UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DISABILITY ADVOCATES, INC.,

Plaintiff,

v.

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

Defendants.

03 Civ. 3209 (NGG) (MDG)

DISABILITY ADVOCATES INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PROPOSED REMEDIAL PLAN AND IN SUPPORT OF ITS PROPOSED REMEDY

November 24, 2009

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Preliminary Statement

Disability Advocates, Inc. ("DAI") has proposed a plan that both sets forth the elements necessary to remedy the discrimination in the State's mental health service system and accords proper deference to the State in accomplishing the tasks necessary to bring its system into compliance with Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (RA). Nothing in DAI's plan is either novel or unsupported by the extensive findings of the Court. In contrast, the so-called "remedial plan" proposed by the State evidences a complete lack of commitment to remedying the discrimination found in this case and a disregard for many of the Court's findings of fact and conclusions of law. It is also riddled with contingencies, loopholes, and arbitrary deadlines that will all but guarantee that DAI's constituents will remain segregated from their communities and that discrimination in the State's mental health service system will persist.

Defendants propose to make integrated settings available to only a fraction of the number of people whom the Court found are today unnecessarily segregated in institutional Adult Homes in violation of the ADA and the RA.[1] They also resist developing integrated settings for any of DAI's constituents (1) until after the State has re-determined each Adult Home resident's eligibility for supported housing using its own, deeply flawed standards of "clinical appropriateness," "education" and "supports,"

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[1] As used herein and consistent with the Court's Memorandum and Order dated September 8, 2009, the term "Adult Homes" refers to adult homes in New York City with more than 120 beds and in which twenty-five residents or 25% of the resident population (whichever is fewer) have mental illness. *Disability Advocates, Inc.* v. *Paterson*, No. 03-CV-3209 (NGG) 2009 WL 2872833, at *1 (E.D.N.Y. Sept. 8, 2009).

and (2) unless numerous contingencies occur. What's more, the State has proposed to limit relief only to people residing in Adult Homes on the date the Court issues its injunction; anyone moving into an Adult Home after that date will not be entitled to the benefits of this Court's decision, in clear violation of federal law. Bringing defendants' discriminatory system into compliance with the ADA and the RA requires far more than the grudging measures offered by defendants.

For the reasons set forth below, DAI respectfully requests that the Court reject the proposed order and judgment submitted by defendants and issue an injunction adopting the remedial provisions set forth in DAI's Proposed Findings of Fact and Conclusions of Law and in the accompanying Proposed Order and Judgment. DAI's proposed provisions are necessary and appropriate to remedy defendants' systemic violations of the law and will ensure that DAI's constituents have the opportunity to live and receive services in the most integrated setting appropriate to their needs.

Argument

Where discrimination has been found, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Milliken* v. *Bradley*, 433 U.S. 267, 281 (1977) (*quoting Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). Injunctions issued to remedy civil rights violations should be (1) related to the scope and nature of the violation of federal law, (2) "designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct,'" and (3) attentive to the interests of state and local authorities in managing their own affairs. *Milliken*, 433 U.S. at 280-281 (citing *Swann*, 402 U.S. at 16 and *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974).)

The extent of the civil rights violations in this case is significant. The Court has found that approximately 4,300 people with mental illness have been discriminated against in violation of the ADA and the RA and are qualified to receive services in more integrated settings. DAI's proposed remedial plan is based on the extensive findings of this Court, contains elements tailored to effectuate the remedy of this large scale civil rights violation, and accords appropriate deference to the State's interest in administering its own service system.

I. DEFENDANTS SHOULD BE REQUIRED TO REMEDY THEIR VIOLATION OF FEDERAL LAW WITHIN FOUR YEARS

DAI has proposed that the Court require defendants to ensure that, within four years, (1) all current Adult Home residents with mental illness who desire placement in supported housing have been afforded such a placement if qualified, (2) all future Adult Home residents with mental illness (individuals who are admitted to Adult Homes during and after the four-year transition period) who desire placement in supported housing are promptly afforded such a placement if qualified, and (3) no individual who is qualified for supported housing will be offered placement in an Adult Home unless, after being fully informed, he or she declines the opportunity to receive services in supported housing.[2]

In order to afford DAI's constituents full relief, the remedy adopted in this case must include the expansion of supported housing with all necessary support services and appropriate in-reach—including coordinated and committed education, assessments,

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[2] Scattered site supported housing is the type of service setting DAI seeks for its constituents, and it is the far more integrated setting for which the Court found DAI's constituents are qualified. *Disability Advocates, Inc.*, 2009 WL 2872833, at *1, 19.

encouragement, and engagement—to ensure the successful transition of DAI's constituents to more integrated settings. It also must include measures to ensure that when current Adult Home residents move out, the homes will not be "backfilled" with similar individuals who, if fully informed, would choose instead to receive services in supported housing. Otherwise, DAI's constituents will be subjected in the future to the same civil rights violations present today.

A. Sufficient Supported Housing Capacity Must Be Developed

Despite the Court's finding that roughly 4,300 people with mental illness in Adult Homes are not in the most integrated setting appropriate to their needs and are qualified for supported housing, the defendants propose to develop only 200 supported housing beds per year for the next five years, for a total of 1,000 beds. (Defts' Proposal at ¶ 2(b).) That proposal is woefully inadequate.

Defendants claim that their proposal is justified because of the "current fiscal crisis," because of the needs of other populations, and because they simply do not agree with the finding that virtually all of DAI's constituents are qualified for and interested in supported housing. (Defts' Mem. 6-7; *see also* Myers Aff. ¶ 36 ("OMH believes that fewer than 4,300 Current Adult Home Residents will be determined to be eligible and clinically appropriate for Supported Housing and choose to move.").) They also claim that their proposal is supported by the findings of the Adult Care Facilities Workgroup; findings they disavowed and tried to exclude from evidence at trial. (*See* Defts' Mem. 6-7.) Each of defendants' excuses, however, was explicitly rejected by this Court.

First, the Court rejected at trial defendants' argument that the relief DAI seeks cannot be accommodated because of the "current fiscal crisis." *Disability*

Advocates, 2009 WL 2872833, at *82 (finding that "defendants did not present any evidence showing a nexus between the current state of the economy and the specific relief DAI seeks" and also that defendants "have not shown that the current economic circumstances have impacted the State's ability to develop supported housing, which requires no outlay of capital."). To the contrary, the Court found that

> Defendants have failed to meet their burden to show that the requested relief would increase costs or limit the State's ability to provide services to other individuals with mental illness … As Mr. Jones's analysis showed, when the cost of Medicaid services for individuals in Adult Homes and supported housing is properly considered, the annual cost to the State of serving an Adult Home resident in supported housing is on average $146 *cheaper* than the cost of serving that resident in an Adult Home.

Id. at *80.

Second, the Court found that virtually all of the approximately 4,300 individuals with mental illness at issue in this case are not receiving services in the most integrated setting appropriate to their needs. *Id.* at *1. Defendants' proposal to develop only 1,000 supported housing beds over five years is in blatant disregard of that finding.[3] Defendants refer to the findings of the Adult Care Facilities Workgroup as support for their proposal, but the remedy they seek is in fact inconsistent with that report, which found that more than 6,000 individuals could be moved to more integrated settings. *Id.* at *33, 44, 61, 78. Defendants also ignore the significant body of evidence upon which the

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[3] Defendants' proposal is also deficient in that it proposes to defer the funding and development of supported housing capacity until after "educational opportunities" and assessments are conducted. (Defts' Mem. 6.) Defendants' proposed timetable makes no sense except as a delay tactic. Indeed, defendants fail to identify any basis for deferring the process of issuing requests for proposals until after assessments and "educational opportunities" are completed.

Court based its finding that virtually all of DAI's constituents are qualified for supported housing, including the conclusions of DAI's four expert witnesses, *id.* at *29-32, the testimony of the Former Senior Deputy Commissioner of OMH, *id.* at *32, the New York Presbyterian Hospital's Assessment Project commissioned by DOH, *id.* at *34, and many other documents produced by the State and testimony provided by the State's own witnesses,[4] *id.* at *38, 44.

DAI's proposal for the expansion of supported housing is commensurate with the scope of the discrimination that has occurred and is fully supported by the Court's findings of fact and conclusions of law. DAI proposed that defendants be required to develop at least 1,500 supported housing units per year until such time as there are sufficient supported housing beds for all DAI constituents who desire such housing, and no fewer than 4,500 supported housing beds total. This proposal is based on the Court's finding that approximately 4,300 people with mental illness are not currently receiving services in the most integrated setting appropriate to their needs. It is also based on the "convincing evidence [in the record] that the State is capable of expanding its supported housing program to meet the needs of Adult Home residents." *Id.* at *74 (explaining that "Pathways to Housing has served people who have come from Adult Homes, that they have done well in supported housing, and that Adult Home residents in general would do very well in supported housing"); *id.* (citing Dennis Jones's testimony

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[4] The total number of beds proposed by defendants is even less than the number of residents whom their own expert determined could be served in supported housing without additional supports. As this Court noted, defendants' expert Dr. Geller conceded that roughly one third of DAI's constituents could be served in supported housing "without ancillary services." *Disability Advocates*, 2009 WL 2872833, at *71.

that the responses of supported housing providers to requests for proposals issued by OMH demonstrate that "New York is capable of developing supported housing beds for Adult Home residents at a rate of approximately 1,500 per year for several years"). The Court credited the opinion of DAI's expert, Dennis Jones, who explained that in response to its 2005 request for proposal to develop supported housing, OMH received proposals to develop a total of 1,500 beds, that many supported housing providers have established working relationships with landlords, and that OMH has a history of taking on "big projects" such as the New York/New York III initiative to develop 9,000 units of supported housing for homeless individuals in the third phase of the initiative alone. *Id.* Given these findings, defendants should be required to develop 1,500 supported housing units per year for four years to remedy the discrimination in its service system for individuals with mental illness.

1. Defendants' Proposal Concerning "Additional" Supported Housing Units Is Disingenuous and Inadequate

Defendants' proposal includes language apparently intended to soften the impact of their clear disregard for the Court's findings and conclusions. They propose a provision that would obligate them "to fund additional supported housing" to address any shortfall of housing, but only if the State in its own discretion determines the following: (1) they have "a reasonable basis to believe" that the number of residents who are (a) "determined to be eligible and clinically appropriate" and (b) "determined to have completed any required training" will exceed the number of housing units available; (2) there is state funding available; (3) that state funding is not needed for other demands; and (4) there is no member of another "priority population" who is also seeking

supported housing. (Defts' Proposal ¶ 2(e).) By its own terms, this provision is entirely illusory.

Defendants also propose to designate Adult Home residents as a priority population for future supported housing and to *consider* designating them as a priority population for previously developed supported housing, except that (1) they will not have priority over people with mental illness discharged from psychiatric hospitals, homeless individuals, or persons referred from OMH licensed or funded housing, and (2) they will not be eligible for housing under the New York/New York agreements or any other "future similar agreement" with the City of New York. (Defts' Proposal ¶ 2(c).) This proposal is a similarly empty promise, and has already been rejected as inadequate by the Court.[5] *Disability Advocates*, 2009 WL 2872833, at *56-57.

2. Defendants' Proposed Expiration Date On Supported Housing Beds Should Be Rejected

Defendants' proposal is flawed for the additional reason that it imposes a three-month deadline on supported housing vacancies, providing that "if a designated bed is not filled with an Adult Home resident within three months, it will be made available to other individuals." (Defts' Mem. 7; Defts' Proposal ¶ 2(b)(ii).) Defendants assert that:

> If the eligibility for and interest in supported housing turns out not to be as great as anticipated, it would be wasteful

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[5] At trial, defendants claimed that this approach was part of their so-called *Olmstead* plan to enable Adult Home residents to access supported housing. The Court found that it could not be considered part of any *Olmstead* plan because notwithstanding their designation as a "priority population," Adult Home residents "continued, for the most part, to be denied access to supported housing because members of other priority populations received higher priority." *Id.* at *55-56. As the Court concluded then, "without a specific allocation of beds for Adult Home residents, Adult Home residents will not have access to supported housing as a practical matter." *Id.* at *57.

> and unfair to other persons with mental disabilities who are in need of housing to let the apartments sit empty.

(Defts' Mem. 7.) This provision, particularly when coupled with the other hurdles erected by defendants' proposal, will surely guarantee that at least some of the supported housing beds under the Proposal will be diverted away from DAI's constituents.

It should be rejected for several reasons. First, by raising questions about "eligibility," it treats one of the Court's primary findings of fact in this case as a hypothetical question that has yet to be answered. The Court already found that virtually all of DAI's constituents meet the eligibility requirements of supported housing. *Disability Advocates*, 2009 WL 2872833, at *43. Second, it presumes that if any supported housing bed is vacant for any period of time, that vacancy is due to a lack of interest or eligibility on the part of DAI's constituents, rather than any deficiencies on the part of the defendants or any aspect of their plan. Naturally, if DAI's constituents are not given meaningful choices and instead are offered units that may not meet their needs (for example, to be near family members or friends), defendants may have difficulty quickly filling the units, but that problem would be of their own making.[6] The three-month deadline also ignores the other factors that the Court found hindered Adult Home residents from moving, such as the for-profit nature of Adult Homes and the anxiety that years of institutionalization have caused. *Id.* at *49-50. Defendants' proposed three-month window for filling beds is inappropriate, creates perverse incentives, and is

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[6] When the legislature forced OMH to develop 60 beds of supported housing, OMH did not quickly fill the beds because its outreach efforts were slow to start, and lackluster once they did start. Under the defendants' proposed remedy, every one of the 60 supported housing beds would have been given to others, and Adult Home residents would have received no supported housing.

unnecessary if the supported housing apartments are developed, as they should be, with the involvement of DAI's constituents.

B. The Remedy Should Include Necessary Support Services

In addition to proposing an inadequate number of supported housing beds, defendants propose to limit their obligations further by refusing to ensure that the necessary supports are available in supported housing for each of DAI's constituents. The proposal first defines supported housing to mean *only* the housing itself and not "other services, such as Assertive Community Treatment ("ACT") team services, Intensive Case Management ("ICM"), Supportive Case Management, Blended Case Management, clubhouse services, employment services, outpatient services such as Continuing Day Treatment, Personal Recovery Oriented Services, Clinic Services, Intensive Rehabilitation Treatment or Partial Hospitalization, medical services and personal care services." (*Id.* ¶¶ 1(b)(iii), 2(a)(ii) & 2(g); Myers Aff. ¶ 26.) It then mandates that "in no event shall any Current Adult Home Resident be placed in a Supported Housing unit if the necessary services and supports provided in the resident's Service Plan are unavailable." Nowhere do defendants undertake any commitment to ensure that necessary support services are provided.

These provisions should be rejected because the manner in which they have been drafted makes clear that defendants refuse to guarantee DAI's constituents access to the same services the State already provides to other people with mental illness residing in supported housing. *Disability Advocates*, 2009 WL 2872833, at *20 (finding that "[i]n addition to the services of the supported housing provider, residents can receive additional support services" and noting "[h]igh-level OMH officials … [among others] testified that ACT and case management services, including blended and intensive case

management, are currently available to supported housing residents."). In doing so, the State is implicitly redefining supported housing as housing for persons with minimal support needs—a view that is inconsistent with the way it is defined for other groups of people with mental illness in New York and a view that was rejected by the Court. *See id.* at *29-30 (rejecting, based on the State's own documents, defendants' argument that supported housing is only for people with no ancillary support needs).

C. In-Reach Should Be a Coordinated Effort Conducted by Supported Housing Providers

DAI proposed that the Court require defendants to contract with supported housing providers not only to provide scattered site supported housing and to secure access for residents of such housing to needed services, but also to conduct in-reach to DAI's constituents. In order to be effective, in-reach should comprise an assessment of each DAI constituent's interest in supported housing, confirmation of that resident's eligibility,[7] development of an individualized service plan for each resident, and the provision of the services that resident needs to transition successfully to supported housing; all in one unified effort. (DAI PFF ¶ 298(g) & (h); DAI Proposed Order ¶ 5.)

The State's proposal, on the other hand, would impose three separate processes: (1) a once annual "educational opportunity," (2) assessment of eligibility and "clinical appropriateness," and (3) assessment of necessary supports. Not only is the State's proposal inconsistent with the Court's findings, as discussed further below, but it is also inefficient and will only serve to delay the remedy unnecessarily.

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[7] A constituent's eligibility should be confirmed as discussed in paragraph 298 of DAI's Proposed Findings of Fact and Conclusions of Law and in paragraph 9 of DAI's Proposed Order and Judgment.

Because of the harms caused by long-term isolation in Adult Homes, the transition measures should be part of one coordinated effort. Long–term institutionalization has instilled in residents a sense of fear, anxiety, reluctance to move, and distrust. As this Court found, many Adult Home residents are "uninformed about alternative housing options" and the testimony of many residents demonstrated the discouragement they have faced in response to expressing a desire to move. *Disability Advocates*, 2009 WL 2872833, *47-50 (citing testimony of G.L and I.K. regarding the barriers they overcame to move out of their Adult Home). The Court further found, based in part on OMH's own admission, that

> one of the harms of long-term institutionalization is that it instills "learned helplessness," making it difficult for some who have been institutionalized to move to more independent settings. Several of DAI's witnesses explained that people with mental illness who have spent much of their lives in an institutional setting tend to be highly reluctant to move on, even if they are capable of living independently. As a result, some residents may be reluctant or ambivalent about leaving the Adult Home.

Id. at *50. Given these factors, achieving the remedy in this case requires more than a once yearly informational session followed by a protracted schedule of assessments and training. It requires a concerted effort and unified process of in-reach in which residents are educated, their support needs are determined, and any red flags are identified simultaneously.

1. Supported Housing Providers Should Conduct the In-Reach Efforts

Defendants do not explain who would be tasked with education efforts under their plan. The in-reach process should be conducted by supported housing providers, as opposed to case managers or other service providers affiliated with the

Adult Homes who have a proven track record of failure to effectively transition Adult Home residents to integrated settings. The evidence at trial established that Adult Homes promote dependency and discourage self-sufficiency and the pursuit of alternative housing. *Disability Advocates*, 2009 WL 2872833 at *17 (finding that "the Adult Homes are a setting that fosters learned helplessness" and that they "discourage and … [sometimes] outright prohibit residents from cooking, cleaning, doing their own laundry, and administering their own medication."); *see also id.* (citing testimony of DAI expert Dennis Jones that Adult Homes are a "residency based model which means the goal there is not really to promote independence, it's to promote dependence and sustain dependency"). The Court also found that Adult Home residents expressing a desire to leave were often discouraged by service providers:

> The record is replete with testimony from residents explaining that, when they expressed an interest to case managers or other mental health providers in moving to more independent housing, they received no help—and often outright discouragement—in exploring and securing alternative housing options.

Id. at *42. Indeed, the for-profit model of Adult Homes creates an incentive not to support independence. *Id.* ("Staff or social workers employed by the Adult Home also have a motive to be unhelpful to residents seeking to move: the Adult Homes are for-profit enterprises that lose revenue with each resident who secures alternative housing."). Additionally, the Court found that even the OMH case management program implemented in some Adult Homes had done very little to help residents overcome the barriers to moving to other housing. *Id.* at *16 (noting that programs aimed toward promoting independence have limited effectiveness when applied in an institutional setting and citing Dennis Jones's testimony that the OMH case management initiative

primarily "arranges services within the existing setting," rather than "deal[ing] frontally with the issue of where people live"). Given these findings, supported housing providers who are unaffiliated with the Adult Homes and who are knowledgeable about and committed to supported housing and its benefits should be the service providers tasked with undertaking the in-reach efforts. Defendants should also be required to provide, or arrange for, training for the supported housing providers awarded contracts pursuant to paragraph 4 of DAI's Proposed Order and Judgment to ensure that they are committed to achieving the goals of the remedy. (*See, e.g.*, Trial Tr. 227 (Testimony of S. Tsemberis describing the role of the New York State ACT Institute).)

2. Educational Efforts Must Be Comprehensive

Defendants have proposed to provide an "educational opportunity" to each Adult Home resident once a year—and only once—in which OMH or some other unidentified entity "discusses" supported housing, supports and income available in supported housing, "the assessment process," other housing alternatives,[8] and resident rights. (Defts' Proposal ¶ 1(a).) Defendants suggest that the "education" can be accomplished simply by handing out a sheet of paper summarizing supported housing. (Defts' Mem. 5 n.2.) The once a year "educational opportunity" described in defendants' proposal is inadequate because it does nothing to address the learned helplessness and

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[8] The references to educating DAI's constituents about "other housing alternatives" (*see* Defts.' Proposal ¶¶ 1.a.(i)4., 1.d) apparently refers to OMH housing and treatment programs, such as community residences, and is a thinly veiled attempt to resurrect the "linear continuum" model of housing that is inconsistent with OMH's own current practices and principles. *Disability Advocates, Inc.*, WL 2872833, at *39-41.

anxiety that years of institutionalization has fostered.[9] In addition, most Adult Home residents are uninformed about supported housing. *Id.* at 47 (citing testimony of, among others, an Adult Home administrator and defendants' own expert and finding that "[i]n general, residents are unaware of other housing options and the wide range of assistance that would be available to them in supported housing and other settings.") Accordingly, educational efforts sufficient to adequately inform Adult Home residents of their options will plainly require a much more sustained and comprehensive effort.

The educational measures should include at a minimum a full explanation of the benefits and financial aspects of supported housing, the supports available in supported housing and visits to supported housing apartments. Given the discouragement and barriers to alternative housing DAI's constituents have faced for many years, the process must include efforts to build trust, to emphasize strengths, and to encourage the exercise of informed choices. This type of education and support is necessary to address the Court's findings concerning the learned helplessness and fears instilled in many DAI constituents, the homes' discouragement of residents from leaving, and residents' lack of awareness of housing alternatives and the availability of services in supported housing. *Id.* at *17, 42, 47, 50.

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[9] Moreover, defendants' "educational opportunities" proposal contains a description of supported housing, and supported housing residents, that is misleading. (Defts' Proposal ¶¶ 1(a)(i), 2(a)(i) (educational opportunities shall discuss supported housing, defined as scattered site apartments with supports that "are intended to be occupied by individuals with serious mental illness who are able to maintain their living environment, shop and prepare meals, and manage their medications without ongoing assistance.").)

OMH has experience dealing with the anxiety and reluctance experienced by individuals leaving psychiatric hospitals and has implemented measures to overcome the long-term effects of institutionalization in that context. *Id.* at *50 ("The State has long encountered this issue in its psychiatric facilities and has developed effective methods for combating it."). For example, it has developed effective "Peer Bridger"[10] programs in psychiatric hospitals to help patients transition to the community, whereby individuals are accompanied on visits to community housing and paired with community providers to ensure a smooth transition and to follow-up on residents as they get used to living in the community. *Id.* at *50-51. There is no reason the State cannot contract with supported housing providers to undertake the same measures here. *Id.* at *27-28 (noting that supported housing providers routinely conduct assessments as part of their effort to identify the specific supports and services that their clients will require and citing Exhibit P-748, a recent OMH RFP requiring supported housing providers to "provide in-reach to develop coordinated discharge/admission plans with psychiatric center staff, and identify/provide services and supports to ensure successful transition to the community").

3. Assessments Must Be Consistent with the Court's Order

The State's Proposal "provides for assessment of Adult Home residents to determine their eligibility and clinical appropriateness for supported housing, either by OMH or by another entity designated by OMH." (Defts' Mem. 5; Defts' ¶ 1.b.) Defendants' proposal that assessments be conducted to determine whether DAI's constituents are qualified for supported housing ignores entirely the Court's finding that

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[10] A "Peer Bridger" is a consumer of mental health services who provides support and assistance to others with mental illness. (Trial Tr. 1632:2-5.)

"virtually all [of DAI's] constituents are qualified to move to supported housing and are not opposed to receiving services in more integrated settings." *Disability Advocates*, 2009 WL 2872833 at *6. Indeed, the Court elaborated that:

> DAI has proven that virtually all of its constituents meet the essential eligibility requirements of supported housing. For virtually all of DAI's constituents, nothing about their disabilities necessitates living in the Adult Homes as opposed to supported housing, nor would they require services that are not already provided to people living in supported housing. The evidence at trial demonstrates that Defendants expect New York's supported housing programs to serve individuals with serious mental illness who have a wide range of support needs – including individuals transitioning directly from psychiatric hospitals and inpatient psychiatric centers, whom OMH terms "high need." The evidence at trial further demonstrates that the supports that would be needed by Adult Home residents to live independently are well within the capabilities of New York's supported housing providers to accommodate. Indeed, many of DAI's constituents would need only minimal supports.

Id. at *43. Given the Court's factual findings, the only assessments that are required are assessments of the precise mix of supports each of DAI's constituents would need in supported housing.

Moreover, defendants' proposed evaluation process relies on a contention that was soundly rejected by the Court after the trial: that supported housing offers only "a minimum level of housing-related support services" and is "intended to be occupied by individuals with serious mental illness who are able to maintain their living environment, shop and prepare meals, and manage their medications without ongoing assistance." (Defts' Proposal ¶ 2(a)(i).) Defendants' effort to define supported housing in this way flies in the face of numerous findings made by the Court, including that:

- "Defendants have imposed no requirement that individuals have 'minimal' support needs in order to live in supported housing." *Disability Advocates*, 2009 WL 2872833, at *27.

- "[I]n recent years, OMH's Requests for Proposals ("RFPs") for supported housing have specifically targeted those with significant needs." *Id.*

- "As OMH's Supported Housing Implementation Guidelines provide, supported housing provides individuals with mental illness with a permanent place to live coupled with flexible support services customized to each individual's specific needs." *Id.*

- "OMH officials testified that ACT and case management services, including blended and intensive case management, are available to supported housing residents." *Id.*

- "The evidence contradicts Defendants' contention that to live in supported housing, individuals must be capable of seeking assistance and taking their medication independently, . . . must be able to 'meet their own daily needs' and must 'maintain their apartment with 'minimal assistance.'" *Id.*

- Individuals "may require a range of services, including medication management, assistance with budgeting and socialization, and substance abuse treatment," or who "may need service planning regarding 'medication compliance, symptom awareness and management, and appropriate community integration." *Id.*

Defendants cannot now rely on a characterization of supported housing that was rejected by the Court. The State's Plan would essentially permit it to re-try this case one resident at a time, but this time with themselves as judge and with no opportunity for appeal.[11]

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[11] Defendants' argument that DAI's proposed assessments are "unduly limiting to the professionals" conducting them is simply an attempt to relitigate an argument that was rejected at trial. Defendants have asserted previously that the Supreme Court's decision in *Olmstead* v. *L.C.* required DAI to prove eligibility by establishing that each of its constituents had been individually and clinically determined qualified for supported housing by the State's treatment providers. *Id.* at 45. The Court rejected defendants' interpretation of *Olmstead* and found that it would "render the ADA's integration mandate effectively unenforceable as to Adult Homes." *Id.* at 46 (finding that to require determinations from treatment providers would "condemn the placements of DAI's constituents to the virtually unreviewable discretion of the

Presumably, the assessors contemplated by the State will be the same persons—or will be acting at the direction of the same persons—who to date have allowed Adult Home residents to languish in Adult Homes.

Because the Court has held that "virtually all" Adult Home residents are qualified for supported housing, the State should be ordered to treat each one as presumptively qualified for supported housing. All that should be required for each resident is a determination of the precise mix of supports he or she will need in supported housing. Consistent with the Court's finding, there may be a few residents who are not qualified to move to supported housing because of (1) severe dementia, (2) a high level of skilled nursing needs that cannot be met in supported housing with home care or waiver services provided under the Medicaid program, or (3) a likelihood that they will cause danger to themselves or others.[12] The best and most efficient way to identify constituents with these "red flags" is in the "in-reach" process DAI has proposed. As supported housing providers conduct in-reach to educate residents about their choices and explore the types of services and supports the constituent would need to be successful in supported housing, they will determine if any residents fall within these categories. DAI

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various entities on whom the State relies to deliver services to Adult Home residents").

DAI's proposal contemplates assessments, conducted in connection with the service planning process, by supported housing providers whose judgment should be respected. Assessments should not be used as defendants propose—as an effort to relitigate an issue that was already determined at trial.

[12] *Id.* at *30 (citing testimony of Dr. Kenneth Duckworth, who reviewed the mental health records of between 260 and 270 Adult Home residents, visited five Adult Homes, interviewed approximately 38 Adult Home residents, visited a supported housing program and reviewed numerous documents).

also proposes that, if a constituent falls into one of those categories, he or she will nonetheless be treated as eligible for supported housing if, after a further assessment, the supported housing provider determines that he or she could live successfully in supported housing.

4. Defendants' Proposed Definition of Eligibility Should Be Rejected

In addition to applying a definition of "clinical appropriateness" that would exclude anyone needing more than minimal support, the State seeks to apply a definition of "eligibility" that would exclude constituents whose mental illness is not serious enough. The State proposes to define as ineligible for supported housing any resident it determines does not have "a serious mental illness."[13] (*Id.* ¶ 1.b.(i)1.) Neither the evidence at trial, nor the Court's findings, however, were limited to residents who have "serious mental illness" as defendants define it. Nor have defendants offered any reason why relief in this case should be so limited. Even if there were DAI constituents whose mental illnesses were found not to be "serious"—a fact not established at trial—there is no reason why those constituents should be denied relief from defendants'

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[13] Defendants have taken inconsistent positions throughout this proceeding with respect to the number of DAI constituents who have serious mental illness. The primary determinant of whether a mentally ill individual is considered to have a "serious mental illness" is the degree of his or her functional impairment. (*See, e.g.* Ex. S-33 (2007 OMH RFP for Supported Housing) (defining criteria for determining serious and persistent mental illness as (1) meeting the criteria for a DSM-IV psychiatric impairment and (2) either (a) enrollment in SSI due to mental illness, or (b) extended impairment in functioning due to mental illness, or (c) reliance on psychiatric treatment, rehabilitation and supports).) Defendants have claimed on the one hand that DAI's constituents are too functionally impaired to be qualified for supported housing (they need more than minimal support) and on the other hand that their impairments are not serious enough to justify access to supported housing (they are not impaired enough).

violations of the ADA and the RA. Any person with mental illness living in one of the Adult Homes who is capable of living in a more integrated setting has, by definition, been needlessly segregated and is entitled to relief. In addition, any DAI constituent whose mental illness is not "serious" would likely need no more than minimal supports in community housing.

The State would also find "ineligible" any resident who "refuses or declines to participate in or cooperate with the assessment process." (*Id.* ¶ 1.b.(i)2.) As discussed more fully above, *supra* pp. 12, 14-16, given the extensive findings concerning the anxiety, distrust and ambivalence caused by long-term institutionalization, the initial refusal to participate in the assessment process should not render someone ineligible for supported housing. Instead of barring anxious constituents from relief, the remedy should require defendants to incorporate in their contracts with supported housing providers measures for reviewing regularly the preferences of DAI constituents who are ambivalent or anxious as a result of their institutionalization.

Finally, defendants' proposal would make some DAI constituents ineligible for supported housing by limiting access to ACT services. (Defts' Proposal ¶ 2(b)(i).) In essence, defendants propose to declare DAI constituents unqualified for supported housing if they need ACT but do not meet the narrow CUCS eligibility criteria for ACT. Defendants should not be permitted to limit access to supported housing by limiting access to ACT. The Court has already rejected this basis for finding DAI constituents unqualified for supported housing. *Id.* at *85 ("Although OMH uses the 'more stringent' CUCS eligibility criteria in New York City, OMH would hardly be fundamentally altering its programs merely by applying its own statewide guidelines in

New York City."). The Court also found that the money now spent on segregated services for DAI's constituents could be reallocated to support them in supported housing, including providing ACT to those constituents who may need that service. *Disability Advocates*, 2009 WL 2872833, at *71-72 (finding that the State has demonstrated its ability to redirect funds as individuals move from one setting to another and noting that ACT shifts the locus of services and thereby results in the avoidance of costs formerly borne by the State). There is thus no basis for the State's proposal to limit access to ACT.

5. The Defendants' Requirement of "Training" Plans Should Be Rejected

Defendants also propose to require that some DAI constituents, despite having been deemed "eligible" and "clinically appropriate" for supported housing, complete "training plans" before they gain access to supported housing. (Defts' Proposal ¶¶ 1(b)(ii)(3), 1(b)(iv), 1(e).) Defendants maintain that some DAI constituents should be required to complete training in the of use public transportation, medication, money management, shopping or cooking *before* they can live in supported housing. (Defts' Mem. 5.) This proposed element of defendants' remedial plan should be rejected because the Court has already found, based on the testimony of both sides' experts and the experiences of Adult Home residents, that skills training is ineffective and does not achieve the desired result when conducted in an institutional setting. As the Court explained:

> To the extent that mental health programs or case management aim to teach independent living skills, such as cooking, budgeting, and grocery shopping, residents have little or no opportunity to practice these skills in their present living situation. Experts for both sides testified that the most effective way for people with mental illness to

> recover and retain skills is to practice them in the environment in which they actually live. For example, residents are unlikely to learn how to cook in the Adult Home environment simply because a training kitchen is installed. Therefore, while it is possible for Adult Home residents to benefit to some extent from these programs, the weight of the evidence shows that they are unlikely to gain a significant benefit from this type of training or develop any lasting skills.

Disability Advocates, 2009 WL 2872833, at *16. Indeed, even defendants' expert, Dr. Geller, testified that "the system needs to have that person exist in an environment where they can use the skills." *Id.* at *16 n.189.

The Court squarely rejected defendants' argument that DAI's constituents could not move directly from Adult Homes to supported housing because they must first gain needed skills. *Id.* at *40-41 (citing, among other evidence, testimony of expert witness Elizabeth Jones that "the accepted approach in the states where she has worked is to provide individuals with permanent housing and add or subtract supports based on their specific needs."). In fact, individuals living in supported housing routinely receive help with the very tasks that defendants insist they must master before entering supported housing. *See, e.g., id.* at *21 ("Pathways routinely and successfully helps people overcome difficulties with activities of daily living such as laundry, cooking, or using public transportation, and does not regard such challenges as "difficult issues" to deal with."). Simply maintaining the current system of providing training to individuals in a setting where they have no opportunity to practice skills will do nothing to further the remedy in this case.

6. The Remedy Should Include Measures To Ensure DAI's Constituents Receive Accurate Information

DAI also proposes that defendants require case managers, clinicians, Adult Home staff, and others who may discuss housing options with DAI's constituents to accurately and fully inform them about supported housing, its benefits, the array of services and supports available to those in supported housing, and the SSI, rental subsidy, and other income they will receive in supported housing. (DAI PFF ¶ 298(f); DAI Prop'd Order ¶ 10.)

Surprisingly, defendants resist putting such prophylactic measures in place. They protest that they do not control the actions of third parties such as case managers, clinicians and Adult Home staff, but they offer no reason why they cannot—through regulation, contract, or policy—require that these third parties comply with the provisions DAI has proposed. (Defts' Mem. 4.) Indeed, defendants acknowledge that they "oversee" the actions of these third parties. (Defts' Mem. 4-5.) Defendants have a variety of means at their disposal to require that these third parties take steps to ensure DAI's constituents relief, including through the licensure and certification process. Contrary to defendants' contention, the words "accurately" and "fully inform" are hardly so vague as to prevent defendants from understanding their obligations.

D. The Remedy Must Include Measures to Prevent Re-Creation of the Same Violations of Federal Law

The remedy should include measures to ensure that when current Adult Home residents move to supported housing, the institutions will not be "backfilled" with similar individuals who, if fully informed, would choose instead to receive services in supported housing. Such steps are necessary to ensure DAI's constituents complete

relief. Otherwise, the same civil rights violation will inevitably recur. Moreover, by avoiding backfilling, defendants will be able to reallocate funds from Adult Homes to supported housing to fund relief in this case. *See Disability Advocates*, 2009 WL 2872833, at *80-83.

Although defendants propose to adjust the admission criteria to require Adult Homes to notify individuals with mental illness that this Court has ruled that impacted Adult Homes are not the most integrated setting available, that supported housing is a more integrated setting, and that there is a process for submitting an application for supported housing, defendants would also require that every person with mental illness admitted to an Adult Home sign a waiver stating that they have knowingly "chosen" to live in an Adult Home rather than supported housing. (Defts' Proposal ¶ 3(a)(ii).) Admission to the Adult Home would be conditioned on a waiver of their entitlement to services in a more integrated setting. By requiring such a statement, Defendants intend to wash their hands of any responsibility to help such individuals relocate to supported housing in the future. Defendants also propose to notify hospitals, nursing homes, adult care facilities, homeless shelters, and correctional facilities that no discharge or referral should be made to impacted Adult Homes unless residents are provided with similar information and sign a similar waiver of their rights. (*Id.* ¶ 3(a)(i).) In short, the defendants' proposal would ensure that New York can continue to provide mental health services in unnecessarily segregated Adult Homes and avoid its ADA and Section 504 responsibilities.

The "choice" defendants propose to offer DAI's constituents in the future is precisely the choice that the Court has found unlawful – the choice of going to an

Adult Home or winding up on the streets because supported housing is unavailable. The Court's ruling was not an informational notice. It was a declaration that defendants must change the way they manage their service system so that DAI constituents have the choice of living in supported housing instead of an Adult Home.

Prospective future residents of Adult Homes should be told that supported housing is or will be available to them as an alternative to the Adult Home. And more than the one-time Miranda-like reading of rights proposed by the defendants is necessary. The in-reach described above will be necessary to remedy defendants' discriminatory conduct.

II. THE CONTINGENCIES AND TIME LIMITS PROPOSED BY DEFENDANTS SHOULD BE REJECTED

Defendants propose that this Court issue a remedy in this case that is entirely contingent upon numerous factors, including passage by the New York State Legislature of budget legislation, contract bidding and approval, and performance of contracts without breach. They drop a footnote in their memorandum in support of their proposed order explaining these proposed contingencies:

> Defendants have also made certain portions[14] of their plan contingent upon legislative appropriation. Given the State's current economic situation, defendants could not in good faith voluntarily put forward a plan that they were unsure they could accomplish without legislative appropriation. The plan is also contingent upon receiving sufficient responses or bids to the RFPs and performance of any ensuing contract by the private entities, as defendants cannot be held responsible if there is either insufficient response to any RFPs or a failure to perform under a

[14] The "certain portions" are all of the provisions relating to the expansion of supported housing and all of the provisions relating to training, education, assessments and supports. (Defts' Proposal ¶¶ 1(f) & 2(h).)

> contract. The plan should also be contingent upon a private housing provider being willing to accept a resident into its program, because these private agencies have the discretion to determine whether an individual is appropriate for their programs.

(Defts' Mem. 8 n.5.)

Defendants cite no legal support for the proposition that they can avoid compliance with federal law or refrain from remedying the large-scale discrimination in their mental health service system through contingencies. Indeed there is none. This Court has the authority to order State officials to comply with federal law, and it need not seek the approval of the New York State legislature before requiring State officials to conform their conduct to requirements of federal law. *See Olmstead* v. *L.C.*, 527 U.S. 581 (1999) (subject to fundamental alteration defense, federal courts can enjoin state officials to place persons with mental disabilities in community settings rather than institutions); *Spallone* v. *United States*, 493 U.S. 265, 276 (1990) (court properly imposed contempt sanction against City of Yonkers for failure to secure legislative approval of plan to cure longstanding residential housing discrimination); *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977) (federal courts can enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury); *Helen L.* v. *Didario*, 46 F.3d 325, 338 (3d Cir. 1995) (rejecting argument of defendant state agency that it was justified in administering its care program in violation of the ADA's integration mandate because of a funding mechanism of the General Assembly of Pennsylvania).

Nor do any of defendants' factual assertions underlying these proposed contingencies have any support. Indeed, they were disproved at trial. Based on the evidence at trial, the Court found that the annual cost to the State of serving an Adult

Home resident in supported housing is on average cheaper than the cost of serving that resident in an Adult Home. *Disability Advocates*, 2009 WL 2872833, at *80. Additionally, defendants failed to prove at trial that the current economic climate has impacted the State's ability to develop supported housing, which requires no outlay of capital. *Id.* at *82 (finding that "defendants did not present any evidence showing a nexus between the current state of the economy and the specific relief DAI seeks."). The Court further found that based on the enthusiastic response of supported housing providers to recent OMH-issued RFPs for supported housing, many supported housing providers would seek to serve Adult Home residents, and New York State has the capacity to develop sufficient supported housing to meet the needs of DAI's constituents. *Id.* at *74-75. Given these findings, there is no reason to make the remedy contingent on anything.

Defendants also propose that their obligations under the injunction cease after six years and that they be permitted to request modification of the injunction under various scenarios. (Defts' Proposal ¶¶ 5(a)-(d).) These proposals are particularly inappropriate in light of the limited commitments offered in defendants' proposal. It would also allow defendants, after six years, to subject DAI's constituents to precisely the same violations of the integration mandate found by the Court. There is simply no basis to incorporate any loopholes or expiration dates into the remedial plan, particularly

when the defendants have demonstrated a complete lack of commitment to remedying the discrimination in its mental health service system.[15]

III. A MONITOR SHOULD BE APPOINTED TO OVERSEE IMPLEMENTATION OF THE REMEDY

Defendants' Plan proposes that defendants collect data and information and report to plaintiff on its implementation of the Plan only once a year. Given the State's track record to date, this is plainly insufficient to guarantee compliance with any order the Court will issue.

Defendants have ignored decades of government and press reports describing Adult Homes as "de facto mental institutions" and "satellite mental institutions." *Disability Advocates*, 2009 WL 2872833, at *8 (*citing* Deputy Att'y Gen. Charles J. Hynes, Private Proprietary Homes for Adults: A Second Investigative Report (Mar. 31, 1979); New York City Council Subcomm. on Adult Homes, The Adult Home Industry: A Preliminary Report). Indeed, as recently as 2007, the Office of Mental Health itself characterized Adult Homes as institutions. *See id.* at *9. Yet, defendants have failed to remedy this problem voluntarily. Defendants' attempt to ignore this widespread civil rights violation continues to this day. Defendants' proposed remedy shows a complete unwillingness to accept the detailed findings of fact and conclusions of law in this Court's order. As detailed in Part I above, in constructing a proposed remedy, defendants have completely ignored this Court's finding that over 4,000 Adult Home

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[15] There is no reason to incorporate these provisions into the plan for the additional reason that the proper procedure and standard for seeking modification of an injunction is through a motion under Fed. R. Civ. P. 60(b)(5).

residents are not being provided services in the most integrated setting appropriate to their needs and that virtually all of those individuals are qualified for supported housing.

The prospect of noncompliance is compounded by the nature of Adult Homes. This Court has found that "Adult Homes are designed to manage and control large numbers of people and do so by establishing inflexible routines, restricting access, and limiting personal choice and autonomy." *Id.* at *23. Adult home residents are subject to "an extensive and significant set of rules," including limitations on visitors. *Id.* at *10. Adult home residents are also "limited in the times that they can leave the Adult Homes, due to the rigid schedules for meals, medications, and distribution of personal needs allowances." *Id.* at *12. Without the appointment of a monitor to oversee the remedy, the regimented nature of life in an Adult Home is likely to make it difficult for Adult Home residents to be fully informed about their rights under the Court's remedy order and to feel safe exercising those rights. The Adult Home industry's attempt to intervene in this action to protect its financial interests and its contracts with Adult Home residents also raises the specter of additional obstacles to the implementation of the Court's remedy.

DAI proposes that the Court appoint a Monitor who is experienced in the development, management, and oversight of community programs serving people with mental illness, including supported housing. The appointment of a Monitor is necessary to ensure compliance with the Court's remedy order. This is especially true in light of the complexity of the issues involved, the importance of the remedy to over 4,000 individuals with mental illness, and defendants' unwillingness to make a serious commitment to address the civil rights violations found by the Court after a lengthy trial.

The Monitor's duties should include monitoring defendants' compliance with the remedy order, identifying potential areas of non-compliance, facilitating the resolution of compliance issues without Court intervention, and recommending appropriate action by the Court where an issue cannot be resolved through discussion and negotiation among the Monitor and parties.[16] DAI also proposes that defendants report to the Monitor, DAI, and DAI's counsel every sixty days so that they can evaluate defendants' compliance with the remedy order.[17] The Monitor would file reports with the Court at least two times per year.[18]

DAI proposes that, within one week of the entry of the remedial order, the parties meet and confer and attempt to agree who the Monitor should be. If the parties cannot agree, each side would submit the names of one or two qualified professionals or organizations, and each party would have an opportunity to comment on the

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[16] DAI is not asking that the monitor be granted any authority to, inter alia, impose contempt sanctions, conduct evidentiary hearings, or exercise the Court's power to compel evidence. *See* Fed. R. Civ. P. Rule 53(c).

[17] Defendants' proposal to submit reports only once each year is inadequate to ensure compliance, and would likely result in significant delays in implementation. Reports at sixty-day intervals will help ensure that timely efforts are made to achieve compliance and that unanticipated problems do not cause undue delays. The report would contain, among other things, information describing the number of DAI constituents offered supported housing, the number of constituents who have accepted supported housing, the identity of supported housing providers serving those individuals and providing in-reach to Adult Home residents, reasons why DAI constituents if any, declined supported housing, in-reach efforts, the number of new admissions to each Adult Home and source of payment, and the current census of each Adult Home.

[18] DAI is no longer requesting that defendants submit a draft plan to the Monitor within 90 days. Given defendants' recent proposal, DAI believes such a process would only delay relief in this case.

qualifications of the other party's submissions. The Court would then select one of the professionals or organizations to serve as the Monitor.

Pursuant to its inherent equitable authority and Rule 53 of the Federal Rules of Civil Procedure, the Court has the authority to appoint a monitor to evaluate or oversee the implementation of its remedy.[19] Appointment of a monitor is appropriate if, for example, the issues involved in a case are complicated or complex,[20] the remedy is

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[19] *See Ex parte Peterson*, 253 U.S. 300, 312, 40 S.Ct. 543, 547 (1920) (describing the "inherent power" that federal courts have "to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause"); *Berger* v. *Heckler*, 771 F.2d 1556, 1568 (2nd Cir. 1985) ("Where 'a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'") (*quoting Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276 (1971)); *Ruiz* v. *Estelle,* 679 F.2d 1115, 1161 (5th Cir. 1982), *opinion amended in part and vacated in part*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983) (noting that a district court has "inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy"); 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); Fed. R. Civ. P. 53(a) (allowing a court to appoint a "master" to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district").

[20] *See, e.g.*, *Ruiz*, 679 F.2d at 1162 ("The scope and complexity of the decree and the importance as well as the difficulty of ensuring compliance gave the court adequate reason" to appoint a master); *Hoptowit* v. *Ray*, 682 F.2d 1237, 1263 (9th Cir. 1982) (holding that a district court did not abuse its discretion in appointing a master to "monitor compliance with the court's orders" based on "the complexity of this litigation and of compliance with the district court's orders."); *Knight* v. *Alabama*, 829 F. Supp. 1286, 1288 (N.D. Ala. 1993) (appointing a monitor to oversee compliance with the court's order based on the complexities of the case, including "the geographic dispersal" of institutions involved); *see also* Robert E. Buckholz, Jr., et al., *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 828 (1978) ("Monitors are appropriate if the remedy is complex, if compliance is difficult to measure, or if observation of the defendant's conduct is restricted.").

important to a vulnerable population,[21] or there is a prospect of noncompliance by defendants.[22] These three circumstances are clearly present in this case.

The issues involved in this case are complex. The case was filed over six years ago, and this Court has already issued two extensive orders. The first order was issued after the court considered "a voluminous and comprehensive record containing more than 13,000 pages" and "approximately 675 exhibits." *Disability Advocates, Inc.* v. *Paterson*, 598 F. Supp. 2d 289, 294 (E.D.N.Y. 2009). The second order was issued after an eighteen-day trial in which "[t]wenty-nine witnesses testified, more than three hundred exhibits were admitted into evidence, and excerpts from the deposition transcripts of twenty-three additional witnesses were entered into the record, along with the 3,500 page trial transcript." *Disability Advocates*, 2009 WL 2872833, at *2. As described in DAI's proposed order, the remedy will affect thousands of DAI constituents. *See id.* at *7. Implementation will involve, inter alia, the issuance of RFPs for supported housing providers and the coordination of efforts by the Office of Mental Health, the Department of Health, and the Governor's Office.

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[21] *See, e.g.*, *Juan F.* v. *Weicker*, 37 F.3d 874, 876 (2d Cir. 1994) (affirming the appointment of a monitor "because of the difficult issues involved, as well as the importance to the plaintiff class of enforcing the decree."); *United States* v. *State of Conn.*, 931 F.Supp. 974, 984-85 (D. Conn. 1996) (holding that "the complex nature of the case, together with the delicate interests of STS's [843 residents with mental disabilities], call for the appointment of a special master to determine why STS's efforts are not producing the Remedial Orders' intended results, and to make recommendations to the court").

[22] *See National Organization for the Reform of Marijuana Laws* v. *Mullen*, 828 F.2d 536, 542 (9th Cir. 1987) ("NORML") (holding that "the prospect of noncompliance is an 'exceptional condition' that justifies reference to a master."). The *NORML* Court noted that "there is no circuit authority that requires a determination of intentional disregard of court orders before a special master may be appointed under Rule 53(b)." *Id.* at 543.

The remedy is also of vital importance to thousands of individuals with mental illness. This case involves the unlawful institutionalization of individuals with mental illness in Adult Homes. The Court found that most Adult Home residents had little or no choice in moving to an Adult Home. *See id.* at *47. As a result, thousands of individuals with mental illness have been involuntarily relegated to life in—as one of defendants' own witnesses termed Adult Homes—"'psychiatric ghettos.'" *Id.* at *19 (*quoting* P-673 (Letter from Susan Bear to OMH official Joseph Reilly (Jan. 9, 2004)) at JBFCS 354; Tr. 2236-2238 (Bear) (testifying about P-673)). The Court found that "having a stable, safe, and permanent place to call home is a universal desire, and people with mental illness are no different from anyone else in this regard." *Id.* at *51. In describing the difference between living in an Adult Home and living in a supported housing apartment, one former Adult Home resident eloquently summarized the importance of this remedy for thousands of Adult Home residents: "'It's free. It's freedom for me. It's freedom. It's being able to actually live like a human being again.'" *Id.* at *21 (*quoting* Tr. 2751).

The defendants do not deny that exceptional circumstances exist that warrant the appointment of a monitor. (Defts' Mem. 12-13.) Instead, defendants ask the Court not to appoint a monitor because it is "unnecessary" and because it would be a financial burden. These two arguments are unavailing.

Defendants first argue that the appointment of a monitor is "unnecessary" because the Court and DAI's attorneys have knowledge about the subject matter of the litigation. Although DAI's attorneys have much to contribute during the implementation phase, their participation is not an adequate substitute for the services of an independent

monitor who has access to information as well as experience in developing and managing community-based programs. *See Brewster* v. *Dukakis*, 544 F. Supp. 1069, 1079 n.6 (D. Mass. 1982) (distinguishing between the role of the court-appointed monitor and the role of plaintiffs' counsel during the implementation of the remedy in a de-institutionalization case).

Defendants also argue that appointing a monitor would impose a financial burden on them, although they do not demonstrate how the marginal cost of a monitor will impose a burden in the context of the scale of the remedy required in this case. Nor do defendants cite any authority supporting denial of a monitor on the basis of financial burden alone. While this Court should consider the cost to defendants, the numerous exceptional circumstances present in this case both require the involvement of a monitor and clearly outweigh the marginal cost a monitor would entail.

IV. ATTORNEYS FEES

Defendants' Plan proposes to limit future attorney's fees "for activities undertaken by the plaintiff's attorneys under this Remedial Plan" to "40 hours per year at reasonable rates." (Defts' Proposal ¶ 4.b.) Given the likelihood that DAI and its counsel will have to remain actively involved throughout implementation of the remedy, the State's attempt to place an arbitrary and unreasonably low limit on its attorney's fees should be rejected.

Moreover, as the prevailing party, DAI is entitled to payment of reasonable fees and costs pursuant to 42 U.S.C. § 12205 and 29 U.S.C. § 794a(b). Given the complexity of the case, the length of the discovery and trial proceedings and the large number of attorneys involved, DAI respectfully requests an extension of the 14-day deadline imposed by Fed. R. Civ. P. 54(d)(2)(B) in which to submit its application for

attorneys fees to date. It further requests that the parties be directed to confer and propose within 14 days of the Court's Order and Judgment a schedule for the briefing of DAI's fee application.

Conclusion

For the foregoing reasons, DAI respectfully requests that the Court reject defendants' proposed remedial plan and adopt the remedial provisions proposed by DAI.

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New York, New York

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