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October 11, 2011

Commissioner David A. Cook
Georgia Department of Community Health
2 Peachtree Street, NW
Atlanta, GA 30303

Sue Jamieson
Atlanta Legal Aid
246 Sycamore Street, Suite 120
Decatur, GA 30030-3434

Reference Number: 09-103155

Dear Commissioner Cook and Ms. Jamieson:

The Office for Civil Rights ("OCR") of the U.S. Department of Health and Human Services ("HHS") has completed its investigation of a complaint filed by Sue Jamieson of Atlanta Legal Aid ("Complainant") on behalf of [redacted] ("Affected Party") against the Georgia Department of Community Health ("DCH"). The complainant alleged that the actions of DCH constitute unlawful discrimination on the basis of disability in violation of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, and implementing regulations at 28 C.F.R. Part 35 ("Title II"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and implementing regulations at 45 C.F.R. Part 84 ("Section 504").

Based on its investigation, OCR has concluded that DCH has violated Title II of the ADA and Section 504 based on its failure to place the Affected Party in the most integrated setting appropriate to her needs and its refusal to make reasonable modifications in its policies, practices or procedures to avoid discrimination on the basis of disability.

The basis for OCR's finding is discussed in detail below.

I. Jurisdiction

OCR conducted its investigation pursuant to Section 504 and Title II of the ADA. As a recipient of Federal financial assistance, DCH is obligated to comply with Section 504 and its implementing regulations. As a public entity, DCH is also obligated to comply with Title II of the ADA and its implementing regulations.

II. Background

Complainant filed a complaint with OCR on May 1, 2000 alleging that DCH's failure to provide services to the Affected Party in the community was in violation of the "integration mandate" of the ADA and Section 504. See 28 C.F.R. § 35.130(d); 45 C.F.R. § 84.4(b) (2).[1] The Affected Party's complaint was administratively closed on July 1, 2008 when the State of Georgia entered into a Voluntary Compliance Agreement to address a class complaint filed on May 1, 2001 on behalf of people with developmental disabilities and mental illness. As part of that agreement, the State was required to develop an Olmstead plan that would address the needs of all persons with disabilities, including those with physical disabilities. The State failed to comply with the agreement and develop the Olmstead plan. On July 29, 2009, OCR received a request from Complainant to re-open Affected Party's complaint, arguing that Affected Party is a person with a physical disability and was not a member of the class complaint. The Affected Party had not received any relief as a result of the agreement and despite multiple attempts by Atlanta Legal Aid to locate an appropriate personal care home that was approved by Georgia's Medicaid Community Care Services Program (CCSP); the Affected Party remained in a nursing home.[2] OCR re-opened Affected Party's complaint on September 25, 2009 to investigate the complaint's allegations that DCH's failure to provide services to Affected Party in the community was in violation of the "integration mandate" of Title II and Section 504.

Affected Party is 79 years old. Seventeen years ago, Affected Party suffered a stroke and was admitted to a nursing facility for rehabilitation services. It was never the Affected Party's intention to remain in a nursing facility and she has persistently sought to leave the nursing facility and live in a community setting. Besides filing her complaint with OCR, she also filed an administrative complaint against DCH over 9 years ago. Affected Party has lived in her current nursing facility, [redacted] Nursing Home, for the past 11 years. As a result of her stroke, Affected Party has left-side paralysis. The left side paralysis further impedes Affected Party speech. In addition, Affected Party is diagnosed with the following conditions: [redacted] A February 2011 medical assessment found Affected Party to be oriented to person, place and time of day. The assessment found that Affected Party is able to feed herself with supervision. In addition, Affected Party is able to propel her wheelchair using her right leg and arm. The medical examiner stated she did not observe any skilled nursing needs other than medication administration.

Following the re-opening of Affected Party's complaint in September 25, 2009, OCR issued a Letter of Notification on November 2, 2009, informing Georgia of the complaint. Georgia responded to the complaint's allegations on December 8, 2009 denying that it acted inappropriately or in violation of state or federal laws or regulations in operating Georgia's CCSP waiver. A subsequent data request was sent on February 9, 2010, requesting information regarding the process involved in transitioning Affected Party into the community. At that time

[1] Olmstead v. L.C., 527 U.S. 581 (1999), held that unjustified institutionalization is a form of discrimination under the "integration mandate" of the Americans with Disabilities Act.

[2] Both DCH and the Complainant identified personal care homes as an acceptable and more integrated alternative to a nursing home. In resolving the specific facts at issue here, OCR is not taking the position that personal care homes are the most integrated setting appropriate for individuals with disabilities.

Georgia responded that although Affected Party's needs met the CCSP eligibility criteria based on her Level of Impairment, Unmet Need and Medicaid eligibility, her treating physician had not approved her care plan certifying that her needs could be met by the CCSP waiver. During this time period, on December 21, 2009, DCH created a new Individualized Transition Plan (ITP) for Affected Party that supported Affected Party's longstanding desire to move into the community, but noted that there might not be a personal care home able to care for Affected Party because DCH reimburses such homes at only $12, 789.60 a year.[3]

The CCSP waiver referenced in Georgia's response to OCR's notification letter and data request is a 1915 (c) Medicaid Waiver program approved by the Centers for Medicaid and Medicare Services (CMS) that is administered through DCH. The waiver provides services to Medicaid beneficiaries who, but for the provision of such services, would require the level of care found in a nursing facility. Eligibility for the waiver is limited to Georgia residents who have a functional impairment caused by a physical disability. Approval for the CCSP waiver requires a finding that the individual's health and safety needs can be met through the CCSP waiver, and individuals must have their plan of care approved by their physician. Furthermore, the cost of an individual's CCSP services for a year must cost less than the average annual cost of Medicaid reimbursed care provided in Georgia nursing facilities.

The Affected Party was subsequently assessed and approved for Georgia's CCSP Waiver program in March 2010. The Affected Party's CCSP plan of care, which was approved by her treating physician, states that the following needs must be met in the community: 24/7 supervision, handicap accessible home, smoking supervision, and provision of care for the following ADLs: Bathing, Feeding, Dressing, Transferring (2-Person Lift), Certified Staff, Provide and Administer Medication (LPN Minimum), and Transportation to Appointments.

In April 2010, nine personal care homes were contacted regarding the possibility of providing care to Affected Party under the CCSP waiver. All nine providers declined to accept the Affected Party. Six of the contacted providers stated they did not have adequate staff to meet Affected Party's needs. For example, one provider stated "client would require too much care and [the home] doesn't have the staff to accommodate client at this time." Other providers noted that they are unable to accommodate all of Affected Party's needs such as her [redacted] and need for a two-person transfer. Another provider stated "she is unable to meet [Affected Party's] needs [because]...the reimbursement rate does not match the level of service required."

Georgia's CCSP waiver program pays a per diem rate of $12,789.60/year to personal care homes to provide care to waiver recipients. This is the same rate for all individuals regardless of need. The services available under the CCSP waiver are Adult Day Health,[4] Alternative Living Services,[5] Home-Delivered Services,[6] Personal Support Services,[7] Out-of-Home Respite[8] and

[3] This amounts to a daily per diem rate of only $35.04.
[4] This includes: daytime care and supervision, nursing and medical social services, planned therapeutic activities, physical, speech, and occupational therapy, and meals including prescribed diets.
[5] This includes: meals, personal care, and supervision for those who are unable to remain independent in their own home.
[6] This includes: skilled nursing services, physical, speech and occupational therapy, medical social services and home health aide assistance, personal care and help with meals.

Home-Delivered Meals.[9] Prior authorization of the services is derived from a care plan outlining service type and frequency. The per diem rate does not cover room and board.

Based on the statements of the personal care homes DCH had contacted and the statement within DCH's own ITP for Affected Party which linked the lack of appropriate personal care homes to the low per diem rate, OCR met with DCH in November 2010. OCR expressed its concern that the inability to locate an appropriate community placement for Affected Party was a result of a standard per diem rate that is not appropriate to meet Affected Party's needs. OCR requested that DCH poll providers to determine at what per diem rate they felt they could provide appropriate care for the Affected Party. After several months two personal care home providers were polled in February 2011. One provider expressed that "with our option of homes we believe the right match might be possible, however, because of her needs we feel it would take minimally [$36,000 a year] to serve her in a community setting." The other provider expressed "it will probably take a minimum" of [$47,160 a year] to serve her in a [community setting]. Both quoted per diem rates are equal to or less than the Affected Party's current $49,488 annual nursing facility Medicaid reimbursement rate and also less than the $57,289 annual amount allowed under the cost neutrality requirements of the CCSP waiver.

OCR met with the Complainant and Affected Party at the [redacted] Nursing Home in February 2011. OCR observed the Affected Party eating a meal in the home's cafeteria, which she was doing independently and with minimal supervision. OCR also visited the Affected Party's bedroom, which she shares with a roommate. The Affected Party's bedroom is small and does not provide privacy to either of the occupants. The roommates' beds were separated by a curtain. The Affected Party indicated that the nursing facility does not take its residents on community trips and that her family does not visit her often. During OCR's visit, the Affected Party reiterated her desire to move into the community. The Complainant stated that Affected Party has expressed to her many times that she would like more independence, more exposure to community life, and that she does not want to die in a nursing facility. Complainant stated that before Affected Party entered the nursing facility, she had a number of hobbies, which included reading, cooking and visiting with close friends. When OCR inquired from Affected Party what type of community activities she would like to explore, Affected Party stated that she would like to go fishing.

In April 2011, OCR met with DCH to express concerns that the Affected Party was not being served in the most integrated setting appropriate to her needs. OCR expressed to DCH the possibility of making reasonable modifications in policies, practices or procedures so that the Affected Party could be served in the community. OCR made several suggestions based on its understanding of waiver requirements from previous conversations with CMS,[10] but requested that DCH discuss with CMS any of the possibilities if DCH wanted to pursue them as a means to

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[7] This includes: assistance with meal preparation, hygiene and nutrition, light housekeeping, shopping and other support services, and in-home respite care provided by an aid.

[8] This includes: out-of-home respite care in an approved facility with 24-hour supervision.

[9] Meals are prepared outside the home and delivered to the client.

[10] While OCR made suggestions regarding possible options the State could pursue in serving Affected Party in the most integrated setting appropriate to her needs, it was not and is not OCR's position that these suggestions are the only options the State may pursue. The State remains free to pursue other possible options that will allow Affected Party to be served in the most integrated setting appropriate to her needs.

accommodate the Affected Party. CMS was available via telephone during this meeting to answer any technical questions and stated its willingness to provide any assistance requested in the future. OCR discussed the possibility of accommodating the Affected Party's community placement by using Money Follows the Person (MFP) funds to minimize the one-time costs that might be incurred in transitioning her to a more integrated setting (costs such as a Hoyer Lift and making the home wheel-chair accessible).

In addition, OCR raised the possibility of accommodating the Affected Party's placement in the community by amending its waiver to create a tiered approach that would allow a higher per-diem rate only for individuals, like the Affected Party, who are appropriate for community placement, but whose community needs can only be met by a per diem rate higher than the annual standard $12,789.60 rate. As long as the amended rate was still within the Medicaid waiver cost-neutrality rate, this approach would be allowable under Medicaid waiver requirements. OCR also noted the possibility of an exception process through the CCSP Waiver.[11] For example, the State could amend its waiver to offer an exception process for waiver participants, like the Affected Party, who are appropriate for community placement, but who have needs requiring a higher per diem rate than most Waiver participants. As long as the higher per diem rate offered in the exception is within the Medicaid cost-neutrality rate and less than the Medicaid nursing home cost, this action would be permissible under CMS waiver regulations and also save the state money in providing services for the Affected Party. With respect to any waiver amendment, the state would have wide latitude in determining the best method for structuring, limiting, and implementing the amendment according to the unique needs of the state.

During the meeting both OCR and CMS informed the State that CMS would be available to offer technical assistance to the State and to address any concerns or questions regarding these options. At the conclusion of the meeting, OCR asked that DCH provide a response to OCR within three weeks as to what reasonable modification it would implement so that Affected Party could be served in the most integrated setting.

OCR attempted to ascertain DCH's response several times, both before and after the requested time frame. In June 2011, DCH responded to OCR with the following:

> The Department of Community Health will not be able to offer an exceptional rate for the purpose of admitting [redacted] to the Elderly and Disabled Waiver Program. Our concerns include, but are not limited to the following:
>
> - The current waiver on file with and sanctioned by CMS does not give Georgia the authority to approve a rate other than the [$12,789.60] per diem rate approved for Alternative Living Services.

[11] OCR originally presented this approach as an individual exception that would apply only to the Affected Party. OCR since learned that an exceptions process to waiver requirements must be open to all participants, though it can be limited to participants who meet certain criteria, such as participants with significant needs that can be met in the community at a rate less than the nursing facility Medicaid reimbursement rate. The state also can require an authorization or review process based on the criteria established in the exceptions process.

- The risk of offering an exceptional rate for one waiver participant that is not available to the other participants is significant and could lead to allegations of discrimination against DCH.[12]
- The potential impact of allowing variable rates for individual waiver participants could jeopardize the cost neutrality of the waiver mandated by CMS; thus jeopardizing the viability of the waiver's continuation.

The Department appreciates the advocacy efforts of the Office for Civil Rights and others on behalf of but is not able to accommodate the request made on her behalf.

To date, DCH has not contacted CMS to discuss or obtain additional information regarding any of the corrective actions suggested by OCR.

III. Legal Framework

With the passage of the ADA, Congress intended to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b) (1). In Title II of the ADA and Section 504 of the Rehabilitation Act, Congress set forth specific prohibitions against discrimination in public services furnished by governmental entities and by recipients of federal financial assistance. Specifically, the ADA and Section 504 provide that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; and see 45 C.F.R. § 84.4(a). The regulations provide that "[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); and see 45 C.F.R. § 84.4(b) (2). The preamble to the ADA regulations define "the most integrated setting" to mean a setting "that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, App. A (2010). In addition, the ADA and Section 504 require covered entities to modify policies or procedures when necessary to avoid discrimination.

In construing the anti-discrimination provision contained within the ADA and Section 504, the Supreme Court held that "[u]njustified isolation ... is properly regarded as discrimination based on disability." Olmstead, 527 U.S. at 597. The Court explained that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Id.* at 600. The Court added that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 601. The Court held that public entities are required to provide community-based services for persons with disabilities who would otherwise be entitled to services in an institution when: (1) "community placement is appropriate:" (2) "the affected persons do not oppose such treatment;" (3) and, the

[12] Because an exceptions process must be open to all waiver participants, we do not address the concern related to OCR's original characterization of the exceptions process as being available only to one participant. Instead, OCR later addresses the DCH concern here that other persons, similarly situated to the Affected Party, could seek relief from DCH.

placement can be "reasonably accommodated," taking into account the resources available to the jurisdiction and the needs of others who are similarly situated. *Id.* at 607.

For the reasons set forth below, OCR finds that DCH has violated the ADA and Section 504 based on its failure to place the Affected Party in the most integrated setting appropriate to her needs and its refusal to make reasonable modifications in its policies, practices or procedures to avoid discrimination on the basis of disability.

IV. Discussion and Analysis

A. Affected Party is a Qualified Individual with a Disability

As a threshold matter, an Affected Party must be an individual with a disability that substantially limits one or more life activities in order to be protected under the ADA and Section 504. 28 C.F.R. § 35.104 and 45 C.F.R. § 84.3(j). The phrase "major life activities" means "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 35.104 and 45 C.F.R. § 84.3(j) (2) (ii). The phrase "physical or mental impairment" means "[a]ny physiological disorder or condition . . . affecting one or more of the following body systems: neurological; musculoskeletal . . . respiratory (including speech organs), cardiovascular . . . ." 28 C.F.R. § 35.104 and 45 C.F.R. § 84.3(j)(2)(i). In addition, to be protected under the ADA and Section 504 the Affected Party must be a "qualified individual with a disability" which means "an individual who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for receipt of services or participation in programs" conducted by a covered entity. 28 C.F.R. § 35.104 and 45 C.F.R. § 84.3(k)(4).

OCR concludes that Affected Party is an "individual with a disability" because the record contains clear medical evidence that she has a physical impairment that substantially limits one or more major life activities: [redacted]. In addition, the record establishes that Affected Party was approved for the CCSP Waiver and found to meet the essential eligibility requirements in March 2010 and is therefore a "qualified individual with a disability."

B. DCH Violated Section 504 and Title II of the ADA by Failing to Provide Services to the Affected Party in the Most Integrated Setting Appropriate to her Needs

1. Affected Party Can be Served Appropriately in the Community

As stated above, Section 504 and Title II of the ADA require public entities to administer their services in the most integrated setting appropriate to the needs of qualified individuals with disabilities. In Olmstead the Court opined that institutional placements of persons who can handle and benefit from community settings perpetuate unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life, and also severely diminish individuals' everyday life activities, including family relations, social contacts, work, educational advancement and cultural enrichment.

Approval for the CCSP waiver requires a finding that the individual's health and safety needs can be met through the community services offered through the program. In addition, to participate in the CCSP waiver, an individual must have his or her plan of care approved by the treating physician. In the instant case, the Affected Party's treating professional has documented his recommendation that her health and safety needs can be appropriately met in the community. The Affected Party's treating physician also created and approved a plan of care describing her community needs. Based on the recommendation of the Affected Party's treating physician and his approved plan of care, DCH approved Affected Party for the CCSP waiver in March of 2010. The evidence clearly establishes that the Affected Party's treating physician determined that her health and safety needs could be appropriately met through community services and approved of her placement on the CCSP waiver for community services.

For the reasons stated above, OCR concludes that the Affected Party is appropriate for community placement.

2. The Individual Does Not Oppose Community Placement

As enunciated by the Court in Olmstead, the second factor that must be considered in determining whether community placement is required is whether "the affected persons do not oppose such treatment..." 527 U.S. at 607. The Court noted that there is not "any federal requirement [in the ADA] that community based treatments be imposed on patients who do not desire it." *Id.* at 583.

As discussed above, the Affected Party entered a nursing facility to receive rehabilitation services after a stroke, and it was never her intention to remain in a nursing facility. The Affected Party has expressed numerous times since her admittance to a nursing facility that she does not wish to remain in the nursing facility, and her strong preference to receive services in a community setting. A medical assessment of the Affected Party conducted in February of 2011, found her to be oriented to person, place, and time of day. She has remained persistent regarding her desires to live in the community so that she can have more independence and opportunity to explore new interests and has made it unquestionably clear that she does not oppose community treatment.

3. The Community Placement can be Reasonably Accommodated

Once an institutionalized individual meets the first two prongs, a state is required to provide community-based treatment when "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with... disabilities." 527 U.S. at 607. Under the ADA and Section 504, a covered entity must modify its policies, procedures, or practices when necessary to avoid discrimination. *See* 28 C.F.R. §35.130(b)(7). The obligation to make modifications to its policies or practices may be excused only where the covered entity can demonstrate that the requested modification would fundamentally alter the program or services at issue.

The evidence gathered by OCR demonstrates that the Affected Party's placement in the community can be reasonably accommodated without creating a fundamental alteration of the CCSP program. The Affected Party is not asking for a new program, but rather a reasonable

modification to an existing program. Although the Affected Party's individual health needs require a higher level of care than can be met through the standard $12,789.60 annual per diem rate for CCSP providers, two providers have indicated that they can safely care for the Affected Party through the CCSP waiver for an annual rate of $36,000 to $47,160.

Under an aggregate cost neutrality requirement of Medicaid waivers, the cost for waiver services for beneficiaries must fall within the average annual cost of Medicaid reimbursed care provided in an institution--in this case a state nursing facility--which is currently $57,289 per year in Georgia. The $36,000 to $47,160, that the state would have to pay a provider in order to serve the Affected Party in the most integrated setting appropriate to her needs, would be equal to or less than the Affected Party's $49,488.00 annual nursing facility Medicaid reimbursement rate and less than the $57,289 annual average rate allowed under the cost neutrality rules. In this case, the modified rate for CCSP waiver services would not only be permissible under cost neutrality rules, but DCH would spend less than it currently does on nursing home costs for the Affected Party.

As noted above, OCR discussed several options that the State could consider in order to reasonably accommodate the Affected Party's placement in the community. First, OCR discussed with the State the possibility of accommodating the Affected Party's placement in the community by using funds from the Money Follows the Person program to minimize the one-time costs that might be incurred in transitioning her to a more integrated setting (e.g., costs for a Hoyer Lift and making the home wheel-chair accessible). Second, OCR raised with the State the possibility of accommodating the Affected Party's community placement by pursuing a waiver amendment for a new category of individuals who, like the Affected Party, are appropriate for community placement, but whose health needs can only be met if the provider per diem rate were higher than CCSP's yearly standard rate of $12,789.60. That new waiver category could be narrowly drawn to assist individuals with high care needs which can still be treated in the community at a per diem rate within Medicaid's cost neutrality rate. Another option suggested to the State to consider as an accommodation was to implement an exception process that would allow individuals like the Affected Party to receive a higher per diem rate within Medicaid's cost neutrality rate. OCR informed the State that such actions would be permissible under CMS waiver regulations. These approaches would also save the State money in providing the services that would be needed by the Affected Party in the community. Not only has DCH not presented any evidence that any of the options that were suggested would result in a fundamental alteration of its existing CCSP program, but it has not sought any technical assistance from CMS regarding the possible implementation of OCR's suggestions or proposed alternative remedies which would allow the Affected Party to live in the most integrated setting appropriate to her needs.

DCH maintains that it does not have the authority under its existing waiver to increase the Affected Party's per diem rate to a rate that would be appropriate to her needs, and that such an action would jeopardize the cost neutrality of the CCSP waiver. DCH's argument lacks merit.[13] There is no dispute that, during a telephone conference between OCR, CMS, and DCH that took place in April in 2011, CMS offered to provide assistance to DCH if it chose to amend its waiver. DCH made no subsequent attempt to follow up with CMS to discuss the possibility of seeking a waiver amendment to its CCSP program. Also, DCH posits that, if it accommodates

[13] *See* Grooms v. Maram, 563 F. Supp.2d 840, 857 (N.D. Ill. 2008).

the Affected Party by increasing the current CCSP per diem rate, it will likely result in DCH receiving more complaints from other waiver participants alleging discrimination if similar requests for a higher per diem rate are denied. However, as noted above, the state will have wide latitude in determining the best method for structuring and limiting a waiver amendment to accommodate the state's needs and the state can structure the waiver to limit its impact on the state. In this case, DCH has not presented any evidence to substantiate that creating a tiered approach to the offered CCSP per diem rate or creating an exception process to the CCSP waiver per diem rates would jeopardize Medicaid's cost-neutrality requirements or, more importantly, would result in a fundamental alteration of the CCSP program. In addition, as expressed above, under the ADA and Section 504, a covered entity is obligated to make reasonable modifications to its policies or procedures where necessary to avoid discrimination, unless such modification would fundamentally alter the nature of the program or activity in question. A solution that amends the waiver to allow individuals with higher needs to benefit from a higher per diem rate that is still within the Medicaid cost-neutrality rate will permit GA residents to move from Nursing Home placements to the most integrated setting appropriate to their needs at a cost savings to the state.

In addition, the state has not attempted to argue that it has an effective Olmstead Plan. The court in Olmstead held that a state may establish that it has met the reasonable modification standard if it can show that it has a "comprehensive, effectively working plan" to move individuals into the community and a waiting list that moves at a reasonable pace. 527 U.S.at 605-06. As the state has no Olmstead plan,[14] there is currently no workable plan to address the continued segregation of individuals like the Affected Party who have been found eligible for the CCSP waiver, but who cannot benefit from the waiver under its current per diem rate limits. Also, the state's current plan provides a low per diem rate for providers and allows them to pick and choose which individuals that they will serve in the community. Because the Affected Party has such high needs, she has repeatedly been passed over by providers and realistically will be passed over indefinitely. A state policy which allows an individual who can be treated appropriately in the community at a cost less than in institutional care, but which allows the individual to wait indefinitely, cannot be said to move at a reasonable pace.

In a case decided subsequent to Olmstead that addressed the rights of individuals who also had been institutionalized for long periods, the Third Circuit Court of Appeals held that for a state to assert a fundamental alteration defense, the state must have a commitment to take action for which it can be held accountable. The court stated:

> After all, what is at issue is compliance with two federal statutes enacted to protect disabled persons. The courts have held states throughout the country responsible for finding the manner to integrate the schools, improve prison conditions, and equalize funding to schools within the respective states, notwithstanding the states' protestations about the cost of remedial actions. The plaintiffs in this case are perhaps the most vulnerable. It is a gross injustice to keep these disabled persons in an institution notwithstanding the agreement of all relevant parties that they no longer require institutionalization. We must reflect on that more than a passing moment. It is not enough

[14] The state's Olmstead Coordinator headed a committee of stakeholders and advocates which recently drafted an Olmstead Plan. This plan, however, has never been adopted by the State or Governor.

> for DPW to give passing acknowledgment of that fact. It must be prepared to make a commitment to action in a manner for which it can be held accountable by the courts.

Frederick L. v. Dep't of Pub. Welfare of Pa., 364 F.3d 487, 500 (3d Cir. 2004).[15]

Here the state proposes no action to remedy the Affected Party's continued segregation. The state has provided no data to OCR supporting its defenses and has given no avenue or timetable for relief for the Affected Party. Instead, the state has made broad, conclusory statements unsupported by any evidence and contradicted by the facts presented here. This does not meet the state's obligations to the Affected Party under the ADA.

For the foregoing reasons, OCR finds DCH in violation of 28 C.F.R. § 35.130(d) and 45 C.F.R. § 84.4(b) (2) based on its failure to serve the Affected Party in the most integrated setting appropriate to her needs and failure to comply with its obligation under the ADA and Section 504 to make reasonable modifications to its policies or practices when necessary to avoid discrimination.

V. Conclusion and Remedy

OCR finds that DCH violated Section 504 and Title II of the ADA by failing to serve the Affected Party in the most integrated setting appropriate to her needs and failing to demonstrate that the Affected Party's placement in the community cannot be reasonably accommodated without fundamentally altering the nature of its program. DCH has **thirty (30) calendar days** from the date of this letter to inform OCR of the steps it will to take to provide the Affected Party with services in the most integrated setting appropriate to her needs, and not in an institutional setting, in accordance with the ADA's integration regulation. The state shall also specify the timeline for taking these steps. OCR will review the state's remedial plan and if OCR finds that the state's proposal will serve the Affected Party in a timely manner in the most integrated setting appropriate, then the state will be required to implement the proposal in accordance with the timeline agreed upon by OCR and the state. Please note that pursuant to authorities cited above OCR is required to seek voluntary, informal resolution of findings of non-compliance. To that end, please be advised that OCR stands ready to provide technical assistance and to discuss informally voluntary measures the State should institute to remedy the violations discussed above.

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[15] *See also* Frederick L. v. Dep't of Pub. Welfare, 422 F.3d 151, 157 (3d Cir. 2005) (finding "[defendant] may not avail itself of the 'fundamental alteration' defense to relieve its obligation to deinstitutionalize eligible patients without establishing a plan that adequately demonstrates a reasonably specific and measurable commitment to deinstitutionalization for which [defendant] may be held accountable."); Pa. Prot. & Advocacy Inc., 402 F.3d 374, 381-82 (3d Cir. 2005) (stating "[a]ny interpretation of the fundamental alteration defense that would shield a state from liability in a particular case without requiring a commitment generally to comply with the integration mandate would lead to a bizarre result."); Haddad v. Arnold, No. 3:10-cv-00414-MMH-TEM (M.D. Fla. July 9, 2010) (granting preliminary injunction to plaintiff seeking waiver services and finding that Florida's fundamental alteration defense was not sufficiently supported when state failed to show it has a comprehensive, effectively working plan in place to address unnecessary institutionalization.).

If we are unable to achieve an acceptable informal resolution of this matter within the time specified above, you should note that OCR will commence formal steps to enforce compliance as provided under the regulations implementing Title II and Section 504.

Advisements

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION

General Notice

The complainant may have the right to file a civil action to remedy discrimination by a recipient of Federal financial assistance or other covered entity.

The complainant may wish to consult an attorney about his/her right to pursue a private cause of action, any applicable statute of limitations, and other relevant considerations.

PROHIBITION AGAINST RETALIATION

The complainant has the right not to be intimidated, threatened, coerced by a recipient/covered entity or other person because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint.

DISCLOSURE OF RECORDS

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, would constitute an unwarranted invasion of privacy.

If you have any questions, or would like to discuss this matter further, you may contact me by phone at: (404) 562.7859, or via email at: roosevelt.freeman@hhs.gov.

Sincerely yours,

/s/

Roosevelt Freeman
Regional Manager