANTS ARE IMMUNE FROM SUIT UNDER TITLE II OF THE ADA AND SECTION 504 OF THE REHABILITATION ACT.

A. Congress Failed to Abrogate State Sovereign Immunity under Title II of the ADA and Section 504 of the Rehabilitation Act.

To the extent that the complaint seeks relief from Defendants pursuant to Title II of the ADA and Section 504 of the Rehabilitation Act, the suit is constitutionally barred because the State of New Jersey and its officials are immune from suit. The Eleventh Amendment to the United States Constitution makes explicit reference to the States' immunity from suits:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. [U.S. Const. Amend. XI].

The phrase "Eleventh Amendment immunity" is

> something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the

> authoritative interpretations by [the Supreme Court] make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ... except as altered by the plan of the Convention or certain constitutional Amendments. [Alden v. Maine, 527 U.S. 706, 712-13 (1999)].

Although States enjoy sovereign immunity from suit, Congress does have limited authority to abrogate this immunity and subject non-consenting States to suit in federal court pursuant to the Enforcement Clause of the Fourteenth Amendment. Tennessee v. Lane, 541 U.S. 509, 517-20 (2004); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59 (1996). In assessing whether Congress has validly abrogated the states' sovereign immunity, the court must answer two questions: (1) whether Congress has unequivocally expressed its intent to abrogate the immunity and (2) whether Congress acted pursuant to a valid exercise of power. Lane, supra, 541 U.S. at 517; Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 635 (1999) (hereinafter "Florida Prepaid"); Seminole Tribe, supra, 517 U.S. at 55. Although in enacting the ADA and the Rehabilitation Act, Congress unequivocally expressed its intent to abrogate the immunity of the states, see 42 U.S.C. § 12202 (ADA) ("A state shall not be immune under the Eleventh Amendment"); 42 U.S.C. § 2000d-7(a)(1) (Rehabilitation Act) ("A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973."), the second

prong of the test--whether Congress acted pursuant to a valid exercise of power--has not been met for either of the statutes, which were passed pursuant to the Fourteenth Amendment.

The Supreme Court provided the framework for examining the scope of Congress's authority under the Fourteenth Amendment in Boerne v. Flores, 521 U.S. 507 (1997), superceded by statute on other grounds. See also Lane, supra, 541 U.S. 520; Board of Trustees v. Garrett, 531 U.S. 356 (2001) (holding that Title I of the ADA exceeded Congress's authority to abrogate the states' sovereign immunity) (hereinafter "Garrett"). The Boerne framework rests on the basic principle that the Court is the ultimate authority on the scope of the Fourteenth Amendment. Thus, Congress may not define or declare the rights under the Fourteenth Amendment because Congress's power under § 5 is limited to the remedial power of enforcing the provisions of the Fourteenth Amendment. Boerne, supra, 521 U.S. at 520 (citing South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)). A statute that crosses the line beyond Congress' § 5 power and makes a substantive change in the governing law cannot be upheld. Ibid. The Court noted that the line is not always easy to draw, but required that there must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." Ibid.; Accord Lane, supra, 541 U.S. at 520.

In Boerne, the Court held that the Religious Freedom Restoration Act of 1993 ("RFRA") was beyond Congress' authority to abrogate the states' sovereign immunity. The Court came to the conclusion that Congress crossed the line of its power when it passed RFRA because (1) it was enacted without any findings on the existence of widespread violations of any constitutional right that the Supreme Court has recognized, and (2) the RFRA created rights that far exceeded any the Supreme Court had previously read the First Amendment to provide. Boerne, supra, 521 U.S. at 532, 117.

After deciding Boerne, the Supreme Court further explained the "congruence and proportionality" framework in Kimel v. Florida Board of Regents, 528 U.S. 62 (2000). In Kimel, the Court concluded that the Age Discrimination in Employment Act ("ADEA") is not appropriate enforcement legislation because the substantive requirements the ADEA imposes on state governments are far greater than any restrictions that could have been imposed by the Equal Protection clause of the Fourteenth Amendment. Kimel, supra, 528 U.S. at 82. To reach this conclusion, the Court compared the analysis of an age discrimination claim under the Equal Protection Clause which would only receive rational basis scrutiny with a presumption of constitutionality, thus upholding age classifications in many instances, to the analysis of an ADEA claim, where the burden for the state was much higher, which, in effect, disallowed the classification in many instances. Ibid. Moreover, the Kimel Court examined the legislative record to

consider the appropriateness of the remedial measures in light of the evil presented. Id. at 89 (noting that "Congress never identified any pattern of age discrimination by the states, much less any discrimination by states whatsoever that rose to the level of constitutional violation"). As the Boerne Court had explained, specific findings made before passing the Voting Rights Act were necessary. Boerne, supra, 521 U.S. at 532.

In 2004, the Supreme Court in Lane altered the Boerne analysis by allowing a statute to be considered part by part, for congruence and proportionality. In Boerne, the Court considered the whole of the statute, and its sweeping nature, when determining congruence and proportionality. See Boerne, supra, 521 U.S. at 532 (noting "Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments" as part of the basis for the determination that RFRA is not congruent and proportional to Congress's Fourteenth Amendment powers). In Lane the Court held that although Title II of the ADA "reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees," that wide array does not negatively impact on congruence and proportionality analysis, but requires that Title II be examined in light of the particular issue on review. Lane, supra, 541 U.S. at 530-31.

In analyzing the issue presented here, the first step that must be taken is to identify the Fourteenth Amendment "evil" or "wrong" that Congress intended to remedy. With the ADA, Congress intended to remedy discrimination against the disabled. Title II of the ADA specifically prohibits discrimination by pubic entities. In enacting the ADA, Congress did make substantial findings about many forms of discrimination against the disabled, but, as in Kimel, Congress did not make any findings about particular state laws or specific state actions which violated the Constitution. See Garrett, supra, 531 U.S. 356; Alsbrook v. City of Maumelle, supra, 184 F.3d 999, 1009-1010 (8th Cir. 1999) ("In the present case, it cannot be said that Title II identifies or counteracts particular state laws or specific state actions which violate the Constitution. . . . We do not think that the legislative record of the ADA supports the proposition that most state programs and services discriminate arbitrarily against the disabled."); see also, Lavia v. Pennsylvania Dep't of Corr. , 224 F.3d 190, 204 (3d Cir 2000) (ADA Title I); Erickson v. Board of Governors of State Coll. & Univ For Northeastern Ill., 207 F.3d 945, 951 (7th Cir. 2000); (ADA Title I) Stevens v. Illinois Dep't of Transp., 210 F.3d 732, 739-40 (7th Cir. 2000) (ADA Title I), cert. denied, 531 U.S. 1190 (2001). The Stevens court put its finger on an important issue in examining the ADA: "[V]irtually every State in the Union has promulgated state statutes prohibiting discrimination against

the disabled ...." 210 F.3d at 739-40. Congress found no evidence that the states were ignoring or violating their own laws. Id.

New Jersey has laws protecting persons with developmental disabilities and preventing discrimination against them. N.J.S.A. 30:6D-2 and 17 set forth the rights of individuals with developmental disabilities that are receiving services from the State. This includes a requirement similar to the ADA, in that developmentally disabled individuals are entitled to receive services "in a manner least restrictive of personal liberty." N.J.S.A. 30:6D-17. In addition, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., prohibits discrimination against the disabled and provides for civil damages and other judicial relief.

Given the lack of evidence of any state laws passed specifically to discriminate against the disabled, the State legislative response to the plight of the disabled, and the lack of any evidence of a pattern of discrimination by State actors against the disabled, it cannot be shown that either the ADA or Section 504 of the Rehabilitation Act are proportional responses to the "evil" identified.

Moreover, the ADA does not meet the other "congruence and proportionality" standards outlined in Boerne and Lane. The central issue is whether Congress, consistent with the Fourteenth Amendment, could increase the level of judicial scrutiny for states' actions that incidentally burden disabled persons. See

Garrett, supra 531 U.S. 356; Alsbrook, 184 F.3d at 1009. Under the Boerne framework, § 5 enactments must target unconstitutional state action, but the Constitution has given state governments significant latitude in dealing with the problems of individuals with disabiliies. Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698, 706 (4th Cir.), cert. denied, 531 U.S. 1190 (2001). The Supreme Court has never found the disabled to be a suspect or even a quasi-suspect class, thus state action discriminating against the disabled is subject to only a rational basis review. See Garret, supra, slip op. at 7-8 (citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985)). Under the rational basis review, "courts are compelled ... to accept a legislature's generalizations even when there is an imperfect fit between means and ends." Heller v. Doe, 509 U.S. 312, 321 (1993); See also Garrett, supra, 531 U.S. 356; Mill v. Maine, 118 F.3d 37, 47 (1st Cir. 1997).

By contrast, the ADA prohibits distinctions built on generalizations, even if those generalizations would pass rational basis review. Under the ADA, a state's actions are no longer presumptively valid if rationally related to the interests they serve. Instead, the ADA requires a state to make "reasonable accommodations" for the disabled, and only once the state can show that it cannot "reasonably accommodate" will the courts validate the state's chosen policy. See 42 U.S.C. §12101, et seq. Such "searching judicial scrutiny" is incompatible with rational basis

review. Coolbaugh v. Louisiana, 136 F.3d 430,441 (5th Cir.)(Smith, J., dissenting), cert. denied 525 U.S. 819 (1998); See also Garrett, supra, 531 U.S. 356; Lavia, supra, 224 F.3d at 200; Amos v. Maryland Dep't of Corrections, 178 F.3d 212, 225 (4th Cir. 1999)(Williams, J., dissenting); Alsbrook v. City of Maumelle, supra, 184 F.3d 999, 1011 (8 th Cir. 1999); Erickson, 207 F.3d at 949; Stevens, 210 F.3d at 738. The reasonable accommodations provisions of the ADA redefine the Equal Protection Clause, transforming it from a prohibition on invidious state action "into a charter for positive rights." Bane v. Virginia Dep't of Corrections, 110 F. Supp.2d 469, 476 (W.D.Va. 2000) (holding that Title II of the ADA is not valid enforcement legislation under Congress's § 5 powers). Particularly in the area of placement in the most integrated setting, the ADA far surpasses any constitutional protection.

The issue in Plaintiffs' complaint is whether Defendants are violating the ADA and its implementing regulations, and Section 504, by not providing services in the community to individuals who currently reside in developmental centers. Employing the Lane analysis reveals that the "integration mandate" of the ADA is in no way congruent and proportional to the remedies available to the Plaintiffs under the Fourteenth Amendment. Thus, in this proposed application of the ADA, Congress lacked the power to abrogate the State's Eleventh Amendment sovereign immunity from suit.

Olmstead and its Third Circuit progeny have gone beyond the remedies available under the Fourteenth Amendment when considering the rights of institutionalized persons. Nowhere in the Fourteenth Amendment jurisprudence concerning persons with disabilities is there a substantive requirement that states relocate individuals receiving services in developmental centers to the community, or, in the alternative, develop and implement specific plans to move all such persons. This requirement far exceeds the constitutional requirement enunciated in Cleburne, supra, which, in this context, would simply require that the manner in which the state delivers services to individuals with developmental disabilities be rationally related to a legitimate government end, and that the government end cannot be to harm this group of disabled individuals. See Cleburne, supra 473 U.S. at 446. It is certainly a legitimate government end to conserve scarce financial resources. The courts in Olmstead and Frederick L., however, condition the states' reliance on the rational goal of conserving scarce state resources on creating and implementing a statewide plan for deinstitutionalization, which goes well beyond rational basis review.[14] To the extent the ADA and Section 504 require this relief, they are grossly disproportionate to the constitutional

[14] The Supreme Court and the Third Circuit did not consider whether Congress effectively abrogated states' sovereign immunity by enacting Title II of the ADA in this line of cases. Thus, those decisions are not controlling in this matter.

requirement that the delivery of services to individuals who are disabled be rationally related to a legitimate government end.

In sum, neither the ADA nor Section 504 are proper enforcement legislation to the extent that they concern placement in the most integrated setting under Olmstead and Frederick L. Because Congress lacked authority to abrogate the states' immunity in the present context, the states are immune from plaintiff's ADA claims.

Similarly, Section 504 of the Rehabilitation Act has not been found to meet the Bourne test for congruence and proportionality such that it is a valid exercise of Congress's powers under the Fourteenth Amendment. See A.W. v. Jersey City Public Schools, 341 F.3d 234, 239 (3d Cir. 2003) (not reaching the issue of abrogation) (citing Koslow v. Pennsylvania, 302 F.3d 161, 170 (3d Cir 2002), cert. denied, 537 U.S. 1232 (2003)). Particularly here, where the Rehabilitation analysis is identical to the ADA analysis, it is evident that, for abrogation analysis, they must be treated in the same manner.

Further, while Koslow, supra, relying on Supreme Court case law, concludes that the state's immunity is impliedly waived as to Section 504 the Rehabilitation Act, that analysis is suspect in light of the specific language of the Rehabilitation Act, and the recent Third Circuit decisions interpreting Olmstead, and Lane, supra.

As discussed, Plaintiffs' amended complaint asserts ADA enforcement rights that are beyond Congress's § 5 powers. The

Court has held that the states' eleventh amendment immunity must be honored if there is no federal right for the plaintiff to vindicate. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106 (1984) (holding that a plaintiff cannot vindicate state rights as part of a Young suit). Under these principles, Defendants are immune from suit because the ADA does not provide an enforceable federal right for plaintiff to pursue under the facts alleged.

B. The State Did Not Waive Sovereign Immunity by Accepting Funds under Section 504 of the Rehabilitation Act.

"State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." College Savings Bank, supra, 527 U.S. at 682. (citations omitted). Thus, "'the test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" Id. at 675 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985), superceded by statute on other grounds). A waiver of sovereign immunity must be "unequivocally expressed in statutory text, and will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996) (internal citations omitted). If ambiguous, a statute must be construed in favor of immunity. See United States v. Williams, 514 U.S. 527, 531 (1995), superceded by statute on other grounds. If a statute that supposedly waives immunity has a "plausible" alternate reading, a finding of waiver must be rejected. United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992), superceded

by statute on other grounds. A "plausible" alternate reading is enough to establish that a "reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." Id.

The Supreme Court has vigorously reaffirmed the principle that a purported "waiver" of state sovereign immunity will be "strictly and narrowly construed" against waiver. See Lane v. Pena, supra, 518 U.S. at 192; Williams, 514 U.S. at 531; Nordic Village, 503 U.S. at 33; Ardestani v. I.N.S., 502 U.S. 135, 137 (1991). This principle of strict statutory construction against waiver applies whether or not the legislation in question is remedial. See id. If the text of the statute itself does not clearly and unambiguously contain a waiver provision, courts cannot find waiver even if such an interpretation would foster the general purpose of the statute. See Ardestani, supra, 502 U.S. at 138. Nor may courts look to the legislative history to find a waiver of sovereign immunity if such a provision is not expressly stated in the text of the statute itself. See Lane v. Pena, supra, 518 U.S. at 192.

Accordingly, if Congress intends to condition receipt of funds on the states' waiver of sovereign immunity, Congress must unequivocally express the conditions of receipt and what conduct violates those conditions so that the states may enter into the agreement fully aware of the consequences. See Barnes v. Gorman, 536 U.S. 181, 186-88 (2002); Davis v. Monroe County Bd. of Educ.,

526 U.S. 629, 640 (1999) (citing Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)). "[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court." Atascadero, 473 U.S. at 246-47. The State must make a "clear declaration" that it intends to submit itself to the federal courts' jurisdiction. College Savings Bank, supra, 527 U.S. at 679.

Courts may not rely solely on the conditions expressed in a Congressional Act on the waiver of sovereign immunity. Id. Without a clear declaration by the states of consent, such language merely constitutes an implied or constructive waiver, and not evidence of the "clear declaration" from the states required by the Supreme Court. Id.

Based on these exacting standards, the Supreme Court articulated certain restrictions on the spending power that "guide" the waiver analysis. College Savings Bank, supra, 527 U.S. at 676 (citing South Dakota v. Dole, 483 U.S. 203 (1987)). First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" Id. (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937)). Second, Congress must unambiguously "condition the States' receipt of federal funds," on the states' consent to the federal condition so that the states may "'exercise their choice knowingly, cognizant of the consequences of their participation.'" Id. (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). Third, "conditions on federal grants" must be related

"'to the federal interest in particular national projects or programs.'" Id. at 207-8 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

The Court also instructed "that other constitutional provisions may provide an independent bar to the conditional grant of federal funds." Id. at 208 (citing Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985) (additional citations omitted)). Finally, the Court stated that the financial assistance offered by Congress may not "'pass the point at which 'pressure turns into compulsion.'" Id. at 203 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

Congress did not make its intent to have states waive their sovereign immunity clear under Section 504. Nor did the State make a clear declaration that it knowingly and voluntarily consented to suit in Federal court under Section 504. Indeed, based on the text and history of Section 504 and its expansion of rights under Frederick L., supra, the State could not make a knowing and voluntary waiver of immunity as required by the Supreme Court. Section 504 and its recent expansion for rights under Frederick L. fails the exacting standards announced above by the Supreme Court.

In the Rehabilitation Act, Congress used the language of abrogation, not waiver. The Rehabilitation Act states:

> A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act.
>
> 42 U.S.C. §2000d-7(a)(1).

That language is identical to the abrogation language in other federal statutes. See e.g. 20 U.S.C. §1403 (Individuals with Disabilities Education Act). "It is a general rule of statutory construction that where Congress has clearly stated its intent in the language of a statute, a court should not inquire further." Brookside Veneers, Ltd. v. United States, 847 F.2d 786, 788 (Fed. Cir.), cert. denied, 488 U.S. 943 (1988) (citations omitted). In the Rehabilitation Act, Congress explicitly stated its intent to abrogate state sovereign immunity through its §5 enforcement powers of the Fourteenth Amendment.

The State of New Jersey could not knowingly waive its Constitutional right of immunity from suit in Federal court for violations of Frederick L. under the Rehabilitation Act, because those violations were unknown at the time that the State accepted federal funds.

Similarly, in Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001), the Second Circuit held that the State of New York could not knowingly waive its sovereign immunity against suit under Section 504 when it accepted Federal funds for SUNY. Garcia, supra, 280 F.3d at 114. Specifically, the court found that

> [a]t the time that New York accepted the conditioned funds, title II of the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress's Commerce Clause authority. Indeed, the ADA expressly provided that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation . . ." 42 U.S.C.

> §12202. Since, as we have noted, the proscriptions of Title II and §504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, College Savings Bank, 527 U.S. at 682, since by all reasonable appearances state sovereign immunity had already been lost. [Id. (additional citation omitted)].

The Garcia Court also offered an intelligent criticism of other courts finding that mere acceptance of federal funds constitutes a waiver of sovereign immunity. See id., at 115, n. 5 (citing Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied sub nom., Wilson v. Armstrong, 1524 U.S. 937 (1998). Significantly, the Second Circuit noted that

> [t]hese cases are unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds. None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required in College Savings Bank, 527 U.S. at 682. [Id.]

Similarly, here, the State of New Jersey could not be expected to understand that it was relinquishing its right to sovereign immunity for violations of Federick L., supra, by accepting funds under the Rehabilitation Act because those sweeping obligations were not in existence when the State accepted the funds.

Finally, the waiver analysis for a statute as sweeping as the Rehabilitation Act, where the waiver is based on the acceptance of any federal funds, whatsoever, is due to be revisited in light of

Tennessee v. Lane, supra. The analysis in Lane requires that each particular application of a statute be examined to determine if Congress had the power to abrogate immunity with regard to that particular allegation. Lane, supra, 541 U.S. at 531. Similarly, a State's knowing and intelligent waiver should be analyzed based on the allegations, and whether the State was aware that acceptance of federal funds could subject it to suit for that particular allegation.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 should be granted and Plaintiffs' Amended Complaint should be dismissed with prejudice.

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