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amicus file

No. 97-8538

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

L.C., by JONATHAN ZIMRING, as guardian ad litem and next friend, and E.W.,

Plaintiff and Plaintiff-Intervenor-Appellees

v.

TOMMY OLMSTEAD, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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L.C. & E.W. v. Olmstead

No. 97-8538

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CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 28-2(b), amicus curiae, the United States of America, certifies that the following persons have an interest in the outcome of this case:

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CERTIFICATE OF TYPE SIZE AND STYLE

The United States certifies that this brief complies with 11th Cir. R. 32-4. The brief, though not proportionally spaced, is in 12 point type, is 10 pitch, courier style, and double-spaced.

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INTEREST OF THE UNITED STATES

The Attorney General of the United States has enforcement responsibilities under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 et seq. (CRIPA), involving mental retardation facilities, psychiatric hospitals, and nursing homes. In addition, the Attorney General enforces Title II of the Americans With Disabilities Act, 42 U.S.C. 12131 et seq. (ADA). Pursuant to Congress's direction, the Attorney General promulgated regulations to implement Title II, 28 C.F.R. Pt. 35. Those regulations require a public entity to "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 decision of this Court could have a significant impact on the Attorney General's enforcement responsibilities. The United States filed a brief as amicus curiae in Helen L. v. DiDario, 46 F.3d 325 (3d Cir.), cert. denied, 116 S. Ct. 64 (1995), which presented similar issues regarding the scope of the ADA Title II regulation at issue in this case, i.e., 28 C.F.R. 35.130(d).

STATEMENT OF THE ISSUE

Whether appellants violated Title II of the Americans With Disabilities Act, 42 U.S.C. 12132, by refusing to provide services to L.C. and E.W., qualified individuals with disabilities, in the most integrated setting appropriate to their needs.

STATEMENT OF THE CASE

A. Facts. In May 1995, L.C., a mentally retarded woman with schizophrenia who was hospitalized in the Georgia Regional Hospital at Atlanta (GRH-A), a state psychiatric hospital, filed a complaint challenging her confinement. L.C. v. Olmstead, No. 95-CV-1210, 1997 WL 148674, at *1 (N.D. Ga. March 26, 1997). She alleged that the ADA and the Fourteenth Amendment require the State to provide her care in the most integrated setting appropriate to her needs. Ibid. She sought an order requiring that she be released to a community care residential program with adequate professional treatment to support her community placement. Ibid. In February 1996, L.C. was discharged by consent of the parties to a community support program, where she

remains today. She contends that she fails to receive appropriate services in the community, as required by the ADA, and that she is thus at high risk of developing problems that could require a return to hospitalization. Ibid.

In January 1996, E.W., a second mentally retarded woman who was also institutionalized was permitted to intervene. 1997 WL 148674, at *1. E.W. remained institutionalized at GRH-A in spite of recommendations of the State's own treating professionals that she be placed in the community. Id. at *1, *3. See R. 50: Plaintiff E.W.'s Motion for a Preliminary Injunction at Exh. 2 (deposition testimony of E.W.'s physician that he is in favor of community placement, with proper supports); Exh. 14 (deposition testimony of E.W.'s psychologist that she is ready for community placement); Exh. 3 (deposition testimony of E.W.'s social worker that E.W. does not belong in a hospital except during an acute crisis).[1/]

The parties filed cross-motions for summary judgment on the ADA issues (R. 59, 61).[2/] While motions were still pending, in

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[1/] "R.__" refers to the documents filed in the district court. "Br. __" refers to the Brief of Appellants.

[2/] E.W. also filed a motion for a preliminary injunction directing defendants to release her from the psychiatric facility. 1997 WL 148674, at *2. The court deferred a hearing on E.W.'s motion for a preliminary injunction pending a ruling on the parties' cross-motions for summary judgment. Ibid. After (continued...)

February 1997, the defendants filed an affidavit declaring that E.W. had a medical problem requiring surgery that precluded a community placement at that juncture (R. 77: Defendants' Supplemental Brief in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment; Echols Affidavit at ¶¶ 16, 18).

After E.W. had her surgery, the court found that the evidence submitted by defendants did not support their assertion that community placement was precluded by E.W.'s health problems. 1997 WL 148674, at *3 n.1. It found that the record "establishes that E.W.'s medical problem has been resolved by surgery and does not prevent her being placed in the community." Ibid.[3/]

B. The Decision Of The District Court. On March 26, 1997, the district court held that "under the ADA, unnecessary institutional segregation of the disabled constitutes discrimination per se, which cannot be justified by a lack of funding." L.C. v. Olmstead, No. 95-CV-1210, 1997 WL 148674, at

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(...continued)
ruling in favor of E.W.'s motion for summary judgment, the court found E.W.'s preliminary injunction motion moot. Id. at *5.

[3/] In pleadings filed in connection with their request for a stay of the district court's order pending appeal, the defendants agreed that E.W. had "shown clear improvement" since April, and that her present condition does not preclude her being placed in a community residential placement. (R. 90: Defendants' Reply on Stay, Second Affidavit of Philip A. Horton, M.D. at ¶ 3).

*3. In so holding, the court relied on Helen L. v. DiDario, 46 F.3d 325 (3d Cir.), cert. denied, 116 S. Ct. 64 (1995). The court found that there is no dispute that the State operates the type of community programs that would be appropriate for E.W. 1997 WL 148674, at *4. It ordered the State to release E.W. to an appropriate, community-based treatment program, and to provide L.C. "with all appropriate services necessary to maintain her current placement in such a program." Id. at *5. The court rejected the State's contention that it lacked funds to provide community placements because all available funds were being used to provide services to other disabled persons. Id. at *4.[4/] It found that community placements are considerably less costly than institutional care,

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[4/] Defendants contended that mandating community placement would require them to shift funds from institutionalized programs to community programs (R. 85: Defendants' Brief Supporting Motion to Stay Judgment and Suspend Injunction, at Exh. B). However, plaintiffs provided evidence that the State has more than ample funds to provide community services to E.W. For example, although Georgia is authorized to shift its federal/state Medicaid money to fund up to 2,109 community placements under the Medicaid Waiver program, as of last year, it had used only about 700 of these slots (R. 88: Plaintiffs' Request for Court to Order an Immediate Community Placement and Memorandum in Response to Defendants' Motion to Stay Judgment, at 6).

and that neither fiscal nor administrative convenience justified providing services in a more segregated setting. Id. at *4 & n.4.[5/]

SUMMARY OF ARGUMENT

Congress enacted the ADA in 1990, after acknowledging that its prior disability rights statute, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, had not fulfilled the "compelling need * * * for the integration of persons with [disabilities] into the economic and social mainstream of American life," S. Rep. No. 116, 101st Cong., 1st Sess. 20 (1989). Although Section 504 recognized that society historically has discriminated against people with disabilities by unnecessarily segregating them from their family and community, and the sponsors of that legislation condemned the "invisibility of the handicapped in America," and sought to respond to the country's "shameful oversights" that caused

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[5/] The district court denied, as moot, both plaintiffs' and defendants' motions for summary judgment on plaintiffs' Fourteenth Amendment Due Process claims. 1997 WL 148674, at *5. We do not address in this brief appellants' argument that it was entitled to summary judgment on the constitutional issue. The district court correctly recognized that, having found appellants liable under the ADA, it was unnecessary to reach the constitutional claims. Id. at *4. If this Court disagrees, it should remand for district court consideration of those claims in the first instance.

individuals with disabilities to be "shunted aside, hidden, and ignored," see Alexander v. Choate, 469 U.S. 287, 295-296 (1985) (internal quotations omitted), individuals with disabilities were still all too often isolated, excluded, and segregated from other Americans. See S. Rep. No. 116 at 8. Thus, Congress enacted the ADA, describing it as "a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation." H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 26 (1990).

The purpose of Title II of the ADA, 42 U.S.C. 12131 et seq., which prohibits public entities from discriminating against individuals with disabilities, was "to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life." H.R. Rep. No. 485, Pt. 3, at 49-50. Congress directed the Attorney General to issue regulations implementing the general mandate of Title II. It specified that those regulations be consistent with the rest of the ADA, as well as with the coordination regulations (28 C.F.R. Pt. 41), which implemented Section 504 of the Rehabilitation Act in federal agencies. Both the ADA and the Section 504 coordination regulations make clear that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes (independent of the discrimination that arises when individuals with disabilities receive different services than those provided to individuals

without disabilities). In compliance with the legislative mandate, the Attorney General issued 28 C.F.R. 35.130(d), requiring public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."

It is undisputed that the State operates the type of community programs that are appropriate for E.W. The record demonstrates that community placement is the most appropriate placement for her based upon the opinions of the State's treating professionals. The record also demonstrates that institutional care for persons with mental illness costs more than twice as much per year as community care, and it appears that the State has ample funds to provide community services for E.W. Under these circumstances, the State's refusal to provide a community placement for E.W. violates Title II and its implementing regulations. In addition, the State has an obligation to provide the support necessary for L.C. to remain in the residential program in which it placed her in 1996.

ARGUMENT

APPELLANTS VIOLATED TITLE II OF THE ADA BY REFUSING TO PROVIDE SERVICES TO E.W., AND TO CONTINUE SERVICES TO L.C., IN THE MOST INTEGRATED SETTING APPROPRIATE TO THEIR NEEDS

A. The Unnecessary Segregation Of Individuals With Disabilities Is A Form Of Discrimination Prohibited By The ADA And Its Implementing Regulations

In enacting the ADA, Congress found that discrimination against individuals with disabilities persists in a variety of critical areas, including institutionalization, 42 U.S.C. 12101(a)(3), and that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion * * * [and] segregation." 42 U.S.C. 12101(a)(5). The ADA is the congressional response to the "compelling need to provide a clear and comprehensive national mandate * * * for the integration of persons with [disabilities] into the economic and social mainstream of American life." S. Rep. No. 116, 101st Cong., 1st Sess. 20 (1989). In sum, "[i]ntegration is fundamental to the purposes of the ADA." H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 56 (1990).

Title II of the ADA prohibits discrimination against persons with disabilities by state and local governments. It mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such

entity." 42 U.S.C. 12132.[6/]

In 42 U.S.C. 12134, Congress directed the Attorney General to promulgate regulations implementing this general mandate. It noted that "[u]nlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited." H.R. Rep. No. 485, Pt. 3, at 52. Congress specified that, except with regard to program accessibility and communications issues, the Attorney General's ADA regulations "shall be consistent with [the ADA] and with the coordination regulations under part 41 of title 28, Code of Federal Regulations * * * applicable to recipients of Federal financial assistance under section 794 of title 29 [Section 504 of the Rehabilitation Act of 1973]." 42 U.S.C. 12134(b).

1. Department Of Justice Regulations Clearly Define Unnecessary Segregation As A Form Of Discrimination Prohibited By The ADA.

The ADA's integration regulation, 28 C.F.R. 35.130(d),

[6/] A "qualified individual with a disability" is:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. 12131(2).

provides that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." In accordance with Congress's mandate, the Attorney General patterned the Title II regulations on the Section 504 coordination regulations, 28 C.F.R. Pt. 41, which govern the Section 504 obligations of federal agencies. The coordination regulations' integration requirement, 28 C.F.R. 41.51(d), is a separate subpart under the "[g]eneral prohibitions against discrimination" and provides that "[r]ecipients [of federal financial assistance] shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons."

To implement its findings that segregation and unnecessary institutionalization are forms of discrimination based upon disability, Congress made a conscious choice in mandating that the Attorney General promulgate Title II regulations that are consistent not only with the rest of the Act but also with the Section 504 coordination regulations, 28 C.F.R. Pt. 41, in which integration is a stand-alone requirement, 28 C.F.R. 41.51(d). Congress's choice of the coordination regulations, which impose a duty to provide services to individuals with disabilities in an integrated setting -- unrelated to any difference in services provided to individuals with disabilities vis-a-vis individuals without disabilities -- is a significant guide to the statute's meaning. In Section 504 regulations promulgated by other federal

agencies, the integration requirement is linked to differences in services provided to individuals with disabilities and those without disabilities. Thus, for example, the Section 504 regulations of the Department of Health and Human Services require integration only in the context of providing opportunities for people with disabilities that are equal to those available to individuals without disabilities. 45 C.F.R. 84.4(b)(2).[7/] See also 24 C.F.R. 8.4(b)(2) (Department of Housing and Urban Development); 34 C.F.R. 104.4(b)(2)(Department of Education).

In addition, as required by 42 U.S.C. 12134(b), the Attorney General's Title II regulation also conforms to the definition of discrimination in the rest of the ADA. See also H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 84 (1990) (the "construction of 'discrimination' set forth in section 102 (b) and (c) and section 302(b) should be incorporated in the regulations" implementing Title II); H.R. Rep. No. 485, Pt. 3, at 52. For example, the general prohibition on discrimination by public accommodations in

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[7/] 45 C.F.R. 84.4(b)(2) states:

> (b) Discriminatory actions prohibited.
>
> * * * * *
>
> (2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

Title III of the ADA contains language almost identical to the Section 504 and ADA integration regulations: "Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. 12182(b)(1)(B) (emphasis added). This separate "integration" requirement is independent of Title III's other provisions prohibiting the differential treatment of people with disabilities in the provision of services that also are available to individuals without disabilities. 42 U.S.C. 12182(b)(1)(A)(ii), (iii). In describing Title III, the House Report states that "[i]ntegration is fundamental to the purposes of the ADA." H.R. Rep. No. 485, Pt. 3, at 56.

In Title I, which applies to employment, the definition of discrimination includes "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee." 42 U.S.C. 12112(b)(1).

2. The ADA's Anti-Discrimination Mandate Reaches Public Agency Programs That Are Provided Only To Individuals With Disabilities.

Appellants' primary argument (Br. 20-35) is that the district court erred in failing to require plaintiffs to make a separate showing that they were discriminated against by reason of their disability. This argument ignores Congress's purpose in enacting the ADA. Because the fundamental purpose of the ADA and

the regulations is to end the exclusion and segregation of individuals with disabilities, the statute is not limited to mandating that persons with disabilities be treated the same as persons without disabilities. Accordingly, as the district court properly recognized, 1997 WL 148674, at *3, Congress manifested an intent to include "segregation" of individuals with disabilities as a "form of discrimination" prohibited by the ADA. In enacting the ADA, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and * * * such forms of discrimination * * * continue to be a serious and pervasive social problem," 42 U.S.C. 12101(a)(2); that "discrimination against individuals with disabilities persists in such critical areas as * * * institutionalization," 42 U.S.C. 12101(a)(3); and that "individuals with disabilities continually encounter various forms of discrimination, including * * * segregation," 42 U.S.C. 12101(a)(5). Thus, the Title II regulations require that public entities "administer services, programs, and activities in the most integrated setting appropriate to the needs" of individuals such as L.C. and E.W. 28 C.F.R. 35.130(d).

The Attorney General's Title II regulations reflect Congress's determination that services must be provided in appropriate integrated settings to achieve the Act's purposes. The ADA's integration regulation, 28 C.F.R. 35.130(d), is an independent subpart of the provision entitled "[g]eneral prohibitions against discrimination" that defines discrimination.

The definition of discrimination thus includes the unnecessary segregation of individuals with disabilities from the rest of the community. No showing of differential treatment of people with disabilities and individuals without disabilities is required, since on its face, the regulation applies to all services administered by a public entity. It is not restricted to services that also are provided to people without disabilities.

The structure of the rest of the Title II regulations supports this reading. If 28 C.F.R. 35.130(d) applied only to programs and services offered to everyone, then 28 C.F.R. 35.130(b)(1)(iv), which prohibits a public entity from providing separate services to people with disabilities than are provided to others, would be redundant. The Attorney General's regulations thus recognize, consistent with the statute, that in the case of individuals with disabilities, discrimination takes many different forms, including programs that perpetuate the false assumption that people with disabilities must be segregated from the rest of society. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

An institutional setting, such as the hospital in which L.C. and E.W. were confined when this suit was brought, is a segregated environment because individuals living in such a setting are separated from the community and removed from the mainstream of society. Community-based programs, on the other hand, are integrated both because they are physically located in the mainstream of society and because they provide opportunities

for persons with mental disabilities to interact with their non-disabled peers in all areas of life.

3. The Department Of Justice's Interpretation Of Its ADA Regulation Is Entitled To Substantial Deference.

When, as here, Congress enacts broad statutory language and leaves to an administrative agency the task of fleshing out its terms, those regulations are "legislative regulations" that have the mandatory force and effect of federal law. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843-844 (1984). See, e.g., General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976); Helen L. v. DiDario, 46 F.3d 325, 331-332 (3d Cir.), cert. denied, 116 S. Ct. 64 (1995) (Title II regulations are "entitled to substantial deference"), quoting Blum v. Bacon, 457 U.S. 132, 141 (1982), and Chevron U.S.A., Inc., 467 U.S. at 844. In addition, as the court of appeals in Helen L. correctly held, id. at 332, when Congress manifests its approval of an administrative interpretation of a statute, as it did in the case of the Section 504 coordination regulations, the ADA interpretation, patterned on the Section 504 coordination regulations, "acquires the force of law and courts are bound by the regulation."

Moreover, substantial deference should be given to the Department's interpretation of its own regulation. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). It is not a court's "task * * * to decide which among several competing interpretations best serves the regulatory purpose. Rather, the

agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." Ibid. (internal quotation marks omitted). The consistent position of the Department of Justice is that Title II's integration regulation, modeled directly upon the Section 504 coordination regulation, means that a public entity's provision of services in an unnecessarily segregated setting constitutes unlawful disability-based discrimination. This position is not only consistent with, but also compelled by, the purpose of the statute and the language of the regulation.

4. The Department Of Justice's Interpretation Of Title II And The Integration Regulation Is Supported By The Legislative History Of The ADA.

Finally, as the district court recognized, 1997 WL 148674, at *3, the Act's legislative history confirms "Congress's intent to prohibit unnecessary segregation of the disabled." In introducing the legislation, Senator Harkin declared that "[f]or too long, individuals with disabilities have been excluded, segregated, and otherwise denied equal, effective, and meaningful opportunity to participate in the economic and social mainstream of American life. It is time we eliminate these injustices." 135 Cong. Rec. 19,801 (1989). The House and Senate Reports emphasize that the purpose of the Act is to end the isolation, exclusion and segregation of individuals with disabilities, and the discrimination that "persists in such critical areas as * * * institutionalization." S. Rep. No. 116, supra, at 8 (citing

findings of the U.S. Commission on Civil Rights). See id. at 6 (recognizing that the unnecessary segregation of people with disabilities from the community is "[o]ne of the most debilitating forms of discrimination"); id. at 20 ("compelling need" for the "integration of persons with [disabilities] into the economic and social mainstream of American life"); H.R. Rep. No. 485, Pt. 2, at 22 (purpose of the ADA is to "bring persons with disabilities into the economic and social mainstream of American life"); id. at 28 (noting that historic "isolation" of individuals with disabilities); H.R. Rep. No. 485, Pt. 3, at 26 (finding that "segregation for persons with disabilities 'may affect their hearts and minds in a way unlikely ever to be undone,'" quoting Brown v. Board of Educ., 347 U.S. 483, 494 (1954)); id. at 49-50 ("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").

In addition to the social cost of segregating individuals with disabilities from society, Congress also was aware of the economic cost of such exclusion, and that "discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year." H.R. Rep. No. 485, Pt. 2, at 43. See also 135 Cong. Rec. 19,898 (1989) (Sen. Simon estimated that "[m]ore than $100 billion a year is being spent by Government to sustain people with disabilities in welfare situations").

The reports of the House Judiciary Committee and the House Committee on Education and Labor explain that although Title II does not "list all the types of actions that are included within the term 'discrimination,' as was done in titles I and III," the forms of discrimination prohibited by Title II shall be identical to those set out in Titles I and III of the legislation. H.R. Rep. No. 485, Pt. 2, at 84; see also H.R. Rep. No. 485, Pt. 3, at 52. As noted above, Titles I and III define discrimination to include the segregation of people with disabilities. Congress clearly intended this form of discrimination by public entities to be prohibited as well, regardless of whether the segregation occurred as a result of the differential provision of services. The unnecessary segregation of individuals with disabilities thus conflicts directly with Congress's purpose in enacting the ADA.

B. Section 504 Cases Decided Prior To Enactment Of The ADA Are Not Relevant To Interpreting Title II's Integration Requirement

The district court's decision followed the Third Circuit's opinion in Helen L., supra, the only court of appeals decision interpreting the Title II integration regulation. The court in Helen L. concluded that "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled." 46 F.3d at 333. In that case, the court found that the Pennsylvania Department of Public Welfare (DPW) violated Title II by requiring an individual who was paralyzed as a result of meningitis to remain in the

segregated setting of a nursing home rather than providing her with home-based services stipulated by DPW as appropriate to her needs. Id. at 327-328. The court of appeals relied on the Title II integration regulation in finding that the "ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them." Id. at 335.

In contrast, appellants here rely on prior decisions under Section 504 that did not consider the stand-alone type of integration requirement, on which the ADA Title II regulation was modeled. All of the cases that appellants cite are inapposite to the issues before this Court. Accordingly, those decisions are of little relevance in interpreting the requirements of Title II.

Appellants first assert that this Court has addressed the identical issue presented by this case under Section 504 and rejected a claim that residents of a state facility for persons with mental retardation were entitled to community-based treatment. The district court in S.H. and P.F. v. Edwards, 860 F.2d 1045, 1052 (11th Cir. 1988) (district court opinion attached as appendix) held that the facts did not support plaintiffs' contention that they were denied hearings to determine their need for continued institutionalization "solely by reason of [their] handicap," the showing that the court stated was required by Section 504. It did not reach the "substantive aspect of the plaintiffs' section 504 claim." Id. at 1055 n.3 (Clark, J., dissenting). On appeal, however, this Court's opinion addressed

only the constitutional claims. S.H. and P.F. v. Edwards, 886 F.2d 292, 293 (11th Cir. 1989) (en banc). In any event, the stand-alone integration requirement of the Section 504 coordination regulations was not addressed in that case.

The Third Circuit has itself distinguished its prior decision in Clark v. Cohen, 794 F.2d 79, 84 n.3 (3d Cir.), cert. denied, 479 U.S. 962 (1986), cited by appellants (Br. 29). In Helen L., 46 F.3d at 334, the court of appeals noted that in Clark, it was "not there concerned with the integration mandate of the ADA or the Rehabilitation Act" because the plaintiff in Clark relied upon HHS's Section 504 regulations, 45 C.F.R. 84.4(b)(1) & (2), in which there is no stand-alone integration requirement. As the court in Helen L. noted, the language of the ADA Title II regulations, 28 C.F.R. 35.130(d), "is very different." 46 F.3d at 334. In Clark, the court of appeals merely affirmed the lower court's finding that neither Section 504 nor the HHS regulation requires a public entity to provide services in an integrated setting without proof of unequal treatment. See Clark v. Cohen, 613 F. Supp. 684, 692 (E.D. Pa. 1985).

Similarly, in Phillips v. Thompson, 715 F.2d 365, 368 (7th Cir. 1983), another case cited by appellants (Br. 29), the court did not address a stand-alone integration regulation like that at issue in this case. Rather, the court noted that the plaintiffs were not contending that, by reason of their handicap, they were being denied access to community residential living situations

that the state was affording to others. Ibid. The court concluded that, under the "plain meaning" of Section 504, the statute did not, therefore, apply to plaintiffs' claim that state officials "had the affirmative duty to create less restrictive community residential settings for them." Ibid.

The Second Circuit in P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990), cited by appellants (Br. 28), addressed Section 504 claims only in the context of deciding defendants' claims of qualified immunity. In that context, the court found that "the law governing [section] 504 did not clearly establish an obligation to meet P.C.'s particular needs vis-a-vis the needs of other handicapped individuals, but mandated only that services provided nonhandicapped individuals not be denied P.C. because he is handicapped." Ibid. That case did not address either the stand-alone integration requirement of the Section 504 coordination regulations nor that of the ADA Title II regulations.

In short, none of the cases cited by appellants support their interpretation of the ADA and its implementing regulations.

C. Appellants Are Required To Provide Services To L.C. And E.W. In An Integrated Setting

The district court found that "the qualified experts are unanimous in their opinion that E.W. can be placed in the community," 1997 WL 148674, at *3.[8/] By failing to serve E.W. in

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[8/] Appellants now argue on appeal (Br. 35-37) that the district (continued...)

the most integrated setting appropriate to her needs, appellants were in violation of the prohibition of disability-based discrimination found in Title II of the ADA and the integration regulation. As the district court found, providing L.C. and E.W. with services in the community does not result in any fundamental alteration of the State's program, since it has "existing programs providing community services to persons such as plaintiffs." Id. at *4. In addition, providing community-based services results in "considerably less cost than is required to maintain them in an institution." Ibid.

The district court also correctly concluded that appellants have an ongoing responsibility to continue to provide appropriate services necessary to maintain L.C. in the community-based treatment program in which she was placed shortly after she filed this suit. That same conclusion applies equally to E.W., who we understand was placed in the community following the district court's decision.[9/] If the obligation placed by the integration

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[8/] (...continued)
court erred in finding that there was no dispute that E.W. could be placed in the community. As amicus curiae, the United States takes no position on this fact-bound issue.

[9/] We agree with the district court's assessment that L.C.'s claim is not moot so long as appellants' failure or refusal to provide the level of services necessary to maintain her community placement places her at risk of a return to institutionalization. As to E.W., appellants have insisted that they "were considering
(continued...)

regulation on public entities -- to provide services in the most integrated setting appropriate to the needs of qualified individuals with disabilities -- is to have any meaning, it must include the obligation to maintain at least the level of services that was found to be necessary at the time the community placement decision was made.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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[9/](...continued)
E.W. for community placement under State law" (Br. 14), refusing to recognize their responsibility under federal law. Accordingly, absent the district court's injunction, it is not "absolutely clear" that appellants' unlawful behavior "could not reasonably be expected to recur." Vitek v. Jones, 445 U.S. 480, 487 (1980).

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Brief for the United States As Amicus Curiae on counsel of record by first class mail, postage prepaid, at the following addresses:

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