UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

T.G., et al., *Plaintiffs*, v. Maryland Department of Human Services, et al., *Defendants.*	Case No. 8:23-cv-01433

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States of America respectfully submits this Statement of Interest under 28 U.S.C. § 517 to provide its views regarding the legal standard for stating a claim of unnecessary segregation under Title II of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12131–12134, and Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794.[1] The regulations implementing Title II of the ADA and Section 504 both require covered entities to administer their services, programs, and activities to people with disabilities in "the most integrated setting appropriate to the needs" of the disabled individuals. 28 C.F.R. § 35.130(d); 28 C.F.R. § 41.51(d). This requirement is known as the "integration mandate."[2] This Statement of Interest focuses specifically on claims arising under the integration mandate and does not

[1] The Attorney General is authorized "to attend to the interests of the United States" in any case pending in federal court. 28 U.S.C. § 517.

[2] The integration mandates of both statutes are analyzed together because they "impose the same integration requirements." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013); *see also* 42 U.S.C. § 12134(b); 28 C.F.R. § 35.103. Although this Statement of Interest focuses on interpretation of the ADA's integration mandate, the analysis herein equally applies to integration mandate claims under Section 504.

address any other claims alleged by Plaintiffs arising under the ADA, other statutes, or the Constitution.

Plaintiffs, individual foster children and Disability Rights Maryland ("DRM"), filed a putative class action on behalf of foster children in Maryland. Plaintiffs allege that these children are, or will be, placed in psychiatric hospitals, psychiatric units of hospitals, or hospital emergency rooms unnecessarily (collectively "psychiatric facilities"), or held in these facilities longer than necessary, in violation of Title II of the ADA.[3] Plaintiffs allege that these children are unnecessarily segregated, or at risk of unnecessary segregation, in these facilities, despite being ready for and wanting to discharge to the community. Plaintiffs further allege that Defendants—the Maryland Department of Human Services ("DHS"), the Maryland Department of Health ("MDH"), and administrators from both agencies—failed to reasonably modify the programs they administer to prevent the children's unnecessary overstay in segregated facilities.

Defendants' motion to dismiss Plaintiffs' Title II claim includes multiple errors of law.

First, Defendants entirely ignore the analytical framework required by *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999), which governs actions – such as this one – that concern implementation of the ADA's integration mandate. The proper legal standards are detailed below.

Second, Defendants argue that Plaintiffs fail to establish that the children are qualified to receive the services they seek because the Complaint does not allege that Plaintiffs meet the clinical eligibility requirements of specific programs or services. The ADA does not require that the Plaintiff allege such facts. Under the ADA, people with disabilities are "qualified" for

[3] The class excludes foster children residing in Baltimore City, who are covered by a separate consent decree in *L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988).

community-based services if they meet the services' essential eligibility requirements. Because the foster children Plaintiffs ("Named Plaintiffs") allege that they are eligible to receive behavioral health Medicaid services, they have sufficiently pled that they are qualified to receive these services under the ADA.

Third, Defendants make the related argument that Plaintiffs fail to establish that the Named Plaintiffs are appropriate for community-based services because the Complaint does not allege facts to counter the judgment of the State officials who have elected to keep the children in segregation. Defendants again misstate the law. Individuals are appropriate for community-based services when their needs could be met by community-based services. Here, the Named Plaintiffs allege that they are appropriate to receive services in a more integrated setting than a psychiatric hospital because treatment professionals in the psychiatric hospital in which they reside cleared them for discharge. These allegations are sufficient to plead that Plaintiffs are appropriate to receive services in a more integrated setting.

Finally, Defendants argue that the complaint does not state a claim for relief under the ADA because Plaintiffs do not allege that their disabilities were a motivating cause for any discrimination they suffered. But a claim under Title II's integration mandate does not require a showing of either discriminatory intent or disparate impact. Unnecessary institutionalization is in itself a form of unlawful discrimination under Title II.

INTEREST OF THE UNITED STATES

This litigation implicates the proper interpretation and application of Title II of the ADA. The United States Department of Justice implements and enforces Title II of the ADA.[4] 42

[4] The Department of Justice is also charged with enforcing Section 504, 29 U.S.C. § 794(a), and with coordinating federal agencies' implementation and enforcement of Section 504. 28 C.F.R.

U.S.C. §§ 12133-12134; 28 C.F.R. Part 35 (delegating authority to the Department of Justice to promulgate regulations under Title II). The Department of Justice therefore has an interest in supporting proper and uniform application of the ADA, and in furthering Congress's intent to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" and reserve a "central role" for the federal government in enforcing the ADA's standards. 42 U.S.C. § 12101(b)(2)-(3).

PLAINTIFFS' FACTUAL ALLEGATIONS

Plaintiffs allege that Defendants are violating the ADA's integration mandate by unnecessarily segregating a putative class of foster children with disabilities in psychiatric facilities long after these children have been medically cleared for discharge to more integrated settings and placing other children at serious risk of such unnecessary segregation in a psychiatric facility. Amended Compl. (D.E. 37-1) ¶¶ 1-7, 107, 122-125. Because they are in state custody, these children are categorically eligible for Medicaid services, including psychiatric and behavioral health treatment. D.E. 37-1 ¶¶ 127, 214, 240. Maryland provides services that these children receive—including medication management, group therapy, recreational therapy, and occupational therapy—in both psychiatric facilities and community-based settings such as family homes and therapeutic foster homes. D.E. 37-1 ¶¶ 52, 60, 68, 76, 87, 98. Plaintiffs allege that foster children with disabilities must stay in psychiatric facilities longer than necessary due to Defendants' failure to provide access to community-based services such as in-home crisis prevention and in-home therapeutic services—not the nature of the children's disabilities or needs. D.E. 37-1 ¶¶ 16-26, 207-225.

Part 41; Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); *see also* 28 C.F.R. § 0.51(b)(3).

Plaintiffs allege that Defendants must reasonably modify Maryland's Medicaid service systems to increase access to existing community-based supports and services and thus enable members of the putative class to receive services in more integrated settings. D.E. 37-1 ¶¶ 108-120, 122, 213-214. The putative class members are eligible for and appropriate for an array of Medicaid-funded services in the community, including group therapy, recreational therapy, occupational therapy, individual therapy and community-based services, including state-funded disability services and other services offered through Maryland's child welfare system and statewide Medicaid program. D.E. 37-1 ¶¶ 53, 60, 61, 68, 69, 76, 77, 88, 99, 127-131.

Plaintiffs allege that rather than expanding community-based services for foster children with psychiatric disabilities, Defendants have directed more funding towards overly restrictive settings such as hospitals and Residential Treatment Centers ("RTCs"). D.E. 37-1 ¶¶ 20, 23-25. Plaintiffs allege that Defendants place children in these restrictive settings rather than provide the wraparound, intensive home-based services to which children with disabilities are entitled under Medicaid. D.E. 37-1 ¶¶ 19-25. All Named Plaintiffs state that they want to live in the community, D.E. 37-1 ¶¶ 54, 62, 70, 78, 89, 100, and have been determined to be appropriate for discharge to the community. D.E. 37-1 ¶¶ 49, 57, 65, 73, 81, 92, 107. In fact, since the filing of the original Complaint, four of the Named Plaintiffs have been successfully placed in more integrated settings. D.E. 37-1 ¶¶ 49 (discharged after nearly a year in overstay status), 57 (discharged after six months in overstay status), 65 (discharged after over six months in overstay status), 73 (discharged after three and a half months in overstay status).

Plaintiffs seek an order requiring Defendants to reasonably modify their service systems to enable the putative class members to reside in the community. Plaintiffs request, among other things, an expansion of emergency foster homes and longer-term community placements, step-

down placements for children leaving residential care, and data review and analysis to support the development of systemic changes to the behavioral health system. D.E. 37-1, *Request for Relief*.

LEGAL BACKGROUND

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "society has tended to isolate and segregate individuals with disabilities" and that "individuals with disabilities continually encounter various forms of discrimination, including . . . segregation." *Id*. § 12101(a)(2), (5). To address this longstanding history of segregation and isolation, the regulation implementing Title II of the ADA includes an integration mandate that requires public entities, including states and their departments, to "administer services, programs, and activities" to people with disabilities "in the most integrated setting appropriate to the[ir] needs." 28 C.F.R. § 35.130(d); *see also* 42 U.S.C. § 12131(1) (defining "public entity"). The "most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. B at 711. Public entities must make "reasonable modifications" to policies and practices when "necessary to avoid discrimination," unless they "can demonstrate" that the modifications would "fundamentally alter the nature of the service." *Id*. § 35.130(b)(7)(i).

The Supreme Court has recognized that unnecessary segregation is discrimination on the basis of disability. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999). Under the integration mandate, a public entity must provide community-based services to individuals with disabilities when (1) community-based services are appropriate to the individuals' needs; (2) the individuals do not oppose community-based services; and (3) the public entity can reasonably

accommodate community-based services. *Id.* at 607. Public entities must comply with the integration mandate even if they license, contract with, or otherwise arrange for other entities to administer their services. 28 C.F.R. § 35.130(b)(3)(i).

The first prong of the analysis requires that the integrated setting be "appropriate to the needs of qualified individuals." 28 C.F.R. § 35.130(d); *Olmstead*, 527 U.S. at 602. Individuals are "qualified" for a service, program, or activity if, "with or without reasonable modifications to rules, policies, or practices," they "mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131; *Olmstead*, 527 U.S. at 602.

Community placement is appropriate if the qualified individuals could live in the community with access to the services for which they are eligible. *See, e.g.*, *Olmstead*, 527 U.S. at 601-02; *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 256 (E.D.N.Y. 2009) ("*DAI II*") (plaintiffs demonstrated appropriateness when there was "nothing about their disabilities that necessitates living in" institutions, as there were services that could meet their needs in the community), *vacated on other grounds sub nom. Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012). Appropriateness may be demonstrated by, for example, a state's medical professional's authorization of community-based services for a plaintiff; such approval demonstrates that community services are "both appropriate and possible." *See Steimel v. Wernert*, 823 F.3d 902, 915-16 (7th Cir. 2016); *see also Radaszewski v. Maram*, 383 F.3d 599, 612-13 (7th Cir. 2004) (explaining that plaintiff's years of living at home with in-home services authorized by the State supported a finding that he was appropriate for community-based services); *A.H.R. v. Wash. State Health Care Auth.*, 469 F. Supp. 3d 1018, 1045 (W.D. Wash. 2016) (medically complex infants' and toddlers' authorization

to receive private duty nursing rendered their family homes the "most integrated setting appropriate" to their needs). But plaintiffs need not plead that the State's treatment professionals have authorized community-based services to show that plaintiffs are appropriate for those services. *E.g.*, *M.J. v. District of Columbia*, 401 F. Supp. 3d 1, 12-13 (D.D.C. 2019) (plaintiff adequately pled appropriateness by alleging that she would be able to live in the community with services and did not need to allege that the State's treatment professionals have determined her to be suitable for community-based treatment); *DAI II*, 653 F. Supp. 2d at 262-63 (rejecting the argument that a plaintiff must present evidence that he or she has been assessed by a "treatment professional" and found eligible to be served in a more integrated setting to be considered appropriate); *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 540 (E.D. Pa. 2001) (holding that plaintiffs do not need a professional's formal recommendation for a particular placement to be considered appropriate for discharge to a more integrated setting); *Long v. Benson*, No. 08-cv-0026, 2008 WL 4571904 at *2 (N.D. Fla. Oct. 14, 2008) (refusing to limit the scope of a class to individuals whom the State has already determined could be treated in the community).

The second element requires that the individual does not oppose the receipt of community-based services. *Olmstead*, 527 U.S. at 602, 607 (citing 28 C.F.R. § 35.130(e)(1), which provides that the ADA does not "require an individual with a disability to accept an accommodation … which such individual chooses not to accept"); *see also* 42 U.S.C. § 12201(d). Non-opposition can be established by showing that individuals would not oppose community placement if provided adequate community-based services and information about available options. *See, e.g.*, *Kenneth R. v. Hassan*, 293 F.R.D. 254, 270 n.6 (D.N.H. 2013) ("[T]he meaningful exercise of a preference will be possible only if an adequate array of

community services are available …."); *DAI II*, 653 F. Supp. 2d 184, 263 (E.D.N.Y. 2009) (people currently reporting "a preference to move out of their adult home is merely 'a floor' with regard to who would truly be willing to move if given" information and support in making a "true choice"). When individuals or their guardians express "interest" in, or would consider, community placement, then they are not opposed. *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 295, 332-34, 339-42 (D. Conn. 2008).

Finally, when plaintiffs have articulated a requested reasonable modification to receive services in the community, and if a defendant raises the affirmative defense of 'fundamental alteration,' courts examine "whether the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Olmstead*, 527 U.S. at 592 (quoting 28 C.F.R. § 35.130(b)(7)); *Pashby v. Delia*, 709 F.3d 307, 323-24 (4th Cir. 2013). Whether a modification amounts to a fundamental alteration is typically a fact-intensive question that may be inappropriate for resolution at the pleading stage. *See, e.g.*, *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1030-31 (D. Minn. 2016); *Martin v. Taft*, 222 F. Supp. 2d 940, 974 (S.D. Ohio 2002).[5]

DISCUSSION

A. Plaintiffs are qualified under the ADA because they meet the essential eligibility requirements for Medicaid services.

Defendants argue that the Named Plaintiffs are not "qualified" under Title II of the ADA because the Named Plaintiffs do not allege that they meet clinical eligibility requirements for specific Medicaid programs or services. Am. Mot. To Dismiss, D.E. 47-1 at 34-37. But the

[5] Plaintiffs do not bear the burden of disproving that the modifications they seek would fundamentally alter the service system. Fundamental alteration is an affirmative defense to an *Olmstead* claim that a defendant must raise and prove. *E.g., Olmstead*, 527 U.S. at 603-06; *Frederick L.*, 364 F.3d at 490; *Messier v. Southbury Training Sch.*¸562 F. Supp. 2d 294, 323 (D. Conn. 2008); *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1030 (D. Minn. 2016).

Named Plaintiffs' unquestioned eligibility for Medicaid services is sufficient to render them qualified under Title II of the ADA. Moreover, as discussed separately below and contrary to Defendants' arguments, the Named Plaintiffs allege facts sufficient to plead that they may be appropriately served in a more integrated setting, which is distinct from, though related to, whether the Named Plaintiffs are qualified individuals.

As noted above, the first element of the *Olmstead* analysis is whether community-based services are appropriate to the needs of qualified individuals. *See Olmstead*, 527 U.S. at 597; *see also* 28 C.F.R. § 35.130(d). A "qualified" individual is one who, "with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in the program or activities provided by a public entity." *Id*.[6] To be qualified individuals, plaintiffs need not show that they have been deemed eligible for a specific placement by a treatment provider, as Defendants contend. *See Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 258 (E.D.N.Y. 2009) ("*DAI II*") ("[F]ailure to apply and obtain approval for supported housing is not an 'essential eligibility' requirement for receiving services in supported housing"), *vacated on other grounds sub nom. Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012).

[6] Notably, a person with a disability who does not currently meet all requirements for a particular service may nonetheless be a qualified if they meet the essential eligibility requirements for the relevant service. *See, e.g.*, *Pashby v. Delia*, 709 F.3d 307, 313 (4th Cir. 2013) (affirming the grant of a preliminary injunction in favor of Medicaid-enrolled plaintiffs whose access to integrated services was threatened by a proposed change to the service's eligibility criteria); *Hiltibran v. Levy*, 793 F. Supp. 2d 1108, 1112 (W.D. Mo. 2011) (Medicaid-enrolled plaintiffs in the community were able to challenge policy limiting their eligibility for incontinence supplies when they would be eligible to receive those supplies in an institutional setting). For example, in *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175 (10th Cir. 2003), when plaintiffs could no longer access unlimited prescriptions in their home—a service they were eligible for previously and that they would be eligible to receive in an institutional setting—it was undisputed that they were qualified for those services under the ADA. *Id*. at 1180 n.5.

Rather, to plead that they are "qualified" to receive these services, the Named Plaintiffs need only allege that they meet the essential eligibility requirements for participation in these services. 42 U.S.C. § 12131(2). Whether an individual meets the essential eligibility requirements for a public entity's services is a separate inquiry from whether an individual is "appropriate" to receive these services in a more integrated setting, as discussed below. The Defendants conflate these two inquiries when they argue that the Named Plaintiffs are not "qualified individuals" because they have not purportedly demonstrated "readiness for community care." D.E. 47 -1 at 36. A determination of "readiness" to receive community-based services relates to appropriateness, not eligibility. The services at issue in this case include psychiatric and behavioral health services—the same services that the Named Plaintiffs receive in institutional settings—provided in community-based settings under the State's Medicaid program. As foster children and youth in the custody of the State, the Named Plaintiffs are automatically eligible for Medicaid services. D.E. 37-1 ¶¶ 127, 214, 240. They are thus considered "qualified" under the ADA to receive the community-based services offered by the State's Medicaid program. To plead that they are qualified under the ADA, plaintiffs need only allege that they meet the criteria for the public services at issue, which the Named Plaintiffs here have done.

B. Plaintiffs who are medically cleared for discharge from a hospital are appropriate to receive services in a more integrated setting.

Defendants, while arguing that Plaintiffs are not qualified individuals with disabilities, also contend that Plaintiffs do not allege "facts to counter the judgment of state social workers and juvenile courts" who kept the Named Plaintiffs in segregation. D.E. 47-1 at 36. This argument misstates Plaintiffs' pleading requirements. Named Plaintiffs sufficiently allege that they are appropriate for community-based services because professionals have found them to be

appropriate for placement in more integrated settings, namely therapeutic foster homes or therapeutic group homes. D.E. 37-1 ¶¶ 49, 57, 65, 73, 81, 92, 93.

Plaintiffs can show that they are appropriate for more integrated services if "nothing about their disabilities … necessitates living in" an institution. *DAI II*, 653 F. Supp. 2d at 256. Plaintiffs may also demonstrate appropriateness if they have been approved to receive services in the integrated setting. *See Steimel v. Wernert*, 823 F.3d 902, 915-16 (7th Cir. 2016); *see also Radaszewski v. Maram*, 383 F.3d 599, 612-13 (7th Cir. 2004) (explaining that a young adult's receipt of services at home for years supported a finding that he was appropriate for community-based services); *A.H.R. v. Wash. State Health Care Auth.*, 469 F. Supp. 3d 1018, 1045 (W.D. Wash. 2016) (holding that medically complex infants' and toddlers' authorization to receive in-home private duty nursing demonstrated their appropriateness for community-based services).

Here, Plaintiffs allege that Administrative Law Judges (ALJs), medical staff, or a court determined the Named Plaintiffs to be appropriate for discharge from an institution. D.E. 37-1 ¶¶ 49, 57, 65, 73, 81, 92, 107. In other words, the State's own officials and treatment professionals found that nothing about Named Plaintiffs' disabilities necessitated living in an institution. And the Named Plaintiffs who remain in a psychiatric hospital have been found appropriate to receive services in particular community-based settings—a therapeutic foster home or therapeutic group home. D.E. 37-1 ¶¶ 81, 93. These allegations are sufficient to allege that an integrated setting is appropriate, as required by the first prong of the *Olmstead* analysis.

C. Unnecessary institutionalization is in itself a form of discrimination under the ADA.

Defendants argue that Plaintiffs fail to show that their disabilities were the "motivating cause[s]" for their exclusion from a program because they have not pled facts supporting intentional discrimination, disparate impact, or failure to accommodate theories of discrimination. D.E. 47-1 at 37-38. However, Plaintiffs need not plead facts establishing intentional discrimination, disparate treatment, or disparate impact to state a claim that Maryland has violated the integration mandate. The Supreme Court has squarely held that unnecessary segregation constitutes *per se* discrimination on the basis of disability under Title II of the ADA. *Olmstead*, 527 U.S. at 597 ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability.").

In *Olmstead*, the Supreme Court rejected an argument similar to the State's argument here. The public entity in *Olmstead* argued that plaintiffs "encountered no discrimination 'by reason of' their disabilities because they were not denied community placement on account of those disabilities." *Id.* at 598. The Court declined to adopt that reasoning, holding that unnecessary segregation of people with disabilities is itself a form of discrimination under Title II. *Id.* at 598-600; *see* 42 U.S.C. § 12101(a)(2) (identifying the isolation and segregation of individuals with disabilities as a form of discrimination).

Defendant's argument that Plaintiffs do not allege that the community-based services they seek are provided to a comparison group of "others in foster care or society at large," D.E. 47-1 at 38, is irrelevant. In *Olmstead*, the Supreme Court expressly rejected the argument that plaintiffs must identify a "comparison class" of "similarly situated individuals given preferential treatment" to state a violation of the integration mandate. 527 U.S. at 598 & n.10. Because unnecessary segregation is "discrimination *per se,*" plaintiffs need not show intentional

discrimination, disparate treatment, or disparate impact to sustain an *Olmstead* claim. *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 290 (E.D.N.Y. 2008); *see also Davis v. Shah*, 821 F.3d at 260-61 (2d Cir. 2016) ("*Olmstead* unquestionably holds that the unjustified institutional isolation of persons with disabilities is, in and of itself, a prohibited form of discrimination." (internal quotations omitted)); *L.E. by & Through Cavorley v. Superintendent of Cobb Cnty. Sch. Dist.*, 55 F.4th 1296, 1303–04 (11th Cir. 2022); *Steimel v. Wernert*, 823 F.3d 902, 910 (7th Cir. 2016). That Plaintiffs here did not allege disparate treatment or impact is thus of no legal import.

CONCLUSION

For the foregoing reasons, the United States requests that the Court consider this Statement of Interest in this litigation.

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