UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians and next friends of Bradley J. Jensen; James Brinker and Darren Allen, as parents, guardians and next friends of Thomas M. Allbrink; Elizabeth Jacobs, as parent, guardian and next friend of Jason R. Jacobs; and others similarly situated,

Plaintiffs,

v.

Minnesota Department of Human Services, an agency of the State of Minnesota; Director, Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Clinical Director, the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Douglas Bratvold, individually, and as Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Scott TenNapel, individually and as Clinical Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; and the State of Minnesota,

Defendants.

Civil No. 0:09-cv-01775-DWF-BRT

MEMORANDUM OF AMICUS CURIAE MINNESOTA DISABILITY LAW CENTER IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO STATE'S PROPOSED OLMSTEAD PLAN

INTRODUCTION

Amicus curiae Minnesota Disability Law Center ("MDLC") of Mid-Minnesota Legal Aid submits this memorandum in support of the plaintiff class's ("Plaintiffs") ongoing objections to the State's proposed *Olmstead* plan, as last modified on March 20, 2015.[1] The Court should reject the State's proposed plan but allow the State to continue developing a plan that fully complies with applicable law and that delivers upon the promises of the *Olmstead* decision and the *Jensen* settlement.

AMICUS'S INTEREST IN THIS MOTION

Mid-Minnesota Legal Aid is designated as the federally-mandated protection and advocacy system, *see* 42 U.S.C. § 15041 et seq., for people with disabilities in Minnesota. MDLC provides legal and policy advocacy for individuals with all types of disabilities statewide on issues related to their disabilities. MDLC has extensive knowledge and expertise pertaining to the policy and civil rights issues implicated in the *Olmstead* plan that can assist the Court. MDLC and its clients have significant interest in the ongoing efforts of the State and the Court to create a legally satisfactory *Olmstead* plan that ensures opportunities for people with disabilities to receive services in the most integrated settings, consistent with their needs and preferences.

Pro bono co-counsel Miller O'Brien Jensen, P.A. ("MOJ") has participated in writing this brief. The firm's lawyers have litigated and arbitrated hundreds of cases, obtaining substantial relief for clients in single and multiple plaintiff discrimination cases,

[1] *Putting the Promise of Olmstead into Practice: Minnesota's 2013 Olmstead Plan (proposed plan modifications to Court Monitor: March 20, 2015) [hereinafter "Plan"].*

as well as in class and collective actions. MOJ lawyers have represented many clients in the disability discrimination arena, including under the Americans with Disabilities Act.

ARGUMENT

This brief is divided into three parts. The first part discusses the ambitious requirements of the "integration mandate" of the ADA. The second part discusses the necessary elements of a compliant *Olmstead* plan and provides examples of the ways in which Minnesota's proposed plan fails to meet those requirements, requiring further revision. The third part explains how approving a non-compliant plan may endanger the viability of the integration mandate in Minnesota.

I. THE FEDERAL INTEGRATION MANDATE IMPOSES AN AFFIRMATIVE DUTY ON STATES THAT IS BOTH CHALLENGING AND CRUCIAL

A. History of the Americans with Disabilities Act and the Integration Mandate

In passing the ADA, Congress intended to prohibit the unnecessary segregation of individuals with disabilities in treatment, habilitation, work, and educational programs. The resulting legislation, regulations, and interpretations all require that state and local governments that provide service programs for individuals with disabilities do so in the most integrated setting appropriate to the needs and preferences of the individual.

i. Birth of the Americans with Disabilities Act

The Americans with Disabilities Act arose out of the belief that the discrimination against, isolation and segregation of, and lack of legal recourse for, people with disabilities was an intolerable civil rights problem. 42 U.S.C. § 12101(a)(1)(2) and (4)

(2012). Upon signing the ADA in 1990, President George H. W. Bush compared the event to the recent fall of the Berlin Wall, remarking that the ADA "takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp." *See* George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (Jul. 26, 1990), *available at* http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html. He predicted that the ADA would allow persons with disabilities to "move proudly into the economic mainstream of American life, and that's what this legislation is all about." *Id.*

Congress emphasized that the intent of Title II's anti-discrimination provisions was to create opportunities for people with disabilities to become integrated into the greater community. Attorney General Dick Thornburgh testified that "[d]espite the best efforts of all levels of government and the private sector . . . many persons with disabilities . . . still lead their lives in an intolerable state of isolation and dependence." H.R. Rep. No. 101-485, pt. II, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 313. The House Committee on the Judiciary explained that the ADA "promises . . . a future of inclusion and integration, and the end of exclusions and segregation," adding that "[t]he purpose of title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life" and emphasizing that "integrated services are essential to accomplishing the purpose of title II." *Id.* at 32, 49-50, *reprinted in* 1990 U.S.C.C.A.N. at 472–73.

Congress was aware that state and local governments had grown accustomed to providing segregated services, but did not accept that as an excuse to their Title II integration obligations. "The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under [...] this title." *Id.* at 50, *reprinted in* 1990 U.S.C.C.A.N. at 473. This statement of legislative purpose emphasized that isolation and segregation of individuals with disabilities requires swift and sometimes radical change.

ii. The Americans with Disabilities Act and Integration Mandate Regulations Contain Strong, Affirmative Obligations

Title II of the Americans with Disabilities Act states as follows: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA also directed the Department of Justice to issue regulations elaborating on the anti-discrimination provisions in Title II. 42 U.S.C. § 12134(a).

One central regulation has become known as the "integration mandate," which states 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). The DOJ defined an "integrated setting" as "a setting that enables

disabled individuals to interact with non-disabled persons to the fullest extent possible."[2] 28 C.F.R. pt. 35, app. B. Failure to provide services appropriately may constitute unlawful discrimination under the ADA. Title II's regulations further prohibit public entities from "utiliz[ing] criteria or methods of administration" that "have the effect of subjecting qualified individuals with disabilities to discrimination," including unnecessary segregation. 28 C.F.R § 35.130(b)(3); *see also Day v. District of Columbia*, 894 F. Supp. 2d 1, 22–23 (D.D.C. 2012) (holding that, to state an ADA claim, it is "sufficient to allege . . . that the [government] has utilized criteria or methods of administration that have caused plaintiffs to be confined unnecessarily in nursing facilities.... rather than facilitate their transition to the community with appropriate services and supports") (internal punctuation and quotation marks omitted). Accordingly, the DOJ has warned that a public entity may violate the ADA's integration mandate if it "directly or indirectly operates facilities and/or programs that segregate individuals with disabilities." *Statement of DOJ, supra* note 2, at 3.

The regulations also declare that non-discrimination cannot be achieved merely through passive avoidance of discrimination; rather, they create an affirmative duty,

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[2] *The DOJ has recently expounded on the meaning of "integrated settings," explaining that "integrated settings are those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities. Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible." U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C. at 3, available at http://www.ada.gov/olmstead/q&a_olmstead.htm (last updated June 22, 2011) [hereinafter Statement of DOJ].*

stating that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability . . .." 28 C.F.R. § 35.130(b)(7). A public entity may be relieved of this duty only if it "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). This second clause of section 35.130(b)(7) has become known as the "fundamental alteration defense." Its meaning should be construed in light of congressional intent that fiscal and administrative convenience, or the existence of segregated benefits, "can never be used as a basis to . . . refuse to provide an accommodation in a regular setting." *See* H.R. Rep. No. 101-485, pt. III, at 50 (1990) (Committee on the Judiciary), *reprinted in* 1990 U.S.C.C.A.N. 445, 473.

B. *Olmstead* and Its Place in Civil Rights History

In *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597–600 (1999), the Supreme Court held that Title II of the ADA prohibits the unjustified segregation of individuals with disabilities. The Court specifically held that the ADA and the integration mandate obligate public entities to place persons with mental disabilities in community settings rather than institutions, "when [1] the State's treatment professionals determine that such placement is appropriate, [2] the affected persons do not oppose such treatment, and [3] the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id.* at 607. The Court stressed that the decision to move from a segregated placement must be the individual's own choice; community-based treatment should not be imposed "on patients

who do not desire it." *Id.* at 602 (citing 28 C.F.R. § 35.130(e)(1) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept."), and 28 C.F.R. pt. 35, app. B ("[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation.")).

The Court's decision rested on the notion that the "unjustified isolation" of persons with disabilities must be "properly regarded as discrimination based on disability." *Olmstead*, 527 U.S. at 597. The Court acknowledged concerns that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 600-01. Thus, when a treatment professional deems continued segregation "unjustified" for a particular individual, a state's failure to offer a more integrated placement deprives that person of key life experiences and is therefore discriminatory. *Id.*

The Court noted that if a state could demonstrate that it had a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, [then] the reasonable-modifications standard would be met." *Id.* at 603–06 (citing 28 C.F.R. § 35.130(b)(7)).

For instance, the Court noted that an individual who sues for a community placement may not displace others higher up on a waiting list, as this would involve a "fundamental alteration" of the state's existing program. *Id.* at 606 ("[I]t is reasonable for the State to ask someone to wait until a community placement is available") (citation omitted). However, the Court also indicated that a mere assessment of the cost of providing the most integrated treatment against the state's overall budget was insufficient for this defense. *Id.* at 606, n.16.

The *Olmstead* decision has been hailed as the disability rights equivalent to *Brown v. Board of Education,* 347 U.S. 483 (1954). *See, e.g.,* S. Comm. on Health, Education, Labor, and Pensions, 113th Cong., Separate and Unequal: States Fail to Fulfill the Community Living Promise of the Americans with Disabilities Act 6 (Comm. Print. 2013), *available at* http://www.help.senate.gov/imo/media/doc/Olmstead%20Report%20July%2020131.pdf [hereinafter "separate and Unequal Committee Print]. The analogy is apt. The Supreme Court has held that the nation's history of discrimination against African-Americans requires bold and sometimes inconvenient action, including an "affirmative duty to desegregate," even where it would be "administratively awkward, inconvenient, and even bizarre." *See Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 28, 32 (1970) ("[A]ll awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems."). In a similar way, to protect the civil rights of individuals with disabilities - a group that continues to suffer the stigmatizing injury of segregation - the ADA and *Olmstead*

require services to be provided in integrated settings, consistent with individual needs and preferences. *See Americans with Disabilities Act: Hearing before the S. Comm. on Labor and Human Resources and the Sub-Committee on the Handicapped*, 101st Cong., 1st Session, 215 (1989) (statement of Sen. Lowell Weicker) ("For years, this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and segregated educational settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal. It was not for blacks; it is not for the disabled.").

C. Adoption of *Olmstead Plans* in Other States and Related Litigation

Since *Olmstead*, nearly three-quarters of the states have developed formal plans that expressly seek to address *Olmstead* issues, and over ten more have developed alternative plans that address community integration issues. *See* Brittany S. Mitchell, Note, *Expanding the Integration Mandate to Employment: The Push to Apply the Principles of the ADA and the Olmstead Decision to Disability Employment Services*, 30 J. Lab. & Emp. L. 155, 159 (2014). Despite these efforts, it does not appear that the goals of *Olmstead* are being achieved. A 2013 Senate report noted that "hundreds of thousands of people with disabilities remain on waiting lists" for HCBS, and the number is increasing. Separate and Unequal Committee Print, *supra,* at 2, 18, *available at* http://www.help.senate.gov/imo/media/doc/Olmstead%20Report%20July%2020131.pdf. States still approach decisions about disability services from a "social welfare and budgetary perspective," but for "the promise of *Olmstead* to be fully realized, state

leaders must view service options from a civil rights perspective." *Id.* at 1. Compounding this problem, many *Olmstead* plans have lacked "enforceable benchmark targets" and careful evaluations of "whether a state can take advantage of new federal options to better ensure that individuals can live in community-based settings where they can fully participate and be granted the power of individual decision making and choice." *Id.*

Predictably, significant post-*Olmstead* litigation has focused on whether an existing *Olmstead* plan can relieve a state of Title II liability as part of a fundamental alteration defense. Susan Stefan, *Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings*, 26 Ga. St. U. L. Rev. 875, 931 (2009). The key question is whether the plan is or can be effective. If a state demonstrates that it has a "comprehensive, effectively working plan" and that its commitment to desegregation is "genuine, comprehensive and reasonable," then the state may be found compliant with *Olmstead*, even if plaintiffs demonstrate that their needs are not currently being met in the most integrated, appropriate setting. *See, e.g.*, *Arc of Washington State Inc. v. Braddock,* 427 F. 3d 615, 621–22 (9th Cir. 2005).

In such cases, the public entity bears the burden of demonstrating that it has an effectively working and compliant *Olmstead* plan. *Thorpe v. D.C.*, CV-10-2250 (ESH), 2014 WL 1273134, at *15 (D.D.C. Mar. 29, 2014); *Pa. Prot. & Advocacy v. Dep't of Pub. Welfare*, 402 F.3d 374, 381–82 (3d Cir. 2005). This is no small burden. If a state merely points to a plan containing "general assurances and good-faith intentions" to comply with *Olmstead* principles, without setting forth specifics, including "measurable

benchmarks," a "reasonable timetable" for integration, and a process for interagency collaboration, the plan cannot protect a state from a Title II challenge. *See, e.g.*, *Frederick L. v. Dep't of Pub. Welfare (Frederick L. II)*, 422 F. 3d 151, 156, 160 (3d Cir. 2005). In *Benjamin v. Department of Public Welfare of Pennsylvania*, 768 F. Supp. 2d 747, 755-56 (M.D. Pa. 2011), the court agreed with a class of individuals with intellectual disabilities that the possibility of successful desegregation under the state's *Olmstead* plan was "quite remote" and that the state could therefore not use its *Olmstead* plan to defend its failure to provide services in the most integrated setting appropriate to the needs of plaintiffs. The court noted that (1) the plan "lacks any time frames or dates" for desegregation, (2) the plan's "vague declarations of a commitment to integration, without identifiable benchmarks, are insufficient to demonstrate a tangible commitment to action toward deinstitutionalization for which they can be held accountable," (3) the plan was "riddled with exceptions and loopholes," and (4) the state had not yet implemented the plan. *Id.* at 755. In short, for an *Olmstead* plan to hold any legal weight in subsequent Title II actions, it must be sufficiently detailed and supported by concrete metrics so that a court could genuinely trust that the state will fulfil its obligations to individuals with disabilities.

In the oft-cited *Frederick L. II* case, the Third Circuit acknowledged that creating and administering a fully compliant *Olmstead* plan - which typically involves the participation of the state, its multiple agencies, and its counties, as well as coordination of funding allocations - is difficult to create and manage. *Frederick L. II*, 422 F. 3d at 159–60. However, the court emphasized that neither administrative difficulty nor budgetary

constraints can relieve the state of its *Olmstead* obligations. *Id.; see also Disability Rights New Jersey, Inc. v. Velez,* No. Civ. 05-4723 AET, 2010 WL 3862536, at *3 (D.N.J. Sept. 24, 2010) ("Budgetary constraints alone are insufficient to establish a fundamental alteration defense." (citing *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 495 (3d Cir. 2004); *Pa. Prot. & Advocacy*, 402 F.3d at 380)), *reconsideration granted on other grounds*, No. Civ. 05-4723 AET, 2010 WL 5055820 (D.N.J. Dec. 2, 2010). In the effort to secure civil rights for individuals with disabilities, the stakes, and concomitant legal expectations, are inevitably high.

II. MINNESOTA'S PLAN MUST COMPLY WITH THE AMBITIOUS DEMANDS OF *OLMSTEAD* AND THE INTEGRATION MANDATE

A. Department of Justice's Role and Rules

Since *Olmstead*, the Civil Rights Division of the Department of Justice has played an aggressive role in ensuring that public entities are fulfilling their obligations.[3] The DOJ has used a variety of tools to expand community opportunities that serve as models for comprehensive plans, including reaching settlement agreements; filing statements of interest in private litigation; suing non-compliant state governments; and developing guidance documents to help individuals understand their rights and public entities to implement their obligations. *See* Thomas Perez, *Assistant Attorney General Thomas E. Perez Testifies Before the U.S. Senate Committee on Health, Education, Labor and Pensions* (June 21, 2012), *available at*

[3] *President Barack Obama declared 2009, the ten-year anniversary of Olmstead, the "Year of Community Living." As part of this initiative, the DOJ launched an "aggressive effort" to enforce Olmstead. See Olmstead: Community Integration for Everyone, Dep't of Just., http://www.ada. gov/olmstead/ (last visited Apr. 21, 2015).*

http://www.justice.gov/crt/opa/pr/speeches/2012/crt-speech-120621.html; Separate and Unequal Committee Print, *supra.* As the entity tasked with enforcing Title II of the ADA and *Olmstead*, the DOJ's guidance memoranda and successful past efforts in implementing compliant public service programs should be afforded great deference. *See* Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (June 18, 2001); *cf. Auer v. Robbins,* 519 U.S. 452, 461 (1997) (holding that courts must defer to an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation").

The DOJ has been particularly instructive in helping states and the courts understand the scope and breadth of states' integration mandate obligations. In 2011, the DOJ issued a comprehensive guide that described how the development of a proper *Olmstead* plan can provide individuals with disabilities with essential opportunities to live, work, and receive services in integrated settings:

> A comprehensive, effectively working plan must do more than provide vague assurances of future integrated options or describe the entity's general history of increased funding for community services and decreased institutional populations. Instead, it must reflect an **analysis** of the extent to which the public entity is providing services in the most integrated setting and must contain **concrete and reliable commitments** to expand integrated opportunities. The plan must have **specific and reasonable timeframes** and **measurable goals** for which the public entity may be held accountable, and **there must be funding to support** the plan, which may come from reallocating existing service dollars. The plan should include **commitments for each group of persons** who are unnecessarily segregated, such as individuals residing in facilities for individuals with developmental disabilities, psychiatric hospitals, nursing homes and board and care homes, or individuals spending their days in sheltered workshops or segregated day programs.

Statement of the DOJ, *supra* note 2 (emphasis added). The DOJ's guidance explains that the most integrated setting is one that provides individuals with disabilities with opportunities to live, work, and receive services in the greater community, like individuals without disabilities. Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and provide individuals the opportunity to interact with non-disabled persons to the fullest extent possible. *Id.* at 3.

The DOJ's clear and cautionary guidance is of utmost relevance to a state in the process of crafting an *Olmstead* plan.[4] In detailing the requirements of an adequate *Olmstead* plan, the DOJ stressed that an adequate plan is not limited to the facts presented in the *Olmstead* case. For example, the plan must broadly include commitments for each group of persons who are unnecessarily segregated, such as individuals living in facilities for persons with developmental disabilities, psychiatric hospitals, nursing homes and board and care homes, or individuals spending their days in sheltered workshops or segregated day programs. *Id.* at 7. A public entity cannot use its *Olmstead* plan as a defense to a Title II claim unless it can prove that its plan comprehensively and effectively addresses the needless segregation of the specific group at issue in a case. *Id.*

Moreover, as the DOJ explained, a state's *Olmstead* plan must actually work. A plan "must have demonstrated success in actually moving individuals to integrated

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[4] *Minnesota itself relies on the DOJ Statement to define core terms such as "most integrated setting" and "segregated settings" in its draft plan. See Plan, supra note 1, at 102, 104.*

settings in accordance with the plan." *Id.* Any proposed plan should be evaluated "in light of the length of time that has passed since the Supreme Court's decision in *Olmstead*, including a fact-specific inquiry into what the public entity could have accomplished in the past and what it could accomplish in the future." *Id.*

B. In its Current Form, Minnesota's Proposed *Olmstead* Plan Does Not Meet the DOJ's Standards

Developing a comprehensive and effective *Olmstead* plan takes significant time and dedication. Minnesota has clearly spent substantial time and effort drafting and redrafting its proposed plan. Nevertheless, viewing Minnesota's most recent draft plan in light of the standards set forth by the DOJ, the State's proposal still lacks necessary detail, accurate baseline data, and adequately robust goals. Without citing each instance in which the proposed plan falls short, the following analysis, with examples, summarizes the shortcomings of the plan as a whole.

To meet the DOJ's standard that *Olmstead* plans reflect an "analysis" of the public entity's current integrated services, Minnesota's plan must first be based on comprehensive, reliable, and relevant data. Only then will it become feasible to evaluate whether it creates "concrete and reliable commitments to expand integrated opportunities" or "specific and reasonable timeframes and measurable goals," as the DOJ Integration Mandate standard requires.[5]

[5] *Statement of the DOJ, supra note 2, at 12.*

Comments submitted in response to prior drafts of Minnesota's proposed plan,[6] as well as previous orders from this Court,[7] have highlighted numerous problems with the State's attempt to establish accurate, informative baseline data. The most recent draft plan still fails to set a foundation from which an accurate picture of current integration can be drawn or reliable commitments to expand integration opportunities could be made. Rectifying these shortcomings will require the State to improve its current data collection process. This draft of the plan does not set out a clear process to collect key data.

1. The Employment Services Sections of the Plan Lack Adequate Baseline Data for Measuring Current Levels of Integration, Required by the DOJ and Necessary for Measuring Proposed Improvements

The employment-related sections of the plan provide several examples of these deficits which appear throughout the plan. The first relates to choice. A compliant, integrated-employment program would emphasize each individual's opportunity to make an informed choice to pursue competitive employment in the community.[8] Yet the plan offers no system for reporting the choices that individuals make among integrated work,

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[6] *On seven separate occasions - August 19, 2013; October 31, 2013; April 8, 2014; June 19, 2014; October 9, 2014; January 8, 2015; and April 6, 2015 - MDLC and other signatories have submitted letter responses to drafts of the Olmstead plan to the Olmstead subcabinet, focusing on apparent flaws and shortcomings in the employment-related sections of the plan and proposing alternative provisions and approaches. The most recent of these letters is submitted with this brief as an example to assist in this Court's review of the current draft plan. See Exhibit A*, Letter from MDLC to Olmstead Subcabinet dated April 6, 2015.

[7] *See, e.g., Order provisionally approving proposed Olmstead Plan, Jensen v. Minn. Dep't of Human Services, No 09:1775 (DWF/FLN) (D. Minn. Jan 1, 2015) (Doc. 378).*

[8] *See generally, Statement of Interest of the United States, Lane v. Kitzhaber, No. 3:12-cv-00138-ST (D. Or., Apr. 20, 2012) (Doc. 34), available at http://www.ada.gov/olmstead/documents/lane_soi.pdf.*

sheltered work, and non-work, or why they make those choices. Because person-centered planning, supported decision-making, and independent choices by individuals with disabilities are key elements of the *Olmstead* plan, gathering and tracking this data is essential.

Second, deficiencies in the proposed plan's analysis of current integrated-employment services are further illustrated by its working definition of competitive employment. The plan does not identify a system for identifying or reporting substantive details of competitive employment (*i.e.*, hours, wages, or types of employers). Instead, the plan uses a $600 per month figure as an indicator of competitive employment. Under the state's definition, anyone who earns $600 or more per month is considered to be competitively employed, even if they are working in a sheltered workshop or other segregated setting. The $600 indicator thus creates tension within the plan itself by contradicting the State's proposed definition for "competitive employment," which requires that such employment be in integrated settings.

Third, and more generally, because the plan describes no overarching system for analyzing how people are currently spending their days or for tracking hours in various work and non-work activities, it is not possible to set a clear baseline of the extent to which the state is now providing employment services in the most integrated setting. Without a baseline for current activity, it is simply not feasible to set "concrete and reliable commitments" for improving opportunities for integration.

The plan's data related to Home and Community Based Services ("HCBS") exacerbates these problems. HCBS services may include, among an array of service and

supports, employment–related services and other day services. The proposed plan does not indicate a total number of people receiving employment-related supports as part of their HCBS services. Further, although the plan lists 53,689 people as receiving HCBS long-term services and supports, it does not indicate how many of these people are on HCBS waivers, which are the primary programs through which the State pays for long-term employment supports. The plan even fails to indicate how many of the 53,689 people receiving HCBS services are of working age (elsewhere described in the plan as being people who are 18-64 years old.)

The plan also fails to explain or reconcile the employment-related data and goals contained in the HCBS sections with the section that appears to set goals for individuals who are in segregated "day settings" that are not identified as work. For example, in the section of the plan focused on moving individuals into integrated settings, the plan uses an estimated number of "individuals in segregated day settings" of 20,055 as a baseline for the goal of moving 500 individuals (or approximately 2.5 percent of the total) into "more integrated settings" by the end of a five-year effort. Plan, *supra* note 1, at 71. The plan does not explain how or whether this number overlaps with the HCBS recipient data; how many of these individuals are on HCBS waivers; or how this number relates to data on individuals employed, fully or part-time, in segregated settings. This is a significant problem because many individuals receive a mixture of services and supports in segregated day settings that include some paid work activities and some unpaid, non-work activities. Some individuals even spend part of their day or week in segregated day activities and some of their time in integrated competitive employment.

The plan does not attempt to separately analyze or track the progress made for these sub-groups of service recipients. Even worse, regardless of these key unresolved baseline data questions, the plan's ultimate goal of providing "integrated day options" to less than 3% more of the opaque baseline number of 20,055 individuals, at the end of a five-year process, is shockingly inadequate on its face. *See id.*

What the plan lacks is a comprehensive, interagency data collection system that tracks basic information about an individual's services. Such a system is an essential component for any plan to meet the DOJ's standards. Much of the information that is missing from the employment sections of Minnesota's proposed plan is available from providers and counties, and in billing data already in the State's possession. However, the State's plan does not describe a process for collecting, organizing, and tracking such data. To gain approval of its plan, Minnesota should first develop a process for collecting and using this basic data, through such means as county reports and provider surveys, and then build objective goals from that foundation. Until the State has done so, the plan will continue to fall short of the DOJ's required analysis of existing integrated services.

2. The Housing Services Sections of the Plan Lack Both Adequate Baseline Data Explaining Current Levels of Integration and Specifics about How Current Services Will be Improved to Increase Opportunities to Live in More Integrated Settings

In the fundamental area of housing services, the plan lacks sufficient explanation and data about the current state of integration. The plan describes the state-funded Group Residential Housing ("GRH") program used to pay for housing-based costs for many

individuals with disabilities. *See* Plan at 54. The plan also lists a variety of characteristics deemed helpful for gauging the "level of integration and choice within a particular setting." *Id.*

Missing from the plan is any analysis of the extent to which current forms of housing assistance evince or otherwise help meet these characteristics of choice and integration. For example, most congregate care settings, including the common four-person group home and board & lodge facilities, most of which are funded in part through GRH, do not offer each individual resident:

- a lease;
- complete control over the individual's scheduling or activities;
- the right to have visitors at any time; or
- the freedom to choose a residential service provider separate from the housing itself.

Thus, while establishing laudable, general goals of increasing housing choices and integrated housing options, the plan lacks both comprehensive, baseline data and information breaking down the demographics of housing (who receives what kinds of housing supports and where). The plan contains rough percentages of the number of people living in adult group homes and other licensed or registered settings but does not attempt to quantify the current number of people waiting for such services or the number of individuals trying to create more independent housing options. Without a baseline showing current levels of integration and desired integration, the plan does not and

cannot propose concrete goals[9] for measuring "success" in helping individuals move to more integrated residential settings.

In sum, throughout the plan, the critical task of establishing an appropriate baseline from which goals are set and progress is measured has not been completed. Even if the Court were to find that some sections of the plan meet the DOJ standards for providing an accurate picture of current integration, specific, reasonable timeframes, and measureable goals for increases, the law requires more. This current draft plan still falls short because it does not meet the DOJ's standard of including detailed commitments for each group of persons who are unnecessarily segregated, not just an illustrative few. Accordingly, the plan as a whole fails to provide a clear, comprehensive, and achievable road map for integration.

III. COURT APPROVAL OF A PLAN THAT DOES NOT MEET DOJ GUIDELINES WILL ENDANGER THE VIABILITY OF THE INTEGRATION MANDATE IN MINNESOTA

As delineated above, the current draft plan does not fulfill the civil rights promise of *Olmstead* plans described by the DOJ and envisioned by the many individuals and organizations who were involved in Minnesota's *Olmstead*-planning process. An

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[9] *Similarly, the plan describes "individualized housing options" as a "county-led initiative to help more persons with disabilities live in the community setting of their choice" and contains minimal goals of "increasing" the number of counties offering this service. See Plan, supra note 1, at 59. The plan does not promise to offer this important service option statewide, in every county. It does not commit to helping a specific number of people move into more integrated settings. Instead, it merely promises to set annual goals to increase the number of counties offering the service, raising serious doubts about the availability of this service to all eligible individuals and the State's ability to ensure individualized, integrated housing opportunities across Minnesota.*

inadequate plan would solidify the current problems with service coordination and oversight by state agencies, remove incentives for moving forward with increased integration, and throw state disability policy into a state of confusion. Premature court approval would curtail the State's impetus to continue the arduous but essential data-gathering, analysis and planning to which such tremendous state and disability community resources have already been devoted.

Moreover, because it is not yet a comprehensive, working document, the proposed plan cannot serve as a blueprint for the successful, broad expansion of integration opportunities envisioned by numerous stakeholders in this significant process. If approved as is, state agencies attempting to implement it will be inadequately prepared to address the fragmentation and disconnectedness of the current service systems without the information and infrastructure needed to effect meaningful change.[10]

Progress toward increasing integration of individuals with disabilities would be impeded were the current plan to be approved, because it would assist the State in raising a fundamental alteration defense. As noted above, a public entity can assert a fundamental alteration defense to an ADA claim by citing to an existing *Olmstead* plan. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 606 (1999). The DOJ interprets the ADA and its implementing regulations to generally require an *Olmstead* plan "as a prerequisite to raising a fundamental alteration defense, particularly in cases involving individuals

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[10] *See, e.g., Rolland v. Patrick, 946 F. Supp. 2d 226 (D. Mass. 2013) (recounting 15 years of litigation, multiple compliance actions, and a second settlement agreement after court approval of an Olmstead settlement, despite concerns over the agreement's speed of implementation and uncertain funding).*

currently in institutions or on waitlists for services in the community." *Statement of the DOJ*, *supra* note 2, at 7. To successfully raise a fundamental alteration defense, the state must show both that it has developed a comprehensive, effectively working Olmstead plan that meets the DOJ standards and that it is implementing the plan. *Id.*

Approval of the current plan – despite its obvious flaws – could stymie future attempts to enforce the integration mandate. With an approved plan, the State would inevitably argue that it has met the first prong of the fundamental alteration defense. Although the defense also requires the state to show that it is implementing a comprehensive, effectively working plan, the prospect of lengthy litigation would have a chilling effect on individuals with disabilities seeking to assert their right to more integrated services.

CONCLUSION

For the above-stated reasons, MDLC requests that this Court reject the State's proposed plan. The Court should allow the State to continue developing a plan that fully complies with applicable law and the DOJ guidance, and that delivers upon the promise that the State made to Minnesotans with disabilities when it agreed to the *Jensen* settlement. The promise of a comprehensive, effective plan should not be abandoned or weakened because of its administrative challenges. Instead, this should be recognized as a rigorous, lengthy process that will require renewed collaboration within the State and with stakeholders in the disability community, under continued oversight by the Court.

Respectfully submitted,

MID-MINNESOTA LEGAL AID/
MINNESOTA DISABILITY LAW CENTER

Dated: April 27, 2015

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Dated: April 27, 2015

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EXHIBIT LIST

Exhibit A Letter from MDLC to Olmstead Subcabinet dated April 6, 2015

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April 6, 2015

Delivered by Email and by U.S. Mail

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RE: *Olmstead* Plan Revisions Dated March 20, 2015

Dear Subcabinet Chair Tingerthal, Commissioners and Subcabinet:

The Minnesota Disability Law Center of Mid-Minnesota Legal Aid (MDLC), Minnesota Employment First Coalition, and the Miller O'Brien law firm are following up on our numerous

previous communications regarding the *Olmstead* Plan. As with our letter of January 8, 2015, we are providing a copy to the Court, the Court Monitor, Special Consultants to the Court in *Jensen*, Roberta Opheim and Colleen Wieck, *Jensen* class counsel, and *Jensen* defense counsel.

We commend the Subcabinet for making improvements to the Plan in its March 20, 2015 submission. However, the Plan falls short of being acceptable because it still does not contain sufficient sound baseline data, measureable goals, or outcomes. In this letter, as in our letters of January 8, 2015 and October 9, 2014 (which was also copied to the Court Monitor), we focus our comments on the sections of the Plan related to employment and day programming.

Employment Section Shows Improvement But Still Falls Short:

The Employment section of the Plan is improved from the January 8, 2015 version. However, many of the reporting and data problems we noted before have not been addressed. The Plan still does not provide a clear road map to effectuating an Employment First Policy in Minnesota.

- **The Plan Still Lacks Key Data and Metrics:**

As we have noted in previous letters, for the State's measurable goals to be meaningful, they must be based on comprehensive, reliable, and relevant data. This will require the state to improve its current data collection process. This draft of the Plan does not set out a plan to collect key data.

The Plan offers no system for reporting choices individuals make between integrated work, sheltered work, non-work, and why they make those choices. Since person-centered planning, supported decision-making, and independent choices by individuals with disabilities are key elements of the *Olmstead* Plan, gathering and tracking this data is essential.

Because the Plan describes no system for ongoing reporting on how people are spending their days, or for tracking hours in various work and non-work activities, it is not possible to set a clear baseline, to set transparent goals, or to track progress toward them. Moreover, the Plan does not identify a system for reporting substantive details of competitive employment (i.e. hours, wages, types of employers.) In addition, the Plan is still using the $600 per month figure as an indicator of competitive employment without adequate explanation for what it means. Anyone who earns $600 or more per month is considered to be competitively employed under the state's definition, even if they are working in a sheltered workshop or other segregated setting.

We urge the state to develop a comprehensive, cross-agency data collection system that tracks basic information about an individual's employment. Much of this information is now available from providers and counties. We suggest that the state obtain this basic data from billing data

already in its possession and from existing county reports, augmented by surveying providers, to ascertain the number clients who are currently working for competitive wages, the number of hours they work in a week, whether that work is integrated, the location and type of work, and the overall percentage of integrated work compared to other day activities for each individual.

- **Intermediate Steps and Funding Plan are Still Inadequate**

The Plan continues to suffer from a lack of firm timetables for creating person-centered career plans for youth exiting secondary school and for people currently in sheltered workshops or segregated day programs. The Plan needs measurable goals and aggressive timetables for facilitating career exploration and volunteer programs so that these youth can engage in meaningful career planning.

Furthermore, without robustly acknowledging and addressing the role of providers, the Plan is not realistic and implementation will not be successful. The Plan lacks a narrative description, measurable goals, and outcomes for engaging service providers in the transition to significantly more integrated competitive employment and integrated day programs. Providers need clear guidance for funding the internships, trainings, volunteer facilitation and integrating other creative solutions already being tested by providers across the state into their programs. An important piece of this, of course, is funding. Currently, there is scant description of the financial incentives and technical support that will be needed for many employment services and day services providers to transform their current business model. For integration to be successful, the Plan must fully acknowledge the need to create or increase the capacity of many providers to serve clients with programming and supports consistent with the more integrated, person-centered approach required by *Olmstead.*

- **Youth Employment Goals Have Improved But Still Fall Short**

Although the Subcabinet has adopted an Employment First policy for Minnesota, the Plan still does not aim for all youth exiting school and not attending post-secondary education to obtain competitive employment. This is inconsistent with the Employment First approach. In addition, it not does present goals or a pathway to integrated non-work day opportunities for youth exiting school who choose not to pursue the goal of integrated, competitive employment.

The data in this section of the Plan is still too limited and unacceptably opaque. The November 2014 draft Plan aimed to go from about 263 of survey cohort respondents having competitive employment to 388. The March 2015 Plan aims to go from 263 to 623. This is a substantial jump, especially considering the survey population is generally around 783. If the survey cohort (survey respondents from 1/5 of school districts) remains constant, this would be a jump from

33% to nearly 80% of students in competitive employment. But the survey cohorts may grow, limiting this effect.

In any case, as noted in our previous comments, this survey represents an unacceptably small slice of students who get special education services to provide a baseline for change. Even if one were to accept the survey as the appropriate baseline, the Plan does not address the fact that the voluntary survey may over-represent community-minded youth who are more likely to seek and find integrated opportunities.

Extended Employment Goals are Based on Restrictive Data and Speculative Analysis and are Still Too Low

In an improvement over the last draft Plan, this Plan now provides a figure for how many people are in segregated extended employment. The total number of people in this group is small: 923. These individuals are served in center-based, "segregated settings." The Plan's description of this population is oddly limited. It includes some basic demographic information (age and rural/urban living area) but makes certain "assumptions" about these individuals being served, such as whether this group would be likely to choose more integrated work options, and the likelihood that many of these individuals have worked in the same setting for many years. For such a small number of people, rather than basing a plan on speculation, the state should obtain this actual information from county case managers and the individuals themselves.

According to the Plan's data, 38% of those 923 people (about 351 people) are under 45 years old. The Plan states that 23% are under 35 (about 212 people). The Plan focuses on the under 35 group as the most likely to be interested in exploring competitive employment opportunities. This is unduly restrictive. Even whittling down the size of the group of intended targets, the Plan only seeks to move four of these individuals into competitive employment in the first year. This represents just 1% of the under- 45-year-old group.

Over five years, the Plan's goal is to move 86 of these individuals into competitive employment. This is just under 25% of the group that is currently under age 45. We question whether this goal is aggressive enough and think that the basis for setting goals and projecting progress is speculative.

HCBS Services Data is Not Clear and Goals are Too Weak:

The Plan's section discussing HCBS (p. 42) better describes the data the Plan is based on than the previous draft Plan. However, the numbers in this section still lack sufficient definition and clarity regarding basic information needed to make a Plan that includes measurable goals and outcomes.

The Plan does not indicate a total number of people receiving employment-related supports as part of their HCBS services. The Plan identifies 53,689 people getting HCBS Long-Term Services and Supports. It is not clear how many of these people are on HCBS waivers (which are a common way of paying for long-term employment supports).

The Plan does not indicate how many of the 53,689 people are of working age (elsewhere described as being people who are 18-64 years old); although it does state a subset figure for what number of working age individuals within the 53,689 are competitively employed.

The Plan indicates that 15,001 people receive HCBS waiver services in "segregated" settings. But it is not clear what is included in "segregated settings." For example, the Plan does not state whether this includes DT&Hs, adult day programs, or other residential programs of some sort. Nor is it clear whether some or all of these "segregated settings" provide employment-related supports.

Even more confusion regarding this data arises when one attempts to reconcile information in this section of the Plan with the section that appears to set goals for individuals who are in segregated day settings that are not identified as work. For example, in the section of the Plan focused on moving individuals into integrated settings, on page 71, the Plan uses an estimated number of "individuals in segregated day settings" of 20,055 as a baseline for the goal of moving 500 individuals—approximately 2.5 percent of the total—into "more integrated settings" by the end of a five-year effort. It is not clear whether this number overlaps with the HCBS data, how many of these individuals are on HCBS waivers, or how this number overlaps with data on individuals employed in segregated settings. We know that many individuals spend part of their time in segregated day settings that include some work activities and some activities that are not work. They may also spend some of their time in segregated day activities, and some of their time in integrated competitive employment. There is no way to parse out who falls into the stated categories based on the data in the Plan. We also note that, regardless of these key unsolved data questions, the Plan's goal on page 71 of providing more integrated day options to less than 3% of this opaque baseline number of 20,055 individuals at the end of a five-year process is shockingly inadequate.

Other data used in the HCBS section of the Plan are also questionable as appropriate baseline figures. The Plan states that 4,263 people – about 8% of the 53,689 total HCBS recipients – are working age and competitively employed. This is the "base" number the Plan uses for people being successfully served. However, as in the previous draft Plan, here "competitively employed" is still measured using the clumsy, "$600 of earnings/month" metric. We do not know whether that is an earnings level that is tracked over time, or whether anyone who manages to earn that amount in any given month is included in the base number.

We also find that the goals stated in this part of the Plan remain too low for a number of reasons. It is commendable that the Plan has increased the numbers of people receiving services who will meet the definition of competitive employment. The total new/additional people who will be competitively employed over five years is 4,835, compared to 3,378 from the prior draft. That represents a sizable increase.

However, the Plan does not discuss the expected growth in the service programs overall. We know from other documents that DHS forecasts the number of people using HCBS to expand over the next five years. Without knowing the "N" – the expected number of people using services – we cannot tell whether the proposed increase from 3,378 to 4,835 is merely proportional to expected growth overall or represents a more aggressive goal to obtaining competitive employment for people than the prior Plan draft.

In this part of the Plan—as throughout—setting an appropriate baseline from which goals are set and progress is measured is critical. Taking the current numbers reported, there are 15,001 people who are currently receiving HCBS services in segregated settlings, and 4,263 people in competitive employment. If all 4,835 additional people to be moved to integrated settings come out of that segregated settings group, then by 2019, there would be a total of 9,098 people being served in integrated settings, and 10,166 people remaining in segregated settings. That would be progress, but slightly more than half (53%) the total number of people would still be segregated after 5 years. As a goal, that projected result is too low.

However, if the target population is the total 53,689 population of all people receiving HCBS services—in our view, a more appropriate target—then the 9,098 represents an overly modest 17% in competitive employment. That is unacceptably low.

Also, even assuming (1) the 15,001 figure of persons receiving waiver services and being served in segregated settings remains constant over the next five years, and (2) that all of the 4,835 additional people come out of that 15,001 group (and are not new people to services generally), the Plan would still leave over 10,000 people on the HCBS waivers in segregated settings. That is not sufficient progress.

VRS Data is Not Clear and Goals are Too Weak

We appreciate the clarity that the current iteration of the Plan added to the goals regarding Vocation Rehabilitation Services. It is now clear that the state views the VRS as a key engine in driving the move towards increased competitive employment. Yet the goals remain unacceptably modest. As a percentage of the FY 2014 "base" number of 2,738 people, the Plan posits a 4.2% increase in FY 2015, followed by a 6.3% increase in FY 2016, up to an 11.7% increase in FY 2019. These incremental annual goals do not represent the sort of change Minnesota needs.

Conclusion

This version of the Plan does not provide an acceptable road map to integration based on sound baseline data with measurable goals and timelines to integrate individuals with disabilities into competitive employment and integrated day programs consistent with *Olmstead.* We urge the Subcabinet to rectify these grave shortcomings so that the promise of the *Olmstead* planning process can be fulfilled. We would welcome the opportunity to discuss future updates to the Olmstead Plan with the key authors. We believe continued dialogue between our respective groups and state leaders could lead to better development of not only key objectives but in the development of systemic changes that will be needed to achieve these goals.

Sincerely,

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PH/MWO/JA/KN-L/:nb

cc: The Honorable Donovan Frank, U.S. District Court Judge
David Ferleger, Jensen Court Monitor
Cathy Haukedahl, Executive Director, MMLA/MDLC
Colleen Wieck, Executive Director, Governor's Council on Developmental Disabilities
Roberta Opheim, Ombudsman for Mental Health and Developmental Disabilities
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