10-235-cv(L)

10-251 (CON), 10-767cv(CON), 10-1190cv(CON)

United States Court of Appeals
for the Second Circuit

DISABILITY ADVOCATES, INC., UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

NEW YORK COALITION FOR QUALITY ASSISTED LIVING,
EMPIRE STATE ASSOCIATION OF ASSISTED LIVING,

Movants-Appellants,

-and-

DAVID A. PATERSON, in his official capacity as Governor of the State of New York, RICHARD F. DAINES, in his official capacity as Commissioner of the New York State Department of Health, MICHAEL F. HOGAN, in his official capacity as Commissioner of the New York State Office of Mental Health, THE NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE OFFICE OF MENTAL HEALTH,

Defendants-Appellants.

On Appeal from the United States District Court
For the Eastern District of New York

BRIEF OF AMICUS CURIAE EMPIRE STATE ASSOCIATION OF ASSISTED LIVING IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, counsel for Amicus Curiae Empire State Association of Assisted Living, certifies that:

1. Amicus Curiae is a non-profit association that does not have any parent corporations and is not owned, in whole or in part, by any publicly held corporations.

DATED: Albany, New York
July 30, 2010

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STATEMENT OF INTEREST

ESAAL is a statewide, not-for-profit trade association that has been dedicated to strengthening New York State's assisted living industry and promoting the best interests of providers and residents for more than 30 years. It is the only association that exclusively represents the assisted living industry statewide, both for-profit and not-for-profit, serving close to 250 Assisted Living Residences, Adult Homes and Enriched Housing Programs throughout New York State. These member residences are home to more than 23,000 people.

ESAAL members provide services to a broad cross-section of the population, including the wealthy and middle income residents ("private pay"), the needy ("SSI recipients"), the frail elderly, and those with disabilities, including residents who receive mental health services. As the largest assisted living trade association in New York, ESAAL has extensive knowledge and experience regarding long term care services for residents with mental illness, and the challenges associated with the care needs of residents with a mental health diagnosis. ESAAL has a history of litigating on behalf of its members, and has participated as amicus curiae in State and Federal Courts.

Within 60 days of the District Court's Memorandum Order of September 8, 2010, ESAAL, along with the New York Coalition for Quality Assisted Living ("NYCQAL") and the United States of America moved to intervene. The District

Court denied ESAAL and NYCQAL's motions as being untimely, but the District Court granted the United States' motion to intervene. (SPA 205-217).

ESAAL submits this Amicus Curiae Brief in support of Defendants-Appellants' appeal of the District Court's final Order and Judgment.[1] ESAAL seeks to provide input to the Court regarding the specific needs of the resident populations in the impacted adult homes. ESAAL supports the Defendant's appeal, since the judgment and remedial Order are inconsistent with the Americans with Disabilities Act and the Supreme Court's decision in *Olmstead v. L.C.*, 527, U.S. 581 (1999).

All parties have consented to the filing of this brief.

[1] Pursuant to Local Rule 29.1, no counsel of any party assisted in the preparation of this brief, and no one other than amicus curiae and its members contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The District Court's Order must be reversed because it is inconsistent with the requirements of the Americans With Disabilities Act ("ADA") and improperly sets forth a judicially created "level of benefits", which has no foundation in the ADA's regulation of governmental services.

The District Court's remedial order is also overbroad, and inconsistent with the Supreme Court's holding in *Olmstead v. L.C.*, 527 U.S. 581 (1999). The Order of the District Court ignores *Olmstead's* holding that a state "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 v. L.C.* 527 U.S. 581, 602 (1999).

In devising a new and unprecedented eligibility determination for supported housing, the District Court has created a court-defined and court-supervised benefit program, in which supported housing providers unilaterally determine which adult home residents are qualified for the very same housing programs that they themselves provide. The District Court's Order and Judgment also ignores the actual needs of the residents, jettisons the clinical assessment process, and mandates a presumptive qualification for supported housing. The remedial order directs the State Defendants to fund a supported housing apartment, and whatever services are needed, even if the resident has moderate dementia, is eligible for a

nursing home, and may be a danger to himself or others. The lower court's order has no basis in the ADA, *Olmstead*, or the evidence in the record before this Court. For these reasons, the Order and Judgment must be vacated, and Plaintiff's Complaint dismissed.

ARGUMENT

POINT I

THE STATE DEFENDANTS DID NOT VIOLATE THE ADA, AND THE LOWER COURT'S ORDER MUST BE VACATED

A. The District Court's Ruling Represents an Unprecedented Expansion of the ADA Claim Recognized by Olmstead

The District Court improperly relied upon *Olmstead v. L.C.*, 527 U.S. 581 (1999) in ruling that defendants discriminated against plaintiff's constituents living in the 28 impacted adult homes in New York City. In *Olmstead*, the Supreme Court held that two specific forms of state action may constitute unlawful discrimination under Title II of the ADA: (1) conditioning access to state services on residence in an institution; (2) forcing individuals to remain confined in segregated state institutions when such confinement is not medically warranted. *Olmstead,* 527 U.S. at 593.

Further, the Supreme Court in *Olmstead* held that Title II creates only a qualified right on the part of individuals "confine[d]" by the state to community – based treatment if [1] "the State's treatment professionals determine that such

placement is appropriate," [2] "the affected persons do not oppose such treatment", and [3] "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead*, 527 U.S. at 593, 607. Plaintiff did not establish any of these prerequisites to a Title II discrimination claim.

The District Court's remedial order requires the State to provide supported housing to all of Plaintiff's constituents who desire such housing, regardless of future cost, and without individualized assessments of residents performed by an independent entity. (SPA 237-239). In so ruling, the District Court misappropriated the *Olmstead* holding to improperly transform the delivery and funding of an important part of New York State's mental health services program.

The District Court's criteria for adult home residents who are qualified for supported housing is also inconsistent with *Olmstead*, in which the Court held that "states are required to provide community-based treatment for persons with mental disabilities when a state's treatment professionals determine that such placement is appropriate. *Olmstead* 527 U.S. at 607. The governing regulation establishes that a pubic 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 discussed herein, the remedial order replaces the judgment of the State's treatment professionals, with the unilateral

decisions of supported housing providers who will financially benefit from placement of adult home residents into their supported housing programs.

B. Adult Home Residents Live In Integrated Settings.

In *Olmstead,* the Supreme Court held that, in limited circumstances, the ADA requires that qualified individuals with mental illnesses be transferred from institutional facilities to more integrated settings. *Olmstead*, 527 U.S. at 587, 591-92. Neither *Olmstead, n*or Title II of the ADA, contemplate the applicability of the ADA to privately operated adult home residences. However, even if this Court were to find that the ADA applies to adult homes, nothing in that statute or its governing regulations would require that adult home residents be moved to supported housing, because adult homes are integrated, community based residences.

As defined by the governing regulations, integrated settings are those that permit opportunities for contact with nondisabled persons. 28 C.F.R.. § 35.130(d). Adult homes are private residences, not state institutions. They are not mental health facilities, which are separately licensed by the New York State Office of Mental Health.

The evidence before the District Court established extensive, meaningful opportunities to have contact with nondisabled persons. Virtually all of the impacted adult homes are located close to stores, restaurants, parks, religious

institutions, beaches and/or other recreational opportunities. (JA i76-78:526-533; SLX 387-88; SLX 482-483). The adult homes are also located near public transportation. With few exceptions, adult home residents who are plaintiff's constituents have the freedom to come and go as they please.

Adult home staff, mental health providers, and other community resources arrange for and facilitate additional interaction with nondisabled persons. New York State Department of Health Regulations require adult homes to provide and encourage participation in community-based activities and to assist residents to maintain family and community ties. 18 NYCRR § 487.7(g) & (h). In furtherance of these regulations, adult homes organize outings to various community and recreational activities, provide opportunities for residents to attend religious services, and encourage residents to maintain contact with family members and friends. In short, adult home residents have access to an active, community-based social life.

The District Court, in finding an ADA violation by the state defendants, assumed that supported housing is more integrated than adult homes. While plaintiff, and the District Court, may believe that supported housing is preferable as a matter of public policy, this does not establish Title II discrimination by defendants. *Leocata v. Wilson-Coker*, 343 F. Supp.2d 144, 154-56 (D. Conn. 2004). For many residents who rely on SSI income, a private adult home provides

affordable housing with need services. Indeed, living alone in a supported housing apartment may result in more isolation, with residents having little contact with nondisabled persons, and resultant loneliness and depression. Residency in an adult home provides a social model of congregate housing, with frequent opportunities for interaction with other residents, (including nondisabled residents), family and the community at large. The District Court's ruling improperly injects ADA discrimination and *Olmstead's* integration mandate to the adult home model of long term care.

C. Adult Home Residents Include a Diverse Population Who Are Not Eligible for Supported Housing Under *Olmstead*.

The record evidence established that adult home residents in the 28 "impacted facilities" are a diverse group of individuals. The current resident profile varies by: (1) income level - the wealthy and middle income (private pay), and the financially needy (SSI recipients), (2) age – the elderly and younger residents; (3) personal care needs – those with limited personal care needs and those who require extensive assistance with most personal care tasks; (4) mental health status – those residents with a mental diagnosis and those without such a diagnosis; and (5) health care status – those with chronic medical conditions

and those who require minimal medical attention. In many cases, there is more than one reason why a resident resides in an adult home. Adult homes reflect the diversity of their residents, and are not monolithic in their operational practices or resident profiles.

The District Court identified twenty-eight (28) "impacted" adult homes in the five boroughs of New York City (SPA 85-86) that will be subject to the Court's remedial plan. Eight of the twenty-eight impacted adult homes identified by the Court are ESAAL members.[2] Approximately 20% of the 4300 impacted adult home residents (the plaintiff's "constituents") with a mental health diagnosis live in ESAAL member facilities. As discussed herein, the empirical reality is that a large percentage of the mental health residents in these impacted adult homes are not eligible for supported housing, and they have ongoing personal care, health care and supervision needs that make a clinical assessment to evaluate their readiness for supported housing completely unwarranted.[3]

Significantly, none of the plaintiff's constituents applied for or otherwise sought supported housing alternatives to residence in an adult home. Nevertheless,

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[2] The eight adult homes are: Long Island Living Center (Queens County), Elm-York (Queens County), New Central/Central Assisted Living (Queens County), Castle Senior Living at Forest Hills (Queens County), Scharome Manor (Kings County), Anna Erika Adult Home (Richmond County), New Broadview Manor (Richmond County), and Bronxwood Home for Adults (Bronx County).

[3] Eligibility, in this context, relates solely to whether the residents were the subject of the Defendants' alleged discrimination, not whether the residents might otherwise be entitled to supported housing services.

the District Court has ruled that the ADA was violated by defendants because the State failed to ensure that no individual with a mental health diagnosis resides in an impacted private adult home.

1. **Private Pay Residents Are Presumed to Have Made an Informed, Conscious Choice to live in an Adult Home, and as such, are Not Eligible for Supported Housing, and Should Not be Subject to the Remedial Order.**

The ADA does not force accommodations on individuals who do not desire an accommodation. *Olmstead v. L.C.*, 527 U.S. 581, 587, 602 (1999). This is premised on the notion that an individual who exercises free choice cannot be the victim of discrimination relating to that choice. *Olmstead*, *supra* at 602 (stating the federal requirement does not require "that community-based treatment be imposed on patients who do not desire it.")

With respect to Plaintiff's discrimination claims in this litigation, each of the eight impacted ESAAL members have residents who pay for their housing with private funds. In some of the impacted adult homes, the majority of the residents, including residents with a mental health diagnosis, are private pay residents who have chosen to live in that adult home. (PX-774). By way of example, the 2008 NY DOH Census Report established that 107 of the 111 residents of Scharome Manor (Kings County) were private pay. (PX-774, p. 11). These residents received no SSI benefits or other public funds to subsidize their residency. Similarly, the majority of residents (including residents with a mental health

diagnosis) at Castle Senior Living at Forest Hills (Queens County) are private pay, do not receive any OMH funds or other state funds, and have made a conscious decision to live in that facility rather than a myriad of other adult home and other housing options such as senior housing. (PX-774, p. 21).[4] The District's court's remedial order ignores this distinction, and subjects these private pay residents to a persistent "in reach" protocol which they neither want nor need. (SPA 236-238).

The District Court justified the unprecedented mandate contained in the remedial order by stating that defendants' obligations only relate to adult home residents "who desire placement in supported housing" if qualified (SPA 234-235). However, the "in-reach" protocol set forth in Paragraph "6" of the remedial order permits the supported housing providers themselves to continually review and assess adult home resident's preferences, and "explore and address the concerns" of residents who decline supported housing. (SPA 237). The persistent "in-reach" contemplated by the Court, calls into question whether an objective choice can be made. This is particularly true for mental ill residents, many of whom are elderly residents with dementia or other conditions which affect their judgment. Notably, the remedial order makes no reference to the participation of a resident's immediate family in the decision making process.

[4] The 2008 DOH Census Report was discussed during the trial, but not produced until after the trial. The District Court subsequently admitted the 2008 Census Report as evidence (See *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 195 (SPA 85-86).

By definition, private pay residents do not desire a supported housing model, or any other alternate accommodations, since they have made an informed, personal choice to expend their own funds to live in the particular adult home. Private pay residents with a mental health diagnosis have the financial ability to move to another residence if their current residence is too restrictive or otherwise not to their liking. Accordingly, private pay residents with a mental health diagnosis should not be considered eligible for supported housing. They do not receive any State funding for services provided by OMH, and were improperly included as a focus of the District Court's remedial order.

2. Residents in an Assisted Living Program Are Not Eligible For Supported Housing.

Residents of the Assisted Living Programs in the impacted adult homes were improperly considered eligible for supported housing. The Assisted Living Program ("ALP") is the only "assisted living" environment that is reimbursed by Medicaid in New York, and by definition serves individuals who are "medically eligible for, and would otherwise require placement in, a nursing home..." (18 NYCRR 494.4[c][1]).

The ADA only requires a state to provides services in an alternative community-based program if an individual "meets the essential eligibility requirements" for habilitation in a community-based program. *Olmstead*, 527 U.S. at 602. The Supreme Court in *Olmstead* specifically observed that "absence such

qualification, it would be inappropriate to remove a patient from the more restrictive setting." *Olmstead* at 602. Further, the State "generally may rely on the reasonable assessments of its own professionals". *Id.*

ALP placement occurs following clinical assessment by an independent Certified Home Health Agency ("CHHA") which is reviewed and approved by County Officials, as well as an evaluation by their primary physician. The ALP program is unique in that it allows Medicaid-funded nursing and home care services to be delivered in adult care facilities. These residents have substantially greater health care and personal care needs and require more assistance than is provided in adult homes. This assistance includes help with both scheduled and unscheduled needs.

Overwhelmingly, residents in the ALP are elderly and require hands-on assistance from staff various times during the day and night with the activities of daily living, including assistance with dressing, bathing, and maintaining continence either by being escorted to the restroom on a regular schedule or assisted with changing their incontinence undergarments. ALP residents need more intensive assistance from staff, along with skilled nursing and medical assistance to carry out the activities of daily living such as walking from one room to the other, dressing, and using the bathroom. Many are fall risks who need ongoing monitoring assistance with a multitude of tasks, including transferring

from their beds to chairs, feeding and nutrition, and assistance with toileting, bathing and grooming. Many need regular assistance to manage their incontinence. Of the 864 residents with a mental health diagnosis in the eight ESAAL member impacted facilities, 325 are ALP residents who, but for the ALP program, would require services in a nursing home. (*See,* DOH 2008 Census Report, PX-774). (SPA-85-86).

These ALP residents are presumptively not eligible for independent living, since they are incapable of performing activities of daily living without regular assistance, both scheduled and unscheduled, and may have also have ongoing skilled nursing needs, such as insulin injections once or twice per day. Safe and effective supported housing services for these ALP residents would require a live in caregiver, as well as daily visits by skilled nursing staff. The District Court remedial order ignores this reality, by using a "one size fits all" approach to characterizing the needs of adult home residents.[5]

3. Residents Without a Qualifying Mental Health Diagnosis Are Not Eligible for Supported Housing.

The regulations governing the operation of adult homes require each operator to submit a statistical report. This report is the primary source of data regarding occupancy and resident characteristics. In the remedial order, the lower

[5] As an example, at the Long Island Hebrew Living Center, nearly two-thirds of the residents with a mental health diagnosis are part of the ALP program. (PX-774 p. 22). All of these residents are over sixty-five years old.

court disregarded the conflict between various definitions of "mental health" in the complex regulatory structure governing adult homes. The Office of Mental Health ("OMH") and the Commission on Quality of Care and Advocacy for Disabled Persons ("CQC"), define an "impacted" facility as one in which:

> At least twenty-five percent or twenty-five residents, which ever is less, have at any time received or are receiving services from a mental hygiene provider which is licensed, operated or funded by the Office of Mental Health or the Office of Mental Retardation and Developmental Disabilities.

(Mental Health Law §45.09[a]; §45.10[a]).

However, the Department of Health ("DOH") definition of "mental health", for purposes of reporting data for the annual adult home census (which was used by the lower court to identify the adult homes affected by the court decision), requires adult home operators to count a considerably broader segment of the resident population. Specifically, operators are instructed to include every resident:

> Who has a history of mental illness as manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that the person has received or is receiving mental health services. That service must be licensed or funded by the Office of Mental Health or be provided by a private practitioner specializing in mental health. (Emphasis supplied).

(Docket No. 361, Attachment 1, p. 16-19) (JA 37).

Adult home operators have been advised by DOH to report all residents who have ever received "mental health" services. This would include any treatment for depression, a condition which is common among the frail elderly population many adult homes tend to serve who may have suffered depression due to a loss of a spouse or loved one, a loss of independence or other situations associated with the aging process. Indeed, some estimates are as high as 50-75% of the number of elderly that develop depression associated with the aging process and/or dual diagnoses such as Alzheimer's/dementia, many of whom have never exhibited any chronic or serious persistent mental illness in their lifetime. Because of the statistical reporting guidance, residents with depression were counted simply if they were on a common antidepressant, prescribed by their primary physician, without any services from a psychiatrist or other mental health professional whatsoever. (Docket No.36, Attachment 1, p. 16-19) (JA 37). As a result, the twenty-five percent or twenty-five residents' threshold is reached much more quickly than the statutory definition contained in the Mental Health law.

The confusion regarding reporting of a mental health diagnosis further demonstrates that the remedial order captures residents that should not have been the subject of the Plaintiff's ADA claim. According to 2008 DOH census data, upon which plaintiff relied, and which is included in the Record and Factual Findings of the District Court, thirty-six percent of adult homes in the State are

currently classified as "impacted." (PX-774). It is unclear how many of these homes have received this categorization due to over-classification of mental health diagnosis, rather than because a significant portion of the resident population is living with a mental disability contemplated by the Office of Mental Health definition used by the District Court. The District Court ignored these statistical realities when defining the number of mental health residents subject to the court's remedial order and judgment.

POINT III

THE REMEDIAL ORDER IS OVERBROAD, AND FAILS TO CONSIDER THE ACTUAL NEEDS OF THE RESIDENTS

A. The District Court's Criteria for Supported Housing Eligibility is Inconsistent with the ADA, and Subverts the Clinical Judgment of Defendants, and Defendants' Long Standing Statutory and Historical Role in Assessing and Determining the Actual Needs of Adult Home Residents with a Mental Health Diagnosis.

In *Olmstead*, the Court held that the State has an obligation to provide services and programs in community-based settings only if the individual with disabilities "meets the essential eligibility requirements for habilitation in a community-based program." *Olmstead,* 527 U.S. at 602 (199) (citing 28 C.F.R. 35.130(d)).

The lower court's ruling that "virtually all" residents with a mental health diagnosis are eligible for supported housing violates the Supreme Court's holding

in *Olmstead*, that the determination for supported housing is made by the State's treatment professionals through the clinical assessment process, to determine if any individual is qualified. *Olmstead* v. L.C, *supra*, at 607. *See* also *Rodriguez v. City of New York*, 197 F.3d 611 (2d Cir. 1999).

The remedial order's sweeping mandate is based on the unsupported premise that "virtually all" adult home residents with a mental health diagnosis are qualified to live in supported housing. (SPA 238-239). This, despite the lack of evidence of the nature and extent of the support services that will need to be provided to any of the plaintiff's individual constituents. In this sense, the District Court's remedial order has no foundational basis, and is based on the circular assumption that virtually all adult home residents are qualified to live in supported housing, without any professional assessment or empirical data to identify which support services must be provided, and which constituents require them.

The District Court's remedial order requires that residents be treated as presumptively qualified for supported housing unless they have one of three disqualifying factors: (1) have severe dementia, (2) have a high level of skilled nursing needs that cannot be met in supported housing with services provided by Medicaid, home care or waiver services, or (3) are likely to cause imminent danger to self or others (SPA 238-239). The District Court's standard for eligibility has no basis in any professional or governmental definition of mental illness. ESAAL

believes the remedial order uses an improper and potentially dangerous criteria, since all categories of dementia, not only severe dementia, are specifically excluded from the qualifying mental health diagnosis set forth in the OMH definition relied on by the Court.

1. **Adult Homes Include Frail, Elderly Residents with Extensive Personal Care Needs That Cannot Be Met in a Supported Housing Model of Long Term Care.**

The lower court's remedial order makes no reference to the demonstrated fact that the majority of adult homes at issue in this litigation serve an aging population, whose needs include assistance with activities of daily living ("ADLs") such as ambulation, dressing, bathing, and continence management. While these are not "skilled nursing needs", they are ongoing and provided on both a scheduled and unscheduled basis. Because of the age and frailty of many of ESAAL members' residents, they need staff present and available to them on a 7 days per week/24-hour basis.[6]

[6] If individuals with these kinds of frequent, but unscheduled, personal care needs were living in single site settings, such as supported housing apartments scattered throughout New York City, the costs associated with providing home care aides to them would be astronomical. As noted above, many of these adult home residents with a mental health diagnosis require personal care, monitoring and supervision at all hours of the day and night. As of 2007, SSI recipients with persistent medical illness and residing in adult homes in New York City received funding at an annual rate of $16,416.00 per year. (JA 918-919). These funds are used by residents to pay for room, board, three meals a day, housekeeping, personal care, laundry services, and 24-hour supervision. The District Court's conclusion that supported housing services for these high need mental health residents will cost less than this amount, flies in the face of this economic reality.

Seven of the eight ESAAL member homes report that more than two-thirds of their mental health population is over the age of 65. The 2008 Department of Health census figures show that, of the mental health residents reported therein, seventy-five percent or more were over the age of 65 in six of the eight ESAAL member homes. (PX 774). In two homes, more than 97% of residents are over the age of 65. More than two-thirds of the residents in these homes, including residents with a "mental health diagnosis", are over the age of 80; any proposal to transfer this population to supportive housing fails to consider these persons' individual needs. (*See* DOH Census Reports, PX-283, PX-774). These residents' needs are not considered in the District Court's over-generalized and undifferentiated supported housing qualification criteria.

Importantly, two of the eight ESAAL members identified as impacted facilities in the Court's trial decision (SPA 86), were not named in the plaintiff's complaint, and no evidence was submitted regarding these facilities during the trial of this matter in May and June of 2009. Scharome Manor, a Kings County adult home, which was added to the District Court's list of impacted facilities after the trial was concluded, had a 2008 census of 111 residents. Thirty of these residents were identified on the census report as having a mental health diagnosis. However, all of the residents with a mental health diagnosis are over sixty-five years old, with more than ninety percent of these thirty mental health residents being over

eighty years old. (PX-774, p. 11) (SPA 85-86). In this context, the District Court failed to recognize that the need for mental health services, or a previous mental health diagnosis, is often ancillary to the primary reason for residence at Scharome Manor. Moreover, the "mental health" services that many of them require are associated with depression due to aging and not any kind of chronic mental health condition.

Similarly, the census report for Castle Senior Living at Forest Hills, in Queens County, indicates that all of the residents with a mental health diagnosis are over sixty-five years old. More than two-thirds of the mental health residents are over seventy-five years old. (PX-774, p. 11) These impacted facilities were not considered by the District Court during the trial of this matter, or in the order and judgment Defendants appeal from.

2. Many Adult Home Residents Require Medication Management and Skilled Nursing That Cannot be Provided in Supported Housing on a Cost Effective Basis.

The District Court's remedial order also fails to consider resident needs for medication management and medication assistance. In virtually all of the ESAAL member facilities, the majority of residents with a mental health diagnosis take four or more medications on a daily basis. By way of example, in Scharome Manor, all of the residents take four or more medications on a daily basis, and sixty-five percent of the residents take ten or more medications on a daily basis.

(Docket No. 361, Attachment No. 1, JA 37). Significantly, fully ninety-five percent of the residents at Scharome Manor with a mental health diagnosis are eighty-five years old or older. (PX-774, p. 11). At the New Central Adult Home in Queens County, ninety percent of the mental health residents take seven or more medications on a daily basis. (Docket No. 361, Attachment No. 1, JA 37). Clearly, the reality of the residents' needs for medication management and assistance is critical to a meaningful assessment criterion for supported housing eligibility and readiness.

The care of every adult home resident is directed by their own personal physician, who completes a medical evaluation form at least annually, and more often if there is a change in the resident's condition. 18 NYCRR § 487.4(k). This medical evaluation contains a physician certification as to whether the resident's needs can be met in an adult home. (See DOH Form 3122). Residents and their families have the opportunities to regularly reassess the residents' needs. It is beyond dispute that "[t]he opinion of the responsible treating physician...ought to be given the greatest of deference. It is a common phenomenon that a patient functions well with medication, yet, because of the mental illness itself, lacks the discipline or capacity to follow the regime the medication requires. This is illustrative of the factors a responsible physician will consider in recommending an

appropriate setting or facility for treatment." *Olmstead v. L.C.*, 527 U.S. 581, 610 (1999) (Kennedy, J., concurring).

The District Court's ruling presumed that virtually all residents are eligible for supported housing, based largely on the testimony of one witness, who never clinically assessed (or even met) any of the 4,300 Adult Home residents who are now subject to the District Court's Order. (SPA 117-149). Under the remedial order, any assessment of mental health residents will be done by supported housing providers, not treatment professionals.

The District Court's presumption ignores the depth of the assessment required to identify residents' needs. The failure to carefully examine all of an individual's personal care, functional, medical and mental needs will likely result in those needs being unmet. ESAAL submits that a comprehensive, individualized clinical assessment is essential to accurately identify a person's needs through the use of independent clinicians to ensure that the individual receives the appropriate services. For this reason, the District Court's remedial order is dangerously overbroad.

This Court should reject the lower court's proposed criteria for assessing residents' suitability for supported housing services. The remedial order and judgment is untethered from the requirements of the ADA, and creates an entitlement to supported housing, as well as unlimited support services, needed to

maintain an otherwise unqualified resident in an apartment. This entitlement does not exist, and *Olmstead* does not mandate the creation of this entitlement.

Adult Home Residents, including residents with a mental health diagnosis, reside in an adult home as a matter of choice. To be sure, for some residents, their ability to freely choose a home is tempered by their individual needs, financial situation, family circumstances, and other factors which limit all people who choose a place to live. However, the District Court's ruling that Defendants discriminated against Plaintiff's constituents, by confining them to an "institution", has no basis in law or fact. Further, this Court has held that the ADA requires nondiscriminatory access to existing services and benefits for the disabled, but does not mandate "additional" or "different services" or benefits for the disabled, "no matter how great their need for the services" may be. *Wright v. Giuliani*, 230 F.3d 543, 548 (2d Cir. 2000).

B. The District Court's Remedial Plan "In-Reach" Protocols are Inconsistent with the ADA and Olmstead.

As part of the sweeping remedial plan, the lower court created an unprecedented "in-reach" protocol for supported housing providers to enter adult homes, and "inform" residents about the "benefits" of supported housing (SPA 37-38). The lower court mandated that this in-reach protocol should be continued even for residents who decline or "are ambivalent" about moving to supported housing. SPA 37-38. The remedial plan does not include any corresponding

information about the services offered and features of adult home residency. This "in-reach" opportunity directed by the lower court not only applies to current adult home residents, but also applies to the guaranteed supported housing for future adult home residents who have not been subjected to any discrimination or other cognizable injury under Title II. The remedial order thus calls into question whether informed, voluntary choice is possible, and this provides another basis for vacating the remedial order and judgment of the court below. The issue of coercive in-reach is highlighted by the fact that as noted herein, a substantial percentage of the adult home residents with a mental health diagnosis constitute a frail elderly population, including many residents with dementia and other mental health conditions affecting their ability to make an independent, voluntary choice. (PX-774). The in-reach protocols are inconsistent with *Olmstead*, and provide a separate and independent basis to vacate the District Court's Order.

CONCLUSION

For the foregoing reasons, the Order and Judgment of the District Court should be vacated, with the action remanded to the District Court with direction to enter judgment for Defendants.

Dated: Albany, New York
July 30, 2010

HINMAN STRAUB P.C.

By _____

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Rule 32(a)(7)(b) of the Federal Rules of Appellate Procedure because it contains 6,027 words, excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

This Brief complies with the type base requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because it has been prepared using 14 Times New Roman in Microsoft Word.

Dated: July 30, 2010

HINMAN STRAUB P.C.

By _____
David T. Luntz

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DISABILITY ADVOCATES, INC., UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

NEW YORK COALITION FOR QUALITY ASSISTED LIVING, EMPIRE STATE ASSOCIATION OF ASSISTED LIVING,

Movants-Appellants,

DAVID A. PATERSON, in his official capacity as Governor of the State of New York, RICHARD F. DAINES, in his official capacity as Commissioner of the New York State Department of Health, MICHAEL F. HOGAN, in his official capacity as Commissioner of the New York State Office of Mental Health, THE NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE OFFICE OF MENTAL HEALTH,

Defendants-Appellants

CERTIFICATE OF SERVICE

10-235-cv(L)

10-251 (CON), 10-767cv(CON), 10-1190cv(CON)

I hereby certify that on July 30, 2010, the Amicus Curiae Brief Of Empire State Association Of Assisted Living In Support Of Defendants-Appellants Appeal was filed with the Clerk of the Court via ECF and Federal Express and served in accordance with the Federal Rules of Appellate Procedure, and/or the Second Circuit Court of Appeals Local Rules, and/or the Second Circuit Court of Appeals Rules on Electronic Service upon the following parties and participants:

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