UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID MARSTERS, ET AL.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION NO.
	)	1:22-cv-11715-NMG
v.	)	
	)	
MAURA HEALEY, in her official capacity as Governor of the Commonwealth of Massachusetts, ET AL.,	)	
	)	
Defendants.	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

In this lawsuit, Plaintiffs allege that the Commonwealth of Massachusetts (the "Commonwealth") administers its long-term care services system for people with disabilities in a manner that unnecessarily segregates them in nursing facilities, in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131–12134, and the Supreme Court's opinion in *Olmstead v. L.C.*, 527 U.S. 581 (1999). Compl. ¶ 179. According to the Complaint, named Plaintiffs are current nursing facility residents who qualify for the Commonwealth's system of home- and community-based services and prefer to live in a more integrated setting. Compl. ¶¶ 1–2.

In a partial motion to dismiss the claims of named Plaintiffs, Defendants argue that the named Plaintiffs do not have an injury in fact to support standing. The Commonwealth's motion ignores Plaintiffs' allegations of unnecessary segregation and leap-frogs over the *Olmstead* caselaw that establishes that unnecessary segregation is an injury in fact. Instead, the Defendants try to narrow Plaintiffs' allegations to denial of particular services and argue that those services must be requested

and refused for the Plaintiffs to have an injury in fact. Even if Plaintiffs' allegations were this narrow, no request and refusal is required to establish standing to bring an ADA claim.

The United States of America respectfully submits this Statement of Interest under 28 U.S.C. § 517 to provide its view on the application of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.1. Specifically, the United States clarifies that unnecessary institutionalization is an injury in fact under the ADA and that standing to bring an *Olmstead* claim does not require Plaintiffs to request certain services.

Argument

The first flaw in the Defendants' motion to dismiss is the failure to recognize that unnecessary institutionalization is an injury in fact sufficient to establish Article III standing. Given the Supreme Court's holding that "unjustified institutional isolation of persons with disabilities is a form of discrimination," 527 U.S. 581, 600 (1999) (plurality opinion), courts regularly conclude that unnecessary institutionalization or segregation constitutes an injury in fact. *E.g.*, *Murphy by Murphy v. Minn. Dep't of Hum. Servs.*, 260 F. Supp. 3d 1084, 1100 (D. Minn. 2017) ("Through the ADA and the R[ehabilitation] A[ct], Congress has elevated the segregation of individuals with disabilities to the status of a legally cognizable injury." (internal quotation omitted)); *see also Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) ("[T]he ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled." (quoting *Helen L. v. DiDario*, 46 F.3d 325, 333 (3d Cir. 1995))); *Davis v. Shah*, 821 F.3d 231, 263–64 (2d Cir. 2016) (holding that plaintiffs' showing that they were "at a substantial risk of requiring institutionalized care . . . establishe[d] an injury sufficient to carry [their] integration mandate claim"). Here, the Complaint plainly alleges that

named Plaintiffs are institutionalized in nursing facilities, but can and want to live and receive services in the community. Compl. ¶¶ 18–24 (each named Plaintiff has resided in a nursing facility for at least 60 days); Compl. ¶¶ 124–73 (describing each named Plaintiff, including their desire and ability to live in the community with supports). These are precisely the sort of allegations of unnecessary institutionalization that courts have found sufficient to establish a specific, tangible harm to meet the injury in fact requirement for Article III standing. *See A.R. v. Dudek*, No. 12-60460-CIV, 2014 WL 11531370, at *8 (S.D. Fla. Nov. 13, 2014) (explaining that children with disabilities have standing to bring a claim for unnecessary institutionalization based on the injury of institutionalization), *report and recommendation adopted*, No. 12-60460-CIV, 2014 WL 11531887 (S.D. Fla. Dec. 29, 2014); *Disability Rts. N.Y. v. New York*, No. 17-CV-6965-RRM-SJB, 2019 WL 2497907, at *13 (E.D.N.Y. June 14, 2019) (holding that plaintiff who was institutionalized in a residential school had "alleged sufficient facts to establish a concrete and particularized ADA and Rehab[ilitation] Act-based injury").

In response to Plaintiffs' allegations of unnecessary institutionalization, the Commonwealth props up arbitrary and narrow injuries that it then knocks down as insufficiently concrete or particularized. For example, the Commonwealth highlights allegations that named Plaintiff, David Marsters did not receive ancillary services or specialized PASRR services as an example of how Plaintiffs' pleading fails to name a concrete injury. ECF No. 109 at 11–12. This argument ignores the Complaint's allegations that Mr. Marsters lives in a locked unit of a nursing facility but wants to live in a community residential setting and could do so with support. Compl. ¶¶ 138, 143. The Commonwealth's attempt to narrowly frame the injury mirrors an argument rejected in *Murphy*. In *Murphy*, a lawsuit brought by individuals with disabilities who wanted to live in a more integrated setting, the state similarly misidentified the injury as the failure to provide a certain service. 260 F.

Supp. 3d at 1100. The district court in *Murphy* rejected that argument: "The primary injury Plaintiffs allege they are facing is segregation. While perhaps not tangible, this injury is indeed concrete and particular to Plaintiffs." *Id*. at 1101.

In inaccurately framing the injury, the Commonwealth sets up a second legal error: suggesting that standing requires Plaintiffs to allege that they have applied for certain community-based services. To make this point, the Commonwealth also attempts to define the injury as the denial of particular waiver services and then argues that certain named Plaintiffs cannot claim an actionable injury because they never applied for that waiver. ECF No. 109 at 14–18. But the Commonwealth cites no case law for the proposition that such a request must be made to establish an injury in fact. Nor could it because the law is to the contrary. For example, in an *Olmstead* lawsuit brought by nursing facility residents with mental illness, the defendant similarly tried to argue that the named plaintiffs had failed to allege an injury in fact because they had not applied for community-based services. *State of Connecticut Off. of Prot. and Advocacy v. Connecticut*, 706 F. Supp. 2d 266, 284 (D. Conn. 2010). The court squarely rejected the argument and held that the plaintiffs had sufficiently alleged that they suffered an injury in fact. *Id.*

In any event, a request for such an accommodation is gratuitous when there is an obvious need for an accommodation. *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 283 (1st Cir. 2006) (acknowledging that different rules apply when the need for an accommodation is obvious). Such is the case in *Olmstead* cases because public entities are affirmatively required to prevent unnecessary segregation. *See, e.g.*, *United States v. Florida*, No. 12-CV-60460, 2023 WL 4546188, at *5 (S.D. Fla. July 14, 2023) (explaining that the ADA imposes an affirmative obligation to provide community treatment options if three elements are met); *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1297–98 (M.D. Fla. 2010) (plaintiff was likely to succeed on the merits

because Florida had affirmative duty "*[t]o avoid* the discrimination inherent in the unjustified isolation of disabled persons" by making "reasonable modifications to policies, practices, and procedures for services they elect to provide" (emphasis added)); *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1032 (D. Minn. 2016) ("[T]he alleged discrimination—undue isolation—stems from a failure to satisfy an affirmative duty"); *cf. Toledo v. Sanchez*, 454 F.3d 24, 32 (1st Cir. 2006) ("Title II imposes an affirmative obligation on public entities to make their programs accessible to qualified individuals with disabilities, except where compliance would result in a fundamental alteration of services or impose an undue burden."). So, when plaintiffs in *Olmstead* litigation receive state disability services, the state is on actual notice of their disabilities and its obligation to deliver services in the most integrated setting appropriate to their needs. *See, e.g.*, *Olmstead*, 527 U.S. at 603 n.14 ("States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide."). It logically follows that individuals need not request community integration for that obligation to be triggered. Indeed, *Olmstead* itself requires only that the affected persons "do not oppose" community placement—a standard clearly lower than requiring an affirmative and explicit request. *Olmstead*, 527 U.S. at 602–03, 607.

Finally, requiring Plaintiffs to request a specific service is particularly inappropriate where, as here, Plaintiffs allege that the defendant public entity consistently fails to provide them with information about available community-based services. Compl. ¶¶ 11, 12, 97, 115, 120, 123, 181, 187–188 (alleging that the Commonwealth routinely fails to provide Plaintiffs with information about community-based programs and services); *United States v. Florida*, 2023 WL 4546188, at *32 (rejecting state's argument that parents must make a "formal request" for community-based services for their disabled children and finding "a widespread failure to affirmatively inform families that they have alternatives to placing their children in a nursing facility"); *cf. Murphy*, 260 F. Supp. 3d at

1095–97, 1099–1100 (plaintiffs who alleged that the State failed to provide them with information about integrated service options had standing).

Conclusion

In conclusion, it is well settled law that unnecessary institutionalization is an injury in fact under the ADA and that standing to bring an *Olmstead* claim does not require Plaintiffs to request certain services. The United States respectfully requests that the Court consider this Statement of Interest in this litigation.

Dated: September 28, 2023

Respectfully submitted,

JOSHUA S. LEVY
Acting United States Attorney
District of Massachusetts

/s/ Gregory J. Dorchak
GREGORY J. DORCHAK
BBO No. 692246
Assistant U.S. Attorney
One Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3100 (telephone)
(617) 748-3969 (fax)
Gregory.Dorchak@usdoj.gov

/s/ Kristen Clarke
KRISTEN CLARKE
Assistant Attorney General
Civil Rights Division

JENNIFER MATHIS
Deputy Assistant Attorney General
Civil Rights Division

REBECCA B. BOND
Chief

JENNIFER MCDANNELL
Deputy Chief

/s/ Jennifer Robins
JENNIFER ROBINS #1032209 (DC)
Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
150 M Street, N.E. (4CON)
Washington, D.C. 20002
(202) 353-5043
Jennifer.Robins@usdoj.gov

Counsel for United States of America

CERTIFICATE OF SERVICE

I, Jennifer Robins, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/ Jennifer Robins

Jennifer Robins

Dated: September 28, 2023