The Honorable MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SHAWN MURINKO, and DISABILITY RIGHTS WASHINGTON, a nonprofit membership organization for the federally mandated Protection and Advocacy Systems, Plaintiffs, v. CHERYL STRANGE, in her official capacity as Secretary of the Washington State Department of Social and Health Services, SUE BIRCH, in her official capacity as Director of the Washington State Health Care Authority, Defendants.	NO. 19-cv-00943-MJP PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT **NOTED FOR MARCH 20, 2020** **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION

The State of Washington bears the legal burden and ultimate responsibility to protect the health and welfare of people with developmental disabilities, prevent their institutionalization, and provide necessary services with reasonable promptness. It may not delegate or shift these burdens onto private contractors, nor may it simply abandon those who cannot be served by private providers. But this is what is occurring across Washington State, as scores of vulnerable people with developmental disabilities are trapped in jails, hospitals, and other institutions for months or even years. Hundreds more are at imminent risk of institutionalization. This tragic outcome is the direct result of Defendants' failure to provide necessary services and refusal to

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

change policies and practices in order to protect individuals from being abandoned without community services. The severe harm suffered by the victims of Defendants' policies and practices is ongoing, systemic, and in need of a judicial remedy.

There is no genuine question of law or fact that Defendants' failures to deliver services violates clear legal mandates to protect the rights of people with developmental disabilities, to include Title II of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act (Section 504), and the Medicaid and Social Security Act. The ADA and Section 504 prohibit unnecessary institutionalization, while the Medicaid Act requires necessary Home and Community Based Services be provided to ensure health and welfare and with reasonable promptness. Just as Defendants have conceded they must provide necessary services for Mr. Murinko, they are also required to deliver these services to other eligible waiver participants who likewise need residential care to avoid institutionalization. (*See* Dkt. No. 64 at 4-5).

Plaintiffs, therefore, move the Court pursuant to FED. R. CIV. P. to 56(a) for an Order of Summary Judgment that: (1) declares that Defendants' failure to provide community based supported living services to eligible recipients violates the ADA, Section 504, and the Medicaid Act; (2) permanently enjoins Defendants from continued violations of the ADA, Section 504, and the Medicaid Act; (3) orders Defendants to prevent service gaps and deliver person-centered supported living services to eligible recipients within 90 days of eligibility determinations absent show cause why a longer delay is reasonable; and (4) orders Defendants to pay Plaintiffs' attorney fees and costs.

II. FACTS

A. Numerous Disability Rights Washington constituents wait in segregation for the community-based supported living services they have been deemed eligible to receive.

Through Plaintiff Murinko's August 29, 2019 motion for preliminary injunction, the Court is already familiar with how Defendants failed to protect Mr. Murinko from being unnecessarily trapped in Harborview hospital for more than six months, and then failed to

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

provide him with necessary supported living services for many months thereafter. (Dkt. No. 26). As described in the parties' briefs and supporting declarations, Mr. Murinko is enrolled in the Defendants' Home and Community Based Services (HCBS) waiver program, which provides Medicaid-funded services, including residential services known as "supported living," as an alternative to institutionalization. (Dkt. Nos. 26-43, 38-53, 55-58). In its Order on this motion, the Court recognized that Plaintiff Murinko demonstrated a likelihood of success on the merits of his claim that Defendants are in violation of federal law, "[b]ased on Defendants' concessions at oral argument that the State is required to provide Mr. Murinko with 24 hours per day of services, and on Plaintiffs' significant showing that Mr. Murinko has not been receiving those services[.]" (Dkt. No. 64 at 4).

The parties have since expanded their knowledge beyond Mr. Murinko's circumstances to better understand the scope of Defendants' failure to deliver these supported living services to many other HCBS waiver participants who have the same entitlement and need for 24hour supports. Plaintiff DRW has investigated the cases of several other constituents who, like Plaintiff Murinko, are eligible for supported living services under a HCBS waiver but have been forced into institutionalization as a result of Defendants' failure to provide this entitlement. *See* Kas Decl. at ¶ 3. Some of the most recent examples of constituents suffering harm are presented herein:

1. C.D. is an HCBS waiver participant whose supported living provider terminated services in October of 2018. Davis Decl. at ¶ ¶ 3-4, Exhibits 1-2. C.D.'s mother then attempted to care for him in her home, despite having her own health concerns, but she was unable to safely do so and was forced to hospitalize him at Sacred Heart in December 2018. Davis Decl. at ¶ 6; Bowen Decl. at ¶ 3. Defendants did not identify any supported living provider in the area who was willing to serve him. *Id.* at ¶ 4; Kas Decl. at ¶ 4, Exhibit 1. Defendants did not discuss offering to serve him in the SOLA program until October 2019. Davis Decl. ¶ 7. Defendants have finally accepted C.D. into the SOLA program, but are still not prepared to deliver SOLA

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

services that will enable him to discharge and have indicated it will be many more weeks before the placement will be ready. *Id.* at ¶ ¶ 7-8. Bowen Decl. at ¶ 3.

The harm being suffered by C.D. is more than his segregation from the community. Sacred Heart is not an appropriate placement for him, as it an acute care medical hospital that is not designed to be a long-term residential facility for people with developmental disabilities and does not have staff trained to provide appropriate care and behavioral supports. Bowen Decl. at ¶ ¶ 5-7. As a result, C.D. is placed in physical restraints every day, which may consist of a vest restraint that straps him to his bed, bilateral wrist restraints, or restraints from security personnel; this is likely to continue until his discharge. *Id.* at ¶ 6.

2. J.D. is another HCBS waiver participant who experienced an inordinate hospital stay. After spending a decade living in an institution, J.D. was finally able to move into the community with supported living services. Downing Decl. at ¶ 3. In March 2019, he was hospitalized for seizure observation with the expectation that he would be there for a few days. *Id.* While in the hospital, his provider gave a 72-hour termination notice. *Id.* By the end of March 2019, he had returned to "baseline" and was ready for discharge, but no supported living provider would accept his referral. *Id.* at ¶ 4. His mother was left with no choice but to try and bring him home with her, which she did in June 2019, but he was re-admitted to Sacred Heart hospital the next day due to seizures. *Id.* at ¶ 5. Again, he stabilized within a few days and referrals were resent to various providers, all of whom declined or indicated they were not accepting any referrals. *Id.;* Kas Decl. at ¶ 5, Exhibit 2. With no available residential provider and no other options provided by DDA, his mother requested that he be re-institutionalized and on February 11, 2019, after unnecessarily spending eleven months in a medical hospital, he discharged to Lakeland Village rather than the community. Downing Decl. at ¶ 5.

3. S.C. and his brother D.C. are currently institutionalized at Fircrest, despite their and their guardian's strong preference for supported living. Campbell Decl. at ¶ 10. Both S.C. and D.C. were HCBS waiver participants who were receiving supported living services. *Id.* at ¶

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

2. When their providers gave ten days' notice of termination, Defendants failed to replace the services they continued to need. *Id.* at ¶ ¶ 3, 8. S.C.'s provider voluntarily agreed to two extensions to the ten-day termination notice when it appeared the only alternative was to hospitalize S.C., and one provider expressed an interest in serving him. *Id.* at ¶ 6. But Defendants still did not secure services to ensure his health and welfare before his other provider stopped serving him. *Id.* at ¶ ¶ 9-10. As a result, his guardian had no choice but to accept a placement in an institution for him, just as she had been forced to do for her other son. *Id.*

4. Defendants' failure to provide services to E.D.L.S., an 18-year-old with autism, has led to his incarceration in the Franklin County jail, where he has been engaging in self-harming behavior so severe that he has had to be taken to the hospital, despite the efforts of jail staff and the prosecutor to transfer him to a more appropriate setting. Stovern Decl. at ¶ 5. According to records from Defendants, E.D.L.S had been receiving HCBS waiver services when he was a minor, and was offered to re-enroll on a HCBS Waiver after his mother reported that she could not support him to stay at home. Kas Decl. at ¶ 6, Exhibit 3 at 1. Defendants' records indicate the paperwork for him to enroll on the HCBS waiver was completed on December 18, 2019. *Id.*, Exhibit 3 at 2-3. Defendant sent out referrals a month later, by which time E.D.L.S. had suffered multiple new incidents and no supported living provider was willing to accept his referral. *Id.*, Exhibit 3 at 3-11. In January, with no services provided by Defendants and concerns about safety, E.D.L.S. was admitted to Lourdes medical hospital (which, again is not designed to provide necessary behavioral supports) after a meeting with local first responders, crisis response, and his social worker from the Developmental Disabilities Administration (DDA). *Id.*, Exhibit 3 at 12. In late January, he exhibited aggressive behavior at the hospital and was arrested and taken to jail. Stovern Decl. at ¶ 3.

The prosecutor assigned to the case, Daniel Stovern, did not wish to file charges and indicated that he would be willing to dismiss charges if there were a safe place where Mr. D.L.S. could be released. *Id.* at ¶ 4. The prosecutor's office contacted Plaintiff DRW in order to

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

assisting in finding an "alternative placement" to jail, which seemed to be "the only viable alternative to protect this individual from self-harm or harming others." Kas Decl. at ¶ 7, Exhibit 4. An advocate for Mr. D.L.S. asked if Defendants could provide him with DDA services, including services from SOLA so that he could be released and diverted from an involuntary commitment. Tracy Decl. ¶ 3, Exhibit 2. However, the DDA case manager admitted she had advised Mr. D.L.S's mother to hospitalize him so that he could be admitted to Eastern State Hospital, where she believed he could be kept indefinitely. Stovern Decl. at ¶ 6.

These individuals are not exceptional. To the contrary, records kept by Defendants show that the prompt delivery of supported living services is the exception. Defendants have produced data regarding 100 HCBS waiver participants who had their supported living services terminated between June 2018 and October 2019. Kas Decl. at ¶ 8, Exhibit 5. Of these 100 people:

- Only 30 people regained supported living services during this time period. 16 of the 30 waited 3 or more months to regain services.
- Only 1 person received SOLA services.
- 20 people were institutionalized. (13 were institutionalized in Residential Habilitation Centers, and 7 were institutionalized in a Skilled Nursing Facility.)
- 20 people had Involuntary Treatment Act orders entered against them.

Id. The data illustrate how challenging, and rare, it is for waiver participants to promptly access the care they are entitled to receive.

B. Defendants' policies do not ensure health and welfare without institutionalization.

The unnecessary and harmful institutionalization described above is a direct result of Defendants' decisions, policies, and practices that do not protect against inappropriate institutionalization or hospitalization. Defendants have chosen to rely almost entirely on private companies to provide the supported living services that waiver recipients need and to which they are entitled, yet permissively allow these private entities to decline and terminate services at will.

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

(Dkt. 50 at ¶ ¶ 21- 22) (Declaration of Sharon Cloninger, the Community Services Unit Manager of DSHS, DDA).

All providers have the option of declining or withdrawing any and all client referrals and services, at any time, and upon very short notice. Under Defendants' regulations, a service provider may refuse services by simply stating any reason why it believes it cannot meet a client's needs, or how refusing services would be in the best interest of the client or other clients. WAC 388-101D-0200 (*see* Appendix A) *See also* Dkt. 50 at ¶ 22 (indicating that providers may determine "at any point during this process…even after services have begun" that they cannot meet the client's needs.) This refusal of services can occur even if a client is currently receiving and reliant upon the services; in this scenario, the service provider merely needs to give written notice ten working days before terminating services. *Id.* When providers decline or do not respond to referrals, Defendants' policy contains no next steps other than to "document client and provider responses in the referral data base" and to "notify the client, or the client's legal representative if they have one, of the status of the referral." Kas Decl. at ¶ 10, Exhibit 7 at 5 (PROD 1522). Nowhere in Defendants' regulations or policies is there a requirement that service providers obtain approval from Defendants before declining or withdrawing services, nor do clients have the right to contest providers' decisions.

The effect of these policies and regulations are easily observed in actual cases. The notices for terminations occurring between June 2018 and October 2019 show that the level of detail and rationale for each termination varies considerably, and no one is given an opportunity to challenge the accuracy or appropriateness of the providers' decisions to end services. Kas Decl. at ¶ 9, Exhibit 6. In some instances, providers terminated because clients or guardians had allegedly expressed dissatisfaction with services. *Id.*, Exhibit 6 at 3, 5. Some providers asserted, without citing particular examples, that they are not able to meet the individual's needs. *Id.*, Exhibit 6 at 6-7. In another example, the provider justified the termination by explaining that its staff were "uncomfortable doing the tasks" required for the client, who has a colostomy. *Id.*,

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

Exhibit 6 at 10. Others cited the interests of other clients as a reason to terminate, without regard to the impact on the individual losing services *Id.*, Exhibit 6 at 4, 12. In some examples, providers simply stated general conclusions that "efforts have been exhausted," that there "continue to be issues," that they are "no longer a good fit," or are "not in a position to best serve" the individual *Id.*, Exhibit 6 at 1-2, 8-9, 11, 13.

While allowing service providers to terminate services within ten working days, Defendants allow providers a much longer time to decide whether to provide services, which leaves individuals to suffer massive gaps in services. Plaintiffs have been unable to identify any regulation or policy that specifies how soon referrals must be sent by case managers after learning of a termination of services. Even assuming referrals are made immediately, prospective providers have at least fifteen working days to consider the referral: after receiving a Client Referral Summary, they have five working days to indicate whether they would like to receive a full referral packet, and then another ten working days after receiving the full packet to respond whether they will accept the referral. Kas Decl. at ¶ 10, Exhibit 7 at 5. Even for an "emergency referral," there are no shortened deadlines for referrals to be sent or accepted. *Id.*, at 6. And as provided in the policy and described by Ms. Cloninger, providers "may take additional time to conduct a more in-depth review, including arranging meetings with the client, or arranging meetings between the client and potential housemates." (Dkt. 50 at ¶ 13.) Thus, Defendants' policies are calculated to allow providers to stop delivering services well before new providers are required to even *decide* whether they will provide replacement services. As illustrated by the data and recent case examples above, the referral process can drag on for months and is rarely, if ever, complete within ten to fifteen working days, or even thirty days. Service gaps that last weeks, months, or even longer, inevitably result.

The data and case examples presented above demonstrate Defendants' failure to establish and implement policies that even aspire to provide services on a timely basis, resulting in a failure to divert individuals from institutionalization. Mr. Murinko spent more than six months

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

unnecessarily hospitalized. C.D. remains segregated and isolated in a hospital after a fourteen-month hospitalization involving daily restraints. J.D. was institutionalized after spending eleven months at a hospital. S.C. was institutionalized in lieu of being hospitalized. E.D.L.S. is currently in jail, where he has harmed himself, and is likely to be involuntarily committed despite the prosecutor's preference to dismiss charges and release him to an alternative placement. These preventable outcomes are the predictable result of Defendants' choices.

C. Other Options are Available to Defendants.

Gaps in supported living services, especially lengthy gaps that last months or even years, are unnecessary and avoidable. As conceded by Defendants, they have at their disposal waiver-funded supported living services through the State Operated Living Alternative (SOLA) program, which "provides the same residential rehabilitation services as a contracted supported living agency." (Dkt 49 at ¶ 6.) While Defendants assert that they are guided by "Legislative priorities" as to whether and to whom they will provide SOLA services, they cannot point to any laws, regulations, policies, or rules that prohibit them from providing SOLA services to any client in need. (*See* Dkt 49 at ¶ 5 *et seq.*)

There is no genuine dispute that DDA can use the SOLA program when necessary for individuals to avoid being hospitalized or institutionalized. Indeed, the Assistant Secretary of DDA testified that DSHS utilized SOLA staff on an on-call basis and committed to provide full-time SOLA services to Plaintiff Murinko if a private provider had "not begun full time services to Mr. Murinko by December 31, 2019." (Dkt. No. 81 at ¶ ¶ 6, 9). Nor is there any genuine dispute that SOLA services prevent hospitalization and institutionalization of DDA clients. But Defendants do not offer these protections to all clients, nor have they established any policies or procedures allowing HCBS waiver participants to access SOLA if there are no other resources available to fulfill their entitlement to supported living services.

Other alternative approaches available to Defendants are policies and practices implemented by other states that limit unilateral provider terminations and minimize the risk of

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

service gaps. For example, as cited in Plaintiffs' Reply in Support of Motion for Preliminary Injunction (Dkt. 55 at 5), the State of Maryland requires HCBS waiver providers to show good cause and obtain written approval from the state agency before terminating waiver services. Md. Code Regs. Sec. 10.22.02.02(G) (attached hereto as Appendix B). In contrast to Washington's ten-day notice, HCBS providers in Maryland must also give 90 days' written notice to a state agency and written notification to the client of their intent to terminate services and the client's right to a hearing. *Id.* In Washington D.C., HCBS waiver providers cannot terminate before demonstrating attempted remediation of the situation giving rise to the termination request and must document actions taken to ensure the termination does not endanger the client's health and safety. D.C. Mun. Regs. Tit. 29, §§ 4205.12-15 (attached hereto as Appendix C). Importantly, the District also requires that HCBS waiver providers arrange for alternative services prior to service termination. As other states have shown, Defendants could protect HCBS waiver participants from abrupt service terminations that leave them without critical services.

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A "material fact" is a fact upon which the outcome of the litigation depends, in whole or in part. *See generally Mutual Fund Investors v. The Putnam Mgmt. Co.*, 553 F.2d 620, 624 (9th Cir. 1977). When reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law. *One Indus., LLC v. Jim O'Neal Distrib.*, 578 F.3d 1154, 1160 (9th Cir. 2009) (citation omitted). A party moving for summary judgment must inform the court of the basis for its motion and identify those portions of the pleadings and materials in the record, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986); Fed. R. Civ. P. 56(a), (c). Once the moving party carries its burden, the burden shifts to the nonmovant to go beyond the pleadings and provide specific facts

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

showing the existence of a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324; FED. R. CIV. P. 56(c), (e). When a moving party has carried its burden and the record could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial" and the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322-323.

The material facts in this case are not in dispute. Defendants' own data reveal dozens of eligible HCBS waiver participants who lost supported living services they were entitled to receive. This data and individual case records show indefinite wait times, sometimes lasting over a year, for the State's SOLA program or another provider to offer replacement services. Defendants cannot dispute that DRW's constituents are suffering in highly inappropriate places such as jails or medical hospitals while they wait for services, and dozens more are being institutionalized in skilled nursing or Residential Habilitation Centers. These undeniable facts show Defendants are violating the rights of Plaintiff DRW's constituents and may once again violate the rights of Plaintiff Murinko under the ADA and the Medicaid Act.

B. <u>There Is No Genuine Question That Defendants Are Violating Federal Law.</u>

There is no question that dozens of people with developmental disabilities are being denied entitlement services. It is equally clear that this lack of services is the result of Defendants' policies and practices, including their permissive approach to private providers who decline or terminate services before new services can be reasonably expected to be put in place, and their refusal to provide SOLA when necessary. Defendants' refusal to provide for appropriate services violates Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 *et seq.*, Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794 *et seq.*, the United States Supreme Court's landmark decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), as well as the Social Security Act, 42 U.S.C. § 1396 *et seq.*

1. <u>Defendants are violating the ADA and Rehabilitation Act</u>.

Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, and the Rehabilitation Act of 1973, 29 U.S.C. § 794, are designed to ensure that individuals with

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

disabilities receive their services in the least restrictive, most integrated setting appropriate. The ADA was enacted 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). In enacting the ADA, Congress found 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). Congress further recognized that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally; [and] 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)(6)-(7).

Like the ADA, the Rehabilitation Act prohibits discrimination against people with disabilities under any program or activity that receives federal financial assistance. 29 U.S.C. § 794(a). The Act's implementing regulations prohibit recipients of federal financial assistance from utilizing "criteria or methods of administration" that have the effect of subjecting qualified persons with disabilities to discrimination on the basis of disability, or have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to persons with disabilities. 45 C.F.R. § 41.51(b)(3)(i)-(ii); 45 C.F.R. § 84.4(b)(4)(i)-(ii). The regulations also require entities receiving federal financial assistance to "administer programs and activities in the most integrated setting appropriate to the needs of qualified . . . persons [with disabilities]." 28 C.F.R. § 41.51(d); *see also*, 45 C.F.R. § 84.4(b)(2).

Title II of the ADA applies to public entities, including state or local governments and any departments, agencies, or other instrumentalities of state or local governments. 42 U.S.C. §§ 12131, 12132. It provides that "no 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. §

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

12132. Title II's implementing regulations prohibit public entities from utilizing "criteria or methods of administration" that "have the effect of subjecting qualified individuals with disabilities to discrimination," or "[t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities[.]" 28 C.F.R. § 35.130(b)(3)(i), (ii).

The Title II implementing regulation known as the "integration mandate" requires that public entities "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 one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. § Pt. 35, App. B.

Under the Integration Mandate, "States are required to provide community-based treatment for persons . . . with disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonable accommodated, taking into account the resources available to the State and the needs of others with . . . disabilities." *M.R. v. Dreyfus*, 698 F.3d 706. 713 (citing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999)). Failure to provide community-based services for individuals to transition to appropriate community services and supports constitutes a violation of the Integration Mandate. A provider shortage does not obviate the State's responsibility to provide the care to which individuals are entitled to under the HCBS waiver – especially when the rates for providers are set by the state – as the regulations require a public entity to make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 35 C.F.R. § 35.130(b)(7)(i). As at least one federal court has observed, the Integration Mandate calls for the provision of services without gaps and development of "adequate alternative or contingency plans for instances when a service is unable to be provided." *Ball v. Biedess (Rodgers)*, No. CIV00-0067-TUC-EHC, 2004 WL 2566262, at *6-7 (D. Ariz. Aug. 13, 2004).

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

The U.S. Supreme Court has held that Title II of the ADA prohibits the unjustified institutionalization of individuals with disabilities, noting that segregation of people with disabilities "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," and "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, [and] economic independence." *Olmstead v. L.C.*, 527 U.S. 581, 597-600 (1999). The Court held that "[u]njustified isolation . . . is properly regarded as discrimination based on disability." *Id.* at 597. The Court noted that "in findings applicable to the entire statute, Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.'" *Id.* at 600. It thus concluded that the ADA requires public entities to provide community services in the most integrated setting when: (a) such services are appropriate, (b) the affected persons do not oppose community-based treatment, and (c) community services can reasonably be accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. *Id.* at 607.

According to case law and the Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, the ability to state a claim under Title II of the ADA and *Olmstead* is not limited to people currently in institutional or other segregated settings, but applies equally to those at serious risk of institutionalization or segregation (*e.g.*, if a public entity's failure to provide community services "will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution"). *Available at* http://www.ada.gov/olmstead/q&a_olmstead.htm. As a result, "[i]ndividuals need not wait until the harm of institutionalization or segregation occurs or is imminent" before they may state a claim for illegal discrimination. *Id.*

Thus, a public entity violates the Rehabilitation Act and Title II of the ADA when it segregates people with disabilities in public or private facilities or promotes the segregation of people with disabilities in such facilities through its planning, system design, funding choices, or

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

service implementation. *See, e.g.*, 28 C.F.R. § 35.130(d); *Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003) (finding that state's failure to provide community-based services to qualified individuals with disabilities as opposed to a nursing facility violated Title II's integration mandate); *A.H.R. v. Washington State Health Care Auth.*, CASE NO. C15-5701JLR, 2016 WL 98513(W.D. Wash. Jan, 7, 2016); *Steimel v. Wernert*, 823 F.3d 902, 911 (7th Cir. 2016) (explaining that a state may "violate the integration mandate if it operates programs that segregate individuals with disabilities or through its planning, service system design, funding choices, or service implementation practices, promotes or relies upon the segregation of individuals with disabilities in private facilities or programs") (internal quotation marks and alterations omitted); *Fisher v. Oklahoma*, 335 F.3d 1175, 1181-82 (10th Cir. 2003) (reversing grant of summary judgment where defendants' restructuring of medication entitlements could place people at serious risk of unnecessary institutionalization in nursing facilities).

In addition, Title II regulations prohibit states from using "methods of administration" that have the "effect of subjecting qualified individuals with disabilities to discrimination," as well as the "effect of defeating or substantially impairing accomplishment of the objectives" of the program 42 C.F.R. § 35.130(b)(3). Courts have found ADA violations had been properly claimed for a variety of methods of administration that were resulting in unnecessary institutionalization of people with disabilities. *See e.g., Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Conn.*, 706 F. Supp.2d 266, 277-78 (D. Conn. 2010) (ADA violation to inadequately assess long-term needs and withhold information regarding alternatives to nursing facility care); *Dunakin v. Quigley*, 99 F. Supp.3d 1297, 1319-20 (W.D. Wash. 2015) (ADA violation to deny evaluations for an alternative to nursing facility placement); *Kathleen S. v. Dep't of Pub. Welfare of Pa.*, 10 F. Supp.2d 460, 471 (E.D. Pa. 1998) (methods of administration at state institution caused eighty-eight people to be unnecessarily segregated in the hospital). Specifically, in *Ball v. Rogers*, a federal district court found violations of the ADA where the state agency "failed to properly monitor" its home and community based services

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

program and "repeatedly failed to provide the personal care services required in Plaintiffs' case management plans" due to a "shortage of attendant care workers." *Ball v. Rodgers*, No. CV 00-67TUCEHC, 2009 WL 1395423, at *5 (D. Ariz. Apr. 24, 2009). The Court found the agency was violating the ADA through its policy of allowing the service recipients to "assume the risk, by choosing to remain at home rather than being institutionalized, that services that they are dependent upon will not be delivered." *Id.* The agency's failure to "prevent unnecessary gaps in service" created a threat of institutionalization or actual institutionalization, which the district court found to constitute discrimination. *Id.*

The legal claims of DRW's constituents line up precisely with the ample case law based on similar facts. It is plain from the data, case examples, and their own policies that Defendants are administrating the waiver program with methods that have the effect of subjecting qualified waiver participants to unnecessary institutionalization and defeating the HCBS program goal of offering community services to individuals who need institutional levels of care in order to "prevent their placement" in institutions. *See* WAC 388-845-0010. In particular, the agencies rely heavily on private providers to provide supported living services while imposing no referral acceptance or continuity of care requirements. When a waiver participant, such as Mr. Murinko, C.D., or J.D., is hospitalized due to an injury or illness, or like E.D.L.S. is arrested due to disability-related behavior, Defendants have no plan for timely delivering supported living services to facilitate a timely discharge or release. Even without a major incident, Defendants allow providers, such as S.C.'s provider, to terminate community services at will regardless of whether there are replacement services available in the community. When private supported living providers refuse or terminate services, DDA does not customarily leverage its own SOLA program as a contingency plan to help its clients maintain their lives in the community. As a result, waiver recipients are suffering prolonged hospitalizations, institutionalization, and even being jailed unnecessarily and against the wishes of the prosecutor.

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

Based on these indisputable facts, Plaintiffs are entitled to judgment as a matter of law that Defendants have violated the ADA and Rehabilitation Act.

2. Defendants are violating Title XIX of the Medicaid and Social Security Act

Having chosen to participate the Medicaid program, the State of Washington is required to operate its Medicaid services in compliance with the Medicaid and Social Security Act, 42 U.S.C. § 1396, and its implementing regulations. Section 1915(c) of the Social Security Act, 42 U.S.C. § 1396n(c), allows states to submit a request to the U.S. Secretary of Health and Human Services ("Secretary") to "waive" certain federal Medicaid requirements in order to offer a broad range of home and community-based services (HCBS) as an alternative to institutional care in an Intermediate Care Facility (ICF). When states choose to implement a waiver plan, the Medicaid Act creates an "entitlement to waiver services" for individuals in those states who are eligible for the waiver and "affords them the full protections of the Medicaid Act with regard to those services." *Boulet v. Cellucci*, 107 F. Supp.2d 61, 77 (D. Mass. 2000).

In order to comply with federal requirements governing Medicaid HCBS waivers for people with intellectual and developmental disabilities, Defendants provide specific assurances about how they administer their waiver programs. 42 U.S.C. § 1396n(c). Defendants must evaluate whether service recipients are eligible to receive HCBS in lieu of residing in an ICF and assure that "the beneficiary or his or her legal representative will be—(1) [i]nformed of any feasible alternatives available under the waiver; and (2) [g]iven the choice of either institutional or home and community-based services." 42 C.F.R. § 441.302(d); 42 U.S.C. § 1396n(c)(2)(B).

Importantly, Defendants must also provide assurances that the HCBS services an individual is assessed to need are provided to meet each individual participant's health and welfare. 42 U.S.C. §1396n(c)(2)(C). *See Wood v. Tompkins*, 33 F.3d 600, 611 (6th Cir. 1994); *Cohen v. Chester Cty. Dep't of Mental Health/Intellectual Disabilities Servs.*, No. CV 15-5285, 2016 WL 3031719, at *8 (E.D. Pa. May 25, 2016) (finding Plaintiff had stated a valid claim in asserting that Defendants had failed to provide her with the services in her Individual Service

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

Plan to meet her needs at home); *Masterman v. Goodno*, No. CIV.03-2939(JRT/FLN), 2004 WL 51271, at *9–10 (D. Minn. Jan. 8, 2004) (denying motion to dismiss, in part, for plaintiffs' claim that implementation of a "cost saving plan" was denying them access to sufficient services to meet their actual needs); *Jackson v. Dep't of Human Servs. Div. of Developmental Disabilities*, No. CV17118MASLHG, 2019 WL 669804 (D.N.J. Feb. 19, 2019) (denying motion to dismiss health and welfare claims by waiver participant alleging his services had been revoked, reduced, or not implemented with care). Defendants must also provide for HCBS waiver participants to be given choice and preference for where, how, and who delivers their supports. 42 C.F.R. § 441.301(c)(2) (requiring that waiver participants have a "person-centered service plan" that "[r]eflect[s] that the setting in which the individual resides is chosen by the individual" as well as their other preferences, goals, and choice of natural supports).

There is no genuine dispute that DRW's constituents are eligible for and urgently need supported living services for their health and welfare, yet they cannot exercise their choice to access these services in their own communities. E.D.L.S. is presently sitting in jail, an environment that is severely detrimental to his health and welfare, based solely on Defendants' failure to provide him with an alternative. Stovern Decl. at ¶ 7; Kas Decl. at ¶ 7, Exhibit 4. C.D. has been trapped in Sacred Heart Hospital for fourteen months, where he has been subjected to isolation and physical restraints. Bowen Decl. at ¶ 6. J.D. had to suffer eleven months in a medical hospital and was then institutionalized. Downing Decl. at ¶ 5. S.C. was relatively fortunate that his provider voluntarily extended the date to terminate his services, yet he nonetheless ended up in an institution. Campbell Decl. at ¶ 8.

Even those who are currently receiving waiver services, such as Mr. Murinko, face uncertainty about their supported living services. In particular, they have no assurances that the services will be continuously available to meet their health and welfare needs because Defendants have no policies or contract provisions to protect against at-will terminations or open-ended referral processes that drag on for months with no provider or SOLA program

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

agreeing to deliver services. If they express dissatisfaction about their services, they are at risk of losing services. *See* Kas Decl. at ¶ 9, Exhibit 6. Despite having had a client die after her supported living services were terminated with no replacement provider (*see* Dkt. No. 33 at 2-3), Defendants have not implemented protections against supported living providers refusing and terminating services, nor established a contingency plan for clients whose lives depend on supported living services.

While Defendants have codified and protected the right of service providers to abruptly terminate a client's care, they do not ensure HCBS waiver participants' entitlement services will be delivered to protect them from harm. Defendants allow providers to terminate well before new services can be reasonably secured, which results in all too foreseeable service gaps that eliminate any real prospects of being able to choose a community-based setting. Because Defendants do not ensure that appropriate services are provided, other inappropriate resources such as hospitals and jails are forced to bear the responsibility (and financial burden) of indefinitely housing DDA clients and are often incapable of doing so in an appropriate manner. In refusing to make their own SOLA services available or take measures that other jurisdictions use to protect HCBS waiver clients from being denied access to necessary services, Defendants have failed to meet the health and welfare assurances required by the Medicaid Act, as well as requirements that waiver participants choose the settings where they will receive services.

Finally, Defendants must provide all Medicaid services for which an individual is eligible, including HCBS waiver services, with reasonable promptness. 42 U.S.C. § 1396a(a)(8); *See Ball v. Rodgers*, 492 F.3d 1094, 1107–08 (9th Cir. 2007); *O.B. v. Norwood*, 170 F. Supp.3d 1186, 1193 (N.D. Ill.), *aff'd*, 838 F.3d 837 (7th Cir. 2016) (finding Plaintiffs had stated a valid reasonable promptness claim for Defendant's failure to provide for in-home services). To determine whether services are being provided with "reasonable promptness," the Centers for Medicaid and Medicare Services (CMS) has explained that states should consider the urgency of an individual's need, the health and welfare concerns of the individual, the nature of the services

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

required, the potential need to increase the supply of providers, the availability of similar or alternative services, and similar variables. Center for Medicaid and State Operations Guidance Letter, January 10, 2001 (*available at* https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/smd011001a.pdf, 6).

As one federal court has found, the fact that Medicaid beneficiaries "might be able to receive placements in large institutions" does not satisfy the § 1396a(a)(8) reasonable promptness requirements for community-based services. *Boulet*, 107 F. Supp.2d at 79. There, the Massachusetts District Court determined that the state "should be able to respond to each new request for plan or waiver services by providing those services within 90 days" but afforded the defendants "an opportunity to show cause, if they choose to do so, why 90 days is not a feasible timetable at this point and to propose transitional modifications to the order." *Id.* at 82. Delivering HCBS services in 90 days is just as possible, and is not unprecedented, in Washington. *See* Order and Settlement Agreement at 7, *Boyle v. Arnold-Williams*, No. 3-01-CV-05687-JKA (W.D. Wash. Dec. 15, 2006) (Dkt. No. 223) (requiring "reasonable efforts to provide needed HCBS waiver services within 90 days of the date a need is identified" in a service plan), attached hereto as Appendix D.

Defendants' records and data show they are not providing integrated, community-based services with reasonable promptness and have no effective policies or practices that limit how long a client may be reasonably required to wait for services or specify how they would determine a reasonable wait time for any individual. This is clear from the experience of Mr. Murinko and the other individuals discussed above. Looking more broadly, Defendants' records show that of the HCBS waiver participants who lost their supported living services between June 2018 and October 2019, only fourteen percent received replacement supported living services within three months. Kas Decl. at ¶ 8, Exhibit 5. Twenty percent of the people who lost their supported living services during this timeframe have been institutionalized. *Id.* In total, sixty-nine percent of the people whose supported living services were terminated before October 2019

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

are still waiting for any new waiver residential services. *Id.* It is beyond dispute that these individuals have an immediate need for community-based residential habilitation services to meet their basic health and welfare needs, and that these needs are not being met with reasonable promptness. Without these services, these individuals have been, or are at imminent risk of being, institutionalized.

If there are no private providers willing to serve the urgent needs of people without services, Defendants could provide these services directly through the expansion of its SOLA program or offer increased rates for its contractors. *See A. H. R. v. Washington State Health Care Auth.*, No. C15-5701JLR, 2016 WL 98513, at *13, 14 (W.D. Wash. Jan. 7, 2016) (finding plaintiffs were likely to succeed in their reasonable promptness claim based on evidence of insufficient funding). As several courts have found, funding decisions "do not excuse failure to comply with reasonable promptness." *Boulet v. Cellucci*, 107 F. Supp.2d 61, 79 (D. Mass. 2000) (citing *Doe 1-13 v. Chiles*, 136 F.3d 709 (11th Cir. 1998); *Sobky v. Smoley*, 855 F. Supp. 1123 (E.D. Cal. 1994)). While it has several options available to it, the State may not continue with its current approach, which is to simply leave individuals without services to suffer incarceration, hospitalization, and institutionalization. Plaintiffs ask the Court to enforce Defendants' legal obligation to protect the health and welfare of waiver recipients with reasonable promptness.

IV. CONCLUSION AND REQUEST FOR RELIEF

Because there is no genuine question that Defendants are in violation of the laws analyzed above, Plaintiffs respectfully request that the Court enter judgment in favor of Plaintiffs and issue the following relief:

1) Declare that Defendants' failure to provide community based residential habilitation services under the Core waiver to Mr. Murinko and DRW's constituents who need and are eligible for residential habilitation services places him them at risk of unnecessary institutionalization and segregation, and violates the Title II of the ADA, Section 504 of the Rehabilitation Act, and the Medicaid and Social Security Act;

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

(2) Permanently enjoin Defendants from continued violations of Title II of the ADA, Section 504 of the Rehabilitation Act, and the Medicaid and Social Security Act;

(3) Order Defendants to prevent gaps in necessary services to eligible HCBS recipients and ensure person-centered HCBS waiver supported living services are available to eligible recipients within 90 days of eligibility determinations, absent show cause; and

(4) Order Defendants to pay Plaintiffs' attorney fees and costs.

RESPECTFULLY SUBMITTED February 25, 2020.

DISABILITY RIGHTS WASHINGTON

/s/ Susan Kas
Sarah Eaton, WSBA #46854
Susan Kas, WSBA # 36592
315 – 5th Avenue South, Suite 850
Seattle, WA 98104
Tel. (206) 324-1521; Fax (206) 957-0729
Email: sarahe@dr-wa.org
susank@dr-wa.org

PAUKERT & TROPPMANN, PLLC

/s/ Andrew Biviano
Andrew Biviano, WSBA # 38086
522 W. Riverside Avenue, Suite 560
Spokane, WA 99201
Tel. (509) 232-7760; Fax (509) 232-7762
Email: abiviano@pt-law.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Jeffrey C. Grant jeffrey.grant@atg.wa.gov

Nissa Ann Iversen NissaI@atg.wa.gov

Kathryn Krieger KATHRYNK1@atg.wa.gov

DATED: February 25, 2020, at Seattle, Washington.

Mma Rennie

Legal Assistant, Disability Rights Washington

Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729