10-235-cv (L)

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

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

v.

NEW YORK COALITION FOR QUALITY ASSISTED LIVING,
Movant-Appellant,

– AND –

DAVID A. PATERSON, in his official capacity as Governor of the State of New York,
Plaintiffs-Appellees,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE STATES OF CONNECTICUT ARKANSAS, TENNESSEE, UTAH, AND WYOMING, AS *AMICI CURIAE* IN SUPPORT OF NEW YORK STATE APPELLANTS

DUSTIN McDANIEL
ATTORNEY GENERAL OF ARKANSAS

ROBERT E. COOPER, JR.
ATTORNEY GENERAL OF TENNESSEE

MARK L. SHURTLEFF
ATTORNEY GENERAL OF UTAH

BRUCE A. SALZBURY
ATTORNEY GENERAL OF WYOMING

RICHARD BLUMENTHAL
ATTORNEY GENERAL OF CONNECTICUT

HUGH BARBER*
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel. (860) 808-5210
Fax (860) 808-5385
Email: hugh.barber@ct.gov

*Counsel of Record

(caption continued from front cover)

EMPIRE STATE ASSOCIATION OF ASSISTED LIVING,
Movant-Appellant,

RICHARD F. DAINES, in his official capacity as Commissioner of the New York State Department of Health, MICHAEL F. HOGAN, in his official capacity as Commissioner of the New York State Department of Mental Health, NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE OFFICE OF MENTAL HEALTH,
Defendants-Appellants,

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INTEREST OF THE *AMICI* STATES

This brief *amici curiae* is submitted by the states of Connecticut, Arkansas, Tennessee, Utah and Wyoming, by their respective Attorneys General. The *amici* states provide a range of services, within available resources, on behalf of their residents. Chronically mentally ill individuals who satisfy financial and other eligibility requirements frequently qualify for "entitlement" programs, such as Medicaid and Food Stamps, which are generally available to all needy, "disabled" persons in the state. These "entitlement" programs are typically administered by "state welfare" or "state Medicaid" agencies. In addition, the states administer programs and services through designated state mental health agencies that are targeted for mentally ill individuals.

The states are fully committed to providing community-based mental health care, whenever feasible. However, any state's ability to assist is limited by the practical need to meet the educational, public health, and public safety needs of all of its residents, and the need to maintain the economic vitality of the state and its citizens through reasonable taxation. Accordingly, no state provides state-administered mental health service to its citizens as open-ended entitlements.

The Americans with Disabilities Act ("ADA") and § 504 of the Rehabilitation Act forbid discrimination on the basis of

disability in the "services, programs, or activities" that are, in fact, provided by a state. To date, courts have carefully construed the ADA as being primarily concerned with ensuring evenhanded treatment of the disabled with respect to their ability to participate in programs that the government administers, and not as requiring a state to provide a "level of services" or to "prevent institutionalization." Alexander v. Choate, 469 U.S. 287 (1985); Doe v. Pfrommer, 148 F.3d 73 (2d Cir. 1998); Rodriguez v. City of New York, 197 F.3d 611 (2d Cir. 1999). In a series of cases based upon the "integration mandate" to the ADA, 28 C.F.R. § 35.130(d), this Court ruled that the ADA does not require a state to alter the scope of services that are covered under optional Medicaid Home and Community-Based Waiver programs, 42 U.S.C. § 1396n(c), by covering additional services, notwithstanding that the individual could otherwise avoid "institutionalization" in a nursing facility if the Waiver program were modified as requested. Rodriguez, supra; Leocata v. Leavitt, 148 Fed. Appx. 64 (2d Cir. 2005). In each of these cases, an otherwise-eligible plaintiff identified the governmental program at issue and requested a specific modification that allegedly could be reasonably accommodated. This Court, however, found no obligation to make the requested modification.

Advocates for the disabled, however, have filed a series of recent cases on behalf of mentally ill individuals who reside in privately operated facilities arguing that the state governmental defendants are liable under the ADA's "integration mandate" for their "institutionalization," without identifying any particular governmental service, program or activity, any discriminatory method of administration, or any state conduct that "caused" the institutionalization. The District Court in this case specifically disavowed any obligation on Plaintiff to identify any particular discriminatory "service, program, or activity," finding liability under the ADA merely because of Defendants' mental health system planning responsibilities, and Defendants' failure to affirmatively ensure that mentally ill individuals reside in State-subsidized "supported housing," receiving whatever additional support services they need, instead of residing in privately-administered Adult Homes. The District Court also precluded the State from setting eligibility criteria for supported housing, or from assessing mentally ill individuals' eligibility for such services by utilizing its own treatment professionals. The decision of the court below is unprecedented, contradicts this Court's decision in Rodriguez, and grossly interferes with the prerogatives of the State by creating open-ended entitlements to housing and support services. A recent decision by another district court in this

Circuit has followed this holding. See, State Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut, 2010 U.S. Dist. LEXIS 31601 (D. Conn. Mar. 31, 2010)(denying motion to dismiss).

The *amici* states are most concerned about this potential boundless liability to "prevent institutionalization" without any identified discriminatory administration of a governmental service, program, or activity, and urge reversal of the Judgment below.

STATEMENT OF THE FACTS AND PROCEEDINGS

The *amici* states refer to and incorporate the statement of facts and proceedings of the New York Defendants-Appellants, but wish to emphasize certain facts that demonstrate that the Defendants did not injure Plaintiff's "constituents," that the relief entered below is not based upon New York's discriminatory provision of governmental "services, programs, or activities," and that the relief ordered below will work a "fundamental alteration."

"Adult Homes" are privately operated "room and board" facilities that are licensed by the New York Department of Health ("DOH") to provide "long-term residential care, board, housekeeping, personal care and supervision to five or more adults." 18 NYCRR §§ 485.2(b), 487.2(a). They are not medical facilities that are eligible to participate in the Title XIX

Medicaid program, and they are not considered to be "mental health facilities," which are licensed by New York's Office of Mental Health ("OMH").

While a state statute authorizes OMH to discharge mentally ill individuals from state psychiatric hospitals into Adult Homes, relatively few such individuals have been transferred out of state facilities into Adult Homes, especially in recent years. The overwhelming majority of mentally ill residents in Adult Homes arranged for their own admission, with OMH playing no role in their decision to reside there.[1] Furthermore, OMH does not "pay for" their care in the Adult Homes. Instead, the residents are legally liable to pay for their own cost of care, and to apply their own funds towards their costs of care.[2]

[1] The Judgment of the court below is not dependent on the limited extent that OMH may have arranged for the transfer of some mentally ill individuals into Adult Homes.

[2] The *amici* states understand that the majority of chronically mentally ill Adult Home residents are eligible for, and participate in, the federal Supplemental Security Income ("SSI") program and the state program of State Supplement to SSI ("State Supplement"). The SSI program is administered by the Social Security Administration ("SSA") and provides periodic (monthly) cash (welfare) assistance for needy, aged, blind and disabled individuals for "basic needs," such as food and shelter. State Supplement is an optional supplement to SSI that provides additional cash assistance at state expense, and at state election, to needy, aged, blind and disabled persons. The State Supplement program is administered by another state agency, the Office of Temporary and Disability Assistance, which is not a defendant in this action.

Accordingly, the only connection that OMH has to the Adult Homes or to their mentally ill residents is that state statute authorizes OMH to "monitor" the services that are provided to mentally ill residents of such facilities, and OMH has given grants to non-profit organizations to provide case management services on behalf of mentally ill residents in approximately ten of the "impacted" Adult Homes in question in this lawsuit.[3]

The OMH, and the state mental health agencies in the *amici* states, operate and fund a range of mental health residential treatment programs that vary in their intensity, location, target populations, and cost. However, the states are not responsible for, and do not undertake to provide residential mental health services for all of its mentally ill residents of each state. The receipt of state-provided or state-funded mental health services, including mental health residential services, is not an "entitlement." OMH and the *amici* states inevitably make service provision determinations based upon priorities that include the extent of the individual's need for mental health services. Many mentally ill individuals are simply unknown to OMH and/or other state mental health agencies, and are not part of their service networks or considered to be

[3] The Judgment does not depend on whether OMH has provided grant funds for case management and/or day treatment services at the Adult Homes.

their "clients." To the extent that their mental illness is sufficiently severe to render them "disabled," such individuals are typically eligible for the federal SSI program, any State Supplement, and the state-administered Medicaid and Food Stamp programs. The Title XIX Medicaid program, in particular, can fund the cost of federally-prescribed mental health services.[4]

The trial court explicitly rejected Defendants' contention that Plaintiff must identify a "specific act or policy" that discriminated against Plaintiff's constituents based upon their "disability," mental illness. 598 F. Supp. 2d 289, 319 (E.D.N.Y. 2009) (Ruling at Summary Judgment). The trial court ruled that "if Defendants allocated their resources differently, adult home residents could receive services in a more integrated setting." Id. (emphasis added). The only "programmatic" tie that the court identified between mentally ill Adult Home residents, Defendants, and the possibility of Plaintiff's constituents residing in alternative settings was various sections of N.Y. Mental Hygiene Law, including N.Y. Mental Hyg.

[4] Medicaid-funded mental health services are typically provided without any involvement of the state mental health agency. Generally, residential care in mental health facilities cannot be funded by State Medicaid programs due to the "Institution for Mental Disease" exclusion in the federal Medicaid statute. See, Connecticut Dep't of Income Maintenance v. Heckler, 471 U.S. 524 (1985). In addition, room and board costs cannot be covered by any optional Medicaid Waiver program that the state may administer. 42 U.S.C. § 1396n(c).

Law §§ 5.07, 7.07, 41.03, 41.39, and 41.42, which require OMH to engage in system planning functions. Id., at 313, 314. Specifically, the court justified its decision by ruling that, "Defendants are required under New York law to develop a comprehensive, integrated system of treatment and rehabilitative services for the mentally ill. N.Y. Mental Hyg. Law § 7.01," 653 F. Supp. 2d 184, 188 (E.D.N.Y. 2009) (emphasis added).[5] The Court also cited DOH regulations, both at summary judgment and at trial. Id. at 194; 598 F. Supp. 2d at 314, 315. These DOH regulations only authorize DOH to take specific regulatory action with respect to Adult Homes pursuant to its inspection and licensure authority. The regulations do not authorize or require DOH to take any action with respect to the development of community-based residential or day treatment services for mentally ill persons.

Specifically, with respect to the Governor, the trial court "justified" retaining him as a defendant at summary judgment by indicating that he "plays a key role in shaping the State's mental health policies," and because he "has access to resources unavailable to the other defendants, such as the Governor's capital budget … ." Id. At trial, the court below imposed

[5] Notwithstanding the plural s referring to all Defendants, the New York Mental Hygiene Law only applies to defendant OMH and to its Commissioner. Said statutes create no right or duties with respect to DOH, the DOH Commissioner, or the Governor.

liability on the Governor solely by utilizing the plural s with respect to the "Defendants" alleged planning and service responsibilities with respect to the mentally ill under N.Y. Mental Hygiene Law. 653 F. Supp. 2d at 188.

The trial court ultimately found all Defendants liable for "violating the ADA," essentially because they had not affirmatively acted to develop sufficient supported housing programs, and had not affirmatively ensured that no mentally ill individual resided in an Adult Home unless the individual voluntarily chose to reside in such a setting after being afforded an informed choice to receive "supported housing" instead. The trial court did not identify any "services, programs, or activities" that Defendants administered in a discriminatory fashion (other than that Defendants failed to affirmatively plan for, and to provide, alternatives). Instead, the trial court held that the ADA affords a right for Plaintiff's constituents to receive a subsidized apartment and "whatever" support services are necessary to "prevent institutionalization."

The District Court also found that many mentally ill Adult Home residents have "expressed the desire" to move to alternative housing arrangements. The District Court, however, only identified resident responses to "surveys" conducted during discovery, and did not find that the residents had informed

Defendants of their "desire" to move to alternative settings, or that Defendants had denied any such requests. Indeed, the record indicates that to the extent that Adult Home residents followed prescribed procedures and applied to OMH for assistance utilizing the OMH-prescribed application form, HRA 2000, OMH evaluated their applications and approved community-based alternatives, when appropriate.

The District Court summarily rejected OMH's position that supported housing is only appropriate for individuals with mild impairments by accepting Plaintiff's contention that "whatever support services are necessary" may be brought into supported housing settings. The Court, however, made no findings as to whether sufficient psychiatric, psychological, case management, social work, nursing and direct care staff are available in the community. The Court also employed historic supported housing cost figures in addressing New York's fundamental alteration defense, notwithstanding that the cost of providing supported housing will obviously balloon if New York is required to afford "whatever supportive services are necessary."[6]

Plaintiff's "constituents" are not currently participating in any OMH-funded residential mental health service, program or

[6] Supported housing is a cost-effective option for many individuals; however, it becomes cost prohibitive, and therefore unreasonable, if it is necessary to bring in extensive medical, nursing, case management, direct care, and other services into dispersed apartment settings.

activity, but, by virtue of the mere fact that the constituents elected (without OMH involvement or funding) to reside in privately-operated "Adult Homes," the Judgment of the Court below entitles them to receive an apartment, substantially paid for by Defendants, and "whatever" support services they require. Remedial Order and Judgment, March 1, 2010, ¶ 1. Moreover, Defendants are enjoined to ensure that no individual with mental illness is offered placement in an Adult Home unless the individual declines supported housing. Therefore, any mentally ill individual who even "thinks about" living in an Adult Home in the future is now entitled, solely by the Court's Judgment, to receive an apartment and whatever supported services he or she requires. Id.

The availability of this "entitlement" is not even limited by the severity of an individual's mental illness or his or her comparative need for assistance. See, 2010 U.S. Dist LEXIS 17949, *15,*16 (Memorandum and Order, March 1, 2010)(rejecting Defendants' proposal to limit the scope of the Judgment to individuals in Adult Homes with "severe" mental illness).

Moreover, the Judgment precludes OMH from following its standards defining when Plaintiff's "constituents" are "qualified" for supported housing. Instead, OMH must provide supported housing unless the individual has very narrowly defined characteristics, set entirely by the Court.

Specifically, the Court requires Defendants to determine that the individual is "qualified" unless he or she has "severe dementia," 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 is "likely to cause imminent danger to themselves or others." Remedial Order and Judgment, ¶ 10.

ARGUMENT

I. THERE IS NO PROPER BASIS FOR RELIEF AGAINST THE GOVERNOR, DOH, OR THE DOH COMMISSIONER

The Governor, the Commissioner of DOH, the DOH and similar officials and agencies in the *amici* states need to devote their attention to their assigned public responsibilities, and should not be found liable for violating the ADA, or be compelled to participate in implementing the remedies afforded by a Court when they are not responsible for and did not cause the "injury" that is claimed in this action. The constitutional case or controversy requirement ensures that particularized demonstrations of "injury in fact" and causation are made with respect to each claim, and with respect to each defendant. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982); Duchesne v. Sugarman,

566 F.2d 817 (2d Cir. 1977); Dahlberg v. Becker, 748 F.2d 85 (2d Cir. 1984).

Declaratory or injunctive relief may not enter against a defendant in the absence of an "affirmative link between the occurrences of the various incidents … and the adoption of any plan or policy … showing their authorization or approval of such misconduct." Rizzo v. Goode, 423 U.S. 362 (1976)(emphasis added). Furthermore, a suit may not be brought against a governor "based upon the theory … [that] as the executive of the state, [the governor] was, in a general sense, charged with the execution of all of its laws." Ex parte Young, 209 U.S. 123, 157 (1908).

Even if Plaintiff claimed that DOH failed to exercise its limited health inspection and licensure responsibilities appropriately (which is not the case here), the agency's discretionary exercise of its licensure authority only indirectly benefits residents of facilities subject to licensure. Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005); O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980). Messier v. Southbury Training Sch., 1999 U.S. Dist. LEXIS 1479 (D. Conn. Jan. 5, 1999).[7]

[7] Unlike Plaintiff in this action, the plaintiffs in Messier claimed that the alleged failure of the health inspection agency to properly fulfill its health inspection functions resulted in improper medical treatment of disabled persons. The district

Furthermore, DOH also cannot be held responsible for any "discriminatory" conduct by the private Adult Homes, in the absence of allegations and proof that the "discriminatory conduct" of such third parties was substantially motivated by DOH's regulatory choices. Whitmore v. Arkansas, 495 U.S. 149, 155-56 (1990); Community for Creative Non-Violence v. Pierce, 814 F.2d 663, 669 (D.C. Cir. 1987).

Accordingly, no proper basis exists for the entry of relief against the Governor, DOH, or the Commissioner of DOH.

II. PLAINTIFF LACKS STANDING TO ASSERT THE CLAIMS RAISED IN THIS ACTION

The District Court improperly held that Plaintiff Disability Advocates, Inc. ("DAI") had standing to sue on behalf of its constituents by relying upon the "well-established [authority] in this district that P&A organizations have standing to sue on behalf of their constituents … ." 598 F. Supp. 2d at 309, citing Brown v. Stone, 66 F. Supp. 2d 412 (E.D.N.Y. 1999). Respectfully, the Court erred because the "well-established authority" in the District is predicated solely upon the terms of a federal funding statute that

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court nevertheless dismissed the claim against the health inspection agency in the absence of pleading that the agency's misconduct was "a substantial factor motivating the third parties action," due to standing and causation requirements. Id., at *76-80.

authorizes funded organizations to engage in advocacy activities. That "well-established authority" is erroneous because the federal funding statute, by its terms, only authorizes funded organizations to engage in advocacy, including litigation. The text of the funding statute does not purport to displace the normal, constitutional "case or controversy" requirement that a plaintiff must have suffered injury in fact in order to have standing to sue. If Congress intended to take such a radical step as removing constitutional standing requirements, that intention would have been apparent in the text of the statute and in the history of the provision when it was first enacted, yet the text and history indicate no Congressional intent to confer standing in 42 U.S.C. § 10805.

In any event, Congress lacks the constitutional authority to confer standing by mere legislation since "injury in fact" is a bedrock constitutional requirement that cannot be abrogated by an Act of Congress. See, Hunt v. Washington State Apple Adver. Group, 432 U.S. 333 (1977). To the extent that the Court below recognized that constitutional requirements for "associational standing" must be satisfied, the Court erred by determining that those requirements could be met by injury to "constituents."

In order for an association to have standing, it must allege and prove that its members or member equivalents have been injured and would otherwise have standing to sue in their

own right. Warth v. Seldin, 422 U.S. 490 (1975); Hunt, supra.[8] The injury of mere "constituents" is insufficient. Mo. Prot. & Advocacy Servs. v. Carnahan, 499 F.3d 803 (8th Cir. 2007)(ruling that "those persons are only MOPAS constituents," and that "as the Fifth Circuit held in A.R.C. of Dallas, 19 F.3d at 244 the 'constituents of MOPAS have no such relationship to the organization [that was analogous to the relationship between apple growers and the Apple Commission in Hunt].'"); Assoc. for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr., Bd of Trustees, 19 F.3d 241, 244 (5th Cir. 1994); Hope, Inc. v. County of Du Page, 738 F.2d 797 (7th Cir. 1984); American Legal Foundation v. FCC, 808 F.2d 84 (D.C. Cir. 1987); People Organized for Welfare & Employment Rights v. Thompson, 727 F.2d 167, 173 (7th Cir. 1984).

The District Court erroneously found that Plaintiff DAI satisfied associational standing requirements based upon the injury of mere "constituents," without finding that those constituents were, in fact, members of a membership organization

[8] "Member equivalent" status was satisfied in Hunt based upon the fact that the advocacy entity was controlled by injured apple growers who alone served on its governing board and financed its activities, making the organization the functional equivalent of a membership organization.

or "member equivalents" of a non-membership organization. Hunt, supra.[9]

Moreover, even if DAI demonstrated that its "constituents" were "members" or "member equivalents," DAI nevertheless lacks standing to sue because it has not demonstrated that its "constituents" have been injured by Defendants' conduct in a manner that would allow the constituents to bring this action directly on their own behalf. "Standing" requires a demonstration of "injury in fact," a causal relationship between the injury and the challenged conduct, and a likelihood that the injury will be redressed by a favorable decision. United Food & Commer. Workers Union Local 751 v. Brown Group, 517 U.S. 544 (1996). It further requires proof that the challenged conduct violates the "legal rights" of plaintiffs, Judicial Watch, Inc.

[9] Two circuit cases disagree with the holdings of the Fifth and Eighth Circuits in A.R.C. and MOPAS, and find that the Protection and Advocacy organizations involved in those cases are "membership equivalent" organizations, under the facts of each case. See Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101 (9th Cir. 2003) and Doe v. Stincer, 175 F.3d 879 (11th Cir. 1999). The *amici* disagree with the holdings of these Circuits because the Courts gave inordinate weight to the Protection and Advocacy funding statute, 42 U.S.C. § 10805, in violation of the requirements of Hunt, and because the extent of the constituents' involvement in the governance of the organizations was nowhere comparable to the extent of the apple growers' involvement in Hunt. See Weisshaus v. Swiss Bankers Ass'n (In re Holocaust Victim Assets Litig.), 225 F.3d 191, 192 (2d Cir. 2000) wherein this Court remanded a case to the District Court with directions to apply the Hunt criteria in making membership equivalent determinations.

v. United States Senate, 340 F. Supp. 2d 26 (D. D.C. 2004), and a demonstration that the injury is "concrete," "particularized," "actual" and "imminent." Lujan, 504 U.S. at 560. Also, in order to satisfy "causation" requirements, Plaintiff must demonstrate that the "injury" can be "fairly traced" to the challenged conduct of the Defendant. Valley Forge Christian College, 454 U.S. at 472; Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976).

The trial court determined that the mere fact that Plaintiff's mentally ill constituents reside (or could potentially reside in the future) in an Adult Home when they "could be" served in an alternative supported housing program enough to satisfy "injury in fact" requirements. 598 F. Supp. 2d at 309-10. However, the fact that Plaintiff's constituents live in Adult Homes is not a legal injury because Defendants are not required to "prevent institutionalization." See Olmstead v. L.C. by Zimring, 527 U.S. 581, 603 fn. 14 (1999)(ADA does not impose a "standard of care," or require a "level of benefits" to be provided, and only requires "that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide."); Rodriquez, 197 F.3d at 619 ("Olmstead does not, therefore, stand for the proposition that states must provide disabled individuals with the opportunity to remain out of institutions. Instead, it holds only that states must adhere

to the ADA's nondiscrimination requirement with regard to the services they in fact provide."); Doe v. Pfrommer, supra, (finding that the purpose of ADA is to guarantee that the disabled receive fair access to governmental services in comparison to the access of non-disabled persons, and not to ensure that the disabled receive "adequate" services). Accordingly, "legal injury" requires more than mere physical presence in an Adult Home; it requires the identification of a governmental "service, program, or activity" that was administered by Defendants in a discriminatory fashion, specifically causing harm to Plaintiff's constituents.

The closest the court below came to identifying a governmental service, program, or activity at issue is the claim that "Defendants … are responsible for determining what services to provide, in what settings to provide them, and how to allocate funds for each program." 598 F. Supp. 2d at 319. Respectfully, this observation cannot really apply to DOH or its Commissioner, which only perform licensure functions and do not administer or fund mental health programs. It likewise cannot apply to the Governor. Even as to the state mental health agency, the planning or allocation of resources between the various programs OMH administers does not constitute a "service, program or activity" within the meaning of 42 U.S.C. § 12132 (discussed infra).

The State Defendants, furthermore, did not cause the claimed "injury" since Plaintiff's constituents reside in privately-operated facilities on their own volition, and there is no claim or finding that the State required (or even authorized or approved) their admission into such facilities. Plaintiff claims that its constituents had "no choice" but to voluntarily seek admission into such facilities due to the absence of alternatives; however, the alleged lack of alternatives cannot constitute legal injury since the ADA only prohibits the discriminatory provision of services, programs, or activities that are, in fact, administered by the State, and does not require the states to meet the needs, or to provide the level of services, "required" by disabled persons. Alexander, supra; Doe v. Pfrommer, supra; Rodriguez, supra.

Moreover, Plaintiff's constituents are not aggrieved by Defendants' failure to provide them with "supported housing" or any other community-based alternatives to Adult Homes because of the absence of allegations and findings that the constituents applied for and were denied such alternatives by Defendants. In only one fact scenario has the Supreme Court ever suggested that state governments have an affirmative obligation to consider, and to provide, a "less restrictive alternative," in the absence of an affirmative request for such assistance. Namely, in Olmstead, the state agency was actually providing a service,

residential mental health care in an institutional setting. The State's own readily-available treatment professionals had already determined that the individual could more appropriately be served in a community-based setting, and the State had already provided alternative, community-based residential care through State-funded group home and supported housing arrangements. Under such circumstances, Olmstead held that the State violated the ADA by not affirmatively taking steps to transfer the individual to the alternative setting, in the absence of "opposition" by the individual and in the absence of a "fundamental alteration" defense. Id. None of the foregoing facts applies to this case as Plaintiff's constituents are not participating in any governmental "services, programs, or activities" that are provided by Defendants in a discriminatory fashion, and as Defendants' treatment professionals are not readily available and have not assessed them. Under these circumstances, Plaintiffs are not aggrieved by Defendants' "conduct," which has not "caused" the claimed "injury," in the absence of the constituents affirmatively submitting an application to Defendants for community-based care, with such application being denied by Defendants for reasons that are discriminatory. See Vinson v. Thomas, 288 F.3d 1145, 1154 (9th Cir. 2002); Fleming v. New York University, 865 F.2d 478 (2d

Cir. 1989); Martin v. Taft, 222 F. Supp. 2d 940, 972 (S.D. Ohio 2002); Messier, supra.

III. PLAINTIFF'S CONSTITUENTS DID NOT RECEIVE GOVERNMENTAL SERVICES, PROGRAMS, OR ACTIVITIES THAT WERE PROVIDED IN A DISCRIMINATORY MANNER

In Olmstead, it was apparent that the plaintiff, who resided in a state psychiatric hospital, was receiving governmental "services, programs, or activities." However, the Defendants in this case properly argued below that the "service, program, or activity" requirement was not satisfied merely by the "constituents'" residence in institutions in the absence of pleading and proof that Defendants were responsible for the institutionalizations. The Court below severely criticized Defendants' position, citing cases where the ADA had been held to apply notwithstanding plaintiff's residence in private institutions, such as private nursing facilities funded by Medicaid. 598 F. Supp. 2d at 317-319. In each of the cited cases, however, the State operated community-based programs that might have afforded an alternative to state-financed institutional care, and the plaintiff applied for the alternative program and requested a "modification" to the program which allegedly would have allowed him or her to receive community-based services. At issue in each of these cases was

the state's refusal to modify the alternative community-based program.

What is different about this case is Plaintiff's tactical decision not to identify, or to apply for, or to request a modification of, any identified alternative, but to instead claim that the ADA is "violated" whenever a state fails to allocate its resources in a manner that ensures that no individual with a disability resides in a private facility. Respectfully, the pertinent question is whether the discriminatory provision of a governmental "service, program, or activity" harmed Plaintiff's constituents, not whether the constituents reside in a private facility.

The Court below disavowed any obligation on Plaintiff to plead and prove that any specific, discriminatory "service, program, or activity" caused "injury" to their constituents, and imposed liability on Defendants based solely upon the planning and service provisions of N.Y. Mental Hygiene Law and on the Court's determination that Defendants could "reasonably" serve Plaintiff's constituents in supported housing by reallocating their resources. However, even the hortatory planning statutes recognize that resources are limited, and require periodic revision of the plans for reasons that include budgetary concerns. N.Y. Mental Hyg. Law §§ 5.07, 7.07. The statutes have not been construed by the New York courts as creating an

"entitlement" for mentally ill individuals to receive any particular treatment or level of care, or to have any such treatment provided in any particular setting.

> The cited sections of the Mental Hygiene Law do not, as plaintiffs argue, provide a "comprehensive mandate" to furnish to plaintiffs with any particular level of care and treatment. On the contrary these provisions define the general mission, or goal of the Office of Mental Health, and were not designed by the Legislature to vest particular rights in the public at large. … [T]he New York courts have firmly linked the "right to adequate treatment" to those whom the State has either confined or assumed custody over … . Since plaintiffs are not presently in the care or custody of the State, they have no general claim to a particular type of care and treatment whether "least restrictive" or otherwise.

Klostermann v. Cuomo, 126 Misc. 2d 247, 251, 481 N.Y.S. 2d 580, 584 (N.Y. Sup. Ct. 1984)(internal citations deleted).

The New York Mental Health planning statutes cannot justify the relief that was ordered in this case. Title II of the ADA provides that, "no qualified individuals with a disability shall, by reason of such a disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added). The second clause in § 12132, "or be subjected to discrimination," is implemented and defined by the regulatory "integration mandate." 28 C.F.R. § 35.130(d). As a practical matter, the "integration mandate" is the basis for relief sought

in this action. That "mandate," by its terms, applies to governmental "services, programs, or activities." 28 C.F.R. § 35.130(d) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.")

Furthermore, the phrase "be subjected to discrimination" refers back to and applies to "qualified individuals," who are, in turn, defined by reference to their ability to "meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (emphasis added).[10] Accordingly, the phrase "or be subjected to discrimination" is also limited and bound by the individual's eligibility for participation in governmental "services, programs, or activities."

In context, the term "services, programs, or activities" refers to a governmental "output that is generally available,

[10] To the extent that this Court may have suggested in Innovative Health Sys. v. City of White Plains, 117 F.3d 37 (2d Cir. 1997), that the second phrase, "or be subjected to discrimination" applies to all governmental actions without regard to any "service, program, or activity" limitation, this Court did not consider the terms of the "integration mandate," which applies in this case. This Court also did not consider the definition of a "qualified individual," which is also limited by reference to particular services, programs, or activities. See Zimmerman v. Oregon DOJ, 170 F.3d 1169 (9th Cir. 1999).

and that an individual seeks to participate in." Zimmerman, 170 F.3d at 1174. See also, Henrietta D. v. Bloomberg, 331 F.3d 261, 277 (2d Cir. 2003)(defining "benefits of the services, programs, or activities" in 42 U.S.C. § 12132 as meaning the legal entitlements the individual is entitled to receive); Scherman v. New York State Banking Dep't, 2010 U.S. Dist. LEXIS 26288 *30 (S.D.N.Y. Mar. 19, 2010)(citing Zimmerman with approval and noting that Title II defines a "qualified individual" by reference to the individual's "ability to receive services or participate in programs or activities").

"Planning" and "resource allocation" are not governmental "services, programs, or activities" that the public participates in within the meaning of the ADA. The New York "planning statutes" expressly confer planning responsibilities on designated advisory councils and OMH, subject to review and approval by the Governor and the legislature. These statutes do not assure that mentally ill individuals will receive any mental health service from OMH, or that they will receive "supported housing." Klostermann, supra. They are intended to benefit the public generally rather than benefitting any particular mentally ill individual. Town of Castle Rock, supra; O'Bannon, supra.

Moreover, even if "planning" or "resource allocation" determinations were a governmental "service, program, or activity" that is subject to the ADA, a governmental entity does

not "discriminate" by failing to ensure that no individual with mental illness will reside in an Adult Home without first being offered a state-subsidized apartment and "whatever" support services are required. The relief ordered below effectively requires the State to provide a "level of benefits" and to "prevent institutionalization," without regard to the existence of governmental discrimination in any identified governmental service, program, or activity, in direct conflict with the holdings of Olmstead and Rodriguez.

Only by carefully identifying the "service, program, or activity" at issue and carefully examining its purposes and methods of administration is it possible to determine whether any requested modification is reasonable. Moreover, many of the ADA cases involving private providers take place at the intersection of two federal statutes: the federal Medicaid or the federal Vocational Rehabilitation and the ADA. See Alexander, supra; Rodriguez, supra; Leocata, supra. In these cases, the courts read the non-discrimination requirements of the ADA in harmony with the terms of the underlying federal statute, giving full effect to both, if possible, but giving controlling effect to the more specific substantive provision of the federal funding statute in the event of conflict. See, Traynor v. Turnage, 485 U.S. 535 (1988) (requiring terms of

underlying federal statute to be given effect); Alexander, supra(same).

The similar case that is pending in the District of Connecticut, State Office of Prot. & Advocacy, supra, involves a claim on behalf of mentally ill individuals who reside in privately operated nursing facilities. In fact, nearly all of these individuals are eligible for, and participate in, the Title XIX Medicaid program, which pays for their care at the nursing facility. Under federal Medicaid law, the state Medicaid agency is required to authorize their nursing home admission, and to pay for their nursing facility care, if they meet nursing facility level of care requirements. 42 U.S.C. § 1396r(e)(7); 42 C.F.R. §§ 483.116, 483.120. However, the plaintiff in the State Office of Protection and Advocacy case does not even allege that its "constituents" are Medicaid-eligible, or claim that the State administered the Medicaid program improperly in any respect. By not identifying the pertinent "service, program, or activity" at issue, and by not identifying any claimed discriminatory method of administration, the focus and intent of the ADA is distorted from the alleged discriminatory provision of "services, programs, or activities" to an open-ended claim for community-based services.

IV. THE ORDER BELOW INAPPROPRIATELY INTRUDES ON THE AUTHORITY OF THE STATE TO DESIGN PROGRAMS, SET ELIGIBILITY STANDARDS, AND ASSESS CLIENT ELIGIBILITY FOR COMMUNITY-BASED PROGRAMS ULITIZING ITS OWN TREATMENT PROFESSIONALS

By its terms, the ADA potentially requires a State to provide services in an alternative community-based program only if an individual "meets the essential eligibility requirements" for habilitation in a community-based program. Olmstead, 527 U.S. at 602 (citing 28 C.F.R. § 35.130(d)). Olmstead emphasizes that "absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting," and indicates that the State "generally may rely on the reasonable assessments of its own professionals." Id. Accordingly, the plaintiff carries the burden in an ADA integration case to plead and prove that a State's treatment professionals have assessed the individual and determined that individual to be "qualified" for the community-based program. Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003); Martin, 222 F. Supp. 2d at 972; Messier, 1999 U.S. Dist. LEXIS 1479 at *32. Moreover, this Court has determined that it is the State's prerogative to establish the standards for eligibility in alternative, community-based programs. Henrietta D., 331 F.3d at 277-78 (holding that the individual's legal entitlements as defined by the State determine whether or not the individual is a "qualified individual.")

The trial court in this case accepted the contentions of Plaintiffs' experts, who did not perform formal clinical assessments, but found that "virtually all" of the constituents were "qualified" for supported housing. Notwithstanding Olmstead and its emphasis on clinical determinations of the appropriateness of community-based care, the trial court held that clinical assessments are not necessary to determine if the individual is "qualified," but "are only necessary to determine what the supportive services each resident would need *once placed* in supported housing." 653 F. Supp. 2d at 234 fn. 322 (emphasis in original). It specifically rejected Defendants' policy that supported housing is only for individuals with minimal needs, and ordered Defendants to provide "whatever" support services are necessary. Memorandum and Order of March 1, 2010, 2010 U.S. Dist. LEXIS 17949 at *14, *15. The trial court's ruling only allows the housing provider, and not OMH, to determine if the individual is "qualified." Moreover, the Court itself set the "qualifications" for participation in supported housing so broadly that "virtually all" residents must, solely as a result of the Court's Judgment, be determined eligible.

All of the following rulings by the Court below violate the holdings of the Supreme Court and this Court in Olmstead, Rodriguez, and Henrietta D., that it is up to the state's treatment professionals, through the clinical assessment

process, to determine if an individual is "otherwise qualified," and it is up to the administering state agency to prescribe the requirements for participation.

V. THE RELIEF ORDERED BELOW WILL WORK A "FUNDAMENTAL ALTERATION"

Space limitations only allow the *amici* states to briefly identify a few of the ways in which the Judgment of the Court below fundamentally alters the "services, programs, and activities" of the Defendants.

State mental health agencies only provide residential care when it is an integral and necessary part of a treatment plan that requires residential support and supervision. The Judgment of the Court below, however, turns OMH into a provider of subsidized housing.

The Judgment of the Court below fundamentally alters OMH's programs by creating an entitlement to housing and support services on behalf of mentally ill individuals who are not currently being served by OMH, and by barring OMH from engaging in its customary priority-determination processes as to whether the individual is sufficiently needy of mental health residential treatment services to warrant the provision of same.

The Judgment of the Court below fundamentally alters OMH's programs by requiring it to provide "whatever" support services are required.

The Judgment of the Court below fundamentally alters OMH's programs by requiring it to provide housing on behalf of individuals who are not even eligible to receive OMH services, including individuals with dementia.

The Judgment of the Court below fundamentally alters the Governor's and DOH's programs by making them responsible for the development and provision of supported housing when those officials and agencies are not responsible for the provision of mental health services under New York law.

CONCLUSION

For all of the foregoing reasons, the Judgment of the Court below should be vacated, with the action remanded to the District Court with directions to enter Judgment in favor of Defendants.

Respectfully submitted,

STATES OF CONNECTICUT, ARKANSAS,
TENNESSEE, UTAH AND WYOMING
As *Amici Curiae*

RICHARD BLUMENTHAL
ATTORNEY GENERAL of CONNECTICUT*

By: /s/Hugh Barber _____

Hugh Barber**
Assistant Attorney General
Federal Bar No. ct05731
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5212
Fax: (860) 808-5385
E-mail: Hugh.Barber@ct.gov

* Other Attorneys General Listed Inside Front Cover

** Counsel of Record

CERTIFICATION

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6864 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief had been prepared in a monospace typeface (courier new) with 10.5 or fewer characters per inch.

/s/ Hugh Barber
Hugh Barber
Assistant Attorney General

CERTIFICATION OF SERVICE

I hereby certify that on July 29, 2010, a copy of the foregoing Brief of the States of Connecticut, Arkansas, Tennessee, Utah and Wyoming In Support Of The New York State Defendants-Appellants was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of he Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Hugh Barber
Hugh Barber
Assistant Attorney General