10-235-cv(L)

10-251-cv(CON), 10-767-cv(CON), 10-1190-cv(CON)

To Be Argued By:
Patricia A. Millett

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DISABILITY ADVOCATES, INC. AND UNITED STATES OF AMERICA,
Plaintiffs-Appellees,

against

NEW YORK COALITION FOR QUALITY ASSISTED LIVING, INC. AND EMPIRE STATE ASSOCIATION OF ASSITED LIVING,
Movants-Appellants,

and

(caption continued on inside front cover)

On Appeal from the United States District Court
for the Eastern District of New York in Civil Action No. 03-cv-3209

BRIEF FOR NEW YORK COALITION FOR QUALITY ASSISTED LIVING, INC.

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Defendants-Appellants.

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JURISDICTION

Appellant New York Coalition for Quality Assisted Living, Inc. ("Coalition") appeals from an order of the U.S. District Court for the Eastern District of New York, issued on December 23, 2009, denying the Coalition's motion to intervene, and from the final judgment entered by the same court on March 1, 2010.

The district court exercised jurisdiction under 28 U.S.C. § 1331, but jurisdiction was absent due to the plaintiff's lack of standing. The Coalition timely filed on January 20, 2010 a notice of appeal from the order denying its intervention motion (JA915), which this Court has jurisdiction to review under 28 U.S.C. § 1291 (*Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010)). The State and the Coalition filed timely notices of appeal from the final judgment on March 3 and 31, 2010. JA917, JA918-19. This Court has jurisdiction over those appeals under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in denying the Coalition's motion to intervene under Federal Rule of Civil Procedure 24 after the court's liability ruling established both that the remedial phase of the litigation would directly affect the legal interests of Coalition members and that the existing parties could no longer adequately represent those interests.

2. Whether plaintiff lacked Article III standing to prosecute sweeping institutional reform litigation when plaintiff itself suffered no legal injury from the defendants' conduct, plaintiff has no members to support associational standing, and plaintiff failed to join a single affected individual with a disability as a party.

3. Whether referring individuals with disabilities to adult homes and subsidizing their care violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, where the individual's choice of residence is voluntary and the State's treatment professionals have not determined that placement in a less restrictive environment is appropriate.

4. Whether a court order requiring the State to "change the way" it "manage[s] . . . mental health services" violates the Title II regulations' directive that States need not "fundamentally alter" government services to comply with the Americans with Disabilities Act.

STATEMENT OF THE CASE

Plaintiff-Appellee Disability Advocates, Inc. ("DAI") is an advocacy organization operating under the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMIA"), 42 U.S.C. §§ 10801-07. SPA24. DAI filed this institutional reform litigation in its own name on July 1, 2003, alleging that the Governor of New York State and various state commissioners and agencies charged with overseeing the state's mental health system (collectively, the "State") had violated Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act by failing to create a system of supported housing for adults with mental disabilities. SPA9. The State offers subsidies to adults with mental disabilities, but leaves to the individual the voluntary choice of whether to live in state-sponsored housing such as an adult home. DX(2)-368; SPA144. At times, the State refers certain individuals to adult homes. SPA87 & n.44.

DAI alleged that the ADA requires the State to provide several thousand individuals with mental disabilities who have chosen to reside in adult homes with more "integrated" "supported housing," which involves subsidized independent apartment living with supplementary outside services and support. SPA9. The Coalition is a non-profit entity that represents fourteen of the adult homes at issue in this case. SPA206. The homes are private businesses that the State licenses and regulates. SPA83. Most of their several thousand residents receive state stipends

to pay for their residency, which entails "long-term residential care, room, board, housekeeping, personal care, and supervision." SPA83, SPA172-73.

After four years of proceedings, the district court judge revealed to the parties that his wife sat on the board of Fountain House, a non-profit organization dedicated to placing individuals with mental disabilities in supported housing. *See* Tr. (Mar. 22, 2007) at 10. DAI stated that it perceived no conflict; the record discloses no response from the State. *Id.*

On September 8, 2009, following a bench trial, the court found that the State's reliance on adult homes rather than supported housing violated the ADA and Section 504, and invited the parties' remedial proposals. SPA77. At that juncture, the United States, the Coalition, and the Empire State Association for Assisted Living ("Empire") moved to intervene in the litigation's remedial phase. SPA206. The district court granted the United States' motion but denied the Coalition's and Empire's as untimely. *See* SPA205 (Garaufis, J.). Both the Coalition and Empire appealed. JA915-16 (Nos. 10-235-cv & 10-251-cv, respectively).

After the parties submitted remedial proposals, the district court issued a final order commanding the State to, *inter alia*, create 4,500 new supported housing beds for adult-home residents over three years. SPA232-42. The State and the Coalition each appealed the final judgment. JA917-19 (Nos. 10-767-cv & 10-1190-cv). The Coalition also moved to intervene in the State's appeal, and DAI

moved to dismiss the Coalition's appeal, and those motions were referred to the merits panel. No. 10-235-cv, Dkt. No. 196. This Court authorized the Coalition to file a brief in support of the State's appeal. *Id.*[1]

FACTS

A. Legal Framework

1. Federal Rule of Civil Procedure 24(a) (Addendum 19-20) provides that, on timely motion, the district court shall permit intervention by anyone who, *inter alia*:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

Rule 24(b) provides for permissive intervention by anyone who, upon timely motion, "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b).

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[1] If the Court denies the Coalition's appeal in No. 10-235-cv and the Coalition's motion to intervene in No. 10-767-cv, and also dismisses its appeal as a non-party in No. 10-1190-cv, the Coalition respectfully moves that, for the reasons outlined in its motions, the Court treat those portions of its argument addressed to the merits of the district court's final judgment as an *amicus curiae* brief. The balance of the brief is the Coalition's party appeal of the denial of intervention.

2. Title II of the ADA (Addendum 3-7), provides that "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." *Id.* § 12132. A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2). Title II's prohibition on "discrimination," however, does not require any public entity to "fundamentally alter the nature of the service[s]" it provides. 28 C.F.R. § 35.130(b)(7) (Addendum 17).

3. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (Addendum 8), is Spending Clause legislation that generally imposes equivalent obligations on the State to avoid discrimination against individuals with disabilities. *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999). It is undisputed that New York receives federal funding that subjects it to the Rehabilitation Act. SPA82.

4. PAIMIA (Addendum 10-15) provides for the establishment of organizations with authority to "investigate incidents of abuse and neglect of individuals with mental illness" and to "pursue administrative, legal, and other appropriate

remedies to ensure the protection" of "individuals" who are receiving or who have recently received care or treatment in particular states. *Id.* § 10805(a)(1). Not-for-profit PAIMIA organizations must have governing boards composed of people "who broadly represent or are knowledgeable about the needs of the clients served by the system." *Id.* § 10805(c)(1)(B)(i).

B. Factual Background

1. New York State's mental health care system provides care to more than 600,000 individuals with a wide range of disabilities and needs. SPA188.

2. Adult homes are adult-care facilities that provide long term residential care. SPA83. The adult homes at issue in this suit—homes within New York City with at least 120 residents, at least 25% of whom have a mental disability (SPA77)—are home to approximately 4,300 residents (SPA86). They provide basic case management services, and are required to enter into written agreements with a provider of mental health services for ''assistance with the assessment of mental health needs, the supervision of general mental health care and the provision of related case management services." SPA101-02 & n.169. They provide residents with food, housekeeping, and laundry services, and dispense medication. SPA107 n.214. They also provide personal care and offer 24-hour on-site staff. JA918.

Scattered-site "supported housing" entails living independently in an apartment either alone or with a roommate (SPA109), with periodic or as-needed visits by support personnel (SPA110). The State's Office of Mental Health ("OMH") develops supported housing by issuing requests for proposals and awarding contracts to supported-housing providers who agree to deliver the services. SPA109. The providers then select existing rental apartments scattered among various buildings across New York City. *Id.* Providers offer basic case management services, which may be supplemented by additional support providers. SPA110.

Other types of OMH housing include congregate treatment (also called "group homes" or "supervised community residences"); "apartment treatment"; and "community residence-single room occupancy." SPA108 n.221.

3. To obtain any of those types of OMH-funded housing in New York City, a mentally disabled individual submits an application to the City's Human Resources Administration ("Administration"). SPA144; SPA145 n.508. Generally, the individual's treatment provider assists in completing the application and advises what kind of housing to apply for. SPA145 n.511. The application requires "detailed assessments of the applicant from both a psychiatrist and a social worker," including a "professional clinical assessment, and a recommendation as to what type of housing and services the client requires." SPA145 & n.508. The Administration determines the type of housing for which the applicant is eligible.

SPA144. The individual then applies to housing providers of his choosing for which he has been deemed eligible, either using the city's "Single Point of Access" program or applying directly. *Id.* The Single Point of Access Program guarantees the applicant three interviews with providers, and offers applicants who are not accepted with any provider the option of a case conference with OMH, the housing provider, the applicant, and the applicant's treatment provider to determine whether the applicant's placement could be improved. SPA144 & n.501. Individual housing providers make the final determination whether to accept an applicant into their residential programs. SPA144.

4. In 2007, the State issued an RFP seeking to develop 60 supported-housing units earmarked for adult-home residents. SPA247. The State conducted informational forums in adult homes to inform residents of the option. SPA264. After two and a half years, 15 of the apartments remained unclaimed. JA493 (Tr. 1794).

C. Procedural History

1. DAI filed suit against the State in its own name. It did not join any individuals with disabilities, adult-home residents, or their legal guardians as co-plaintiffs. Its complaint did not identify a single adult-home resident by name or medical condition. The complaint sought sweeping reform of the State's mental health housing system, asking the court to "shift[] residents and funds [away] from

impacted adult homes to community-based residential programs" and to halt "[t]he State's practice of knowingly placing and maintaining individuals with serious mental illness in impacted adult homes." Compl. ¶¶ 118, 165.[2]

Although individual adult homes cooperated with the discovery process as requested by court or parties, neither the individual adult homes nor the Coalition intervened at the liability stage. SPA207. The State's defense of the litigation, at that time, was coextensive with the legal interests of the adult homes.

At a bench trial on liability, DAI presented the testimony of several supported-housing experts. *E.g.*, JA100 (Tr. 223), JA209 (Tr. 659), JA245 (Tr. 801). DAI also called as witnesses two adult-home residents, and one former adult-home resident who now lives in supported housing.[3] DAI did not introduce individual medical records for the 4,300 residents at issue.

2. The district court ruled that the State was denying *en masse* adults with mental disabilities "the opportunity to receive services in the most integrated setting appropriate to their needs," in violation of the ADA and Section 504. SPA78. First, the court found that "virtually all" adult-home residents would qual-

[2] "Impacted" refers to adult homes in which "at least 25% of the residents or 25 residents (whichever is fewer) have mental disabilities." SPA84.

[3] In addition to the witness testimony, DAI submitted into evidence designated transcript excerpts from twelve current and former adult-home residents.

ify for supported housing. SPA83. In so finding, the court rejected the selection criteria used by almost all of the State's existing supported-housing providers, relying instead on the proposals that would-be supported housing providers submitted in response to the State's RFPs and which asserted that, if accepted, their admission criteria would be less stringent. *See* SPA120-23 & nn.297-301, 308, 316. The court ruled that the Supreme Court's holding in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), that a State may generally "rely on the reasonable assessments of its own professionals" does not apply when the State referral system makes placement decisions on request rather than by conducting "ongoing assessments." SPA148-49.

Second, the court also found, based on the testimony of three current and two former adult-home residents (SPA155), and plaintiff's experts, that "DAI's constituents, as a whole," would want to leave their current homes and move to supported housing, wherever located. SPA150. The court further held that the State was liable under Title II and Section 504 for having failed to detect that individuals wanted to move to supported housing. SPA157.

Finally, the court disagreed with the evidence submitted by the State's financial professionals and found that moving adult-home residents into supported hous-

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Those witnesses were not cross-examined at trial. The transcript excerpts are sealed and remain unavailable to the public. *See* PX(3)-479-90.

ing would save the State money. The court found that a supported-housing apartment costs $7,370 more annually than an adult-home bed. SPA175. It also found that the medical care needed by each Medicaid-eligible adult-home resident cost $31,530 annually, while supported-housing residents generally needed on average only $16,467 in Medicaid care. The court found that these Medicaid services provided to adult-home residents constituted "over-utilization." SPA177. The court therefore found that, by moving individuals from adult homes to supported housing, the State could cut back on the amount of medical care it provided to those individuals, and thus that moving adult-home residents to supported housing would save $146 per person. SPA181, SPA196. Finally, the court concluded that mandating the provision of 4,500 new apartments over three years solely to adult-home residents would not divert funding from programs for the homeless and others in critical need of housing. SPA189.

3. Following its liability ruling, the district court solicited the parties' remedial submissions. The United States, the Coalition, and Empire each moved to intervene in the remedial phase. In its motion papers, the Coalition explained that it sought only to intervene in "proceedings relating to the fashioning of relief." Coalition Intervention Mot. at 1. The Coalition emphasized that, during the trial phase, "the State of New York was vigorously defending the case," and was "taking the same positions that" the Coalition "would have taken" had it been involved

in the liability phase (Coalition Intervention Mot., Ex. 1 at 3), and the Coalition accordingly had not attempted to intervene at that time. The Coalition further explained that, following the district court's liability determination, the State's and the Coalition's interests diverged for the first time. *Id.* at 11. Specifically, the Coalition explained that, in formulating a remedy, the Court might, directly or indirectly, compel the State to close down adult homes (*id.* at 9), and that the State, unlike the adult homes, would have no legal interest in avoiding that remedial result (*id.* at 11).[4]

The court allowed the United States to intervene in support of DAI, deeming its motion "timely," but denied the Coalition's and Empire's motions to intervene on the State's side as "untimely" because they had known of the litigation since the discovery stage. Ord. (Nov. 23, 2009); SPA216, SPA209-11. With respect to the prior adequacy of the State's defense, the district court ruled that the Coalition and the State's interests were "not coterminous." SPA212. The district court also expressed concern that the Coalition would inject issues "regarding their economic entitlements" into the litigation. SPA213. The district court granted the Coalition

[4] There is no dispute in this case that the Coalition has associational standing. *See Building & Const. Trades Council v. Downtown Dev., Inc.*, 448 F.3d 138, 144-50 (2d Cir. 2006).

and Empire *amicus* status. SPA206; SPA234. Both the Coalition and Empire appealed.

The district court subsequently adopted DAI's remedial proposal. SPA234. The court ordered that "no individual with mental illness who is qualified for supported housing [shall] be offered placement in an adult home unless, after being fully informed, he or she declines the opportunity to receive services in supported housing." *Id.* To accommodate the anticipated demand, the order required the State to create 4,500 new supported-housing apartments within three years. SPA236. That undertaking, the court suggested, could be financed by revoking adult homes' operating certificates, terminating payments to adult homes, and shrinking the number of licensed adult home beds. SPA181-84, SPA201 n.904.

The order also mandates that the State "conduct frequent and effective in-reach—that is, going into the Adult Homes and developing relationships with DAI's Constituents." SPA237. In addition, the State must "require that . . . Adult Home staff . . . accurately and fully inform [their residents] about supported housing, its benefits, [and] the array of services and supports available to those in supported housing." SPA239. Finally, the order obligates the State to "carefully monitor" adult-home operators and "take corrective action" if it finds that adult-home operators are "discourag[ing]" residents from exploring alternative housing. SPA241.

SUMMARY OF ARGUMENT

1. The district court erred in denying the Coalition's motion to intervene at the remedial stage of the litigation. As the terms of the court's order evidence, the legal interests of the Coalition's members were directly at stake and are affected by the court's formulation of a remedial plan because the singular purpose of the remedial order is to close down adult homes, strip them of their clients, and deny them state financial support for the residents who remain in their care.

The district court's reason for denying intervention was that the Coalition's motion was untimely because it had long been aware of the litigation. But that reasoning overlooked that, as is often true in litigation that seeks to reform a state institution, the Coalition's interest in defeating liability was identical to the State's, and thus the Coalition's interests were already adequately represented by the State throughout the liability stage of the litigation. Rule 24, by its plain terms, precluded the Coalition from intervening unless and until "existing parties" could no longer "adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The Coalition thus did exactly what Rule 24 mandates and waited to intervene until its and the State's interests diverged, which was at the remedial stage where the State's primary interest was limiting its economic exposure, while the Coalition's was in maintaining the homes' ability to care for residents and their contractual relationships.

2. The district court's judgment must be vacated because DAI lacked Article III standing. DAI filed suit seeking broadly to reform New York State's mental health housing system, but it did so without including a single individual with a disability as a party and without even knowing their individual diagnoses or their individual housing desires. The protections against disability discrimination created by the ADA that the State allegedly violated belong to individuals with disabilities. But there are none in this lawsuit. Not one. DAI is not an individual with a disability, nor is it a membership association composed of individuals with disabilities. The individuals on whose behalf DAI claims to litigate have never given it the right to do so; neither have their legal guardians. The individuals have no power to control DAI's litigation decisions, and cannot disassociate themselves from it if they do not like its positions. As a result, none of the individuals with disabilities living or potentially living in adult homes in New York had any control over this litigation that was purportedly brought on *their* behalf and to vindicate *their* rights under federal law.

DAI claims that those individuals are its "constituents." But Article III requires more than such vague labels, and associational standing only exists when it is a mechanism for those whose legal rights are at stake to litigate through an entity whose decisionmaking they can control or opt out of. There was no such showing here, and in the absence of any showing that there was a party before the court

whose legal rights were directly affected by the State's program, constitutional, statutory, and prudential standing were absent.

3. Finally, the court's order must be reversed because its requirement of sweeping changes in residency for the mentally disabled reflects a profound misapprehension both of the manner in which the ADA regulates governmental services and of the proper role of a federal court in ensuring a sovereign state's compliance with federal law. The court cast aside the Supreme Court's rule that, in complying with the ADA a state "may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community based program." *Olmstead*, 527 U.S. at 602. It did so in not only overruling the State system's own eligibility determinations—and the very criteria that system uses to make those determinations—but also by devising a new regime that cuts the State out of the process of deciding who may be safely treated in the State's own programs. The court's failure to safeguard the State's role in the treatment process was compounded by its rejection of the State's concerns about the budgetary disaster that the court's order would cause and the profound harm the order would cause to other individuals with disabilities and vulnerable citizens competing for the same scarce housing resources. The ADA and Supreme Court precedent forbid that result.

STANDARDS OF REVIEW

A district court's denial of intervention is reviewed for an abuse of discretion, which exists when the court has "based its ruling on an erroneous view of the law" or "made a clearly erroneous assessment of the evidence." *Bridgeport Guardians*, 602 F.3d at 473.

This Court "review[s] questions of standing *de novo*." *Fulton v. Goord*, 591 F.3d 37, 41 (2d Cir. 2009). Whether the ADA imposes liability when an individual's treatment professionals have determined that a resident's placement is appropriate, and whether the relief ordered is consistent with the ADA and Section 504, are questions of law reviewed *de novo*. *Anderson v. Rochester-Genesee Reg'l Transp. Auth.*, 337 F.3d 201, 207 (2d Cir. 2003).

ARGUMENT

I. THE COALITION WAS ENTITLED TO INTERVENE AT THE REMEDIAL STAGE.

A. The Coalition's Substantial Interest in the Litigation, the Absence of Adequate Representation, and the Relative Timeliness of the Motion Warranted Intervention

Because its legal interests in the remedial litigation were so substantial and those interests were no longer aligned with the State's after liability was resolved, the Coalition's motion to intervene was timely and should have been granted. A party has a right to intervene if (i) disposition of the action might, as a practical matter, impair its interests, (ii) the existing parties will not adequately protect those

interests, and (iii) its application is timely. *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001). The Coalition satisfied all three.

1. The Coalition's Legal Interests Are Direct and Substantial

The Coalition members have "direct, substantial, and legally protectable" interests that, as the district court's remedial order documents, were significantly affected by the disposition below. *Brennan*, 260 F.3d at 129. The thrust of the court's remedial order is to move "virtually all" (SPA77) residents out of the Coalition members' adult homes, to terminate State referrals, to open up the adult homes to third parties seeking to take away their clients, and to monitor adult-home staff members' conversations with their clients. The resulting loss of current residents and cutoff of referrals for new residents will empty the homes and force them to close, leaving those residents who continue to want or need the adult homes' extra services and care without appropriate housing and support and potentially rendering them homeless. That will happen faster if the State terminates the subsidies that supplement the homes' earnings, as the court invited the State to do.

Currently, adult-home residents receive yearly Supplemental Security Income ("SSI") payments of $8,088 from the federal government and $8,328 from the State, all but a small portion of which is paid to the adult homes in exchange for providing room, board, housekeeping, supervision, and personal care. SPA172-73. Because the remedial order is specifically designed to reduce the overall occu-

pancy of the adult homes at issue by more than 33% within the first year, and nearly 100% within three years (SPA236), the order's devastation of the adult homes' businesses and direct effect on their survival and continued ability to care for residents who need and want their services is of such a magnitude as to warrant intervention.

In addition, the Coalition's members are eligible to receive, and historically have received, Quality Incentive Payment ("QuIP") and Infrastructure Capital Program grants from the State which each year provide the Coalition members hundreds of thousands of dollars with which to make capital improvements for the benefit of residents, as well as other grants such as those from the Enhancing Abilities and Life Experiences ("EnAbLE") program, which fund activities and services for residents. SPA182-84. The district court's order, however, is predicated on the redirection of those funds from adult homes to the operators of supported housing.

The homes' foundational interest in basic economic survival, their continued ability to care for residents, and in protecting their licenses and cooperative relationship with the State support intervention. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-136 (1967) (economic interest in competitive market sufficient for intervention); *New York Pub. Interest Research Group, Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 351-352 (2d Cir. 1975) (pharmacists' interest in regulation prohibiting advertising price of prescrip-

tion drugs supported intervention because of effect on their businesses); *cf. Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y., Inc.*, 749 F.2d 124, 125-126 (2d Cir. 1984) (the loss of "an ongoing business representing many years of effort and the livelihood of its . . . owners, constitutes irreparable harm").

Beyond basic patient care and economic survival, the Coalition's members also had a legal interest in the effect of the remedial litigation on their operating certificates, which the court's order suggested should be revoked to pay for the ordered relief. SPA201 n.904. The homes' operating certificates are property protected by New York law. *St. Joseph Hosp. of Cheektowaga v. Novello*, 840 N.Y.S.2d 263, 267 (N.Y. App. Div. 2007). The court's plan that those operating certificates be either directly or constructively terminated thus concretely and materially affects the legal interests and rights of Coalition members.

The order's impact does not stop there. The Coalition's members have an interest in controlling access to their property, including both a legal interest in their right to control their property and a practical interest in maintaining security and protecting their residents and employees. That interest is directly imperiled by the order's requirement that the homes allow myriad supported-housing workers into their facilities to conduct "frequent . . . in-reach." SPA237. The homes also have an interest in what they say and do not say to their residents, including both constitutional protections under the First Amendment and an interest in avoiding

the administrative burdens and expense of training and policing scores of daily staff-to-resident communications. That interest is directly affected by the provision of the court's order restricting the homes' power to discuss with residents the potential disadvantages of moving to supported housing and the provision that will require the homes to provide information to residents about supported housing.

In short, the adult homes have an array of affected interests that are sufficient to warrant intervention. Indeed, as an on-the-ground target of the litigation and a business with substantial experience administering day-to-day care for the individual residents whose rights are truly at stake in this litigation, intervention was particularly warranted because the Coalition could offer both a legal and experiential lens on the claims and the practical effect of the district court's orders that was not represented by any of the institutional parties to this litigation. Bringing the voice of the adult homes to the table would have assisted the court in overseeing relief and in mediating the challenges that the Supreme Court has identified are inherent in such complex, institutional-reform litigation. *Horne v. Flores*, 129 S. Ct. 2579, 2594 (2009).

2. The Coalition's Interests Were Not Adequately Represented

At the liability stage of this case, the adult homes' and the State's legal interests were coextensive, given the State's active defense on the merits. The legal interests of the Coalition's members thus coincided with and were adequately

represented by the State throughout the merits stage of the case, making intervention by the Coalition at that time not only unnecessary but impermissible: "where there is an identity of interest," the court must presume "adequate representation by the party already in the action." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179-80 (2d Cir. 2001). *See NRDC v. New York State Dep't of Env'tl Conservation*, 834 F.2d 60, 61-62 (2d Cir. 1987) (state and private party's common interest in defeating liability precluded intervention); Fed. R. Civ. P. 24(a) (intervention forbidden if intervenors' interests are adequately represented). *See also Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (intervention timely when, at earlier stage, intervenor's "interests were fully consonant with" the Government's and so had been "adequately represented by the Government[]").

That all changed, however, once the liability phase ended and the remedial stage commenced. At that point, the State's and the Coalition's interests diverged because the State developed a distinct interest in, *inter alia*, minimizing the cost and administrative burden of any remedy, which put it at odds with the adult homes' interest in continuing to serve the residents who have chosen to stay with them. Advancing the State's interest may mean, for example, shutting down adult homes. Reinforcing the point, the injunction operates quite differently upon the State and the adult homes. It is the adult homes, not the State, whose property is opened up to access by the very persons trying to destroy their system of care and

existing client relationships. It is the adult homes, not the State, whose businesses will—quite intentionally—be destroyed by the injunction. And it is the homes, not the State, whose right to free speech is restrained by the injunction. That "divergence of interests argument . . . is a strong one . . . [at] the remedial stage of the litigation." *Brody v. Spang*, 957 F.2d 1108, 1124 (3d Cir. 1992). Indeed, in *Brody*, just as here, the court recognized that intervention was improper in the merits phase because at that point the governmental defendant (a school) adequately represented the intervening students' interests, but that in the "remedial phase" those "interests have clearly diverged" and made intervention proper. *Id*.

3. The Motion Was Timely

The district court's central rationale for denying intervention was the Coalition's perceived untimeliness in seeking intervention years after the litigation commenced. But timeliness under Rule 24 is contextual, not purely chronological, and remedial-stage intervention like that sought by the Coalition is common and appropriate, "particularly in institutional reform litigation." *Brody*, 957 F.2d at 1116. That is because, "while only some individuals may be held liable for the unlawful conduct, and thus have an interest in the determination of liability, a larger number of persons' interests may be infringed on at the remedial stage of the litigation." *Id*. Because the Coalition's motion was filed promptly upon its deter-

mination that its interests were no longer adequately represented by the State, the motion was timely.

The district court reasoned, however, that the State could not have represented the Coalition's interests during the liability stage because the Attorney General's statutory obligation was to "protect the interest of the state." SPA212 (quoting N.Y. EXEC. LAW § 63(1)). But that would mean that intervention is always appropriate by every interested party in every case, because the existing parties to litigation always and inherently protect their own interests and do not formally represent the interests of non-parties.

That is not what Rule 24 envisions. Instead, what is relevant is whether legal interests converge—not whether they are perfectly coterminous—and their "adequate[]"—albeit not perfect—representation by the existing parties. In *NRDC*, for example, the State was held to adequately represent the interest of a non-party in fighting liability even though the Attorney General just as much there, as here, formally represented only the interests of the state. 834 F.2d at 61-62. Here, as there, because the Coalition's and the State's interests were identical during the liability phase, the Attorney General's compliance with his duty had the practical effect of representing the Coalition's interests at the liability stage.

Further underscoring the distinctive shift that occurred at the remedial stage was the district court's decision to allow the United States permissive intervention.

"A motion for permissive intervention, like one for intervention of right, must be timely." *Catanzano v. Wing*, 103 F.3d 223, 234 (2d Cir. 1996); *see* Fed. R. Civ. P. 24(b) (timeliness required). If it was timely for the United States to seek intervention after the liability phase, it was also timely for the Coalition to do so.

Indeed, both this Court and other courts have long recognized that, when a party seeks to intervene in a remedial stage, the court should "separately evaluat[e] whether the applicant has a right to intervene at the merits stage and whether he or she may intervene to participate in devising the remedy." *Brody*, 957 F.2d at 1116. In *Bridgeport Guardians*, this Court reversed a denial of intervention sought in a remedial proceeding more than 25 years after judgment was entered. 602 F.3d at 473-474. Similarly, in *Hodgson v. United Mine Workers of America*, 473 F.2d 118 (D.C. Cir. 1972), intervention was first sought "after the action was tried, and some seven years after it was filed" (*id.* at 129). In finding the application in *Hodgson* timely, the D.C. Circuit relied on the fact that the proposed intervenors "sought only to participate in the remedial, and if necessary the appellate, phases of the case." *Id*. That same precedent and rationale control here.

The only other explanation afforded by the district court was its concern that intervention would be prejudicial to the existing parties. *See United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994). But if the mere intervention of additional parties constituted prejudice, then the United States' motion should have

been denied as well. Beyond that, any concern that the Coalition might "inject collateral issues" into the action should have been addressed by limiting the scope of intervention rather than by simply denying it outright, given the extent of the prejudice to the Coalition's substantial legal interests from not being able to fully protect its members during the formulation of a remedial order that aims to close them down and leave their residents without proper care. SPA214; *see, e.g.*, *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 249 (5th Cir. 2009) (applicant would be prejudiced if denied intervention because of an inability to appeal).

B. Permissive Intervention Was Also Warranted

Permissive intervention under Rule 24(b)(1)(B) was also appropriate because the Coalition "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The Coalition's defenses share common questions of law with the main action, including questions relating to DAI's standing, federalism concerns, liability issues pertaining to the district court's interpretation and application of the Supreme Court's decision in *Olmstead*, and statutory and constitutional limitations on the proper scope of the remedial order. Finally, simply bringing the full story to the table about the real-world practical and legal impact of the district court's decision on adult-home residents would have been beneficial, not prejudicial, to the court and the parties.

In the end it was the Coalition that was prejudiced by being denied intervention. Its *amicus curiae* submission was necessarily and explicitly more limited than the full-fledged remedial proposal it would have offered as a party. *See* Letter from J. Sherrin to Judge Garaufis (Nov. 25, 2009). Remedying the problem requires vacating the remedial order and allowing the Coalition the opportunity to be heard in full.

II. THERE IS NO JURISDICTION BECAUSE DAI LACKS STANDING

A. DAI Has No Legal Rights at Stake

If a plaintiff lacks standing, the federal "courts have no business deciding [the case], or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-41 (2006). They only have jurisdiction to dismiss the suit. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The "irreducible constitutional minimum of standing" requires, *inter alia*, that the plaintiff have "suffered an 'injury in fact'" through the "invasion of a legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The party invoking the court's jurisdiction bears the burden of demonstrating standing, a burden that is "substantially more difficult" to meet when, as here, the plaintiff files suit to remedy an injury to someone else. *Id.* at 562.

DAI filed suit by itself and in its own name, but has never asserted that it has suffered injury or that its legal rights have been invaded. DAI is not a disabled in-

dividual, let alone a "qualified individual with a disability" entitled to the ADA's protections. 42 U.S.C. § 12131(2). Nor does DAI reside in adult homes or seek appropriate placement for itself. Neither does DAI purport to stand in the shoes of the United States as a law enforcement agency empowered under federal law and the Constitution to bring enforcement actions against States, nor would Article III and the Eleventh Amendment permit such outsourcing in these circumstances. *Contrast* 42 U.S.C. § 12117 (allowing Attorney General to sue to enforce Title I of the ADA); *see Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (delegation of federal enforcement power to private entities limited to assignee/assignor relationship).

B. DAI Lacks Associational Standing

The district court viewed DAI as suing on behalf of its "constituents." SPA25. Whatever that label means, it does not suffice for Article III.

An association may sue for its "*members*" only when "(a) the *members* would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of *individual members* in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (emphases added). DAI fails that test.

1. DAI Lacks Members and Is Not Controlled by the Individuals Whose Rights It Asserts

The short answer to DAI's assertion of associational standing is that it is not an association of members at all. In fact, it has no members.

While in "some unusual cases," "an organization without 'members' in a traditional sense may be deemed a membership organization for purposes of standing" (*In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 196 (2d Cir. 2000)), DAI does not qualify for such "unusual" treatment. That treatment is confined to entities that (i) serve a specialized community, (ii) possess "the indicia of membership," such as electing leaders, financing activities, and directing the association's activities, and (iii) whose fortunes are "closely tied to those of its constituency" such that the entity will suffer if the litigation fails. *Hunt*, 432 U.S. at 344-45. DAI fails that test too.

DAI has purported to sue on behalf of all "residents in large New York City adult homes and those at risk of entry into such homes," which would include all 600,000 "individuals with mental illness who are receiving care or treatment in the State." 42 U.S.C. § 10805(a)(1)(A). Those 600,000 "constituents" have broadly varied levels of disability, consume different mental health and housing services, and have widely divergent interests that may be antagonistic because they compete for the same resources. None of those individuals is even nominally a "member" of DAI, nor is it likely—and certainly it has not been shown—that any significant

percentage is even aware of DAI's existence, let alone its vicarious enforcement of their rights.

Most critically for Article III purposes, those individuals do not choose to become DAI's "constituents," have no power to control DAI's activities or litigation decisions, do not elect its directors, do not make budget decisions, do not contribute funding, and cannot withdraw from the "constituency" if they disagree with DAI. Indeed, there is no evidence that DAI ever even notified a small percentage of its "constituents" or any of their legal guardians that it was filing this suit purportedly on their behalf, or permitted any of them to opt out. Quite the opposite, when it filed suit, DAI named not a single adult-home resident it thought had been injured. After a year and a half of litigating, it named two. JA49. Ultimately, it introduced the testimony of ten current adult-home residents—only two of which are in the public record. It never introduced the medical records or evidence of the housing desires of the hundreds of residents whose housing arrangements it claimed violated the law.

It is precisely to avoid this kind of litigation in bulk and without consent that the Fifth Circuit concluded that a PAIMIA organization like DAI lacks standing: "most of its 'clients' . . . are unable to participate in and guide the organization's efforts" and so the organization "bears no relationship to traditional membership

groups." *Association for Retarded Citizens v. Dallas County*, 19 F.3d 241, 244 (5th Cir. 1994).

The Eighth Circuit agrees, holding that a PAIMIA organization cannot sue "without the participation of one or more individual wards with specific claims based upon a particular incapacity." *Missouri Protection & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 810 (2007). The presence of such individuals not only obviates Article III concerns but also ensures, as Article III's case-or-controversy requirement envisions, that legal issues are analyzed with the participation of those whose rights are directly at stake. That is how the federal courts are supposed to work.

Because organizations like DAI "possess [none] of the indicia of membership in an organization" that *Hunt* (432 U.S. at 344) and Article III require, DAI cannot evade Article III's requirement by self-asserting a "constituency'' and then claiming to sue on behalf of individuals it has not met, who have given it no authority, who have no control over it, and who are likely completely unaware of what is happening with their rights. *See American Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) (no "watchdog" standing for group whose constituents do not "play any role in selecting [its] leadership, guiding [its] activities, or financing those activities").

In short, DAI lacks standing because it "cannot be described as 'but the medium through which individual[s] . . . seek to make more effective the expression of their own views" because there is no evidence its constituents or their legal guardians—those whom the legal system has actually charged with enforcing their individual rights—"seek" or want the help it offers, or that their views and DAI's are coextensive. *Id.* at 90. Simply pursuing "advocacy initiatives" for individuals with disabilities does not make them "the equivalent of members." *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002); *see also HOPE, Inc. v. DuPage County*, 738 F.2d 797, 814-15 (7th Cir. 1984) (*en banc*) (rejecting standing to sue for nonmembers).

Those cases hew to the Supreme Court's Article III admonition against putting the decision to sue "in the hands of 'concerned bystanders,'" rather than with those who "have a direct stake in the outcome." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). And *Georgia Advocacy Office, Inc. v. Camp*, 172 F.3d 1294 (11th Cir. 1999), proves that the Article III problem is more than constitutional theory; it has serious practical ramifications in the lives of the individuals whose interests are at stake. There the PAIMIA organization attempted to sue for an individual with a mental disability, but that individual herself "had no interest in being represented by" the plaintiff—a problem that the court only discovered by interviewing her *in camera*. *Id.* at 1297.

In this case, DAI—whose burden it is to establish standing (*Lujan*, 504 U.S. at 561)—offered not a shred of evidence that it consulted with, let alone is controlled or even influenced by the individuals with mental disabilities it claims as "constituents," that the group as a whole or even adult-home residents in particular support this suit, that it considered whether winning the suit would harm any of its 600,000 constituents, such as those who critically need adult home support, or that it even consulted with a percentage of those "constituents" whose housing arrangements DAI has turned upside down and on whose behalf it has reconfigured New York's entire mental health housing program. "Article III . . . is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982). The Case-or-Controversy requirement limits federal courts' power in order to protect individuals and to ensure that those whose rights are at stake do not find them used and dissipated by strangers. Surely the ADA (in addition to Article III) preserves that same autonomy for individuals with disabilities, depriving DAI of both statutory and prudential standing as well.

To be sure, the Ninth Circuit found standing in *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003). But the court wrongly relied on the duty of a PAIMIA governing board to "broadly represent" or be "knowledgeable about" the

"needs of the clients served by the system" (42 U.S.C. § 10805(c)(1)(B)), and the requirement that the "board of advisors" include individuals with disabilities in the affected system (*id.* § 10805(a)(6)). *Mink*, 322 F.3d at 1111-12. Article III is not so elastic. Much more than "concerned bystanders[']" knowledge about a legal claim is required. *See Valley Forge*, 454 U.S. at 473. And a board of advisors only advises; it does not control. Nor is there any requirement that those advisors have the precise interest and injury at stake in the litigation for which standing is claimed. The presence of some individuals with disabilities somewhere within an organization does not satisfy Article III. Indeed, Congress's command that DAI listen when "the public" "comment[s] on" its "priorities" and "activities" means the group must be responsive to the interests of *non*constituents. 42 U.S.C. § 10805(8). In any event, the record evidence regarding the makeup of the organization's board that was dispositive in *Mink*, 322 F.3d at 1112, is absent here.

Doe v. Stincer, 175 F.3d 879 (11th Cir. 1999) is of no help to DAI either, both because its standing analysis is as wrong as *Mink*'s, but also because *Stincer*, following *Warth v. Seldin*, 422 U.S. 490 (1975), still required proof that the legal rights of at least one of the group's "constituents" had been violated. *Stincer*, 175 F.3d at 886-88 (dismissing for lack of standing where the plaintiff claimed that "many" of its constituents had been wronged, but never alleged wrong against a particular individual). Proof of a single ADA violation with respect to an identified

person is absent here, a gap that Article III will not tolerate. *See Warth*, 422 U.S. at 516 (no standing where "[t]he complaint refers to no specific project of any of its members that is currently precluded"). "It is not enough that the conduct of which the plaintiff complains will injure someone. The complaining party must also show that he is within the class of persons who will be concretely affected." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (in class actions, "if none of the named plaintiffs . . . establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class" they purport to represent).

2. DAI's Litigation Can Hurt Its "Constituents"

An association lacks standing if winning its suit "would cause a direct detriment to the interests of some of its members." *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 864 (7th Cir. 1996). That is both because harming its members cannot be "germane to the organization's purpose" (*Hunt*, 432 U.S. at 343), and because a suit that will harm members "requires the participation of individual members in the lawsuit" (*id.*) to protect their interests. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (no *jus tertii* standing where interests of litigant and third party are "not parallel and, indeed, are potentially in conflict").

The relief that DAI sought (and won) will directly injure some of the very adult-home residents that DAI has appointed itself to represent. Many residents affirmatively want to stay in their homes. *See* SPA155-56. At least anywhere from 390 (9% of 4,300 (SPA153)) to 1,890 (44% (*id.*)) "constituents" expressed no interest in moving.

But the court's order inevitably will close a large number, if not almost all, adult homes by barring referrals, revoking licenses, and cutting off funding for "virtually all" residents. The very premise of the court's financial calculations was that, "if there was a will to close Adult Homes . . . that money could be shifted and used for the services people in supported apartments would need." SPA188. The court also emphasized that state law "permits the State to downsize or close Adult Homes" (SPA197), and held that the Department of Health was a necessary defendant precisely because it can "conserve resources by 'revok[ing] operating certificates for particular Adult Homes'" (SPA201 n.904).

The end result of DAI's litigation thus will be to force hundreds or perhaps thousands of adult-home residents out of their current homes, regardless of their wishes or individual ability to live in supported housing, because the relief DAI sought and obtained is predicated on the closure of many, if not most, adult homes. The two cannot feasibly co-exist.

Compounding the harm is the reality that the affected "constituents" are those who are least able to care for themselves in a crisis. "[M]oving is especially stressful for people with psychiatric disabilities and can contribute to problems and re-hospitalization." SPA142. As Justice Kennedy explained in *Olmstead*, "'[f]or a substantial minority . . . deinstitutionalization has been a psychiatric *Titanic*," whereby "'[s]elf-determination' often means merely that the person has a choice of soup kitchens," and the "'least restrictive setting' frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies.'" *Olmstead*, 527 U.S. at 609 (Kennedy, J., concurring).

Furthermore, the relevant group for evaluating conflict is not just adult-home residents, but all 600,000 New Yorkers with mental disabilities whom DAI claims as "constituents." Some of them—those on the streets, in homeless shelters, or in psychiatric institutions, at whom supported housing has long been targeted (SPA164)—will be significantly hurt by the judicial order that forces the State to put adult-home residents at the front of the housing line when it comes to the allocation of acutely scarce subsidized apartments in New York City. The multi-layered harms that DAI's litigation has set in motion underscore that "[t]he exercise of judicial power . . . [can] profoundly affect the lives, liberty, and property of those to whom it extends," and that is precisely why the decision to sue "must

therefore be placed 'in the hands of those who have a direct stake in the outcome.'" *Diamond*, 476 U.S. at 62.

Four other circuits have agreed, holding that conflicting interests within an association's membership (let alone within a putative "constituency") destroy the association's power to sue for any of its members. *See Retired Chicago Police Ass'n*, 76 F.3d at 866 (association cannot challenge a pension-related settlement because the requested relief would reduce some members' benefits); *Maryland Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1252-53 (4th Cir. 1991) (association cannot challenge constitutionality of a law where the requested relief would hurt business for some members); *Polaroid Corp. v. Disney*, 862 F.2d 987, 999 (3d Cir. 1988) ("associational standing has never been granted in the presence of serious conflicts of interest"); *Associated Gen. Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 691 (8th Cir. 1979) (no associational standing where some members will be hurt by victory). Here, as in those cases, the interests of DAI's "constituents" are "too diverse and the possibilities of conflict too obvious to make [DAI] an appropriate vehicle" to assert some of those individuals' claims. *Maryland Highways*, 933 F.2d at 1252; *cf. Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997) (conflict among class members defeats adequacy of representation).[5]

[5] While cases from the Ninth and D.C. Circuits have taken the opposite tack, their reasoning only applies to an organization that its members control. *See Asso-*

3. The Claims Asserted Require Individual Participation

DAI's claim of associational standing fails for yet another reason: "the involvement of individual members" was "necessary" to granting the relief it requested. *Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004); *see Hunt*, 432 U.S. at 343. Under Title II, a claim that the State failed to provide treatment in the least restrictive setting requires proof that the individual is a "qualified individual with a disability," in that (i) "the State's treatment professionals determine[d] that [a supported-housing] placement is appropriate," (ii) "the affected persons do not oppose such treatment," and (iii) "the placement can be reasonably accommodated." *Olmstead*, 527 U.S. at 607. The first and second elements make the participation of the affected individuals with disabilities indispensable and, indeed, this Court warned in *Bano* that it could not imagine "a medical monitoring program that would not require the participation of the organizations' individual members." *Id.* at 715. That is dispositive here. [6]

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ciated Gen. Contractors of Cal., Inc. v. Coal. for Economic Equity, 950 F.2d 1401, 1409 (9th Cir. 1991) ("an organization's internal conflicts should be resolved through its own internal procedures"); *see National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228, 1233 (D.C. Cir. 1987) ("conflicts are typically resolved by the association's internal procedures or political structure").

[6] *Hunt*'s third prong is prudential. Prudential standing requirements are "limits on the exercise of federal jurisdiction" (*Selevan v. New York Thruway Auth.*, 584 F.3d 82, 91 (2d Cir. 2009)), and thus must be considered even if never raised (*Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). In any event,

The undisputed evidence is that a "treatment team" must determine, on a case-by-case basis, whether an individual is qualified to live in supported housing, (*see, e.g.*, JA74 (Tr. 118-19)), and is thus a qualified individual under Title II. The "detailed assessments of the applicant from both a psychiatrist and a social worker" include a "professional clinical assessment, and a recommendation as to what type of housing and services the client requires." SPA145 & n.508. Such an assessment will review, *inter alia*, an individual's clinical, psychosocial, and medical history as well as his experiences with medication, substance abuse and domestic violence (JA519 (Tr. 1895)), and consider a comprehensive psychiatric evaluation and placement recommendation from a doctor who has done a mental status examination (JA521 (Tr. 1904)). Determining whether an individual wants to move also requires a case-by-case assessment that is complicated by the need to distinguish between reasoned preference and desires fueled by the mental disability itself, as where a resident wanted to move out only to escape the "demon" living in his room (JA620 (Tr. 2299)), and to address a resident's concern that he might not "want to be so far away that I would be isolated." JA158 (Tr. 455).

Tellingly, though the district court agreed that case-by-case assessment would be required (SPA238-39), the court just declared the violation and pre-

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the district court "passed upon" *Hunt*'s third prong (SPA25 n.22), thereby preserving it (*United States v. Harrell*, 268 F.3d 141, 146 (2d Cir. 2001)).

scribed the remedy first, making the identification of a Title II qualified individual a purely *post hoc* administrative matter.

But that very acknowledgment indicted the district court's decision to order the sweeping creation of extensive supported housing predicated on the displacement and closing of adult homes without hearing from any significant number of affected individuals about the appropriate balance of adult home and supported living residences across the State system. The same type of individual medical assessments that dictated dismissal in *Bano*, 361 F.3d at 715, will be required here. And the district court could not outsource that standing problem by prescribing extra-judicial medical assessments. *Bano* denied standing precisely because the out-of-court medical monitoring program would require individual participation. *Id.* Furthermore, if those *post hoc* case-by-case assessments produce a large number of individuals who wish to remain in adult homes—as the State's experience finding only 45 people willing to occupy the 60 units it has already created suggests may be the case—it will be too late. The district court's order, which has already swung into effect, will have driven many of those individuals' homes out of business.

The district court's reliance (SPA25 n.22) on *UAW v. Brock*, 477 U.S. 274 (1986), was misplaced. The *Brock* plaintiffs sought an answer to a "pure question of law" (*id.* at 287). DAI sought much more here, attempting to formulate by litigation a major overhaul of the State's housing program for individuals with mental

disabilities, which *Olmstead* held must be predicated on factual determinations about the abilities and desires of the individuals. 527 U.S. at 587. After-the-fact consultations with those whose rights have already been adjudicated by the *supported-housing providers* themselves, rather than state professionals, will not do. SPA238-39.[7]

Finally, the district court ruled that Congress abrogated *Hunt*'s individual-participation rule for PAIMIA organizations. SPA25 n.22. But there is no evidence that Congress did that or intended to supplant the individuals' legal guardians from their traditional protective role. In fact, PAIMIA only authorizes DAI to bring suits for "individuals." 42 U.S.C. § 10805(a)(1)(B)-(C). DAI may investigate individual cases of abuse, seek any relief for individuals still in the system, and seek remedies for past violations for recently discharged individuals (42 U.S.C. § 10805(a)(1)), provided it first exhausts its client's administrative remedies (*id.* § 10807(a)).[8]

And the law should not be construed to go any further than that, given the substantial constitutional concerns raised by outsourcing individualized legal

[7] Only after its liability ruling did the district court require any notice at all informing residents of the issues involved in the case—a time when the court declared that intervention by private individuals would be "untimely." SPA216.

claims to entities that the individuals have no knowledge of, let alone control over, not to mention allowing those private entities to sue States protected by the Eleventh Amendment. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (statutes must be construed to avoid "serious constitutional questions"). It stands the ADA on its head to adopt an enforcement mechanism that denies individuals with disabilities any voice in such important decisions with such a significant day-to-day impact on their own lives.

Finally, the United States' intervention solely in the case's remedial phase does not cure the jurisdictional problem. "[I]f jurisdiction is lacking at the commencement of the suit, it cannot be aided by the intervention of a [party] with a sufficient claim." *Pianta v. HM Reich Co.*, 77 F.2d 888, 890 (2d Cir. 1935). Indeed, the court lacked jurisdiction to even order the United States' intervention, since the plaintiff's lack of standing means that there was no case in which to intervene. It is "axiomatic" that "intervention will not be permitted to breathe life into a 'nonexistent' lawsuit" and cannot "cure a situation in which plaintiffs may have stated causes of action that they have no standing to litigate." *McClune v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979).

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[8] DAI never showed which constituents had exhausted administrative remedies, and indeed one of its own witnesses testified that his application for new housing was in process while the case was at trial. JA198 (Tr. 616).

III. THE ADA DOES NOT REQUIRE MASSIVE EXPANSION AND RECONFIGURATION OF THE STATE'S SUPPORTED-HOUSING PROGRAM

At bottom, the court held that, because the State makes supported housing available to some individuals with disabilities, the ADA and Section 504 mandate that the State create an extensive system of supported housing and affirmatively channel adult-home residents into it, while largely terminating state support for the adult home system, notwithstanding the continued need and desire of many individuals for adult-home care. That claim, however, bears no resemblance to the "discriminatory animus against the disabled" that Title II combats (*Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998)), and is foreclosed by precedent from the Supreme Court and this Court.

In *Olmstead*, the Supreme Court held that Title II creates a "qualified" right on the part of individuals "confine[d]" by the State (527 U.S. at 593) to "community-based treatment" if (i) "the State's treatment professionals determine that such placement is appropriate," (ii) "the affected persons do not oppose such treatment," and (iii) "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities" (*id*. at 607).

Ordering the wholesale creation of an extensive and expensive housing program dedicated to a particular subset of the mentally disabled population who are

not confined and who voluntarily chose to reside in adult homes—without the participation in the litigation of the very individuals whose housing rights are at stake and without a single finding that any individual housing placement decision by state officials was unreasonable—lacks any basis in Title II or *Olmstead*.[9]

A. Treatment Professionals Reasonably Determined That Adult Home Placement Was Appropriate

Title II is neither a manual for a state-wide mental health program nor is it a mandate to preferentially divert limited governmental resources to create benefit programs that do not exist, and certainly not for one subgroup of individuals with disabilities at the expense of other disabled individuals. Title II, instead, requires that States not exclude or discriminate in the administration of the services and programs they already "provide[]." 42 U.S.C. § 12131(2). The discrimination in *Olmstead* occurred because the State itself had determined that there was no need to "confine" the plaintiffs in psychiatric hospitals and because the State could reasonably accommodate less restrictive placement. 527 U.S. at 602-03. The test under Title II turns upon the reasonableness of the State's treatment determination. *Id.* at 602.

[9] Contrary to the district court's decision, the Supreme Court has not determined that the Rehabilitation Act considers the absence of community placement to be a form of discrimination. *Olmstead*, 527 U.S. at 600 n.11.

In this case, however, there has been no finding that the State's treatment of a single individual with a disability was unreasonable. Each individual in the adult homes at issue in this case—and in all State-supported housing for the mentally ill—obtained housing following an individualized assessment and referral by the system the State administers and which is designed precisely to offer people the opportunity to choose appropriate services. JA410 (Tr. 1462). The individualized assessment provided by the State's system evaluates psychiatric stability, ability to comply with a treatment program, suicide risk, medication management, and other factors bearing on the level of support and supervision a mentally disabled individual would need to have a successful housing placement. JA522-23 (Tr. 1907-11). No individual is required to move into any particular housing situation, and any individuals who choose to enter adult homes are free to leave at any time.

There is nothing unreasonable about designing a voluntary housing referral system that depends upon individualized assessments of ability and needs, or that offers individuals different housing options. Nor was it unreasonable for the State to include adult homes as one of the available options because of the large number of individuals with mental disabilities who either need or want the level of support and supervision that adult homes provide. Beyond that, the record is devoid of any finding that any individual housing assessment or referral was unreasonable. Indeed, only two of the 4,300 current residents of the adult homes at issue testified—

none were parties—and even as to those two, the district court did not undertake an individualized review of their assessments and referrals based on the full record before their treatment professionals.

Instead, the court ruled globally that the State discriminated against individuals with disabilities by not conducting, *sua sponte*, ongoing reviews of every individuals' eligibility for a change in referral. That was wrong for three reasons.

First, simply finding that there is a different way of evaluating housing needs—state initiated rather than individually initiated—does not mean that the existing way is unreasonable or discriminatory. That is particularly true when, as here, there is no record basis for concluding that any significant percentage of the 4,300 individuals' original assessments would have changed had the State initiated a systemic reassessment program using its own criteria rather than those the court has scripted.

Second, the court went much further here and ordered the State to "deem" "virtually all" adult-home residents "qualified for supported housing unless they have . . . (a) severe dementia, (b) a high level of skilled nursing needs that cannot be met in supported housing with services provided by Medicaid home care or waiver services, or (c) are likely to cause imminent danger to themselves or others." SPA238-39. That categorical determination that supported housing is warranted on such a mass scale, without any individualized State review of the 4,300

adult-home residents' needs, capabilities, and desires, ran roughshod over *Olmstead*'s rule that a state "generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community based program." 527 U.S. at 602. And Justice Kennedy insisted that the State's medical judgment be afforded "the greatest of deference." *Id*. at 610 (Kennedy, J., concurring).[10]

Olmstead's focus on the determination made by the State's referral system under its own criteria is critical because the ADA prohibits exclusion and "discrimination" on the basis of disability (42 U.S.C. § 12132), and if a State program has reasonably determined that a more integrated setting is not appropriate for someone, then the State cannot have "discriminated" against that person simply by referring that individual to housing that the State deems best serves that individual's needs. Moreover, if the State's system had made an unreasonable determination in an individual case, the proper remedy is to remand for proper decisionmak-

[10] *See also, e.g.*, *Washington v. Harper*, 494 U.S. 210, 230 n.12 (1990) ("deference . . . is owed to medical professionals," who "possess, as courts do not, . . . knowledge and expertise."); *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) ("decisions made by the appropriate professional are entitled to a presumption of correctness"): *P.C. v. McLaughlin*, 913 F.2d 1033, 1042 (2d Cir. 1990) (mandating deference to the "judgment exercised by qualified professionals"); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984) ("courts should defer to . . . professional judgment.").

ing, not for the court to take over the entire housing program for the mentally disabled and replace it with one facially skewed toward a particular housing outcome.

The district court here went even further and displaced State decisionmaking altogether by not just redesigning the housing program, but also ordering that, going forward, placement evaluations would be made not by the State's referral system, which relies on the assessment of a resident's treating medical experts, but by *supported housing providers* meeting a resident for the first time. SPA239 (determination of "whether such a condition exists shall be made by the providers awarded contracts to develop supported housing and conduct in-reach"). Nothing in Title II licenses reform organizations or courts, without a single individualized finding of unreasonable State decisionmaking, to push the State out of the treatment process altogether and order them simply to write the checks for housing decisions made by private housing providers.

Third, there is nothing unreasonable about the State determining, in the context of voluntary placement decisions by individuals, that re-evaluations will be made on the request of the individual rather than on a continuous basis by the State itself. Under New York's program, the State is not confining anyone or even making the actual housing decision. It simply provides a stipend with a referral system. SPA144, SPA172-73. It makes little sense to impose on the State the burden of constantly reevaluating the needs of individuals who are not under their control

or day-to-day supervision and who themselves are continuously choosing by their actions whether or not to maintain their current placements. That intervening independent choice breaks the "circuit between government and [individual]" (*Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002)), and thus precludes a finding of discrimination by the State. Beyond that, there could be nothing discriminatory about requiring those same individuals whom DAI insists can live independently, care for themselves independently, and maintain their medical care independently to also exercise the independent initiative of simply requesting re-assessment through the State's referral system.

B. Sufficient Evidence of the Preferences of Individuals With Disabilities Was Lacking

Title II invests individuals with disabilities with the right to appropriate, non-discriminatory treatment. It does not, however, compel those individuals to abandon private housing choices or permit third parties (other than legal guardians, who also were not consulted in this case) to make treatment choices for them without their participation or consultation. The record in this case, in fact, documented the absence of either a large need or desire on the part of adult-home residents to move to supported housing. The State's earlier creation of a sixty-unit supported housing program took two years just to fill 45 slots. JA493 (Tr. 1794).

The autonomy and even-handed treatment that Title II promotes is not advanced by third-party litigation that, while invoking disabled individuals as "con-

stituents," leaves those individuals on the litigation sidelines and seeks a comprehensive overhaul of a state housing program without even consulting the affected individuals, let alone presenting evidence that any significant percentage of the affected individuals desire such change. But now those individuals will have no choice and no say about an adult-home preference, because the remedy ordered in this proxy-litigation of *their* ADA rights is specifically designed to and inevitably will result in the massive downsizing, if not total closure, of almost all adult home facilities.

C. The Judgment Impermissibly Results in the Fundamental Alteration of State Services

The trial court also violated the third prong of *Olmstead*, and the underlying regulation on which it rested, by ordering relief that will "fundamentally alter" the nature of the services the State provides. *See* 28 C.F.R. § 35.130(b)(7).

First, and most basically, the State program at issue under Title II provided financial stipends and housing referrals mediated by the private choice of the disabled individual. The district court has now ordered the State (i) to develop an expansive supported housing program that adds 4,500 new low cost supported-living apartments in New York City dedicated exclusively to current or potential adult-home residents, (ii) to step aside while supported housing providers, rather than the State's referral system, determine appropriate housing placements, and (iii) to finance the overhaul by cutting back on Medicaid treatment for the individuals and

by largely terminating state support for adult homes, notwithstanding the undisputed appropriateness of the adult home setting for some individuals with disabilities. That is a profoundly fundamental change.

"[W]here the plaintiffs seek to expand the substantive scope of a program or benefit, they likely seek a fundamental alteration to the existing program or benefit." *American Council of the Blind v. Paulson*, 525 F.3d 1256, 1267 (D.C. Cir. 2008). Here, the State's supported-housing referrals were "exclusively for people with mental illness who are able to live independently with minimal support services" (SX(3)-239; *see* SX(2)-160), and were in "serious jeopardy" of being placed in the community without proper support (*i.e.*, made homeless). 14 N.Y.C.R.R. 575.6(b)(3) (defining eligibility for community support services ("CSS")); *see* SX(1)-597 (requiring CSS-eligibility for supported housing). The court's decision, however, mandates the creation of new housing for every adult-home resident—individuals who are not in "serious jeopardy" of being left on the street without support services, excluding only those who need extensive nursing care, are severely demented, or pose a risk of harm. SPA238-39. That is a "mandate [for] the provision of new benefits," not the non-discriminatory administration of existing benefits, which the ADA does not permit. *Rodriguez*, 197 F.3d at 619.

Furthermore, the court's design of a program predicated on the termination of state funding and support for another program—adult homes—defies the Su-

preme Court's admonition in *Olmstead* that "the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk." 527 U.S. at 604.

So too, the district court's determination that the State can finance the court-designed supported housing program by cutting back medical services for disabled individuals is in the teeth of Justice Kennedy's warning that it "would be unreasonable, it would be a tragic event, then, were the . . . [ADA] to be interpreted so that States . . . dr[o]ve those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision." *Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring). Yet that is precisely what the district court did when it ruled—without a single disabled individual before it as a party or any evidence of any particular resident's medical needs—that adult-home residents "over-utiliz[e]" medical care and thus can safely be denied, *e.g.*, frequent primary care physician visits that the court concluded were wasteful in every case. SPA177.

Fundamentally, the court erred in defining the relevant Title II program to be not what the State does provide, but what theoretically it could provide. Proving the point, the court defined the eligibility requirements for supported housing by looking to the criteria that aspiring housing providers proposed, rather than to the State's more focused supported housing program. *See* SPA120-23 & nn.297-301,

308, 316. But Title II only applies to individuals who meet "the essential eligibility requirements for the receipt of services" that are actually "provided by" a public entity. *Rodriguez*, 197 F.3d at 618. It does not license courts to imagine the optimal program—to the exclusion of budgetary realities and all the competing demands on State resources, including by other individuals with disabilities—and order the State to "change the way" it "manage[s] . . . mental health services." SPA228.

Second, *Olmstead* made clear that Title II does not command States to rob Peter to pay Paul. "In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, . . . the range of services the State provides to others with mental disabilities, and the State's obligation to mete out those services equitably." *Olmstead*, 527 U.S. at 597. That is because "the purposes of [the ADA and the Rehabilitation Act] are to eliminate discrimination on the basis of disability and to ensure evenhanded treatment between the disabled and the able-bodied." *Pfrommer*, 148 F.3d at 82. Challenges not to discriminatory treatment or exclusion, but instead "to the allocation of resources among the disabled," like the challenge here, "are disfavored." *Flight v. Gloeckler*, 68 F.3d 61, 64 (2d Cir. 1995) (Rehabilitation Act); *Pfrommer*, 148 F.3d at 82 (ADA). Accordingly, under Title II's "integration mandate . . . courts must not tinker with comprehensive, effective state programs for providing care to

the disabled." *The Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005). Courts must "be sympathetic to fundamental alteration defenses, and . . . give states 'leeway' in administering services for the disabled." *Id.*

The district court's order did the opposite, ordering the preferential dedication of a substantial number of exceedingly scarce housing units to individuals who already have safe housing. That decision necessarily comes at the expense of those mentally disabled individuals who are competing for the same limited housing resources from a much more vulnerable position, such as homelessness, temporary shelters, or transitional programs. *See* JA372 (Tr. 1310-12) (opening supported housing to a large group of adult-home residents would "affect other groups competing for similar housing" by reducing the number of beds available); JA582-83 (Tr. 2150-51). After all, the supported housing program relies on the availability of affordable housing in the New York City rental market (JA736 (Tr. 2802); *see also* JA404 (Tr. 1437-39)), where there are "never enough housing resources to meet the needs of anywhere near the people that are in the mental health system" (JA835 (Tr. 3198-99)). Subsidized housing for the mentally disabled, in other words, is a zero sum game: setting aside a large portion of those apartments for one group of individuals (adult-home residents) inevitably denies supported housing to other mentally disabled individuals whom the State deems more immediately needy.

The court's answer was simply to order the State to create enough supported housing to accommodate everyone. SPA235. But the State cannot just conjure up cheap apartments in New York City. OMH can only "pay up to the approved stipend amount" of $15,000 per individual per year, which must cover "rent, utilities, insurance, rent deposits" as well as "furniture" and all "case management." JA539 (Tr. 1978). While free apartments with limitless care for all who want and need it is a laudable goal, Title II does not cast aside the realities of limited housing resources or the very real financial constraints governing the benefit programs that States must make, particularly at a time when State budgets are under extraordinary strain.

Third, *Olmstead* respects budgetary realities by requiring courts to "tak[e] into account the resources available to the State" (527 U.S. at 607), a determination that itself requires deference to State budgetary judgments. The district court's finding that its sweeping relief would not "increase costs to the State" (SPA200) disregarded the contrary conclusion of the State's budget experts. But it is the states, not federal courts, that have the experience juggling state-wide budgets and balancing the extensive demands of the entire population on fiscal resources, and it is the states, not federal courts, that the taxpayers will hold accountable for the choices made.

To illustrate, the district court predicted that supported-housing apartments will cost 0.5% less than adult-home beds, for a savings of $146. But that conclusion overlooked uncontroverted testimony that, when supported housing providers apply for financing assistance from the State, the cost of their supported housing increases by $11,600 per year, per unit, turning the court's predicted $146 savings into a $11,454 cost. JA730 (Tr. 2776). Basic federalism principles foreclose Monday-morning accounting via institutional reform litigation. *See Olmstead*, 527 U.S. at 610 (noting the "federalism costs inherent in referring state decisions regarding the administration of treatment programs and the allocation of resources to the reviewing authority of the federal courts") (Kennedy, J., concurring); *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) ("principles of federalism which play such an important part in governing the relationship between federal courts and state governments" apply "where injunctive relief is sought . . . against those in charge of an executive branch of an agency of state or local governments").

Fourth, the lack of participation by the affected individuals with disabilities fatally infects the remedy the court ordered. Direct participation by those whose rights are at stake assures "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. Only two current adult-home residents tes-

tified in support of DAI's position, and not one of them was a party.[11] The rest of the testimony was a battle between advocates and former policymakers on the one hand and current agency experts on the other.

While such debates are appropriate for the policy arena, it is profoundly wrong to employ them as the basis for judicially reconstructing state mental health programs in the purported names of individuals who have had no say in and absolutely no control over the litigation that adjudicates their housing rights and desires. Such expansive and consequential relief cannot be predicated on a record that did not find that the ADA rights of a single individual had been violated, did not find that anyone in particular was entitled to be moved to supported housing, and did not order that the State relocate any individual.

In *Lewis v. Casey*, 518 U.S. 343 (1996), the plaintiffs similarly put on evidence that they claimed showed the likely violation of the constitutional rights of thousands of inmates. But they proved "actual injury on the part of only one named plaintiff." *Id.* at 358. The district court ordered sweeping relief to transform the prison library system. The Supreme Court held that, because only two

[11] Plaintiffs submitted sealed depositions of eight current and four former adult-home residents. Even so the voices of just sixteen individuals were heard, a fraction of the 4,300 who live in the relevant homes. And the submitted testimony was not subject to cross-examination and is not part of the public record. Secret, untested evidence cannot provide an appropriate basis for massively overhauling a state housing program.

specific examples of violations had been proven, the district court could only order a remedy for those two individuals.

Lewis controls here and obligated the court to limit its relief to the individual unreasonable placement decisions it found in this case—of which there were none. While it "is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm," it is not the court's role "to shape the institutions of government in such fashion as to comply with the laws and the Constitution" in the absence of particularized findings of violations of the law. *Id.* at 349. Those individualized determinations are at the core of *Olmstead*'s recognition of a right to appropriate placement. Litigation that proceeds both without individual parties, without individual treatment records, and without a single individualized finding of erroneous placement is not what the ADA licenses.

CONCLUSION

For the foregoing reasons, the district court's order denying intervention and its final judgment should be reversed and the case dismissed for lack of jurisdiction.

Respectfully submitted,

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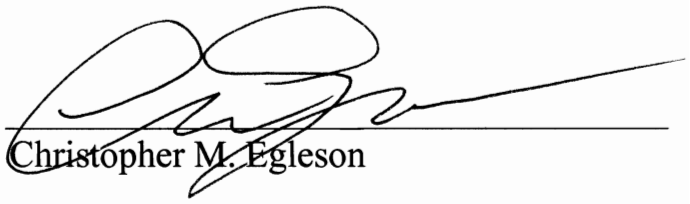
July 23, 2010

CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 13,983 words, and thus complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.



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July 23, 2010

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Dean Misser, being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 23rd day of July 2010 deponent served 1 copy of the within

Brief for New York Coalition for Quality Assisted Living, Inc.

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Case Name: Disability Advocates, Inc., v. New York Coalition For Quality Assisted Living Inc.,
Case Nos: 10-235-cv(L);10-251(CON);10-767-cv(CON); 10-1190-cv(CON)

ADDENDUM

lic Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States will be a party;—to Controversies between two or more States;—between a State and Citizens of another State;[10]—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed

[10] This clause has been affected by amendment XI.

within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. [1]Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2]The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. [1]The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2]A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3]No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[11]

SECTION 3. [1]New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2]The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which,

[11]This clause has been affected by amendment XIII.

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub. L. 101–336, § 2, July 26, 1990, 104 Stat. 328.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original ''this Act'', meaning Pub. L. 101–336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

SHORT TITLE

Section 1(a) of Pub. L. 101–336 provided that: ''This Act [enacting this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, amending section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47, and enacting provisions set out as notes under sections 12111, 12131, 12141, 12161, and 12181 of this title] may be cited as the 'Americans with Disabilities Act of 1990'.''

STUDY BY GENERAL ACCOUNTING OFFICE OF EXISTING DISABILITY-RELATED EMPLOYMENT INCENTIVES

Pub. L. 106–170, title III, § 303(a), Dec. 17, 1999, 113 Stat. 1903, provided that, as soon as practicable after Dec. 17, 1999, the Comptroller General was to undertake a study to assess existing tax credits and other disability-related employment incentives under the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) and other Federal laws, specifically addressing the extent to which such credits and other incentives would encourage employers to hire and retain individuals with disabilities; and that, not later than 3 years after Dec. 17, 1999, the Comptroller General was to transmit to the appropriate congressional committees a written report presenting the results of the study and any appropriate recommendations for legislative or administrative changes.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term ''auxiliary aids and services'' includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually deliv-

ered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term ''disability'' means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term ''State'' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(Pub. L. 101–336, § 3, July 26, 1990, 104 Stat. 329.)

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

SUBCHAPTER I—EMPLOYMENT

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term ''Commission'' means the Equal Employment Opportunity Commission established by section 2000e–4 of this title.

(2) Covered entity

The term ''covered entity'' means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term ''direct threat'' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term ''employee'' means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term ''employer'' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term ''employer'' does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general

The term ''illegal use of drugs'' means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term ''drug'' means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

(7) Person, etc.

The terms ''person'', ''labor organization'', ''employment agency'', ''commerce'', and ''industry affecting commerce'', shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term ''qualified individual with a disability'' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term ''reasonable accommodation'' may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term ''undue hardship'' means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

(Pub. L. 101–336, title I, §104, July 26, 1990, 104 Stat. 334.)

REFERENCES IN TEXT

The Drug-Free Workplace Act of 1988, referred to in subsec. (c)(3), is subtitle D (§§5151–5160) of title V of Pub. L. 100–690, Nov. 18, 1988, 102 Stat. 4304, which is classified generally to chapter 10 (§701 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 41 and Tables.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e–10 of this title.

(Pub. L. 101–336, title I, §105, July 26, 1990, 104 Stat. 336.)

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

(Pub. L. 101–336, title I, §106, July 26, 1990, 104 Stat. 336.)

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e–4, 2000e–5, 2000e–6, 2000e–8, and 2000e–9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

(Pub. L. 101–336, title I, §107, July 26, 1990, 104 Stat. 336.)

REFERENCES IN TEXT

The Rehabilitation Act of 1973, referred to in subsec. (b), is Pub. L. 93–112, Sept. 26, 1973, 87 Stat. 355, as amended, which is classified generally to chapter 16 (§701 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 29 and Tables.

SUBCHAPTER II—PUBLIC SERVICES

PART A—PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term ''public entity'' means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4)[1] of title 49).

(2) Qualified individual with a disability

The term ''qualified individual with a disability'' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

(Pub. L. 101–336, title II, § 201, July 26, 1990, 104 Stat. 337.)

REFERENCES IN TEXT

Section 24102 of title 49, referred to in par. (1)(C), was subsequently amended, and section 24102(4) no longer defines ''commuter authority''. However, such term is defined elsewhere in that section.

CODIFICATION

In par. (1)(C), ''section 24102(4) of title 49'' substituted for ''section 103(8) of the Rail Passenger Service Act'' on authority of Pub. L. 103–272, § 6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Title 49, Transportation.

EFFECTIVE DATE

Section 205 of Pub. L. 101–336 provided that:

''(a) GENERAL RULE.—Except as provided in subsection (b), this subtitle [subtitle A (§§ 201–205) of title II of Pub. L. 101–336, enacting this part] shall become effective 18 months after the date of enactment of this Act [July 26, 1990].

''(b) EXCEPTION.—Section 204 [section 12134 of this title] shall become effective on the date of enactment of this Act.''

EX. ORD. NO. 13217. COMMUNITY-BASED ALTERNATIVES FOR INDIVIDUALS WITH DISABILITIES

Ex. Ord. No. 13217, June 18, 2001, 66 F.R. 33155, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to place qualified individuals with disabilities in community settings whenever appropriate, it is hereby ordered as follows:

SECTION 1. *Policy*. This order is issued consistent with the following findings and principles:

(a) The United States is committed to community-based alternatives for individuals with disabilities and recognizes that such services advance the best interests of Americans.

(b) The United States seeks to ensure that America's community-based programs effectively foster independence and participation in the community for Americans with disabilities.

(c) Unjustified isolation or segregation of qualified individuals with disabilities through institutionalization is a form of disability-based discrimination prohibited by Title II of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 [12131] *et seq*. States must avoid disability-based discrimination unless doing so would fundamentally alter the nature of the service, program, or activity provided by the State.

(d) In *Olmstead v. L.C.*, 527 U.S. 581 (1999) (the ''*Olmstead* decision''), the Supreme Court construed Title II of the ADA [42 U.S.C. 12131 et seq.] to require States to place qualified individuals with mental disabilities in community settings, rather than in institutions, whenever treatment professionals determine that such placement is appropriate, the affected persons do not oppose such placement, and the State can reasonably accommodate the placement, taking into account the resources available to the State and the needs of others with disabilities.

(e) The Federal Government must assist States and localities to implement swiftly the *Olmstead* decision, so as to help ensure that all Americans have the opportunity to live close to their families and friends, to live more independently, to engage in productive employment, and to participate in community life.

SEC. 2. *Swift Implementation of the Olmstead Decision: Agency Responsibilities*. (a) The Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration shall work cooperatively to ensure that the *Olmstead* decision is implemented in a timely manner. Specifically, the designated agencies should work with States to help them assess their compliance with the *Olmstead* decision and the ADA [42 U.S.C. 12101 et seq.] in providing services to qualified individuals with disabilities in community-based settings, as long as such services are appropriate to the needs of those individuals. These agencies should provide technical guidance and work cooperatively with States to achieve the goals of Title II of the ADA [42 U.S.C. 12131 et seq.], particularly where States have chosen to develop comprehensive, effectively working plans to provide services to qualified individuals with disabilities in the most integrated settings. These agencies should also ensure that existing Federal resources are used in the most effective manner to support the goals of the ADA. The Secretary of Health and Human Services shall take the lead in coordinating these efforts.

(b) The Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration shall evaluate the policies, programs, statutes, and regulations of their respective agencies to determine whether any should be revised or modified to improve the availability of community-based services for qualified individuals with disabilities. The review shall focus on identifying affected populations, improving the flow of information about supports in the community, and removing barriers that impede opportunities for community placement. The review should ensure the involvement of consumers, advocacy organizations, providers, and relevant agency representatives. Each agency head should report to the President, through the Secretary of Health and Human Services, with the results of their evaluation within 120 days.

(c) The Attorney General and the Secretary of Health and Human Services shall fully enforce Title II of the ADA, including investigating and resolving complaints filed on behalf of individuals who allege that they have been the victims of unjustified institutionalization. Whenever possible, the Department of Justice and the Department of Health and Human Services should work cooperatively with States to resolve these complaints, and should use alternative dispute resolution to bring these complaints to a quick and constructive resolution.

(d) The agency actions directed by this order shall be done consistent with this Administration's budget.

SEC. 3. *Judicial Review*. Nothing in this order shall affect any otherwise available judicial review of agency action. This order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

GEORGE W. BUSH.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall,

[1] See References in Text note below.

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.

(Pub. L. 101–336, title II, § 202, July 26, 1990, 104 Stat. 337.)

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

(Pub. L. 101–336, title II, § 203, July 26, 1990, 104 Stat. 337.)

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for ''program accessibility, existing facilities'', and ''communications'', regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to ''program accessibility, existing facilities'', and ''communications'', such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

(Pub. L. 101–336, title II, § 204, July 26, 1990, 104 Stat. 337.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original ''this Act'', meaning Pub. L. 101–336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

EFFECTIVE DATE

Section effective July 26, 1990, see section 205(b) of Pub. L. 101–336, set out as a note under section 12131 of this title.

PART B—ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION PROVIDED BY PUBLIC ENTITIES CONSIDERED DISCRIMINATORY

SUBPART I—PUBLIC TRANSPORTATION OTHER THAN BY AIRCRAFT OR CERTAIN RAIL OPERATIONS

§ 12141. Definitions

As used in this subpart:

(1) Demand responsive system

The term ''demand responsive system'' means any system of providing designated public transportation which is not a fixed route system.

(2) Designated public transportation

The term ''designated public transportation'' means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 12161 of this title)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) Fixed route system

The term ''fixed route system'' means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) Operates

The term ''operates'', as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

(5) Public school transportation

The term ''public school transportation'' means transportation by schoolbus vehicles of schoolchildren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) Secretary

The term ''Secretary'' means the Secretary of Transportation.

(Pub. L. 101–336, title II, § 221, July 26, 1990, 104 Stat. 338.)

EFFECTIVE DATE

Section 231 of Pub. L. 101–336 provided that:

''(a) GENERAL RULE.—Except as provided in subsection (b), this part [part I (§§ 221–231) of subtitle B of title II of Pub. L. 101–336, enacting this subpart] shall become effective 18 months after the date of enactment of this Act [July 26, 1990].

''(b) EXCEPTION.—Sections 222, 223 (other than subsection (a)), 224, 225, 227(b), 228(b), and 229 [sections 12142, 12143(b) to (f), 12144, 12145, 12147(b), 12148(b), and 12149 of this title] shall become effective on the date of enactment of this Act.''

§ 12142. Public entities operating fixed route systems

(a) Purchase and lease of new vehicles

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a public entity which operates a fixed route system to purchase or lease a new

Subsec. (b). Pub. L. 100–630, §206(c)(2), substituted ''refused'' for ''refuses''.

Subsec. (c). Pub. L. 100–630, §206(c)(3), substituted ''which the President'' for ''which The President'' and ''when the President'' for ''when The President''.

1986—Subsec. (a). Pub. L. 99–506, §§103(d)(2)(C), 1002(e)(3), substituted ''individuals with handicaps'' for ''handicapped individuals'' and ''section 706(8) of this title'' for ''section 706(7) of this title''.

Subsec. (b). Pub. L. 99–506, §§103(d)(2)(B), (C), 1001(f)(2), substituted ''individual with handicaps'' for ''handicapped individual'', ''individuals with handicaps'' for ''handicapped individuals'', and ''a contract'' for ''his contract''.

Subsec. (c). Pub. L. 99–506, §1001(f)(3), substituted ''The President'' for ''he'' in two places and substituted ''the reasons'' for ''his reasons''.

1978—Subsec. (a). Pub. L. 95–602 substituted ''section 706(7) of this title'' for ''section 706(6) of this title''.

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term ''program or activity'' means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

(Pub. L. 93–112, title V, §504, Sept. 26, 1973, 87 Stat. 394; Pub. L. 95–602, title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub. L. 99–506, title I, §103(d)(2)(B), title X, §1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub. L. 100–259, §4, Mar. 22, 1988, 102 Stat. 29; Pub. L. 100–630, title II, §206(d), Nov. 7, 1988, 102 Stat. 3312; Pub. L. 102–569, title I, §102(p)(32), title V, §506, Oct. 29, 1992, 106 Stat. 4360, 4428; Pub. L. 103–382, title III, §394(i)(2), Oct. 20, 1994, 108 Stat. 4029; Pub. L. 105–220, title IV, §408(a)(3), Aug. 7, 1998, 112 Stat. 1203; Pub. L. 107–110, title X, §1076(u)(2), Jan. 8, 2002, 115 Stat. 2093.)

REFERENCES IN TEXT

The amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, referred to in subsec. (a), mean the amendments made by Pub. L. 95–602. See 1978 Amendments note below.

The Americans with Disabilities Act of 1990, referred to in subsec. (d), is Pub. L. 101–336, July 26, 1990, 104 Stat. 327, as amended. Title I of the Act is classified generally to subchapter I (§12111 et seq.) of chapter 126 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

AMENDMENTS

2002—Subsec. (b)(2)(B). Pub. L. 107–110 substituted ''section 7801 of title 20'' for ''section 8801 of title 20''.

1998—Subsec. (a). Pub. L. 105–220 substituted ''section 705(20)'' for ''section 706(8)''.

1994—Subsec. (b)(2)(B). Pub. L. 103–382 substituted ''section 8801 of title 20'' for ''section 2891(12) of title 20''.

1992—Subsec. (a). Pub. L. 102–569, §102(p)(32), substituted ''a disability'' for ''handicaps'' and ''disability'' for ''handicap'' in first sentence.

Subsec. (d). Pub. L. 102–569, § 506, added subsec. (d).

1988—Subsec. (a). Pub. L. 100–630, § 206(d)(1), substituted ''her or his handicap'' for ''his handicap''.

Pub. L. 100–259, § 4(1), designated existing provisions as subsec. (a).

Subsec. (b). Pub. L. 100–259, § 4(2), added subsec. (b).

Subsec. (b)(2)(B). Pub. L. 100–630, § 206(d)(2), substituted ''section 2891(12) of title 20'' for ''section 2854(a)(10) of title 20''.

Subsec. (c). Pub. L. 100–259, § 4(2), added subsec. (c).

1986—Pub. L. 99–506 substituted ''individual with handicaps'' for ''handicapped individual'' and ''section 706(8) of this title'' for ''section 706(7) of this title''.

1978—Pub. L. 95–602 substituted ''section 706(7) of this title'' for ''section 706(6) of this title'' and inserted provision prohibiting discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service and requiring the heads of these agencies to promulgate regulations prohibiting discrimination.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–110 effective Jan. 8, 2002, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 107–110, set out as an Effective Date note under section 6301 of Title 20, Education.

EXCLUSION FROM COVERAGE

Amendment by Pub. L. 100–259 not to be construed to extend application of this chapter to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see section 7 of Pub. L. 100–259, set out as a Construction note under section 1687 of Title 20, Education.

ABORTION NEUTRALITY

Amendment by Pub. L. 100–259 not to be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion, see section 8 of Pub. L. 100–259, set out as a note under section 1688 of Title 20, Education.

CONSTRUCTION OF PROHIBITION AGAINST DISCRIMINATION UNDER FEDERAL GRANTS

Rights or protections of this section not affected by any provision of Pub. L. 98–457, see section 127 of Pub. L. 98–457, set out as a note under section 5101 of Title 42, The Public Health and Welfare.

COORDINATION OF IMPLEMENTATION AND ENFORCEMENT OF PROVISIONS

For provisions relating to the coordination of implementation and enforcement of the provisions of this section by the Attorney General, see section 1–201 of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d–1 of Title 42, The Public Health and Welfare.

EXECUTIVE ORDER NO. 11914

Ex. Ord. No. 11914, Apr. 28, 1976, 41 F.R. 17871, which related to nondiscrimination in federally assisted programs, was revoked by Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d–1 of Title 42, The Public Health and Welfare.

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e–5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub. L. 93–112, title V, § 505, as added Pub. L. 95–602, title I, § 120(a), Nov. 6, 1978, 92 Stat. 2982.)

REFERENCES IN TEXT

The Civil Rights Act of 1964, referred to in subsec. (a)(2), is Pub. L. 88–352, July 2, 1964, 78 Stat. 241, as amended. Title VI of the Civil Rights Act of 1964 is classified generally to subchapter V (§ 2000d et seq.) of chapter 21 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of Title 42 and Tables.

§ 794b. Removal of architectural, transportation, or communication barriers; technical and financial assistance; compensation of experts or consultants; authorization of appropriations

(a) The Secretary may provide directly or by contract with State vocational rehabilitation agencies or experts or consultants or groups thereof, technical assistance—

(1) to persons operating community rehabilitation programs; and

(2) with the concurrence of the Access Board established by section 792 of this title, to any public or nonprofit agency, institution, or organization;

for the purpose of assisting such persons or entities in removing architectural, transportation, or communication barriers. Any concurrence of the Access Board under paragraph (2) shall reflect its consideration of cost studies carried out by States.

(b) Any such experts or consultants, while serving pursuant to such contracts, shall be entitled to receive compensation at rates fixed by the Secretary, but not exceeding the daily equivalent of the rate of pay for level 4 of the Senior Executive Service Schedule under section 5382 of title 5, including travel time, and while so serving away from their homes or regular places of business, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5 for persons in the Government service employed intermittently.

(c) The Secretary, with the concurrence of the Access Board and the President, may provide, directly or by contract, financial assistance to

SUBCHAPTER I—PROTECTION AND ADVOCACY SYSTEMS

PART A—ESTABLISHMENT OF SYSTEMS

§ 10801. Congressional findings and statement of purpose

(a) The Congress finds that—

(1) individuals with mental illness are vulnerable to abuse and serious injury;

(2) family members of individuals with mental illness play a crucial role in being advocates for the rights of individuals with mental illness where the individuals are minors, the individuals are legally competent and choose to involve the family members, and the individuals are legally incompetent and the legal guardians, conservators, or other legal representatives are members of the family;

(3) individuals with mental illness are subject to neglect, including lack of treatment, adequate nutrition, clothing, health care, and adequate discharge planning; and

(4) State systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate.

(b) The purposes of this chapter are—

(1) to ensure that the rights of individuals with mental illness are protected; and

(2) to assist States to establish and operate a protection and advocacy system for individuals with mental illness which will—

(A) protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes; and

(B) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

(Pub. L. 99–319, title I, §101, May 23, 1986, 100 Stat. 478; Pub. L. 102–173, §§3, 10(2), Nov. 27, 1991, 105 Stat. 1217, 1219.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original ''this Act'', meaning Pub. L. 99–319, May 23, 1986, 100 Stat. 478, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note below and Tables.

AMENDMENTS

1991—Subsec. (a). Pub. L. 102–173, §10(2), substituted ''individuals with mental illness'' for ''mentally ill individuals'' in three places.

Subsec. (a)(2) to (4). Pub. L. 102–173, §3, added par. (2) and redesignated former pars. (2) and (3) as (3) and (4), respectively.

Subsec. (b). Pub. L. 102–173, §10(2), substituted ''individuals with mental illness'' for ''mentally ill individuals'' in three places.

SHORT TITLE OF 1991 AMENDMENT

Section 1 of Pub. L. 102–173 provided that: ''This Act [amending this section and sections 10802 to 10807, 10821, 10824, 10826, 10827, 10841, and 10851 of this title] may be cited as the 'Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991'.''

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–509, §1, Oct. 20, 1988, 102 Stat. 2543, provided that: ''This Act [amending sections 10802, 10804 to 10806, 10821, 10822, 10825, and 10827 of this title and enacting a provision set out as a note under section 10827 of this title] may be cited as the 'Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1988'.''

SHORT TITLE

Pub. L. 99–319, §1, May 23, 1986, 100 Stat. 478, as amended by Pub. L. 106–310, div. B, title XXXII, §3206(a), Oct. 17, 2000, 114 Stat. 1193, provided that: ''This Act [enacting this chapter and section 247a of this title and enacting provisions set out as a note below] may be cited as the 'Protection and Advocacy for Individuals with Mental Illness Act'.''

SUPERSEDURE OF BALANCED BUDGET PROVISIONS

Section 402 of Pub. L. 99–319 provided that: ''This Act [see Short Title note above] shall not be construed as superseding any of the balanced budget provisions set forth in section 3(7) of the Congressional Budget and Impoundment Control Act of 1974 [2 U.S.C. 622(7)].''

§ 10802. Definitions

For purposes of this subchapter:

(1) The term ''abuse'' means any act or failure to act by an employee of a facility rendering care or treatment which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury or death to a[1] individual with mental illness, and includes acts such as—

(A) the rape or sexual assault of a[1] individual with mental illness;

(B) the striking of a[1] individual with mental illness;

(C) the use of excessive force when placing a[1] individual with mental illness in bodily restraints; and

(D) the use of bodily or chemical restraints on a[1] individual with mental illness which is not in compliance with Federal and State laws and regulations.

(2) The term ''eligible system'' means the system established in a State to protect and advocate the rights of persons with developmental disabilities under subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 [42 U.S.C. 15041 et seq.].

(3) The term ''facilities'' may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons.

(4) The term ''individual with mental illness'' means, except as provided in section 10804(d) of this title, an individual—

[1] So in original. Probably should be ''an''.

(A) who has a significant mental illness or emotional impairment, as determined by a mental health professional qualified under the laws and regulations of the State; and

(B)(i)(I) who is an inpatient or resident in a facility rendering care or treatment, even if the whereabouts of such inpatient or resident are unknown;

(II) who is in the process of being admitted to a facility rendering care or treatment, including persons being transported to such a facility; or'';[2]

(III) who is involuntarily confined in a municipal detention facility for reasons other than serving a sentence resulting from conviction for a criminal offense; or

(ii) who satisfies the requirements of subparagraph (A) and lives in a community setting, including their own home.

(5) The term ''neglect'' means a negligent act or omission by any individual responsible for providing services in a facility rendering care or treatment which caused or may have caused injury or death to a[1] individual with mental illness or which placed a[1] individual with mental illness at risk of injury or death, and includes an act or omission such as the failure to establish or carry out an appropriate individual program plan or treatment plan for a[1] individual with mental illness, the failure to provide adequate nutrition, clothing, or health care to a[1] individual with mental illness, or the failure to provide a safe environment for a[1] individual with mental illness, including the failure to maintain adequate numbers of appropriately trained staff.

(6) The term ''Secretary'' means the Secretary of Health and Human Services.

(7) The term ''State'' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(8) The term ''American Indian consortium'' means a consortium established under part C of the Developmental Disabilities Assistance and Bill of Rights Act[3] (42 U.S.C. 6042 et seq.).

(Pub. L. 99–319, title I, § 102, May 23, 1986, 100 Stat. 478; Pub. L. 100–509, § 3, Oct. 20, 1988, 102 Stat. 2543; Pub. L. 102–173, §§ 4, 10(1), Nov. 27, 1991, 105 Stat. 1217, 1219; Pub. L. 106–310, div. B, title XXXII, § 3206(b), Oct. 17, 2000, 114 Stat. 1194; Pub. L. 106–402, title IV, § 401(b)(13)(A), Oct. 30, 2000, 114 Stat. 1739.)

REFERENCES IN TEXT

The Developmental Disabilities Assistance and Bill of Rights Act of 2000, referred to in par. (2), is Pub. L. 106–402, Oct. 30, 2000, 114 Stat. 1677. Subtitle C of the Act probably means subtitle C of title I of the Act, which is classified generally to part C (§ 15041 et seq.) of subchapter I of chapter 144 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 15001 of this title and Tables.

The Developmental Disabilities Assistance and Bill of Rights Act, referred to in par. (8), is title I of Pub. L. 88–164, as added by Pub. L. 98–527, § 2, Oct. 19, 1984, 98 Stat. 2662, as amended, which was repealed by Pub. L. 106–402, title IV, § 401(a), Oct. 30, 2000, 114 Stat. 1737. Part C of the Act was classified generally to subchapter III (§ 6041 et seq.) of chapter 75 of this title. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2000—Par. (2). Pub. L. 106–402 substituted ''subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000'' for ''part C of the Developmental Disabilities Assistance and Bill of Rights Act''.

Par. (4). Pub. L. 106–310, § 3206(b)(1)(A), inserted '', except as provided in section 10804(d) of this title,'' after ''means'' in introductory provisions.

Par. (4)(B). Pub. L. 106–310, § 3206(b)(1)(B), designated existing provisions as cl. (i), redesignated former cls. (i) to (iii) as subcls. (I) to (III), respectively, of cl. (i), and added cl. (ii).

Par. (8). Pub. L. 106–310, § 3206(b)(2), added par. (8).

1991—Par. (1). Pub. L. 102–173, § 10(1), substituted ''individual with mental illness'' for ''mentally ill individual'' wherever appearing.

Pars. (3) to (7). Pub. L. 102–173 added par. (3), redesignated former pars. (3) to (6) as (4) to (7), respectively, and substituted ''individual with mental illness'' for ''mentally ill individual'' wherever appearing in pars. (4) and (5).

1988—Par. (1). Pub. L. 100–509, § 3(1), inserted ''or death'' after ''caused, injury''.

Par. (3)(B). Pub. L. 100–509, § 3(2), designated existing provisions as cl. (i), substituted '', even if the whereabouts of such inpatient or resident are unknown;'' for period at end, and added cls. (ii) and (iii).

Par. (4). Pub. L. 100–509, § 3(3), inserted ''or death'' after ''injury'' in two places and inserted before period at end '', including the failure to maintain adequate numbers of appropriately trained staff''.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

§ 10803. Allotments

The Secretary shall make allotments under this subchapter to eligible systems to establish and administer systems—

(1) which meet the requirements of section 10805 of this title; and

(2) which are designed to—

(A) protect and advocate the rights of individuals with mental illness; and

(B) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

(Pub. L. 99–319, title I, § 103, May 23, 1986, 100 Stat. 479; Pub. L. 102–173, § 10(2), Nov. 27, 1991, 105 Stat. 1219.)

AMENDMENTS

1991—Par. (2). Pub. L. 102–173 substituted ''individuals with mental illness'' for ''mentally ill individuals'' in two places.

§ 10804. Use of allotments

(a) Contracts

(1) An eligible system may use its allotment under this subchapter to enter into contracts with State agencies and nonprofit organizations which operate throughout the State. In order to be eligible for a contract under this paragraph—

[2] So in original.

[3] See References in Text note below.

(A) such an agency shall be independent of any agency which provides treatment or services (other than advocacy services) to individuals with mental illness; and

(B) such an agency or organization shall have the capacity to protect and advocate the rights of individuals with mental illness.

(2) In carrying out paragraph (1), an eligible system should consider entering into contracts with organizations including, in particular, groups run by individuals who have received or are receiving mental health services, or the family members of such individuals, which,[1] provide protection or advocacy services to individuals with mental illness.

(b) Obligation of allotments; technical assistance and training

(1) If an eligible system is a public entity, the government of the State in which the system is located may not require the system to obligate more than 5 percent of its allotment under this subchapter in any fiscal year for administrative expenses.

(2) An eligible system may not use more than 10 percent of any allotment under this subchapter for any fiscal year for the costs of providing technical assistance and training to carry out this subchapter.

(c) Representation of individuals with mental illness

An eligible system may use its allotment under this subchapter to provide representation to individuals with mental illness in Federal facilities who request representation by the eligible system. Representatives of such individuals from such system shall be accorded all the rights and authority accorded to other representatives of residents of such facilities pursuant to State law and other Federal laws.

(d) Definition for purposes of representation of individuals with mental illness; priority

The definition of ''individual with a mental illness'' contained in section 10802(4)(B)(iii) of this title shall apply, and thus an eligible system may use its allotment under this subchapter to provide representation to such individuals, only if the total allotment under this subchapter for any fiscal year is $30,000,000 or more, and in such case, an eligible system must give priority to representing persons with mental illness as defined in subparagraphs (A) and (B)(i) of section 10802(4) of this title.

(Pub. L. 99–319, title I, §104, May 23, 1986, 100 Stat. 479; Pub. L. 100–509, §7(a), (b)(1), Oct. 20, 1988, 102 Stat. 2544; Pub. L. 102–173, §§5, 10(2), Nov. 27, 1991, 105 Stat. 1217, 1219; Pub. L. 106–310, div. B, title XXXII, §3206(c), Oct. 17, 2000, 114 Stat. 1194.)

AMENDMENTS

2000—Subsec. (d). Pub. L. 106–310 added subsec. (d).

1991—Subsec. (a). Pub. L. 102–173, §10(2), substituted ''individuals with mental illness'' for ''mentally ill individuals'' in three places.

Subsec. (c). Pub. L. 102–173, §5, added subsec. (c).

1988—Subsec. (a)(2). Pub. L. 100–509, §7(a), substituted ''including, in particular, groups run by individuals who have received or are receiving mental health services, or the family members of such individuals, which'' for ''which, on May 23, 1986''.

Subsec. (b)(2). Pub. L. 100–509, §7(b)(1), substituted ''10'' for ''5''.

§ 10805. System requirements

(a) Authority; independent status; access to facilities and records; advisory council; annual report; grievance procedure

A system established in a State under section 10803 of this title to protect and advocate the rights of individuals with mental illness shall—

(1) have the authority to—

(A) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;

(B) pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State; and

(C) pursue administrative, legal, and other remedies on behalf of an individual who—

(i) was a[1] individual with mental illness; and

(ii) is a resident of the State,

but only with respect to matters which occur within 90 days after the date of the discharge of such individual from a facility providing care or treatment;

(2) be independent of any agency in the State which provides treatment or services (other than advocacy services) to individuals with mental illness;

(3) have access to facilities in the State providing care or treatment;

(4) in accordance with section 10806 of this title, have access to all records of—

(A) any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access;

(B) any individual (including an individual who has died or whose whereabouts are unknown)—

(i) who by reason of the mental or physical condition of such individual is unable to authorize the system to have such access;

(ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and

(iii) with respect to whom a complaint has been received by the system or with respect to whom as a result of monitoring or other activities (either of which result from a complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect; and

(C) any individual with a mental illness, who has a legal guardian, conservator, or

[1] So in original. The comma probably should not appear.

[1] So in original. Probably should be ''an''.

other legal representative, with respect to whom a complaint has been received by the system or with respect to whom there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy, whenever—

(i) such representative has been contacted by such system upon receipt of the name and address of such representative;

(ii) such system has offered assistance to such representative to resolve the situation; and

(iii) such representative has failed or refused to act on behalf of the individual;

(5) have an arrangement with the Secretary and the agency of the State which administers the State plan under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] for the furnishing of the information required by subsection (b) of this section;

(6) establish an advisory council—

(A) which will advise the system on policies and priorities to be carried out in protecting and advocating the rights of individuals with mental illness;

(B) which shall include attorneys, mental health professionals, individuals from the public who are knowledgeable about mental illness, a provider of mental health services, individuals who have received or are receiving mental health services, and family members of such individuals, and at least 60 percent the membership of which shall be comprised of individuals who have received or are receiving mental health services or who are family members of such individuals; and

(C) which shall be chaired by an individual who has received or is receiving mental health services or who is a family member of such an individual;

(7) on January 1, 1987, and January 1 of each succeeding year, prepare and transmit to the Secretary and the head of the State mental health agency of the State in which the system is located a report describing the activities, accomplishments, and expenditures of the system during the most recently completed fiscal year, including a section prepared by the advisory council that describes the activities of the council and its assessment of the operations of the system;

(8) on an annual basis, provide the public with an opportunity to comment on the priorities established by, and the activities of, the system;

(9) establish a grievance procedure for clients or prospective clients of the system to assure that individuals with mental illness have full access to the services of the system and for individuals who have received or are receiving mental health services, family members of such individuals with mental illness, or representatives of such individuals or family members to assure that the eligible system is operating in compliance with the provisions of this subchapter and subchapter III of this chapter; and

(10) not use allotments provided to a system in a manner inconsistent with section 14404 of this title.

(b) Annual survey report; plan of corrections

The Secretary and the agency of a State which administers its State plan under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] shall provide the eligible system of the State with a copy of each annual survey report and plan of corrections for cited deficiencies made pursuant to titles XVIII and XIX of the Social Security Act [42 U.S.C. 1395 et seq., 1396 et seq.] with respect to any facility rendering care or treatment to individuals with mental illness in the State in which such system is located. A report or plan shall be made available within 30 days after the completion of the report or plan.

(c) Governing authority

(1)(A) Each system established in a State, through allotments received under section 10803 of this title, to protect and advocate the rights of individuals with mental illness shall have a governing authority.

(B) In States in which the governing authority is organized as a private non-profit entity with a multi-member governing board, or a public system with a multi-member governing board, such governing board shall be selected according to the policies and procedures of the system. The governing board shall be composed of—

(i) members (to be selected no later than October 1, 1990) who broadly represent or are knowledgeable about the needs of the clients served by the system; and

(ii) in the case of a governing authority organized as a private non-profit entity, members who broadly represent or are knowledgeable about the needs of the clients served by the system including the chairperson of the advisory council of such system.

As used in this subparagraph, the term ''members who broadly represent or are knowledgeable about the needs of the clients served by the system'' shall be construed to include individuals who have received or are receiving mental health services and family members of such individuals.

(2) The governing authority established under paragraph (1) shall—

(A) be responsible for the planning, design, implementation, and functioning of the system; and

(B) consistent with subparagraph (A), jointly develop the annual priorities of the system with the advisory council.

(Pub. L. 99–319, title I, § 105, May 23, 1986, 100 Stat. 480; Pub. L. 100–509, §§ 4–6(a), 7(c), Oct. 20, 1988, 102 Stat. 2543–2545; Pub. L. 102–173, §§ 6, 10, Nov. 27, 1991, 105 Stat. 1218, 1219; Pub. L. 105–12, § 9(m), Apr. 30, 1997, 111 Stat. 28.)

REFERENCES IN TEXT

The Social Security Act, referred to in subsecs. (a)(5) and (b), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles XVIII and XIX of the Social Security Act are classified generally to subchapters XVIII (§ 1395 et seq.) and XIX (§ 1396 et seq.) of chapter 7 of this title, respectively. For complete classification of this Act to the Code, see section 1305 of this title and Tables.

AMENDMENTS

1997—Subsec. (a)(10). Pub. L. 105–12 added par. (10).

1991—Subsec. (a). Pub. L. 102–173, § 10, substituted ''individual with mental illness'' for ''mentally ill individ-

ual'' and ''individuals with mental illness'' for ''mentally ill individuals'' wherever appearing.

Subsec. (a)(4). Pub. L. 102–173, §6(a), inserted ''as a result of monitoring or other activities (either of which result from a complaint or other evidence)'' before ''there is'' in subpar. (B)(iii) and added subpar. (C).

Subsec. (a)(6). Pub. L. 102–173, §6(b), substituted ''60 percent'' for ''one-half'' in subpar. (B) and added subpar. (C).

Subsec. (a)(9). Pub. L. 102–173, §6(c), inserted before period at end ''and for individuals who have received or are receiving mental health services, family members of such individuals with mental illness, or representatives of such individuals or family members to assure that the eligible system is operating in compliance with the provisions of this subchapter and subchapter III of this chapter''.

Subsec. (b). Pub. L. 102–173, §10(2), substituted ''individuals with mental illness'' for ''mentally ill individuals''.

Subsec. (c)(1). Pub. L. 102–173, §§6(d), 10(2), substituted ''individuals with mental illness'' for ''mentally ill individuals'' in subpar. (A) and inserted at end of subpar. (B) ''As used in this subparagraph, the term 'members who broadly represent or are knowledgeable about the needs of the clients served by the system' shall be construed to include individuals who have received or are receiving mental health services and family members of such individuals.''

1988—Subsec. (a)(4)(B). Pub. L. 100–509, §6(a), inserted ''(including an individual who has died or whose whereabouts are unknown)'' after ''any individual''.

Subsec. (a)(6). Pub. L. 100–509, §4(1), substituted ''an advisory council'' for ''a board''.

Subsec. (a)(7). Pub. L. 100–509, §5, substituted '', including a section prepared by the advisory council that describes the activities of the council and its assessment of the operations of the system;'' for period at end.

Subsec. (a)(8), (9). Pub. L. 100–509, §7(c), added pars. (8) and (9).

Subsec. (c). Pub. L. 100–509, §4(2), added subsec. (c).

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–12 effective Apr. 30, 1997, and applicable to Federal payments made pursuant to obligations incurred after Apr. 30, 1997, for items and services provided on or after such date, subject to also being applicable with respect to contracts entered into, renewed, or extended after Apr. 30, 1997, as well as contracts entered into before Apr. 30, 1997, to the extent permitted under such contracts, see section 11 of Pub. L. 105–12, set out as an Effective Date note under section 14401 of this title.

§ 10806. Access to records

(a) An eligible system which, pursuant to section 10805(a)(4) of this title, has access to records which, under Federal or State law, are required to be maintained in a confidential manner by a provider of mental health services, shall, except as provided in subsection (b) of this section, maintain the confidentiality of such records to the same extent as is required of the provider of such services.

(b)(1) Except as provided in paragraph (2), an eligible system which has access to records pursuant to section 10805(a)(4) of this title may not disclose information from such records to the individual who is the subject of the information if the mental health professional responsible for supervising the provision of mental health services to such individual has provided the system with a written determination that disclosure of such information to such individual would be detrimental to such individual's health.

(2)(A) If disclosure of information has been denied under paragraph (1) to an individual—

(i) such individual;

(ii) the legal guardian, conservator, or other legal representative of such individual; or

(iii) an eligible system, acting on behalf of an individual described in subparagraph (B),

may select another mental health professional to review such information and to determine if disclosure of such information would be detrimental to such individual's health. If such mental health professional determines, based on professional judgment, that disclosure of such information would not be detrimental to the health of such individual, the system may disclose such information to such individual.

(B) An eligible system may select a mental health professional under subparagraph (A)(iii) on behalf of—

(i) an individual whose legal guardian is the State; or

(ii) an individual who has a legal guardian, conservator, or other legal representative other than the State if such guardian, conservator, or representative does not, within a reasonable time after such individual is denied access to information under paragraph (1), select a mental health professional under subparagraph (A) to review such information.

(C) If the laws of a State prohibit an eligible system from obtaining access to the records of individuals with mental illness in accordance with section 10805(a)(4) of this title and this section, section 10805(a)(4) of this title and this section shall not apply to such system before—

(i) the date such system is no longer subject to such a prohibition; or

(ii) the expiration of the 2-year period beginning on May 23, 1986,

whichever occurs first.

(3)(A) As used in this section, the term ''records'' includes reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records.

(B) An eligible system shall have access to the type of records described in subparagraph (A) in accordance with the provisions of subsection (a) of this section and paragraphs (1) and (2) of subsection (b) of this section.

(Pub. L. 99–319, title I, §106, May 23, 1986, 100 Stat. 481; Pub. L. 100–509, §6(b), Oct. 20, 1988, 102 Stat. 2544; Pub. L. 102–173, §10(2), Nov. 27, 1991, 105 Stat. 1219.)

AMENDMENTS

1991—Subsec. (b)(2)(C). Pub. L. 102–173 substituted ''individuals with mental illness'' for ''mentally ill individuals''.

1988—Subsec. (b)(3). Pub. L. 100–509 added par. (3).

§ 10807. Legal actions

(a) Prior to instituting any legal action in a Federal or State court on behalf of a[1] individual

[1] So in original. Probably should be ''an''.

with mental illness, an eligible system, or a State agency or nonprofit organization which entered into a contract with an eligible system under section 10804(a) of this title, shall exhaust in a timely manner all administrative remedies where appropriate. If, in pursuing administrative remedies, the system, agency, or organization determines that any matter with respect to such individual will not be resolved within a reasonable time, the system, agency, or organization may pursue alternative remedies, including the initiation of a legal action.

(b) Subsection (a) of this section does not apply to any legal action instituted to prevent or eliminate imminent serious harm to a[1] individual with mental illness.

(Pub. L. 99–319, title I, § 107, May 23, 1986, 100 Stat. 482; Pub. L. 102–173, § 10(1), Nov. 27, 1991, 105 Stat. 1219.)

AMENDMENTS

1991—Pub. L. 102–173 substituted ''individual with mental illness'' for ''mentally ill individual'' in subsecs. (a) and (b).

PART B—ADMINISTRATIVE PROVISIONS

§ 10821. Applications

(a) Submission for allotment; contents

No allotment may be made under this subchapter to an eligible system unless an application therefor is submitted to the Secretary. Each such application shall contain—

(1) assurances that amounts paid to such system from an allotment under this subchapter will be used to supplement and not to supplant the level of non-Federal funds available in the State in which such system is established to protect and advocate the rights of individuals with mental illness;

(2) assurances that such system will have a staff which is trained or being trained to provide advocacy services to individuals with mental illness and to work with family members of clients served by the system where the individuals with mental illness are minors, legally competent and do not object, and legally incompetent and the legal guardians, conservators, or other legal representatives are family members;

(3) assurances that such system, and any State agency or nonprofit organization with which such system may enter into a contract under section 10804(a) of this title, will not, in the case of any individual who has a legal guardian, conservator, or representative other than the State, take actions which are duplicative of actions taken on behalf of such individual by such guardian, conservator, or representative unless such guardian, conservator, or representative requests the assistance of such system; and

(4) such other information as the Secretary may by regulation prescribe.

(b) Satisfaction of requirements regarding trained staff

The assurance required under subsection (a)(2) of this section regarding trained staff may be satisfied through the provision of training by individuals who have received or are receiving mental health services and family members of such individuals.

(c) Duration of applications and assurances

Applications submitted under this section shall remain in effect for a 4-year period, and the assurances required under this section shall be for the same 4-year period.

(Pub. L. 99–319, title I, § 111, May 23, 1986, 100 Stat. 482; Pub. L. 100–509, § 7(d), Oct. 20, 1988, 102 Stat. 2545; Pub. L. 102–173, §§ 7, 10(2), Nov. 27, 1991, 105 Stat. 1218, 1219; Pub. L. 102–321, title I, § 163(c)(3)(A), July 10, 1992, 106 Stat. 377.)

AMENDMENTS

1992—Subsec. (c). Pub. L. 102–321 substituted ''4-year'' for ''3-year'' in two places.

1991—Subsec. (a)(1). Pub. L. 102–173, § 10(2), substituted ''individuals with mental illness'' for ''mentally ill individuals''.

Subsec. (a)(2). Pub. L. 102–173, §§ 7(1), 10(2), substituted ''individuals with mental illness'' for ''mentally ill individuals'' and inserted before semicolon at end ''and to work with family members of clients served by the system where the individuals with mental illness are minors, legally competent and do not object, and legally incompetent and the legal guardians, conservators, or other legal representatives are family members''.

Subsecs. (b), (c). Pub. L. 102–173, § 7(2), (3) added subsec. (b) and redesignated former subsec. (b) as (c).

1988—Pub. L. 100–509 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–321 effective Oct. 1, 1992, with provision for programs providing financial assistance, see section 801(c), (d) of Pub. L. 102–321, set out as a note under section 236 of this title.

§ 10822. Allotment formula and reallotments

(a)(1)(A) Except as provided in paragraph (2) and subject to the availability of appropriations under section 10827 of this title, the Secretary shall make allotments under section 10803 of this title from amounts appropriated under section 10827 of this title for a fiscal year to eligible systems on the basis of a formula prescribed by the Secretary which is based equally—

(i) on the population of each State in which there is an eligible system; and

(ii) on the population of each such State weighted by its relative per capita income.

(B) For purposes of subparagraph (A)(ii), the term ''relative per capita income'' means the quotient of the per capita income of the United States and the per capita income of the State, except that if the State is Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Marshall Islands, the Federated States of Micronesia, the Republic of Palau, or the Virgin Islands, the quotient shall be considered to be one.

(2)(A) The minimum amount of the allotment of an eligible system shall be the product (rounded to the nearest $100) of the appropriate base amount determined under subparagraph (B) and the factor specified in subparagraph (C).

(B) For purposes of subparagraph (A), the appropriate base amount—

(i) for American Samoa, Guam, the Marshall Islands, the Federated States of Micronesia, the Commonwealth of the Northern Mariana

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

§ 35.105 Self-evaluation.

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

(Approved by the Office of Management and Budget under control number 1190–0006)

[56 FR 35716, July 26, 1991, as amended by Order No. 1694–93, 58 FR 17521, Apr. 5, 1993]

§ 35.106 Notice.

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

§ 35.107 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

§§ 35.108–35.129 [Reserved]

Subpart B—General Requirements

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of 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 public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits,

services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

§ 35.131 Illegal use of drugs.

(a) *General.* (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who—

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) *Health and drug rehabilitation services.* (1) A public entity shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) *Drug testing.* (1) This part does not prohibit a public entity from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in paragraph (c) of this section shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

§ 35.132 Smoking.

This part does not preclude the prohibition of, or the imposition of restrictions on, smoking in transportation covered by this part.

§ 35.133 Maintenance of accessible features.

(a) A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.

(b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

[56 FR 35716, July 26, 1991, as amended by Order No. 1694–93, 58 FR 17521, Apr. 5, 1993]

§ 35.134 Retaliation or coercion.

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(c) SETTLEMENT, DISMISSAL, AND COMPROMISE. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 23.2. Actions Relating to Unincorporated Associations

This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).

(As added Feb. 28, 1966, eff. July 1, 1966; amended Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 24. Intervention

(a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) PERMISSIVE INTERVENTION.

(1) *In General*. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) *By a Government Officer or Agency*. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice*. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) NOTICE AND PLEADING REQUIRED. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 25. Substitution of Parties

(a) DEATH.

(1) *Substitution if the Claim Is Not Extinguished*. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) *Continuation Among the Remaining Parties*. After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) *Service*. A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) INCOMPETENCY. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(c) TRANSFER OF INTEREST. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE. An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)