IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 10-767

DISABILITY ADVOCATES, INC.,

Plaintiff-Appellee

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee

v.

DAVID A. PATERSON, *et al*.,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

_____

UNITED STATES' OPPOSITION TO APPELLANTS' MOTION FOR STAY PENDING APPEAL

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PRELIMINARY STATEMENT

On March 25, 2010, appellants (collectively, the State) filed a motion for a stay pending appeal. The State relies principally on factual assertions that were explicitly rejected by the district court in a 210-page order following a five-week bench trial, in findings that the State makes no effort to show are clearly erroneous. See *Disability Advocates, Inc.* v. *Paterson*, 653 F. Supp. 2d 284 (E.D.N.Y. 2009). As the district court found, *each* person with mental illness who moves from an adult home to supported housing will save the State $146 per year. *Id*. at 291. That savings, the district court found, will take place *immediately* once the person moves to the new setting (because the State will at that point stop reimbursing an adult home and start reimbursing a supported housing provider), and it is a savings over and above any long-term savings that may occur because there will be less need for capital improvement programs and other overhead outlays to the adult homes. *Id.* at 282-298. The district court's decision thus will not cause the State irreparable injury.

And, contrary to the State's suggestion, the district court's decision reflects a straightforward application of the Attorney General's integration regulation, 28 C.F.R. § 35.130(d) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."). The State therefore has little likelihood of success on the merits of its appeal. Moreover, there is a strong public interest in promptly providing adult home residents the more integrated treatment setting to which they are entitled, after six years of litigation. This Court should deny the motion.

STATEMENT OF THE CASE

This appeal arises from an action by Disability Advocates, Inc. (DAI), a disability rights organization, against, *inter alia*, New York mental health agencies for violation of the integration mandate of Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. 794, as expressed in 28 C.F.R. § 35.130(d).[1] Plaintiff claimed that the State discriminated against adults with mental disabilities residing in, or at risk of entering, twenty-one adult homes[2] in New York City by failing to offer them placement in the most integrated setting appropriate to their needs. See *Olmstead* v. *L.C.*, 527 U.S. 581 (1999) (failure to provide services in the most integrated setting appropriate is discrimination under Title II of the ADA).

Following a five-week bench trial, the district court issued 210 pages of findings of fact and conclusions of law, holding that the State's administration of mental health services for DAI's constituents—approximately 4,300 individuals with mental illness—in the adult homes at issue violates the integration mandate. See *Disability Advocates, Inc.* v. *Paterson*, 653 F. Supp. 2d 184, 188 (E.D.N.Y. 2009) (Trial Decision). The district court made five rulings in its exhaustive

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[1] The United States intervened on November 23, 2009, and has standing to pursue the prospective relief ordered by the district court. 42 U.S.C. 12133.

[2] Adult homes are for-profit adult care facilities licensed and regulated by the State that provide long-term care and supervision for people with mental or physical disabilities.

decision.

First, the court held that the adult homes "are institutions that segregate residents from the community and impede residents' interactions with people who do not have disabilities." Trial Decision at 187; see also *id*. at 198, 203. In fact, witnesses on both sides testified that adult homes are similar to institutions in that they "house a large number of people with psychiatric disabilities in a congregate setting" and that the residents' lives are "highly regimented" with "inflexible schedules for meals, taking medication, receiving public benefits, and other daily activities." *Id*. at 199; see also *id*. at 200-218. The court found that adult home residents are "completely 'defined by their illness.'" *Id*. at 203. The evidence also showed that the services provided at adult homes do not help residents gain independent living or job skills; instead, they promote a sense of helplessness among residents by restricting their access to the community and providing child-appropriate activities such as games, puzzles, and coloring books. *Id*. at 203-216. The State's witnesses similarly testified that the characteristics of adult homes impede the ability of adult home residents to function more independently. *Id*. at 217-218. Moreover, the court stated that the existence of a more integrated setting in the form of supported housing[3] demonstrates that adult homes are not the most

[3] Supported housing is a program, funded by defendant New York State Office of Mental Health (OMH), where individuals with mental disabilities live in rental apartments scattered among various buildings throughout the community and receive services from the State to support their living in the community.

integrated setting available. *Id*. at 218-223, 227.

Second, the district court found that virtually all of DAI's constituents are qualified for supported housing. Trial Decision at 227-259. DAI's experts—who visited adult homes, interviewed adult home residents, and reviewed residents' mental health records and other documents regarding the State's mental health services—testified that "'virtually all' of [DAI's constituents] could be served in a more integrated setting," *id*. at 237, and that "there are no material clinical differences between adult home residents and supported housing clients," *id*. at 235. See also *id*. at 234-240, 245-247. A former official at OMH concurred, based on her "firsthand observations from working in New York's mental health system." *Id*. at 240-241. The State's witnesses also testified that "undisputedly," some adult home residents are qualified to move to supported housing. *Id*. at 248. In addition, a 2002 study by the Adult Care Facilities Workgroup (Workgroup Report), convened by the governor of New York, "unanimously concluded that large numbers" of adult home residents in New York City and other parts of New York "could be more appropriately served in more integrated settings." *Id.* at 257; see also *id*. at 241-242. Furthermore, a separate 2002 report (Assessment Project), commissioned by the State, assessed 2,611 residents in adult homes, including 15 of the homes at issue here, and revealed that a "vast majority of adult home residents are not seriously impaired and could be served in supported housing." *Id*. at 242-244. Based on this evidence, the court concluded that many of DAI's constituents would need only minimal support. *Ibid*.; see also *id*. at 295. For those

who need support, the court found that the State's supported housing program already provides individuals with a wide range of support services and thus is capable of providing services for individuals with serious mental illness. *Id*. at 256-257.

Third, the district court found that DAI's constituents are not opposed to receiving services in more integrated settings. Trial Decision at 259-267. DAI's experts and findings by the State's Assessment Project confirm that, when given "accurate information and a meaningful choice," a "large number" of adult home residents would choose to move out of adult homes. *Id*. at 262-265, 267. Testimony by adult home residents at trial and documents in the record show that there are residents who desire to move into more integrated settings. *Id*. at 263-265, 267.

Fourth, the district court found that the State failed to show that it had made any meaningful efforts to enable adult home residents to receive services in the most integrated settings: (1) it did not have a plan to enable adult homes residents to be served in more integrated settings, Trial Decision at 272; (2) although the State had created 13,557 supported housing beds between 1995 and 2009, and adult homes residents were finally added as one of the target populations for supported housing in 2005, the number of adult home residents that have moved to supported housing has been negligible (21 adult home residents in 2002-2006, and

11 since 2008),[4] *id*. at 273-275; (3) the State does not maintain a wait list for adult home residents who desire to move to supported housing, *id*. at 276; (4) the State's programs, designed to improve the conditions at adult homes, do not enable adult home residents to move to more integrated settings, *id*. at 276-281; and (5) the State rejected the 2002 Workgroup Report's recommendation to move 6,000 adult home residents to supported housing, *id*. at 281-282.

Fifth, the district court found that the State may not invoke a fundamental alteration defense because the overwhelming evidence showed that "it would actually cost less to serve DAI's constituents in supported housing than in Adult Homes." Trial Decision at 301; *id*. at 282-298, 305-308, 311. The evidence showed that the State spends more on Medicaid and the state supplement to federal Supplemental Security Income (SSI) payments for adult home residents than for individuals in supported housing. *Id*. at 285-291. Indeed, in 2002, the New York Commission on Quality of Care for and Advocacy for Persons with Disabilities (CQC), an independent state agency, issued a report examining the amount the State spends on Medicaid for adult home residents, which far exceeds its Medicaid

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[4] In 2007, a one-time legislative initiative created 60 supported housing beds exclusively for adult home residents. *Id*. at 274. As of 2009, 45 adult home residents had moved to supported housing under this initiative. *Ibid*. OMH did not propose this initiative; nor does it plan to conduct a similar initiative. *Id*. at 274-275; see also *id*. at 198 n.50. The difference in the success rate of adult home residents in securing placement in supported housing under the legislative initiative and under OMH's normal operating procedures, according to the district court, "demonstrates that * * * adult home residents [do] not have access to supported housing as a practical matter." *Id*. at 275.

expenses for supported housing residents. *Id*. at 286-289. A state study in 2004 confirmed these findings. *Id*. at 288-289. Based on this evidence, and taking into account the State's rental subsidy for supported housing residents, the district court calculated that the State would save "$146 per year to serve an individual in supported housing instead of an Adult Home," a savings that would be realized as soon as an individual moved from an adult home to supported housing. *Id*. at 285, 291. Contrary to the State's suggestion (Br. 17), this conclusion did *not* assume that the State could "divert funds used to improve the quality of care in adult homes or to support upgrades such as the installation of air conditioning," though the district court did note that the State could realize *additional* savings in the *long term* by taking such steps. Trial Decision at 291-294.

The court rejected the State's contrary argument. Trial Decision at 284-298. The State's cost expert ignored any Medicaid savings even though the State agreed that it spends more on Medicaid for adult home residents than individuals in supported housing. *Ibid*. The court also rejected the State's argument that DAI's requested relief would impose costs associated with (1) providing additional support services to the former adult home residents in supported housing; (2) providing administrative services to assess adult home residents and oversee the additional supported housing; and (3) backfilling the beds vacated by adult home residents. *Id*. at 294-297. The State failed to provide evidence to support these assertions. *Id*. at 295-297.

On March 1, 2010, the district court issued the remedial order and a separate

order, rejecting Defendants' proposed remedial plan as unreasonable. See Doc. 405 (Remedial Order & Judgment (Mar. 1, 2010) (Remedial Order)); *Disability Advocates, Inc.* v. *Paterson*, No. 03-CV-3209, __ F. Supp. 2d __, 2010 WL 786657 (E.D.N.Y. Mar. 1, 2010) (Remedial Decision).[5] For example, despite evidence at trial that the State was capable of developing 1,500 supported housing units annually and that moving qualified adult home residents to supported housing would produce cost-savings (see Trial Decision at 282-289, 300-301, 305-308, 311), the State's proposed plan asserted that it could create only 200 units annually due to, *inter alia*, its "fiscal crisis." Remedial Decision at 2. Other parts of the proposed plan flatly contradicted the court's findings, such as the number of qualified adult home residents willing to go to supported housing. *Ibid*. Because the State failed to propose a realistic remedy to address the violations the court found, the district court devised its own remedial order. *Id*. at 6-7.

The district court's Remedial Order requires the State to take steps to ensure compliance with the integration mandate within four years by, *inter alia*, (1) developing supported housing beds for DAI's constituents, at a rate of 1,500 beds annually; (2) securing necessary support services for supported housing residents; and (3) conducting in-reach to DAI's constituents to assist their transition to supported housing. Remedial Order at 5-7. The district court also provided for a court-appointed Monitor to oversee the State's compliance. *Id*. at 8-9.

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[5] "Doc. ___" indicates the docket entry number of documents filed in the district court.

Defendants appealed on March 3, 2010, and then filed a stay motion in the district court. After the district court denied the State's stay motion, see *Disability Advocates, Inc.* v. *Paterson*, No. 03-CV-3209, __ F. Supp. 2d __, 2010 WL 933750 (E.D.N.Y. Mar. 11, 2010), the State filed this motion for a stay pending appeal on March 25, 2010.

ARGUMENT

This Court considers four factors in determining whether to grant a stay of a district court's order pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interests lies." *In re World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (footnote and citation omitted); see also *Nken* v. *Holder*, 129 S. Ct. 1749, 1763 (2009) (Kennedy, J, concurring). In making the requisite showing, the moving party "bears a difficult burden." *United States* v. *Private Sanitation Indus. Ass'n*, 44 F.3d 1082, 1084 (2d Cir. 1995). The State has failed to carry this burden here.

A. *The State Has Not Made A Strong Showing Of A Likelihood Of Prevailing On The Merits*

1. The State asserts (Br. 2) that the district court's ruling is a "dubious and unprecedented extension" of *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), because adult homes are not institutions and the State does not require residents to stay at adult

homes in order to receive mental health services. See Br. 3, 12-13. On the contrary, this case is a straight-forward application of *Olmstead* and the Attorney General's integration regulation.[6] Like the plaintiffs in *Olmstead*, DAI's constituents are segregated from the community in institutions based on their disability. The district court specifically found that adult homes, by their characteristics, were in fact institutions that segregate individuals with mental illness from the community, and the State does not claim that this finding is clearly erroneous. See Trial Decision at 198-218, 223-228.

Nor did the State's witnesses at trial dispute this characterization of adult homes. Trial Decision at 216-218. For example, the State's experts conceded that adult homes "limit the development of relationships with people who do not have disabilities, including social contacts," *id.* at 208, 211, 218; that residents of supported housing feel less isolated, *id*. at 210; and that adult homes limit the ability of their residents to pursue work opportunities, *id*. at 211, 218. Moreover, the state CQC concluded in a 2006 report that the continuing day treatment programs at adult homes—consisting of group television and movie watching, and art programs involving coloring books—contribute little to integrating residents into the community. *Id*. at 212. As the district court stated, "[g]iven the extensive

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[6] The integration regulation is entitled to "controlling weight," *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), and the Department of Justice's interpretation is entitled to deference. *Thomas Jefferson Univ.* v. *Schalala*, 512 U.S. 504, 512 (1994); *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998).

testimony from [the State's] experts that Adult Homes have 'institutional qualities,' 'share[] characteristics with inpatient psychiatric facilities,' and impede residents' development of social contacts and employment opportunities, the court rejects the fallacy that Adult Homes are not 'institutions.'" *Id*. at 218.

The record also belies the State's assertion (Br. 3) that "the State does not require individuals to live in adult homes, to choose one type of community housing over another, or to accept community housing in order to receive other services." *Id*. at 12-13. The State controls the funding for mental health services in the various settings and "effectively control[s] how many adults receive services in any particular setting." See *Disability Advocates, Inc.* v. *Paterson*, 598 F. Supp. 2d 289, 319 (E.D.N.Y. 2009) (Summary Judgment Decision). Adult home residents, including a witness for the State, "testified that they were given little or no choice about being placed in an Adult Home." Trial Decision at 246. And once in adult homes, residents are not adequately informed about other housing choices. *Id*. at 261. Even if an individual wants to leave an adult home, the reality is that, in the absence of supported housing, that person generally has nowhere to go and must choose between being homeless or staying at an adult home or psychiatric hospital. *Id*. at 260.

2. The State further argues (Br. 14) that "the breadth and novelty of the district court's legal analysis is fundamentally at odds with *Olmstead*, which mandated substantial deference to state policy choices." See also Br. 11 n.4. The State's own witnesses, however, testified that OMH's "current focus" is on

supported housing because it is "cost-effective, a best practice, and what consumers want." Trial Decision at 219. Far from usurping the State's policy choices, the district court simply ordered the State to comply with its federal obligations and place qualified and willing adult home residents in a setting that is not only part of an existing program, but also one that the State itself has made a priority. Similarly, any support services that the former adult home residents would require are already offered by the State's supported housing program. *Id*. at 220-223, 309-311.

Also unavailing is the State's argument (Br. 10) that the Remedial Order takes away the State's power to determine who is qualified for supported housing. Specifically, the State challenges (Br. 10), without any legal citation, the provision that supported housing providers determine qualified individuals from among DAI's constituents. No court, however, has held that *Olmstead* requires that the State's mental health professionals be the only ones to determine whether an individual is qualified to live in a more integrated setting. See *Fisher* v. *Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (stating that *Olmstead* and the applicable ADA regulations require a determination by "treatment professionals" that community placement is appropriate for disabled individuals). Even prior to the Remedial Order, supported housing providers "routinely" assessed individuals to identify the supports and services needed. Trial Decision at 229, 258. Supported housing providers also make the "final determination" whether an individual is qualified to enter their programs. *Id*. at 254. In any event,

the State's own witnesses and two separate state studies (the Workgroup Report and the Assessment Project) agree that a large number—indeed, "a vast majority," according to the Assessment Project data—of adult home residents are qualified to live in more integrated settings. *Id*. at 243-244; see also *id*. at 241-242, 249, 257.

The State further contends (Br. 10) that the Remedial Order would force the State to give supported housing to individuals who do not qualify for supported housing under its guidelines, including persons who would pose a danger to themselves or others. Not so. Paragraph 10 of the Remedial Order, cited by the State, refers to individuals already in adult homes, and state regulations prohibit adult homes from admitting people who pose a danger to themselves or others. Trial Decision at 247. Paragraph 10 further provides that if an individual appears to pose an "imminent danger," OMH's concurrence that that person is qualified for placement in a more integrated setting is required. Remedial Order at 8 ¶ 10.

3. The State implies (Br. 8) that it cannot be liable under the integration mandate because the district court did not find that state mental health services regulations are discriminatory. That argument ignores the fact that the ADA prohibits discrimination in the "administration" of programs, 28 C.F.R. § 35.130(b)(6), and the district court found that the State, "and no other entities, [is] responsible for determining what services to provide, in what settings to provide them, and how to allocate funds for each program." Summary Judgment Decision at 319. Under state law, defendant OMH "plan[s] how and where New York's mental health services will be delivered" and "create[s] financing

procedures and mechanisms" to support the State's mental health services, while defendant New York State Department of Health (DOH) must develop "sufficient and appropriate residential care programs for dependent adults," including "issu[ing] operating certificates to establish and operate adult homes" and monitoring their compliance with state regulations. Trial Decision at 194.[7]

B. *The State Has Not Shown Irreparable Harm Absent A Stay*

1. The State's argument that it will suffer financial and administrative harm absent a stay has no support in the trial record and cannot be the basis for finding irreparable injury. The stay motion argues (Br. 1, 4-6, 10) that the Remedial Order imposes duties on the State regardless of costs and that the district court failed to take into account initial costs in complying with the Remedial Order. The overwhelming evidence at trial, however, supports the district court's finding that the relief granted would result in a cost-savings for the State, and the stay motion makes no effort to show that the finding was clear error. Trial Decision at 282-311. The State claims (Br. 5-6, 16-17) that the district court did not consider that the State would need to spend $20 million in rental subsidy in connection with the

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[7] Recently, in *Office of Protection & Advocacy for Persons With Disabilities* v. *Connecticut*, No. 06-cv-179, 2010 WL 1416146, at *5, 7 (D. Conn. Mar. 31, 2010), the district court denied the State's motion to dismiss a claim alleging a violation of the integration mandate with respect the State's placement of individuals with mental disabilities in privately-operated nursing homes. The court found that by alleging that the State "us[ed] methods of administration that subject individuals with disabilities to discrimination," plaintiff alleged a cognizable claim under the ADA. *Id*. at *5.

1,500 new supported housing beds that the State must create during the first year of complying with the Remedial Order. But the court did consider that cost. See Trial Decision at 284-291. The court simply found, based on the evidence before it, that the additional spending for rental subsidies for supported housing recipients was more than offset by the savings in state Medicaid and SSI-supplement outlays. See *id.* at 284-285 (noting that the State's cost comparison "ignores Medicaid costs" and that "[o]nce Medicaid costs are taken into account, it would *not* be more expensive to serve DAI's constituents in supported housing rather than Adult Homes: it would actually *save* the State of New York $146 per year to serve an individual in supported housing instead of an Adult Home"), 291 (chart taking all relevant costs into account, including the rental subsidy and Medicaid and SSI supplement costs, and showing that supported housing costs the State less, on net).

As for any other transitional costs (Br. 11 & n.5), the district court found that the State failed to provide evidentiary support for its arguments concerning additional support services for former adult home residents in supported housing, additional administrative costs, and the costs associated with backfilling beds in the adult homes. Trial Decision at 294-297. Aside from ignoring evidence that the State is already paying for DAI's constituents to receive supportive services in adult homes[8] and that many adult home residents would not require extensive support services to live in supported housing, the State failed to provide any

[8] The court's comparison of Medicaid costs for adult home and supported housing residents reflects this cost. Trial Decision at 285-286.

analysis comparing the costs of supported services in adult homes and in supported housing. *Id*. at 294-295, 298. The State also provided "no evidence" concerning how the cost of administrative services would increase. *Id*. at 296. Likewise, the State "did not offer any evidence that backfill, if it were to occur, would result in increased costs to the State." *Id*. at 296-297. On the contrary, the district court said, the evidence showed that the vacated adult home beds would likely be provided to homeless persons and persons discharged from state psychiatric hospitals and that would result in a cost-savings for the State. *Ibid*.

Thus, the district court considered and rejected the State's arguments concerning transitional costs because the State failed to provide any evidence in support. The State does not, and cannot, argue that the court erred in making these findings. Nor can the State introduce new arguments now that have no basis in the trial record. See, *e.g.*, Br. 17-18 (speculating delay in recovering savings).

2. Nor do the State's arguments concerning its fiscal difficulties support a stay. As described above, implementation of the district court's order will impose no net costs, even in the short term. Moreover, as the district court found, the State "did not present any evidence showing a nexus between the current state of the economy and the specific relief DAI seeks." Trial Decision at 308. The court said, "The record is devoid of evidence showing that the current fiscal difficulties have limited OHM's ability to develop supported housing," which requires no outlay of capital because supported housing involves existing units in the community. *Id*. at 298. That the State had issued a Request for Proposal for "230 beds of new

supported housing, with conditional awards to be made in 2009," demonstrates that the State is capable of (and committed to) developing new support housing units notwithstanding the State's budget problems, even without the benefit of the cost-savings associated with moving adult home residents to supported housing. *Ibid.*; see also *id*. at 252.

Although financial resources are relevant, general allegations of fiscal difficulties alone, such as the State's references (Br. 5, 19) to its current budget deficit and budget cuts, are not sufficient to establish a fundamental alteration defense (Trial Decision at 308); nor do they demonstrate irreparable harm to the State. See *Frederick L*. v. *Department of Pub. Welfare*, 364 F.3d 487, 496 (3d Cir. 2004) (the fundamental alteration defense cannot be based on "vaguely-defined fiscal constraints"); *Fisher*, 335 F.3d at 1183 (a State cannot choose to solve a fiscal crisis by taking steps that impede integration when other available solutions would promote integration); *Townsend* v. *Quasim*, 328 F.3d 511, 520 (9th Cir. 2003) (budget constraints alone do not establish a fundamental alteration defense). Particularly here, where the district court's relief will marginally *alleviate* the State's fiscal difficulties, those difficulties can provide no reason for granting a stay.

3. The State's financial arguments fail to take into account that the relief ordered here "concerns individuals for whose housing and services the State *already* incurs significant costs." Trial Decision at 298 (emphasis in original). The State implies (Br. 15-16) that it would be difficult to reallocate funds between

agencies in connection with transferring residents from adult homes to supported housing. The evidence at trial contradicts this argument. As the district court found, "ample evidence in the record demonstrat[e] the State's ability to redirect funds as individuals with mental illness move from one setting to another." Trial Decision at 297. The State had in fact reallocated funds between agencies for mental health services many times in the past and its witnesses testified that the State is capable of doing so in the future. *Ibid*.[9]

C. *Granting A Stay Would Substantially Injure DAI's Constituents*

The stay motion does not seriously argue that DAI's constituents will *not* suffer substantial injury if a stay is granted. The State argues only (Br. 6) that the former adult home residents would be harmed if they are placed in supported housing and this Court later modifies or vacates the Remedial Order. But Congress in the ADA, see 42 U.S.C. 12101(a), and the Supreme Court in *Olmstead*, 527 U.S. at 599-601, have long recognized the harm suffered by individuals, such as the adult home residents in this case, who have been unlawfully segregated based on their disability. These individuals' continued isolation, by remaining in adult homes during this appeal, far outweighs the unlikely possibility that the State would choose to deny them supported housing based on a decision by this Court.

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[9] It is unclear if the State (Br. 9, 15) is questioning the district court's consideration of the State's mental health budget in evaluating the fundamental alteration defense. That is an appropriate consideration in *Olmstead*-type cases such as this one. See, *e.g.*, *Frederick L.*, 364 F.3d at 496 n.6.

D. *The State Has Not Shown That Granting A Stay Will Serve The Public Interest*

The State argues (Br. 6, 16-19) that compliance with the Remedial Order would adversely affect other needy populations because it will need to cut programs and services for other groups in order to fund new supported housing units. Again, the trial record contradicts this assertion, and the State does not challenge the district court's findings on this issue. The district court specifically found that the State failed to provide sufficient evidence that the requested relief would force the State to cut back on state programs. Trial Decision at 299; see also *id*. at 306-311. Instead, the court relied on the abundant evidence that the requested relief would result in cost-savings. *Id*. at 299. Moreover, pursuant to the State's practice, the State could "use funds currently spent on adult home residents to serve adult home residents in supported housing." Summary Judgment Decision at 354 (discussing the concept of "redirecting spending" or "money follows the person"). Also, there is no evidence in the record that the State has had to take funds away from others when it developed supported housing units in the past. Trial Decision at 298.

As for the State's argument (Br. 17-18) that downsizing or closing of under-populated adult homes would adversely affect others remaining in the adult homes, state law authorizes the State to close adult homes and continue its current focus on increasing supported housing, consolidate under-utilized adult homes, or fill the vacated adult home beds. Trial Decision at 297. Thus, how the vacated adult

home units are handled is entirely within the State's discretion. As discussed at p. 16, *supra*, providing those adult home spots to homeless individuals, for instance, would result in cost-savings to the State.[10] Far from "exacerbat[ing] the low-income housing crisis in New York City" (Br. 18 n.7), compliance with the Remedial Order would enable the State to ameliorate this situation.

CONCLUSION

The Court should deny the State's motion for a stay pending appeal.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

/s/ Teresa Kwong
JESSICA DUNSAY SILVER
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
teresa.kwong@usdoj.gov
(202) 514-4757

[10] Although the stay motion refers (Br. 19) to *Olmstead*'s warning against queue jumping, no such danger exists here. There is no queue or waiting list for supported housing. Trial Decision at 276, 310.

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2010, a copy of the foregoing United States' Opposition To Appellants' Motion For Stay Pending Appeal was served by CM/ECF on:

Cecelia C. Chang
New York State Office of the Attorney General
120 Broadway, 25th Floor
New York, NY 10271

Anne Raish
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019

/s/ Teresa Kwong
TERESA KWONG
Attorney