



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 22 2012

Governor Christine O. Gregoire
State of Washington
Office of the Governor
P.O. Box 40002
Olympia, Washington 98504-0002

Dear Governor Gregoire:

This letter responds to your letter dated October 18, 2012, regarding Washington State's March 2011 reduction in personal care services, proposed changes to the State's Exception to the Rule ("ETR") process to ensure that individuals with disabilities are not placed at serious risk of institutionalization and other negative outcomes, and request for clarification regarding the State's compliance with its obligations under the Americans with Disabilities Act ("ADA"), as interpreted by the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999).

We appreciate your commitment to providing community based services for people with disabilities, and we recognize that Washington State has been committed to providing these services over many years. We also recognize that Washington and other states are confronting serious fiscal challenges at this time. We want to make clear that the ADA and *Olmstead*, do not prohibit all reductions in these services to people with disabilities. As stated in the enclosed June 2011 "Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*," public entities may reduce these services for people with disabilities consistent with *Olmstead* as long as the implementation of those service reductions do not place individuals at serious risk of institutionalization or segregation. In particular, when a service reduction is combined with a process to ensure that there is no such risk, based on all relevant information, the reduction could be compliant with the ADA.

Regardless of the State's decisions regarding the *M.R. v. Dreyfus* litigation, the United States' position is not, and never has been, that states may not reduce community services to individuals with disabilities. If service reductions cause a serious risk of institutionalization to these individuals, public entities must make "reasonable modifications" when implementing the reductions to avoid the institutionalization of impacted persons. Whether a reasonable modification is needed, and what that modification should be, depend on the specific factual

circumstances. We are sensitive to states' budgetary constraints and recognize that states face difficult decisions regarding program reductions. A state's obligation under the ADA to make modifications that are reasonable, but do not fundamentally alter the state's programs, services or activities, enables a state to comply with the ADA while still maintaining control of the program budgets.

Based on your October 18 letter, we understand that Washington State plans to modify its ETR process. Specifically, Washington State will provide notice to individuals who receive personal care services of the availability of the ETR process and will allow individuals themselves, as well as their case manager, to request an increase in their allocated personal care hours. Further, the State will modify its ETR process to allow individuals with disabilities, themselves, to seek a review of a case manager's decision on ETR hours to their case manager's supervisor, the field office, and directly to the expert ETR Committee. We also expect that the State will give necessary guidance to all staff involved in the ETR process regarding the standards for determining whether someone is at serious risk of institutionalization. ETR decisions must be based on evaluations of individuals' needs and must not be driven by the State's ultimate desire to reduce services.

Based on the record pending before the district court in January 2011, the United States' Statement of Interest filed in the *M.R. v. Dreyfus* litigation found the State's anticipated March 2011 across-the-board cuts problematic because of the failure to include an effective mechanism for ensuring that the cuts did not place individuals at serious risk of institutionalization. Your letter asserts that, since the State implemented the March 2011 cuts, there has been no increase in the rate of emergency room visits, nursing facility placement, or client mortality compared to previous years, but rather the nursing facility population continues to decline. We request that you share with us the data that supports this assertion as well as any additional relevant data, including, for example, placement rates at hospitals and Intermediate Care Facilities for Individuals with Intellectual Disabilities. We expect that the State will continue to closely monitor each individual whose services were reduced in the March 2011 cuts, whether or not they request an ETR, and ensure that they have the necessary services to avoid the negative outcomes outlined above.

Based on our above understanding of the facts, the representations contained in your letter of October 18, 2012 (assuming that they are supported by verifiable evidence, as this evidence is not currently in the district court record), and the current record before the district court, we are writing in follow up to our Statement of Interest. The State's proposed modification to the ETR process is a step forward in protecting the interests of individuals who receive personal care services. Assuming that the cuts, as implemented thus far, have not resulted in increased rates of institutionalization or the other related harms outlined above for individuals receiving personal care services, it is our assessment at this time that effective implementation of the modified process, as described in your letter and herein, would be consistent with the State's ADA obligations, as interpreted by the Supreme Court in *Olmstead*. We note that our assessment assumes that the ongoing collection and monitoring of data will demonstrate that implementation of the revised process successfully avoids placing people at serious risk of institutionalization; if that assumption is borne incorrect, our assessment of the sufficiency of the modified process would necessarily change. Because whether a State meets its

Olmstead obligations necessarily depends upon the relevant factual circumstances, our assessment of the State's compliance with *Olmstead* upon effective implementation of these modifications is limited to the present factual circumstances in Washington State as outlined herein. As requested in your October 18 letter, this letter solely addresses the State's obligations under the ADA, as interpreted by the Supreme Court in *Olmstead v. L.C.* and as contained in 28 C.F.R. §§ 35.130(d) and 35.130(b)(7).

We hope this information is helpful. Please do not hesitate to contact us if we may be of further assistance with this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. E. Perez', with a stylized flourish at the end.

Thomas E. Perez
Assistant Attorney General

A handwritten signature in black ink, appearing to read 'Leon Rodriguez / TP', with a stylized flourish at the end.

Leon Rodriguez
Director, Office of Civil Rights
U.S. Department of Health and Human
Services

Enclosure