UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES, SHANNON HEMMINGSEN, SAMUEL RIVERA, GALE YENCHA, NORMA JEAN DIAZ, and AGATHA JOHNSON, individually and on behalf of other similarly situated individuals,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 3:06civ.00179 (AWT)
THE STATE OF CONNECTICUT, MICHAEL P. STARKOWSKI, in his Official capacity as Commissioner of the Dept. of Social Services, THOMAS A. KIRK, Jr., PhD., in his official capacity as Commissioner of the Connecticut Dept. of Mental Health and Addiction Services and J. ROBERT GALVIN, M.D., M.P.H., in his official capacity as Commissioner of Connecticut Dept. of Public Health	:	
Defendants.	:	

UNITED STATES' MEMORANDUM AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Introduction

Plaintiffs bring this action seeking declaratory and injunctive relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("504") challenging Defendants' reliance on privately run segregated nursing home facilities to serve the needs of individuals with mental illness, when such individuals would be more appropriately served in community-based settings. The United States believes that plaintiffs have alleged sufficient facts to state a claim of a violation of the ADA.

In the pending motions to dismiss, Defendants claim, *inter alia*, that Plaintiffs have failed to assert a viable claim under the ADA because (1) the nursing home facilities in which services are provided are privately run, rather than operated by the state and (2) the Complaint fails to allege that the defendant public entities have illegally discriminated against plaintiffs in any of the programs, services, or activities that they administer. Defendants also attack the jurisdiction of this Court, arguing that the Connecticut Office of Protection and Advocacy ("OPA") does not have standing to sue under the ADA because it lacks the requisite relationship with its constituents that is required for it to sue in its own name for harm suffered by its constituents.

Defendants' interpretation of the scope of title II's coverage, however, is contrary to the Department of Justice regulations interpreting the ADA and the Supreme Court's holding in Olmstead v. L.C., 527 U.S. 581 (1999). And Defendants' suggestion that this Court should reject Plaintiffs' claim of associational standing threatens effective enforcement of the ADA.

Because this case involves the application and interpretation of the regulations implementing title II of the ADA, the United States has a direct interest in this case.[1] Pursuant to Congress's mandate, 42 U.S. C. 12134, the Attorney General promulgated regulations construing the nondiscrimination mandate of title II. 28 C.F.R. Pt. 35. One of those regulations, 28 C.F.R. 35.130(d), states that public entities must provide services in the most integrated setting appropriate to the needs of qualified individuals with a disability. In Olmstead, the Court further explained the contours of the ADA's integration mandate, holding that "unjustified isolation . . . [is] discrimination based on disability." Olmstead 527 U.S. at 597. Such "unjustified isolation" includes "institutional placement of persons who can handle and benefit from community settings." Olmstead 527 U.S. at 600.

The state defendant in this case misconstrues the application of the ADA title II regulation, and the United States thus has an important interest in articulating the correct interpretation of that regulation and its application in private enforcement. The United States

[1]The United States has a long history of participating as amicus in cases that involve the interpretation of title II and its implementing regulations, including briefs for the United States as Amicus Curiae in: Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1994), (No. 94-1243) (addressing unnecessary segregation of persons with disabilities as a form of discrimination prohibited by the ADA and the integration regulation); Williams v. Wasserman, (D. Md. 1996) (No. 94-880) (addressing interpretation of integration regulation as covering unnecessary segregation of individuals in institutions); Brown v. Chiles, (S.D. Fl. 1998) (No. 98-673) (addressing scope of title II coverage); Olmstead v. L.C., et al., 527 U.S. 581 (1999) (No. 98-536) (interpreting integration regulation to require a State that offers treatment to persons with disabilities to provide such treatment in community setting); Wyatt v. Sawyer (D. Ala. 1999) (No. 70-T-3195-N) (addressing interpretation of integration regulation); Newberry v. Menke, (M.D. Tn. 2000) (No. 98-cv-01127) (addressing interpretation of the integration regulation, 28 C.F.R. § 35.130(d)); Davis v. California Health and Human Servs., (N.D. Cal. 2001) (No. 00-cv-2532) (addressing interpretation of the fundamental alteration defense under DOJ's reasonable modification regulation, 28 C.F.R. § 35.130(b)(7)); Long v. Benson, (11th Cir. 2009) (No. 08-cv-16261).

also has an interest in protecting the ability of protection and advocacy organizations to bring such suits. Accordingly, the United States, as amicus curiae, respectfully submits that this Court should deny Defendants' Motion to Dismiss for Lack of Standing ("MDLS") and Motion to Dismiss for Failure to State a Claim ("MDFSC").

BACKGROUND

Plaintiffs filed suit on behalf of approximately 200 individuals with mental illness residing in three nursing facilities in Connecticut, as well as numerous other individuals who are at risk of entry into these facilities. (First Amended Complaint at 1) Plaintiffs claim that individuals with mental illness reside in these facilities while equally affordable and more integrated community-based settings exist or could be made available that would better meet the needs of individuals with mental illness. (First Amended Complaint ¶6.) Plaintiffs allege that individuals with mental illness reside in these nursing facility settings because of a lack of community-based alternatives. (Id.) The Complaint alleges that the Defendants' choice of funding expensive institutional care, rather than less costly care in integrated settings, results in these unnecessarily segregated placements. (Id.) The Complaint further alleges that the Defendants failed to develop and fund community-based alternatives after closing down state hospitals, leaving many individuals with mental illness with nowhere to go but the nursing home. (Id. ¶¶ 6, 89.)

Defendants argue in their Motion to Dismiss for Failure to State a Claim that Plaintiffs' "lawsuit is apparently predicated upon the erroneous contention that the defendants all jointly have an obligation, arising out of the ADA, to develop, establish, and fund community-based alternatives, to assess plaintiffs' suitability for community-based alternatives,

and to place plaintiffs into such alternatives." (MDFSC 1.) Defendants further argue that Plaintiffs

> do not allege that the defendants have 'excluded' or 'denied' them from participation in any program, service, or activity as a result of their claimed disabilities, or that the defendants have 'discriminated' against them by providing them public services that are 'unnecessarily separate' and 'institutional' in character. Indeed, plaintiffs do not allege that defendants provide them with any program, services or activities at all, or that the defendants have 'denied' or 'excluded' plaintiffs from participating in any of the programs, services, or activities that they administer. In the absence of such allegations, plaintiffs fail to state a claim upon which relief can be granted.

(MDFSC 2.)

ARGUMENT

A. Plaintiffs Have Alleged Sufficient Facts to Support a Claim that Defendants Have Violated the Integration Mandate of the ADA

1. For Purposes of the Motion to Dismiss For Failure to State A Claim Pursuant to Fed. R. Civ. P. Rule 12(b)(6), the Court Must Accept Factual Allegations in the Complaint as True

In assessing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court must accept the factual allegations contained in the complaint as true. Starr v. Georgeson S'holder, Inc., 412 F.3d 103, 109 (2d Cir. 2005). A court must determine whether a complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal,[2] 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp.

[2]Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) was decided on May 18, 2009, after the Defendants in this case moved to dismiss. Defendants submitted a notice of additional authority on May 27, 2009, urging this Court to find that Plaintiffs' allegations amount to conclusory allegations and fail to state a viable claim, including "specifically what community-based programs the defendants administer, what 'methods of administration' are employed in any such programs, how such methods of administration are discriminatory, and specifically what 'discriminatory' conduct the defendants (or any of them) took that specifically and personally caused injury to the named plaintiffs (or to any of OPA's 'constituents')." Notice of Supplemental Authority May 27, 2009 at 2. The United States believes that Plaintiffs' allegations satisfy the pleading

v. Twombly, 550 U.S. 544, 570). Shomo v. City of New York, 579 F.3d 176 (2d. Cir. 2009).

The factual allegations alleged in the complaint must be sufficient "to raise a right to relief above the speculative level," ATSI Communications v. Shaar Fund, Ltd., 493 F. 3d 87, 98 (2d Cir. 2007) (quoting Twombly, 550 U.S. at 545), and a "formulaic recitation of the elements of a cause of action" is insufficient to state a claim for relief. Twombly, 550 U.S. at 545. If the Court finds that the Complaint "has not 'nudged [his] claims . . . across the line from conceivable to plausible,'" Iqbal, 129 S.Ct. at 1951 (internal citations omitted), then such claims cannot be sustained under the pleading requirements. The Second Circuit has held that this does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face," Twombly 550 U.S. at 570.

2. Defendants Mischaracterize Plaintiffs' Claim as a 'Level of Care' Claim When Plaintiffs Argue Instead that Defendants' Administration of Services Violates the ADA Integration Regulation

Relying on Rodriguez v. City of New York, 197 F.3d 611, 619 (2d Cir.1999), Defendants suggest that Plaintiffs are impermissibly seeking a higher "level of care" by claiming that OPA's constituents should be placed in community-settings rather than nursing facilities. That suggestion lacks merit.[3] In Rodriguez, the Court was not faced with the question whether New

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requirements under Ashcroft v. Iqbal.

[3]At least two circuits have rejected efforts to impose the Rodriguez analysis on integration regulation claim. In Townsend v. Quasim, 328 F.3d 511 (9th Cir. 2003), the court held that the lower court's reliance on Rodriguez was "misplaced": "As Rodriguez makes clear, where the issue is the location of services, not whether services will be provided, Olmstead controls." The Court went on to note: "Characterizing community-based provision of services as a new program of services not currently provided by the state fails to account for the fact that the state is already providing those very same services. If services were determined to constitute distinct programs based solely on the location in which they were provided, Olmstead and the integration regulation would be effectively gutted. States could avoid compliance with the ADA simply by

York unnecessarily segregated plaintiffs in violation of the ADA: plaintiffs instead claimed that the state was required to provide a particular personal care service (when it was already providing a range of other personal care services). The court in Rodriguez characterized Olmstead as a case in which the "parties disputed only – and the court addressed only – where Georgia should provide treatment, not whether it must provide it." Rodriguez, 197 F.3d at 619. Unlike in Rodriguez, the Plaintiffs here are disputing only where, not whether, the state should provide services.[4]

This Court should therefore analyze the Plaintiffs' allegations under the framework adopted by the Supreme Court in Olmstead v. L.C., 527 U.S. 581 (1999). In Olmstead, the Supreme Court held that a violation of the ADA title II's "integration mandate" is a form of discrimination that violates the statute. This mandate requires that "when a state provides services to individuals with disabilities, it must do so 'in the most integrated setting appropriate to their needs.' 28 C.F.R. 35.130(d); 28 C.F.R. 41.51(d)." Olmstead, 527 U.S. at 607. The Court in Olmstead explained the contours of the ADA's integration mandate, recognizing that "unjustified isolation . . . [is] discrimination based on disability." Olmstead 527 U.S. at 597. As

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characterizing services offered in one isolated location as a program distinct from the provision of the same services in an integrated location." Id. at 517. See also Radaszewski v. Maram, 383 F.3d 599, 614 (7th Cir. 2004).

[4]In Joseph S. v. Hogan, 561 F.Supp.2d 280 (E.D.N.Y. 2008), a case involving similar Olmstead unnecessary segregation claims, the Court quickly rejected Defendants' efforts to apply Rodriguez in their Motion to Dismiss, noting: "The cases cited by defendants in their memorandum and letter...are inapposite as they interpret the ADA's reasonable accommodation and equal access requirements and not the integration mandate. See Henrietta D., 331 F.3d at 272-73; Rodriguez v. City of New York, 197 F.3d 611, 618-19 (2d Cir. 1999); Doe v. Pfrommer, 148 F.3d 73, 81-83 (2d Cir. 1998); Lincoln CERCPAC v. Health & Hosps. Corp., 147 F.3d 165, 167-68 (2d Cir. 1998); Leocata v. Wilson-Coker, 343 F.Supp.2d 144, 155 (D. Conn. 2004)." Joseph S. Report and Recommendation Apr. 21, 2008 at 16, n.9.

the Court explained, "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 . . . and institutional confinement severely diminishes individuals' every day activities." Olmstead, 527 U.S. at 600. A State's obligation to provide services in the most integrated setting is not unlimited, however, and may be excused in instances where a state can prove that the relief sought would result in a "fundamental alteration" of the State's service system. Id. at 603-607.

The Court in Joseph S. v. Hogan, 561 F.Supp.2d 280 (E.D. N.Y. 2008) correctly analyzed a similar claim under this framework:

> Plaintiffs' allegations that individuals with mental illness are unnecessarily segregated in highly restrictive nursing homes, even though their needs could be met in a more integrated setting, and that these individuals desire to reside in a more integrated setting, are adequate to state violations of the ADA and Section 504 under Olmstead and meet Twombly's plausibility standard . . . . Accordingly, plaintiffs have sufficiently alleged that defendants fail to "administer [their] 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). Moreover, the allegations concerning the restrictions on freedom within the nursing homes amply state a claim for a violation of the integration mandate because these restrictions on an individual's freedom prevent them from interacting with "nondisabled persons to the fullest extent possible."

Id. at 292.

3. A State's Administration of Programs That Result in Unjustified Segregation of Persons with Disabilities in Private Institutions Violates Title II

The United States urges this Court to adopt the interpretation of the scope of title II of the ADA adopted by the court in Disability Advocates Inc. v. Paterson, 598 F.Supp.2d 289, 319 (E.D.N.Y. 2009). In Disability Advocates, the court held that plaintiff's claim that the state discriminated against individuals residing in privately operated adult homes fell "squarely under Title II of the ADA." There, "[p]laintiff allege[d] that Defendants' administration of services

discriminates against adult home residents by unnecessarily segregating them, and claim[ed] that if Defendants allocated their resources differently, adult home residents could receive services in a more integrated setting." Disability Advocates, 598 F.Supp.2d at 319. In denying summary judgment, the Court held:

> Title II of the ADA applies to the claims in this case. An Olmstead claim concerns a ***public entity's obligation to make reasonable modifications to its service system to enable individuals with disabilities to receive services in the most integrated setting appropriate to their needs***. Defendants, as required by New York law, administer the State's mental health service system, plan the settings in which mental health services are provided, and allocate resources within the mental health service system. Accordingly, Defendants' contention that [Plaintiff DAI] has failed to identify any State service, program, or activity related to DAI's claim that is subject to the ADA is without merit.... Discrimination, in the form of unjustified segregation of individuals with disabilities in institutions, is thus prohibited in the administration of state programs. The statutory and regulatory framework governing the administration, funding, and oversight of New York's mental health services – including the allocation of State resources for the housing programs at issue here – involves "administration" on the part of Defendants.

Id. at 317-18 (emphasis added).

In reaching its determination that title II covered the plaintiff's claim, the Disability Advocates court pointed to a number of factors, including the general structuring of the mental health system and administration of services. Id. at 295. The court also looked to evidence of any "policies" that the State had of relying on segregated facilities to provide state services. Id. at 296-97. The court noted the planning conducted by the State in structuring how to provide services for individuals with mental illness and its role in regulating, monitoring, inspecting, or overseeing the facilities. Id. at 314-15. In addition to these direct actions by the State, the court also looked to evidence suggesting that the State itself considers the private facilities as part of its mental health system. Id. at 297, 301. The court explained that Olmstead imposes obligations "on states which are responsible for providing services, not on the particular facilities

in which service recipients are alleged to be segregated." Id. at 316.

Accepting as true the facts alleged in the pleadings, the various defendant agencies in Connecticut taken together, like those in Disability Advocates, are responsible for a "comprehensive, integrated system of treatment and rehabilitative services for the mentally ill," Disability Advocates, 598 F.Supp.2d at 313, and have a state-operated system that relies in part on private nursing homes. Plaintiff's Complaint sets forth facts supporting each element that would be required for Plaintiffs to prevail on an integration claim:

- The Complaint alleges that Individual Plaintiffs and Plaintiff Class have a disability as defined by the ADA. First Amended Complaint ¶¶ 13,14, 152.

- The Complaint alleges that the individual Plaintiffs and Plaintiff Class have been institutionalized in the facilities in question (or risk entering such facilities) and should be receiving services in the community. Id. at ¶ 5.

- The Complaint alleges that the facilities in question are highly restrictive institutions that significantly limit residents' ability to interact with the outside world. Id. at ¶¶ 107, 112.

- The Complaint alleges that Plaintiffs and Plaintiff Class have similar levels of need to individuals to which the state currently provides community supports and are qualified to live in community settings with appropriate supports. Id. at ¶¶ 64, 125, 126, 153.

- The Complaint alleges that the Individual Plaintiffs would prefer to live in community settings. Id. at ¶¶ 55, 97, 127, 128, 129.

- The Complaint alleges that when "the State of Connecticut closed and downsized state hospitals, it failed to develop the supports and services, including residential services that individuals with mental illness need to live in the community." Id. at ¶89. This allegation supports Plaintiffs' assertions that Defendants' policy choices and practices result in the unnecessary segregation of individuals with mental illness in the named nursing facilities. Id. at ¶ 3.

- The Complaint alleges that the State already provides the type of services that Plaintiffs are requesting and that such services are less costly than the costs to house and provide services to Plaintiffs and Plaintiff Class in the nursing facilities (alleging that providing services in community settings rather than in nursing

facilities would not be a "fundamental alteration"). Id. at ¶¶ 94, 140.

In addition to alleging facts to support each element of a claim that a public entity has violated the integration regulation, Plaintiffs allege specifics regarding the roles of the respective agencies in the unnecessary segregation of individuals with mental illness in nursing home facilities:

- The Complaint alleges that the state's mental health agency "is responsible for providing a network of effective and efficient mental health and addiction services that foster self sufficiency, dignity and respect. As the State's mental health authority, DMHAS operates, funds and coordinates inpatient and community-based mental health services, including residential services, for adults 18 and older." Id. at ¶81.

- The Complaint alleges that the Department of Social Services is "is required to ensure that people with mental illness are appropriately screened and maintained in nursing homes. Conn. Gen. Stat. § 17b-262." Id. at ¶82.

- The Complaint alleges that the Department of Public Health "is the state agency responsible for regulatory oversight of health care facilities and services in Connecticut, and the licensing and regulation of long term care and nursing facilities. Conn. Gen. Stat. § 19a-490, et seq. As part of a comprehensive health care system, DPH determines the number of nursing home beds available, and determines whether nursing facilities are in compliance with federal and state statutes and regulations governing the quality of care and rights of residents in nursing homes. Those laws include the prohibition on admission or continuing confinement of individuals who do not have skilled nursing needs, the unjustified use of locked units, the failure to ensure treatment services are provided, and the failure to do proper discharge planning. See, e.g., 42 C.F.R. §§ 483.1 et seq.; Public Act No. 08-184, Sec. 57(a); DPH Public Health Code 19-13-D8t(b)(3)(A)." Id. at ¶83.

The Complaint alleges that Connecticut chooses to rely on privately operated nursing homes to provide housing and medical services for individuals for whom it is responsible, rather than operate its own residential program, or contract with a provider to run such a program, and that the nursing homes are not the most integrated settings appropriate for the individuals' needs. Defendants argue that, because the residents are housed in privately owned nursing homes rather

than State-owned facilities, the plaintiffs are not discriminated against under a State program, and therefore the State is not liable for violating title II's integration mandate. However, when a State relies on privately owned and operated facilities as part of its system of services for persons with mental illness, the State may be liable under title II for not providing services in the most integrated setting appropriate. As the court in Disability Advocates explained: "The State cannot evade its obligation to comply with the ADA by using private entities to deliver some of those services." Disability Advocates, 598 F.Supp.2d at 318.

Other courts have held that a public entity's system of services that includes privately run facilities should be subject to the integration requirement of the ADA. A district court in Ohio held that the "ADA applies to 'services, programs, and activities,' and liability does not hinge upon whether the setting in question is owned or run directly by the State." Martin v. Taft, 222 F.Supp.2d 940, 981 (S.D. Ohio 2002). Another court found it "immaterial" that many plaintiffs resided "in private rather than public nursing facilities," as the State did not dispute its obligations to private nursing home residents under the ADA. Roland v. Celluci, 52 F.Supp.2d 231, 237 (D. Mass. 1999).

A district court in this Circuit examined at length the nexus between the State's administration of mental health services and the private facilities in question. The court in Disability Advocates held New York liable under title II for failing to provide services in the most integrated setting to individuals living in privately owned and operated "adult homes." The court relied on the state's role in controlling "funding for services in various settings, including adult homes and supported housing, and effectively control[ling] how many adults receive services in any particular setting." Disability Advocates Inc., 598 F. Supp. 2d at 319.

It is true that mere licensure of private facilities cannot make the state responsible for a private entity's independent acts of discrimination, Tyler v. City of Manhattan, 849 F.Supp. 1429, 1442 (D. Kan. 1994). Plaintiffs here, however, are not challenging the nursing homes' independent acts of discrimination. Rather, Plaintiffs here, like the plaintiffs in Disability Advocates, are alleging that the State's system of services relies in part on private, segregated facilities to house individuals who could appropriately be served in community-based settings. Such a challenge is properly governed by title II of the ADA.

Plaintiffs' First Amended Complaint has sufficiently set forth a claim under title II of the ADA and it would be inappropriate to dismiss that claim at this early stage in the case before the facts have been fully developed. The purpose of discovery is to allow for Plaintiffs to develop a more extensive factual record, and dismissing plaintiff's claims at this stage would foreclose plaintiff from obtaining the necessary facts to prove their claim.

B. Plaintiff Protection and Advocacy Organization Has Alleged Sufficient Facts to Satisfy the Hunt Test for Associational Standing

1. Associational Standing Claims Should Be Evaluated Pursuant to Controlling Supreme Court Precedent and with Deference to Prior Authority in this Court

Plaintiff OPA has alleged sufficient facts for this Court to find that it has associational standing to bring a title II claim here. In reaching this determination, the United States urges this Court to 1) adopt the approach taken by the Ninth and Eleventh Circuits in applying the test from Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) for associational standing (rejecting Defendants' approach which follows the Eighth and Fifth Circuits and seeks to impose additional requirements); and 2) follow the approach taken by this District Court in Laflamme and the State of Connecticut Office of Protection and Advocacy for Persons with

Disabilities v. New Horizons, Inc., 605 F.Supp. 378, 395-97 (D. Conn. 2009) (same question of law and same protection and advocacy organization (OPA)).[5]

The standing of the protection and advocacy organization to bring this case is of considerable importance for enforcement of the ADA. The Department of Justice has limited resources and cannot address every violation of title II of the ADA; private litigation is an integral component of effective enforcement of the ADA. See, e.g., Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972) (where Attorney General's ability to enforce civil rights law is limited, "main generating force must be private suits in which complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.").

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[5] While the parties' motions have been pending regarding the issue of standing, the Fourth Circuit issued an opinion in Virginia v. Reinhard, 568 F.3d 110 (4th Cir. 2009), barring a suit by a state-run protection and advocacy organization against the state under the doctrine of sovereign immunity (rather than under an associational standing analysis). The United States strongly disagrees with the Fourth Circuit's application of the sovereign immunity doctrine in this context and filed an amicus brief in Reinhard urging that the issue be reheard *en banc*. The request for *en banc* review was denied and the Plaintiff protection and advocacy organization has recently filed a Petition for Certiorari challenging the Fourth Circuit's opinion. Petition for Certiorari Filed Oct. 28, 2009 (No. 09-529). The Seventh Circuit adopted the position taken by Reinhard in Indiana Protection and Advocacy Services v. Indiana Family and Social Services Admin., et al., 573 F.3d 548 (7th Cir. 2009), barring the protection and advocacy organization from bringing suit, but the court vacated that decision and granted rehearing en banc on Oct. 10, 2009, so that decision no longer stands. The United States also submitted an amicus brief urging rehearing en banc in Indiana Protection and Advocacy Services arguing that sovereign immunity is not a bar to suit by a protection and advocacy organization. (Copies of the United States' briefs are available should the Court wish to review them.) Until the Fourth Circuit's decision in Reinhard, the federal courts, including the Second Circuit, have adjudicated suits brought by protection and advocacy systems, including state systems, against state officials. See, e.g., Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Connecticut Dep't of Mental Health & Addiction Servs., 448 F.3d 119 (2d Cir. 2006); Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Hartford Board of Education, 464 F.3d 229 (2d Cir. 2006); Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Center, 97 F.3d 492 (11th Cir. 1996).

In enacting the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act"), Congress created an independent protection and advocacy system to represent the collective interests of individuals with disabilities. 42 U.S.C. § 10801 *et seq*. Congress recognized that "individuals with mental illness are vulnerable to abuse and serious injury" and that existing mechanisms for monitoring the treatment of individuals with mental illness were "inadequate." 42 U.S.C. § 10801(a)(1), (a)(4). The entities that were created through the PAIMI Act[6], both State agencies and not-for-profit corporations, have played a central role in the enforcement of the Olmstead integration mandate and should continue to play such a role in ensuring that the rights of individuals with mental illness are protected.

2. When Correctly Interpreted, Hunt Does Not Bar Non-Member Organizations From Bringing Suit on Behalf of Constituents

Article III of the Constitution limits federal jurisdiction to "cases" or "controversies." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The minimum constitutional standard that must be met requires a plaintiff to demonstrate:

> [First], an injury in fact–an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed in a favorable decision.

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[6]The conditioning of federal funds under PAIMI required that each state establish a Protection and Advocacy System. The statute created flexibility in how States set up such a system as a "private non-profit entity" or as a state entity. 42 U.S.C. §§15044(a), 10805(c)(1)(B). Eight states (Virginia, Connecticut, Indiana, Kentucky, New York, North Dakota, Ohio and Alabama) established independent State agencies while the remaining forty-two States set up a system of not-for-profit corporations. Having established a system under one of the two frameworks, a State cannot alter the make-up of its system, from private to public (or vice versa) absent "good cause." 42 U.S.C. § 15043(a)(4)(A).

Id. at 560-61.

An association or organization has standing when suing based on injuries to its members or constituents. In Warth v. Seldin, 422 U.S. 490, 511 (1975), the Supreme Court established that a representative association may meet the constitutional requirements of Article III standing where "its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action" and if "the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable." 422 U.S. at 511. In Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977), the Supreme Court confirmed that an association has standing to bring suit where "(a) [the organization's] members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt, 432 U.S. at 343.

In Hunt, the Supreme Court rejected defendants' argument that the Washington State Apple Advertising Commission should be barred from bringing suit because the growers and dealers it claimed to represent were not members and the organization was not a traditional voluntary membership organization. Defendants in Hunt attempted to constrain what sorts of organizations can maintain associational standing in suggesting that only membership organizations could bring such claims. The Court held that even though the Commission was a non-membership organization, like the OPA here, it nonetheless could represent the interests of its constituents:

> The Commission . . . for all practical purposes, performs the functions of a traditional trade association representing the Washington apple industry. As previously noted, its purpose is the protection and promotion of the Washington apple industry; and, in the pursuit of that end, it has engaged in advertising, market research and analysis, public

> education campaigns, and scientific research. It thus serves a specialized segment of the State's economic community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation. Moreover, while the apple growers and dealers are not 'members of the Commission in the traditional trade association sense, they possess all of the indicia of membership in an organization.

Hunt, 432 U.S. at 344-45. In addition, the Court was further persuaded by the fact that the "interests of the Commission itself may be adversely affected by the outcome of this litigation. The annual assessments paid to the Commission are tied to the volume of apples grown and packed as 'Washington Apples.'" Id. at 345.

The Court in Hunt focused on the "particular relationship" between the organization and its constituents to determine whether it is "functionally equivalent" to the relationship between an membership association and its members. Both Plaintiffs and Defendants set forth this test in their briefing and acknowledge the conflicting approaches taken by courts that have applied this framework when determining whether a protection and advocacy organization has standing to bring claims on behalf of individuals with disabilities. (MDLS 14-19.; Pls.' Mem. In Opp. To Defs.' 12(B)(1) Mot. To Dismiss for Lack of Standing ("POMDLS") 23-33.) Each party subsequently urged this Court to follow the approach of the courts who have reached their desired determination as to standing. Id. The United States urges this Court to adopt the more reasoned approach employed by Ninth[7] and Eleventh[8] Circuits in applying the analysis from

[7] Oregon Advocacy v. Mink, 322 F.3d 1101 (9th Cir. 2003).

[8] Doe v. Stincer, 175 F.3d 879 (11th Cir. 1999).

Hunt.[9] The Fifth[10] and Eighth[11] Circuits, in rejecting standing on behalf of Protection and Advocacy organizations, engaged in a cursory treatment of the issue and failed to recognize the willingness of the Court in Hunt to provide for a more flexible inquiry into non-member associational standing, when the critical inquiries behind standing are met.

Defendants' pleadings interpreting these cases attempt to suggest that there is an "additional factor" that "is necessary to ensure that the interests of the non-membership association are sufficiently aligned with the interests of the injured persons, namely that the injured persons either voluntarily affiliate themselves with the association by taking action equivalent to 'joining' the association, or that the association be charged with the legal duty of representing the interests of the injured persons." (MDLS 11.) Defendants' argument, however, is contrary to the plain language of Hunt and seeks to impose an artificial barrier to establishing standing when the critical interests driving the standing inquiry have been satisfied. The lack of support for this position is recognized by Defendants who must frame this alleged "additional requirement" as being "implicitly recognize[d]" in the two Supreme Court cases on the question. (MDLS 11-12.)

The United States urges this Court to reject Defendants' interpretation and follow the analysis of the Eleventh and Ninth Circuits. These Circuits look to the "particular relationship"

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[9] The District of Connecticut, in Laflamme and the State of Connecticut Office of Protection and Advocacy v. New Horizons, Inc., 605 F.Supp.2d 378 (D. Conn. 2009), has adopted this very position, granting standing to OPA in a Fair Housing Act case. For further discussion, see *infra* section B(3).

[10] Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Bd. of Trustees, 19 F.3d 241 (5th Cir. 1994).

[11] Missouri Protection & Advocacy Services, Inc. v. Carnahan, 499 F.3d 803 (8th Cir. 2007).

between the organization and its constituents to ensure that the organization represents the constituents and provides the means by which they express their collective views and collective interests. Hunt, 432 U.S. at 344. In Doe v. Stincer, 175 F.3d 879 (11th Cir. 1999), the Eleventh Circuit held that constituents of the protection and advocacy organization had sufficient indicia of membership to allow the organization to sue in its name based on harm to constituents, analogizing the protection and advocacy organization to the Apple Commission in Hunt. The Court acknowledged the role of such organizations in representing the collective interests of individuals with mental illness as a group – "the [Advocacy Center] represents the State's [individuals with mental illness] and provides the means by which they express their collective views and protect their collective interests." Doe, 175 F.3d at 886.

In applying Hunt, the Doe court notes that the Advocacy Center, as a protection and advocacy organization, has been designated by Congress to serve a "specialized segment of the community" and to "perform the functions of a traditional...association representing [individuals with mental illness]." The Doe court further noted several "indicia of membership in an organization" possessed by constituents of the Advocacy Center, including:

- a governing board composed of members who represent the needs of clients served by the system that includes individuals who have received or are receiving such services
- an advisory council whose membership is comprised of individuals who have received or are receiving mental health services or who are family members of such individuals
- an opportunity for constituents to comment on priorities and activities of the protection and advocacy system and grievance procedure to ensure individuals with mental illness have full access to the services of the protection and advocacy system

Doe, 175 F.3d at 886. In listing these factors, the court did not suggest that any particular one

was determinative, but rather that together they illustrate a sufficient relationship between the organization and the constituents whose interests it represents.

Similarly, the Ninth Circuit in Oregon Advocacy v. Mink, 322 F.3d 1101 (9th Cir. 2003), held that the Oregon Advocacy Center, a federally authorized and funded law office established under PAIMI, had standing to represent the rights of people with disabilities. 322 F.3d at 1105. The Court rejected defendants' arguments that, because individuals with mental illness do not actually control the organization's activities and finances, the organization cannot claim standing to represent their interests: "We think [defendant's] membership argument is overly formalistic. Given OAC's statutory mission and focus under PAIMI, its constituents – in this case, the mentally incapacitated defendants – are the functional equivalent of members for purposes of associational standing." Oregon Advocacy, 322 F.3d at 1110. While the court in Oregon Advocacy recognized that the constituents of OAC did not have all the indicia of membership that the apple growers and dealers possessed in Hunt,[12] nevertheless it found that

> OAC's constituents do possess many indicia of membership – enough to satisfy the purposes that undergird the concept of associational standing: that the organization is sufficiently identified with and subject to the influence of those it seeks to represent as to have a 'personal stake in the outcome of the controversy.' See Vill. of Arlington Heights, 429 U.S. at 261, 97 S. Ct. 555 (internal quotation marks omitted).

Id. at 1111. Rather than imposing rigid formal structures on non-member organizations, this approach looks to the ability and appropriateness of the organization to represent the interests of

[12] The Court noted that "OAC is funded primarily by the federal government, and not by its constituents. OAC's constituents are not the only ones who choose the leadership of OAC, and they are not the only ones who may serve on OAC's constituents leadership bodies." Id. at 1110. Defendants cite to these distinctions to argue that the OAC fails to meet the requirements of Hunt, however, such minor distinctions do not alter the organization's ability to represent its constituents.

its constituents: " 'it would exalt form over substance' to conclude that OAC's constituents lack sufficient indicia of membership to justify OAC's Article III standing." Oregon Advocacy, 322 F.3d at 1112.

Examining the "indicia of membership" alleged by Plaintiffs before this Court, there are sufficient facts alleged to support the "particular relationship" that is necessary between an organization and its constituents to establish associational standing under Hunt. While OPA does not have the identical structure as the protection and advocacy organization in Doe, it has a number of factors which, taken together, provide for the same sort of relationship between the organization and OPA's constituents, including:

- OPA has significant constituent participation through its Advisory Council which "advise[s] the system on policies and priorities to be carried out in protecting and advocating the rights of individuals with mental illness." (POMDLS 4.) (At least 60 percent of the Council is composed of mental health consumers or family members of mental health consumers. POMDLS 5.)

- OPA's Advisory Council, comprised of mental health service consumers, sets priorities for each fiscal year in conjunction with the Executive Director. (POMDLS 6, 7.) The Council has strong influence over the OPA's Executive Director, evidenced by the fact that the Executive Director has never vetoed any priority put forth by the Council. (POMDLS at 17.) Priorities set by the Advisory Council include exactly the issue in this case: "protecting the rights of individuals with psychiatric disabilities who reside in long term facilities like nursing homes, one of which is community inclusion." (First Am. Compl. ¶¶ 22-23.)

- OPA's constituents have additional opportunities to participate in directing OPA's actions through the established grievance procedure. (POMDLS 8.)

- OPA serves a "discrete, specialized segment of the community." (POMDLS 16.)

- The Advisory Council "provides constituents with the additional opportunity to oversee PAIMI's activities, including its financial expenditures, and thus to protect their collective interests." (POMDLS 17-18.)

- OPA is statutorily authorized to bring cases on behalf of individuals with mental illness. (POMDLS 4.)

The Fifth and Eighth Circuits, in rejecting associational standing for protection and advocacy organizations, employ an overly formalistic approach. In Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Bd. of Trustees, 19 F.3d 241 (5th Cir. 1994) (hereinafter, "ARC"), the Fifth Circuit rejected a claim brought by Advocacy, Inc., a protection and advocacy organization, finding that the organization had no member who would have standing to sue in his own right. In a two sentence analysis, the court dismissed the possibility that the advocacy group could have associational standing under Hunt. The court stated that the "organization bears no relationship to traditional membership groups because most of its 'clients'– handicapped and disabled people–are unable to participate and guide the organization efforts." ARC, 19 F.3d at 244.

Despite this questionable, hasty "application" of Hunt, the Eighth Circuit nonetheless relied on ARC as support for its determination that the advocacy organization in Missouri Protection & Advocacy Services, Inc. v. Carnahan, 499 F.3d 803 (8th Cir. 2007), lacked standing to bring suit on behalf of its constituents (making no reference to the approach taken by the other circuits in applying Hunt).[13] In Missouri Protection & Advocacy Services, Inc., the Court dismissed a PAIMI funded organization's attempt to challenge a Missouri statute that disqualified mentally ill individuals under probate court guardianship from voting (relying on ARC's language regarding constituents' participation and guidance with organization efforts).

[13]The only other support that Missouri Protection & Advocacy Services, Inc. points to is a district court case in Tennessee, Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ., 24 F.Supp.2d 808, 815-16 (M.D. Tenn. 1998), which is similarly unpersuasive in its reasoning.

The Court went on to note that even if the first prong of Hunt could be established (that an individual member would have standing), standing would nonetheless fail because the third prong of Hunt, requiring participation of individual persons with specific claims, would not be met. Missouri Protection & Advocacy Services, Inc., 499 F.3d at 810. Such a conclusion, however, disregards the nature of the claims and the relief sought, which do not require individual participation. The Fifth and Eighth Circuits apply the Hunt analysis in an overly formalistic manner that imposes unnecessary obstacles on protection and advocacy organizations seeking to establish standing to enforce the law to protect their members' civil rights and to assure the benefits of the protection of those laws to their members.

3. In Laflamme, This Court Correctly Decided that Plaintiff OPA Satisfied the Requirements for Associational Standing

While the Second Circuit has yet to rule on whether protection and advocacy organizations created under the PAIMI statutes have associational standing to bring suit on behalf of constituents,[14] this District has found standing for the very same agency before this court, in Laflamme and the State of Connecticut Office of Protection and Advocacy v. New Horizons, Inc., 605 F.Supp.2d 378 (D. Conn. 2009). In addition to Laflamme, courts in other districts in this Circuit have also recently found protection and advocacy organizations to have standing to bring suit on behalf of their constituents, including: Disability Advocates, Inc. v.

[14]The Second Circuit has found that a protection and advocacy organization had authority to bring suit under PAIMI in Protection & Advocacy for Persons with Disabilities, State of Connecticut v. Mental Health and Addiction Services, 448 F.3d 119, 121 (2d Cir 2006). However, that case did not address associational standing and the organization's ability to bring suit on behalf of its constituents, as it was an action regarding whether OPA itself had a statutory right to compel disclosure of peer review records at the state's facilities in connection with deaths of certain residents.

Paterson, 598 F.Supp. 2d 289, 307 (E.D.N.Y. 2009) and New Jersey Protection and Advocacy, Inc. v. Velez, Civ. No. 08-1858, slip op. (D.N.J. July 23, 2009) (order denying motion to dismiss).[15]

Laflamme involved a Fair Housing Act claim brought by an individual plaintiff as well as by the State of Connecticut Office of Protection and Advocacy for Persons with Disabilities (hereinafter "OPA") on behalf of its constituents seeking declaratory and injunctive relief from the owner of a state-supported facility which offered rental housing to individuals with disabilities. In ruling on a motion to dismiss for lack of associational standing, defendants argued

> that OPA lacks standing for several reasons: its litigation strategy is determined by its executive director, not its advisory board; its represented constituents do not meaningfully participate in the organization; its constituents do not have a commonality of interests; it does not have a personal stake in litigation; it has no statutory grant of standing; and it is an inadequate representative of Connecticut's disabled community because its constituents have conflicting needs.

Laflamme, 605 F. Supp. at 395. These arguments, which the court in Laflamme rejected, echo the arguments brought by Defendants regarding OPA's standing in this case. (MDLS at 6-8, 16-19.)

The Court in Laflamme applied the Hunt factors in the manner of the Ninth and Eleventh Circuits: (1) the Court held that OPA's constituents have sufficient injury to sue in their own right (rejecting defendants' argument that the OPA lacked sufficient relationship to the

[15]Only Laflamme, dealing with the same protection and advocacy organization before this court, dealt with a state-agency protection and advocacy system; the other cases involve private, non-profit organizations. Laflamme did not analyze the OPA under the sovereign immunity doctrine used by the 4th Circuit to bar claims by state-run protection and advocacy organizations against the state.

individuals it represents as "overly formalistic"[16]); (2) that the interests OPA seeks to protect through this litigation are "germane to its purpose as a representative agency"[17]; and (3) "OPA's claims and relief sought in this litigation do not require the direct participation of its constituents.[18]" Laflamme, 605 F.Supp. at 395-96. In applying the Hunt factors, the Court rejected the Eighth Circuit and Fifth Circuit precedent discussed above as "unpersuasive" and noted that the "greater weight of authority, particularly within this circuit, establishes that organizations like OPA routinely are found to fit within the requirements for associational standing under Hunt."[19] Laflamme, 605 F.Supp. at 397.

Laflamme pointed to other cases within this circuit, including Disability Advocates, Inc. v. Paterson, which held that a non-profit disability-rights agency, Disability Advocates, Inc., satisfied the requirements for associational standing. Disability Advocates, 598 F.Supp.2d at 307 ("It is well-established in this district that [protection and advocacy] organizations have

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[16]Citing to the Eleventh Circuit in Doe v. Stincer and Oregon Advocacy for the proposition that "direct membership" and actual control by members of the protection and advocacy organization does not prevent a finding of injury necessary for associational standing. Laflamme at 396.

[17]The Court stated the injunctive relief sought by OPA "fall[s] squarely" within OPA's organizational purpose (mission statement of OPA is to "advance the cause of equal rights for persons with disabilities and their families" by, among other things, "exposing instances and patterns of discrimination and abuse" and "seeking individual and systemic remediation") Laflamme, 605 F.Supp. at 396.

[18]The Court noted that the third prong of Hunt is a prudential requirement and is not constitutionally required - and that where the organization seeks a " 'purely legal ruling without requesting that the federal court award individualized relief,' the Hunt test may be satisfied." Laflamme at 396.

[19]Citing to Bernstein v. Pataki, 233 Fed. Appx. 21, 25 (2d Cir. 2007); Disability Advocates, Inc. v. Paterson, 598 F.Supp. 2d 289, 307 (E.D.N.Y. 2009); and Joseph S. v. Hogan, 561 F.Supp. 2d 280, 307 (E.D.N.Y. 2008). Laflamme, 605 F.Supp. at 397.

standing to sue on behalf of their constituents, provided they meet the constitutional requirements for associational standing.") The Court in Disability Advocates, Inc. dealt with a similar challenge to standing made by the State Defendants here – whether the organization had "established that a single one of its constituents has standing to sue in his or her own right" (prong one of Hunt). Id. at 308. The court rejected that challenge, holding that plaintiff established standing under Lujan because Disability Advocates alleged that its constituents had suffered an injury-in-fact that is fairly traceable to the defendants' allegedly unlawful action, and was likely to be redressed by a favorable decision:

> The 'injury-in-fact' alleged here is that DAI's constituents are not in the 'most integrated settings appropriate to their needs'– that is, that they are subject to unjustified segregation and are qualified to receive services in a more integrated setting. DAI has put forth substantial evidence in support of its claim that more than one thousand of its constituents are suffering this injury as a result of the State's policies, procedures, and activities... In terms of redressability, DAI seeks an order compelling Defendants to change the manner in which they administer New York's mental health service system so as to enable adult home residents to live and receive services in the most integrated setting appropriate to their needs. If Plaintiff prevails on its claims, the requested relief would redress the alleged injury..... DAI has thus satisfied the requirements of Lujan and the first element of associational standing in Hunt.

Disability Advocates, 598 F.Supp.2d at 309.

The Court in Disability Advocates cited to additional district court support for its position, including Joseph S. v. Hogan, 561 F.Supp.2d 280, 307 (E.D.N.Y.2008) (holding that Disability Advocates, Inc. had standing to bring lawsuits to protect the rights of individuals with mental illness in New York); Monaco v. Stone, No. 98-CV-3386, 2002 WL 32984617, at *21 (E.D.N.Y. Dec. 20, 2002) (holding that protection and advocacy organizations are authorized to bring suit on behalf of their constituents "if they can meet the traditional test of associational standing"); and Brown v. Stone, 66 F.Supp.2d 412 (E.D.N.Y. 1999) (permitting plaintiff

protection and advocacy organization to sue on behalf of current residents of state hospital).

Conclusion

For the foregoing reasons, the United States respectfully urges the Court to grant its Motion for Leave to Participate as Amicus Curiae and to deny Defendants' Rule 12(b)(6) and 12(b)(1) Motions to Dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2009, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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