UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DISABILITY ADVOCATES, INC., Plaintiff, and THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. DAVID A. PATERSON, in his official capacity as Governor of the State of New York, RICHARD F. DAINES, in his official capacity as Commissioner of the New York State Department of Health, MICHAEL F. HOGAN, in his official capacity as Commissioner of the New York State Office of Mental Health, THE NEW YORK STATE DEPARTMENT OF HEALTH, and THE NEW YORK STATE OFFICE OF MENTAL HEALTH, Defendants.	)	Civil No. 03-CV-3209 (NGG/MDG)

PLAINTIFF-INTERVENOR UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S REMEDIAL PLAN AND IN OPPOSITION TO DEFENDANTS' PROPOSED REMEDIAL PLAN

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I. Introduction

The United States has carefully reviewed the Plaintiff's remedial plan and the Defendants' remedial plan. A plan must effectively carry out the carefully considered decision of this Court and comply with federal law. The remedial order is also not the place to reargue or resurrect positions that were lost at trial. The United States avers that Defendants' proposed plan is unreasonable and inadequate to address the violations found by the Court in its September 8, 2009 Memorandum & Order Setting Forth Findings of Fact and Conclusions of Law ("Order"). In contrast, Plaintiff's proposed plan will reasonably remedy the violations found by the Court in its Order. Thus, the United States supports the Plaintiff's proposed remedial plan and objects to Defendants' remedial plan.

Plaintiff's plan proposes that Defendants create 1,500 units of supported housing per year, for up to four years, until such time as there are sufficient supported housing beds for all DAI constituents and future adult homes residents who desire such housing, and that no fewer than 4,500 beds are developed. (Plaintiff's Proposed Findings of Fact and Conclusions of Law 128-129.) Plaintiff's plan further proposes that supported housing providers be identified and awarded contracts to provide scattered site supported housing and supports, assess residents' need for supportive services and secure those services, and conduct in-reach to residents of Adult Homes. (Id. 130-131.) Also, Plaintiff proposes that Defendants require Adult Home staff and others who discuss housing options with DAI's constituents to accurately inform them about supported housing. (Id. 130.) Plaintiff's plan also proposes the appointment of a Special Master to oversee compliance with the remedial order. (Id. 132-133.) Plaintiff's proposed plan will effectively implement the rulings of this Court and the important community integration

mandate of Olmstead v. L.C., 527 U.S. 581 (1999), to which this Administration is fully committed.

The United States recognizes the federalism concerns implicated in a court's decision to issue injunctive relief against a state government. (Defs.' Mem. of Law in Supp. of their Proposed Remedial Plan 3 ("Defs.' Mem.").) But those concerns cannot prevent this Court from issuing such relief "where a state has failed to come forward with a reasonable plan or remedy." Dean v. Coughlin, 804 F.2d 207, 214 (2d Cir. 1986); see also Milliken v. Bradley, 433 U.S. 267, 281 (1977) (if state and local authorities fail in their affirmative obligations, judicial authority may be invoked). While Defendants claim that their proposed remedy is reasonable (Defs.' Mem. 3-4), in fact, Defendants' proposal contradicts the factual and legal rulings issued by this Court and fails to remedy the violations already identified in this Court's Order. That Order recognized the urgent mandate to remedy the longstanding discrimination against persons with mental disabilities in the Adult Homes, as defined by the Supreme Court in Olmstead. It is not sufficient for the Defendants to come forward with a proposal that addresses only a fraction of the violations found by the Court. The defendant must "come forward with a plan that promises realistically to work, and promises realistically to work *now*." U.S. v. Yonkers Bd. of Educ., 29 F.3d 40, 43 (2d Cir. 1994) (emphasis in original, citing Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 439 (1968))

The Court has determined that Defendants have failed to comply with the Supreme Court decision in Olmstead, more than ten years after it was decided. Further, Defendants have repeatedly shown themselves unready and unwilling to accept responsibility for remedying known Olmstead violations, going back to 2002. In 2002, Governor Pataki convened and

selected the Adult Home Facilities Workgroup, which recommended that Adult Home residents be served in more integrated settings; Defendants never implemented that recommendation. (Order 84-86, 151.) Also in 2002, New York State commissioned a study of Adult Home residents by New York Presbyterian Hospital, costing $1.3 million, to "deflect[] . . . what had become a crisis for the Governor's office." (Order 87-88.) The data from that study demonstrated that the vast majority of Adult Home residents could be served in supported housing. (Order 87.) However, the State prevented the director of the study from analyzing the data and never used it to determine how many Adult Home residents could live in integrated settings. (Order 149-150.) Defendants' proposal is the latest evidence of its long-standing unwillingness to remedy the unnecessary segregation of residents of Adult Homes.

Discrimination on the basis of disability against individuals residing in the Adult Homes was fully documented in an exhaustive trial of the facts before the Court. The remedial order should fully address the violations found be the Court and be implemented immediately. Defendants may not now hide behind arguments against coming into compliance with the law that this Court has already rejected. Instead, they must be ordered to take the steps necessary to comply with federal law. Should some genuine obstacles to compliance arise, the parties are free to come to the Court at some future point for a modification of the Order based upon fact rather than conjecture about potential obstacles to compliance. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992).

II. Defendants Propose to Create an Inadequate Number of Supported Housing Units

A. Defendants' Proposal Fails to Comply With the Scope of the Court's Findings and Order

Defendants propose creating a total of 1,000 supported housing units over a five year

period (Defs.' Proposed Order 7), a number of units that is woefully inadequate to remedy the violations identified by the Court. The Court found that "virtually all" of Plaintiff's 4,300 constituents – including those "who might have relatively high needs" – are qualified for supported housing and are not opposed to moving to a more integrated setting. (Order 3, 12, 67, 64-108, 109-128.)

Defendants argue that their proposal of 1,000 units is consistent with the alleged assumption of the Adult Care Facilities Workgroup that 800 adult home residents with mental illness could live in independent settings. (Defs.' Mem. 7). But Defendants mischaracterize the Workgroup report, in an attempt to re-argue an issue on which the Court has already ruled against them. As this Court explained, the Adult Care Facilities Workgroup "recommended that 6,000 individuals with mental illness in Adult Homes be moved to supported housing." (Order 111.)

Defendants propose to release any supported housing unit that is not filled by an Adult Home resident within 3 months of its availability, to individuals not covered by the remedial order. (Defs.' Order 7.) The United States objects to this proposal because it reflects the Defendants' position, already rejected by the Court, that few adult home residents will choose to move to supported housing. The United States also objects to this proposal because it may legitimize a lack of effort by Defendants to facilitate the transition of Adult Home residents into supported housing, which, given Defendants' history with this population, is a legitimate concern. Further, under the current procedure for filling supported housing, supported housing providers first identify a client, and then select an apartment with the client so that the apartment satisfies the client's desires with respect to location and other factors. Consequently, housing

units do not sit waiting, empty, for a tenant. It is within Defendants' control to structure the Request for Proposals process and subsequent in-reach efforts so as to ensure that units are being fully utilized by Plaintiff's constituents.

Defendants' proposal rejects the scope of the Court's findings in another way. Defendants' proposal states that supported housing is available only to those who "are able to maintain their living environment, shop and prepare meals, and manage their medications without ongoing assistance." (Defs.' Order 7.) This statement directly contradicts the Court's ruling that supported housing, in fact, serves individuals who have a wide range of support needs, including those who are considered "high need." (Order 109.) The Court specifically rejected Defendants' position "that to live in supported housing, individuals must be capable of seeking assistance and taking their medication independently, must demonstrate a 'significant period of psychiatric stability,' must be able to 'meet their own daily needs' and must 'maintain their apartment' with 'minimal assistance.'" (Order 70.) Thus, Defendants may not so limit eligibility for supported housing in the remedial plan.

B. Defendants Improperly Reject the Court's Findings and Order on Grounds of Expense and Need for Legislative Appropriations

Defendants' stated primary reason for proposing only 1,000 units of supported housing is the alleged expense. Defendants, by refusing to propose a remedy that complies with this Court's Order, argue that they "preserve their position that moving individuals from Adult Homes to supported housing will not be cost neutral or result in savings, in Medicaid costs or otherwise." (Defs.' Mem. 8 n.6.) While the Court found that moving individuals from Adult Homes to supported housing will save the State money – specifically, $146 per year to serve an individual in supported housing instead of an Adult Home – Defendants' proposed remedy

refuses to accept that finding. (Order 152-168.) Defendants cling to their position, rejected at trial, that it will cost them somewhere between $14,654 and $23,162 per year to serve an individual in supported housing with services, and that creating 1,000 units will cost $18 million per year when fully implemented. (Aff. of Martha Schaefer Hayes ¶¶5, 6, 7, 13.) Significantly, Defendants ignore the comparative Medicaid costs for individuals in adult homes versus those in supported housing, a fatal error in their analysis and the fundamental pillar of the Plaintiff's case. The Court found that Medicaid costs are much lower in supported housing than in Adult Homes and drive the overall cost savings of supported housing compared to Adult Homes for the State. (Order 157-168.) Defendants' burden at trial was to prove their defense of a fundamental alteration based on the expense of providing supported housing for Plaintiff's constituents, and now, having failed to carry that burden, they cannot simply reject the Court's findings and Order.

Defendants further contend that creating additional supported housing units must be contingent upon the New York State legislature appropriating the money to fund the units. (Defs.' Order 9.) Even assuming – contrary to this Court's findings – that creating additional supported housing units will result in a net cost to the State, that would provide the State no legal basis for failing to comply. See Milliken v. Bradley, 433 U.S. 267 (1977) (affirming lower court's order to state to fund future costs associated with prospective remedial plan to desegregate schools); Missouri v. Jenkins, 495 U.S. 33, 55 (1990) (holding that a District Court may order a local government entity to raise money to fund a desegregation order); Glover v. Johnson, 934 F.2d 703, 708-12 (6th Cir. 1991) (rejecting defendant's argument that its compliance failures were caused by the legislature's failure to appropriate sufficient funding); Halderman v. Pennhurst State School and Hosp. 542 F.Supp. 619, 625-626 (E.D. Pa..1982)

(rejecting defendant's argument that it could not comply with court's order to transition individuals into community settings because legislature did not appropriate the funds it requested, as there was evidence that defendant had control over sufficient funds to comply with the order).

C. Defendants Improperly Reject the Court's Findings and Order on the Ground of the Feasibility of a Remedy.

Defendants argue that creating 1,500 beds of supported housing per year is not feasible given the difficulty of finding that number of affordable housing units in that time period. (Def.'s Mem. 8.) But this Court found, to the contrary, that the State is capable of expanding its supported housing program at that rate to meet the needs of adult home residents. This finding was based, in part, on expert testimony from Dennis Jones that New York is capable of developing supported housing beds for Adult Home residents at a rate of approximately 1,500 per year for several years, and that it would be possible, given the real estate market in New York City, to identify a sufficient number of units or appropriate housing to achieve this goal. (Order 181-183.) Further, New York has a history of taking on big projects, like the New York/New York Initiative to provide supported housing for homeless individuals, which has planned for the development of 9,000 beds in its third phase alone. (Order 182-183.)

The United States agrees with Plaintiff's proposal that New York create 1,500 units of supported housing each year, for up to four years, until sufficient housing has been created to meet the needs of current and future adult home residents. (Plaintiff's Proposed Findings of Fact and Conclusions of Law 128-129.) This plan will create enough supported housing to satisfy the needs of "virtually all" of Plaintiff's 4,300 constituents, and thus remedy the ADA violations found by the Court. The Court has already found that New York is capable of developing

supported housing beds at this rate, and that doing so is feasible in the New York City real estate market. (Order 181-183.)

D. Defendants Improperly Reject the Court's Findings that Providing Supported Housing for Adult Home Residents is not a Fundamental Alteration

Defendants argue that allocating supported housing for adult home residents will result in less supported housing for other populations, thus constituting a fundamental alteration (citing to Olmstead v. L.C., 527 U.S. 581, 604 (1999)). (Defs.' Mem. 7-8.) Defendants lost this fundamental alteration argument at trial (Order 128-203), however, and cannot reargue that issue at the remedial stage. Because the Court found that moving adult home residents into supported housing will save the State money, doing so should have no affect on the number of units of supported housing available to other populations.

III. Defendants Improperly Propose Education, Assessment and Training that the Court Has Already Determined is Largely Unnecessary and Will Only Cause Further Delay

The Defendants propose education, assessment, and training that will not effectively prepare people in Adult Homes to transition to the community, and will unnecessarily delay the remedy for one year. The United States agrees that in-reach to, and assessment of, adult home residents is needed in order for those individuals to move into supported housing, but that in-reach and assessment can and should be performed by supported housing providers, in accordance with current State procedures.

OMH already has a process in place by which supported housing providers – the organizations and groups that find housing and provide staff support for the clients in supported housing – conduct assessments to enable individuals to move to that setting. Supported housing providers (typically non-profit social service organizations selected by OMH through a Request

for Proposals process) fill their units by doing in-reach into psychiatric and other hospitals, homeless shelters and the streets, prisons, Adult Homes, and other places, to educate individuals about, and determine the correct supports the individual will need to succeed in, supported housing. (Order 67-68, 68 n.293, 112.) As Linda Rosenberg, a former Senior Deputy Commissioner of OMH, testified at trial, OMH currently contracts with providers of supported housing, Assertive Community Treatment ("ACT") services, and case management services, who go into prisons to do in-reach to individuals with mental illness reaching the end of their prison term. Providers could proceed the same way with "[residents] in the Adult Homes and begin to get to know them, develop a relationship, develop trust, have them visit, as I said, and then offer them the chance to live in their own home with supports." (Trial Tr. 698-99.) The same process occurs for individuals in state psychiatric centers: OMH's April 2009 RFP for Supported Housing for Adults with Serious Mental Illness specified that "Agencies must work with the psychiatric center . . . [and] provide in-reach, develop coordinated discharge admission plans, . . . identify/provide services and supports to ensure successful transition into the community." (Trial Tr. 3467-69.)

The most effective education about the actual experience of using supported housing and services is this kind of in-reach by supported housing and treatment providers. The providers can most accurately describe and show potential residents their program and which supports would be available to the resident. As Dennis Jones testified at trial, the supported housing providers' in-reach should include taking potential clients to look at different apartments, building trust with the clients, and helping them to understand how their benefits and services will be maintained. (Trial Tr. 3485-86.)

Identifying the correct supports for the individual is a critical part of the supportive housing providers' job as well. As the Court stated, "Supported housing providers routinely do assessments as part of their work to identify the specific supports and services that their clients will require." (Order 68, 112.) The supported housing provider is also in the best position to determine if there is some reason that the resident would not succeed in its housing, and thus not be accepted.

In contrast, Defendants' proposed once-per-year educational opportunity for adult home residents to learn about supported housing is inadequate and ineffective, and Defendants do not commit to more than one opportunity per year. Some individuals who have been living in Adult Homes for many years may need multiple meetings or discussions about supported housing, and trips to see what supported housing and their potential apartment looks like, before they feel sufficiently informed to make a decision to move to supported housing. Residents of Adult Homes should not be limited to an annual OMH educational opportunity to get the information they need to decide whether to move into supported housing.[1] This element of Defendants' proposal appears to be a token effort without any real commitment to the education and encouragement that residents, like many individuals who have lived for long periods in an institution, may need to overcome their fear of leaving the institution. (Order 126.)

Defendants recommend unnecessarily limiting criteria to determine who will be permitted to move to supported housing. These elements of Defendants' proposal once again

[1]As a separate requirement, the United States agrees with the Defendants that a written handout or fact sheet, developed by the parties, would be a good way to facilitate a requirement that clinicians, adult home staff, and others relay accurate information to adult home residents about supported housing. (Defs.' Mem. 5.)

contradict the Court's ruling that virtually all of Plaintiff's constituents are qualified for, and not opposed to, supported housing. (Order 3, 12, 64-108, 109-128.) Defendants attempt to limit the individuals eligible for supported housing to those with "serious mental illness" (Defs.' Proposed Order 3), but who also have minimal needs. (Id. 7.) As discussed above, the Court rejected Defendants' proposition that supported housing is only for individuals with minimal needs. In addition, the Court did not limit the individuals who are entitled to relief to those with "serious mental illness." The Court's order applies to "individuals with mental illness residing in, or at risk of entry into, 'adult homes' in New York City with more than 120 beds and in which twenty-five residents or 25% of the resident population (whichever is fewer) have a mental illness." (Order 2.) The Court further identified Plaintiff's constituents as "approximately 4,300 individuals with mental illness, [whom Plaintiff proved] are not receiving services in the most integrated setting appropriate to their needs." (Order 2.) Defendant cannot be permitted, at the remedial stage, to change the definition of those entitled to relief, in contradiction of the Court's Order.

Additional limitations on eligibility for supported housing offered in the Defendants' plan make no sense and serve only to frustrate and undermine an appropriate remedy for Plaintiff's constituents. First, Defendants make ineligible any resident who "refuses or declines to participate in or cooperate with the assessment process." (Defs.' Proposed Order 4.) Second, Defendants make ineligible any resident who expresses "that he or she does not desire to move from the adult home to Supported Housing." (Id. 5.) There is no legitimate reason to disqualify from supported housing a person who initially refuses or declines to participate in whatever assessment process is provided, or who initially expresses a lack of desire to move to supported

housing. If there are individuals who do not wish to move after receiving appropriate information, or who refuse to participate in whatever assessment or transition process is required, then those individuals will not move. There is no need to permanently disqualify them as they may choose to move at a subsequent time.

Once more contradicting the Court's findings and Order, Defendants assert that ACT teams should be available only to three groups: a) individuals who are under a court's Assisted Outpatient Treatment order; b) individuals who demonstrate a high use of acute psychiatric hospitalization or psychiatric emergency or mobile crisis services; or, c) individuals who have an inpatient psychiatric hospitalization during the last year that lasted ninety days or longer. (Defs.' Order 7). These eligibility criteria for ACT are the current criteria used in New York City, while less restrictive guidelines apply to the rest of the State. (Defs.' Mem. 10.) The Court, however, has already ruled that OMH's statewide ACT guidelines would apply to any adult home residents with high needs, and that applying those guidelines in New York City would not be a fundamental alteration of its program. (Order 202.) Thus, Defendants may not limit ACT services for adult home residents in New York City as they propose, if doing so will prevent such residents from moving into supported housing.

Defendants argue that Plaintiff's proposal impermissibly constrains the judgment of the professionals assessing adult home residents' qualifications to live in supported housing. (Defs. Mem. 6.) To the contrary, Plaintiff's proposal is consistent with the Court's findings, and allows appropriate deference for professional judgment. Plaintiff proposes that almost all of its constituents be treated as qualified for supported housing. (Pl.'s Proposed Findings at 130.) This is consistent with the Court's finding that virtually all of Plaintiff's constituents are

qualified for supported housing. Plaintiff then defines certain characteristics which *may* disqualify an individual from supported housing, depending on the assessment of the supported housing provider. (Id.) This standard allows the assessing professional appropriate deference.

Defendants propose that, after assessment, some residents go through training before they will be considered eligible for supported housing. (Defs.' Proposed Order 5, 6.) Defendants assert that this training is necessary because "some individuals may need to learn how to use the public transportation system, so that they will not become lost, or require education concerning their medications, managing their money, or shopping or cooking." (Defs.' Mem. 5.) The United States agrees that some individuals may need or wish to learn certain skills in order to successfully live in supported housing. The United States rejects, however, that residents must complete such training while living in Adult Homes in order to qualify for supported housing, and the Court rejected this approach as ineffective. The Court found that "teaching skills in a setting in which they cannot be applied or practiced is ineffective" (Order 61), and that the best way for people with mental illness to retain skills is to practice them in the environment in which they actually live. (Order 41-42.) Individuals who move into supported housing do get help with and training on life skills through ACT, which "delivers comprehensive and flexible treatment, support, and rehabilitation services to individuals in their natural living settings," and other case management services. (Order 52.) ACT can assist recipients with teaching medication management, personal care and safety, grocery shopping and cooking, using transportation, managing finances, and other activities. (Order 53.) Thus Defendants' proposal to require adult home residents to undergo training in order to become eligible for supported housing appears to be just another unnecessary obstacle to effectuating a remedy for the

violations found in this case.

IV. Defendants' Proposed Remedy Fails to Satisfy the Court's Order to Provide Adequately for Future Adult Home Residents

Defendants' proposed remedy does not include the creation of supported housing units for future adult home residents who desire placement in supported housing. While Defendants agree to inform such future adult home residents that Adult Homes are not the most integrated setting available to individuals with mental illness (Defs.' Proposed Order 10), such knowledge is meaningless if there is no integrated residential setting available for the person. The Court's conclusion that Adult Homes are not the most integrated setting appropriate to the needs of Plaintiff's constituents is no less true for future Adult Homes residents with mental illness, and serving such individuals in Adult Homes will similarly violate the ADA. In yet another regard, Defendants ignore the Court's findings as they apply to future adult home residents, and propose to knowingly discriminate against those individuals in the future, by failing to provide sufficient supported housing for current and future adult home residents.

V. Defendants' Proposal Improperly Rejects Independent Monitoring of their Compliance with the Remedial Order

It is within a federal court's power to appoint a special master to monitor compliance with its remedial power. United States v. Yonkers Bd. of Ed., 29 F.3d 40, 44 (2d Cir. 1994) Further, where defendants have demonstrated resistance to the remedy, as Defendants have here, courts have found a monitor to be necessary. Toussaint v. McCarthy, 926 F.2d 800, 807 (9th Cir. 1991) ("appointment of a monitor is peculiarly appropriate when there has been recalcitrance on the part of prison officials" that evinced a lack of "desire or the ability to comply in the future"). Furthermore, this court does not need to wait for compliance issues to arise in order to appoint a

special master. Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982).

Defendants reject the proposal for a Special Master and instead propose that Defendants report directly to Plaintiff's counsel, who may receive attorneys' fees for no more than 40 hours of work per year for monitoring Defendants' compliance in this case. While a Special Master may or may not be necessary, the United States believes that an independent monitor will be necessary to ensure the State's compliance with the remedy in this case. As the Defendants' proposed remedy illustrates, Defendants have not accepted the findings of this Court and do not propose a plan that will remedy the violations found. Based upon the inadequacy of the Defendants' remedial proposal and the repeated rejection of the Court's findings, it is reasonable to anticipate that Defendants will comply only begrudgingly, at best, with whatever remedy this Court ultimately orders. Consequently, it will be important for effectuating this Court's order to have an independent monitor who has the time and knowledge to collect accurate data and assess Defendants' compliance with the requirements set out by the Court's remedial order. While Plaintiff's counsel may have the expertise to do this, such monitoring is very time consuming, and will certainly take more than 40 hours per year. Plaintiff's counsel cannot be expected to perform this function pro bono.

For the foregoing reasons, the United States supports the Plaintiff's proposed remedial plan and objects to Defendants' remedial plan. The United States respectfully requests that the Court issue an order consistent with Plaintiff's proposed remedial plan, and reject the Defendants' invitation to rewrite its well-reasoned and carefully drafted Order as proposed in their proposed remedial plan.

Date: November 24, 2009

Respectfully submitted,

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