ORAL ARGUMENT NOT YET SCHEDULED
No. 17-7152

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IVY BROWN, in Her Individual Capacity
and as Representative of the Certified Class,
Plaintiff-Appellant

LARRY MCDONALD, *et al.*,
Plaintiffs-Appellees

v.

DISTRICT OF COLUMBIA,
Defendant-Appellee

On Appeal From a Judgment of The United States
District Court For The District Of Columbia

BRIEF FOR AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, THE ARC, THE ARC OF DC, AUTISTIC SELF ADVOCACY NETWORK, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, JUSTICE IN AGING, NATIONAL DISABILITY RIGHTS NETWORK, AND WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AS AMICI IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Amici state as follows:

(A) Parties, Intervenors, and Amici:

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants: American Association of People with Disabilities, The Arc, The Arc of DC, the Autistic Self Advocacy Network, the Judge David L. Bazelon Center for Mental Health Law, Justice in Aging, the National Disability Rights Network, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs.

(B) Ruling Under Review:

An accurate reference to the rulings at issue appear in the Brief for Appellants.

(C) Related Cases:

As identified in the Brief for Appellants, this matter previously has been before this Court, *sub nom. In re: District of Columbia*, No. 14-8001, 792 F.3d 96 (D.C. Cir. 2015). Counsel is aware of no currently pending related case.

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Amici hereby submit the following disclosure statements:

The American Association of People with Disabilities is a non-profit, tax-exempt organization incorporated in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The Arc is a non-profit, tax-exempt organization incorporated in Maryland. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The Arc of DC is a non-profit, tax-exempt organization incorporated in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The Autistic Self Advocacy Network is a non-profit, tax-exempt organization incorporated in New Jersey and headquartered in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The Judge David L. Bazelon Center for Mental Health Law is a non-profit, tax-exempt organization incorporated in the District of Columbia. The

organization has no parent corporation, and no publicly held company has 10% or greater ownership.

Justice in Aging is a non-profit, tax-exempt organization incorporated in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The National Disability Rights Network is a non-profit, tax-exempt organization incorporated in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs is a non-profit, tax-exempt organization incorporated in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief.[1] Pursuant to D.C. Circuit Rule 29(d), Amici certify that a separate brief is necessary to provide the perspective of disability advocates and individuals with disabilities that Amici represent, including a dedicated interest in: (1) the proper application of the Americans with Disabilities Act; (2) the importance of continuing to remove obstacles that can interfere with access to government programs and services; and (3) the right of persons with disabilities to be integrated with non-disabled persons in a manner that is consistent with their wishes and responsive to their needs.

[1] No counsel for a party authored this brief in whole or in part, and no person other than the Amici Curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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GLOSSARY

Term	Definition
ADA or Act	Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213
Amended Complaint	Plaintiffs' Fourth Amended Class Action Complaint
DD Act	Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 89 Stat. 486 (codified at 42 U.S.C. §§ 6001-6081 (1976)), *repealed and superseded by* Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, 114 Stat. 1677 (codified at 42 U.S.C. §§ 15001-15115)
DESA	Delaware Settlement Agreement
EPD Waiver	Elderly and People with Disabilities Waiver
GASA	Georgia Settlement Agreement
MFP	Money Follows the Person federal grant program
NCSA	North Carolina Settlement Agreement
NHSA	New Hampshire Settlement Agreement
Olmstead Litigation	Olmstead Litigation in the Twelve U.S. Circuit Courts of Appeals, ADA.gov (U.S. Dep't of Justice, Civil Rights Div.)
Section 504	Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794
TXISA	Texas Interim Settlement Agreement

STATUTES AND REGULATIONS

Except for the statutes set forth in the Statutory Addendum, all applicable statutes and regulations are contained in the Brief for Appellants.

INTEREST OF AMICI CURIAE

The American Association of People with Disabilities ("AAPD") organizes the disability community to be a powerful voice for change. The AAPD is committed to eliminating barriers to community integration, equal opportunity, and civic participation.

The Arc is the nation's largest organization of and for people with intellectual and developmental disabilities ("I/DD"). The Arc has a vital interest in ensuring all individuals with I/DD receive the protections to which they are entitled by law.

The Arc of DC is the D.C. affiliate of The Arc and works to promote and protect the rights of people with I/DD throughout the District of Columbia.

The Autistic Self Advocacy Network ("ASAN") is a nonprofit organization run by and for autistic people seeking to advance the principles of the disability rights movement. ASAN has an interest in ensuring individuals with disabilities benefit from integration into the community.

Since 1972, The Judge David L. Bazelon Center for Mental Health Law has advocated for the equality of adults and children with mental disabilities. The settlement agreements and court orders secured by the Bazelon Center have provided thousands of individuals with opportunities to live full lives in their communities.

Justice in Aging ("JIA") is a national non-profit legal advocacy organization that fights senior poverty through law. JIA advocates for affordable health care and economic security for older adults, focusing especially on those traditionally lacking legal protection.

The National Disability Rights Network ("NDRN") provides legal representation and related advocacy services for individuals with disabilities in a variety of settings. NDRN works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("the Committee") fights discrimination and endeavors to create legal, economic, and social equity. Since the ADA was passed in 1990, the Committee's Disability Rights Project has been litigating cases involving equal access to public accommodations, public entities, transportation providers, and health care providers.

INTRODUCTION

Amici curiae, the American Association of People with Disabilities, The Arc, The Arc of DC, the Autistic Self Advocacy Network, the Judge David L. Bazelon Center for Mental Health Law, Justice in Aging, the National Disability Rights Network, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs share a strong interest in ensuring that individuals with disabilities can overcome discrimination, stigma, and unnecessary segregation. Amici are experts in disability law and civil rights, promoting the integration of individuals with disabilities into community settings where they can live full lives. Amici have been at the forefront of efforts to ensure the goals of the Americans with Disabilities Act of 1990 ("ADA" or the "Act"), 42 U.S.C. §§ 12101-12213, and the requirements of *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), are met, and are authorities on the benefits of integrating individuals with disabilities into the community.

SUMMARY OF ARGUMENT

People with disabilities historically have been denied access to public life—separated from communities by governmental policies, programs, and practices. Public rejection of this segregation has grown, however, with policies over the past 30 years gradually affirming that people with disabilities have a right to participate in the mainstream of society. The ADA promotes what is no longer novel—

persons with disabilities cannot be denied services, benefits, and opportunities essential for engaging in public life. This integration of people past institutional walls and into their communities, however, is impossible without necessary transition services. To remedy decades of state-sponsored segregation, and to ensure ongoing compliance with the ADA mandate, the state must provide a program of meaningful, coordinated, and comprehensive transition services.

In its decision below, the district court observed that "[t]he District [of Columbia] has little to be proud of regarding its historical inability to comply with *Olmstead*'s integration mandate," *Brown v. D.C.*, 322 F.R.D. 51, 96 (D.D.C. 2017), and yet suggested recent voluntary efforts somehow absolved the District's longstanding failure. The court also assumed that, even though systemic deficiencies attributable to the District existed, factors beyond the District's control—a shortage of affordable housing and "a myriad of individualized barriers"—precluded mandating improvements. *Id.* at 95.

These barriers, though, are exactly why transition services are indispensable. The decision below effectively ignores the legal and practical need for robust, ongoing transition services for effective community integration of individuals with disabilities. And while, to be sure, transition services alone cannot guarantee integration, the absence of effective transition services prevents reentry for many, even where other community-based services are in fact available. It is therefore

unsurprising that other courts have effected enduring, enforceable consent decrees, or agreements requiring effective transition services.

The many transition services failures that Plaintiffs brought before the district court are too significant to credit the District's promises and post-lawsuit action, especially given the ineffectiveness of those efforts. For years, Amici have watched these same issues play out in states across the country—with necessary services ensured only through enduring, court-ordered actions and government settlements. People with disabilities in the District deserve no less assurance that the conclusion of Plaintiffs' lawsuit will not constitute the end of the District's voluntary provision of transition services or efforts to enhance their efficacy.

ARGUMENT

I. A COMPREHENSIVE PROGRAM OF TRANSITION ASSISTANCE IS INTEGRAL TO CONNECTING INDIVIDUALS WITH DISABILITIES TO THEIR COMMUNITIES AND COMMUNITY-BASED SERVICES

The ADA culminated decades of effort to end the discrimination faced by more than 54,000,000 Americans with disabilities. The Act mandates that people with disabilities have equal access to the basic institutions of government and participation in society.[2] And yet, even with housing and community service

[2] *U.S. Department of Justice Civil Rights Division Accomplishments, 2009-2012*, § I.4 (Expanding Opportunity in the Community for People with *(cont'd)*

providers offering improved access to the community, the goals of the ADA remain elusive without effective transition services guiding individuals out of institutional settings and into their communities.

Prior to the ADA's enactment, Americans with disabilities faced discrimination in all aspects of life, including employment, government services, transportation, and public accommodations. Historically, and throughout most of the twentieth century, states routinely segregated persons with disabilities and primarily, if not solely, provided disability-related services in institutional settings. *See generally City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). Some states went so far as to find persons with disabilities "unfit for citizenship."[3] Assuming that people with disabilities were unable to interact with broader society, states enforced or encouraged policies of segregation that effectively isolated them.[4]

(cont'd from previous page)
Disabilities), U.S. Dep't of Justice, www.justice.gov/crt/us-department-justice-civil-rights-division-accomplishments-2009-2012 (last visited June 11, 2018).

[3] *See* 1920 Miss. Laws 294, ch. 210, § 17 (courts have jurisdiction for inquiry regarding "feeble-mindedness" potentially rendering persons "unfit for citizenship").

[4] *See generally* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-403 (1991).

Congress passed Section 504 of the Rehabilitation Act in 1973 ("Section 504").[5] Section 504, creating the right to be free from discrimination based on disability by recipients of federal funds, was modeled on previous laws banning race, ethnicity, and sex-based discrimination by federal fund recipients.[6] The Developmentally Disabled Assistance and Bill of Rights Act of 1975 ("DD Act") followed, holding that the "treatment, services, and habilitation for a person with developmental disabilities . . . should be provided in the setting that is least restrictive of the person's personal liberty."[7] Notably, while the DD Act established integration goals, it did not mandate them.[8]

Segregation still remained far too common. As Congress considered further protections for individuals with disabilities, it rejected assumptions fueling decades of segregation, acknowledging that the obstacles facing those with disabilities are "not inherent in their disabilities, but arise from barriers that have been imposed

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5 Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2012)).

6 *See* Cook at 467 n.489.

7 Pub. L. No. 94-103, § 111(2), 89 Stat. 486, 502 (codified at 42 U.S.C. § 6010(2) (1976)), *repealed by* Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, § 401, 114 Stat. 1677, 1737, *and superseded by* Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, § 109(a)(2), 114 Stat. 1677, 1692 (codified at 42 U.S.C. § 15009(a)(2) (2012)).

8 The courts and the Department of Justice interpreted Section 504 to have an integration mandate, but Title II of the ADA applied the mandate to a broader group of entities. *See* Cook at 415-17.

externally and unnecessarily."[9] Congress understood that those barriers, created by governmental policy and by law, as a result required positive action to end this discrimination and segregation.

Congress ultimately passed the ADA in 1990. The Act acknowledges past deficiencies, recounting that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). It also affirms that individuals with disabilities faced discrimination in employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. *See id.* § 12101(a)(3). In response, the ADA prohibits public entities from discriminating on the basis of disability and makes clear that unjustified segregation of persons with disabilities is a form of discrimination.

Title II of the ADA, addressing state and local government entities, mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services,

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[9] *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before Subcomm. on the Handicapped of S. Comm. on Labor & Human Res. and Subcomm. on Select Educ. of H. Comm. on Educ. & Labor*, S. Hrg. 100-926, at 3 (1988) (Opening Statement of Sen. Lowell Weicker, Jr. (quoting Nat'l Council on the Handicapped, *Toward Independence* (1986))).

programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132. The Department of Justice regulations implementing Title II of the ADA provide that "[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) (2017).

Nine years after the ADA's enactment, the Supreme Court confirmed that unjustified segregation of persons with disabilities in institutions is discrimination based upon a disability. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999). The Court observed that the ADA sought to address historical isolation and segregation by "'provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Id.* at 589 (quoting 42 U.S.C. § 12101(b)(1)). The Court held that people with disabilities must be integrated into a community setting rather than institutions when (i) community placement is determined to be appropriate for the individual; (ii) the transfer from institutional care to a less restrictive setting is not opposed by the affected individual; and (iii) the individual's transition to the community can be reasonably accommodated, taking into account the resources available to the state and the needs of certain others with disabilities. *Id.* at 587.

The Court explained the critical need for the integration mandate. First, the institutional placement of those who can manage, and would benefit from,

community settings perpetuates the perception that they are incapable or unworthy of participating in community life. *See id.* at 600. Second, confinement in an institution severely diminishes the everyday activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. *Id.* at 601. This needless segregation denies individuals with disabilities their communities, interaction with those who do not have disabilities, and agency for their own daily choices.

Deinstitutionalization, however, "is not as simple as opening doors and letting people out."[10] An individual who has been institutionalized loses independent access to services available within the community (*e.g.*, the ability to visit a housing or service provider), often does not have access to the tools necessary to reach those service providers (such as on-demand telephone access and transportation for appointments), and, over the passage of time in isolation, can lose the ability to effectively interact with community-based service providers. More is needed than just services awaiting in communities—individuals with disabilities need support to leave their institutions, enter those communities, and adapt to a community setting.

[10] Eve Hill & Peter Blanck, *Future of Disability Rights Advocacy and "The Right to Live in the World,"* 15 Tex. J. C.L. & C.R. 1, 6 (2009).

Institutionalization isolates persons with disabilities and leaves them, their families, and their health care providers apprehensive about the prospect of integration into the community. A study of an institutional closure in Georgia found that more than half of families had negative feelings about the prospect of integration prior to closure of the facility.[11] This apprehension is often widespread, with families concerned about effects on family life and the welfare of the individual.[12] Additionally, some can find integration after a long period of institutionalization daunting, resulting in re-institutionalization without the appropriate support.[13] Studies are clear that the isolation and segregation caused

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[11] *See* Zolinda Stoneman & Beverly Al-Deen, *River's Crossing: Transition from Institution to the Community* 26 (1999), https://www.fcs.uga.edu/docs/RiversCrossing.pdf.

[12] *See* Raymond A. Lemay, *Deinstitutionalization of People With Developmental Disabilities: A Review of the Literature*, 28 Can. J. Community Mental Health, no. 1, 181, 181-194 (2009), http://www.valorispr.ca/images/Valoris_site/documents/Bibliographie_-_Raymond_Lemay/Lemay_2009-Deinstitutionalization.pdf (reviewing deinstitutionalization literature).

[13] *See* Letter from Thomas E. Perez, Assistant Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Haley R. Barbour, Governor, State of Miss., re: United States' Investigation of the State of Mississippi's Service System for Persons with Mental Illness and Developmental Disabilities at 21 (Dec. 22, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2012/01/26/miss_findletter_12-22-11.pdf.

by institutionalization in fact make exiting institutions harder for individuals and their families, with a greater risk of re-institutionalization.[14]

Transition services ameliorate this concern by helping individuals leave institutions and integrate into their communities. A 2005 study by the state of Michigan found that transition services helped individuals make the initial move from an institutional to a community setting, and reduced the need for post-transition state-supported services.[15] Once successfully in the community, individuals have reported higher self-advocacy skills, self-determination, and improved behavior and medical conditions than those who remain institutionalized.[16] Transition assistance is essential to ensuring that people with disabilities do not unnecessarily remain in institutions and that they are able to stay in the community after they are deinstitutionalized. Without effective transition services, the promise of the ADA and *Olmstead* cannot be realized.

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14 *See, e.g.*, Lemay at 184-88.

15 *See* David Youngs & Carol Clifford, *Michigan Nursing Facility Transition Initiative Project Evaluation Report, Transition Component* 24-27 (2005), https://www.michigan.gov/documents/NFTIEvaluationTransitionFinalReport_156747_7.pdf.

16 *See, e.g.*, Nat'l Disability Rights Network, *Keeping the Promise: True Community Integration and the Need for Monitoring and Advocacy* 9 (2011), http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Keeping_the_Promise.pdf.

II. OTHER AUTHORITIES HAVE REQUIRED TRANSITION SERVICES OF THE KIND SOUGHT HERE BECAUSE OF THEIR CRITICAL IMPORTANCE TO REALIZING THE ADA'S INTEGRATION MANDATE

As Plaintiffs highlighted, the District failed to provide effective transition assistance, including a coherent and integrated program of services. While the needs of each individual may not be identical, those leaving institutions all require comprehensive transition services that include: transition planning, accurate information about available community-based services, engagement and support for making decisions about where to live, consideration of concerns about transitioning, arrangements for necessary services and benefits, funding program assistance, and identification of barriers to transition and assistance overcoming them. The District long neglected to provide these services to Plaintiffs.

The district court nevertheless concluded that the District is no longer responsible for its historical failures to provide transition assistance because it made belated, non-binding improvements, and encountered certain individualized issues that could potentially impede a successful transition. *See Brown*, 322 F.R.D. at 94-95.

Those non-binding changes, however, impose no obligation on the District to fully comply with the integration mandate and, in any event, have failed to help transition a meaningful number of individuals. The district court's conclusion also runs counter to what courts across the country have done to address similar

deficiencies: imposing binding obligations for effective transition services for persons with disabilities and monitoring compliance for actual improvements.

A. The District's Belated, Voluntary Improvements to Its Transition Services Do Not Absolve Its Noncompliance with the Integration Mandate

As Plaintiffs make clear (Pls. Br. 6-18), mere voluntary changes do not permit the District to escape historical failures to comply with the integration mandate. When Plaintiffs filed this lawsuit in December 2010, 11 years after *Olmstead*, the District still had no comprehensive plan for achieving community integration of individuals with disabilities.[17] Not until this litigation did the District begin to address glaring transition program deficiencies, though the District has yet to produce meaningful results.[18] And even these insufficient efforts are backed by no legal compulsion to maintain improvements or take further action to fully comply with the integration mandate. The District itself admits that its Olmstead Community Integration Plan "does not create independent

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[17] Indeed, the District's record is dismal. For example, the District's 1995-2009 nursing home population decreased by only 45 individuals. The District's Money Follows the Person federal grant program, first authorized in 2007, helped transition only three individuals in almost five years. *See Day v. District of Columbia*, 894 F. Supp. 2d 1, 28 (D.D.C. 2012); *see also infra* Section II.B.

[18] *See infra* Section II.B.

legal obligations on the part of the District."[19] As such, despite the Plan, individuals with disabilities who currently or will reside in District nursing facilities could be deprived of the very same transition services sought in Plaintiffs' original 2010 complaint.

The need for binding remedies is even more evident in light of the District's poor record of achieving compliance with court orders and consent decrees to adequately support people with disabilities. For example, in *Evans v. Fenty*, No. 1:76-cv-00293 (D.D.C. compl. filed Feb. 23, 1976), the district court required multiple consent and contempt orders to address the constitutionally deficient level of care, treatment, education, and training provided to residents of Forest Haven, the District's former institution for people with developmental disabilities. The District needed *more than 40 years* to fully comply with the orders.[20] *Evans* was not an isolated incident; the District also has been slow to implement court orders in other cases. *See*, *e.g.*, *Blackman v. D.C.*, No. 1:97-cv-01629, Order (D.D.C. Dec. 18, 2014), ECF No. 2504 (requiring more than 14 years to fully comply with

[19] Olmstead Community Integration Plan – DC One Community for All, D.C. Office of Disability Rights, https://odr.dc.gov/page/olmstead-community-integration-plan-dc-one-community-all (last visited June 11, 2018).

[20] Martin Austemuhle, *Judge Settles 40-Year-Old Lawsuit Against D.C. Over Treatment of People with Developmental Disabilities*, WAMU (Am. Univ.) (Jan. 17, 2017), https://wamu.org/story/17/01/10/judge-settles-40-year-old-lawsuit-d-c-treatment-people-developmental-disabilities/.

consent decree ordering more support services for students with mental and physical disabilities in D.C. public schools and their parents); *Dixon v. Gray*, No. 1:74-cv-00285, Consent Order (D.D.C. Feb. 16, 2012), ECF No. 405 (requiring more than 35 years to comply with 15 of 19 conditions established to end the class action by psychiatric patients who sought deinstitutionalization and treatment in the community).

In contrast to the decision below, courts across the country have mandated or approved consent decrees and agreements requiring concrete improvements to transition programs, providing security for individuals with disabilities. As Plaintiffs explain in their brief (Pls. Br. 48-50), this matter is well-suited for the same treatment. Appeals to the equity jurisdiction conferred on federal district courts are appeals to the exercise of their broad and sound discretion. *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1943). The essence of this authority "is 'to do equity and to mould each decree to the necessities of the particular case.'" *Reid ex rel. Reid v. District of Columbia.*, 401 F.3d 516, 523-24 (D.C. Cir. 2005) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). A court's power to grant injunctive relief survives discontinuance of the conduct—the purpose "is to prevent future violations." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

Without rigorous enforcement through government settlement and court-ordered requirements, any changes that may have been made after the filing of the Complaint are at risk. *See, e.g.*, *Young v. D.C. Hous. Auth.*, 31 F. Supp. 3d 90, 95-99 (D.D.C. 2014) (denying motion to dismiss for mootness in ADA and Rehabilitation Act matter where D.C. authority "fixes" were introduced only once litigation began and could be undone). When only voluntarily provided, these programs remain vulnerable to any number of threats. Budgetary pressures, political conflicts, agency inaction, or other factors can readily thwart even well-intentioned plans to improve what is still an ineffectual process.

After serving their litigation purpose, the District's transition services could disappear, requiring Plaintiffs to bring yet another lawsuit to ensure that the District upholds its obligations. The District's current transition services are at their core transitory, leaving Plaintiffs insecure as to what their future may hold absent injunctive relief.

B. The District's Voluntary Efforts Have Failed to Produce Meaningful Transition Outcomes

As Plaintiffs explain (Pls. Br. 28-40), courts should measure the adequacy of a comprehensive program of transition services against its results in determining whether the services satisfy ADA's requirements. While the district court found that the District currently has done enough to avoid findings of systemic deficiencies, *see Brown*, 322 F.R.D. at 89-92, the District has yet to produce

meaningful transition outcomes through adequate transition services. Under the Money Follows the Person ("MFP") federal grant program,[21] for example, the District is required to set annual targets for the number of physically disabled nursing facility residents it anticipates transitioning to the EPD Waiver.[22] In 2007, when the District first applied for and received approval to participate in the MFP program, the District proposed transitioning a total of 645 individuals with physical disabilities out of nursing facilities at a rate of more than 100 per year. *Thorpe v. District of Columbia*, 303 F.R.D. 120, 130 (D.D.C. 2014). In 2010, the District reduced its benchmarks to 30 residents in 2010 and 40 residents each in 2011, 2012, 2013, and 2014. *Id.*

Publicly available data demonstrate that the District has not made sufficient progress in transitioning individuals through its MFP program. The District transitioned 0 residents in 2010, 17 in 2011, 16 in 2012, 16 in 2013, 24 in 2014, 36 in 2015, and 40 in 2016, for a total of 149 MFP program transitions from October

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[21] The MFP program provides states, rather than individuals, with grants so states can develop MFP programs to aid in individuals' transitions. These programs use existing Medicaid resources such as Home and Community-Based Services to assist individuals in managing their care outside of a nursing home.

[22] The term "waiver" refers to a Medicaid-financed program for services to the elderly and people with disabilities ("EPD") who otherwise would be in a nursing home or hospital for long-term care. Before 1991, the Federal Medicaid program paid for services only if a person lived in an institution—Medicaid now "waives" that requirement for certain individuals. The District's program is called the EPD Waiver.

2010 through December 2016.[23] These numbers combine figures for older adults, people with physical disabilities, people with intellectual or developmental disabilities, and people with mental illness. When including only people with physical disabilities, the class at issue here, the District transitioned only 53 individuals through the MFP program from 2007-2016—far short of the 100-person *annual* target the District set in 2007.[24] As of February 2012, there were at least 526 individuals with physical disabilities living in nursing facilities who had expressed an interest in living in the community. *Brown*, 322 F.R.D. at 57-58. The District's nursing-facility occupancy rate has remained well above 90% since 2012 until at least September 2017. *Id.* at 72.

The abysmal rate of improved transition outcomes in the District does not reflect a determined effort to change, even in the face of a lawsuit. As the numbers show, merely relying on the District's voluntary efforts has not produced meaningful progress for the full community integration of individuals with disabilities.

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[23] *See Brown,* 322 F.R.D. at 77.

[24] *See* Rebecca Coughlin et al., Mathematica Policy Research, *Money Follows the Person Demonstration: Overview of State Grantee Progress, January to December 2016*, at A.3, tbl. A.1 (2017), https://www.medicaid.gov/medicaid/ltss/downloads/money-follows-the-person/2016-cross-state-report.pdf.

C. Other States Have Been Required to Provide Transition Assistance Improvements to Redress Deficiencies of the Kind Identified in the District

Effective transition services are essential elements of state and local compliance with the *Olmstead* integration mandate. To meaningfully effectuate the right to live in an integrated setting, states must not only stop unnecessary admissions into nursing facilities and other institutions, but also assist those who already or repeatedly are institutionalized with returning to communities. As explained in Section I, *supra* at 10-12, the segregation of persons with disabilities severs their access to community-based resources and makes community integration all the more difficult.

Courts across the country have recognized that challenge, requiring at least 20 states to confront the harms of unnecessary segregation and prevent its recurrence through effective transition services.[25] While court-imposed orders and settlement agreements have not always fully resolved deficiencies in other states' programs, the District's failure to produce meaningful transition outcomes through belated and non-binding changes at a minimum necessitates imposing similar obligations here.

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[25] *See* Olmstead Litigation in the Twelve U.S. Circuit Courts of Appeals, ADA.gov (U.S. Dep't of Justice, Civil Rights Div.), https://www.ada.gov/olmstead/olmstead_enforcement.htm (last visited June 11, 2018) (hereinafter "Olmstead Litigation").

In the original 2010 complaint, Plaintiffs identified deficiencies in the District's transition assistance.[26] Five years later, after the District implemented certain non-binding measures, Plaintiffs in their Fourth Amended Complaint identified nearly identical deficiencies.[27] Plaintiffs alleged that the District still lacked:

1. Discharge/Transition Planning. Discharge/transition planning that commences upon admission and includes a comprehensive written discharge/transition plan;

2. In-Reach Programs. Provision of accurate information about available community-based services, and engaging and supporting residents to make meaningful decisions about where to live;

3. Identifying Interested Residents. Identification of nursing facility residents interested in community-based services;

4. Identifying/Arranging Services. Identification of, and arrangement for, community-based services;

5. Waiver/Program Assistance. Assistance in applying for, and enrolling in, available waivers, other community services programs, or transition programs; and

6. Barrier Assistance. Identification of barriers to transition and assistance in overcoming those barriers to the extent possible.

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[26] Class Action Complaint ¶ 76, *Day v. District of Columbia*, No. 1:10-cv-2250 (D.D.C. filed Dec. 23, 2010), ECF No. 1.

[27] Fourth Amended Class Action Complaint for Declaratory and Injunctive Relief ¶ 105, *Brown v. District of Columbia*, No. 1:10-cv-2250-ESH (D.D.C. filed Sept. 10, 2015), ECF No. 162 (hereinafter "Amended Complaint").

The District belatedly released its first Olmstead Community Integration Plan in April 2012. The Plan asked primary service agencies to "[d]evelop a transition plan upon admission of an individual to a non-community-based setting."[28] The District only began voluntarily implementing improvements to its transition programs in 2016.

Across the country, individuals in institutional facilities have identified and challenged other states' overreliance on institutional services for people with disabilities.[29] In those cases, states were required to implement improvements, not only to the availability of community-based services but, crucially, to their transition assistance programs.[30] In lawsuits predicated on Title II of the ADA and

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[28] *The District of Columbia Olmstead Community Integration Plan*: *One Community for All*, at 9 (2013), https://odr.dc.gov/sites/default/files/dc/sites/odr/release_content/attachments/FY%202013%20Olmstead%20Plan%20FINAL.pdf.

[29] *See generally* Olmstead Litigation.

[30] *See, e.g.*, *United States v. North Carolina*, No. 5:12-cv-00557-D, Order (E.D.N.C. Sept. 21, 2017), ECF No. 29 (court approved settlement agreement); *Amanda D. v. Hassan*, No. 1:12-cv-00053-SM, Order for Final Approval of Proposed Settlement and Entry of Judgement (D.N.H. Feb. 12, 2014), ECF No. 104 (same); *United States v. Delaware*, No. 1:11-cv-00591-LPS, Order Entering Settlement Agreement (D. Del. July 18, 2011), ECF No. 6 (same); *Steward v. Perry*, No. 5:10-cv-01025-OLG, Order Granting Joint Motion for Entry of Interim Settlement Agreement and Stay of Proceedings (W.D. Tex. Aug. 19, 2013), ECF No. 179 (court approved two-year interim settlement agreement); *United States v. Georgia*, No. 1:10-cv-00249-CAP, Order (N.D. Ga. Oct. 29, 2010), ECF No. 115 (court approved settlement agreement); *United States v. Louisiana*, No. 3:18-cv-00608-JWD-EWD, Order Granting Joint Motion For Dismissal (M.D. La. June 7, 2018), ECF No. 4 (same).

Section 504 of the Rehabilitation Act, plaintiffs obtained settlement agreements enforced by court orders, compelling states to correct transition assistance deficiencies of the kind found in the District. Such court-ordered assurances are likewise warranted here.

1. <u>Discharge/Transition Planning</u>

Failures in discharge and transition planning similar to those in the District have resulted in legally binding corrective actions elsewhere. For instance, Texas' settlement required it to develop, implement, monitor, and revise Community Living Discharge Plans for each individual to transition from a nursing facility to the community.[31] New Hampshire's transition planning process now requires an effective written transition plan.[32] North Carolina must provide each individual with effective discharge planning and a written discharge plan within 90 days;[33] and, in Delaware, discharge planning must begin upon admission.[34]

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[31] Interim Settlement Agreement at 11, *Steward v. Perry*, No. 5:10-cv-01025-OLG (W.D. Tex. filed Aug. 19, 2013), ECF No. 177-1 (hereinafter "TXISA").

[32] Class Action Settlement Agreement at 15, *Amanda D. v. Hassan*, No. 1:12-cv-00053-SM (D.N.H. filed Feb. 12, 2014), ECF No. 105 (hereinafter "NHSA").

[33] Settlement Agreement at 13-15, *United States v. North Carolina*, No. 5:12-cv-00557-D (E.D.N.C. filed Aug. 23, 2012), ECF No. 2-2 (hereinafter "NCSA"). Subsequent modifications to the settlement agreement made no substantive changes to the transition assistance provisions.

[34] Settlement Agreement at 14, *United States v. Delaware*, No. 1:11-cv-00591-LPS (D. Del. filed July 6, 2011), ECF No. 5 (hereinafter "DESA").

2. <u>In-Reach Programs</u>

The District also failed to help institutional residents make meaningful and informed decisions about where to live, including community-based alternatives.[35] These services must be provided to nursing facility residents upon admission as well as regularly throughout residents' tenure, with resulting information provided to staff, contractors, and other stakeholders who interact with residents.

Other states have implemented improvements similar to those sought here by Plaintiffs. For example, Texas programs are required to discuss a range of community options and alternatives, facilitate visits to community programs, address concerns about community living, and provide information about community options upon individuals' admissions and at least every six months thereafter.[36] North Carolina's discharge planning was enhanced to inform the individuals about all community-based options, including supported housing, facilitate visits in such settings, and offer opportunities to meet with others living, working, and receiving services in integrated settings.[37] In Delaware, the transition team is required to develop and implement discharge planning through a person-

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35 Amended Complaint ¶¶ 105(vi), (ix); *see also Day*, 894 F. Supp. at 29-30.

36 TXISA at 8, 11.

37 NCSA at 11-12.

centered planning process, based on principles of self-determination.[38] The team meets within five days of admission to identify needed services and supports for return to the community, regardless of whether currently available, as well as to engage individual peer specialists.[39]

3. <u>Identifying Interested Residents</u>

The District also neglected to periodically review and assess nursing facility residents for preferences about community-based treatment.[40] To avoid keeping people in institutions when they would prefer community-based services, residents must be asked about their preferences early in their institutional residency and periodically thereafter.

Other states that similarly failed to conduct such reviews have been required to do so pursuant to court oversight. Texas must issue monthly reports of interested nursing facility residents who must be contacted within 30 days of admission to discuss community transitioning.[41] New Hampshire must review individuals' housing preferences and community-living interest at least quarterly.[42] In Delaware, those who remain in an institutional setting after an assessment

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38 DESA at 15.

39 *Id*.

40 Amended Complaint ¶ 105(vii).

41 TXISA at 10.

42 NHSA at 16.

process will be re-reviewed each month under the settlement agreement.[43] Under its agreement, North Carolina implements individual strategies to address concerns regarding placements in integrated settings.[44]

4. Identifying/Arranging Services

The District failed to address various barriers to transitioning of class members, including lack of proper identification required to access community-based services, understanding the requirements of an EPD Waiver application, and getting a physician determination of the required level of care or the number of personal-care hours needed. *Brown*, 322 F.R.D. at 86. Moreover, states must deploy Community Transition Teams to coordinate transitions, assist with Medicaid eligibility applications and determinations, and identify and arrange services for residents.

Deficiencies in the identification of, and arrangement for, community-based services also are not unique to the District, and these deficiencies have prompted binding requirements in other states to address these gaps. Under its settlement, Georgia provides Community Support Teams, including a nurse, peer specialist, and paraprofessionals for services in individuals' homes and to ensure community

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[43] DESA at 16.

[44] NCSA at 16-17.

resources.[45] North Carolina is required to identify providers for support and services specific to individuals' desired outcomes.[46] New Hampshire must identify services specific to individual needs for successful transition, including scope, frequency, and duration.[47] Likewise, Texas must provide information for individuals to apply for rental or housing assistance through all existing sources.[48]

5. <u>Waiver/Program Assistance</u>

The District also failed to effectively use existing programs and funds to transition individuals with physical disabilities. For example, the District met only 33% of its transition targets under the MFP program between 2010 and 2013. *Brown*, 322 F.R.D. at 76-77. Other states have been required to address transition service shortcomings related to applying for and enrolling in waiver or transition programs. The Texas settlement requires individuals to be enrolled in a community-based program within 180 days from when a state-designated service provider is notified of the availability of an EPD waiver slot for the individual.[49] And Georgia must fund persons with developmental disabilities through the State's

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[45] Settlement Agreement at 13, *United States v. Georgia*, No. 1:10-cv-00249-CAP (N.D. Ga. filed Oct. 19, 2010), ECF No. 112 (hereinafter "GASA").

[46] NCSA at 13.

[47] NHSA at 15.

[48] TXISA at 10.

[49] TXISA at 11.

Medicaid Waiver Program, with the regional office required to supply a list of all community providers and their services.[50]

6. Barrier Assistance

The district court acknowledged various barriers to transitioning of class members that the District failed to address, *see Brown*, 322 F.R.D. at 63-64, 82-86—barriers that Plaintiffs consistently noted unnecessarily segregated class members in institutional settings. *See id.* at 63 In particular, the court stated that a lack of available, affordable, and accessible housing poses significant barriers to Plaintiffs' transition to communities. *Id.* at 83, 86. And yet the court determined that it "cannot order relief that would facilitate quicker transitions for those who need public or subsidized housing" because it had concluded that the District had no obligation to provide housing. *Id.* at 95. That housing is a significant barrier, however, is precisely why effective transition planning is necessary: without such barriers, there would be little need for transition services.[51]

Unlike the District, other states are required to address deficiencies in overcoming transition and assistance barriers, including housing. Texas, for

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[50] GASA at 7-8, 25.

[51] The district court recognized this point in its previous opinion. *See Thorpe*, 303 F.R.D. at 142 ("Just because a resident lacks readily-identifiable housing in the community does not automatically mean that plaintiffs will not be able to show that there is 'transition assistance' that the District could and should provide.").

example, must document the reason for recommending an individual remain in a nursing facility, identify the relevant barriers, and describe the plan to address those barriers.[52] Texas also is required to make appropriate referrals for individuals to apply for rental or housing assistance through all existing sources, including local, state, or federal affordable housing or rental assistance programs.[53] In North Carolina, the state must document any barriers preventing transition to a more integrated setting.[54] North Carolina also is required to develop and implement measures to provide access to community-based supported housing and allocate a certain number of state or federal housing vouchers and rental subsidies for those individuals.[55]

New Hampshire likewise must employ a transition plan addressing ways to overcome barriers to an integrated community setting.[56] New Hampshire must *create* supported housing units for individuals in institutions and "make all reasonable efforts to apply for and obtain" federal funding for additional units.[57] In Delaware, if the state recommends institutional care or a less-integrated setting for

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[52] TXISA at 12.

[53] *Id.* at 10.

[54] NCSA at 13-14.

[55] *Id.* at 4-8.

[56] NHSA at 15.

[57] *Id*. at 10-12.

an individual, the treatment team must identify the barriers to a more integrated setting and the steps being taken to address those issues.[58] For housing, Delaware must provide an array of individualized services and promote housing stability, including funds for rental subsidies or vouchers and housing transitions.[59] And Georgia is required to have at least one case manager and transition specialist per state hospital to review transition planning for individuals who have challenging behaviors or medical conditions impeding transitions to the community.[60] Georgia also must assist individuals in "attaining and maintaining safe and affordable housing" and provide supported housing beds for individuals who are not eligible for pre-existing state or federal housing assistance programs.[61]

III. PERSONS WITH DISABILITIES ARE ENTITLED TO TRANSITION SERVICES SUFFICIENT TO ALLOW THEM TO ACCESS COMMUNITY-BASED SERVICES

For many people with disabilities, the promise of lives where they enjoy equal access and meaningful participation in ordinary life has for too long been out of reach. But with the passing of the ADA, "[v]illages, cities, counties, and States are looking at people with disabilities as real citizens. . . . Local and state

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58 DESA at 15.

59 *Id*. at 7-8.

60 GASA at 24-25.

61 *Id*. at 18-21.

government programs and facilities have become much more accessible."[62] While communities today may welcome individuals with disabilities, those residing in institutions still need assistance to escape their confining circumstances from the same governments that originally promoted the use of these institutions. Effective services are the key to accomplishing this transition.

When President George H. W. Bush signed the ADA, he recalled the fall of the Berlin Wall, extolling the Act as taking "a sledgehammer to another wall, one which has, for too many generations, separated Americans from the freedom they could glimpse, but not grasp." He urged his fellow Americans, "Let the shameful wall of exclusion finally come tumbling down."[63] The work continues towards that goal as states across the country finally are providing the necessary transition and other services to allow people with disabilities to begin participating as full members of society. That march towards human dignity should not, however, be subject to the whim of the government or political winds of the day. Because the

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[62] *Voices of Freedom: America Speaks Out on the Americans with Disabilities Act*, Nat'l Council on Disability (July 26, 1995), https://ncd.gov/publications/1995/voices-freedom-america-speaks-out-americans-disabilities-act.

[63] Jonathan M. Young, *Equality of Opportunity: The Making of the Americans with Disabilities Act*, Nat'l Council on Disability (July 26, 1997, reissued July 26, 2010), https://ncd.gov/publications/2010/equality_of_Opportunity_The_Making_of_the_Americans_with_Disabilities_Act.

District's voluntary and ineffective actions in response to Plaintiffs' lawsuit risk that result, the district court erred in concluding that they were sufficient.

CONCLUSION

For the foregoing reasons, Amici respectfully request the Court vacate the district court's entry of judgment and remand the case for further proceedings.

Dated: June 11, 2018 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,468 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

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I certify that the foregoing brief was filed with the Court via the Court's ECF system on June 11, 2018, and a copy of the brief was served on all counsel of record by operation of the ECF system on the same date.

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Sec. 17. Filing petition for commitment to the Mississippi Colony—That the chancery courts have jurisdiction in all cases of legal inquiry in regard to feeblemindedness, including idiocy, imbecility, and the higher grades and varieties of mental inferiority which render the subjects unfit for citizenship. This jurisdiction may be exercised by the clerk of the chancery court, subject to the approval of the chancellor.

At any time, subject to the approval of the court, any relative of a feebleminded person, child or adult, may make application to the clerk of the chancery court to have him adjudged feebleminded; but if the relatives of any feebleminded person shall neglect or refuse to make application to the clerk of the chancery court to have him adjudged feebleminded, and shall permit him to go at large, the clerk of the chancery court shall, on the application, in writing and under oath, of a citizen of the county in question, issue a summon to the sheriff to summon the alleged feebleminded person and his parent, guardian, or next friend to contest the application.

The application shall request that the alleged feebleminded person be adjudged feebleminded, and in need of proper care. It shall state the facts upon which the allegation of feeblemindedness is based, and because of which the application is made.

42 U.S.C. § 6010(2) (1976)

§ 6010. Congressional findings respecting rights of the developmentally disabled

Congress makes the following findings respecting the rights of persons with developmental disabilities:

* * *

> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

* * *

Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394

SEC. 504. No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.