UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD DAY, et al., Plaintiffs, v. DISTRICT OF COLUMBIA, et al., Defendants.	Case No. 1:10-cv-02250-ESH Judge Ellen Segal Huvelle

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

I. INTRODUCTION

The United States files this Statement of Interest, pursuant to 28 U.S.C. § 517,[1] because this litigation implicates the proper interpretation and application of title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). In particular, this case involves title II's integration mandate, 28 C.F.R. § 35.130(d). *See Olmstead v. L.C.*, 527 U.S. 581, 607 (1999). The Department of Justice has authority to enforce title II, and to issue regulations implementing the statute. 42 U.S.C. §§ 12133-34. The United States therefore has a strong interest in the resolution of this matter.

This lawsuit alleges that the District of Columbia ("District") administers its program of long-term care services for persons with disabilities in a manner that unnecessarily confines them to segregated nursing facilities. (First Amended Complaint ("Compl.") at ¶¶ 82, 84, 99, 101, ECF No. 17, March 30, 2011.) The District continues to fund costly, unnecessary institutional

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

placements in violation of the integration mandate of title II of the ADA, as interpreted by the Supreme Court in the *Olmstead* decision, when it could provide appropriate community-based services and supports at the same or even lower cost. (Compl. at ¶¶ 3-4, 6-9, 50, 55, 76, 79-80, 106-112.)

The United States respectfully urges this Court to deny the Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment. First, a public entity's financing and administration of its long-term care system can constitute a violation of title II. Second, a determination by the public entity's treatment professionals regarding the appropriateness of community placement is one method of establishing this element of an *Olmstead* claim, but is not the only way to do so. Third, in order to prevail on a fundamental alteration defense, a public entity must demonstrate that it has a comprehensive, effectively working plan for placing qualified persons with disabilities in integrated community settings and that the relief requested would fundamentally alter that plan or the entity's programs.

II. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It found 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." 42 U.S.C. § 12101(a)(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.

42 U.S.C. § 12132.

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 of 1973.[2] *See* 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Exec. Order 12250, 45 Fed. Reg. 72995 (1980), *reprinted in* 42 U.S.C. § 2000d-1. 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." 28 C.F.R. § 35.130(d). 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 . . . ." 28 C.F.R. Pt. 35, App. B at 673 (2011). This integration mandate advances one of the principal purposes of title II of the ADA—ending the isolation and segregation of persons with disabilities. *See Olmstead*, 527 U.S. at 588-89 (citing 42 U.S.C. §§ 12101(a)(2), (3), (5)).

Twelve years ago, the Supreme Court applied these authorities and held that title II prohibits the unjustified segregation of individuals with disabilities. *Olmstead*, 527 U.S. at 597. The Court held that public entities are required to provide community-based services for persons with disabilities when: 1) such services are appropriate; 2) the affected persons do not oppose such services; and 3) the community-based placement can be reasonably accommodated, taking

[2] Section 504, like title II, 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 . . . ."). In all ways relevant to this discussion, the ADA and Section 504 of the Rehabilitation Act are generally construed to impose similar requirements. *See, e.g., Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1261 n.2 (D.C. Cir. 2008); *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999). This principle follows from the similar language employed in the two acts. It also derives from the Congressional directive that implementation and interpretation of the two acts "be coordinated to prevent[ ] imposition of inconsistent or conflicting standards for the same requirements under the two statutes." *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-69 (4th Cir. 1999) (citing 42 U.S.C. § 12117(b)) (alteration in original).

into account the resources available to the entity and the needs of others who are receiving disability services from the entity. *Id.* at 607.

The Court explained that this holding "reflects two evident judgments." *Id.* at 600. "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." *Id*. "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." *Id.* at 601. *Olmstead* thus clarifies that unnecessary institutionalization violates the ADA's integration mandate.

To comply with the integration requirement of title II of the ADA, a public entity must reasonably modify its policies, procedures, or practices when necessary to avoid discrimination, unless the public entity demonstrates that making the modifications would fundamentally alter the entity's programs or services. 28 C.F.R. § 35.130(b)(7); *see also Olmstead*, 527 U.S. at 603-06.

III. SUMMARY OF FACTS

A. The Plaintiffs

Each of the five named Plaintiffs (Bonita Jackson, Vietress Bacon, Roy Foreman, Edward Day, and Larry McDonald) is a person with a disability whose care in nursing facilities is or was funded by the District's Medicaid program. (Plaintiffs' Opposition to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment ("Opp.") Ex. B, ¶¶ 2-4, ECF No. 28, Sept. 1, 2011; Opp. Ex. C, ¶¶ 3-5, 9; Opp. Ex. D, ¶¶ 2-3, 7-8; Opp. Ex. E, ¶¶ 3-4, 8-9; Opp. Ex. F, ¶¶ 3-4, 9.) Each named Plaintiff would prefer to live in the community and could do

so with appropriate supports and services. (Opp. Ex. A, ¶ 16; Opp. Ex. B, ¶ 5; Opp. Ex. C, ¶¶ 11, 21; Opp. Ex. D, ¶¶ 10, 21; Opp. Ex. E, ¶¶ 11-13; Opp. Ex. F, ¶ 14.)

Bonita Jackson is 53 years old and lived at Washington Nursing Facility for more than four years. (Opp. Ex. B, ¶¶ 1-2.) She has depression and equilibrium problems that require her to use a walker for mobility. (Opp. Ex. B, ¶ 3.) She was very unhappy living in a nursing home, and spent more than two years informing nursing facility staff that she wanted to be discharged to live in the community. (Opp. Ex. B, ¶¶ 5-6.) She was finally discharged while the parties were briefing the District's Motion. (Opp. Ex. B, ¶ 10.)

Vietress Bacon is 47 years old and lived at Washington Nursing Facility for three years. (Opp. Ex. C, ¶¶ 1, 4.) She has a mobility impairment, brain injury, depression, and bipolar disorder. (Opp. Ex. C, ¶¶ 2, 5.) She has repeatedly told nursing facility staff that she wants to live in the community. (Opp. Ex. C, ¶ 11.) She would like to attend the church she used to go to routinely. (Opp. Ex. C, ¶ 8.) According to Plaintiffs' counsel, Ms. Bacon was discharged on September 13, 2011.

Roy Foreman is 66 years old and has lived at Washington Center for Aging Services for five years. (Opp. Ex. D, ¶¶ 1, 3.) He has diabetes, depression, orthopedic limitations that require him to use a wheelchair for mobility, and pressure ulcers. (Opp. Ex. D, ¶ 7.) He misses socializing with friends and family and attending football games. (Opp. Ex. D, ¶¶ 5-6.) Mr. Foreman is eager to leave the nursing facility and return to life in the community, and he has been trying to get out of the nursing facility since he was admitted. (Opp. Ex. D, ¶¶ 11, 14.)

Edward Day is a 76-year-old Air Force veteran who has lived at Unique Residential Care Center for five years. (Opp. Ex. E, ¶¶ 1-2, 4.) He has diabetes, seizures, kidney disease, depression, and anemia, and has had both of his legs amputated. (Opp. Ex. E, ¶ 8.) He wants to

get prostheses, leave the nursing facility, and return to the community. (Opp. Ex. E, ¶¶ 11-12.) He would like to be able to talk to his friends in private, outside of visiting hours. (Opp. Ex. E, ¶ 7.)

Larry McDonald is a 57-year-old Army veteran who has lived at Unique Residential Care Center for more than five years. (Opp. Ex. F, ¶¶ 1-2, 4.) He has a seizure disorder and mild dementia. (Opp. Ex. F, ¶ 9.) He wants to leave the nursing facility so that he can help his family, attend community events and family gatherings, and live near his siblings. (Opp. Ex. F, ¶¶ 7-8, 15.)

The individually named Plaintiffs seek to represent a class of similarly situated individuals who 1) have a disability; 2) receive services in nursing facilities located in the District of Columbia or funded by Defendants; 3) could live in the community with appropriate supports and services; and 4) prefer to live in the community rather than in nursing facilities. (First Amended Complaint ("Compl.") at ¶ 96, ECF No. 17, March 30, 2011.) The putative class includes between 500 and 2,900 members. (Compl. at ¶ 97.)

B. The District of Columbia's Long Term Care System

The District's long term care system includes institutional care such as nursing facilities, as well as community-based services. The District's Medicaid state plan funds nursing facility care.[3] There are nineteen nursing facilities in the District of Columbia, two of which are owned by the District. (Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment

[3] D.C. Department of Health Care Finance, State Plan Under Title XIX of the Social Security Act, Section 3.1, Attachment 3.1A at 2, ¶ 4a; Attachment 3.1B at 1, ¶ 4, available at http://dhcf.dc.gov/dhcf/cwp/view,A,1413,Q,609171.asp (last visited Sept. 19, 2011). Medicaid is a medical assistance program cooperatively funded by the federal and state governments. *See* 42 U.S.C. § 1396 *et seq.*; *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985).

("Motion"), Ex. 5, ¶ 6, ECF No. 19, Apr. 27, 2011; Ex. AA, 96:18-97:4; Opp. Ex. I, ¶ 8.[4]) According to the most recent data reported by the Centers for Medicare and Medicaid Services ("CMS"), 2,516 people lived in nursing facilities in the District in the third quarter of 2010,[5] and 70.5% of these individuals had their nursing facility care funded by Medicaid.[6] The District also funds out-of-state nursing facility placements for approximately 200 individuals. (Opp. Ex. G, 118:9-119:1.)

The District provides community-based services for individuals with disabilities, including services through its Medicaid state plan and the Medicaid Home and Community Based Services Waiver Program for the Elderly and Physically Disabled ("EPD Waiver"). Through its Medicaid state plan, the District provides community-based services, including home health services, physical and occupational therapy, skilled nursing services, case management, assertive community treatment, crisis intervention, and personal care services for assistance with activities of daily living. (Opp. Ex. G, 69:2-21; Ex. BB, 70:1-11; Opp. Ex. H, 18:18-21:18; Ex. CC, 17:11-19:19, 29:2-30:12, 33:20-35:4, 36:6-18; Opp. Ex. L, 39:18-40:4.)

Through the EPD Waiver, the District provides community-based services to some Medicaid recipients who would otherwise be eligible to receive care in nursing facilities. *See* Motion Ex. 4; 42 U.S.C. §§ 1396n(c), 1396n(d). For a waiver to be approved by CMS, it must

[4] Exhibits referred to by numbers were filed with the District's Motion. Exhibits referred to by single letters were filed with Plaintiffs' Opposition. Exhibits referred to by double letters were filed with this Statement of Interest.

[5] CMS, MDS Active Resident Count Report: Sept. 30, 2010, http://www.cms.gov/MDSPubQIandResRep/04_activeresreport.asp?isSubmitted=rescnt&date=32 (last modified May 2, 2011).

[6] CMS, MDS Active Resident Information: Third Quarter 2010, A7a: Identification and Background Information - Current Payment Sources for N.H. Stay - Medicaid per diem, http://www.cms.gov/MDSPubQIandResRep/04_activeresreport.asp?isSubmitted=res3&var=A7a&date=32 (last modified May 2, 2011).

be cost-neutral, meaning that it costs the same amount of money or less to provide the waiver services in the community than it would to provide services in an institution. (Motion Ex. 2, ¶ 9; Opp. Ex. M, 53:19-54:14.) Participants in the EPD Waiver can receive up to sixteen hours of personal care assistance per day, as well as homemaker services, chore aide services, case management, and other services. (Motion Ex. 2, ¶ 5; Opp. Ex. H, 21:19-23:5, 134:1-20; Opp. Ex. DD, 133:19-21.) The waiver is approaching capacity, and the District has announced its intention to establish a waiting list instead of increasing the capacity of the waiver to serve more individuals. (Ex. G, 63:4-16, 67:2-68:6; 58 D.C. Reg. 7592 (Aug. 19, 2011).) No slots in the waiver are set aside for individuals transitioning out of nursing facilities, and individuals in nursing facilities will not be given priority on the waiver waiting list. (Opp. Ex. G, 54:12-56:18; 58 D.C. Reg. 7592 (Aug. 19, 2011).)

The District receives additional funding through the federal Money Follows the Person Rebalancing Demonstration Program ("MFP") to transition individuals from institutions to the community. MFP provides enhanced federal funding to assist states in transitioning currently institutionalized individuals into the community. *See* 42 U.S.C. 1396a, Pub. L. 109-171, tit. VI, § 6071, 120 Stat. 102 (Feb. 8, 2006). Under the program, the federal government reimburses at least 85% of the District's costs for providing the first year of community-based services to individuals with disabilities who transition from institutions. (Motion Ex. 3, ¶ 5; Opp. Ex. H, 51:14-53:3.) CMS authorized $26,377,620 in MFP funds to facilitate these transitions. (Opp. Ex. H, 14:18-15:18.)

IV. ARGUMENT

To survive a motion to dismiss, a complaint must state a plausible claim for relief, contain a short and plain statement of the claim showing that the pleader is entitled to relief, and

give the defendant fair notice of what the claim is and the grounds upon which it rests. *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1108 (D.C. Cir. 2008); *Dean v. Walker*, 756 F. Supp. 2d 100, 102 (D.D.C. 2010). The plaintiff is granted the benefit of all inferences that can be derived from the facts alleged in the complaint. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). A motion for summary judgment should only be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see Breeden v. Novartis Pharm. Corp.*, 646 F.3d 43, 49-50 (D.C. Cir. 2011). Because the Plaintiffs have stated a plausible claim for relief, there are genuine disputes as to material facts, and the District is not entitled to judgment as a matter of law, the District's Motion to Dismiss, or in the Alternative, for Summary Judgment should be denied.

A. A Public Entity Can Violate the Integration Mandate Through Its Funding and Administration of Programs and Services.

The District incorrectly argues that it only violates the ADA's integration mandate if it directly places individuals with disabilities in nursing facilities. (Motion at 10-11.) To the contrary, a public entity violates the integration mandate when it finances the segregation of individuals with disabilities in public or private facilities or promotes the segregation of individuals with disabilities in such facilities through its planning, system design, funding choices, or service implementation. *See* 28 C.F.R. § 35.130(b)(3)(i) (stating that a public entity may not "directly or through contractual or other arrangements, utilize criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability"); *Disability Advocates, Inc. v. Paterson* (*DAI I*), 598 F. Supp. 2d 289, 316-19 (E.D.N.Y. 2009) (finding that the defendants' planning, funding, and administration of a service system was sufficient to support an *Olmstead* claim and rejecting the argument that public entities could not be held liable when services were provided in privately-

operated facilities); *Martin v. Taft*, 222 F. Supp. 2d 940, 981 (S.D. Ohio 2002) (finding that liability does not depend on whether the public entity owns or runs institutional settings).

Courts have consistently applied title II's integration mandate in cases brought by individuals unnecessarily institutionalized in private nursing homes. *See, e.g., Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Conn.*, 706 F. Supp. 2d 266, 276-277 (D. Conn. 2010) (denying motion to dismiss although plaintiffs resided in privately-operated nursing homes); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 286-87, 293 (E.D.N.Y. 2008) (denying motion to dismiss where defendant funded nursing home placements); *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 WL 4571904, at *3 (N.D. Fla. Oct. 14, 2008) (certifying class of Medicaid-eligible individuals who resided in nursing homes that receive Medicaid funding); *Colbert v. Blagojevich*, No. 07 C 4737, 2008 WL 4442597, at *1, *10 (N.D. Ill. Sept. 29, 2008) (granting motion for class certification when plaintiffs were housed in private nursing facilities that received state and federal funding); *Rolland v. Cellucci*, 52 F. Supp. 2d 231, 237 (D. Mass. 1999) (finding it immaterial to a motion to dismiss that plaintiffs resided in private nursing facilities).

B. There Are Many Ways to Establish That Community Placement Is Appropriate for an Individual.

As part of an *Olmstead* case, an individual must show that community placement is "appropriate" for his or her needs. 527 U.S. at 607. The District argues that Plaintiffs' claim should be dismissed because "Plaintiffs . . . have failed to allege that the District has determined community-based services are appropriate for their needs." (Motion at 11.) The District further, and incorrectly, states that, "[i]f Plaintiffs expect the District to fund their community-based services, Plaintiffs are subject to the District's determination of whether or not such services are appropriate to meet their needs." (Motion at 11-12.) Contrary to Defendants' assertions, the Plaintiffs are not required to allege that the District has determined that community placement is

appropriate in order to plead or prove an *Olmstead* claim.

Nothing in the ADA or its implementing regulations requires an individual to show a determination by a state treatment professional as to whether community care is appropriate. An individual may rely on a variety of evidence to establish the appropriateness of an integrated setting, and a reasonable, objective assessment by a public entity's treatment professional is only one way of doing so. *See Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 290-91 (E.D.N.Y. 2008) (rejecting the argument that the state's treatment professionals must be the ones to make an appropriateness determination). If the District were correct in its interpretation of the law, a public entity would be able to indefinitely retain individuals with disabilities in institutions by either failing to evaluate them for community placement or by refusing to recommend community placement. Allowing the public entity to hold ultimate control over individuals' rights would contradict the spirit and purpose of the *Olmstead* decision and the ADA.[7] *See, e.g.*, *Disability Advocates, Inc. v. Paterson* (*DAI II*), 653 F. Supp. 2d 184, 258-59 (E.D.N.Y. 2009) (finding that plaintiffs need not provide determinations from state treatment professional to demonstrate that they are qualified for community placement and noting that holding otherwise would "eviscerate the integration mandate"); *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (noting that the right to receive services in the community would become illusory if the state could deny the right by refusing to acknowledge the appropriateness of community placement); *Frederick L. v. Dep't of Pub. Welfare*, 157 F.

[7] *Olmstead*'s statements on this issue do not mandate a different result. *See* 527 U.S. at 602, 607 (noting that "the State generally may rely on the reasonable assessments of its own professionals" in determining whether community placement is appropriate and stating that community-based treatment is required when "the State's treatment professionals determine that such placement is appropriate"). The *Olmstead* Court did not need to address this issue because, as it noted, in that case the State's treatment professionals had already determined that community placement would be appropriate for the plaintiffs. *Id.* at 602-03. Thus, the Court in *Olmstead* simply acknowledged one set of facts, but did not establish a legal standard that was confined solely to those facts.

Supp. 2d 509, 540 (E.D. Pa. 2001) (finding that states cannot avoid the integration mandate by failing to make recommendations for community placement).

The District incorrectly relies on *Boyd v. Steckel*, 753 F. Supp. 2d 1163 (M.D. Ala. 2010), to assert that, as a matter of law, only a public entity's treatment professional can determine appropriateness for community services. (Motion at 11-12.) In fact, the District Court for the Middle District of Alabama considered the plaintiff's own declaration regarding his appropriateness for community placement, as well as an affidavit by the State's treatment professional to the contrary. *Boyd*, 753 F. Supp. 2d at 1173-74. The court did not hold that only a public entity's treatment professional may opine as to whether community placement is appropriate, but rather found that the plaintiff had not met the high burden necessary to obtain a preliminary injunction. *Id.* at 1168-69, 1174.

C. To Defeat an *Olmstead* Claim, A Public Entity Must Demonstrate that the Relief Requested Would Be a Fundamental Alteration.

Under title II of the ADA, public entities must make reasonable modifications to programs, services, or activities when necessary to prevent discrimination on the basis of disability, unless they are able to demonstrate that those modifications would be a fundamental alteration. 28 C.F.R. § 35.130(b)(7). This is also true in the *Olmstead* context. 527 U.S. at 596-97, 603-06; *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 379-80 (3d Cir. 2005). It is the defendants' burden to demonstrate that the requested relief would fundamentally alter its system of services. *Olmstead*, 527 U.S. at 603-06; *Frederick L. v. Dep't of Pub. Welfare* (*Frederick L. I*), 364 F.3d 487, 492 n.4 (3d Cir. 2004).

A public entity can establish that the relief requested on an *Olmstead* claim would be a fundamental alteration by demonstrating that it has a "comprehensive, effectively working plan for placing qualified persons with . . . disabilities in less restrictive settings, and a waiting list

that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." 527 U.S. at 605-06. The defense is only applicable when the requested relief would so disrupt the orderly implementation of a comprehensive, effectively working *Olmstead* plan as to cause a fundamental alteration of that plan.[8] *See* 28 C.F.R. 35.130(b)(7); *Olmstead*, 527 U.S. at 605-06.

A public entity can also assert a fundamental alteration defense if "in the allocation of available resources, immediate relief would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with . . . disabilities." *Olmstead*, 527 U.S. at 604. Public entities may not avail themselves of this defense unless they can first demonstrate that they have a comprehensive, effectively working plan to comply with the *Olmstead* mandate. *See, e.g.*, *Frederick L. v. Dep't of Pub. Welfare of Pa.* (*Frederick L. II*), 422 F.3d 151, 157 (3d Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051, 1067-68 (9th Cir. 2005); *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381-82.

[8]The District appears to argue that a comprehensive, effectively working plan is the sole requirement it must meet to comply with *Olmstead*. Motion at 13. This is incorrect. *Olmstead's* central holding is that unnecessary institutionalization violates the ADA. *Olmstead*, 527 U.S. at 597. The Court made clear that a comprehensive, effectively working plan does not constitute a public entity's integration obligation; rather, it enables an entity to establish a fundamental alteration defense. *Olmstead*, 527 U.S. at 605-06 (linking this language to the fundamental alteration defense and noting that if this standard is met, a court would have no warrant to order injunctive relief); *see also Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 619-20 (9th Cir. 2005) (noting that state must demonstrate that remedy would constitute a fundamental alteration); *Sanchez v. Johnson*, 416 F.3d 1051, 1063-64 (9th Cir. 2005) (describing a comprehensive, effectively working plan as a state defense); *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381-82 (noting that agency must establish fundamental alteration defense); *Radaszewski v. Maram*, 383 F.3d 599, 611 (7th Cir. 2004) (providing the state the opportunity to show that relief would be a fundamental alteration); *Frederick L. I*, 364 F.3d at 492 & n.4 (noting that the defendant has the burden of establishing a fundamental alteration defense); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003) (stating that fundamental alteration can serve as a defense to the requirements of the integration regulation); *Pitts v. Greenstein*, No. 10–635–JJB-SR, 2011 WL 1897552, at *3 (M.D. La. May 18, 2011) (state can satisfy its obligations by demonstrating that it has a comprehensive, effectively working plan); *Haddad v. Dudek*, No. 3:10-cv-414-J-34TEM, 2011 WL 1892322, at *15 (M.D. Fla. March 16, 2011) (characterizing a comprehensive, effectively working plan as the defendants' affirmative defense).

1. To Successfully Assert a Fundamental Alteration Defense, a Public Entity Must Have a Comprehensive, Effectively Working Plan.

There are unresolved questions of fact about whether the District even has an *Olmstead* plan,[9] or if it does, whether this plan constitutes a "comprehensive, effectively working plan," as required by *Olmstead*. While the Court of Appeals for the District of Columbia Circuit has not had the occasion to enunciate what constitutes a comprehensive, effectively working plan, the District has not established, as a matter of law, that its plan meets the standard of either of the circuit courts that have considered this issue. The Third Circuit has properly required a public entity to prove that it has developed and is implementing an *Olmstead* plan that demonstrates a specific and measurable commitment to action by the public entity, including goals, benchmarks, and timeframes for which the entity can be held accountable.[10] *Frederick L. II*, 422 F.3d at 156-59. The Third Circuit has also rejected a public entity's vague, general assurances and good faith intentions of future community placement because such assurances may change, and has properly found that past progress in deinstitutionalization alone is insufficient to establish a comprehensive, effectively working *Olmstead* plan. *Id.*; *Frederick L. I*, 364 F.3d at 499-501; *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 383-85. Although the Ninth Circuit, incorrectly in the

[9] Twelve years after the Olmstead decision, the District of Columbia has never finalized a written *Olmstead* plan, and is no longer even having interagency meetings to attempt to do so. (Opp. Ex. H, 213:19-214:8.) It is not clear that what the District of Columbia has done is sufficient to be considered an *Olmstead* plan at all. However, for purposes of this Statement, the United States will refer to the District's inchoate efforts as an *Olmstead* plan.

[10] The Third Circuit held that:

> a viable integration plan at a bare minimum should specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.

Frederick L. II, 422 F.3d at 160.

Department's view,[11] has not required public entities' *Olmstead* plans to include the same level of specificity, jurisdictions must still be able to show a past successful record of deinstitutionalization and other evidence of their ongoing commitment to integration. *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 619-21 (9th Cir. 2005); *Sanchez*, 416 F.3d at 1067-68.

The District has not demonstrated, as a matter of law, that it has a comprehensive, effectively working *Olmstead* plan that can support a fundamental alteration defense because questions of fact remain about whether: 1) the District's systems for transitioning individuals with disabilities out of nursing facilities are effectively working; 2) its plan has specific timeframes, concrete and reliable commitments, or measurable goals for which it may be held accountable; and 3) it has demonstrated success in actually moving individuals with disabilities to integrated settings.

a) A Comprehensive, Effectively Working Plan Includes Effectively Working Systems for Achieving Successful Transitions.

The testimony of the District's own representatives raises questions of fact about whether its systems for transitioning individuals with disabilities out of nursing facilities are effectively

[11] The Department of Justice, pursuant to a Congressional mandate, promulgated the title II integration regulation at issue. 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980), *reprinted in* 42 U.S.C. § 2000d-1. As such, its interpretation of its own regulation is entitled to substantial deference. *See Olmstead*, 527 U.S. at 597-98 (Justice Department's views warrant respect because it is the agency directed by Congress to issue regulations implementing title II of the ADA); *Bragdon v. Abbott*, 524 U.S. 624, 642, 646 (1998) (granting the Justice Department's views on the ADA deference because "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its regulations "controlling unless plainly erroneous or inconsistent with the regulation"); *Fiedler v. Am. Multi-Cinema, Inc.*, 871 F. Supp. 35, 39 (D.D.C. 1994) (as "the author of the [ADA] regulation, the Department of Justice is also the principal arbiter as to its meaning").

working. The director of the District's only program to assist individuals seeking to leave nursing facilities (Opp. Ex. G, 42:16-21, 127:8-12) stated, "I think we need to consider if there's a systemic mechanism by which people transition, and I would say the answer is no." (Opp. Ex. H, 86:7-11.)

Furthermore, the District's Medicaid agency has refused to allow any additional transitions beyond the 27 that are currently planned because, according to the agency's own assessment, there is not an appropriate mechanism in place to assist individuals with establishing community living arrangements. (Ex. DD, 64:16-65:21; Opp. Ex. H, 66:1-19, 232:1-20.) Plaintiffs have submitted evidence indicating that the District's Medicaid agency lacks policies, procedures, or guidance for transitioning people from nursing homes into the community. (Opp. Ex. G, 45:13-16.) Plaintiffs also submitted evidence raising disputes of fact about whether there is a comprehensive process for assessing individuals in nursing facilities for community placement – even when these individuals affirmatively contact the District (Ex. DD, 64:19-65:17, 81:5-21; Opp. Ex. H, 82:1-12; 97:7-98:10; 231:17-233:3) – and whether the District is monitoring nursing facilities to ensure that they properly identify and assist individuals with community placement. (Opp. Ex. H, 86:14-21). Though the District has several lists of individuals who expressed an interest in leaving nursing facilities, or were identified by nursing facilities as ideal candidates for transition, the Plaintiffs have submitted evidence suggesting that the District is not working to transition these individuals. (Opp. Ex. H, 96:4-11, 97:2-99:5.)

Plaintiffs' evidence concerning Bonita Jackson's transition also raises material disputes of fact about the effectiveness of the District's systems for transitioning individuals out of nursing facilities. Plaintiff Jackson, who the District counts as one of its "successful" transitions, was discharged from Washington Nursing Facility on June 13, 2011, during the

briefing of this Motion. (Opp. Ex. B, ¶ 10.) Her case manager reportedly did not even know she was being discharged. (Opp. Ex. B, ¶ 9.) She had no money. (Opp. Ex. B, ¶ 12.) Her apartment was not furnished. (Opp. Ex. B, ¶ 16.) Her medications were placed in one unmarked bag, and she was not given dosage instructions. (Opp. Ex. B, ¶¶ 11, 14, 18.) For five days following her discharge, Ms. Jackson did not have the home health care services she needed for bathing, meal preparation, housekeeping, and medication management. (Opp. Ex. B, ¶¶ 3, 4, 9, 13.)

Plaintiffs' evidence concerning Plaintiffs Roy Foreman and Vietress Bacon's attempts to transition from nursing facilities into the community raises additional questions of fact about the effectiveness of the District's systems. With the D.C. Housing Authority's help, Plaintiff Roy Foreman was able to secure wheelchair accessible public housing, and he signed a lease for his own apartment in March 2011. (Opp. Ex. D, ¶¶ 12-13.) He requested assistance from both the District's Aging and Disability Resource Center and his social worker at Washington Center for Aging Services, which is owned by the District (Opp. Ex. I, ¶ 8), in finding home health services to help him with transferring into his wheelchair, bathing, dressing, and toileting. (Opp. Ex. D, ¶¶ 8-9, 11, 16.) Mr. Foreman's social worker terminated his lease instead of assisting him to access the personal care assistance services he needed to live in the apartment he had already obtained. (Opp. Ex. D, ¶ 17.) As of August 16, 2011, he was still living in the nursing facility. (Opp. Ex. D, ¶ 3.) Plaintiff Vietress Bacon's discharge from Washington Nursing Facility was scheduled for July 1, 2011. (Opp. Ex. C, ¶¶ 4, 14.) She is one of the few participants in MFP, and was able to secure a wheelchair accessible apartment and sign a lease. (Opp. Ex. C, ¶ 13.) However, her discharge was postponed because District case managers and program coordinators did not complete and process her applications for needed home health services. (Opp. Ex. C,

¶¶ 14-17.) As of August 29, 2011, she was still living in the nursing facility (Opp. Ex. C, ¶ 12.), though she appears to have been discharged on September 13, 2011.

Finally, the District asserts that it has a comprehensive, effectively working *Olmstead* plan because some individuals could receive services in the community through the MFP and EPD Waiver programs. (Motion at 16-21.) However, the mere existence of some community-based *programs* does not demonstrate, as a matter of law, that the District has a comprehensive, effectively working *plan* to ensure that individuals with disabilities receive services in the most integrated setting appropriate for their needs. To the contrary, the existence of these programs, as well as the fact that the District already provides the services in the community that individuals would need once they transition, indicate that the requested relief would not fundamentally alter the District's programs.

b) A Comprehensive, Effectively Working Plan Must Include Meaningful Transition Goals for Which a Public Entity May Be Held Accountable.

Because the District has no consistent, measurable benchmarks for nursing home transitions for which it may be held accountable, questions of fact persist regarding whether it has a comprehensive, effectively working *Olmstead* plan. *See Frederick L. II*, 422 F.3d at 156-57. In the *Frederick L.* cases, the court refused to allow the fundamental alteration defense in situations involving transition goals that were more concrete than the District of Columbia's. In *Frederick L. I*, the State of Pennsylvania had planned 33 community placements for the next year, but the court found that this fell "far short of the type of plan . . . the Court referred to in *Olmstead*" and did not provide sufficient assurance to the court that there would be ongoing progress toward community placement. 364 F.3d at 499-500. In *Frederick L. II*, the court again rejected the State's fundamental alteration defense where the State had set a vague goal of

closing up to 250 institutional beds per year. 422 F.3d at 157-58.

The District's constantly shifting and decreasing benchmarks for transitioning individuals with disabilities out of nursing facilities precludes a finding that, as a matter of law, it has a comprehensive, effectively working *Olmstead* plan. The District points to its MFP program as evidence that it has a comprehensive, effectively working *Olmstead* plan. (Motion at 17-21.) However, it is undisputed that the District's transition target for individuals with physical disabilities and mental illness under MFP keeps changing: first 960 individuals by the end of 2011, then 0, then 70, then 80, then 26, finally landing on 27. (Opp. Ex. H, 14:18-15:18 (target of 960), 43:15-20 (only transitioning people with intellectual and developmental disabilities), 34:16-20 (target of 30 in 2010 and 40 in 2011), 36:12-38:7 (target of 80 in 2011); Motion Ex. 3, ¶ 25 (target of 26 by September 2011), ¶ 28(a) (target of 80 by December 2011); Opp. Ex. H, 85:5-8 (target of 27 by December 2011).) Moreover, the District is in the process of lowering its benchmarks yet again, based on its "history of setting benchmarks [it] cannot attain" and its desire "to set a target that [it] will achieve." (Opp. Ex. H, 38:21-40:2.) The District's current best estimate of transitions is as amorphous and non-specific as the plan the *Frederick L.* court rejected. *Compare* Motion Ex. 3 ¶ 25 ("all pilot participants *should be* transitioned by September 2011 *barring any unanticipated barriers*") (emphasis added) *with Frederick L. II*, 422 F.3d at 158 ("The final plan substituted the more amorphous, i.e., non-specific, goal of closing '*up to* 250 [institutional] beds a year.'").

Given the District's acknowledgments that it sets goals that it cannot attain, that these goals continue to shift, and that it is still in the process of formulating its latest target, the District's "failure to articulate [its] commitment in the form of an adequately specific comprehensive plan for placing eligible patients in community-based programs by a target date

places the 'fundamental alteration defense' beyond its reach." *See Frederick L. II* at 158-59.

c) A Comprehensive, Effectively Working Plan Includes Demonstrated Success in Transitioning Individuals Out of Nursing Facilities.

The Third Circuit and the Ninth Circuit both consider a jurisdiction's past progress in deinstitutionalization when evaluating whether a public entity has a comprehensive, effectively working *Olmstead* plan. Even when jurisdictions have demonstrated significant progress, the Third Circuit has correctly refused to allow the fundamental alteration defense, absent a detailed plan for the future. *Frederick L. I*, 364 F.3d at 490-91, 499-501 (over 400 new community placements in five years and an over 90% reduction in the state mental hospitals' population), *Frederick L. II*, 422 F.3d at 160 (describing necessary plan components). The court noted that that it was "unrealistic (or unduly optimistic) [to] assum[e] past progress is a reliable prediction of future programs." *Frederick L. I*, 364 F.3d at 500. Instead, there must be a "plan for the future." *Id*. Even under the Ninth Circuit standard, public entities must prove that they are "genuinely and effectively in the process of deinstitutionalizing disabled persons 'with an even hand'" before they can assert the fundamental alteration defense. *Arc of Wash. State, Inc.*, 427 F.3d at 619, 621-22 (quoting *Olmstead*, 527 U.S. at 605-06) (permitting Washington State to assert the defense when it had "significantly reduced" the size of its institutionalized population, by 20% over seven years); *accord Sanchez*, 416 F.3d at 1067-68 (permitting California to assert the defense where it had a "reasonable rate of deinstitutionalization," with a 20% decrease in its institutional population over five years).

The District's minimal progress in transitioning persons with disabilities out of nursing facilities prevents its *Olmstead* plan from being considered a comprehensive, effectively working plan under either Circuit's standard. Even the cases in which the Ninth Circuit has permitted a

fundamental alteration defense involve significantly more progress than the District has demonstrated. The District does not dispute that there are at least 526 individuals with disabilities living in nursing facilities in the District of Columbia who do not object to community placement, and in fact would prefer to live in the community. (Compl. at ¶ 69; Opp. Ex. H, 32:5-33:16.) Yet, as of July 2011, the District had not moved a single individual with mental illness from a nursing home into the community. (Opp. Ex. L, 52:2-53:4.) And the District only transitioned a total of two individuals with physical disabilities out of nursing facilities into the community between 2007 and August 2011. (Opp. Ex. H, 67:3-68:10.) Considering the lowest possible number of persons with disabilities who wish to leave nursing facilities, the District had only transitioned 0.38% according to its plan at the time this Motion was filed. (Compl. ¶ 69 (District nursing facilities' reports show that 526 individuals would prefer to live in the community); Opp. Ex. H, 67:3-68:10 (two individuals with physical disabilities have been transitioned as of July 27, 2011).) Even taking into consideration the period before the District's plan was in place, the actual number of nursing home occupants in the District has dropped by just 45 individuals (1.7%) between 1995 and 2009. (Ex. BB, 158:8-159:8.) Unlike California in *Sanchez* and Washington in *Arc of Washington,* the District has not significantly reduced its relevant institutionalized population.

2. A Public Entity Can Successfully Assert an Affirmative Defense if the Relief Requested Would Be So Inequitable Given Available Resources as to Cause a Fundamental Alteration of Its Programs.

Disputes of fact also remain about whether "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable . . . ." *Olmstead,* 527 U.S. at 604. The District's own calculations provide support for Plaintiffs' claim that providing services to the putative Plaintiff class in the community instead of in nursing facilities would not be so costly

that it would require a fundamental alteration of the District's programs. In order to receive approval for the EPD Waiver, the District was required to submit cost estimates to CMS demonstrating that it costs the same amount of money or less to provide the waiver services in the community than it would to provide services in an institution. (Motion Ex. 2, ¶ 9; Opp. Ex. M, 53:19-54:14.) The District estimates that it would save between $19,970 and $32,875 per person every year by providing services to an individual in the community instead of in a nursing facility. (Motion Ex. 4 at 172; *see also* Opp. Ex. M, 61:6-63:14 (explaining factors utilized in calculations); 63:15-19 (noting that it costs less money to provide services for recipients through the waiver program than to provide institutional care).) Because the District has not established, as a matter of law, that the relief requested would be so costly as to constitute a fundamental alteration of its service system, it is not entitled to summary judgment.

V. CONCLUSION

For the reasons stated above, the Court should deny Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment. With the Court's permission, counsel for the United States will be present and prepared to argue the present Statement at any upcoming hearings regarding the Motion, should such argument be helpful to the Court.

Dated: October 3, 2011

Respectfully submitted,

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Counsel for the United States

Exhibit AA

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - - - X

EDWARD DAY, et al., :

Plaintiffs, : Civil Action No.:

vs. : 10-cv-02250 ESH

DISTRICT OF COLUMBIA, :

Defendant. :

- - - - - - - - - - - - - - - - - - X

Tuesday, July 26, 2011

Washington, DC

DEPOSITION OF:

DARRIN SHAFFER

called for examination by Counsel for Plaintiffs, taken at AARP Foundation, 601 E Street, NW, Washington, DC, 20049, commencing at 9:00 a.m., before Kim Brantley, a Court Reporter and Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

APPEARANCES:

On behalf of the Plaintiffs:

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KELLY BAGBY, ESQUIRE
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I N D E X

DEPOSITION OF DARRIN SHAFFER

(Exhibits attached to original transcript.)

P R O C E E D I N G S

Whereupon,

DARRIN SHAFFER,

called as a witness by Counsel for the Plaintiffs and, after having first been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFFS

BY MR. VIGNERY:

Q. Morning, Mr. Shaffer. As I said before, if you want a break at any time, just holler and we will take a break.

Could you state your name for the record?

A. Darrin Shaffer.

Q. And your position?

A. I'm the agency fiscal officer at the DC Department of Healthcare Finance.

Q. And how long have you held that position?

A. A little over two years, two years and

like two months.

Q. And before that were you employed by the DC government?

A. I was not.

Q. Where were you employed?

A. Immediately prior to that I worked for a firm called Health Management Systems.

Q. Okay. What do they do?

A. Health Management Systems is a vendor to various Medicaid programs across the country. I manage their cost containment contacts with the Arizona Medicaid Program and the Mexico Medicaid Program.

Q. And your background is in accounting, auditing?

A. My education is in economics. Prior to working for Health Management Systems I worked for the Massachusetts Medicaid Program for several years.

Q. Can you tell me what your duties are in your current position?

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launched, we'd talk about it and talk about how to forecast that, if possible.
Q. Where would that come from? How would you be aware that there was a new program initiative?
A. Through meeting with the program staff.
Q. The program staff --
A. Primarily, at that time, it would have been Linda.
Q. And to whom does Linda report?
A. Then or now?
Q. It would have been then, when she was acting as the deputy director.
A. Well, then she was the interim and director.
Q. Interim director?
A. She was the director of Healthcare Finance on an interim basis.
Q. Well, is it --
A. I guess she reported to the mayor.
Q. Is it fair to say that you are more of

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an implementer of the policy or a developer of the policy, or am I short-shrifting you?
A. I don't know if I'm an implementer of the policy. On the fiscal side, you know, we're forecasting. We're recording expenditures. We're recording revenue. We're drawing cash, but policy is driven completely by the other side of the house.
Q. Would you normally sit in on policy generation kinds of meetings, or have you had the occasion to do that?
A. I have on occasion. Typically my staff is brought in at the point where we need to figure out what something is going to cost, what the fiscal impact will be.
Q. Were you in on any kind of policy meeting with respect to the EPD waiver the last budget cycle?
A. You mean apart from just forecasting what the budget would be?
Q. Right.

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A. Apart from the basic forecasting of the budget, I would say, no, I was not in a policy discussion.
Q. Okay.
A. Though, in budget formulation policy issues obviously come up.
Q. Sure. Do you ever, in the budget, generally, and I don't know if it would be represented in Exhibit Number 2 or not, but can you tell me what the fixed costs are that the District might incur for nursing facilities?
A. The fixed costs?
Q. Is there some cost to the District?
A. I guess I'm getting stuck on the fixed cost part of your question.
Q. Okay. So --
A. What exactly do you mean?
Q. Yes, it's going to be hard for me to give a quick answer. Really what I'm trying to get at is, for the most part, the nursing homes in the District are privately operated, correct?

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A. Most of them are, yes.
Q. Are at least two exceptions where the District owns two nursing homes, correct?
A. That's my understanding, yes.
Q. So, they're private enterprise, so to speak, but is there -- for instance in the Medicaid reimbursement, we're figuring out how much money the nursing home provider should be paid, is there some capitol overhead about construction of the nursing home that is part of that budget?
A. Part of the nursing home rate, there is a capitol component within the nursing home rate, so to the extent that the rate then flows through into the expenditures in forecasting the budget indirectly, then yes.
Q. So there might be some portion of the reimbursement that's related to the --
A. To the capitol?
Q. That's what I meant by fixed costs?
A. Yes, yes.
Q. Are you aware of any control that the

E R R A T A S H E E T
SLR REPORTING
13111 Foxden Drive
Rockville, Maryland 20850
(301) 651-3335

IN THE MATTER OF: EDWARD DAY, et al., vs. DISTRICT of Columbia
DEPONENT: DARRIN SHAFFER

Enclosed is the transcript of your deposition testimony. Please review the transcript, complete and distribute the signed errata sheet and acknowledgment page to all parties, including this office, within thirty (30) days of any changes and/or the transcript itself.

PAGE LINE CHANGE OR CORRECTION REASON THEREFORE

DATE: _____ SIGNATURE _____

CASE: EDWARD DAY, et al., vs. District of Columbia
DATE: July 26, 2011

ACKNOWLEDGMENT OF DEPONENT

I, DARRIN SHAFFER, do hereby acknowledge that I have read and examined pages 1 through 104, inclusive, of the transcript of my deposition and that: (Check appropriate box)

[ ] The same is a true, correct, and complete transcript of the answers given by me to the questions therein recorded.

[ ] Except for the changes noted in the attached Errata sheet, the same is a true, correct, and complete transcription of the answers given by me to the questions therein recorded.

Date: Signature:

Sworn to and subscribed to before me on
This day of , 2011.

NOTARY PUBLIC
My Commission Expires:

CERTIFICATE OF NOTARY PUBLIC

I, Kim M. Brantley, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to computerized transcription under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Notary Public in and for
The District of Columbia
My Commission Expires:
October 14, 2014

_____

Exhibit BB

UNITED STATES DISTRICT COURT

FOR THE DISTRICT of Columbia

- - - - - - - - - - - - - - - - - - X

EDWARD DAY, et al., :

Plaintiffs, : Civil Action No.:

vs. : 10-cv-02250 ESH

DISTRICT OF COLUMBIA, :

Defendant. :

- - - - - - - - - - - - - - - - - - X

Friday, July 29, 2011

Washington, DC

DEPOSITION OF:

ERICKA BRYSON-WALKER,

called for examination by Counsel for Plaintiffs, taken at University Legal Services, 220 I Street, NE, Suite 130, Washington, DC, commencing at 9:07 a.m., before Kim Brantley, a Court Reporter and Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

APPEARANCES:

On behalf of the Plaintiffs:

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I N D E X

DEPOSITION EXHIBITS CONTINUED

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resulting in a higher nursing home expenditure. A nursing home is way more expensive than EPD and a lawsuit.

"John, let me know if we need meeting."

Q. Do you know whether any action was taken by DHCF following this August 2010 E-mail exchange to increase waiver slots?

A. With the former administration, the only thing I do know of, based on this background information that was just provided, they were making a decision to increase the EPD waiver slots to five hundred.

Q. By five hundred?

A. By five hundred.

Q. And when you say the former administration, do you mean DHCF?

A. DHCF, I'm sorry, DHCF, former administration.

Q. Did that ever happen?

A. No.

Q. And you already mentioned that there

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are no plans currently to --

A. The current administration had not elected to make an increase in the EPD waiver cap. The former administration for DHCF wanted to increase the cap by five hundred for the EPD waiver program. They wanted to do an amendment.

Q. So in your view as program manager --

A. Project.

Q. Project manager, what will happen when the two hundred and forty available waiver slots are filled?

A. In reference to?

Q. People seeking to get access to services through the waiver program.

A. Access to services through the waiver program. People will be placed on a waiting list and the process for that is based on a first come, first serve basis.

Q. Is there a protocol for that?

A. Not yet.

Q. So people from nursing facilities

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seeking to get access to waiver services will be placed on a waiting list?

A. Yes.

Q. And they will continue to have to reside in the nursing facilities?

A. Yes.

Q. Has the District advised CMS of this plan?

A. It's in our EPD waiver application. Our EPD waiver application references to, if you fill the cap, it's identified that it is on a first come, first serve basis for EPD waiver.

Q. And when will the protocol be developed for this waiting list?

A. It's being drafted as we speak.

Q. Can you tell us a little more about the personal care services under the state plan which you referenced earlier that the District had planned to cut by fifty percent?

MR. PATRICK: Objection. What do you want the witness to tell you about?

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BY MS. RIFKIN:

Q. Can you describe what the services are, what the benefit is for the personal care services under the state plan?

A. The state plan offers PCA services, personal care aide services to individuals who need assistance with at least one ADL, activity of daily living, and a person can receive up to eight hours a day, a maximum of ten forty hours in a calendar year, unless there is a need for continued services where an extended care request could be made.

Q. And are there additional services available under the state plan for people seeking to live in the community with long-term care needs?

A. Yes. We have skilled services --

Q. Can you say what --

A. Yes, there are skilled services where you can have RN services, LPN services, in reference to if a person has a wound, if a person is on a G-tube, vent patients have been part of receiving skilled services in the community,

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physical therapy, occupational therapy also.
Q. And those are on an outpatient basis?
A. On an outpatient basis.
Q. In a clinic setting, not in the home, right?
A. You can receive RN-skilled services in the home.
Q. As to PT and OT?
A. You can receive in the home -- I apologize, yes, in a facility for Medicaid beneficiary, if they don't have Medicare.
Q. So is it fair to say that nursing home level of care is not required for the personal care services under the state plan?
A. Yes.
Q. What is the financial eligibility limit for the EPD waiver program?
A. Three hundred percent of SSI.
Q. So that includes, I should say, people who are not otherwise DC Medicaid eligible, people above the SSI, obviously, who would not otherwise

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be on Medicaid can get access to waiver services, correct?
A. Yes.
Q. And what about people above the three hundred percent of SSI income limit?
A. Income maintenance administration makes the determination for -- IMA makes the determination for Medicaid eligibility. They have the guideline of three hundred percent of SSI and assets, resources six thousand -- sorry, six thousand for a couple and three thousand for a single person, I believe that's the round about figures, and IMA will is the entity that will send out a letter who makes the determination of Medicaid eligibility.
Q. Are people entitled to spend down, so to speak, to participate in the waiver?
A. There is no spend-down process for EPD waiver services.
Q. Has CMS directed DHCF to develop a spend-down process?

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A. Yes, they have.
Q. Was that in approximately August of '09 that CMS directed DC --
A. I'm not sure of the exact timeframe, but I do know that that directive was given and that DHCF is doing it. They are working with Income Maintenance Administration in developing a spend-down process.
MS. RIFKIN: Can I have this marked Number 7.
(Letter of 8/6/09 was marked Deposition Walker Exhibit 7, for identification.)
BY MS. RIFKIN:
(Brief pause while witness peruses document.)
BY MS. RIFKIN:
Q. Have you had a chance to read it?
A. I did.
Q. So this is Exhibit 7. Can you tell me what it is?
A. It's a letter to John McCarthy, at the

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time deputy director of DHCF, from the Centers for Medicare and Medicaid Services, CMS, with regards to informing him of the following items DHCF had agreed to implement.
Q. And can you --
A. With regards to spend-down for the EPD waiver program.
Q. And this date is?
A. August 6th, 2009.
Q. So is it fair to say this is the CMS director to DC?
A. It's the CMS director to DC.
Q. And under the second bullet, can you read that?
A. Sure. "Individuals with income above the special income level must be allowed to spend down to be eligible for waiver services."
Q. Thank you. Are there other criteria for waiver eligibility, other than financial, other than nursing home level of care requirement?
A. Yes.

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MS. RIFKIN: Can we take a three-minute break.
(Brief recess taken.)
MS. RIFKIN: We have no further questions.
EXAMINATION BY COUNSEL FOR THE DEFENDANTS
BY MR. PATRICK:
Q. I want to turn your attention back to the document that was marked for identification purposes as Plaintiff's Exhibit 18. If you could please turn to the table, the third page.
Did you have any role in preparing this document?
A. No.
Q. If I could turn your attention to the row for the District of Columbia, and the raw number of residents, according to this report, that were in nursing homes in the year 1995, could you tell me how many are reflected on this document?
A. Well, the residents in the District of Columbia for 1995?

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Q. Yes.
A. Two thousand five hundred and seventy-six.
Q. And according to the document, how many nursing home residents were in District of Columbia nursing homes in 2009?
A. In 2009 there were two thousand five hundred and thirty-one.
Q. I'd now like to direct your attention to the document that was marked for identification purposes as Exhibit 10, which is an E-mail exchange between you and Sari Greene.
Do you have that?
A. Yes.
Q. Do you have a recollection of this specific case that's discussed in the E-mail exchange in Plaintiff's Exhibit 10?
A. Brief, yes.
Q. Prior to receiving the E-mail from Miss Greene on June 15th, 2010, had you previously been advised about this particular case?

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A. I do not recall being advised.
MS. RIFKIN: Which E-mail are you referring to?
MR. PATRICK: The one dated June 15th, 2010.
BY MR. PATRICK:
Q. Let me turn your attention now to what was marked for identification as Exhibit 15, which was the DCMMIS EMAR 372 printout.
A. I have it.
Q. Can you tell me whether the format of this particular document is the format that is submitted to CMS for the particular 372 report for the year?
A. No, this is not the format used in the 372 reports for CMS.
Q. What format is typically used?
A. It's a Web-based format that's typically used on the CMS Web portal.
Q. If I could direct your attention to the first page of this document and the section Roman

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numeral four, do you see that?
A. Yes.
Q. Can you just read the calculation for the D plus D prime?
A. "D is twenty-one thousand eight hundred forty-nine dollars and forty-one cents, plus the prime, D prime zero dollars.
Q. And if you look to the right, not where it says G plus G prime, but all the way to the right where the calculation is, according to this document, what is twenty-one thousand eight hundred and forty-nine dollars and forty-one cents, plus zero dollars and zero cents?
A. EPD waiver --
Q. I'm sorry, what is the calculation, according to this particular document of those two figures.
A. Twenty-nine thousand four hundred and forty-one cents.
Q. And what is reflected in the document that's marked Exhibit 15?

CASE: DAY vs. DISTRICT OF COLUMBIA
DATE:

ACKNOWLEDGMENT OF DEPONENT

I, ERICKA BRYSON-WALKER, do hereby acknowledge that I have read and examined pages 1 through 167, inclusive, of the transcript of my deposition and that: (Check appropriate box)

[ ] The same is a true, correct, and complete transcript of the answers given by me to the questions therein recorded.

[ ] Except for the changes noted in the attached Errata sheet, the same is a true, correct, and complete transcription of the answers given by me to the questions therein recorded.

Date: Signature:

Sworn to and subscribed to before me on
This day of , 2011.

NOTARY PUBLIC
My Commission Expires:

CERTIFICATE OF NOTARY PUBLIC

I, Kim M. Brantley, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to computerized transcription under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Notary Public in and for
The District of Columbia

My Commission Expires:
October 14, 2014

_____

Exhibit CC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - - - X

EDWARD DAY, et al., :

Plaintiffs, : Civil Action No.:

vs. : 10-cv-02250 ESH

DISTRICT OF COLUMBIA, :

Defendant. :

- - - - - - - - - - - - - - - - - - X

Friday, July 22, 2011

Washington, DC

DEPOSITION OF:

ELSPETH CAMERON RITCHIE, M.D.

called for examination by Counsel for Plaintiffs, taken at University Legal Services, 220 I Street, NE, Suite 130, Washington, DC, commencing at 9:00 a.m., before Kim Brantley, a Court Reporter and Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

APPEARANCES:

On behalf of the Plaintiffs:

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I N D E X

DEPOSITION OF ELSPETH CAMERON RITCHIE, M.D.

INDEX OF DEPOSITION EXHIBITS:

DEPOSITION EXHIBITS CONTINUED

(Exhibits attached to original transcript.)

P R O C E E D I N G S

Whereupon,

ELSPETH CAMERON RITCHIE, M.D.,

called as a witness by Counsel for the Plaintiff, and, after having first been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF:

BY MS. LAV:

Q. Dr. Ritchie, we met off the record, but again allow me to introduce myself. My name is Jennifer Lav. I represent the plaintiffs in a lawsuit we filed against the District of Columbia, Day versus District of Columbia, and it's concerning District residents who are unnecessarily institutionalized in nursing homes.

The named plaintiffs in the case are Edward Day, Larry McDonald, Vietress Bacon, Juanita Jackson and other similar situated, and the defendants are the District of Columbia, Vincent Gray, Wayne Turnage and Stephen Baron.

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looking at Brad, here, by "you."
Q. Did anybody else join you for those discussions?
A. No.
Q. What documents have you reviewed to prepare for today?
A. I have reviewed a number of documents not necessarily in preparation for today. So, for example, I reviewed the lawsuit when it came out and I have reviewed a number of documents related to PASARR.
The review of the documents related to PASARR in general was related to my visits to nursing homes, because I've had a series of visits to different nursing homes in the area, to help them understand the PASARR regulations.
Q. For today I was going to ask, would those documents that you reviewed be different than the ones that you reviewed for the declaration that you prepared in this case?
A. That question is a little hard to

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answer. Again, I have reviewed a number of documents, but in general it's related to the overall subject of mental health and nursing homes and the PASARR process rather than specific to either the declaration or the deposition.
MS. LAV: We would ask that any documents that Dr. Ritchie has reviewed that were not produced be produced.
MR. PATRICK: Okay. Please put the request in writing and we will take it under advisement.
BY MS. LAV:
Q. Just to backtrack a little bit and talk about your experience. You mentioned that you had been in the military before. Can you give a brief background of your training and your experience?
A. Sure. As an undergraduate I went to Harvard University. I worked for two years, went to medical school at George Washington. I was on a program called the Help Profession Scholarship Program where the army paid for medical school.

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After graduating from medical school I did an internship and residency in psychiatry at Walter Reed. I went to Korea for a year, came back to Walter Reed, well, went to Somalia, came back to Walter Reed, did a forensic psychiatry fellowship, went back to Korea, came back to Walter Reed for four years, was at the Department of Defense Health Affairs for four years, where I did mental health policy in women's health issues.
I did a disaster psychiatry fellowship at the Uniformed Services University. The first year was a masters in public health. I became appointed as psychiatry consultant to the army Surgeon General and worked at the army Surgeon General's office for five years and then retired last September 30th.
I started at the Department of Mental Health about two days later on October 4th, 2010.
Q. Prior to coming to the Department of Mental Health, did you ever work on any PASARR issues?

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A. No.
Q. Did you ever work with individuals in nursing homes?
A. Personally I had a grandfather, step-grandfather in a nursing home, but working in nursing homes was not part of what I did for the military.
Q. Not part of your professional experience?
A. Correct.
Q. I'm going to change gears a little bit and talk about the Department of Mental Health a little bit in general and the services that they provide.
Can you explain who is eligible for Department of Mental Health services?
A. Our core population is about nineteen thousand individuals who are severely mentally ill. By and large these individuals are on Medicaid. However, we have a larger population because many individuals come into the District and receive

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emergency or urgent care services. That's primarily through the Comprehensive Psychiatric Emergency Program or through our walk-in clinic at 35 K Street, Northeast, quite near here. In addition, in the Department of Mental Heath is St. Elizabeth's Hospital. At the office where I reside, 64 New York Avenue, we have a number of people who are involved in programs, and there's a wide variety of programs to include integrated care, adult services, child services. We have a child clinic at 821 Howard Road in Anacostia.

We have contractual relationships. We had a number of core service agencies with the psychiatric hospitals. I'm most involved with the relationships with the community psychiatric hospitals, and then I already mentioned the Mobile Crisis team and the Homeless Outreach.

Under children are also school-based integrated mental health programs. I have less involvement with the child services, as I primarily do adults.

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I think I've covered most of it. I may have left out a piece or two.

Q. You mentioned core service agencies, or referred to sometimes as CSAs. Could you explain what those are?

A. Yes. Core service agencies, and the ones that are the largest include Community Connections, Pathways, Green Door, Anchor and there's other smaller ones. They are organizations that provide services to the individuals, the nineteen thousand individuals that I mentioned.

They provide a variety of different services. It's rehabilitation services. A lot of it is case management, and they also, many of them provide supported employment. They will help individuals with housing. They will help them with food stamps and vouchers and a number of areas which are related to mental health but not specifically mental health.

Q. And how would someone enroll or become involved in the course of this agency?

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A. Most of the time they get enrolled through the Access Helpline. Either the individual can call or somebody who is taking care of the individual can help call, and so they come in from a wide variety of areas, including pretrial services and legal areas.

Q. And what is the Access Helpline?

A. The Access Helpline is a department that does a number of things. It's the one-stop shopping for -- I won't say all things mental health, because again it's primarily focused on those who are severely mentally ill, who by and large are on Medicaid.

If somebody's hospitalized, it provides treatment numbers and authorizations for the hospitalization in the hospitals that we have contracts with and these are involuntary hospitalizations I should clarify. So that's Providence, United Medical Center, Psych Institute of Washington and most recently Washington Hospital Center.

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They also link people up to services, including the core service agencies.

Q. And when you say severely mentally ill, are there any diagnoses that you need in order to qualify for the core services agency services?

A. The vast majority of our patients or consumers have a diagnosis of schizophrenia or schizoaffective disorder. We also have a large number of those with bipolar disorder or manic depression.

Many of our consumers also have what we call co-occurring diagnoses of substance abuse including alcohol, cocaine and PCP is the most common.

Q. I'd like to show you, this is from the Department of Mental Heath. Could you identify what this is?

A. I think you're going to have to identify it. I see a title that says MHRS services, but I don't see where it's from.

Q. This is from the Department of Mental

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A. "Assistance to the consumer in increasing social support skills and networks that ameliorate life stresses resulting from the consumer's metal illness or emotional disturbance and are necessary to enable or maintain the consumer's independent living."

Q. So that might include different memberships in community activities, supporting them to have different social connections in the community?

A. The way that question is phrased is a little speculative to me, but in general I would agree with what you're saying, that it would certainly include to increase a social network to include activities in the community.

Q. And Number 7?

A. "Developing strategies and supportive mental health interventions for avoiding out-of-home placement for adults, children and youth, and building stronger family support skills and knowledge of the adult, child or youth's

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strengths and limitations."

Q. What mental health interventions would you include to avoid out-of-home placement of adults? Can you give me an example of that?

A. Well, in general what we want to do is keep people in the community, and so we are trying, for example, through a number of different ways, to return people to home rather than to hospitalize them, and if we do hospitalize them, to hospitalize for a short period of time rather than a longer period of time.

In regards to children, if we can, we want to avoid sending them to a psychiatric, residential, treatment facility and keeping them in home.

In the context of the nursing homes, we want to, if possible, either transition them from the nursing home to a community or avoid sending them to the nursing home if they can be kept in a less intensive level of care, and this less intensive level of care includes our what's called

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CRS or community residential facilities.

There is a challenge in that housing is in very short supply in the District. So, it is definitely easier to maintain somebody in housing when they're already there rather than it can be very hard to place somebody.

Q. Your support worker might help someone in maintaining housing in the community by assisting them with, for example, complying with the landlord's rules?

A. That is my understanding.

Q. Would they be the person that might help someone that was not able to do so on their own apply for subsidies for housing?

A. I believe so. I have to caution my answer by saying this is not an area that I'm particularly involved in, so my understanding is secondhand, based on either the consumer service reviews or what I have heard from the CSAs.

But, for example, I know that Pathways is very involved with helping people find housing.

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I don't know all the details of how that's done.

Q. Let's go on to crisis and emergency services. Could you give the definition of that as an MHRS service?

A. I can give the formal definition as listed here. I can also describe in practice what happens. Would you like me to start with the formal definition?

Q. Why don't you start with the formal definition and then describe what happens in practice.

A. Okay. So we've got "An immediate response to an emergency situation involving a consumer with mental illness or emotional disturbance that is available twenty-four hours a day, seven days a week."

Shall I go on to read the rest of the paragraph or would you like me to describe in practice how that works?

Q. Could you go on and at least read the next sentence.

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A. "Crisis/Emergency services are provided to consumers involved in an active mental health crisis and consist of immediate response to evaluate and screen the presenting situation, assist in immediate crisis stabilization and resolution and ensure the consumer's access to care at the appropriate level."

Q. One more sentence, I'm sorry?

A. "Crisis/Emergency services may be delivered in natural settings and the Crises/Emergency provider shall adjust its staffing to meet the requirements for immediate response."

Q. And then could you explain.

A. How it operates in practice?

Q. Yes, please.

A. We have a number of departments or organizations within the Department of Mental Heath that provide urgent and emergent response. The Access Helpline, which I described earlier, is one of them, and response both to the consumers who may be in crisis and to the system, for example,

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providing authorization and/or a treatment number to someone who needs emergency hospitalization.

35 K Street, which is a clinic that we run, on 35 K Street, Northeast, provides walk-in services, and there's a number of situations where people come to walk-in services.

Many of the people who come are supervised by CSA, and I am never quite sure of the whole acronym, but it's court ordered supervision authority. I think I'm missing a letter in there. Those are the people that essentially have been recently released from a correctional setting and often need medication or evaluation.

35 K also provides walk-in services to a number of other consumers, usually indigent, and they provide immediate -- let me say, same-day services, often focus around psychiatric medication.

Then another major part of the psychiatric emergency response is the Comprehensive Psychiatric Emergency Program that's located at --

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excuse me, strike that. Is located on the grounds of DC General near the DC correctional facilities there. That is a twenty-four-hour facility staffed by the psychiatrist and other mental health providers and consumers come there day and night, twenty-four hours a day, three hundred and sixty-five days of the year.

Those consumers are evaluated and about fifteen percent of them go on to be hospitalized at a community hospital. The rest are treated and released back to the community, usually with very tight follow-up with their core service agency.

So a majority of the people who are there are also followed by a core service agency. The fifteen percent of people who go on to community hospitals, most go on to Providence in the United Medical Center.

Washington Hospital Center has recently started taking people who are involuntary and people who are involuntary who have insurance may go to Psych Institute of Washington.

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Q. Just to clarify, though, of course the definition that you read from here for core service agencies, this discusses specifically crises/emergency services provided to consumers in the community.

A. I'm sorry, you said "the definition I read from for core service agencies." I don't recall reading a definition for core service agencies.

Q. Earlier you did say "these are MHRS services and are provided through core service agencies."

A. Yes, I did. Some are provided through core service agencies, and some are provided through the government-run organizations, which include 35 K and the CPEP, and then we have contracts with the other local hospitals, and I'm not understanding your question or your concern. If you could clarify.

Q. I guess I'm asking, there is a specific service that core service agencies provide that is

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emergency or crisis intervention in the community, short of the other interventions that you mentioned, such as CPEP and hospitalization.

A. Is that a question or a statement?

Q. I'm asking if that's a correct understanding.

A. The core service agencies do assist with crises, however, there are times when the patient becomes too disruptive or too assaultive and then they may well call on us for assistance.

The other part of the crisis intervention, which I have not yet mentioned, is our mobile crisis team, which is an outreach, which often is called on, and I said often, I don't think I can define exactly how often, but is often called on by the core service agency, if they cannot diffuse the situation, themselves.

Q. But they may be delivered in an actual setting, crisis intervention services?

A. I'm sorry, your question is vague.

Q. You read from this you said,

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crises/emergency services may be delivered in natural settings. Do you agree with that statement, as well?

A. I do.

Q. Let's just talk briefly about day services.

A. I can.

Q. And if you could please differentiate between intensive day services and day services.

A. I would like to preface my remarks about day service. I have been here nine months. The areas that I have focused the most on are the hospitalization, mobile crisis services, homeless outreach and other things that fall directly underneath me.

The day programs I have a less intimate knowledge of. My understanding, however, is that a number of CSAs offer day services and, for example, McClinton Center offers a day service program. Washington Hospital Center offers a day service program. I believe PSI does, but I have not

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directly observed those day treatments, myself.

Q. And assertive community treatment?

MR. PATRICK: Objection. Is that a question?

BY MS. LAV:

Q. Can you please describe assertive community treatment?

A. Assertive community treatment is our most intensive outpatient delivery of services, and it consists usually of either frequent visits to the consumer or other contacts. If the consumer is homeless, as many of these are, it may be partially frequent looking for the particular consumer.

Many but not all of the CSAs offer a form of ACT treatment, and the consumers can be formally enrolled in what's called ACT, assertive community treatment, if they are judged to need that level of service.

Q. You get formally enrolled on an ACT team through a core service agency? Is that what you just said, I'm sorry?

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A. That's not what I just said.

Q. Okay.

A. But I can address that question. Is the question whether consumers get formally enrolled in an ACT team through a core service agency?

Q. Yes.

A. Consumers get formally enrolled in an ACT program through Mr. Wooten, and he is in charge of that process and deciding which consumers get formally enrolled in an ACT program. The core service agency then, if they have an ACT team, would increase the level of care to that consumer.

In come cases, core service agencies do not have an ACT team and they may get the ACT service through another organization.

Q. And by another organization, do you mean another core service agency?

A. Yes.

MS. LAV: Please mark this as Plaintiff's Exhibit 2.

litigation, so be it.

Thank you, Madam Court Reporter.

(Whereupon the deposition of Elspeth Cameron Ritchie, M.D., was concluded at 3:35 p.m.)

E R R A T A S H E E T

SLR REPORTING
13111 Foxden Drive
Rockville, Maryland 20850
(301) 651-3335

IN THE MATTER OF: EDWARD DAY, et al vs. District OF COLUMBIA
DEPONENT: ELSPETH CAMERON RITCHIE, M.D.

Enclosed is the transcript of your deposition testimony. Please review the transcript, complete and distribute the signed errata sheet and acknowledgment page to all parties, including this office, within thirty (30) days of any changes and/or the transcript itself.

PAGE LINE CHANGE OR CORRECTION REASON THEREFORE

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CASE: EDWARD DAY, et al vs. DISTRICT OF COLUMBIA
DATE: June 22, 2011

ACKNOWLEDGMENT OF DEPONENT

I, ELSPETH CAMERON RITCHIE, M.D., do hereby acknowledge that I have read and examined pages 1 through 253, inclusive, of the transcript of my deposition and that: (Check appropriate box)

[ ] The same is a true, correct, and complete transcript of the answers given by me to the questions therein recorded.

[ ] Except for the changes noted in the attached Errata sheet, the same is a true, correct, and complete transcription of the answers given by me to the questions therein recorded.

Date: Signature:

Sworn to and subscribed to before me on
This day of , 2011.

NOTARY PUBLIC
My Commission Expires:

CERTIFICATE OF NOTARY PUBLIC

I, Kim M. Brantley, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to computerized transcription under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Notary Public in and for
The District of Columbia
My Commission Expires:
October 14, 2014

_____

Exhibit DD

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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EDWARD DAY, et al., :

Plaintiffs, : Civil Action No.:

vs. : 10-cv-02250 ESH

DISTRICT OF COLUMBIA, :

Defendant. :

- - - - - - - - - - - - - - - - - - X

Wednesday, July 27, 2011

Washington, DC

DEPOSITION OF:

LEYLA SARIGOL,

called for examination by Counsel for Plaintiffs, taken at University Legal Services, 220 I Street, NE, Suite 130, Washington, DC, commencing at 9:07 a.m., before Kim Brantley, a Court Reporter and Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

APPEARANCES:

On behalf of the Plaintiffs:

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I N D E X

DEPOSITION OF LEYLA SARIGOL

INDEX OF DEPOSITION EXHIBITS:

DEPOSITION EXHIBITS CONTINUED

(Exhibits retained by Ms. Rifkin.)

P R O C E E D I N G S

Whereupon,

LEYLA SARIGOL,

called as a witness by Counsel for the Plaintiffs, and, after having first been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFFS:

BY MS. RIFKIN:

Q. Good morning, Miss Sarigol.

A. Good morning.

Q. I want to re-introduce myself, although we have met. My name is Marjorie Rifkin and I am managing attorney here at University Legal Services, and I am representing the plaintiffs in Day versus District of Columbia.

I'll give you a short description, one line. It's a case on behalf of DC residents in nursing facilities who are seeking to exercise their right under the ADA to return to the community with the services and supports that they

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in this case the EPD waiver, if we're talking about a nursing home, primarily the people coming out of nursing homes.

Q. Are there other criteria for eligibility for the MFP?

A. Those are the criteria.

MS. RIFKIN: Please mark this as Exhibit 5.

(Affidavit of Leyla Sarigol was marked Deposition Sarigol Exhibit 5, for identification.)

BY MS. RIFKIN:

Q. I'm showing you what's been marked as Exhibit 5. Can you identify this?

A. Yes, this is my affidavit submitted in response to the complaint, and this is the --

Q. Complaint in this case?

A. Yes, that's correct, the Edward Day, et al. complaint, dated April 26th, 2011.

Q. I think we'll come back to this in a moment. We will come back to that.

Are you focusing eligibility more on

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people who have housing lined up, already identified housing?

A. Currently we are.

Q. And are you also focusing on people who have family supports in place?

A. No, we are not.

Q. Do nursing facility residents need to affirmatively apply to MFP?

A. What do you mean "affirmatively apply"?

Q. Can they call the MFP office and request to be considered for the program?

A. Yes.

Q. Is there an application that they fill out for this?

A. No, there is not.

Q. So how do they apply?

A. Right. I wouldn't refer to it as an application process. There is an application as a part of it, as a part of the MFP enrollment process, which is consistent with the EPD waiver application. But there is no additional

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application that is filled out.

The way that they apply is that we have a Preference Interview Tool, and it's a screening that goes over one, someone's preference to return to the community, two, their housing needs, and three, the assistance that they will require with activities of daily living.

That Preference Interview Tool is conducted as an initial screen with people who express an interest in going back to the community, and based on the responses to the Preference Tool, we will either proceed with the transition or not.

Q. And is that Preference Tool conducted in person in an interview by Chrysty Lyons?

A. It is, yes.

Q. So would it be fair to say that she interviews each potential MFP candidate?

A. Yes.

Q. Would she interview anyone who calls and requests to be interviewed, from a nursing facility?

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A. Right. Currently, no.

Q. Who makes the determination of who Ms. Lyons interviews for the program?

A. Right. At this point, we are still working on the Pilot Demonstration, so let's say it this way, that once we transition the first group of people who we are working with, and we have the mechanisms in place to conduct and deliver the transition services in a way that the management at the Medicaid Healthcare Finance Agency -- let's see, how do I say this, will agree with and find that is appropriate for the delivery of these services, then, yes, she will interview anyone who expresses an interest.

For the time being, however, we are not conducting new interviews, except for those people who have housing already identified.

Q. So, you mentioned that the managers at DHCF have a particular standard in mind for the services that are being provided to people coming out of nursing facilities?

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Is that an accurate characterization?
A. Well, I believe that is an accurate characterization. The dilemma in this case is not about the standard of the care that's provided but rather the mechanism by which the services are delivered.
This goes to the transition services that I described earlier that are currently being paid for by the financial transaction.
Q. I see. Those are the transition costs that you mentioned?
A. That's correct.
Q. Which the federal government has funded MFP to provide?
A. That is correct.
Q. So if I am understanding you, then, that is impeding the further transition or expansion of the people from the pilot?
A. Yes.
Q. And how many of the people are currently identified in the MFP pilot for

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transition?
A. Twenty-seven.
Q. And you mentioned six people got out under MFP?
A. That's correct; two people under the EPD waiver and four who transitioned through nursing homes.
Q. What do you mean by transitioned through nursing homes --
A. Excuse me, what I mean is -- I didn't complete the sentence, through the IDD waiver.
Q. So, of the six there were two through the IDD waiver?
A. Correct.
Q. So that's not --
MR. PATRICK: I think you may have gotten it flipped.
MS. BAKER: I think you flipped it. I don't want to testify.
BY MS. RIFKIN:
Q. Just clarify.

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A. Yes, thank you. Through the IDD waiver, four; two through the EPD waiver.
Q. Of the people transitioning, of the population we're here discussing today, if I'm getting this right, there were two people?
A. That's correct.
Q. Who are either seniors, called elderly in our jargon, or people with physical disabilities, a total of two were transitioned thus far under Money Follows the Person?
A. Yes.
Q. And how many people have been identified, in addition to the two, to transition under the EPD phase of the Money Follows the Person Program?
A. We have twenty-five additional people.
Q. Okay. That's part of what you called the Demonstration pilot?
A. Correct.
Q. What is the status of the work of the Money Follows the Person Program on behalf of those

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twenty-five pilot participants?
A. What do you mean by what is the status?
Q. Have the twenty-five got housing at this point?
A. Some of them, yes.
Q. For those how many have housing?
A. Without the numbers in front of me, I can't give you an accurate -- I'm going to give you my guesstimate. We in fact recently kind of broke it up. Let me give you the one liner. They're in various stages of transition. The majority either they have housing choice vouchers, or are about to receive them, and there are two that have public housing, as well.
And so we are in the process of -- many of them have, let's see, of those -- let me break it down. There's got to be, let's say about seven that already have housing identified.
Q. Seven of the twenty-seven --
A. And leases signed.
Q. Seven of the twenty-seven?

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Q. I'm just asking. Given the way the Housing Authority works and your experience with working with the pilot participants, can you estimate how long that process takes for someone with a priority of MFP?
A. Right. I can give you a range.
Q. That's fine.
A. And I would say that with the priority it's taken as little time as one month, depending on again unanticipated barriers, missing documents, et cetera, that come up in the process. It could take up to six months.
So, one month to six months.
MR. PATRICK: Miss Rifkin, I don't mean to interrupt your flow. If at any time it's convenient for you, I'd like to take a break to use the men's room.
MS. RIFKIN: We can take a break.
(Brief recess taken.)
MS. RIFKIN: We're back on the record. We took an eight-minute break, give or take.

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BY MS. RIFKIN:
Q. You mentioned in your affidavit, Exhibit 5, Paragraph 23, if you would take a look at that. On Page 10, the carryover paragraph. Can you read the part that says, "this Pilot Program"...
A. "This Pilot Program reached forty nursing home residents in five District nursing facilities, including any of the thirty individuals identified by University Legal Services who still resided in nursing facilities at the time the pilot project was initiated (or sixteen people)."
Q. What did you mean by the Pilot Program reached forty individuals?
A. Right. What I mean by that is that we, as a part of the pilot, interviewed at least forty nursing home residents for participation in the pilot.
Q. So is that Ms. Lyons' interviewed, based on that Preference Interview Tool?
A. It is Ms. Lyons' interviewed, and at

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the time that we initiated the pilot project, I was working with a team of people from the Aging and Disability Resource Center, who also conducted interviews.
Q. When you say a team from the Aging and Disability Resource Center, how many people were involved?
A. There were two additional people who were doing work in nursing homes.
Q. So it was two people from the ADRC plus Ms. Lyons?
A. Correct. There were three people.
Q. Three people.
A. Working in the five nursing homes.
Q. And that enabled you to interview forty people?
A. That's correct.
Q. What would it take for MFP to be able to interview people in all nineteen nursing facilities?
A. Right. The staff that we have now can

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do interviews in all nineteen nursing facilities, meaning Ms. Lyons can conduct those interviews.
Q. On her own?
A. Correct.
Q. What would it take for MFP to interview the five hundred and eighty people who have expressed a preference to move back to the community?
A. To interview the five hundred and eighty people, that would take more than just Ms. Lyons.
Q. How many more?
A. That would have to be determined based on the timeframe within which we were actually going to conduct the interviews.
If we were to say we would interview all of them at once, that would yield a different answer than if we were to say we would interview all of them over a period of six months.
Q. Well, the time period you mentioned for reaching forty nursing home residents was, I

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believe, nine months, August, 2010 to April, 2011, if I counted under the table correctly.

So does that give you a sense of --

A. Within that time -- let me just say a little bit about how the pilot was done.

We were able to reach the forty residents with three people in a period of approximately I would say one month that we actually did reach those people. That being said, I mean, if we were to have three staff working solely on outreach, we could reach all five hundred and eighty. That would be one way to approach it.

Q. In your affidavit in Paragraph 2, you reference the fact that you cooperate with, among others, the Mathematic Policy Research?

A. Mathematica, yes.

Q. Mathematica. Are you familiar with the Mathematica January, 2011 report?

A. I would have to see it to confirm that.

MS. RIFKIN: Could I ask that you mark this Exhibit 6.

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(Mathematica Research Report was marked Deposition Sarigol Exhibit 6, for identification.)

BY MS. RIFKIN:

Q. Showing you what's been marked as Exhibit 6, can you identify this?

A. Yes. It is a Money Follows the Person Demonstration, Overview of State Grantee Progress, January through June, 2010. Mathematica Policy Research issued January, 2011.

Q. I'd like to direct your attention to Page 3. Can you read from the top, "states vary," that paragraph?

A. Yes. "States vary in the degree to which they are reaching their 2010 transition benchmark goals. Seven states achieved sixty percent or more of their goals during the first half of the year and are on track to either meet or exceed their 2010 transition benchmark.

"In fact, two of these states, Texas and Virginia, exceeded their annual goals in the first half of 2010.

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"Eleven states achieved between forty percent and sixty percent of their 2010 transition benchmark goals, and the remaining twelve states achieved less than forty percent of their 2010 transition goals.

"Of these, five states, California, District of Columbia, Nebraska, North Carolina and Wisconsin, achieved less than twenty percent of their 2010 target, but express a need for these five states to either A, invest substantially more resources, or adjust the program design to significantly increase transition volume or B reduce transition goals for subsequent years through amendments to their operational protocols, so as not to jeopardize their ability to receive supplemental MFP grant funds."

BY MS. RIFKIN:

Q. And on Page 25, can you take a look at the chart, and under percentage of 2010 transition target achieved, what is it for the District of Columbia?

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A. Seventeen point eight percent.

Q. How many people do you expect will transition through MFP from nursing facilities by December, 2011?

A. By December, 2011, I project that all of the twenty-seven participants in the Demonstration will have transitioned, again, barring any unanticipated barriers.

Q. You mentioned that MFP is not the primary way for people to transition to the community. What is the primary way?

A. Honestly, the primary way, I don't know what that way is, to be frank.

If you look at our transition numbers, there are two people who have moved. That being said, it cannot be the primary way by which people are moving out of nursing facilities.

I don't have the rates of transition currently from nursing facilities, but I would guess that there are many more people, again, from personal conversations with nursing home

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Authority's waiting list for housing choice vouchers, or at that point Section 8. There were people, who, of course, have been on the waiting list for ten years or more, so --

Q. Let me just stop you there a second.

Who set that criteria that someone had to be on the DC Housing Authority waiting list in order to get access to these vouchers, I mean, in order for your program to have an allocation of vouchers?

A. My understanding of the NEPD voucher program is that it's a criteria set by HUD, but anything DC-specific, of course, would have been established, I would assume, by the DC Housing Authority and the board of the DC Housing Authority.

Q. And did the DC Housing Authority reveal to you how many of the waiting list candidates for the Housing Authority are nursing facility residents?

A. No, they did not.

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Q. Would they have a way of knowing who on the waiting list is the nursing facility resident?

A. Currently, I'm not aware of any way that they would be able to identify it, "it" being the reality that someone is in a nursing home now, given that the address on file is based on the address at time of application for the voucher.

Just quickly, on the process for securing the vouchers...

Q. Um-hum.

A. DCHA invited agencies that were involved in the planning for the application for these vouchers to submit lists of people who were ready to transition and their social security numbers.

So that was the primary criteria, that you had to have the list. That was something that I believe was set by the Housing Authority. You had to have the list and the Social Security Number for all the people who you wanted to submit for review for eligibility for this particular set of

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vouchers.

I will say that Healthcare Finance was invited to the table later, much later in the planning process for these vouchers, DMH and DHS -- obviously DMH received the bulk of the vouchers, had been involved from the beginning.

So we were able to get the ten, as we have noted all ready. I submitted seventeen names and Social Security numbers upon request.

Q. Was that after the allocation had already been established that you were asked to submit a list with the names?

A. I don't know. I cannot recall.

Q. Is it fair to say that you were seeking more than ten vouchers?

A. Yes, it is.

Q. Significantly more than ten vouchers?

A. I was able to produce names and Social Security numbers for seventeen. I do believe there is a greater need for them, definitely, but meeting the criteria of on the waiting list already, that

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was a limiting factor.

MS. RIFKIN: I think we should probably break for lunch, since it's 12:05.

(Whereupon a luncheon recess was taken at 12:05 p.m.)

A F T E R N O O N S E S S I O N

(Whereupon at 1:08 p.m. the Deposition of Leyla Sarigol was continued and she further testified as follows.)

MS. RIFKIN: It's 1:08 and we're back on the record.

BY MS. RIFKIN:

Q. Would you say, based on your experience, that nursing facility residents' predominant need for services is with their activities of daily living?

A. Based on our experience with the pilot, I would say no, that's not necessarily the case.

Q. So, in terms of accessing personal care services, homemaker and chore maker to assist people with their daily activities, those services

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are covered under the waiver? I'm sorry, you have to give a verbal answer.
A. Yes, that's correct.
Q. And how many hours of those services are available to people in the community?
A. Personal care assistance is available at a maximum of sixteen hours per day, per person.
I have not seen hourly limits on the other services, and certainly with the environmental accommodation it's not based on an hourly rate. There is a payment that's made for the accommodation, a one-time payment.
Q. And do many of the pilot participants get the full sixteen hours of services under the waiver?
A. I think that it's too soon to say whether or not it's "many." Of the two participants who have transitioned, it's my understanding that neither one of them receives the sixteen hours.
Q. Does either one of them, the two people

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who have transitioned, receive any skilled services in their home?
A. They do received skilled services. For example, one of them receives physical therapy in her home, but if you're referring to a skilled service as skilled nursing, for example, the answer is no.
Q. Physical therapy is an outpatient basis under the state Medicaid plan, isn't it, for this population?
A. That's correct. That is correct.
Q. So there is no physical therapy in the home under the EPD waiver?
A. That's correct.
Q. Would you say that the needs of the, you call it the EPD population, differ from the needs of the population with intellectual and developmental disabilities?
A. Yes.
Q. Would you agree that its important to involve nursing home staff in the discharge

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process?
A. Yes.
Q. And does the nursing home staff also take responsibility for some of the transition assistance, or logistics, if you will?
A. Yes.
Q. We talked a little earlier about the DHCF role in processing waiver authorizations for people getting out of nursing facilities.
A. Um-hum.
Q. Would you say that delays in the waiver authorization process can cause delayed discharge for nursing facility residents?
A. Hypothetically, yes, a delay in that process could. To date, a delay in that process has not.
Q. And is that because the two people who got out didn't need the full sixteen hours under the waiver?
A. I don't believe that is why there was no delay.

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Q. In other words, they were able to access personal care services under the state plan prior to the waiver program kicking in, if you will?
A. That is correct for one of them. The other, again, I was not actually in the country at the time when she transitioned, but when she did transition my understanding is that waiver services were in place that day.
So it was an issue -- I won't say an "issue," but in either case did it hold up the transition, and for the one, yes, we were able to provide emergency state plan PCA.
Q. Is it important for the EPD waiver case manager to work closely with the nursing home staff in facilitating the transition?
A. Yes.
Q. And does the EPD waiver case manager work with the MFP transition coordinator?
A. Yes.
Q. As well as with the nursing facility

CERTIFICATE OF NOTARY PUBLIC

I, Kim M. Brantley, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to computerized transcription under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Notary Public in and for
The District of Columbia

My Commission Expires:
October 14, 2014

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