UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of Thomas Mitchell,
a person with developmental disabilities,
by and through his Guardian, John Mitchell;

Plaintiff.

Case No. 16-11605
Hon. DAVID M. LAWSON

v.

Community Mental Health of Central Michigan,
Michigan Department of Health and Human Services,
Nick Lyon, Director of the Michigan Department of Health and Human Services,
Rick Snyder, Michigan Governor.

Defendants.
_____/

Patricia E. Kefalas Dudek (P46408)
Patricia E. Kefalas Dudek and Associates
Attorney for Plaintiff
30445 Northwestern Highway, Suite 310
Farmington Hills, Michigan 48334
pdudek@pekdadvocacy.com
(248) 254-3462
_____/

COMPLAINT FOR DECLARATORY AND/OR INJUNCTIVE RELIEF AND DAMAGES

NOW COMES PLAINTIFF, In the matter of Thomas Mitchell, a person with developmental disabilities, by and through his Guardian, John Mitchell, and by and

through his attorney Patricia E. Kefalas Dudek of Patricia E. Kefalas Dudek & Associates, for his Complaint states as follows:

PARTIES AND JURISDICTION

1. Thomas Mitchell is a 29 year old Medicaid beneficiary with severe intellectual disabilities and a seizure disorder, who qualifies as a person with a developmental disability pursuant to MCL 330.1100a(25).

2. John Mitchell is Thomas Mitchell's father and was appointed Thomas' plenary Guardian on August 28, 2014 by the Isabella County Probate Court. (*Letter of Guardianship, Exhibit 1.*)

3. Thomas Mitchell resides in his own apartment in the lower level of John Mitchell's family home located at all relevant times in Mount Pleasant, Michigan.

4. Defendant Community Mental Health of Central Michigan ("CMHCM") provides Medicaid waiver-covered services to people, like Plaintiff, who reside in the service area.

5. Defendant Michigan Department of Health and Human Services ("MDHHS") oversees the Michigan Medicaid program and implementation.

6. Defendant Nick Lyon is the Director of the Defendant MDHHS and oversees and/or is in charge of the Defendant MDHHS.

7. Defendant Rick Snyder is the governor of Michigan and oversees and/or is in charge of all departments of the Michigan government including Defendant MDHHS.

8. This Court has jurisdiction pursuant to Title II of the American's with Disabilities Act, 42 U.S.C. §12101, et seq. ("ADA"); 42 U.S.C. §1983; Section 504 of the Rehabilitation Act of 1973, as amended, at 29 U.S.C. §794 (the "Rehabilitation Act"); and/or pursuant to 28 U.S.C. §1343(a)(4).

9. Venue is proper in this Court under 28 U.S.C. §1391(b) because the events giving rise to Plaintiffs' claims occurred in the Mount Pleasant area and the Defendants provide Medicaid covered services for this area.

FACTUAL ALLEGATIONS

10. Plaintiff incorporates and restates the allegations in paragraphs 1 through 9 as if fully set forth herein.

11. Thomas Mitchell moved home from a licensed Adult Foster Care home in August 2014. Thomas has his own apartment in the lower level of John Mitchell's Mount Pleasant home.

12. Thomas' primary care physician, Michael L. McConnon, M.D., concluded that it is medically necessary that Thomas receive 24 hour care including supervisory care at night because he has a history of falls at night. Plus, Thomas

medically requires assistance at night for using the toilet (voiding) and for transferring and repositioning. (*May 22, 2015 letter from Dr. McConnon, Exhibit 2).*

13. Since August 2014, Thomas has received, as part of his Habilitation Supports Waiver Program, Community Living Supports ("CLS") which included medically necessary supervisory care at night due to his medical conditions, as Defendant CMHCM had previously concluded that such care was medically necessary.

14. On March 6, 2015, John Mitchell met with Defendant CMHCM's Case Manager, Lorraine Crawford, and was informed that Defendant CMHCM would no longer pay any CLS toward any medically necessary supervisory care when Thomas was asleep.

15. However, at no point, did Defendant CMHCM send a termination notice of the CLS night time supervision to Plaintiff detailing the reasons for the change in coverage, as required by law. 42 C.F.R. 431.201; 42 C.F.R. 210.

16. For the first time and in direct contradiction to its own past conduct of paying for said services, Defendant CMHCM took the new position that medically necessary supervisory care while Thomas was sleeping was not covered provided for under the definition of CLS in the Medicaid Waiver and Manual.

17. Defendant CMHCM took this new position despite the fact that there was no change in the law and no change in Thomas's medical status. There was no change in Michigan's Habilitation Supports Waiver or the Michigan Medicaid Provider Manual. It is believed the only "change" was due to Defendant CMHCM's interpretation change.

18. At the Administrative Hearing held on July 30, 2015, Kara Kime (Utilization Manager for Defendant CMHCM) testified that the CLS definition does not include supervisory care while a consumer, like Plaintiff, is sleeping. Ms. Kime testified this was supported by the PIHP/CMHSP Encounter Reporting HCPCS Revenue Codes. *Relevant portions of Ms. Kime's testimony, page 40, attached as Exhibit 3.*

19. However, Defendant CMHCM's own billing codes ("PIHP/CMHSP Encounter Reporting HCPCS and Revenue Codes") account for the fact that CLS does include supervisory care when a consumer is sleeping. *See attached highlighted portion; page 13 of the "PIHP/CMHSP Encounter Reporting HCPCS and Revenue Codes", Exhibit 4.*

20. Without payment for the medically necessary supervisory care while Thomas sleeps, Thomas' medical condition will likely deteriorate and he will be in

serious danger of institutionalization, or being placed into a more restrictive setting.

21. In fact, Kara Kime admitted at the Administrative Hearing that Defendant CMHCM would have to "look at different level of residential arrangements" for Plaintiff if natural supports (parents) cannot cover for the Defendant CMHCM's decision to no longer cover CLS provided at night for medically necessary supervisory care. *Relevant portions of Ms. Kime's testimony, page 47, attached as Exhibit 3.*

22. Due to Defendant CMHCM's arbitrary decision to reduce the CLS benefits without any change in the law to support it and in direct contradiction to Thomas's clearly stated medical needs, Plaintiffs sustained damages as more fully set forth herein.

COUNT I
VIOLATION OF 42 U.S.C. §1983

23. Plaintiff incorporates and restates paragraphs 1 through 22 as if fully set forth herein.

24. As a condition of receiving federal funds, Michigan must operate its Medicaid program in compliance with the federal Medicaid statute and implementing regulations. *Harris v McRae*, 448 U.S. 297, 301 (1980).

25. Plaintiff has a federal right to be from discrimination and/or harassment based upon his disability pursuant to Title II of the American's with Disabilities Act, 42 U.S.C. §12101, et seq. ("ADA") and Section 504 of the Rehabilitation Act of 1973, as amended, at 29 U.S.C. §794 (the "Rehabilitation Act").

26. Under the Due Process clause of the Fourteenth Amendment to the United States Constitution, individuals have the right to a meaningful notice and an opportunity to be heard before their assistance under Medicaid is terminated.

27. The individual rights established by the due process clause of the Fourteenth Amendment are enforceable under 42 U.S.C. 1983.

28. Under the federal regulations that interpret and apply the federal Medicaid statute and the due process clause of the Fourteenth Amendment to the United States Constitution, individuals have the right to a pre-termination notice that fully explains the factual and legal basis for the proposed termination.

29. Defendants acted under the color of state law and used and abused its power of office when Defendants arbitrarily deprived Plaintiff of his CLS benefits and otherwise discriminated against Plaintiff based upon his disability as set forth in the factual allegations of this Complaint, paragraphs 10-22.

30. In addition, Defendants did not give proper notice or due process to Plaintiff prior to terminating the CLS benefits for medically necessary night time supervision as required by law. 42 C.F.R. 210; 42 C.F.R. 201.

31. As a direct and proximate result of Defendants' violation of Plaintiffs' civil rights and due process rights, Plaintiffs have sustained injuries and damages and Plaintiffs seek compensatory, economic and punitive damages along with reasonable attorney fees and costs.

COUNT II
DISABILITY BASED DISCRIMINATION IN VIOLATION OF TITLE II OF THE AMERICAN'S WITH DISABILITIES ACT, 42 U.S.C. 12132

32. Plaintiffs incorporate and restate each of the above paragraphs as if fully set forth herein.

33. Plaintiff is a "qualified individual with a disability" as defined in 42 U.S.C. §12131(2).

34. Defendant CMHCM is a public entity for the purposes of the ADA pursuant to 42 U.S.C. §12131(1) and receives federal funding.

35. The ADA and its implementing regulations along with the *Olmstead v L.C.*, 527 U.S. 581 (1999) decision mandate that public entities administer services, programs, and activities in the most integrated setting appropriate to the needs of the qualified individuals with disabilities.

36. The most integrated setting is one that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. 28 C.F.R. §35.130(d).

37. On June 22, 2011, the Department of Justice released a Statement reiterating that enforcing the Integration Mandate of Title II of the ADA and *Olmstead* case was a top priority. *Exhibit 5*.

38. Defendants arbitrarily deprived Plaintiff by taking away the CLS benefits for the medically necessary supervisory care or on call care provided when he is asleep.

39. Due to Defendants' arbitrary conduct of depriving Plaintiff of CLS benefits for medically necessary supervisory care while Plaintiff is sleeping, Plaintiff's medical condition will likely deteriorate and Plaintiff will face a serious risk of being institutionalized, or being placed into a more restrictive setting.

40. Defendants' actions directly contravene the requirement to integrate persons with disabilities into the community as mandated by the Supreme Court in *Olmstead*.

41. As a direct and proximate result of Defendants' unlawful discrimination, Plaintiff has sustained injuries and damages, and Plaintiffs seek

compensatory, economic and punitive damages along with reasonable attorney fees and costs.

COUNT III
VIOLATION OF THE REHABILITATION ACT
29 U.S.C. §701 et seq.

42. Plaintiff incorporates and restates each of the above paragraphs as if fully set forth herein.

43. Plaintiff is a "disabled/handicapped" individual as defined in 29 U.S.C. §705.

44. The Rehabilitation Act and its implementing regulations require that Defendants administer programs/activities in the most integrated setting appropriate to the needs of qualified handicapped/disabled persons. 28 C.F.R. §41.51 and 45 C.F.R. §84.4.

45. Plaintiff has been denied CLS benefits by Defendants' arbitrary decision and this violates the integration mandate of *Olmstead* and otherwise subjects Plaintiff to discrimination based on his disability.

46. As a direct and proximate result of Defendants' unlawful discrimination, Plaintiffs have sustained injuries and damages, and Plaintiffs seek compensatory, economic and punitive damages along with reasonable attorney fees and costs.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter judgment against Defendants providing the following relief:

A. A declaration that Defendants violated Plaintiff's rights under Section 504 of the Rehabilitation Act and the ADA;

B. Reasonable attorney fees and costs pursuant to 42 U.S.C. §1988 and the ADA;

C. Compensatory damages exclusive of costs, interest and attorney fees, to which Plaintiff is found to be entitled;

D. Punitive/exemplary damages against Defendants in whatever amount, exclusive of costs, interest and attorney fees, to which Plaintiff is found to be entitled and awarded to the fullest extent available under the law;

E. An order placing Plaintiff in the position he would have been in had there been no violation of his rights;

F. An injunction enjoining or restraining Defendants from withholding payment of CLS benefits for Plaintiff's medically necessary supervisory care while sleeping;

G. Take other appropriate nondiscriminatory measures to overcome the above described discrimination; and

H. Granting any other relief which this Honorable Court deems equitable and appropriate under the circumstances.

By: /s/ Patricia E. Kefalas Dudek
Patricia E. Kefalas Dudek (P46408)
Patricia E. Kefalas Dudek and Associates
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Dated: May 4, 2016.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

INDEX OF EXHIBITS – MITCHELL COMPLAINT

Exhibit	Description
1	Guardianship papers for Thomas Mitchell
2	May 22, 2015 letter from Dr. McConnon
3	Kara Kime's testimony, pages 39-40, 47
4	PIHP/CMHSP Encounter Reporting HCPCS and Revenue Codes, page 12-13
5	June 22, 2011 letter from the Department of Justice

Approved, SCAO

JIS CODE: LET

STATE OF MICHIGAN PROBATE COURT CIRCUIT COURT-FAMILY DIVISION ISABELLA COUNTY	LETTERS OF GUARDIANSHIP OF INDIVIDUAL WITH DEVELOPMENTAL DISABILITY	CASE NO. 2014 0000025270-DD

In the matter of THOMAS MITCHELL, an individual with a developmental disability

TO:

Name, address, city, state, and zip
JOHN MITCHELL
4650 S NOTTAWA RD
MOUNT PLEASANT, MI 48858

You have been appointed and have qualified as ☐ partial guardian ☒ plenary guardian of the ☐ estate ☒ person of the individual named above. By this instrument you are granted authority to perform all acts permitted or required by statute, court rules, and order of this court unless limited below.

☐ The guardian's authority is limited to those acts specifically set forth below:

The order appointing you as guardian expires on _____.
Date

08/28/2014
Date

William T. Ervin
Judge

30654
Bar No.

WILLIAM T. ERVIN

Attorney name (type or print) Bar no.

Address

City, state, zip Telephone no.

SEE NOTICE OF DUTIES ON LAST PAGE

I certify that I have compared this copy with the original on file and that it is a correct copy of the whole of such original, and on this date, these letters are in full force and effect.

8/28/14
Date

Laura Pleasants
Deputy probate register/clerk

Do not write below this line - For court use only

FILED

AUG 28 2014

Isabella Citizens for Health, Inc.
2940 Health Parkway
Mount Pleasant, MI 48858
Phone (989) 953-5320
Fax (989) 953-5329

05/22/2015

RE:
Thomas Mitchell
4650 S Nottawa Rd
Mount Pleasant, MI 48858-

To Whom It May Concern:

Mr. Thomas G. Mitchell has a hx of severe mental retardation and seizures. He has a hx of falls at night time and frequently wakes up at night trying to use the bathroom and needs assistance with night time voiding, transferring, as well as repositioning. I recommend that he have 24 hour assistance, thanks.

Sincerely,

Electronically signed by: Michael L. McConnon MD 05/22/2015 09:33 AM

Document generated by: Michael L. McConnon, MD 05/22/2015

A MDHHS, it comes directly from the State.
Q Is this a new requirement?
A It is not. This particular one was--actually, that I'm looking at currently in the exhibit, was revised on 4/1/15. I do not believe it changed the reporting and costing considerations of community living supports, so.
Q Okay. Do you have any consumers that you pay for supervision while they're sleeping?
A I am not aware of any that we are currently providing. I can't answer that question in terms of other consumers based on this case.
Q Why not?
A One, I've been here six months. But for the ones that I've had--
Q Okay.
A The ones that I have reviewed, there are current--there were currently sleeper stipends that were in place that are being looked at and determined. There is an assessment process that's being developed currently from my position coming in that will be put into place. All of them are under review and will be switched over and looked at for medical necessity as well as clinical determination.
Q So the only people you're looking at are people who have sleeper stipends, not people who have paid CLS staff awake at night?

A No, this is every--every single consumer will be reviewed with that process over the next year. We have lots of consumers who are getting CLS, so it's gonna take some time, but we will have a committee reviewing those.

Q And when you say face-to-face, the Department told you that a face-to-face interaction, does that include supervising them while they're sleeping?

A That is inherently not a face-to-face service if they are sleeping.

Q Where are you basing that?

A Because community living supports are meant to facilitate the individual's independence, productivity and promote inclusion and participation, which is a training experience for that consumer. It's not something--

Q What are you basing that on?

A This is literally coming from the Medicaid Provider Manual as well as the HCPC code and revenue code reporting that I just--we entered into as an exhibit.

Q Can you please read to me where it literally says that in the Medicaid Manual, please?

A Community living supports facilitate an individual's independence, productivity and promote inclusion and participation. In conjunction with that, then the HCPC and revenue codes states that--

Q Wait--wait--wait--wait--wait. I didn't ask about the revenue

you familiar with that at all about what adult home help can provide and not provide?

A I do not have it directly in front of me. I do not believe that supervision is one of the adult home help tasks that are delineated within those time and task forms.

Q Okay. So if you eliminated the number of hours they get for adult home help and the person needs medically necessary supervision, reminding, observing or cueing, how is that provided to them during those hours?

A There are other supports that have to be looked at. For example, CLS is a mental health service, it is not specifically meant for medical support at night if that's what's needed. So other private paid situations have to be looked at, natural supports and community supports.

Q Okay. If there were no natural supports to step in in this situation, what do you think would happen?

A And we would look at different--different level of residential arrangements for that consumer because he would not be able to maintain his independence in that setting in a safe manner.

Q Okay. So if--if your service allocation forces him into a more restrictive setting, do you not find that to be a violation of the ADA [inaudible]

A I'm not familiar with those, so I'm not going to speak directly to them.

PIHP/CMHSP ENCOUNTER REPORTING
HCPCS and REVENUE CODES

Service Description (Chapter III & PIHP Contract)	HCPCS & Revenue Codes	Reporting Code Description from HCPCS and CPT Manuals	Reporting Units/ Duplicate Threshold "DT"	Reporting Technique & Claim Format	Coverage	Reporting and Costing Considerations
						-Includes physician's fees, discharge meds, court hearing transportation costs -If physician is paid separately, use inpatient physician codes and cost the activity there -Report physician consult activity separately -Report ambulance costs under transportation -For authorization costs, see assessment codes if reportable as separate encounter, otherwise report as part of PIHP admin Hospital liaison activities (e.g., discharge planning) are reported as case management or supports coordination
Community Living Supports	H2015, H2016, H0043, T2036, T2037	H2015-comprehensive Community Support Services per 15 min. H2016 – comprehensive Community Support Services per day in specialized residential settings, or for children with SED in a foster care setting that is not a CCI, or children with DD in either foster care or CCI. Use in conjunction with Personal Care T1020 for unbundling specialized residential per diem. H0043 – Community Living Supports provided in unlicensed independent living setting or own home, per day T2036 therapeutic camping overnight, waiver each session (one night = one session) T2037 therapeutic camping day, waiver, each session (one day/partial day = one session) Modifier HK (specialized mental health programs for high-risk populations) must be reported for Habilitation Supports Waiver beneficiaries. No	Refer to code descriptions DT: H2015=96/day H2016=1/day H0043=1/day T2036=1/day T2037=1/day	H2015, T2036, T2037: Line H2016, H0043: Series Professional	Habilitation Supports Waiver, 1915 (b)(3), & EPSDT	<u>When/how to report encounter:</u> -Face-to-face for 15 minute unit codes -Days of attendance in setting for per diem codes, with a minimum of 15 minutes face-to-face with qualified provider -For an individual receiving CLS that is reported as a per diem, it is also permissible to report for CLS 15 minutes, skill building, or other covered services that are provided outside the home in a 24 hour period. <u>Allocating and reporting costs:</u> -Cost includes staff, facility, equipment, travel, staff and consumer transportation, contract services, supplies and materials -Day rate reported must be net of SSI/room and board, Home Help and Food stamps -Costs for community activities -Costs for vehicles <u>Boundaries:</u> -Between CLS (H2016) and Personal Care (T1020) in Specialized Residential -For H2016 in specialized residential assume:

PIHP/CMHSP ENCOUNTER REPORTING
HCPCS and REVENUE CODES

Service Description (Chapter III & PIHP Contract)	HCPCS & Revenue Codes	Reporting Code Description from HCPCS and CPT Manuals	Reporting Units/ Duplicate Threshold "DT"	Reporting Technique & Claim Format	Coverage	Reporting and Costing Considerations
		modifier is reported for B3 Services. Modifier TT when multiple consumers are served simultaneously in non-licensed settings				*Less intensive staff involvement than personal care *Staff provide one-on-one training to teach the consumer to eventually perform one or more ADL task(s) independently; OR *One staff to more than one consumer provides training along with prompting and or guiding the consumers to perform the ADL tasks independently; OR *One staff to more than one consumer prompting, cueing, reminding and/or observing the consumers to perform one or more ADL tasks independently; OR *One staff to one or more consumers supervising while consumers are sleeping. Boundaries: -Between CLS and supported employment (SE): *Report SE if the individual has a job coach who is also providing assistance with ADLs *If the individual has no job coach, but for whom assistance with ADLs while on the job is being purchased, report as CLS -Between CLS and Respite: *Use CLS when providing such assistance as after-school care, or day care when caregiver is normally working and there are specific CLS goals in the IPOS. *Use Respite when providing relief to the caregiver who is usually caring for the beneficiary during that time -Between CLS and Skill-building (SK): *Report SK when there is a vocational or productivity goal in the IPOS and the individual is being taught the skills he/she will need to be a worker (paid or unpaid)

U.S. Department of Justice
Civil Rights Division

Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*

In the years since the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), the goal of the integration mandate in title II of the Americans with Disabilities Act – to provide individuals with disabilities opportunities to live their lives like individuals without disabilities – has yet to be fully realized. Some state and local governments have begun providing more integrated community alternatives to individuals in or at risk of segregation in institutions or other segregated settings. Yet many people who could and want to live, work, and receive services in integrated settings are still waiting for the promise of *Olmstead* to be fulfilled.

In 2009, on the tenth anniversary of the Supreme Court's decision in *Olmstead*, President Obama launched "The Year of Community Living" and directed federal agencies to vigorously enforce the civil rights of Americans with disabilities. Since then, the Department of Justice has made enforcement of *Olmstead* a top priority. As we commemorate the 12th anniversary of the *Olmstead* decision, the Department of Justice reaffirms its commitment to vindicate the right of individuals with disabilities to live integrated lives under the ADA and *Olmstead*. To assist individuals in understanding their rights under title II of the ADA and its integration mandate, and to assist state and local governments in complying with the ADA, the Department of Justice has created this technical assistance guide.

The ADA and Its Integration Mandate

In 1990, Congress enacted the landmark Americans with Disabilities Act "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." [1] In passing this groundbreaking law, Congress recognized that "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." [2] For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities:

> [N]o 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. [3]

As directed by Congress, the Attorney General issued regulations implementing title II, which are based on regulations issued under section 504 of the Rehabilitation Act. [4] The title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." [5] The preamble discussion of the "integration regulation" explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . ." [6]

In *Olmstead v. L.C.*, 527 U.S. 581 (1999),the Supreme Court held that title II prohibits the unjustified segregation of individuals with disabilities. The Supreme Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. [7] The Supreme Court explained that this holding "reflects two evident judgments." First, "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." Second, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." [8]

To comply with the ADA's integration mandate, public entities must reasonably modify their policies, procedures or practices when necessary to avoid discrimination. [9] The obligation to make reasonable modifications may be excused only where the public entity demonstrates that the requested modifications would "fundamentally alter" its service system. [10]

In the years since the passage of the ADA and the Supreme Court's decision in *Olmstead*, the ADA's integration mandate has been applied in a wide variety of contexts and has been the subject of substantial litigation. The Department of Justice has created this technical assistance guide to assist individuals in understanding their rights and public entities in understanding their obligations under the ADA and *Olmstead*. This guide catalogs and explains the positions the

Department of Justice has taken in its Olmstead enforcement. It reflects the views of the Department of Justice only. For questions about this guide, you may contact our ADA Information Line, 800-514-0301 (voice), 800-514-0383 (TTY).

Date: June 22, 2011

Questions and Answers on the ADA's Integration Mandate and *Olmstead* Enforcement

1. What is the most integrated setting under the ADA and *Olmstead*?

A: The "most integrated setting" is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 11 Integrated settings are those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities. Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible. Evidence-based practices that provide scattered-site housing with supportive services are examples of integrated settings. By contrast, segregated settings often have qualities of an institutional nature. Segregated settings include, but are not limited to: (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for daytime activities primarily with other individuals with disabilities.

2. When is the ADA's integration mandate implicated?

A: The ADA's integration mandate is implicated where a public entity administers its programs in a manner that results in unjustified segregation of persons with disabilities. More specifically, a public entity may violate the ADA's integration mandate when it: (1) directly or indirectly operates facilities and or/programs that segregate individuals with disabilities; (2) finances the segregation of individuals with disabilities in private facilities; and/or (3) through its planning, service system design, funding choices, or service implementation practices, promotes or relies upon the segregation of individuals with disabilities in private facilities or programs. 12

3. Does a violation of the ADA's integration mandate require a showing of facial discrimination?

A: No, in the *Olmstead* context, an individual is not required to prove facial discrimination. In *Olmstead*, the court held that the plaintiffs could make out a case under the integration mandate even if they could not prove "but for" their disability, they would have received the community-based services they sought. It was enough that the state currently provided them services in an institutional setting that was not the most integrated setting appropriate. 13 Additionally, an *Olmstead* claim is distinct from a claim of disparate treatment or disparate impact and accordingly does not require proof of those forms of discrimination.

4. What evidence may an individual rely on to establish that an integrated setting is appropriate?

A: An individual may rely on a variety of forms of evidence to establish that an integrated setting is appropriate. A reasonable, objective assessment by a public entity's treating professional is one, but only one, such avenue. Such assessments must identify individuals' needs and the services and supports necessary for them to succeed in an integrated setting. Professionals involved in the assessments must be knowledgeable about the range of supports and services available in the community. However, the ADA and its regulations do not require an individual to have had a state treating professional make such a determination. People with disabilities can also present their own independent evidence of the appropriateness of an integrated setting, including, for example, that individuals with similar needs are living, working and receiving services in integrated settings with appropriate supports. This evidence may come from their own treatment providers, from community-based organizations that provide services to people with disabilities outside of institutional settings, or from any other relevant source. Limiting the evidence on which *Olmstead* plaintiffs may rely would enable public entities to circumvent their *Olmstead* requirements by failing to require professionals to make recommendations regarding the ability of individuals to be served in more integrated settings.

5. What factors are relevant in determining whether an individual does not oppose an integrated setting?

A: Individuals must be provided the opportunity to make an informed decision. Individuals who have been institutionalized and segregated have often been repeatedly told that they are not capable of successful community living and have been given very little information, if any, about how they could successfully live in integrated settings. As a result, individuals' and their families' initial response when offered integrated options may be reluctance or hesitancy. Public entities must take affirmative steps to remedy this history of segregation and prejudice in order to ensure that individuals have an opportunity to make an informed choice. Such steps include providing information about the benefits of integrated settings; facilitating visits or other experiences in such settings; and offering opportunities to meet with other individuals with disabilities who are living, working and receiving services in integrated settings, with their families, and with community providers. Public entities also must make reasonable efforts to identify and addresses any concerns or objections raised by the individual or another relevant decision-maker.

6. Do the ADA and *Olmstead* apply to persons at serious risk of institutionalization or segregation?

A: Yes, the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent. For example, a

plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.

7. May the ADA and *Olmstead* require states to provide additional services, or services to additional individuals, than are provided for in their Medicaid programs?

A: A state's obligations under the ADA are independent from the requirements of the Medicaid program. 14 Providing services beyond what a state currently provides under Medicaid may not cause a fundamental alteration, and the ADA may require states to provide those services, under certain circumstances. For example, the fact that a state is permitted to "cap" the number of individuals it serves in a particular waiver program under the Medicaid Act does not exempt the state from serving additional people in the community to comply with the ADA or other laws. 15

8. Do the ADA and *Olmstead* require a public entity to provide services in the community to persons with disabilities when it would otherwise provide such services in institutions?

A: Yes. Public entities cannot avoid their obligations under the ADA and *Olmstead* by characterizing as a "new service" services that they currently offer only in institutional settings. The ADA regulations make clear that where a public entity operates a program or provides a service, it cannot discriminate against individuals with disabilities in the provision of those services. 16 Once public entities choose to provide certain services, they must do so in a nondiscriminatory fashion. 17

9. Can budget cuts violate the ADA and *Olmstead*?

A: Yes, budget cuts can violate the ADA and *Olmstead* when significant funding cuts to community services create a risk of institutionalization or segregation. The most obvious example of such a risk is where budget cuts require the elimination or reduction of community services specifically designed for individuals who would be institutionalized without such services. In making such budget cuts, public entities have a duty to take all reasonable steps to avoid placing individuals at risk of institutionalization. For example, public entities may be required to make exceptions to the service reductions or to provide alternative services to individuals who would be forced into institutions as a result of the cuts. If providing alternative services, public entities must ensure that those services are actually available and that individuals can actually secure them to avoid institutionalization.

10. What is the fundamental alteration defense?

A: A public entity's obligation under *Olmstead* to provide services in the most integrated setting is not unlimited. A public entity may be excused in instances where it can prove that the requested modification would result in a "fundamental alteration" of the public entity's service system. A fundamental alteration requires the public entity to prove "that, in the allocation of available resources, immediate relief for plaintiffs would be inequitable, given the responsibility the State [or local government] has taken for the care and treatment of a large and diverse population of persons with [ ] disabilities." 18 It is the public entity's burden to establish that the requested modification would fundamentally alter its service system.

11. What budgetary resources and costs are relevant to determine if the relief sought would constitute a fundamental alteration?

A: The relevant resources for purposes of evaluating a fundamental alteration defense consist of all money the public entity allots, spends, receives, or could receive if it applied for available federal funding to provide services to persons with disabilities. Similarly, all relevant costs, not simply those funded by the single agency that operates or funds the segregated or integrated setting, must be considered in a fundamental alteration analysis. Moreover, cost comparisons need not be static or fixed. If the cost of the segregated setting will likely increase, for instance due to maintenance, capital expenses, environmental modifications, addressing substandard care, or providing required services that have been denied, these incremental costs should be incorporated into the calculation. Similarly, if the cost of providing integrated services is likely to decrease over time, for instance due to enhanced independence or decreased support needs, this reduction should be incorporated as well. In determining whether a service would be so expensive as to constitute a fundamental alteration, the fact that there may be transitional costs of converting from segregated to integrated settings can be considered, but it is not determinative. However, if a public entity decides to serve new individuals in segregated settings ("backfilling"), rather than to close or downsize the segregated settings as individuals in the plaintiff class move to integrated settings, the costs associated with that decision should not be included in the fundamental alteration analysis.

12. What is an *Olmstead* Plan?

A: An *Olmstead* plan is a public entity's plan for implementing its obligation to provide individuals with disabilities opportunities to live, work, and be served in integrated settings. A comprehensive, effectively working plan must do more than provide vague assurances of future integrated options or describe the entity's general history of increased funding for community services and decreased institutional populations. Instead, it must reflect an analysis of the extent to which the public entity is providing services in the most integrated setting and must contain concrete and reliable commitments to expand integrated opportunities. The plan must have specific and reasonable timeframes and measurable goals for which the public entity may be held accountable, and there must be funding to support the plan, which may come from reallocating existing service dollars. The plan should include commitments for each group of persons who are unnecessarily segregated, such as individuals residing in facilities for individuals with developmental disabilities, psychiatric hospitals, nursing homes and board and care homes, or individuals spending their days in sheltered workshops or segregated day programs. To be effective, the plan must have demonstrated success in actually moving individuals to integrated settings in accordance with the plan. A public entity cannot rely on its *Olmstead* plan as part of its defense unless it can prove that its plan comprehensively and effectively addresses the needless segregation of the group at issue in the case. Any plan should be evaluated in light of the length of time that has passed since the Supreme Court's decision in *Olmstead*, including a fact-specific inquiry into what the public

entity could have accomplished in the past and what it could accomplish in the future.

13. Can a public entity raise a viable fundamental alteration defense without having implemented an *Olmstead* plan?

A: The Department of Justice has interpreted the ADA and its implementing regulations to generally require an *Olmstead* plan as a prerequisite to raising a fundamental alteration defense, particularly in cases involving individuals currently in institutions or on waitlists for services in the community. In order to raise a fundamental alteration defense, a public entity must first show that it has developed a comprehensive, effectively working *Olmstead* plan that meets the standards described above. The public entity must also prove that it is implementing the plan in order to avail itself of the fundamental alteration defense. A public entity that cannot show it has and is implementing a working plan will not be able to prove that it is already making sufficient progress in complying with the integration mandate and that the requested relief would so disrupt the implementation of the plan as to cause a fundamental alteration.

14. What is the relevance of budgetary shortages to a fundamental alteration defense?

A: Public entities have the burden to show that immediate relief to the plaintiffs would effect a fundamental alteration of their program. Budgetary shortages are not, in and of themselves, evidence that such relief would constitute a fundamental alteration. Even in times of budgetary constraints, public entities can often reasonably modify their programs by re-allocating funding from expensive segregated settings to cost-effective integrated settings. Whether the public entity has sought additional federal resources available to support the provision of services in integrated settings for the particular group or individual requesting the modification – such as Medicaid, Money Follows the Person grants, and federal housing vouchers – is also relevant to a budgetary defense.

15. What types of remedies address violations of the ADA's integration mandate?

A: A wide range of remedies may be appropriate to address violations of the ADA and *Olmstead*, depending on the nature of the violations. Remedies typically require the public entity to expand the capacity of community-based alternatives by a specific amount, over a set period of time. Remedies should focus on expanding the most integrated alternatives. For example, in cases involving residential segregation in institutions or large congregate facilities, remedies should provide individuals opportunities to live in their own apartments or family homes, with necessary supports. Remedies should also focus on expanding the services and supports necessary for individuals' successful community tenure. *Olmstead* remedies should include, depending on the population at issue: supported housing, Home and Community Based Services ("HCBS") waivers, [19] crisis services, Assertive Community Treatment ("ACT") teams, case management, respite, personal care services, peer support services, and supported employment. In addition, court orders and settlement agreements have typically required public entities to implement a process to ensure that currently segregated individuals are provided information about the alternatives to which they are entitled under the agreement, given opportunities that will allow them to make informed decisions about their options (such as visiting community placements or programs, speaking with community providers, and meeting with peers and other families), and that transition plans are developed and implemented when individuals choose more integrated settings.

16. Can the ADA's integration mandate be enforced through a private right of action?

A: Yes, private individuals may file a lawsuit for violation of the ADA's integration mandate. A private right of action lies to enforce a regulation that authoritatively construes a statute. The Supreme Court in *Olmstead* clarified that unnecessary institutionalization constitutes "discrimination" under the ADA, consistent with the Department of Justice integration regulation.

17. What is the role of protection and advocacy organizations in enforcing *Olmstead*?

A: By statute, Congress has created an independent protection and advocacy system (P&As) to protect the rights of and advocate for individuals with disabilities. [20] Congress gave P&As certain powers, including the authority to investigate incidents of abuse, neglect and other rights violations; access to individuals, records, and facilities; and the authority to pursue legal, administrative or other remedies on behalf of individuals with disabilities. [21] P&As have played a central role in ensuring that the rights of individuals with disabilities are protected, including individuals' rights under title II's integration mandate. The Department of Justice has supported the standing of P&As to litigate *Olmstead* cases.

18. Can someone file a complaint with the Department of Justice regarding a violation of the ADA and *Olmstead*?

A: Yes, individuals can file complaints about violations of title II and *Olmstead* with the Department of Justice. A title II complaint form is available on-line at www.ADA.gov and can be sent to:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Disability Rights Section - NYAV
Washington, DC 20530

Individuals may also call the Department's toll-free ADA Information Line for information about filing a complaint and to order forms and other materials that can assist you in providing information about the violation. The number for the ADA Information Line is (800) 514-0301 (voice) or (800) 514-0383(TTY).

In addition, individuals may file a complaint about violations of Olmstead with the Office for Civil Rights at the U.S. Department of Health and Human Services. Instructions on filing a complaint with OCR are available at http://www.hhs.gov/ocr/civilrights/complaints/index.html.

1 42 U.S.C. § 12101(b)(1).

2 42 U.S.C. § 12101(a)(2).

3 42 U.S.C. § 12132.

4 *See* 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Executive Order 12250, 45 Fed. Reg. 72995 (1980), *reprinted in* 42 U.S.C. § 2000d-1. Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C § 794(a) ("No otherwise qualified individual with a disability . . . 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 . . . ."). Claims under the ADA and the Rehabilitation Act are generally treated identically.

5 28 C.F.R. § 35.130(d) (the "integration mandate").

6 28 C.F.R. Pt. 35, App. A (2010) (addressing § 35.130).

7 *Olmstead v. L.C.*, 527 U.S.at 607.

8 *Id.* at 600-01.

9 28 C.F.R.§ 35.130(b)(7).

10 *Id.*; *see also Olmstead*, 527 U.S. at 604-07.

11 28 C.F.R. pt. 35 app. A (2010).

12 *See* 28 C.F.R. § 35.130(b)(1) (prohibiting a public entity from discriminating "directly or through contractual, licensing or other arrangements, on the basis of disability"); § 35.130(b)(2) (prohibiting a public entity from "directly, or through contractual or other arrangements, utilizing criteria or methods of administration" that have the effect of discriminating on the basis of disability").

13 *Olmstead*, 527 U.S. at 598; 28 C.F.R. 35.130(d).

14 *See* CMS, Olmstead Update No. 4, at 4 (Jan. 10, 2001), available at https://www.cms.gov/smdl/downloads/smd011001a.pdf.

15 *Id.*

16 28 C.F.R. § 35.130.

17 *See* U.S. Dept. of Justice, ADA Title II Technical Assistance Manual § II-3.6200.

18 *Olmstead*, 527 U.S. at 604.

19 HCBS waivers may cover a range of services, including residential supports, supported employment, respite, personal care, skilled nursing, crisis services, assistive technology, supplies and equipment, and environmental modifications.

20 42 U.S.C. §§ 15001 *et seq.* (Developmental Disabilities Assistance and Bill of Rights Act, requiring the establishment of the P&A system to protect and advocate for individuals with developmental disabilities); 42 U.S.C. § 10801 *et seq.* (The Protection and Advocacy for Individuals with Mental Illness Act, expanding the mission of the P&A to include protecting and advocating for individuals with mental illness)

21 42 U.S.C. §§ 10805, 15043.