

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

THOMAS MAERTZ, by his sister )  
and next friend Francesca Kemp; )  
COLTON and CODY COLE, by )  
their mother and next friend Tamara )  
Awald; and TIMOTHY KEISTER, )  
by his sister )  
and next friend Kristie Wright, )

Plaintiffs, )

v. )

DEBRA MINOTT, in her official )  
capacity as Secretary of the Indiana )  
Family and Social Services )  
Administration; )  
NICOLE NORVELL, in her official )  
capacity as Director of the Division of )  
Disability and Rehabilitative Services; )  
and YONDA SNYDER, in her official )  
capacity as Director of the Division )  
of Aging, )

Defendants. )

CIVIL ACTION

No. 1:13-cv-957-JMS-MJD

**STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA**

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*Statement of the Department of Justice on Enforcement  
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**I. INTRODUCTION**

The United States submits this Statement of Interest in opposition to Defendants’ motion for summary judgment, Filing Nos. 143 and 144. In their motion for summary judgment, Defendants premise their argument on the incorrect contention that Plaintiffs must subject themselves to institutionalization in order to bring an integration mandate claim. Because there is no such legal requirement and because Plaintiffs have provided evidence that they are indeed at serious risk of institutionalization or segregation due to Defendants’ policies and practices, this Court should deny Defendants’ motion.

In this case, Plaintiffs are individuals with developmental disabilities such as cerebral palsy. To live in the community, Plaintiffs require services such as an aide during the day to assist with daily activities such as getting out of bed and into a wheelchair. Without these services, Plaintiffs are at serious risk of institutionalization. Until recently, Plaintiffs received services through a Medicaid program enabling them to live in their own homes and participate in their communities. Defendants’ changes to the administration of two Indiana Medicaid Waiver programs reduced their services, placing Plaintiffs at risk of institutionalization or segregation in violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.* and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794.

Defendants counter that, as a matter of law, an individual must be institutionalized to claim a cognizable injury under the integration mandate of the ADA. This is not so.

The threshold question raised in Defendants’ motion is the proper interpretation of the prohibition against unnecessary segregation of individuals with disabilities under Title II of the Americans with Disabilities Act (ADA) and its implementing regulations, which prohibit discrimination against individuals with disabilities in the provision of public services. 42 U.S.C.

§ 12132.

The Department of Justice (Department) has consistently interpreted the ADA and the regulatory integration mandate to protect not only those who are institutionalized but also those who are at serious risk of institutionalization. In fact, the Department issued technical assistance regarding the proper legal standard under the integration mandate and clarified that “the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings.” U.S. Department of Justice, *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.* (June 22, 2011), [http://www.ada.gov/olmstead/q&a\\_olmstead.htm](http://www.ada.gov/olmstead/q&a_olmstead.htm) (hereinafter “*Olmstead* Statement”); Filing No. 145-7.

Because Plaintiffs have provided evidence that Defendants’ changes to the administration of the Medicaid Waiver programs place them at risk of institutionalization or segregation, Defendants’ motion should be denied.

## **II. INTEREST OF THE UNITED STATES**

Under 28 U.S.C. § 517, the Attorney General may send any officer of the United States Department of Justice “to attend to the interests of the United States in a suit pending in a court of the United States . . . .” The Department is the federal agency charged with primary responsibility for enforcing Title II of the ADA and its implementing regulation. *See* 42 U.S.C. § 12188(b). Consistent with this statutory charge, the Department has an interest in, *inter alia*: (1) supporting the ADA’s proper interpretation and application; (2) furthering the statute’s explicit Congressional intent to provide clear, strong, consistent, and enforceable standards addressing discrimination against individuals with disabilities; and (3) ensuring that the United States plays a central role in enforcing the standards established in the ADA. *See id.* § 12101(b).

These interests are particularly strong here, where Defendants suggest an interpretation of the Department's regulations that is inconsistent with the Department's interpretation of its own regulations.

### **III. STATEMENT OF THE CASE**

#### **A. Statutory and Regulatory Background**

Congress enacted the ADA in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). Congress found that, “historically, society has tended to isolate and segregate individuals with disabilities” and that “individuals with disabilities continually encounter various forms of discrimination, including \* \* \* segregation.” 42 U.S.C. § 12101(a)(2) and (5). Congress determined that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, *independent living*, and economic self-sufficiency for such individuals.” 42 U.S.C. § 12101(a)(7) (emphasis added).

Title II of the ADA prohibits disability discrimination in public services: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Congress directed the Attorney General to promulgate regulations to implement Title II. 42 U.S.C. § 12134. Pursuant to this authority, the Attorney General issued the integration mandate: “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). The most integrated setting is “a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.” 28 C.F.R. Pt. 35, App. B at 685. The Attorney General also required that a public entity “make reasonable modifications in policies, practices, or procedures when the

modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).

In *Olmstead*, the Supreme Court held that, under the ADA and its regulations, “unjustified institutional isolation of persons with disabilities is a form of discrimination.”

*Olmstead v. L.C.*, 527 U.S. 581, 600 (1999).

#### B. Statement of the Facts

Plaintiffs are adult Medicaid recipients with developmental disabilities. Thomas Maertz has an intellectual disability and cerebral palsy. Pls.’ Answers to Interrog. Filing No. 143-8, at 15. Cody Cole has spastic hemiplegia cerebral palsy and uses a power wheelchair for mobility. He has upper body spasticity and difficulty swallowing. Filing No. 143-8, at 16. Colton Cole has spastic hemiplegia cerebral palsy and uses a power wheelchair for mobility. He also has severe lower body spasticity and hip subluxation. Filing No. 143-8, at 17. As a result, Plaintiffs require assistance with activities of daily living such as dressing, bathing, and mobility.<sup>1</sup> Notice of Action to Cody Cole, Family Supports Waiver, Filing No. 145-4, at 29; Notice of Action to Colton Cole, Family Supports Waiver, Filing No. 145-5, at 35; Notice of Action to Thomas Maertz, Family Supports Waiver, Filing No. 145-6, at 7.

Plaintiffs previously received assistance and supervision through Indiana’s Aged and Disabled Medicaid Waiver Program (“A&D Waiver”), which enabled them to live in their own homes and participate in their communities. Medicaid Waivers “permit[] a State to furnish an array of home and community-based services that assist Medicaid beneficiaries to live in the community and avoid institutionalization.” Appl. for § 1915(c) Home and Community-Based

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<sup>1</sup> Plaintiffs did not address Plaintiff Timothy Keister’s claims in their Cross-Motion for Summary Judgment, acknowledging that they “are likely to become moot.” Filing No. 146, 1. As a result, the Department similarly omits Mr. Keister.



Servs. Waiver, Filing No. 143-1, at 1. These home and community-based services can include, for example, home health aides who come to the individual's private apartment or house to assist with activities of daily living like transferring out of bed and into a wheelchair. However, the State of Indiana ("State") Family and Social Services Administration ("FSSA") changed its policy regarding the A&D Waiver and as a result transferred Plaintiffs to the Family Supports Medicaid Waiver Program ("FS Waiver"). Pls.' Cross-Mot. for Summ. J., Filing 146, at 1. The FS Waiver services, alone, are insufficient to enable Plaintiffs to live at home and participate in their communities. Filing 146, at 13-15.

The State's reduction of Plaintiffs' services is already harming their health. Under the FS Waiver, Plaintiffs Colton and Cody Cole's hours were drastically reduced, so that they are now served by a single aide for an extended period each week although they live in separate residences and require frequent assistance. Tamara Wald Aff., Filing No. 145-2, at 3-5. At times when the aide was shuttling back and forth, each man fell and had to call for emergency assistance. Filing No. 145-2, at 5. Similarly, under the A&D Waiver Plaintiff Thomas Maertz received approximately forty hours of services per week, but under the FS Waiver, he only receives twelve hours of services per week. Francesca Kemp Aff., Filing No. 145-3, at 2-3. With this lower level of services, Plaintiff Thomas Maertz became increasingly lethargic and depressed. Filing No. 145-3, at 4-5.

But for the willingness of Plaintiffs' family members to provide care, Plaintiffs would immediately be forced to move out of their own homes and into institutions for people with disabilities. Filing No. 146, at 3. For example, Ms. Francesca Kemp, sister to Plaintiff Thomas Maertz, previously worked 52 hours per week while Plaintiff Maertz received A&D Waiver services. In order for him to remain in their home now that Mr. Maertz is receiving FS Waiver services, Ms. Kemp cut her work hours to stay home with Mr. Maertz and assist him during days

and times that the FS Waiver does not provide services. Filing No. 143-8, at 6. Similarly, the FS Waiver does not provide sufficient services to Colton and Cody Cole, and so Ms. Tamara Awald (Plaintiff Colton and Cody Cole's parent) provides additional care to them herself and has paid \$2,000 out of pocket for services previously provided through the A&D waiver. Filing No. 143-8, at 8.

Plaintiffs have put forth evidence that the State's cuts to their services will likely force them into institutions. Ms. Awald will be "forced to seriously contemplate institutionalization for both Colton and Cody as the FS Waiver does not offer sufficient services to ensure their care and supervision." Filing No. 143-8, at 8-9. Likewise, "[i]f it were not for [Ms. Kemp's] care and assistance, there is absolutely no doubt that Thomas [Maertz] would require institutionalization." Filing No. 145-3, at 4. Ms. Kemp is "expecting a child in or around September of 2015" and "it will be exceedingly difficult to provide constant care and supervision to Thomas [Maertz] while at the same time caring for an infant." Filing No. 145-3, at 4.

Plaintiffs applied for the Community Integration and Habilitation Medicaid Waiver Program ("CIH Waiver"), which may offer more sufficient coverage, but the State found them ineligible. Julie Reynolds Decl., Filing No. 143-7, at 2-3.

Plaintiffs sued the Secretary of the Indiana Family and Social Services Administration; Director of the Division of Disability and Rehabilitative Services; and Director of the Division of Aging, arguing that: "The level of services offered, provided, and/or available to the plaintiffs-intervenors as a result of their termination from the Aged and Disabled Medicaid Waiver Program violates the 'integration mandate' of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973." Pls.' Statement of Claims, Filing No. 141, at 1. They alleged violations of Title II of the ADA, 42 U.S.C. § 12131 *et seq.*; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

#### IV. ARGUMENT

As non-institutionalized individuals with disabilities, Plaintiffs have standing to claim, under Title II and the integration mandate, that by reducing their Medicaid services, the State's actions put them at serious risk of institutionalization or segregation. The standard for "at-risk" claims is dictated by the plain text and intent of the ADA and its regulations; by the Supreme Court's reasoning in *Olmstead v. L.C.*, 527 U.S. 581 (1999); by three recent Court of Appeals decisions; and by the Department's guidance on the issue, which warrants deference. Plaintiffs provided sufficient evidence of this serious risk, including evidence that their health is declining due to the reductions, and so they have a cognizable "at-risk" claim.

In seeking summary judgment, Defendants rely on a misinterpretation of the Seventh Circuit's holding in *Amundson ex rel. Amundson v. Wisconsin Department of Health Services*, which states that where a plaintiff claims a state's actions violate the integration mandate, but fails to connect the state's actions to a cognizable harm such as institutionalization, the claim is unripe. 721 F.3d 871, 874 (7th Cir. 2013). Contrary to Defendants' argument, the Seventh Circuit's holding in *Amundson* is not inconsistent with the three other Circuits that hold that at-risk claims are cognizable. Rather, the *Amundson* decision includes language that an individual must sufficiently allege risk of institutionalization or segregation, which Plaintiffs here have amply shown.

##### A. A Serious Risk of Institutionalization or Segregation States a Claim Under the Integration Mandate

Individuals with disabilities need not wait until they are institutionalized to assert an integration claim under Title II of the ADA, 42 U.S.C. § 12132, and its integration mandate, 28 C.F.R. § 35.130(d). Neither the statute nor the integration mandate regulation by its own terms applies only to institutionalized individuals. Instead, the plain text of each protects the rights of

all “qualified individuals with disabilities.” 28 C.F.R. § 35.130(d); accord 42 U.S.C. § 12132.

Indeed, protecting individuals with disabilities from the harm of unnecessary segregation was one of Congress’s intents in passing the ADA. Congress found that, “historically, society has tended to isolate and segregate individuals with disabilities.” 42 U.S.C. § 12101(a)(2). Congress further found that such discriminatory segregation continues. 42 U.S.C. § 12101(a)(5). Congress thus stated that one of “the Nation’s proper goals” is to ensure “independent living” for individuals with disabilities. 42 U.S.C. § 12101(a)(7).

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court recognized that the unnecessary segregation of an individual with a disability is discrimination prohibited by Title II and the integration mandate. The Court held that “[u]njustified isolation \* \* \* is properly regarded as discrimination based on disability” because it “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.” *Id.* at 597, 600. The Court reasoned that “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” *Id.* at 601. These concerns and the potential for harm exist both where individuals unnecessarily institutionalized seek to return to their communities and where those with disabilities seek to avoid unnecessary, discriminatory institutionalization or segregation in the first place.

#### B. Three Circuits Agree “At-Risk” Claims Are Cognizable

The Fourth, Ninth and Tenth Circuits have each held that an individual who is at serious risk of institutionalization has a claim under the integration mandate; no court to squarely address the issue has held otherwise.<sup>2</sup> In *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10<sup>th</sup>

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<sup>2</sup> See *B.N. ex rel. A.N. v. Murphy*, 2011 WL 5838976 (N.D.Ind., 2011) (granting summary judgment to the plaintiff because a cap on certain A&D Waiver services put him at risk of institutionalization); *Grooms v. Maram*, 563 F.Supp.2d 840, 857-58 (N.D. Ill. 2008) (denying summary judgment to state where limits on Medicaid Waiver

Cir. 2003), the Tenth Circuit held that “disabled persons who \* \* \* stand imperiled with segregation” have standing to bring a claim “under the ADA’s integration regulation without first submitting to institutionalization.” *Id.* at 1182. The court reasoned that “there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized.” *Id.* at 1181. The court concluded that the integration mandate “would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation.” *Id.* The plaintiffs in *Fisher* “face[d] a substantial risk of harm” because they were “at high risk for premature entry” to an institution due to the state policy at issue in the case. *Id.* at 1184 (internal quotation marks omitted).

In *M.R. v. Dreyfus*, 663 F.3d 1100 (9<sup>th</sup> Cir. 2011), amended by 697 F.3d 706 (2012), the Ninth Circuit held that “[a]n ADA plaintiff need not show that institutionalization is ‘inevitable’

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services put the plaintiff at risk of institutionalization); *Pitts v. Greenstein*, No. 10-635-CIV, 2011 WL 1897552, at \*4 (M.D. La. May 18, 2011) (finding that the state’s plan for providing services violates the ADA by creating a greater risk for institutionalization); *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1308 (M.D. Fla. 2011) (issuing preliminary injunction requiring defendants to provide community-based services to plaintiff to prevent unnecessary placement in a nursing home); *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 WL 4571903, at \*2 (N.D. Fla. Oct. 14, 2008), *aff’d*, 383 Fed. Appx. 930 (11th Cir. 2010) (granting preliminary injunction requiring Medicaid coverage to prevent plaintiff from entering a nursing home); *Cruz v. Dudek*, No. 10-23048-CIV, 2010 WL 4284955, at \*13 (S.D. Fla. Oct. 12, 2010) (granting preliminary injunction that required the state agency to provide Medicaid recipients home-based services to prevent their institutionalization); *Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 637 (E.D.N.C. 2010) (granting preliminary injunction in case where plaintiffs were at risk of institutionalization); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 985 (N.D. Cal. 2010) (granting preliminary injunction where cuts to community-based services placed plaintiffs at risk of institutionalization); *Ball v. Rogers*, No. 00-67, 2009 WL 1395423, at \*6 (D. Ariz. April 24, 2009) (holding that defendants’ failure to provide adequate services to avoid unnecessary institutionalization was discriminatory); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1164 (N.D. Cal. 2009) (granting preliminary injunction where plaintiffs were at risk of institutionalization due to cuts in community-based services); *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1109 (N.D. Cal. 2009) (preliminarily enjoining cuts to community-based services where plaintiffs demonstrated risk of institutionalization), *dismissed as moot*, *Oster v. Wagner*, No. 09-17581, Dkt. No. 106-1 (9th Cir. Jan. 7, 2013); *Crabtree v. Goetz*, No. 3:08-0939, 2008 WL 5330506, at \*30 (M.D. Tenn. Dec. 19, 2008) (“Plaintiffs have demonstrated a strong likelihood of success on the merits of their [ADA] claims that the Defendants’ drastic cuts of their home health care services will force their institutionalization in nursing homes.”); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1309 (D. Utah 2003) (ADA’s integration mandate applies equally to those individuals already institutionalized and to those at risk of institutionalization); *Makin v. Hawaii*, 114 F. Supp. 2d 1017, 1034 (D. Haw. 1999) (holding that individuals in the community on the waiting list for community-based services offered through the state’s Medicaid program could challenge administration of the program as violating Title II’s integration mandate because it “could potentially force Plaintiffs into institutions”).

or that she has ‘no choice’ but to submit to institutional care in order to state a violation of the integration mandate. Rather, a plaintiff need only show that the challenged state action creates a serious risk of institutionalization.” *Id.* at 1116.

In *Pashby v. Delia*, 709 F.3d 307 (4<sup>th</sup> Cir. 2013), the Fourth Circuit held that individuals who “face a risk of institutionalization” and “must enter institutions to obtain \* \* \* services for which they qualify” have standing to bring an ADA claim. *Id.* at 322. The court reasoned that “nothing in the plain language of the regulations \* \* \* limits protection to persons who are currently institutionalized.” *Id.* (quoting *Fisher*, 335 F.3d at 1181).

Defendants’ proffered interpretation of the integration mandate conflicts with these decisions of the Fourth, Ninth, and Tenth Circuits. Defendants argue that the integration mandate first requires institutionalization in order to state a claim. Defs.’ Br. Supp. Summ. J., Filing No. 144, at 8-10. Defendant misconstrues Seventh Circuit precedent in arguing otherwise. In *Amundson*, the Seventh Circuit never reached the question of the proper legal standard under the integration mandate because the integration claim in that case was “unripe.” 721 F.3d at 874. The plaintiffs in *Amundson* challenged the state’s Medicaid service rates regarding community placements but did not allege that community providers would not accept the rates. *Id.* at 873-874. The court credited the state’s assertion that “it has safeguards in place that will prevent any plaintiff from being transferred to an institution.” *Id.* at 874. Crucially, the court found that the “complaint does not give a sufficient reason to think that these [safeguards] will fail.” *Id.* This language makes clear that the Seventh Circuit did not foreclose at-risk claims. Rather, in order to make out a claim under the integration mandate, an individual need not necessarily be institutionalized, but must give the fact-finder “sufficient reason to think” that the state’s actions could result in institutionalization. *Id.* Because the *Amundson* plaintiffs did not connect the state’s actions to a cognizable harm (risk of institutionalization), the court dismissed their claims.

So, the Seventh Circuit's holding in *Amundson* is not inconsistent with the decisions of the Fourth, Ninth, and Tenth Circuits that at-risk claims are cognizable under the integration mandate.

C. The Department of Justice's Interpretation of the Integration Mandate Warrants Deference

The Department's views on Title II of the ADA "warrant respect," *Olmstead*, 527 U.S. at 597-598. Further, its interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation," *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation and internal quotation marks omitted); *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, n. 4 (2015) (*Auer* deference applies to agencies' interpretations of their own regulations unless "the agency's interpretation is plainly erroneous or inconsistent with the regulation" or "does not reflect the agency's fair and considered judgment" (citations omitted)).

The Department's *Olmstead* Statement provides that suing to prevent the harm of unnecessary institutionalization or segregation is a cognizable claim under Title II, the integration mandate, and *Olmstead*. See DOJ *Olmstead* Statement, Filing No. 145-7. Defendants turn the Department's *Olmstead* Statement on its head by claiming that it supports their position that Plaintiffs' claims must fail because they have not been institutionalized. Defs.' Reply Supp. Summ. J., Filing No. 148, at 14. In its *Olmstead* Statement, the Department answered the very question presented in this case: "Do the ADA and *Olmstead* apply to persons at serious risk of institutionalization or segregation?" *Id.* at 3 (Question & Answer 6). The answer, unequivocally, is "[y]es, the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation." *Id.* Protection against the harm of unnecessary institutionalization or segregation is "not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent." *Id.*

The Department's *Olmstead* Statement meets *Auer*'s requirements for deference because it is a consistent implementation of Title II's prohibition on unnecessary institutionalization or segregation of individuals with disabilities, the integration mandate, and *Olmstead*. 519 U.S. at 461. It is also consistent with the Fourth, Ninth, and Tenth Circuits' interpretation that at-risk claims can be brought under the integration mandate. *See generally Pashby*, 709 F.3d 307 (4<sup>th</sup> Cir. 2013); *M.R.*, 663 F.3d 1100 (9<sup>th</sup> Cir. 2011); *Fisher*, 335 F.3d 1175 (10<sup>th</sup> Cir. 2003). So finding, the Fourth and Ninth Circuits explicitly deferred to the Department's view. *Pashby*, 709 F.3d 307 (4<sup>th</sup> Cir. 2013); *M.R.*, 663 F.3d 1100 (9<sup>th</sup> Cir. 2011); *Fisher*, 335 F.3d 1175 (10<sup>th</sup> Cir. 2003).

In short, Plaintiffs here may sue for relief under the ADA if the State's actions place them at a serious risk of institutionalization or segregation. This standard best effectuates the broad prohibition of discrimination against individuals with disabilities in public services under Title II, the integration mandate, and *Olmstead*. The standard also implements the Department's reasonable interpretation of its own regulation and comports with every court of appeals decision that has squarely addressed the issue.

D. Plaintiffs' Evidence Shows They Are at Serious Risk of Unnecessary Segregation

Plaintiffs in this case showed that the State's changes to its Medicaid program place them at serious risk of institutionalization or segregation in two ways: 1) the State reduced their community Medicaid services to a level which does not meet their needs; and 2) due to the service cuts, their health is declining and they may require institutionalization. Under the ADA, a state may be required to provide the relief Plaintiffs are requesting: changes to the State's Medicaid program to prevent institutionalization.

As the Fourth, Ninth and Tenth Circuits have held, plaintiffs are at risk of unnecessary institutionalization where a state's failure to provide services will likely cause a decline in health



that will lead to an individual's eventual placement in an institution. *See Pashby*, 709 F.3d at 322; *M.R.*, 663 F.3d at 1115; *Fisher*, 335 F.3d at 1184-1185. This was the situation in *Cruz v. Dudek*, where plaintiffs alleged that the state's restrictions on the number of hours of Medicaid community services placed them at serious risk of institutionalization. No. 10-23048-CIV, 2010 WL 4284955, \*1 (S.D. Fla. Oct. 12, 2010). The magistrate judge recommended that preliminary relief be granted, finding that plaintiffs stated a cognizable at-risk claim, demonstrated, for example, by one plaintiff's "repeated hospitalizations in recent months due to the fact that he does not receive adequate services from Florida's Medicaid plan." *Id.* at \*13. Similarly to the plaintiffs in *Cruz*, both the Coles and Mr. Maertz are already experiencing health risks such as falls due to gaps in service. *See supra* at p. 9.

Here, the State claims that the Plaintiffs are not at risk of institutionalization because the Plaintiffs' families provide free services and hope to keep their loved ones out of institutions. *See* Filing 144, at 5, 7, 10. The State cannot rely on the goodwill of the Plaintiffs' family members as a defense here. The Plaintiffs are at serious risk of institutionalization because if and when their family members become unable to supplement their services, they will be forced to enter institutions in order to get the services they need. Defendants' response to Plaintiffs' evidence of risk of institutionalization is a conclusory statement by the Director of Bureau of Developmental Disabilities Services that Plaintiffs' services are sufficient. Filing 148, at 4 (*citing* Second Julie Reynolds Decl., Filing No. 147-1, at 3). Defendants' insistence that Plaintiffs have no integration mandate claim so long as they continue to reside in their homes, Filing No. 148, at 3-4, 10-18, is an impermissibly black and white formulation of the integration mandate. The State does not dispute that even with the efforts of family members, Plaintiffs experienced falls, depression, and other threats to their health due to the change in services. Plaintiffs thus have a cognizable at-risk claim under the integration mandate.

#### IV. CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court hold that a non-institutionalized individual with a disability can bring a claim under Title II, its integration mandate, and *Olmstead* for a State or local government's actions that put an individual at serious risk of institutionalization or segregation; deny Defendants' motion for summary judgment; and allow the United States to participate in any argument that the Court may hear on either motion.

Dated: March 27, 2015

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## CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2015, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the a true and correct copy of the foregoing document was served on March 27, 2015 on all counsel of record or parties identified on the Service List below via transmission of Notices of Electronic Filing generated by CM/ECF.

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