Hon. Orlando Garcia

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ERIC STEWARD, by his next friend and mother, Lillian Minor, et. al.

Plaintiffs, v.

RICK PERRY, Governor of the State of Texas, et. al,

Defendants.

Case No. SA-5:10-CA-1025-OG

UNITED STATES' SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION

The United States submits this Supplemental Brief in Support of Plaintiffs' Amended Motion for Class Certification, Pls.' Am. Mot., July 9, 2012, ECF No. 94, to address why the commonality requirement of Fed.R.Civ.P. 23 does not preclude class certification for an integration mandate claim under Title II of the Americans with Disabilities Act ("ADA"), as interpreted by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999). The Parties raised this issue in the hearing on September 12, 2012, and this Court entered an order permitting the Parties to file supplemental briefing on the pending motions. Order, Sept. 20, 2012, ECF No.136. Although Defendants conceded that commonality exists in an *Olmstead* class when the case involves a single state policy that places individuals at risk of institutionalization, Hr'g Tr. 175, Sept. 12, 2012, their narrow reading of the law warrants clarification. In short, commonality also can exist where, as here, a state has multiple policies and practices that perpetuate unnecessary institutionalization and deny individuals in institutions the opportunity to receive services in the most integrated setting appropriate to their needs.

Defendants' contention that commonality for an *Olmstead* claim requires "a specific class to address a specific change in the law" where "a specific issue . . . was applied to everyone the same," Hr'g Tr. 175, misreads both the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and the Fifth Circuit's decision in *M.D. v. Perry*, 675 F.3d 832 (5th Cir. 2012). In *Wal-mart*, the Court held that to satisfy commonality, claims must depend upon a common contention that "is capable of classwide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S. Ct. at 2551. The Court focused on the "capability of a classwide proceeding to generate common *answers*." *Id*. The *Wal-mart* plaintiffs were unable to establish a common contention regarding intentional discrimination in promotion and hiring decisions (the issue central to the validity of a Title VII claim) because the decisions were not the result of any common policy or practice and, thus, not capable of generating common answers; instead, each of the millions of relevant hiring and promotion decisions made by individual managers were highly discretionary. *Id*. at 2554.

Here, the common contention central to the validity of Plaintiffs' *Olmstead* claim is that the State does not provide class members the opportunity to receive services in the most integrated setting appropriate to their needs. This common contention is not only *capable* of generating a common answer, but it naturally lends itself to resolution in a classwide proceeding. Because of the State's policies and practices, all class members are denied the opportunity to receive community-based services. Whether a particular class member may decline community placement at some point in time is inapposite to whether all class members have received an opportunity for community-based services and therefore, will not "impede the generation of common answers." *Id.* at 2551.

In *M.D.*, 675 F.3d at 843, the Fifth Circuit similarly focused on whether the proffered common contention could generate common answers susceptible to classwide resolution. *M.D.* questioned the commonality of the plaintiffs' due process claim because the claim potentially required an individualized inquiry as to whether the State's conduct "shock[ed] the conscious" as applied to each individual class member. *Id*. Here, Plaintiffs' common contention requires no individualized inquiry because Defendants' policies and practices deny *all* class members the opportunity to receive community-based services. Moreover, the court in *M.D.* rejected a narrow formulation of the Rule 23(b)(2) requirement which is nearly identical to Defendants' commonality argument. *See id.* at 847 ("[W]e do not necessarily agree with Texas's argument that the proposed class can only be certified under Rule 23(b)(2) if its claims are premised on a specific policy [of the State] uniformly affecting – and injuring – each child." (internal quotation marks omitted)).

There is also no support in *Oster v. Lightbourne*, No. 09-4668, 2012 WL 685808 (N.D. Cal. Mar. 2, 2012) or *Pashby v. Cansler*, 279 F.R.D. 347 (E.D.N.C. 2011) for Defendants' argument that an *Olmstead* class must allege a single policy to satisfy commonality. *See* Hr'g Tr. 175. There, the courts found commonality because, like the present case, the answer to the common question resolves an issue central to the validity of the claim irrespective of the factual circumstances of each class member; commonality in *Oster* and *Pashby* did not turn on whether the case involved a single policy as opposed to multiple policies and practices. *See Oster*, 2012 WL 685808 at *5 (individuals facing reduction of community services satisfied commonality because common questions regarding the ADA and due process claims could be answered in the litigation, even though some class members would not actually lose services); *Pashby*, 279

F.R.D. at 353(individuals facing loss of community services satisfied commonality for ADA and due process claims.).

Defendants' exceedingly-narrow commonality standard not only runs afoul of *Wal-mart* and *M.D.*, but also would arbitrarily limit the class resolution of civil rights matters. In *Olmstead* cases, where individuals are unnecessarily isolated and segregated in institutions, rarely is the discrimination due to a single state policy or practice. The United States has initiated enforcement actions and recently reached several agreements with states resolving *Olmstead* violations,[1] and many more resolutions have been reached in private *Olmstead* matters through a certified class.[2] These agreements highlight the multiple state policies and practices that, together, denied individuals in institutions the opportunity to receive services in the most integrated setting appropriate to their needs and the ability to remedy the violations through an injunction that does not require the Court to engage in individualized inquires. To require that individuals bring their own claims in lieu of class adjudication would be impractical, judicially inefficient and would leave undisturbed the policies and practices causing unnecessary institutionalization. Despite the availability of a private right of action under Title II, Defendants' position would mean that only the United States could challenge systemic discrimination, undermining Congress's intent that the ADA provide a "clear and comprehensive

[1] *See e.g., United States v. North Carolina*, No. 12-cv-557, ECF 2 (E.D.N.C. Aug. 23, 2012); *United States v. Commonwealth of Virginia*, No. 12-cv-00059, ECF No. 112 (E.D. Va. Aug. 23, 2012); *United States v. Delaware*, No. 11-cv-00591, ECF No. 5 (D. Del. July 6, 2011); *United States v. Georgia*, No. 10-cv-00249, ECF No. 112 (N.D. Ga. Oct. 19, 2010).

[2] *See e.g., Joseph S. v Hogan*, No. 06-cv-01042, ECF 232 (E.D.N.Y. Sept. 7, 2011); *Colbert v. Quinn*, No. 07-cv-4737, ECF 196-1 (N.D. Ill. Aug. 29, 2011); *Ligas v. Hamos*, No. 05-cv-04331, ECF 549 (N.D. Ill. June 15, 2011); *Benjamin v. Dept. of Pub. Welf.*, No. 09-cv-1182, ECF 105-2, (M.D. Pa. May 26, 2011); *Williams v. Quinn*, No. 05-cv-04673, ECF 238-1 (N.D. Ill. March 15, 2010).

national mandate for the elimination of discrimination against individuals with disabilities." 41 U.S.C. §§ 12101(b)(1) and (a)(2)&(3).

CONCLUSION

For the reasons stated above, commonality under *Wal-mart* and *M.D.* exists in *Olmstead* cases where, as here, a state has multiple policies and practices that deny class members the opportunity to receive services in the most integrated setting appropriate to their needs.

DATED: November 12, 2012

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

EVE L. HILL
Senior Counselor to the Assistant Attorney General
Civil Rights Division

ALISON N. BARKOFF
Special Counsel for *Olmstead* Enforcement
Civil Rights Division

JONATHAN SMITH
Chief
Special Litigation Section

BENJAMIN O. TAYLOE, JR.
Deputy Chief
Special Litigation Section

/s/ *Regan Rush*
REGAN RUSH, Trial Attorney
Admitted *pro hac vice*
D.C. Bar No. 980252
ROBERT KOCH, Trial Attorney
Admitted *pro hac vice*
OR Bar No. 072004
Special Litigation Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. - PHB
Washington, D.C. 20530
Telephone: (202) 616-2726
Facsimile: (202) 514-6903
regan.rush@usdoj.gov

Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Regan Rush
REGAN RUSH
Trial Attorney
D.C. Bar No. 980252
Special Litigation Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. - PHB
Washington, D.C. 20530
Telephone: (202) 616-2726
Facsimile: (202) 514-6903
regan.rush@usdoj.gov

Counsel for United States