of institutionalization is the systematic placement of handicapped people in substandard residential facilities, where incidents of abuse by staff and other residents, dangerous physical conditions, gross understaffing, overuse of medication to control residents, medical experimentation, inadequate and unsanitary food, sexual abuses, use of solitary confinement and physical restraints, and other serious deficiencies and questionable practices have been reported.

Such conditions are not, of course, characteristic of all residential facilities. Many institutions for handicapped people are humane and well run, although they often lack adequate programming for residents. But even the better institutions suffer the ill effects of segregation ....

There has been increasing acceptance in recent years of the fact that most training, treatment, and habilitation services can be better provided to handicapped people in small, community-based facilities rather than in large, isolated institutions. Professionals, courts, Congress, and more than one President have called for "deinstitutionalization" and the development of appropriate community programs. Because of such official reorientation toward community alternatives and a variety of other factors (such as the emergence of new service philosophies among human service professionals and the development of drug therapies and other novel treatment approaches), the number of handicapped persons in residential facilities has dwindled in the past two decades.

Despite such initiatives, a great many handicapped persons remain in segregative facilities. The Comptroller General has estimated that about 215,500 persons were residing in public mental hospitals in 1974 and that some 181,000 persons were in public institutions for mentally retarded people as of 1971. In 1976, one study estimated that

> 1,550,120 persons were in long term residential care facilities ....

U.S. Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities, at 32-35 (Sept. 1983) (emphases added) (Attachment ___).

The testimony before Congress on the ADA further evidences that Congress was aware that individuals with disabilities who were institutionalized were subject to violations of their substantive due process rights. Former Senator Weicker testified: "We have created monoliths of isolated care in institutions and in segregated educational settings." Americans with Disabilities Act of 1989, Hearing before the Senate Comm. on Labor and Human Resources and the Sub-Comm. on the Handicapped, 101st Cong. 215 (1989). Witnesses also testified about inappropriate treatment and unnecessary isolation of people with disabilities in institutions. Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 100th Cong. 26-27, 173-74 (1988); Staff of House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Report on P.L. 101-336, Legislative History of the Americans with Disabilities Act 1080-81, 1161-62, 1725-27 (Comm. Print 1990).

Given this evidence, Congress correctly concluded that it was necessary to include in the ADA a provision that would assure that people with disabilities were not unnecessarily institutionalized in congregate, segregated environments, but, rather, were

provided with appropriate and integrated community alternatives. See 135 Cong. Rec. S4986 (daily ed. May 9, 1989) (Senator Harkin stated when he introduced the ADA that one of its purposes is "getting people ... out of institutions ...."); 136 Cong. Rec. H2447 (daily ed. May 17, 1990) (Congressman Miller, a co-sponsor of the ADA, noted that "[s]ociety has made [people with disabilities] invisible by shutting them away in segregated facilities."). Accordingly, the legislative record supports the congruence and proportionality between the ADA's integration mandate and the need to prevent and remedy violations of the due process rights of individuals with disabilities who are unnecessarily institutionalized.

III. PLAINTIFFS MAY PURSUE EX PARTE YOUNG ACTIONS FOR INJUNCTIVE RELIEF AGAINST DEFENDANT HOUSTOUN UNDER THE REHABILITATION ACT AND THE ADA.

A. The Majority View Recognizes The Viability Of Official Capacity Actions Against Individuals Under Federal Civil Rights Laws.

It is well-established -- and Defendants do not dispute -- that, under the Ex parte Young doctrine, the Eleventh Amendment does not bar suits against state officials in their official capacity for prospective, injunctive relief to challenge their violations of federal law. See discussion, supra, at ___. Yet, Defendants contend that an Ex parte Young claim cannot be brought against state officials, such as Secretary Houstoun, under the ADA

and Section 504 because those statutes do not allow individual suits and, therefore, individual defendants are not proper parties.

The majority of courts have recognized that federal claims authorized by the ADA, Rehabilitation Act and similarly-worded anti-discrimination laws (such as Titles VI of the Civil Rights Act) may proceed against state officials for injunctive relief under the Ex parte Young doctrine. See Sandoval v. Hagan, 197 F.3d at 500-01; J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1286-87 (10th Cir. 1999); Nelson v. Miller, 170 F.3d 641, 646-47 (6th Cir. 1999); Armstrong v. Wilson, 124 F.3d 1019, 1025-26 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); Brennan v. Stewart, 834 F.2d 1248, 1251-53, 1260 (5th Cir. 1988); Robinson, 117 F. Supp.2d at 1134-35. Contra Walker v. Snyder, 213 F.3d 344, 347 (7th Cir. 2000), cert. denied, ___ U.S. ___, 69 U.S.L.W. 3281 (Feb. 26, 2001); Lewis v. New Mexico Dep't of Health, 94 F. Supp.2d 1217, 1230 (D.N.M. 2000).[12]

The majority view was recently reaffirmed by the Supreme Court's decision in Garrett. As noted above, the Garrett Court expressly recognized that individuals whose rights under the ADA

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[12] Defendant's citation to Hallett v. New York State Dep't of Correctional Services, 109 F. Supp.2d 190 (S.D.N.Y. 2000), is unavailing. In that case, the court's rejection of individual liability was premised solely on the fact that it would be redundant since the court determined that the claims could proceed directly against the state. Id. at 199-200. The fact that a claim is redundant does not make it improper, and, it would be particularly inappropriate to dismiss claims as "redundant" where, as here, Defendants argue vigorously that the state cannot be sued.

have been violated by states have "federal recourse" because the ADA's "standards can be enforced ... by private individuals in actions for injunctive relief under Ex parte Young, 209 U.S. 123 (1908)." Garrett, 2001 WL 173556 at *11 n.9. This statement in Garrett plainly repudiates that portion of the decision in Walker and Lewis that indicated that individuals in federal court could not pursue Ex parte Young actions against state officials for injunctive relief under the ADA. While Walker concerned Title II and Garrett involved Title I, the result should be no different. Indeed, Walker was based on the conclusion that there could be no individual liability under Title II because there was no individual liability under Title I of the ADA. 213 F.3d at 346, 347. The Supreme Court's conclusion that Ex parte Young suits can proceed under Title I eviscerates the underpinning of Walker and, thus, invalidates its conclusion. Just as individuals can bring Ex parte Young actions for injunctive relief to enforce Title I of the ADA, so, too, can they bring such actions -- as Plaintiffs do here -- to enforce Title II of the ADA and the Rehabilitation Act.

B. State Officials Are Proper Parties Under The ADA And Rehabilitation Act in Ex parte Young Actions.

Defendants' argument that individuals are not proper parties, and therefore cannot be sued in their official capacity for injunctive relief under the ADA and Section 504, is doubly flawed. First, the text of those civil rights statutes simply does

not preclude official capacity suits against individuals. Second, Defendants' argument is premised on a misunderstanding of the nature of Ex parte Young suits.

1. The Statutory Language Of The ADA And Section 504 Does Not Bar Official Capacity Suits Against Individuals.

The ADA and Section 504 of the Rehabilitation Act prohibit disability-based discrimination by, respectively, "public entities" and "programs" or "activities" that receive federal financial assistance. 29 U.S.C. § 794(a) (Section 504); 42 U.S.C. § 12132 (ADA). The statutes, though, do not state that individual officials whose actions cause the entities or programs to engage in disability-based discrimination cannot be sued in their official capacity for injunctive relief that would require those officials to assure that the entities or programs act in compliance with federal law.

Further, the definitions of "public entities" and "programs or activities" under, respectively, the ADA and Section 504, are sufficiently broad to encompass individual defendants. The ADA and Section 504 define "public entity" and "program or activity" to include not only state departments (such as DPW), but also to include agencies and instrumentalities of such departments. 29 U.S.C. § 794(b)(1)(A) (Section 504); 42 U.S.C. § 12131(1)(B) (ADA). Words in a statute should be afforded their plain meaning. See Liberty Lincoln-Mercury v. Ford Motor Co., 134 F.3d 557, 566 (3d

Cir. 1998); Appalachian States Low-Level Radioactive Waste Comm'n v. Pena, 126 F.3d 193, 197 (3d Cir. 1997). The terms "agency" and "instrumentality" encompass "a person or thing through which power is exerted or achieved." Merriam-Webster's Collegiate Dictionary <http://www.m-w.com> (emphasis added). Thus, an individual is a proper party under the language of the ADA and Section 504 if the public entity or program exerts power through him or her. The power of the Commonwealth and its executive agencies is exercised through Secretary Houstoun, making her a proper party to this lawsuit.

Following naturally from the fact that an individual through whom power is exerted is an "agency" or "instrumentality" of a government program, many courts have held that an individual can be liable under Section 504 if she or he is a position to accept or reject federal aid for the program or activity. See Lee v. Trustees of Dartmouth College, 958 F. Supp. 37, 45 (D.N.H. 1997); Gluckenberger v. Boston University, 957 F. Supp. 306, 323 (D. Mass. 1997); Johnson v. New York Hospital, 897 F. Supp. 83, 85 (S.D.N.Y. 1995); Doe v. City of Chicago, 883 F. Supp. 1126, 1136-37 (N.D. Ill. 1994). See also Dep't of Transportation v. Paralyzed Veterans of America, 477 U.S. 597, 606 (1986) ("Congress imposed the obligations of § 504 upon those who are in a position to accept

or reject those obligations as a part of the decision whether or not to 'receive' federal funds.").[13]

2. Ex parte Young Actions Against State Officials Acting in their Official Capacity Can Proceed Under the ADA and the Rehabilitation Act.

Suits against individuals acting in their official capacities for injunctive relief are fundamentally different from individual capacity action lawsuits for damages. An official-capacity action is a suit against the official's office and, as such, is no different than a suit against the state. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). As such, the courts have recognized that individuals are proper parties in suits under civil rights statutes, including the ADA and Rehabilitation Act, when they are sued in their official capacity even though they could not be sued in their individual capacity since such suits, in essence, are suits against the entity, program, or employer. See In re Montgomery County, 215 F.3d 367, 372 (3d Cir. 2000) (noting that officials can be held liable under Title VII solely in their official capacity), cert. denied, ___

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[13] Fitzpatrick v. Commonwealth, Dep't of Transportation, 40 F. Supp.2d 631 (E.D. Pa. 1999), rejected the contention that individuals with authority to accept or reject federal funds can be liable under the Rehabilitation Act. Id. at 638. The court based its conclusion on Title VII cases, which have barred individual capacity actions for damages. Id. The court, though, failed to recognize that official capacity action lawsuits against individuals for injunctive relief may proceed under Title VII. See discussion, infra, at ____.

U.S. ___, 121 S. Ct. 881 (2001); Berthelot v. Stadler, Civil Action No. 99-2009, 2000 WL 1568224 at *2, *3 (E.D. La. Oct. 19, 2000) (Attachment __) (upholding viability of official capacity suits under ADA and Section 504 while rejecting individual liability claims); Brandon v. Dep't of Public Welfare, Civil Action No. 95-CV-5597, 1996 WL 535077 at *2 (E.D. Pa. Sept. 23, 1996) (Attachment __) (upholding official capacity claim under Title VII while rejecting individual capacity claim); Verde v. City of Philadelphia, 862 F. Supp. 1329, 1334-35 (E.D. Pa. 1994) (same).

While an official capacity action is, in essence, a suit against the state and such a suit normally is barred by the Eleventh Amendment, the Supreme Court has declined to treat such actions brought for prospective, injunctive relief as suits against states for purposes of the legal fiction created in Ex parte Young. Will, 491 U.S. at 71 n.10. "Ex parte Young creates 'the well-recognized irony that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not under the Eleventh Amendment.'" Brennan v. Stewart, 834 F.2d at 1252 (quoting Halderman v. Pennhurst State School and Hosp., 465 U.S. 89, 105 (1984)). Likewise, a state official's violation of the ADA and Rehabilitation Act is deemed to be the action of the state (i.e., the public entity, program, or activity) under those statutes, even though suits against such officials for injunctive relief to remedy such violations are not considered actions of the

state for purposes of the Eleventh Amendment. Since such an action would be tantamount to a suit against the public entity or program, it would not contravene any statutory language that might limit liability to such entities or programs. As such, it is not surprising that most courts -- including the Supreme Court in Garrett -- have held that Ex parte Young actions can proceed under the ADA, the Rehabilitation Act, and similar statutes. See discussion, supra, at ___.[14]

IV. PLAINTIFFS HAVE STATED ACTIONABLE CLAIMS UNDER THE ADA AND SECTION 504 OF THE REHABILITATION ACT.

Plaintiffs contend that Defendants violate the ADA and Section 504 by engaging in two forms of prohibited discrimination. First, Defendants have discriminated against Plaintiffs (and most

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[14] Courts routinely allow Ex parte Young suits against state officials to secure injunctive relief for violations of federal statutes that govern the actions of state entities. For example, the federal Medical Assistance law governs the actions of state Medical Assistance agencies. 42 U.S.C. § 1396a(a)(5). Yet, federal courts have had no qualms about allowing Ex parte Young actions against officials in charge of such Medical Assistance agencies to assure future compliance with the law. See, e.g., Johnson v. Guhl, 91 F. Supp.2d 754, 771 (D.N.J. 2000). So, too, the federal Telecommunications Act of 1996, governs the actions of state public utility commissions. See 47 U.S.C. § 252. Federal courts, though, have rejected arguments that individual state public utility commissioners are not proper parties and cannot be sued for injunctive relief under Ex parte Young to assure compliance with that statute. See, e.g., Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862, 867-68 (6th Cir.), cert. denied, ___ U.S. ___, 121 S. Ct. 54 (2000); Bell Atlantic-Delaware v. Global NAPs South, Inc., 77 F. Supp.2d 492, 500-01 (D. Del. 1999). Plaintiffs note, however, that the Supreme Court recently agreed to decide whether Ex parte Young claims can proceed against state officials under the Federal Telecommunications Act. Mathias v. WorldCOM Tech., Inc., 69 U.S.L.W. 3399 (Mar. 5, 2001).

putative class members) by failing to provide them with services in the most integrated setting appropriate to their needs. As detailed above, Plaintiffs and many (though not all) class members can live in the community, rather than the segregated environment of NSH, if the state provided them with appropriate services and supports. Second, Defendants have used methods of administration that have the effect of discriminating against Plaintiffs and putative class members. These methods of administration include: (1) the failure to provide proper evaluations to determine their service needs; (2) failure to adequately fund and require counties to provide an array of community services and supports; and (3) failure to have in place administrative means to enable Plaintiffs and class members to move promptly to the community when they no longer need institutional care.[15]

The Supreme Court in Olmstead v. L.C. held that the ADA bars unnecessary institutionalization of people with disabilities and requires states to provide appropriate community alternatives (though a state may avoid liability if it can establish that compliance would result in a fundamental alteration). 527 U.S. at

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[15] Plaintiffs emphasize that they do not contend that all putative class members currently are appropriate for community placement nor do they seek a remedy that would require community placement for all putative class members. Rather, they seek proper evaluations to assure that putative class members are properly assessed to determine whether, with appropriate services and supports they could live in the community, and an adequate system to assure that community services and supports can be developed promptly once putative class members are ready for discharge.

607. Defendants, though, contend that the Supreme Court's interpretation of the ADA's integration mandate in Olmstead (and the Third Circuit's similar decision in Helen L. v. DiDario, 46 F.3d 325 (3d Cir.), cert. denied, 516 U.S. 813 (1995)) are inapplicable to Section 504, which includes an identical integration provision. Defendants further argue that Plaintiffs have failed to state a claim using the Olmstead criteria. Neither argument can withstand analysis.

A. Section 504's Integration Mandate Bars Unnecessary Institutionalization And Methods Of Administration That Have The Effect Of Unnecessarily Institutionalizing Individuals With Disabilities.

1. Section 504's Integration Mandate.

Section 504 bars federally-funded programs and activities from engaging in disability-based discrimination. 29 U.S.C. § 794(a). "One of the precepts of section 504 is that segregation of people with disabilities will not be tolerated ...." 138 Fed. Reg. S4985 (daily ed. May 9, 1989) (statement of Sen. Harkin). Congress intended to "achieve the tragically overdue goal of full integration of the handicapped into normal community living, working, and service patterns." 118 Cong. Rec. 3,320 (1972) (statement of Sen. Williams). Senator Williams observed:

> Most of us see the handicapped only in terms of stereotypes that are relevant for extreme cases. This ancient attitude is in part the result of the historical separation of our handicapped population. We have isolated them

> so that they have become unknown to the communities and individuals around them.

Id. at 3,321. Thus, Section 504 was enacted to "firmly establish the right of these Americans [with disabilities] to dignity and self-respect as equal and contributing members of society, and to end the virtual isolation of millions of children and adults from society." 118 Cong. Rec. 32,310 (statement of Sen. Humphrey). The Rehabilitation Act constitutes "a commitment to the handicapped that, to the maximum extent possible, they shall be fully integrated into the mainstream of life in America." S. Rep. No. 95-890, at 39 (1978) (emphasis added).

The Supreme Court has recognized that Section 504 was intended to address the isolation and segregation of individuals with disabilities. Quoting the legislative sponsors, the Court noted that Section 504 was introduced to rectify "the country's 'shameful oversights' which caused people with disabilities to be 'shunted aside, hidden, and ignored.'" Alexander v. Choate, 469 U.S. 287, 296 (1985) (citations omitted). So, too, in School Bd. of Nassau County v. Arline, the Court, in interpreting Section 504, noted that "[t]he isolation of the chronically ill and of those perceived to be ill or contagious appears across culture and centuries ...." 480 U.S. at 284 n.12

As originally written in 1973, the statute did not require federal agencies to promulgate implementing regulations. See Rogers v. Bennett, 873 F.2d 1387, 1394 (11th Cir. 1989). In

amending the statute in 1974, Congress expressly stated that it intended all federal agencies to promulgate such regulations and intended the Department of Health, Education and Welfare ("HEW") to assume responsibility for coordination of the Section 504 enforcement efforts. S. Rep. 93-1297, at 39, 40 (1974), reprinted in, 1974 U.S.C.C.A.N. 6373, 6390, 6391. In response, President Ford issued Executive Order No. 11,914, which required the Secretary of HEW to "coordinate the implementation of section 504 ... by all Federal departments and agencies ...." 41 Fed. Reg. 17,871 (1976). The original Executive Order required HEW to, inter alia, "establish ... guidelines for determining what are discriminatory practices within the meaning of section 504." Id.

Following the Executive Order, HEW promulgated "coordination regulations" for Section 504. 43 Fed. Reg. 2132 (1978) (codified at 45 C.F.R. Pt. 85 (1978)). These regulations were intended "to provide consistent governmentwide [sic] enforcement of section 504[.]" Id. Subpart C of the coordination regulations were "Guidelines for Determining Discriminatory Practices." 43 Fed. Reg. 2132, 2137-39 (1978) (codified at 45 C.F.R. Pt. 85, Subpt. C (1978)). HEW stressed that Subpart C's non-discrimination requirements "are, in general, minimum requirements." 43 Fed. Reg. 2132, 2134 (1978). Subpart C's "General prohibitions on discrimination" included the following integration mandate:

> Recipients [of federal financial assistance] shall administer programs and

> activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

Id. at 2138 (codified at 45 C.F.R. § 85.51(d) (1978)).

In 1980, President Carter transferred oversight of this coordination responsibility to the Attorney General and Department of Justice ("DOJ"). Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980). Pursuant to this Order, DOJ re-codified HEW's coordination regulations without change at 28 C.F.R. Pt. 41. 46 Fed. Reg. 40,686 (1981). The integration mandate established by HEW continued -- and remain -- in force. 28 C.F.R. § 41.51(d).[16]

The coordination regulations interpreting and implementing Section 504 -- including the integration mandate -- acknowledge that disability-based discrimination encompasses more than intentional discrimination or disparate treatment between persons with disabilities and those without disabilities. See 43 Fed. Reg. at 2134. See also Alexander v. Choate, 469 U.S. at 297, 299 (concluding that actions that "discriminated by effect as well as design" may be actionable under Section 504); Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1384 (3d Cir. 1991) (noting that proof of intentional discrimination is not necessary under

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[16] The coordination regulations also bar the use of methods of administration that have the effect of discriminating against persons with disabilities. 28 C.F.R. § 41.51(b)(3). This requirement, too, stems from the original coordination regulations promulgated by HEW. 43 Fed. Reg. 2132, 2138 (1978) (codified at 45 C.F.R. § 85.51(b)(3) (1978)).

Section 504). Section 504 also imposes affirmative duties -- including duties to provide reasonable accommodations, to eliminate architectural barriers, and to provide integrated community services -- to eliminate the "effects" of discrimination. See Alexander v. Choate, 469 U.S. at 297 (noting that it was necessary to remove architectural barriers to rectify the harm resulting from the effect of discrimination).

The Supreme Court has recognized that the Section 504 coordination regulations properly implement Section 504 and are entitled to deference. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984). Thus, although each federal agency may have unique Section 504 rules, it is the coordination regulations which constitute the definitive interpretation of Section 504. As the Eleventh Circuit explained with respect to Title VI of the Civil Rights Act (on which Section 504 was modelled):

> When Congress entrusts more than one federal agency to enforce a statute, the Supreme Court has accorded wide deference to the regulations promulgated by the agency charged by Executive Order with coordinating government-wide compliance.

Sandoval, 197 F.3d at 496 n.6.

Accordingly, in interpreting Section 504, this Court should give deference to the coordination regulations, including the integration mandate, 28 C.F.R. § 41.51(d). As discussed in the next two sub-sections, Congress intended Section 504 to be interpreted consistently with the ADA. The ADA's integration mandate

has been interpreted by both the Third Circuit and the Supreme Court generally to require states to provide community services to persons who are unnecessarily institutionalized. Since Section 504's integration mandate in the coordination regulations is virtually identical to that in the ADA, it, too, must be interpreted to require states to provide community services to persons who are unnecessarily institutionalized.

2. Section 504 Should Be Interpreted In The Same Way As The ADA.

Congress enacted the ADA in 1990 to bar disability-based discrimination by employers, public accommodations, and public entities (such as state and local governments). 42 U.S.C. §§ 12101-12213. The legislative history reflects that Title II of the ADA, which governs public entities, was intended to "extend[] the protections of Section 504 of the Rehabilitation Act to cover all programs of state or local governments, regardless of the receipt of federal financial assistance." H.R. Rep. No. 101-485, pt. 3, at 49 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 472. In doing so, Congress acknowledged the breadth of Section 504, noting that it "has served not only to open up public services and programs to people with disabilities but also has been used to end segregation." Id.

Rather than delineate the specific forms of discrimination, Congress instead directed DOJ to promulgate regulations that would be consistent with the Section 504 coordination regulations

codified at 28 C.F.R. Pt. 41. 42 U.S.C. §§ 12134(a)-(b). As the House Committee explained:

> The Committee has chosen not to list all types of actions that are included within the term "discrimination" ... because this title essentially extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments.

H.R. Rep. No. 101-485, pt. 2, at 84 (1990) (emphasis added), reprinted in, 1990 U.S.C.C.A.N. 267, 367.

Following the congressional mandate in 42 U.S.C. § 12134(b), DOJ promulgated regulations under Title II of the ADA that were virtually identical to the Section 504 coordination regulations. 28 C.F.R. Pt. 35. In particular, DOJ's ADA regulations included an explicit integration regulation, providing:

> A public entity shall 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). As the Third Circuit noted, the "integration mandate of § 35.130(d)," id. at 333, "is almost identical to the section 504 integration regulation ..." codified at 28 C.F.R. § 41.51(d). Helen L., 46 F.3d at 332.

The congressional intent that Section 504 and the ADA be congruent was further solidified by the enactment of the Rehabilitation Act Amendments in 1992, Pub. L. 102-569, 106 Stat. 4344 (1992). These amendments were designed to incorporate in the Rehabilitation Act "the values and principles underpinning the

ADA," which "has been referred to as the 20th century emancipation proclamation for individuals with disabilities." S. Rep. No. 102-357, at 7, 14 (1992), reprinted in, 1992 U.S.C.C.A.N. 3712, 3718, 3725. In those amendments, Congress made the following findings:

> [I]ndividuals with disabilities continually encounter various forms of discrimination in such critical areas as ... institutionalization .... [and]
>
> "[T]he goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to -- ... achieve ... full inclusion and integration in society ... [and] independent living ... for such individuals.

Rehabilitation Act Amendments of 1992, Pub. L. 102-569, § 101, 106 Stat. 4344, 4346-47 (1992) (codified at 29 U.S.C. § 701(a)(4), (6)).[17] These findings reflect "values and principles" which "include the right of persons with disabilities to independence, inclusion, choice and self-determination ...." S. Rep. No. 102-357, at 7 (1992), reprinted in, 1992 U.S.C.C.A.N. 3712, 3718. See also 138 Cong. Rec. S10,296 (daily ed. July 24, 1992) (statement of Sen. Harkin) (stating that the Act was "a consensus bill that would incorporate the philosophy of integration and inclusion into the Rehabilitation Act.").

Statutes and rules which relate to the same subject matter and which use similar language are in pari materia and

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[17] These findings substantially tracked the congressional findings in the ADA, 42 U.S.C. §§ 12101(a)(3), (8).

should be interpreted consistently. See Estate of Spear v. C.I.R., 41 F.3d 103, 109 (3d Cir. 1994) (holding that Tax Court rule and Federal Rule of Civil Procedure were in pari materia); United States v. Giovengo, 637 F.2d 941, 944 (3d Cir. 1980) (holding that wire fraud and mail fraud statutes should be construed in pari materia since they used the same language), cert. denied, 450 U.S. 1032 (1981); Monce v. City of San Diego, 895 F.2d 560, 561 (9th Cir. 1990) (construing similar provisions of Title VII and Age Discrimination in Employment Act consistently). The similarity in language between the ADA's integration mandate, 28 C.F.R. § 35.130(d), and the integration mandate in Section 504's coordination regulations, 28 C.F.R. § 41.51(d), as well as the legislative history of both the ADA and Section 504 reveal plainly that Congress intended that they be interpreted in pari materia, and they should be construed in the same way.

3. The ADA And Section 504 Prohibit Unnecessary Institutionalization.

In Olmstead v. L.C., the Supreme Court was asked to interpret the ADA's integration mandate, 28 C.F.R. § 35.130(d). It unequivocally held that unnecessary institutionalization and isolation of individuals with disabilities constitutes discrimination under the ADA. The Court explained:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and

> benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. [citations omitted] 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. [citation omitted]

527 U.S. at 600. The Court concluded that the ADA's proscription on discrimination generally may require placement of persons with mental disabilities in community settings rather than in institutions. Id. at 587.[18] In doing so, the Court rejected the defendants' arguments that unnecessary segregation could not constitute "discrimination" because discrimination requires uneven treatment of similarly situated individuals. Id. at 598.

The Olmstead decision confirmed the Third Circuit's 1995 decision in Helen L., which interpreted the ADA's integration mandate to require the provision of community services to persons who are unnecessarily institutionalized. Helen L., 46 F.3d at 333. Like the Olmstead Court, the Court of Appeals recognized that "the ADA and its attendant regulations clearly define unnecessary

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[18] The state's obligations under the ADA's integration mandate are not limitless. Community placements are not required if they are contrary to professional judgment, if placement is opposed by the individual, or if the placements cannot be reasonably accommodated. Olmstead, 527 U.S. at 587, 600-01, 607. See discussion, infra, at ____.

segregation as a form of illegal discrimination against the disabled." Id.[19]

Olmstead's and Helen L.'s interpretation of the ADA and its integration mandate, 28 C.F.R. § 35.130(d), to require states to provide community services to persons who are unnecessarily institutionalized applies equally to Section 504. Makin ex rel. Russell v. Hawaii, 114 F. Supp.2d 1017, 1036 (D. Haw. 1999). First, Section 504's coordination regulation includes an integration mandate that, as the Supreme Court and Third Circuit have noted, is identical to the ADA's integration mandate. See discussion, supra, at ___; Olmstead, 527 U.S. at 591-92; Helen L., 46 F.3d at 332. Second, the coordination regulations of Section 504 are entitled to deference in interpreting the scope of that statute. See discussion, supra, at ___. Third, Congress plainly intended that the ADA and Section 504 be interpreted consistently since they sought to achieve integration and inclusion through both statutes. See discussion, supra, at ___. Fourth, the identity between the goals and language of Section 504 and the ADA and their respective interpretive regulations requires that the statutes be construed consistently. See discussion, supra, at ___. Finally, as the Olmstead Court noted, DOJ -- which is responsible for both

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[19] Plaintiffs recognize that the Third Circuit's decision in Helen L. is inconsistent with and must yield to Olmstead with respect to the availability and definition of the defenses available to claims under the integration mandate. Compare Olmstead, 527 U.S. at 601-06, with Helen L., 46 F.3d at 336-39.

the Section 504 coordination regulations and the ADA regulations -- "has consistently advocated" that "undue discrimination qualifies as discrimination" under both statutes. 527 U.S. at 597 & n.9 (citing DOJ amicus briefs in integration cases under Section 504 and the ADA).[20]

In sum, there is simply no reason to reach a different result under Section 504 than the courts reached under the ADA in Olmstead and Helen L. Indeed, to hold otherwise would undermine the explicit legislative intent that "Congress intended ... Section 504 ... be given the broadest interpretation." S. Rep. No. 100-64, at 7 (1988), reprinted in, 1988 U.S.C.C.A.N. 3, 9.

4. Pre-1990 Decisions Under Section 504 Are Not Persuasive.

Defendants' reliance on cases decided prior to Helen L. and Olmstead, Defs.' Mem. at 24, are unavailing. The Third Circuit in a footnote in Clark v. Cohen, 794 F.2d 79 (3d Cir.), cert.

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[20] In dicta, the Supreme Court incorrectly indicated that Section 504 differed from the ADA because it included no express recognition that segregation of persons with disabilities is discrimination. Olmstead, 527 U.S. at 600 n.11. Both the original legislative history and the text and legislative history of the Rehabilitation Act Amendments of 1992 make plain that Congress certainly intended to prohibit isolation and segregation of people with disabilities and to promote inclusion and integration. See discussion, supra, at ____, ____. In addition, the brevity of Section 504, cited by the Court, is no different than the brevity of the statutory prohibition on discrimination by public entities under Title II of the ADA, 42 U.S.C. § 12132. The regulations implementing and interpreting both statutes are virtually identical, and there is no valid reason not to read them consistently.

denied, 479 U.S. 962 (1986), indicated that Section 504 did not require the provision of a community placement to a woman who was unnecessarily institutionalized. Id. at 84 n.3. Subsequently, the Third Circuit recognized that the ruling in Clark was not premised on "the integration mandate of the ADA or the Rehabilitation Act." Helen L., 46 F.3d at 334 (emphasis added). In fact, the Helen L. Court concluded:

> The 504 coordination regulations and the ADA make clear that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes, independent of the discrimination that arises when individuals with disabilities receive different services than those provided to individuals without disabilities.

Id. at 335.[21]

The decision in Clark was based on the Section 504 program regulations developed by the Department of Health and Human

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[21] None of Defendants' efforts to undermine the Helen L. Court's interpretation of the Section 504 coordination regulation, Defs.' Mem. at 24-25 n.13, is persuasive. The Third Circuit's interpretation is simply not at odds with the Supreme Court's decision in Olmstead in any way. Olmstead recognized that the lower courts had reached varying conclusions in interpreting Section 504, but did not discuss the bases for these conclusions nor did it hold that Section 504 did not contain an integration requirement similar to that in the ADA. Indeed, DOJ's notation in its Olmstead amicus brief that the interpretation of Section 504 with respect to integration was an "open" question in the courts did not undermine its own consistent interpretation that Section 504 did require integration when appropriate. Olmstead, 527 U.S. at 597 n.9. Finally, the fact that judicial interpretation of a regulation is required simply does not render it unenforceable under Pennhurst.

Services ("HHS", which was formerly HEW) to govern recipients of federal financial assistance, 45 C.F.R. Pt. 84; it was not based on the Section 504 coordination regulations. See Clark v. Cohen, 613 F. Supp. 684, 691 (E.D. Pa. 1995), aff'd, 794 F.3d 97 (3d Cir.), cert. denied, 479 U.S. 962 (1986). The regulatory language of HHS's Section 504 program regulation concerning integration, 45 C.F.R. § 84.4(b)(2), is somewhat different than the integration mandate in the coordination regulation, 28 C.F.R. § 41.51(d). It is this difference in language which may account for the differing interpretations of Section 504 in Clark and Helen L.

Although Defendants' federal funding here is from HHS, the Clark Court's interpretation of the HHS Section 504 program regulations should not govern the interpretation of Section 504 in this case. Rather, Defendants' duty stems from Section 504 itself -- not the HHS Section 504 program regulations. In interpreting the meaning of unlawful discrimination under Section 504 (which has resulted in multiple federal agencies promulgating multiple sets of regulations), it is appropriate to give deference to the coordination regulations promulgated by the agency that was charged with coordinating the regulations of all the federal agencies. See discussion, supra, at ___.[22] The Section 504 coordination regula

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[22] Arguably, the Clark Court erred in its interpretation of the HHS program regulations' integration requirements. The program regulations were promulgated by HEW in 1977, less than a year prior to HEW's promulgation of the coordination regulations. As discussed above, HEW made plain that the general prohibitions on

tion concerning integration, 28 U.S.C. § 41.51(d), is identical to the ADA's integration mandate, 28 U.S.C. § 35.130(d). The latter has been interpreted in both Olmstead and Helen L. to require the provision of appropriate community services to persons who are unnecessarily institutionalized under certain circumstances. It, therefore, follows that Section 504 should be interpreted to impose the same obligations as the ADA, as interpreted in Olmstead and Helen L.

Further, the interpretations of Section 504 by the Third Circuit in Clark and in the other cases cited by Defendants, Defs.' Mem. at 24, all pre-date both the enactment of the ADA in 1990 (which evidenced Congress' intent to model the ADA on Section 504) and the amendments to the Rehabilitation Act in 1992 (which reiterated Congress' intent that the Rehabilitation Act incorporate the values and principles of the ADA). See discussion, supra, at ___. These congressional statements further support the conclusion that

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discrimination identified in the coordination regulations were intended to be "minimum" criteria that federal agencies were to adopt in creating their own Section 504 regulations. See discussion, supra, at ___. Evidently, HEW did not suspect that its program regulations were inconsistent with its subsequently promulgated coordination regulations with respect to integration, despite the language differences between the regulations. In fact, the Director of the Health Care Financing Administration, the federal agency within HHS which implements the Medical Assistance laws, recently informed state Medical Assistance directors: "Although the Olmstead decision interpreted the ADA, unjustified segregation by a Federally funded program would also constitute disability discrimination under Section 504." HCFA, Olmstead Update No. 2, Q15 (July 25, 2000) <available at www.hcfa.gov/medicaid/smd72500.htm> (Attachment __).

Section 504 and the ADA should be interpreted in the same way, rendering highly suspect the continued vitality of those pre-1990 decisions.[23]

B. Plaintiffs Have Stated Actionable Claims Under the Integration Mandate of the ADA and Section 504, As Interpreted In Olmstead.

Defendants contend that Plaintiffs have failed to meet the criteria for liability established for integration claims under Olmstead. Plaintiffs do not dispute that Olmstead governs the parameters of liability under both the ADA and Section 504, but vigorously dispute that their claims do not fall well within those parameters.

The Olmstead Court concluded that States must provide services to persons who are institutionalized in integrated,

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[23] Defendants do not -- and cannot -- assert that Clark is binding precedent on the issue presented in this case. First, the plaintiff in Clark prevailed on her claims under the Constitution, which afforded her full relief, as the court in Helen L. recognized. 46 F.3d at 333. As such, en banc review was effectively unavailable on the Section 504 issue, making Clark's interpretation of Section 504 dicta. See ACLU of New Jersey ex rel. Lander v. Schundler, 168 F.3d 92, 98 n.6 (3d Cir. 1999). Second, Clark was not asked to interpret Section 504 in light of the coordination regulation, but, rather, in terms of the specific program regulations, which are not identical. See discussion, supra, at ___. Finally, the Supreme Court's decision in Olmstead cast doubt on the proper interpretation of Section 504 given the evident congressional intent to provide parallel rights under Section 504 and the ADA. Given this intervening decision -- as well as the legislative amendments to Section 504 subsequent to Clark -- this Court is not bound by Clark. See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110, 1115 (3d Cir. 1993); Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 734 (7th Cir. 1986).

community-based settings. Olmstead, 527 U.S. at 587, 597-601, 607. This holding, though, was not unlimited.

First, the Court indicated that community services need not be provided to individuals who oppose such placements. Olmstead, 527 U.S. at 587, 602, 603. Defendants cannot seriously contend that Plaintiffs have failed to establish that they do not oppose community placement. Defs.' Mem. at 27. Plaintiffs authorized this Complaint to be filed and pursued. More explicit statements of non-opposition are unnecessary.

The Supreme Court also indicated that in determining whether an individual should be provided with community placement, "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program." Olmstead, 587 U.S. at 602 (emphases added). In this case, three of the four named Plaintiffs -- Frederick L., Kevin C., and Steven F. -- have been determined to be appropriate for community placement by the state's own treating professionals. Compl. ¶¶ 23, 37, 44.[24]

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[24] While the Complaint is, admittedly, a bit unclear on the recommendation for community placement for Steven F., see Compl. ¶ 44, the recommendation by the state professionals was for community placement generally -- not to any specific community residential rehabilitation ("CRR") program. While Steven F. had been referred to one such CRR program in his home county which rejected him, that did not undermine the state professionals' general conclusion that he could live in the community with appropriate services and supports. Plaintiffs, if necessary, can amend the complaint to

While Nina S. has not "formally" been recommended for discharge by the state's professionals, Compl. ¶ 30, this should not preclude her claim under the ADA's and Section 504's integration mandates. In Nina S.'s situation, her social worker concluded that she could be discharged to a small community living arrangement, but concluded -- incorrectly -- that such programs did not exist. Compl. ¶¶ 30, 62. In essence, she has been recommended for discharge by her treating professionals.

Even if the determination of Nina S.'s professionals somehow could be construed as a recommendation against discharge, she has still stated an actionable claim under the ADA and Section 504. Olmstead is not an absolute shield against judicial review of professionals' decisions. The Supreme Court did not preclude integration claims that challenged those judgments.[25] Rather, the court indicated only that adherence to the state professionals' judgment was "generally" required and that the states' assessments must be "reasonable". Olmstead, 527 U.S. at 602. Plaintiffs have alleged that the judgment of the NSH staff was fundamentally flawed, as is evidenced by the erroneous conclusion of Nina S.'s

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reflect that fact.

[25] The Court did not have to decide the boundaries of deference to professional judgment since the Olmstead plaintiffs' professionals had recommended them for community placement. Olmstead, 527 U.S. at 593.

social worker. Compl. ¶¶ 30, 62, 73(b). More broadly, Plaintiffs allege:

> Treatment teams at state psychiatric hospitals, such as NSH, routinely fail to ascertain whether residents could be served in the community if services were developed to meet their needs. Instead, treatment team recommendations for discharge are based on the capacity of the individual to fit -- however awkwardly -- into existing programs. ... Defendants' failure to assure that treatment teams undertake proper, individualized assessments of NSH residents results in the continued unnecessary institutionalization of persons at NSH and frequent discharges to inappropriate settings.

Compl. ¶ 62. Plaintiffs should be given the opportunity to prove that the state's treatment teams' judgments are, too often, not "reasonable" and, in fact, are inconsistent with appropriate, professional standards. To hold otherwise would allow states to simply avoid the requirements of the integration mandates in Section 504 and the ADA by declaring that no person in any institution is appropriate for community placement.

Finally, DPW contends that Plaintiffs cannot state a claim under Olmstead because "resources are limited" and "Olmstead does not require DPW to establish additional 'beds' in the community immediately, or on any particular timetable ...." Defs.' Mem. at 28. A plurality of the Supreme Court in Olmstead acknowledged that states may defend against claims under the integration mandate if they can "show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequit-

able, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." Olmstead, 527 U.S. at 604. This is a defense, and the burden rests on the Defendant -- not the Plaintiffs. See id.; Juvelis v. Snider, 68 F.3d 648, 653 & n.5 (3d Cir. 1995) (holding in a case against DPW that burden of proving reasonable accommodation/undue burden defense is on defendant). As such, Plaintiffs had no obligation to plead or prove that relief for themselves and the putative class members would be inequitable and it is premature to address the merits of Defendants' defense on a motion to dismiss.

Furthermore, the Supreme Court indicated that a state could meet its burden to establish that providing community services would result in a fundamental alteration by adopting "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavor to keep its institutions fully populated ...." Olmstead, 527 U.S. at 605-06 (emphases added). Plaintiffs specifically alleged that DPW has not developed an adequate plan for community placements for NSH residents that is comprehensive and effective and that moves at a reasonable pace. See Compl. ¶¶ 65, 72(c). Indeed, Plaintiff Frederick L. has been waiting three and one-half years for a community placement. Compl. ¶ 24. The

obvious fact that no services are currently available for Plaintiffs and class members is wholly insufficient to establish a valid reasonable modification/fundamental alteration defense under the integration mandates of the ADA and Section 504.

CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

Dated: March __, 2001

By: _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK L., NINA S., KEVIN C., and STEVEN F., on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 00-CV-4510
DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA; FEATHER O. HOUSTOUN, in her official capacity as Secretary of Public Welfare for the Commonwealth of Pennsylvania,	:	CLASS ACTION
Defendants.	:	

ORDER

Upon consideration of Defendants' Motion to Dismiss and Plaintiffs' Memorandum of Law in Opposition to that Motion, it is hereby ORDERED on this _____ day of _____, 2001 that Defendants' Motion is DENIED.

_____
Berle M. Schiller
United States District Judge

CERTIFICATE OF SERVICE

I, Robert W. Meek, hereby certify that true and correct copies of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, Attachments, and proposed Order were served as follows on this _____ day of March, 2001:

BY HAND DELIVERY
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_____
Robert W. Meek

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK L., NINA S., KEVIN C., and STEVEN F., on behalf of themselves and all others similarly situated, Plaintiffs, v. DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA; FEATHER O. HOUSTOUN, in her official capacity as Secretary of Public Welfare for the Commonwealth of Pennsylvania, Defendants.	:	Civil Action No. 00-CV-4510 CLASS ACTION

"amicus" FCO

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs, through their counsel, submit this Memorandum of Law in Opposition to Defendants' Motion to Dismiss. Defendants' Eleventh Amendment challenge to Plaintiffs' claims under Section 504 of the Rehabilitation Act ("Section 504") must fail since Pennsylvania has waived its Eleventh Amendment immunity. Similarly unavailing is Defendants' constitutional challenge to the Americans with Disabilities Act ("ADA"). The ADA is valid legislation under both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. Finally, Plaintiffs have stated actionable claims under Section 504 and the ADA, both of which require the provision of services to individuals in the most integrated settings appropriate to their needs.

FACTUAL BACKGROUND

Plaintiffs Frederick L., Nina S., Kevin C., and Steven F. are individuals with mental illness who are institutionalized at Norristown State Hospital ("NSH"), a psychiatric facility operated by Defendants Department of Public Welfare and Houstoun (collectively, "DPW"). See Compl. ¶¶ 11-15. Plaintiffs filed this lawsuit to challenge DPW's failure to develop and implement processes to assure the availability and provision of appropriate community alternatives to themselves and other NSH residents. See id. ¶¶ 4-7, 72-74.[1]

Plaintiff Frederick L. is a 43-year-old Philadelphia resident with mental illness who has been institutionalized at NSH since August 1989. Compl. ¶¶ 20, 22. Since at least July 1997, Frederick L. has been recommended for discharge to a community-based mental health program. Id. ¶ 23. Yet, he has remained unnecessarily institutionalized at NSH for more than three years. Id. ¶ 24. With appropriate services and supports, Frederick L. could live in the community, which is the most integrated setting appropriate to his needs. Id. ¶¶ 25-26.

Plaintiff Nina S. is a 41-year-old Montgomery County resident with mental illness and mental retardation who has been institutionalized since she was 11 and has been committed to NSH since 1976. Compl. ¶¶ 27-29. Nina S.'s treatment team has never

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[1] Plaintiffs' Motion for Class Certification is pending.

determined what types of community services and supports she would need to live in the community so as to make an accurate discharge recommendation. See id. ¶ 30. Nina S.'s social worker has noted that she could live in a small community program, but concluded -- incorrectly -- that such programs did not exist in the mental health system. Id. ¶¶ 30, 62. Nina S. is unnecessarily institutionalized at NSH. Id. ¶ 31. With appropriate services and supports, Nina S. could live in the community, which is the most integrated setting appropriate to her needs. Id. ¶¶ 32-33.

Plaintiff Kevin C. is a 32-year-old Montgomery County resident with mental illness who has been involuntarily committed to NSH since March 1992. Compl. ¶¶ 34, 36. Kevin C. has been recommended for discharge to the community since at least February 1999. Id. ¶ 37. Yet, he remains unnecessarily institutionalized at NSH. Id. ¶ 38. With appropriate services and supports, Kevin C. could live in the community, which is the most integrated setting appropriate to his needs. Id. ¶¶ 39-40.

Plaintiff Steven F. is a 38-year-old Bucks County resident with dual diagnoses of mental illness and substance abuse who has been institutionalized at NSH since February 1992. Compl. ¶¶ 41, 43. Steven F. has been recommended for discharge to an appropriate community-based program. Id. ¶ 44. Yet, he remains unnecessarily institutionalized at NSH. Id. ¶ 45. With appropriate services and supports, Steven F. could live in the com-

munity, which is the most integrated setting appropriate to his needs. Id. ¶¶ 46-47.

Under Pennsylvania law, DPW is responsible "[t]o assure within the State the availability and equitable provision of adequate mental health ... services for all persons who need them ...." 50 Pa. Cons. Stat. Ann. § 4201(1). DPW provides the primary funding (using state and federal sources) for community-based mental health services while the counties have the primary responsibility for developing those services. See Compl. ¶ 52; 50 Pa. Cons. Stat. Ann. §§ 4301(d); 4509(1).

Pennsylvania offers services to persons with mental illness in a range of settings -- institutions (such as NSH), long-term structured residences, various group-home types of settings, and supported independent living. Compl. ¶ 49. The services offered to individuals in state hospitals are also provided in community-based programs where they are more likely to be geared to the individuals' needs. Id. ¶ 50.

Pennsylvania funds community-based mental health services through two means: (1) general allocations from DPW to the counties, and (2) specialized grants (known as the Community Hospital Integrated Project Program ("CHIPP") and more recently in this region as the "Southeastern Integrated Project Program ("SIPP")), which DPW issues to the counties to develop community services for state hospital residents and to allow DPW to close

state hospital beds. Compl. ¶¶ 53-56. DPW has consistently failed to provide Philadelphia, Bucks, Chester, Delaware, and Montgomery counties with the funding no one disputes they need -- either through general allocations or CHIPP/SIPP allocations -- to allow them to develop adequate community alternatives for their residents who are institutionalized at NSH. Id. ¶ 59. As a result, Plaintiffs and other NSH residents remain confined at NSH for long time periods after they are ready for discharge. Id. ¶ 61.

DPW has not only failed to assure funding to provide community alternatives for NSH residents that its staff deems appropriate for such services, it has used procedures which have exacerbated the unnecessary institutionalization of NSH residents by, inter alia:

- ♦ failing to assure that NSH treatment teams undertake appropriate, individualized evaluations of NSH residents to accurately assess their community service needs;
- ♦ failing to assure that counties develop sufficient specialized community-based treatment programs (e.g., for individuals with dual diagnoses); and
- ♦ failing to adequately plan for community placements to assure prompt transfers of NSH residents to the community as they become appropriate for discharge.

See Compl. ¶¶ 62-64.

DPW has announced that it will provide community placements to approximately 60 NSH residents (who are elderly and/or medically fragile) during Fiscal Year 2001-2002 (July 1, 2001 through June 30, 2002). Compl. ¶ 65. DPW, though, has developed no plan whatsoever for community placements of any other NSH residents, even though the community is the most integrated setting in which many NSH residents (including the named Plaintiffs) can receive mental health services appropriate to their needs. Id. ¶¶ 65-67.

Plaintiffs contend that DPW violates Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, by:

- discriminating against Plaintiffs and class members by failing to provide mental health services to them in the most integrated setting appropriate to their needs; and
- using methods of administration that have the effect of subjecting Plaintiffs and class members to disability-based discrimination (i.e., unnecessary segregation at NSH), including, for example: (1) failing to fund and develop an array of community-based mental health services; (2) failing to conduct adequate, individualized evaluations of NSH residents' community treatment needs; and (3)

failing to plan for services to assure prompt transitions to the community.

Compl. ¶ 72-73. Plaintiffs seek appropriate declaratory and injunctive relief. Id. ¶ 75.

ARGUMENT

I. STANDARD OF REVIEW

In a Rule 12(b)(6) motion to dismiss, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). Dismissal should be granted "only if it appears that the plaintiff[] could prove no set of facts that would entitle [him] to relief." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996) (citing Conley v. Gibson, 355 U.S. 41 (1957)).

II. PLAINTIFFS' SECTION 504 CLAIMS AGAINST DPW ARE NOT BARRED BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION.

The Eleventh Amendment to the United States Constitution has been held to bar suits in federal courts against a state or state entity by its own citizens. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); Hans v. Louisiana, 134 U.S. 1, 13-15 (1890). In essence, the Eleventh Amendment embodies the common law doctrine of sovereign immunity which shields states from lawsuits. See Alden v. Maine, 527 U.S. 706, 713 (1999); Litman v.

George Mason University, 186 F.3d 544, 549 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000).

There are, however, three well-recognized exceptions to Eleventh Amendment immunity. See Sandoval v. Hagan, 197 F.3d 484, 492 (11th Cir. 1999), cert. granted on other grounds sub nom. Alexander v. Sandoval, ___ U.S. ___, 121 S. Ct. 28 (2000)[2]; Litman, 186 F.3d at 549-50. First, individuals may sue the state or a state entity if the state has waived its sovereign immunity. See Atascadero, 473 U.S. at 238. Second, individual suits against states may proceed if Congress, pursuant to Section 5 of the Fourteenth Amendment, abrogates a state's immunity. Id. Accord Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996). Third, individual suits that seek solely prospective relief for ongoing violations of federal law may be brought against state officials pursuant to the doctrine of Ex parte Young, 209 U.S. 123, 159-60 (1908). See Alden, 527 U.S. at 757; Seminole Tribe, 517 U.S. at 73.

Two of the three exceptions are applicable to Plaintiffs' claims under Section 504 of the Rehabilitation Act. First, as discussed in the following sub-sections, Plaintiffs may pursue their claims under the Rehabilitation Act against both Defendants DPW and Houstoun because Pennsylvania waived its Eleventh Amendment

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[2] The Supreme Court granted certiorari in Sandoval solely on the question of whether there is a private right of action to enforce federal regulations under Title VI. 69 U.S.L.W. 3012 (July 4, 2000).

immunity by accepting federal funds. Second, as discussed in Section ___ below, Plaintiffs may pursue their claims under the Rehabilitation Act against Defendant Houstoun under Ex parte Young.

A. Congress' Enactment Of 42 U.S.C. § 2000d-7 Notified States That They Waived Their Eleventh Amendment Immunity Under The Rehabilitation Act By Accepting Federal Funds.

States may waive their sovereign immunity either through "overt consent" or by accepting federal funds authorized through Spending Clause legislation (such as the Rehabilitation Act). Sandoval, 197 F.3d at 492; Litman, 186 F.3d at 550. The Supreme Court has recognized:

> Incident to this power [under the Spending Clause], Congress may attach conditions on the receipt of federal funds ... "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."

South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citations omitted). The Court further acknowledged that Congress' power under the Spending Clause was exceedingly broad, allowing it to achieve "objectives not thought to be within Article I's 'enumerated legislative fields' ... through the use of the spending power and the conditional grant of federal funds." Id. at 208 (citation omitted).

One of the conditions that Congress can attach to the receipt of federal funds is a requirement that recipients who accept such funds waive their sovereign immunity. See Atascadero,

473 U.S. at 238 n.1, 247; Sandoval, 197 F.3d at 493. If a statute enacted under the Spending Clause evinces a "clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the state's acceptance of federal funds will be deemed to be a valid waiver of immunity. Atascadero, 473 U.S. at 247; Sandoval, 197 F.3d at 483.

In 1985, the Supreme Court held that there was no evidence that Congress intended to waive states' immunity under the Rehabilitation Act. Atascadero, 473 U.S. at 247. In response to that decision, Congress in 1986 amended the Rehabilitation Act, providing in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments Act of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1) (emphasis added).

As every court which has considered the issue -- including the Courts of Appeals for the Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits -- has held, this "provision's plain language manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity." Sandoval, 197 F.3d at 493. Accord Jim C. v. Atkins School Dist., 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc); Pederson v.

Louisiana State University, 213 F.3d 858, 875-76 (5th Cir. 2000); Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000); Litman, 186 F.3d at 551-55; Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 (2d Cir. 1990); Robinson v. Kansas, 117 F. Supp.2d 1124, 1132-34 (D. Kan. 2000); Beasley v. Alabama State University, 3 F. Supp.3d 1304, 1311-16 (M.D. Ala. 1998).[3] Indeed, the Supreme Court has described Section 2000d-7 as an "unambiguous waiver of the States' Eleventh Amendment immunity ...." Lane v. Pena, 518 U.S. 187, 200 (1996).[4]

B. Defendants' Arguments Against The Validity Of The Waiver Are Flawed.

Defendants seek to undermine the decisions interpreting 42 U.S.C. § 2000d-7 to constitute a waiver of the states' Eleventh Amendment immunity by arguing that the Rehabilitation Act does not

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[3] Although the Third Circuit has not addressed this question, it has recognized in a post-Atascadero decision that a state's agreement to participate in a federal program which specifies remedies can be sufficient to waive the state's Eleventh Amendment immunity and will subject the state to the remedies specified by the federal program. Delaware Dep't of Health and Social Services, Div. for the Visually Impaired v. U.S. Dep't of Educ., 772 F.2d 1123, 1137-38 (3d Cir. 1985).

[4] Defendants' continued reliance on Atascadero, Defs.' Mem. at 17-18, is puzzling given the Supreme Court's recognition that 42 U.S.C. § 2000d-7 -- enacted specifically in response to Atascadero -- was precisely "the sort of unequivocal waiver that our precedents demand." Lane v. Pena, 518 U.S. at 198. After the enactment of Section 2000d-7, states were well aware that they would be binding themselves to comply with federal non-discrimination statutes (including Section 504 of the Rehabilitation Act) when they accepted federal funds.

meet two of the criteria required to support Spending Clause legislation. First, they imply that the conditions imposed on the receipt of federal funds are unduly sweeping. Second, they contend that the waiver of Eleventh Amendment immunity embodied in Section 2000d-7 is coercive. Defs.' Mem. at 16-17.[5] Neither argument -- nor any other argument advanced by Defendants -- can withstand analysis.

1. The Requirements Of Section 504 Are Not Unconstitutionally Ambiguous.

Relying on Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1980), Defendants argue that the non-discrimination requirements imposed by Section 504 are too ambiguous to be valid under the Spending Clause. Defs.' Mem. at 16, 22. Although Defendants do not specify in their Eleventh

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[5] In South Dakota v. Dole, the Supreme Court identified four prerequisites for Spending Clause legislation: (1) "the exercise of the spending power must be in pursuit of the 'general welfare'"; (2) Congress' conditions on the states' receipt of federal funds must be unambiguous to enable the states to knowingly make the choice aware of the consequences of participation; (3) the conditions must bear some relationship to the purpose of the federal spending; and (4) the conditional grant of federal funds cannot require states to engage in any unconstitutional activities. 483 U.S. at 207-08, 210. The Court further indicated that there may be some circumstances when "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" Id. at 211. See also Litman, 186 F.3d at 552-53 (discussing factors for validity of Spending Clause legislation). Defendants here do not contend that the Rehabilitation Act is inconsistent with the "general welfare," that the conditions imposed on federal grants are unrelated to the federal interest, or that Section 504 requires them to engage in unconstitutional acts.

Amendment argument why the Rehabilitation Act is ambiguous, they pick up this thread in their argument that Plaintiffs have failed to state an actionable claim under Section 504 because it does not unambiguously require states to provide community placements. Defs.' Mem. at 21-23.[6] Since mere ambiguity of a statute cannot foreclose a court's interpretation to determine the statute's parameters, Defendants' ambiguity argument is in fact a thinly-veiled challenge to the constitutionality of Section 504.

Defendants' argument disregards Supreme Court precedent which expressly distinguished Section 504 from the statute at issue in Pennhurst. In Pennhurst, the Court was asked to infer that states had an obligation to provide services to persons with disabilities in the least restrictive settings based on a congressional "finding" in the Developmentally Disabled Assistance and Bill of Rights Act. Pennhurst, 451 U.S. at 13. Noting that the statute in question was enacted under the Spending Clause, the Court indicated that any obligation imposed on states must be unambiguous, id. at 17, and determined that the "finding" in

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[6] Defendants' argument that Section 504 is ambiguous extends far beyond the question of whether that statute requires the provision of community services to persons who are unnecessarily institutionalized. If successful, this argument also would relieve states of the well-established responsibility under Section 504 to provide reasonable accommodations to persons with disabilities, see Defs.' Mem. at 23, despite the plethora of federal precedents which have, in fact, recognized and applied Section 504's reasonable accommodation requirement. See, e.g., Wagner v. Fair Acres Geriatric Center, 49 F.3d 1002, 1009, 1014-17 (3d Cir. 1995).

question evinced only a "congressional preference" and not a requirement. Id. at 19.

Subsequently, the Court in School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987), was asked to decide whether Section 504 protected persons with contagious diseases. In answering this question in the affirmative, the Court specifically rejected the argument that its decision interpreting Section 504 was contrary to Pennhurst. Id. at 286 n.15. The Court held that "[t]he contrast between the congressional preference at issue in Pennhurst and the antidiscrimination mandate of § 504 could not be more stark." Id. (emphases added). The Court, therefore, recognized that Section 504 was sufficiently explicit; the necessity to interpret certain terms of the statute and regulations did not render Section 504 too ambiguous to be subject to enforcement.

Similarly, the Eleventh Circuit in Sandoval rejected the argument that Title VI of the Civil Rights Act was invalid under the Spending Clause because it provided states with insufficient notice that they would be required to administer driver's license exams in foreign languages. 197 F.3d at 494-99. The Court noted that Congress "need not specifically identify and proscribe in advance every conceivable state action that would be improper." Id. at 495. Title VI's ban on national origin discrimination, combined with federal regulations that prohibited the use of methods of administration that have the effect of subjecting

individuals to national origin discrimination and regulatory and judicial interpretations, were sufficient to provide the state with notice of its obligations. Id. at 495-96.[7]

The Fourth Circuit in Litman likewise concluded that a state-created university knowingly waived its Eleventh Amendment immunity to sexual harassment claims under Title IX when it accepted federal funds. 186 F.3d at 553-54. The court held that, in accordance with Pennhurst, "[t]here can be no doubt that [the university] is able 'to ascertain what is expected of it' in return for federal education funds." Id. at 553-54 (quoting Pennhurst, 451 U.S. at 17).

The conclusion here should be no different than the conclusions in Sandoval and Litman. First, there can be no doubt that Defendants understood that they would be subject to suit in federal court under federal non-discrimination statutes -- including Section 504. Defendants knowingly made the choice to accept federal funds and have been on notice since the enactment of Section 2000d-7 in 1986 that, in doing so, they would be waiving their Eleventh Amendment immunity.

Second, Defendants knew that Section 504 itself was a congressional mandate. Unlike the statute in Pennhurst, they were

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[7] The Sandoval Court also observed that the notice standard may be less restrictive when, as in this case, claims for injunctive relief (rather than damage claims) are involved. Sandoval, 197 F.3d at 499 n.14.

aware that Section 504 was not a mere congressional finding or statement of congressional preference. Section 504 unmistakably informed Defendants that they could not engage in disability-based discrimination.

Finally, Defendants had sufficient notice of the parameters of their obligations under those non-discrimination statutes in light of the statutory language and regulatory interpretations; it was not necessary for purposes of the Spending Clause that they be aware of each and every potential form of liability. In fact, as discussed infra at ___, the regulatory interpretations of Section 504 -- which are entitled to substantial deference -- as well as recent judicial interpretations of Section 504 and the ADA (which must be read consistently) have unequivocally informed Defendants that unnecessary segregation of individuals in institutions and the failure to provide such individuals with appropriate, community services constitutes unlawful discrimination under Section 504.

2. The Rehabilitation Act, Including The Waiver Of Eleventh Amendment Immunity, Is Not Unconstitutionally Coercive.

Defendants also cannot realistically contend that Congress' decision to condition the receipt of federal funds on states' agreement not to engage in race, gender, or disability discrimination is unlawfully coercive. Pennsylvania and DPW "are free to accept or reject the terms and conditions of federal funds

much like any contractual party." Sandoval, 197 F.3d at 494. The federal government has not forced Defendants to accept the federal dollars; they have chosen to do so voluntarily. "Congress may offer financial incentives to induce state action so long as 'Congress encourages state action rather than compelling it.'" Id. (quoting New York v. United States, 505 U.S. 144, 168 (1992)).

In a challenge to the Equal Access Act (which prevented schools from banning religious groups under certain circumstances), the Supreme Court noted that the Act applied only to schools that received federal financial assistance and that schools could choose to "simply forego federal funding." Bd. of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 241 (1990). The court explained:

> Although we do not doubt that in some cases this may be an unrealistic option, Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech and that obligation is the price a federally funded school must pay if it opens its facilities to non-curriculum-related student groups.

Id.

The federal appellate courts have echoed this sentiment. The Tenth Circuit, for example, rejected a "coercion" challenge to child support enforcement conditions imposed on states which received federal welfare funds, writing:

> [Kansas] asks that we expand the concept of "coercion" as it applies to relations between state and federal governments, and find a

> large federal grant accompanied by a set of conditional requirements to be coercive because of the powerful incentive it creates for states to accept it. We decline the invitation. In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the [federal] requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be. [citation omitted] Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars.

Kansas v. United States, 214 F.3d 1196, 1203-04 (10th Cir.), cert. denied, ___ U.S. ___, 121 S. Ct. 623 (2000). See also California v. United States, 104 F.3d 1086, 1092 (9th Cir.) (rejecting argument that conditions on receipt of federal Medical Assistance funds were coercive), cert. denied, 522 U.S. 806 (1997); North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 535-36 (E.D.N.C. 1977) (three-judge court) (rejecting argument that federal spending clause statute was coercive), aff'd mem., 435 U.S. 962 (1978). In fact, "no party challenging the conditioning of federal funds has ever succeeded under the coercion theory." California v. United States, 104 F.3d at 1092.[8]

Defendants want to continue to feed at the federal trough while being excused from compliance with the relatively simple federal conditions not to discriminate on the basis of race,

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[8] Defendants do not even attempt to present any sort of evidentiary record to support their contention that the Rehabilitation Act is coercive.

gender, or disability. As the Eighth and Eleventh Circuits have correctly concluded, Section 2000d-7 is not unconstitutionally coercive. Jim C., 235 F.3d at 1081-82; Sandoval, 197 F.3d at 494. Accord Robinson, 117 F. Supp.2d at 1133.

3. Defendants' Other Arguments Against The Validity Of The Waiver Of Eleventh Amendment Immunity Are Unpersuasive.

Defendants seem to imply that any waiver in Section 2000d-7 is not valid because the program funds received by DPW for mental health services are not the actual federal funds disbursed to the State under the Rehabilitation Act. See Defs.' Mem. at 17. This argument, too, must fail. As one court has held in rejecting the same argument, "[n]o dollar-for-dollar accounting need be made." Robinson, 117 F. Supp.2d at 1133.

Defendants also argue that Section 2000d-7 is insufficient to create a waiver of their immunity because Pennsylvania had participated in federally-funded programs prior to the enactment of Section 2000d-7 in 1986. Defs.' Mem. at 18 n.9. This argument ignores several facts. First, Plaintiffs' claims do not predate the enactment of Section 2000d-7 in 1986. Second, Defendants receive federal funds annually and certainly have accepted federal funds since the enactment of Section 2000d-7.

II. THE AMERICANS WITH DISABILITIES ACT IS CONSTITUTIONALLY VALID UNDER THE COMMERCE CLAUSE, AND, ITS INTEGRATION MANDATE IS CONSTITUTIONALLY VALID UNDER THE DUE PROCESS CLAUSE.

The Supreme Court in Board of Trustees of the University of Alabama v. Garrett, ___ U.S. ___, 2001 WL 173556 (Feb. 21, 2001) (Attachment __), determined that the Eleventh Amendment barred claims for damages against state employers under Title I of the ADA (which bars discrimination by public and private employers). Id. at *11. While the Court noted that Congress had expressly abrogated states' Eleventh Amendment immunity under the ADA, id. at *5 (citing 42 U.S.C. § 12202), it concluded that Congress was not acting within its constitutional authority when it did so. Id. at *8-*11. The Court determined that the ADA's expansive Title I employment discrimination provisions (which, inter alia, required reasonable accommodations in the workplace) were not "congruent and proportional" to the Equal Protection Clause's narrow requirement that prohibits only those disability-based distinctions that lack any rational basis. Id. at *11.

Although the decision in Garrett did not involve Title II of the ADA (on which Plaintiffs' claims are based), 2001 WL 173556 at *3 n.1, Plaintiffs here do not argue that Title II of the ADA was properly enacted under the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs' Title II claims, however, can proceed (against Defendant Houstoun) because Title II and its the integration mandate are constitutionally valid under the Commerce Clause, and (against both Defendants DPW and Houstoun) because

Title II's integration mandate are valid under the Due Process Clause of the Fourteenth Amendment.

A. The ADA -- Including Title II And The Integration Mandate -- Is Valid Commerce Clause Legislation.

Congress may not abrogate states' Eleventh Amendment immunity under the Commerce Clause or other legislation enacted pursuant to Congress' power under Article I of the Constitution to allow states to be sued for damages or other prospective relief. See Garrett, 2001 WL 173556 at *5; Seminole Tribe, 517 U.S. at 72. However, individuals can still bring federal lawsuits for retrospective, injunctive relief pursuant to Ex parte Young under such Article I legislation. See Alden v. Maine, 527 U.S. at 757. Accordingly, Plaintiffs can pursue their ADA claims against Defendant Houstoun (though not against Defendant DPW) if the ADA is valid Commerce Clause legislation.

Congress enacted the ADA pursuant to both the Commerce Clause and the Fourteenth Amendment. 42 U.S.C. § 12101(b)(4). The Supreme Court in Garrett made plain its view that Title I of the ADA still governed the conduct of states and that state officials could be subjected to actions in federal court for injunctive relief for violations of Title I:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of

> the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages as well as by private individuals in actions for injunctive relief under Ex parte Young, 209 U.S. 123 (1908).

Garrett, 2001 WL 173556 at *11 n.9 (emphases added). While the Court did not identify the constitutional basis for the ADA's provisions, which would justify an Ex parte Young claim against state officials, it is transparent that the basis is the alternate basis identified in the ADA itself, i.e., the Commerce Clause.

The Garrett Court's conclusion is in accord with the Supreme Court's decisions under the Age Discrimination in Employment Act ("ADEA"). In Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000), the Court held that Congress could not validly abrogate states' Eleventh Amendment immunity under the ADEA because it was not congruent and proportional to the scope of the Equal Protection Clause's application to age based discrimination and, thus, individuals could not sue state agencies for monetary damages under the ADEA. Id. at 78-91. However, the Kimel Court expressly reaffirmed its holding in EEOC v. Wyoming, 460 U.S. 226, 243 (1983), in which it held that the ADEA was a valid exercise of Congress' power under the Commerce Clause. Kimel, 562 U.S. at 78.[9]

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[9] While few courts have considered the validity of Title II of the ADA as Commerce Clause legislation, the Seventh Circuit has repeatedly opined that the ADA (including Title II) is valid Commerce Clause legislation. See Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000), cert. denied, ___ U.S. ___, 69 U.S.L.W. 3281 (Feb. 26, 2001); Erickson v. Bd. of Governors of State Colleges and

The Garrett Court's implicit conclusion that the ADA is valid under the Commerce Clause is consistent with its recent Commerce Clause jurisprudence. United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), establish the current framework for assessing the validity of federal legislation under the Commerce Clause. The Lopez Court re-affirmed the rational basis test used to evaluate the constitutionality of congressional action. 514 U.S. at 557. The Court also re-affirmed the long-standing rule that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce (citation omitted), i.e., those activities that substantially affect interstate commerce," id. at 558-59, though it ultimately concluded that the statute in question -- the Gun Free School Zones Act -- was unconstitutional. Id. at 561-68. In Morrison, the Court identified four factors to be considered in determining whether an activity "substantially affects" interstate commerce so as to be within the bounds of congressional authority: (1) the "economic nature of the regulated activity"; (2) the existence of a juris-

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Universities for Northeastern Illinois University, 207 F.3d 945, 952 (7th Cir. 2000), cert. denied, ___ U.S. ___, 69 U.S.L.W. 3003 (Feb. 26, 2001). Nevertheless, the Seventh Circuit has barred individuals from pursuing ADA claims against state officials in federal court on the basis that individuals are not proper parties under the ADA. Walker, 213 F.3d at 347; Erickson, 207 F.3d at 952. The latter conclusion is flawed and is contradicted by Garrett, 2001 WL 173556 at *11 n.9. See discussion, infra, at ___.

dictional element; (3) the existence of congressional findings concerning the impact of the activity on interstate commerce; and (4) whether the link between the regulated and the interstate activity was too attenuated. Morrison, 529 U.S. at ___; United States v. Gregg, 226 F.3d 253, 263 (3d Cir. 2000), cert. pending, 69 U.S.L.W. 3410. Examining these factors, it must be concluded that the ADA is valid Commerce Clause legislation.

1. The ADA's Integration Mandate Regulates Economic Activity.

Lopez and Morrison require that the regulated activity be economic in nature. Congress may regulate purely intrastate activities if they either "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Lopez, 514 U.S. at 561. As the Third Circuit has recognized: "The specific activity that Congress is regulating need not itself be objectively commercial, as long as it has a substantial effect on commerce." United States v. Rodia, 194 F.3d 465, 481 (3d Cir. 1999), cert. denied, ___ U.S. ___, 120 S. Ct. 2008 (2000).

The ADA's integration mandate, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d),[10] substantially affects economic and commercial

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[10] While the integration mandate is in the form of a regulation, Congress expressly directed the Department of Justice ("DOJ") to promulgate such a regulation when it directed DOJ to base the ADA regulations on certain, specific regulations that had been promulgated under Section 504. 42 U.S.C. § 12134(b); Olmstead v. L.C., 527 U.S. 581, 591-92 (1999); Helen L. v. DiDario, 46 F.3d

activities. The provision of community-based residential and non-residential service alternatives for persons who are unnecessarily institutionalized is an economic/commercial activity. Community-based alternatives are provided by private businesses under contract with Pennsylvania's county mental health and mental retardation programs which provides payment with allocations from DPW. These private entities -- whether for-profit or non-profit -- are engaged in an economic enterprise. These private providers hire and pay staff; purchase or rent houses or other facilities in which to provide the services; retain and pay attorneys, accountants, and other professional advisers; borrow money to finance the transactions; and engage in other activities in which any other business would engage. Indeed, some of the businesses which provide community-based mental health services to Pennsylvanians also provide services in other states, and in at least one instance operates internationally. See Attachment ___. The provision of community-based services to individuals with disabilities who are unnecessarily institutionalized, therefore, implicates an entire commercial industry.

The Fifth Circuit's recent decision in Groome Resources Ltd., L.L.C. v. Parish of Jefferson, 234 F.3d 192 (5th Cir. 2000), is analogous. In that case, the court concluded that the "reasonable accommodation" provision of the Fair Housing Amendments Act

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325, 331-32 (3d Cir.), cert. denied, 516 U.S. 813 (1995).

("FHAA"), 42 U.S.C. § 3604(f)(3)(B) -- which, inter alia, requires local zoning boards to make reasonable accommodations in their zoning laws to allow the operation of group homes for persons with disabilities -- is valid under the Commerce Clause. Id. at 205-16. The court determined that the FHA's reasonable accommodation provision affects commercial housing transactions (i.e., purchases and rentals of housing by group home providers), "and, therefore, fits well within the broad definition of economic activity established by the Supreme Court and other circuits." Id. at 205. The commercial use of property "'unquestionably' is an 'activity that affects commerce.'" Id. at 207. The court also noted that the local discrimination by zoning boards which refuse reasonable accommodations for people with disabilities "may be regulated on a federal level if that local refusal affects the national economy." Id. at 210-11. Like the local zoning decisions regulated by the FHAA's reasonable accommodation provision, the states' unnecessary institutionalization of people with disabilities that is regulated by the ADA's integration mandate substantially affects providers' commercial and economic activities and the national economy.

The integration mandate not only affects the commercial and economic activity of providers, but, also, the commercial and economic activities of the individuals who are unnecessarily institutionalized. As Justice Ginsburg wrote for the majority in Olmstead v. L.C., 527 U.S. 581 (1999):

> [C]onfinement 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 (emphasis added). By its very nature, institutionalization greatly circumscribes the ability of individuals to go to work, to travel, to shop, to go to the movies, to take classes, or to engage in any number of other economic or commercial transactions.

In United States v. Gregg, the Third Circuit upheld as valid Commerce Clause legislation the Freedom of Access to Clinic Entrances Act ("FACE"), which allows the government to enjoin certain protests at abortion clinics. 226 F.3d at 261-67. Analyzing FACE under Lopez and Morrison, the court had little trouble in concluding that the regulated conduct -- i.e., the interruption of services by health care providers and the prevention of individuals from accessing services -- is activity "with an effect that is economic in nature". Id. at 262. Just as FACE sought to facilitate the provision of health care services and access to such services by individuals, so, too, the ADA's integration mandate has an impact on the provision of community-based mental health services and access to such services by persons who are unnecessarily institutionalized. The economic impact and nature of the activity is the same.

Finally, as the Fifth Circuit noted in Groome Resources:

> [W]e must emphasize that in the context of the strong tradition of civil rights enforced through the Commerce Clause -- a tradition in which the FHAA firmly sits -- we have long recognized the broadly defined "economic" aspect of discrimination. ... As long as there is recognition of an interstate effect, discrimination, even local discrimination, can be regulated under Congress's commerce power.

234 F.3d at 209 (citing Heart of Atlanta Motel, Inc. v. United States, 397 U.S. 241, 257-58 (1964)). So, too, Congress has broad authority under the Commerce Clause to regulate disability-based discrimination through the ADA.

2. The Absence of a Jurisdictional Element Does Not Undermine The Validity of the Integration Mandate.

While the ADA does not contain an express jurisdictional element (i.e., a requirement that a particular case demonstrate an impact on interstate commerce), the absence of a jurisdictional element does not render the ADA in general, and the integration mandate in particular, invalid under the Commerce Clause. See United States v. Gregg, 226 F.3d at 263; Groome Resources, 234 F.3d at 211.

3. The ADA's Congressional Findings and Legislative History Support The Interstate Impact of Disability-based Discrimination.

In adopting the ADA, Congress expressly "invoke[d] the sweep of congressional authority, including the power ... to regulate commerce, in order to address the major areas of discrimina-

tion faced day-to-day by people with disabilities." 42 U.S.C. § 12201(b)(4). Congress specifically found that isolation and segregation of individuals with disabilities is "a serious and pervasive social problem" and that discrimination "persists in such critical areas as ... institutionalization ...." 42 U.S.C. § 12101(a)(2)-(3). Perhaps most significantly for purposes of the Commerce Clause, Congress found that:

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

42 U.S.C. § 12101(a)(9). Congress' findings concerning the economic and commercial impact of disability-based discrimination are "entitled to judicial deference." United States v. Gregg, 226 F.3d at 263.

Congress' findings in the ADA are supported by the legislative history. For example, former Attorney General Richard Thornburgh testified as to the economic effects of integrating people with disabilities into society:

> "Certainly, the elimination of employment discrimination and the mainstreaming of persons with disabilities will result in more persons with disabilities working, in increased earnings, in less dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenues."

H.R. Rep. No. 101-485, pt. 2, at 43-44 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 325-26. Accord S. Rep. No. 101-116, at 17 (1989). The House Education and Labor Committee also noted:

> In an increasingly competitive international economy, our nation must adopt policies which result in a bridging of the vast gulf separating the actual from the potential contributions of people with disabilities to the health of our economy.

H.R. Rep. No. 101-485, pt. 2, at 45 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 327. The Committee concluded: "[T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life." Id. at 50 (emphasis added), reprinted in 1990 U.S.C.C.A.N. at 332.

These formal and informal congressional findings are more than sufficient to establish the impact of disability-based discrimination on interstate commerce. See Groome Resources, 234 F.3d at 211-14 (indicating that evidence before Congress that indicated that disability-based discrimination "placed burdens on the interstate movement of persons and commerce" was sufficient to support the FHAA as valid Commerce Clause legislation). Indeed,

> As the connection between racial discrimination and its affect on interstate commerce had been established in Heart of Atlanta Motel and [Katzenbach v.] McClung[, 379 U.S. 294 (1964)], Congress was well within its institutional authority to act to prevent discrimination against the disabled.

Groome Resources, 234 F.3d at 213.

4. Congress Had a Rational Basis to Conclude that the ADA and its Integration Mandate Have a Substantial Affect on Interstate Commerce.

The final factor under Morrison is consideration of whether Congress had a rational basis upon which to conclude that the activities governed by the ADA and its integration mandate have a substantial effect on interstate commerce. See United States v. Gregg, 226 F.3d at 263. The link between the statutory requirement and interstate commerce must be sufficiently direct and not too attenuated. See Morrison, 529 U.S. at ___; Groome Resources, 234 F.3d at 214-15.

Upholding the FHAA's reasonable accommodation requirement, the Fifth Circuit concluded:

> We do not need to pile "inference upon inference" to see that by refusing to reasonably accommodate the disabled by discriminatory zoning laws, there will be less opportunity for handicapped individuals to buy, sell, or rent homes. The attendant financial loss to the economy from Groome Resources' failed attempt to purchase such a house in Louisiana is a case in point.

Groome Resources, 234 F.3d at 215. Here, too, there is no "need to pile inference upon inference" to determine that the failure to provide community services to persons who are unnecessarily institutionalized means that: (1) such individuals will be burdened in their ability to engage in interstate commerce (including working and shopping) and will be burdened in their inability to engage in

interstate travel; and (2) that there is a financial loss to the economy since providing community services would enable private providers to expand their services and programs. Further, as the Fifth Circuit observed, the logic of the Supreme Court's decisions in Heart of Atlanta Motel and Katzenbach v. McClung -- which upheld links between local racial discrimination and interstate commerce -- is binding. Groome Resources, 234 F.3d at 215.

B. Title II's Integration Mandate Is Valid Under The Due Process Clause.

An alternative constitutional foundation for the integration mandate of the ADA can be found in the Due Process Clause of the Fourteenth Amendment. Following the analysis of Kimel and Garrett, the integration mandate satisfies the criteria for valid legislation under Section 5 of the Fourteenth Amendment.[11]

1. The Due Process Clause Requires the Provision of Community-Based Services to Persons Who Are Institutionalized Contrary to Professional Judgment.

The first step in determining whether legislation is proper under the Fourteenth Amendment "is to identify with some precision the scope of the constitutional right at issue." Garrett, 2001 WL 173556 at *6. The Supreme Court in Youngberg v. Romeo, 457 U.S. 307 (1982), recognized that the Due Process Clause

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[11] To the extent that the ADA is valid under the Due Process Clause of the Fourteenth Amendment, Congress could -- and properly did -- strip states of their Eleventh Amendment immunity. See Garrett, 2001 WL 173556 at *5.

confers several distinct liberty interests upon individuals confined in state institutions, including, a right to freedom from undue restraint. The Court articulated a straightforward test to determine whether a restraint is "reasonable," writing that the state "may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training." Id. at 324. Accord Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1142 (3d Cir. 1990). Thus, conditions of confinement that are "more restrictive than that considered necessary by the relevant professionals" violate an individual's substantive due process rights. Clark v. Cohen, 613 F. Supp. 684, 704 (E.D. Pa. 1985) (emphasis added), aff'd, 794 F.2d 79 (3d Cir.), cert. denied, 479 U.S. 962 (1986).

Although the unreasonable restraint claim asserted in Youngberg involved the use of "'soft' restraints" for the plaintiff's arms within an institution, 457 U.S. at 310 n.4, Youngberg has had a broader application. Unreasonable restraints can include confinement in a locked ward, unnecessary use of psychotropic medications and institutionalization itself to the extent that such restraints are inconsistent with sound professional judgment. See Thomas S. by Brooks v. Flaherty, 699 F. Supp. 1178, 1200 (W.D.N.C. 1988), aff'd, 902 F.2d 250 (4th Cir.), cert. denied, 498 U.S. 951 (1990).

Under Youngberg, a person who is institutionalized not only has a right to be free from unnecessary restraint, he or she also is entitled under the Due Process Clause to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." Youngberg, 457 U.S. at 319. The standard used to assess the state's compliance with its constitutional obligation to provide such training is one of professional judgment. Id. at 321, 324. The Third Circuit in Clark v. Cohen, 794 F.2d 79 (3d Cir.), cert. denied, 479 U.S. 962 (1986), unequivocally concluded that Youngberg's right to training extends to implementation of professional judgment that an institutionalized person be discharged to a community-based placement, writing:

> The stipulated facts establish that Clark was confined at Laurelton [a state mental retardation center] rather than released to a [community living arrangement], and was deprived of the training for community living that she could have received in a [community living arrangement], despite professional judgment, unanimous since 1976, that she should be released from Laurelton and receive such training. Based on these findings, we agree with the district court and hold that her substantive liberty right to appropriate treatment under [Youngberg v.] Romeo was violated.

Id. at 87. So too, in Thomas S. by Brooks v. Flaherty, 902 F.2d 250 (4th Cir.), cert. denied, 498 U.S. 951 (1990), the Fourth Circuit, applying Youngberg, concluded that the state's decision "'to ignore the community placement recommendations of the state's treating professionals' substantially departed from accepted

professional standards" and, therefore, violated class members' substantive due process rights. Id. at 252, 256 (citation omitted). See also Kirsch v. Thompson, 717 F. Supp. 1077, 1080-81 (E.D. Pa. 1988) (ordering community placement based upon treating professionals' determination).

2. The Integration Mandate Is Congruent and Proportional to the Due Process Clause.

The Supreme Court has acknowledged that Congress' power under Section 5 of the Fourteenth Amendment "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." Kimel, 528 U.S. at 81. Congress' power to enforce the Fourteenth Amendment "includes authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not forbidden by the Amendment's text." Id. (citing City of Boerne v. Flores, 521 U.S. 507, 518 (1997)). The standard for assuring that Congress does not overstep in enacting legislation under the Fourteenth Amendment is to assess whether there is "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" Kimel, 528 U.S. at 81 (quoting City of Boerne, 521 U.S. at 520). Accord Garrett, 2001 WL 173556 at *6. The statute must not be "'so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconsti-

tutional behavior.'" Kimel, 528 U.S. at 86 (quoting City of Boerne, 521 U.S. at 532).

The ADA's integration mandate is congruent and proportional to the constitutional injury identified in Youngberg and its progeny. The integration mandate, as interpreted by the Supreme Court in Olmstead v. L.C., requires states to provide community-based services to persons who are unnecessarily institutionalized unless doing so would result in an undue burden or fundamental alteration of its programs. 527 U.S. at 607. The court further indicated that states "generally may rely on the reasonable assessments of its own professionals in determining" whether community-based services are appropriate. Id. at 602. Although the ADA's "reliance on the reasonable assessments of professionals" standard is less stringent than the "deference to professional judgment" standard under the Due Process Clause as interpreted in Youngberg, see discussion, infra, at ___, the ADA's integration mandate substantially tracks the requirements of the Due Process Clause. Indeed, in some respects the ADA's integration mandate is more stringent than the Due Process Clause's protections because the former allows states the defense of justifying continued inappropriate treatment and unnecessary restraint in an institutional setting by proving that the provision of appropriate, community services to the plaintiffs would result in a fundamental alteration. Olmstead, 527 U.S. at 603-07. While not identical to

the Due Process Clause's guarantees, the ADA's integration mandate is sufficiently congruent and proportional to the constitutional requirements as to be valid legislation under Section 5 of the Fourteenth Amendment.

The close correlation between the ADA's integration mandate and the requirements of the Due Process Clause stands in stark contrast to the wide gap between the ADA's and ADEA's employment discrimination provision, at issue in Garrett and Kimel, and the Equal Protection Clause. The Equal Protection Clause only prohibits disability and age discrimination that is not rationally related to legitimate government purposes. Yet, as the Court noted, many of the activities regulated by both statutes addressed conduct that would not be held unconstitutional under the Equal Protection Clause. Garrett, 2001 WL 173556 at *9-*10; Kimel, 528 U.S. at 86-88. Unlike the ADA's and ADEA's employment provisions, the ADA's integration mandate plainly prohibits conduct that itself would violate the Due Process Clause, i.e., the failure to provide community services to persons who, in the judgment of their treating professionals, are unnecessarily institutionalized. While the ADA's integration mandate also might require the provision of community services in some circumstances that the Due Process Clause would not, its standards are sufficiently parallel to the Due Process Clause as to be valid Fourteenth Amendment legislation.

3. The Legislative History Supports the Need for the Integration Mandate.

In Kimel, the Court acknowledged that a statute which prohibits far more than merely unconstitutional conduct might still be valid Fourteenth Amendment legislation if it is "reasonably prophylactic legislation." 528 U.S. at 88. In addressing that question, the Court looked to the legislative record to determine whether strong measures were necessary in light of the "evil presented." Id. at 89.

Because the scope of the ADA's integration mandate on its face is congruent and proportional to the requirements of the Due Process Clause, any examination of the legislative record is unnecessary. However, such an examination supports the conclusion that Congress was aware that unnecessary institutionalization by states was an ongoing and serious problem.

Congress expressly found that segregation of individuals with disabilities is "a serious and pervasive social problem" and that discrimination "persists in such critical areas as ... institutionalization ...." 42 U.S.C. § 12101(a)(2)-(3). These findings were based on a report issued by the United States Commission on Civil Rights. S. Rep. No. 101-116, at 8 (1989); H.R. Rep. No. 101-485, pt. 2, at 31 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 312. In that report, the Commission included an entire section on institutionalization, writing, inter alia:

> Popular and professional literature contains abundant discussion of problems with large-scale residential institutions for handicapped people. The harshest side effect

lawsuit. 527 U.S. at 606. The *Olmstead* plurality considered that the Eleventh Circuit's formulation of fundamental alteration would, as a practical matter, mean that States – even those which already had a comprehensive plan for community placement and briskly moving waiting lists -- could never win an integration case. *Id.* at 603 (unlikely that a State relying on the Eleventh Circuit's formulation of fundamental alteration "could ever prevail"). The Court sought to insulate States already effectively carrying out the desegregation mandate on a statewide scale from court interference on behalf of a small group of people.

By contrast, the ruling of the District Court here means, as a practical matter, that States which are the farthest from compliance with the integration mandate can never lose an *Olmstead* case. The more limited the planning for desegregation that a State has undertaken, the more it will cost to implement any desegregation plan. The more that a State relies on institutionalization, especially unnecessary institutionalization, the more it will require a fundamental alteration of its spending scheme and budget plans to accommodate plaintiffs. On the other hand, the more that a State has committed to community planning and placement, the less it will cost to comply with the ADA's integration mandate, and the less of an alteration of the State's budget and planning process will be required. The lower Court's rule is a perverse interpretation of *Olmstead* that runs exactly counter to the Supreme

Court's intention to insulate the States already doing the job of desegregation, while leaving vulnerable to liability States that had no plans, waiting lists, or effective processes for promoting desegregation.

2. Congress and The Supreme Court Have Underscored that Defenses in ADA Cases Must be Construed Narrowly to Accomplish the Purpose of the ADA.

Congress intended that the fundamental alteration defense be construed extremely narrowly, protecting programs from accommodations only if the modifications would jeopardize either their identity or their existence. This is the way that fundamental alteration had been interpreted under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 including cases that Congress specifically cited to in the legislative history of the ADA.

This understanding comports with cases decided in this circuit and others concerning the meaning of the fundamental alteration defense. When this Court rejected a proposed modification of the home attendant program in *Easley by Easley v. Snider,* 36 F.3d 297 (3rd Cir. 1994), it was based, in part, on maintaining the core purpose of the program, regardless of cost, and partly on the fact that the proposed expansion of the program was so great it would result in "possibly jeopardizing the whole program." 36 F.3d at 305. *See also Messier v. Southbury Training School,* 1999 U.S.Dist.LEXIS 1479 (D.Conn.1999) at *36-37 ("where plaintiffs' requested

relief would be so unreasonable given the demands of the state mental health budget and resources that it would alter the essential nature of its services, defendants may avoid making an accommodation").

The Supreme Court explicitly differentiates between permissible modifications that constitute "alterations" of defendants' programs, which are permissible and even required by the ADA, and those changes which rise to the level of a "fundamental alteration." In *Martin v. P.G.A. Tour*, 532 U.S. 661 (2001), the majority rejected a reading of the statute, that would have permitted the PGA to determine which rules were essential to the game of golf. "Justice Scalia's reading of the statute renders the word 'fundamental' largely superfluous, because it treats the alteration of any rule governing an event at a public accommodation like a fundamental alteration," 532 U.S. at 689, n. 51.

Similarly, the District Court below concluded that *any* expenditure of money would be a fundamental alteration. This is not a tenable interpretation of Congress' intent. Congress understood that compliance with the ADA would cost money. The Congressional Budget Office reported that enactment "would result in substantial costs for state and local governments," H.R. 101-485, Part I, 101st Congress, 2nd Session (May 14, 1990) at p. 47. The issue of cost dominated floor debates and surfaces frequently in committee reports and testimony. No one, including

opponents of the legislation, ever envisioned that a covered entity could be exempted from compliance by asserting that compliance would not "result in immediate cost savings" as the District Court held here.

The expenditures envisioned by Congress were substantial because of the sweeping reach of the ADA. The purpose of Title II was understood to be the accomplishment of enormous social change, and Congress explicitly acknowledged that it would cost a substantial amount of money:

> The purpose of Title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life . . . *While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative,* the long-range effects of integration will benefit society as a whole.

H.R. 101-485, Part III, 101st Congress, 2nd Sess. (May 15, 1990) at 49 (emphasis added)(footnotes excluded). Congress expected there would be costs specifically associated with community integration, and noted that imposition of these costs was not new to the ADA, but had also been a feature of Section 504 of the Rehabilitation Act over the past decade. In a footnote to the passage quoted above, the Committee reiterated that "[c]ases which have enforced the rights of persons with disabilities to accessible public services have recognized that Section 504 may place substantial burdens on state and local agencies in order to accomplish the goals of non-discrimination and integration." *Id.* n. 50.

This hardly comports with the District Court's conclusion that any cost, no matter how small, is a fundamental alteration. The Court's standard renders the word "fundamental" largely superfluous. In fact, under the District Court's framework, any expenditure not part of defendants' existing budget arrangements is a fundamental alteration. This leaves unnecessarily segregated people exactly where they were before *Olmstead* – entirely dependent on the whim and institutional models of the state mental health agency for their liberty.

C. *Recent District Court Formulations of Fundamental Alteration in the Context of Olmstead Claims.*

Recently, two District Courts have specifically examined the concept of fundamental alteration in an attempt to further elaborate the Supreme Court's instructions in *Olmstead.* The first case was *Williams v. Wasserman*, 164 F.Supp.2d 591 (D.Md. 2001) in which Maryland prevailed. The Court there noted that Maryland, unlike Pennsylvania, had "a waiting list, a waiting list equity fund, and prioritized categories of crisis resolution for providing services." *Id.* at 633. Because trial experts had agreed that a window of 3-5 years was necessary before significant cost savings could be reaped from downsizing institutions, the Court adopted a 3-5 year time frame in its analysis, *id.* at 638, rather than requiring immediate cost neutrality. Significantly, rather than considering community placements an "add-on" or "extra" to the state budget, Maryland had planned

community integration over a multi-year period, and the Court found that "when budget problems have caused reductions in state hospital facilities, Maryland has tried to `hold harmless' its community programs, which are seen as a `higher priority' than the institutional programs." *Id.* at 634. In Pennsylvania, budget difficulties result in elimination of plans for new community beds.

In contrast to the holding of the Court below, another Court has concluded that the fundamental alteration defense would require the Court to look at "the resources available to the State." *Martin v. Taft*, 222 F.Supp.2d 940, 986 (D. Ohio 2002). The case, which involves people with developmental disabilities, contained extensive discussion of the Medicaid program, waiver options, and federal funding as a resource for funding community placements. *See, e.g., id.* at 953-57, 966-69, 974-75.

In all the cases that have been litigated about the requirements the ADA places on public entities, including *Williams* and *Taft*, not a single defendant has argued, and not a single Court has held, that if compliance with the ADA does not result in immediate cost savings for the defendant, there is a fundamental alteration of the defendants' program. The lower Court's adoption of this novel test is legally erroneous and practically unattainable in most instances. It is inconsistent with Congress's intent, the Supreme Court's command, and the realities of integrating

institutionalized persons with disabilities.

D. *The Proper Formulation of a Fundamental Alteration Defense in This Case.*

The fundamental alteration defense must be consistent with Supreme Court precedent. Thus, relief cannot be requested which would result in depriving State clients of needed institutional alternatives, nor which would interfere with existing comprehensive and effective plans to place all persons statewide needing community placement. Neither of these concerns is at issue here at all.

A proper application of the fundamental alteration defense will protect States which have done most to establish an effective plan for statewide community integration. The more seriously a State has committed its resources, structured its administrative methods, undertaken long-term planning to assure that its clients receive treatment in the most integrated setting commensurate with their needs, and the more effectively it is accomplishing this goal statewide, the less it should have to worry that *Olmstead* liability will force *ad hoc* exceptions and inequitable reallocation of placement resources. *Amici* propose four factors which must be evaluated in determining whether an integration remedy would constitute a fundamental alteration of an agency's program:

> 1) whether the State has a Statewide comprehensive community placement plan for identifying persons who are unnecessarily institutionalized and creating the community resources necessary to provide them with integrated

services, and a waiting list moving at a reasonable pace not dictated by State endeavors to keep institutional beds fully populated;

2) whether the State is effectively utilizing all resources available to it to accomplish integration;

3) costs of the placements over the time period involved in planning and implementing community placements for the plaintiffs; and

4) the degree to which defendants have developed and utilized administrative methods supporting the treatment of clients in the most integrated setting.

As the Supreme Court noted, defendants with a statewide comprehensive plan and a waiting list moving at a reasonable pace not controlled by a desire to keep its hospital beds filled (i.e., fiscal considerations) should generally be able to succeed in asserting the fundamental alteration defense. The Court below found that defendants did not meet this standard.

The emphasis on a comprehensive plan indicates that the Supreme Court intended to shield States that had focused on and planned for the need to place people into the community on a statewide basis, prior to and apart from the litigation before the Court. A comprehensive plan is more than an annual inquiry into whether there are extra funds left over in the budget to fund creation of community beds. It is long-term and central to the State's mental health policy, not an "add-on" or "extra funding" item subject to elimination at the first chill of budget difficulties. Pennsylvania's system of funding community placements, that depends from year to

year on available extra money, is unpredictable and precludes long-term planning. It is the antithesis of a comprehensive statewide plan, and it underscores the significance of plaintiffs' administrative methods claims, which the Court below summarily – and erroneously – denied.

II. THE DISTRICT COURT ERRED BY ENTERING JUDGMENT AGAINST PLAINTIFFS ON THEIR ADMINISTRATIVE METHODS CLAIMS.

Two of the five claims asserted by plaintiffs in their complaint asserted that defendants had used criteria or methods of administration that had the effect of subjecting them to discrimination on the basis of disability in violation of the ADA, 28 C.F.R. 35.130(b)(3)(i).

Public entities act and fail to act largely as a result of their administrative structure. The Title II administrative methods claim has been used to successfully remedy administrative methodologies and structures that resulted in disability discrimination, from the methods used by a city to enforce its handicapped parking ordinance, *Indep. Living Res. Ctr v. City of Wichita,* 2002 U.S.Dist.LEXIS 6324 (D.Kansas March 15, 2002), to the methods used to administer a city's social welfare programs. *Henrietta D. v. Giuliani*, 119 F.Supp.2d 181 (E.D.N.Y. 2000).

In this case, plaintiffs identified a number of specific administrative practices which they asserted directly result in unnecessary segregation, from the failure to use

appropriate methods to assess whether residents at Norristown State Hospital could live in the community to defendants' failure to ask the Legislature for the necessary funds to accomplish adequate community integration. In addition, plaintiffs challenged an administrative practice which, from *amici's* perspective, is the paradigm of an administrative practice that clearly and predictably leads to unnecessary segregation: the choice to finance creation of new community resources solely through a program (CHIPP/SIPP), which is funded by "extra" funding left over after the regular agency budget has been funded.

The Court below did not undertake analysis of any of the plaintiffs' administrative methods claims or state conclusions of law regarding these claims. Rather, it simply granted judgment to defendants in a one sentence footnote, "for reasons discussed in connection with the integration mandate claims." *Frederick L.*, 217 F.Supp. at 591, n. 11.

This is insufficient as a matter of law. The Federal Rules of Civil Procedure require a trial court to "find the facts specially and state separately its conclusions of law thereon," Fed.R.Civ.P. 52(a). The Supreme Court has said that appellate courts should, through their application of de novo review, "encourage a district Court to explicate with care the basis for its conclusions of law." *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991).

The lower Court's failure is especially troubling in light of the direct nexus between an agency's administrative methods and the likelihood that it will continue to unnecessarily segregate its clients. In addition, DPW's methods of administration relating to community placement had already been held to violate the ADA in *Kathleen S. v. Department of Public Welfare,* 10 F.Supp.2d 460, 473 (E.D.Pa.1998), and there is no evidence that these practices have changed. The court in *Kathleen S.* held that DPW had violated the ADA with respect to two of the three plaintiff subclasses by utilizing "methods of administration which have resulted in discrimination against class members through its failure to initiate plans sufficiently in advance to ensure the necessary placements in the community within a reasonable time." *Id.* Although plaintiffs made an identical claim below, the Court failed to consider the claim at all.

The understanding that successful transition of an agency's clients from institution-based to community-based treatment must rely on a "range of financial and administrative mechanisms" is at least twenty years old. *See,* John A. Talbott, The Fate of the Public Psychiatric System, 36 *Hospital and Community Psychiatry* 46 (1985). Administrative methods are crucial to the accomplishment of the ADA's mandate that treatment must be provided in the most integrated setting appropriate to the needs of the client. While institutional services are provided in one place, and

paid for in large part by the State through one budget line, community services involve multiple services provided by multiple agencies working through a number of federal-state government programs. *See,* Amalya L. Oliver and Kathleen Montgomery, A Network Approach to Outpatient Service Delivery Systems: Resources Flow and System Influence, 30 *Health Services Research* 771 (1996). These systems do not coordinate automatically. Without sound administrative mechanisms and efficient methods of funding, people will either remain unnecessarily institutionalized, or, like one of the plaintiffs in *Olmstead*, be subject to discharge to homeless shelters or the streets.

Unnecessary segregation is often not a choice but a failure to make choices, an inertia that retains old administrative methods built upon an institutional model which virtually guarantees that persons will remain needlessly institutionalized. *See Alexander v. Choate,* 469 U.S. 287, 295 (1985)(benign neglect a source of discrimination). The Court's finding that Pennsylvania has not responded to the Supreme Court's directive in *Olmstead* by creating a comprehensive plan for community integration suggests inertia, as does Pennsylvania's apparent failure to make any changes to its institutionally-based methods of administration that have already been held to violate the ADA.

The Court erred in ruling for defendants on these claims, particularly in light of

its reliance on the fundamental alteration defense. The failure to utilize available administrative mechanisms to maximize integration has the result of perpetuating segregation when, without fundamentally altering their programs, agencies could reduce segregation. A State should not prevail on a fundamental alteration defense if it could increase integration through commonly utilized administrative mechanisms or readily available resources and funding. This is precisely the meaning of the ADA's requirement that public entities reasonably modify their policies and practices to avoid discrimination on the basis of disability.

As alleged in the complaint and supported by evidence at trial, DPW has not established methods of administering its mental health system that foster integration. While it has some mechanisms to assist in placing unnecessarily segregated individuals in the community, it has chosen not to use them. For example, within the mental health budget, DPW may transfer funding from institutions to the community, with the permission of the governor. *Frederick L.*, 217 F.Supp.2d at 587, n.10. Yet it has made no attempt to do so at Norristown State Hospital, where one third of the residents are stipulated to be unnecessarily segregated.

In fact, DPW's efforts to facilitate desegregation are almost wholly accomplished through funding that is explicitly "extra" or an "add-on" to the principal budget – the CHIPP and SIPP programs. *See Frederick L.*, 217 F.Supp. at

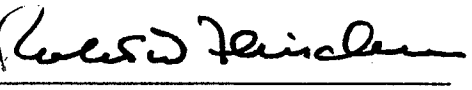
588 ("DPW has not allocated funds to the counties for their expansion proposals except through CHIPP/SIPP") and *Frederick L. v. Department of Public Welfare*, 157 F.Supp.2d 509, 513 (E.D.Pa. 2001)("the Commonwealth has *intermittently* provided funding to the counties through the Community Hospital Integrated Project Program")(emphasis added). Having new community services depend exclusively on new funding rather than embedding it within DPW's base budget will predictably subject clients of its mental health system to unnecessary segregation -- as it has at Norristown State Hospital – and prolong *unnecessary* segregation in violation of the ADA.

Amici made the systematic planning and funding of community placement a central, integrated feature of their budgets and administrative operations, rather than relying on the vagaries of whatever extra funding might be available each year to create an unpredictable number of community placements. Even in very difficult fiscal times, like those being faced now by nearly every state, creative administrators working with limited budgets can fulfill their *Olmstead* responsibilities within smaller budgets and without withdrawing integrated services from one group of persons with disabilities in order to serve another.

CONCLUSION

For the reason stated above, this Court should reverse the decision of the District Court.

Respectfully submitted,
Amici Curiae,
By their attorneys,



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APPENDIX

Identification of *Amici* Former State Mental Health Commissioners, Directors and Administrators

Patrick Babcock

For more than five years, Patrick Babcock served as the Director for the Michigan Department of Mental Health before becoming the Director of the Department of Social Services. As the state official responsible for the delivery of mental health services, Babcock oversaw community mental health services that included 55 community mental health boards serving all 83 Michigan counties. He also was responsible for community residential services for former residents of state facilities for persons with mental illness and developmental disabilities. Babcock is the Director of Public Policy for the W.K. Kellogg Foundation, where his duties include serving as Project Director of a health reform project in three Michigan counties and a national initiative to monitor the impact of devolution of federal policies to state governments.

Marilyn Berner, M.S.W., J.D.

Marilyn E. Berner, JD, LICSW, is both an attorney and a social worker, presently working as a consultant in Florida. She has practiced in the public and private sectors as an attorney and as a mental health professional. She directed the Homeless Evaluation Program at the Massachusetts Mental Health Center and was employed as an Area Director of Adult Services for the Department of Mental Health. She held an appointment as a Lecturer in Psychiatry at Harvard Medical School.

Most recently, she was Chief of Staff for the Massachusetts Department of Mental Health, where she advised the Commissioner on policy matters involving the mental health authority of the Commonwealth, managed a number of special projects, maintained liaison with other state agencies, managed the functions of several operational arms of the Department, and directed the implementation of policy.

Joseph J. Bevilacqua, Ph.D.

Joseph Bevilacqua has twenty-one years experience as State Commissioner of Mental Health Services in Rhode Island, Virginia, and South Carolina. He also served as Assistant Commissioner for Community Services for four years in Virginia. Prior to state services, Bevilacqua served in the United States Army as a social work officer working in psychiatric hospitals and Mental Health Clinics both in the states and overseas. Throughout Bevilacqua's career he has been actively affiliated with a number of academic institutions, including appointments at the University of Virginia, Brown University, Medical College of Virginia, University of South Carolina, and Medical University of South Carolina. He used his state role to encourage collaboration between the universities and departments of mental health. This collaboration included research projects, student placements in state programs and faculty consultation in major state initiatives such as community development and hospital downsizing. He has also written a number of publications in the field of mental health.

A priority of Bevilacqua's commissionerships has been active and strong support of consumers of mental health services. Bevilacqua served two terms as President of the National Association of State Mental Health Program Directors and currently serves on the Board of Directors of the Human Services Research Institute, Boston; the Center for Health Resources, Lincoln, Rhode Island; The Green Door, a psychosocial rehabilitation program in Washington, DC; and the National Alliance for the Mentally Ill-Rhode Island.

Rodney Copeland, Ph.D.

Rodney Copeland has been an administrator of rehabilitation, social service, mental health and health programs for the State of Vermont since 1978. From 1995 to 2000, he was Commissioner of the Department of Developmental and Mental Health Services where he was responsible for the administration of the State's programs for adults with serious mental illness; children and adolescents with a severe emotional disturbance; and programs for persons with mental retardation. In that capacity he used a variety of funding strategies, including maximizing Medicaid benefits, bridge funding, and private foundation support to transition people from the State's mental hospital to the community, by reducing the institutional budget, so that when the process was complete, there were no increased costs to the State. Dr. Copeland has taught at a number of universities including the University of

California, Santa Barbara, Washburn University, the University of San Diego, Adelphi-Vermont, School of Social Work, Johnson State College, University of Vermont, University of Kansas and Southwestern Missouri State College. He is now the Director of the HIV/AIDS Program for the Vermont Department of Health.

King Davis

King Davis served as Commissioner of the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services from 1990 through 1994. During that period, a priority of the department was the placement of individuals with disabilities in the community. A number of initiatives were developed to increase the success of community placements. The Commonwealth of Virginia's commitment to community placements extends as far back as 1968 with the development of the Community Services Act. Additionally, in response to efforts by the U.S. Justice Department to ensure compliance with the Civil Rights of Institutionalized Persons Act, the Governor, Attorneys General, and the legislature supported the Department of Mental Health's efforts to decrease its reliance on institutions in favor of community-based strategies of care. This strategy included specific placement in local communities of a fixed number of institutionalized residents with mental retardation at the Northern Virginia Training Center. This community-based strategy became the accepted policy direction of the Commonwealth of Virginia. Davis is the William & Camille Hanks Cosby Professor at Howard University. King currently occupies the Robert Lee Sutherland Chair in Mental Health and Social Policy at the University of Texas at Austin.

Mary Jane England, M.D.

As the first commissioner of the Massachusetts Department of Social Service ("DSS") from 1979 to 1983, Mary Jane England helped establish and administer a new state agency for children and their families. Before her appointment at DSS, she served as the Associate Commissioner of the Massachusetts Department of Mental Health and Mental Retardation.

In 1995, Dr. England served as president of the American Psychiatric Association, and she is a past president of the American Medical Women's Association. She serves as the Vice President of the National Academy of Public Administration, the American College of Psychiatry, the American College of Mental Health Administration, and the Group for the Advancement of Psychiatry.

Dr. England also served on the Board of Overseers for the U.S. Department of Commerce, Malcolm Baldrige National Quality Award. She currently serves on the U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration National Advisory Council; the National Institute of Mental Health Advisory Council; and the President's Quality Forum Planning Committee.

Dr. England was also associate dean and director of the Lucius N. Littauer Master in Public Administration Program at the John F. Kennedy School of Government, Harvard University. She is the chair of the Board of Visitors of Boston University School of Public Health and a member of the Board of Visitors of Boston University School of Medicine. Dr. England was president of the Washington Business Group on Health, a nonprofit national health policy and research organization whose membership includes many of the nation's major employers. She is now President of Regis College in Massachusetts.

Paul G. Gorman, Ed. D.

Paul G. Gorman, is the Director of the West Institute at the New Hampshire-Dartmouth Psychiatric Research Center. The West Institute is dedicated to developing and evaluating implementation strategies for evidenced-based practices for people with severe mental illness. His career spans thirty years of involvement in management of mental health systems in both the public and private sector. Dr. Gorman was the Director of Mental Health, Substance Abuse and Developmental Services for the state of New Hampshire, and served as the Superintendent of New Hampshire Hospital (NHH), the single public psychiatric hospital in New Hampshire. He was the chief operating officer of West Central Behavioral Health, the community mental health center associated with the Dartmouth-Hitchcock Medical Center. He also was the Director of Out-Patient Services for the Human Resource Institute, a private psychiatric hospital in Boston, Massachusetts. Dr. Gorman has served on a number of boards, including the board of the National Association of State Mental Health Program Directors' Research Institute.

Kenneth Heinlein, Ph.D.

Ken Heinlein is a former Director of the Wyoming Department of Health and its predecessor the Department of Health and Social Services, both of which included mental health services. He is presently the Associate Director of the Wyoming Institute for Disabilities (WIND), one of a national network of university centers on disabilities. He is also the Director of Research and Program Evaluation

WIND at which he conducts research in post-institutional placements, including research into the cost and quality of community-based supports and services for persons with developmental disabilities and community consensus for implementing mental health services. He has more than 20 years experience in the fields of mental health and developmental disabilities, including direct services to adults with developmental disabilities in community-based vocational and residential settings, developmental disabilities programs serving infants, toddlers, and preschool aged children with developmental delays and behavior challenged, and adults with disabilities.

Pamela S. Hyde, J.D.

Pamela Hyde was appointed by Governor Richard F. Celeste as the Director of the Ohio Department of Mental Health, and later the Ohio Department of Human Services, the state's Medicaid and child welfare agency. She served as the Director of the Seattle Department of Housing and Human Services, and then was recruited as President and Chief Executive Officer of ComCare, a Phoenix-based behavioral health managed care company. She currently consults with state and local governments, foundations, federal agencies, and non-profit organizations nationwide on a variety of human services and organizational issues. Hyde is trained as an attorney and also spent several years as an advocate and executive director of a statewide protection and advocacy agency.

Dennis R. Jones, M.S.W., M.B.A.

Dennis Jones was Commissioner of Mental Health in Indiana from 1981 until 1988. He was then Commissioner for the Texas Department of Mental Health and Mental Retardation for six years. Both of these positions included institutional and community responsibility for mental retardation as well as mental health.

Danna Mauch, Ph.D.

Danna Mauch served as Director of Mental Health for the State of Rhode Island, as Assistant Commissioner of Mental Health for Massachusetts, and Executive Director of an ambulatory and long-term care provider. In the Commonwealth of Massachusetts, she directed the Divisions of Forensic Medicine, Mental Health and Substance Abuse. Until recently, she served as the Special

Master for the United States District Court for the District of Columbia, evaluating the implementation of reforms to the publicly-financed mental health system in the nation's capital. In her government roles, Dr. Mauch effected major systems changes in the provision of psychiatric care. As a result, Rhode Island's Mental Health System was rated number one in the nation by the Public Citizen Health Research Group.

Dr. Mauch served as member of the National Advisory Board of the U.S. Center for Mental Health Services and co-chaired a health care reform task force on behavioral health for the Labor and Human Resources Committee of the U.S. Senate. She was also Principal Investigator on a number of federal and foundation-funded research and demonstration projects in the mental health and long-term care fields. She has published several key articles and book chapters on the management of care and public-private partnerships in services delivery and systems management for the behavioral health care industry. Dr. Mauch recently served as the Chief Executive Officer of Magellan Public Solutions, Inc., a health care organization with the capacity to deliver specialty care management solutions to the public sector.

Neil Meisler, MSW

Neil Meisler is Director of Residential and Developmental Psychotherapeutic Services in Chestertown, Maryland and is an Assistant Professor of Psychiatry at the Medical University of South Carolina. In his long career as an administrator of state mental health services he has served as Director of the Division of Mental Health in the Rhode Island Department of Mental Health, Mental Retardation and Hospitals, as Executive Deputy Commissioner of the South Carolina Department of Mental Health, and Director of the Division of Alcohol, Drug Abuse, and Mental Health of the Delaware Department of Health and Human Services.

John A. Morris

John Morris served an interim appointment as Director of Mental Health for South Carolina from 1995 to 1997; he also served as Deputy State Director. Before 1990, he held numerous clinical and administrative positions in the Department of Mental Health, having begun his career as a ward attendant at the South Carolina State Hospital in 1969. Morris became a program director for the Missouri Department of Mental Health in the mid-1970's.

He is Professor of Clinical Neuropsychiatry and Behavioral Sciences at the

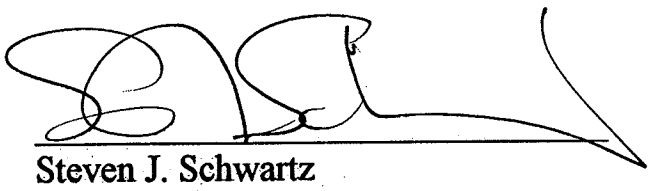
University of South Carolina School of Medicine and the founding Director of the SC Center for Innovation in Public Mental Health, a partnership between the School of Medicine and the SC Department of Mental Health. In addition, Morris is Visiting Professor of Mental Health Policy at the George Warren Brown School of Social Work at Washington University in St. Louis, where he was named a Distinguished Alumnus in 1996. He is currently principal investigator on a federal grant to replicate a supported employment model for persons with serious mental illnesses, and has been PI on two grants to replicate rural assertive case management models. Morris is immediate past president of the American College of Mental Health Administration, and serves on the Board of Directors for the Technical Assistance Collaborative, Inc., as well as for the National Advisory Council to the Georgetown Technical Assistance Center for Children's Mental Health and the Kentucky Center for Mental Health Studies. He is serving a three-year term on the Standing Review Committee on Knowledge Application for the Center for Mental Health Services, and has just been invited to serve a one year term on the Public Policy Committee of the National Mental Health Association.

Thomas D. Romeo

Thomas Romeo was Director of Rhode Island's statewide agency for mental health for 12 years. With the support of four Governors, the Rhode Island State Legislature, and many citizens, he established a system of services based upon individual needs and with the ultimate goal being return to one's home community. In Rhode Island, institutional settings continue to be considered a "last resort."

CERTIFICATION OF BAR MEMBERSHIP

I, Steven J. Schwartz, hereby certify that I am a member in good standing of the Bar of this Court.

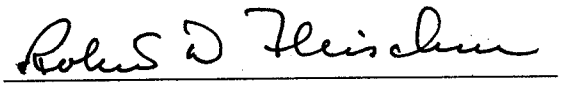


Steven J. Schwartz

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Robert D. Fleischner, hereby certify that the Brief of Amici complies with the Federal Rule of Appellate Procedure 32(a)(7)(B)(i) concerning the length of briefs. The Brief contains 6442 words, excluding the Table of Contents, Table of Citations, Appendix and certifications of counsel.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word Perfect 7.0/8.0 in Times New Roman Style, 14 point font.



Robert D. Fleischner

CERTIFICATE OF SERVICE

I, Robert D. Fleischner, hereby certify that two copies of the Brief for 14 Former State Mental Health Administrators, Amici Curiae, were served by Federal Express on December 13, 2002 on the following:

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