14-1147(L)

14-2217(CON)

United States Court of Appeals for the Second Circuit

FRANK FORZIANO, ROSEANN FORZIANO, as parents and Article 17A Co-Guardians of Paul Forziano, NORMAN SAMUELS, BONNIE SAMUELS, as parents and Article 17A Co-Guardians of Hava Forziano, PAUL FORZIANO, HAVA SAMUELS,

Plaintiffs-Appellants,

v.

INDEPENDENT GROUP HOME LIVING PROGRAM, INC., MARYHAVEN CENTER OF HOPE, INC., COURTNEY BURKE, sued herein in her official capacity as the Commissioner of the New York States Office of Persons with Developmental Disabilities, STATE OF NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLEES THE STATE OF NEW YORK AND BURKE

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for State Appellees
120 Broadway
New York, New York 10271
(212) 416-8020

BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General
ANDREW KENT
Senior Counsel to the Solicitor General of Counsel

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PRELIMINARY STATEMENT

Paul and Hava Forziano are a married couple with intellectual disabilities who receive habilitation services—training and support in various life skills and activities—funded through New York's Medicaid waiver program. They and their parents brought this suit, seeking injunctive relief and damages arising from their difficulties in finding marital housing in a private, supervised, Medicaid-funded, and state-certified group home.

The defendants in this suit are the two private group homes in which Paul and Hava resided before marriage—Independent Group Home Living Program (IGHL) and Maryhaven Center of Hope, and two state defendants—the State of New York, and the Commissioner of the New York State Office for People With Developmental Disabilities (OPWDD).[1] The United States District Court for the Eastern District of New York (Wexler, J.) dismissed the complaint, and the plaintiffs appeal that dismissal.

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[1] This brief is filed on behalf of the state defendants only; the private defendants are separately represented.

Plaintiffs claim that federal laws prohibiting discrimination in the provision of Medicaid-funded habilitation services entitle Paul and Hava to marital housing in a private, supervised group home certified by OPWDD. After Paul and Hava found such housing, where they are currently residing, plaintiffs amended their complaint to seek an injunction guaranteeing Paul and Hava their preferred marital living arrangement in the future. Plaintiffs also seek damages for alleged injuries resulting from Paul and Hava's past difficulties in securing a residence where they can cohabit.

The district court correctly concluded that plaintiffs' claims against the State fail as a threshold matter because plaintiffs have not established their standing to bring those claims, their request for injunctive relief is unripe, and many of their damages claims are barred by Eleventh Amendment sovereign immunity. The court also correctly concluded that plaintiffs have in any event failed to allege viable claims against the state defendants under Title II of the Americans With Disabilities Act (ADA) (42 U.S.C. § 12132), the Rehabilitation Act (29 U.S.C. § 794), the Fair Housing Act (FHA) (42 U.S.C. § 3604(f)), various provisions of the Medicaid statute, and the Fourteenth Amendment.

Housing in a private group home is not a Medicaid-covered habilitation service. The statutes governing the program expressly exclude "room and board" from the list of reimbursable services, and nothing in state or federal law expressly or implicitly guarantees particular living arrangements to Medicaid beneficiaries. Moreover, plaintiffs' pleadings fail to establish any intentional discrimination or failure to accommodate on the part of the state defendants. To the contrary, the allegations in their complaint show that OPWDD generally supported Paul and Hava's desire to marry, actively attempted to find them a group home that would accommodate their preferred living arrangement, and ultimately helped to secure them the placement that they now have. Thus, the district court's dismissal of plaintiffs' claims against the State was proper and should be affirmed.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1367. On March 26, 2014, the district court entered a final order granting defendants' motion to dismiss. (A. 14.) Plaintiffs filed a timely notice of appeal on April 14, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Have plaintiffs established standing to sue the state defendants, and are their claims for injunctive relief ripe for adjudication?

2. Have plaintiffs stated a viable claim under Title II of the Americans with Disabilities Act, the Rehabilitation Act, the Fair Housing Act, the Medicaid statute, or the Fourteenth Amendment?

STATEMENT OF THE CASE

A. The Provision of Supportive Services for Adults with Intellectual Disabilities in New York

The Medicaid program provides joint federal and state funding for "medical assistance" to individuals meeting the program's requirements. 42 U.S.C. § 1396a(10). States that choose to accept federal Medicaid funds must comply with the Medicaid Act and its implementing regulations, and must submit their proposals for service provision to the United States Department of Health and Human Services for review and approval. *Id.* § 1396a(a)(5), (b); *Douglas v. Indep. Living Ctr. of S. Cal., Inc.,* 132 S. Ct. 1204, 1208 (2012).

After finding that Medicaid resources were being disproportionately expended on long-term institutional care for individuals who could live at home or in the community if additional support services were available, Congress created the Home and Community–Based Services Waiver (HCBS) program. *See* 42 U.S.C. § 1396n(c); *Arc of Cal. v. Douglas*, 757 F.3d 975, 979-80 (9th Cir. 2014). The HCBS program permits States to treat home or community-based services for such individuals as "medical assistance" provided by the State's Medicaid plan. 42 U.S.C. § 1396n(c)(1); *Olmstead v. Zimring*, 527 U.S. 581, 601 & n.12 (1999). The waiver program provides benefits where "but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded[,] the cost of which could be reimbursed under the State [Medicaid] plan." 42 U.S.C. § 1396n(c)(1).

New York's HCBS waiver program is administered by OPWDD, which is responsible for coordinating services for more than 126,000 New Yorkers with developmental disabilities. OPWDD provides services directly and through a network of approximately 700 providers,

with about 80 percent of services provided by the private nonprofits and 20 percent provided by state-run entities. *See* OPWDD, *Agency Overview*, www.opwdd.ny.gov/opwdd_about/overview_of_agency.

OPWDD funds a variety of residential and day habilitation services for persons meeting the HCBS program's requirements. *See, e.g.*, 14 N.Y.C.R.R. §§ 635-10.4, 671.1, 671.2, 671.99(a),(e). Those habilitation services aim to help intellectually disabled persons "with acquisition, retention or improvement in skills related to life safety and fire evacuation; to activities of daily living, such as personal grooming and cleanliness, bed making and household chores, eating and the preparation of food; and social and adoptive skills necessary to enable the person to reside in a noninstitutional setting." *Id.* § 635-10.4(b)(1).

OPWDD also participates in the State's licensing and regulation of private group home facilities that provide Medicaid-reimbursable services to adults with intellectual disabilities. *See* N.Y. Mental Hygiene Law (MHL) §§ 13.01, 13.07, 13.09, 16.01, 16.03, 16.11, 16.13, 16.17, 16.33, 43.02; 14 N.Y.C.R.R. §§ 671.2, 671.3, 671.4, 671.6. As this Court has noted in another case involving IGHL, these group homes are private entities

rather than state agencies. *Sybalski v. Indep. Group Home Living Program, Inc.*, 546 F.3d 255, 258 (2d Cir. 2008) (per curiam).

As relevant here, federal law specifically provides that the "room and board" of intellectually disabled persons is not a covered HCBS program expense. 42 U.S.C. § 1396n(c)(1). Instead, these expenses must be funded from other sources, such as Social Security disability benefits and the Supplemental Nutrition Assistance Program. *See* OPWDD, *How to Pay for OPWDD Services*, www.opwdd.ny.gov/node/419. (*See also* Joint Appendix ("A.") 152.) As plaintiffs' complaint recognizes, residential opportunities in OPWDD-certified, supervised group homes are oversubscribed, with demand greatly exceeding the available supply. (A. 93, 108.)

B. Plaintiffs' Original Complaint

Paul Forziano and Hava Forziano (née Samuels) are adults with developmental intellectual disabilities that "significantly limit[] [their] cognitive functioning." (A. 18-19; *see also* A. 69-70.) Paul has "[f]ull Scale IQ scores of 50 and 58," and Hava's IQ has been estimated at 50 and 44, although her expressive language disability may have affected the results. (A. 18-20; *see also* A. 69-71.)

In January 2013, Paul, Hava, and their parents brought this suit against IGHL and Maryhaven—two private not-for-profit organizations that provide housing and habilitation services for adults with intellectual disability. (A. 16-20; *see also* A. 67-68, 79.) Plaintiffs also named as defendants the State of New York and Courtney Burke, Commissioner of OPWDD, in her official capacity.

According to the complaint, Paul and Hava met while attending a Maryhaven day habilitation program (A. 25) and, in 2010, informed their parents that they wished to marry (A. 27; *see also* A. 81). At the time, Hava resided in an all-female Maryhaven group home that provided 24-hour supervision and assistance and residential habilitation services (A. 20; *see also* 67, 80)—technically, a "certified individualized residential alternative" (IRA), *see* 14 N.Y.C.R.R. §§ 635-10.3, 686.16.[2] Paul resided in and received residential habilitation services in an IGHL-run IRA group home. (A. 18-19; *see also* 67, 80.)

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[2] The fact that the home's residents were all female is asserted by plaintiffs in their papers below. *See* Pls' Mem. of Law in Opp'n to State Defs' Mot. to Dismiss at 3 n.7 (Dist. Ct. ECF No. 83) ("Pls' Mem. of Law").

Because Paul and Hava wanted to live together after marriage, and understood "that they need[ed] to live in supervised housing," they and their parents sought a supervised group home placement where Paul and Hava could cohabit "in close geographical proximity to their parents and to the Maryhaven Day Program." (A. 27, 37; *see also* 82.) In a series of meetings and telephone calls, Maryhaven and IGHL informed plaintiffs that Paul and Hava could not cohabit in their current group homes. (A. 30-31.) Other OPWDD-certified group home providers stated that "although they welcome married couples in their homes, they had no placements that would be available within any reasonable time into the future." (A. 37.)

An OPWDD employee, Robert Lopez, participated in those discussions "in an attempt to facilitate a solution." (A. 29; *see also* A. 83.) As plaintiffs' complaint recognizes, "the availability of group home placements for adults with [intellectual disabilities] is very limited in New York State," and persons desiring placement in such homes can wait "up to several years before homes become available." (A. 37; *see also* 93, 108.)

Plaintiffs allege that employees of Maryhaven and IGHL made certain statements suggesting that they believed that marriage was not

appropriate for persons with Paul's and Hava's intellectual limitations. (A. 29-31, 49; *see also* A. 84-86.) They allege that Lopez of OPWDD did not oppose Paul and Hava's marriage and cohabitation, but instead stated "that current and methodologically appropriate sexual consent assessments should be performed for both, together with proper education related to their capacity to consent." (A. 31; *see also* A. 86-87.) Plaintiffs allege that Maryhaven and IGHL did not provide that sexuality education or properly conduct the process for evaluating ability to validly consent to sexual activity. (A. 32-36, 38; *see also* A. 88-98.)

Plaintiffs' original complaint sought an injunction requiring defendants to give Paul and Hava pre-marital counseling, allow them to "spend private, intimate time together" in their supervised IRA homes, and permit them to cohabit in "supervised IRA housing" after their marriage. (A. 63-64.) The complaint also sought money damages for "frustration of [Paul and Hava's] desire to enjoy their non-marital and impending marital relationship with each other through private and intimate time together in each other [sic] supervised IRA houses." (A. 65.)

C. Plaintiffs' Amendment of Their Complaint Following Paul and Hava's Marriage and Cohabitation

Paul and Hava married in April 2013, several months after commencing this lawsuit. (A. 67.) Three months later, in July 2013, they moved together into another group home, East End, where they have been able to cohabit. (A. 68.) Immediately thereafter, on July 17, 2013, plaintiffs filed an amended complaint and withdrew their pending request for a preliminary injunction. (A. 9-10.)

The amended complaint acknowledges that OPWDD worked with plaintiffs to identify ways for Paul and Hava to cohabit after marriage, and ultimately facilitated Paul and Hava's move to East End. (A. 79, 83, 85-87, 95, 97-99.) The complaint also recognizes that OPWDD officials have been generally supportive of marriage and cohabitation by adults with intellectual disabilities. (A. 77-79, 87, 94, 96, 98, 99.) Nonetheless, the complaint faults OPWDD for allegedly counseling plaintiffs to look into other group home placements when it appeared Maryhaven and IGHL were not going to accommodate their preferred living arrangement. (A. 98-99.)

Plaintiffs allege that OPWDD had a legal duty to require Maryhaven and IGHL to provide sex education and marital housing to

Paul and Hava. (A. 95-96, 98-100, 105, 117-118.) Specifically, they assert causes of action under Title II of the Americans With Disabilities Act (42 U.S.C. § 12132), the Rehabilitation Act (29 U.S.C. § 794), the Fair Housing Act (42 U.S.C. § 3604(f)), various provisions of the Medicaid statute, and the Fourteenth Amendment.

The amended complaint seeks money damages on the theory that "Paul and Hava were unable to live together as husband and wife from April 7, 2013 until July 1, 2013"; "delayed their marriage plans for approximately three years" out of concern that they would "have no place to live as a married couple, except in one of their parents [sic] homes"; "were constructively evicted from their [group home] residences"; and incurred certain costs "for counseling and other services related to . . . sexuality consent evaluations, helpful relationship counseling and sex education, and psychological evaluations." (A. 105-106, 129.) Plaintiffs also seek an injunction prohibiting future refusals to house Paul and Hava "as a married couple . . . in supervised group homes operated by IGHL, Maryhaven or any other OPWDD certified, supervised group home provider," in the

event that Paul and Hava need to or choose to move out of their current placement at East End. (A. 122, 125, 128.)

D. The District Court's Dismissal of All Claims

The district court dismissed plaintiffs' amended complaint in full. The court first held that plaintiffs' claims for injunctive relief were barred by a lack of ripeness and standing. It stated that plaintiffs' requested injunction to "prevent alleged harm that Paul and Hava may or may not suffer in the future" was "based on nothing more than speculation and conjecture that the services currently being provided by East End may at some point become unavailable to Paul and Hava as a result of any number of circumstances that may or may not occur." (A. 169.)

The district court also held that Eleventh Amendment sovereign immunity barred plaintiffs' claims for damages against the state defendants under the FHA and 42 U.S.C. § 1983, and that plaintiffs had not stated viable claims for relief against any of the defendants under the ADA, the Rehabilitation Act or the FHA. (A. 167-181.) Upon concluding that plaintiffs had not alleged any viable federal claims, the

district court declined to exercise supplemental jurisdiction over plaintiffs' remaining state law claims.[3] (A. 180.) This appeal followed.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

This Court reviews de novo whether a plaintiff has standing to sue "based on the allegations of the complaint and the undisputed facts evidenced in the record." *Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79, 84-85 (2d Cir. 2014). The court also reviews de novo whether a claim is ripe and whether the district court properly dismissed claims under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. *See Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 511 (2d Cir. 2014) (ripeness); *Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997) (dismissals under Rules 12(b)(1) and 12(b)(6)).

Here, the district court correctly dismissed plaintiffs' entire complaint, which seeks damages and injunctive relief against the State, the OPWDD Commissioner, and two private group homes on the theory

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[3] Plaintiffs have not sought to revive their state law claims on appeal and hence have abandoned them. *See Jackler v. Byrne*, 658 F.3d 225, 233 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1634 (2012).

that Paul and Hava experienced past denials of marital group home housing to which they had an entitlement—and face the prospect of similar denials in the future. As the court noted, plaintiffs' claims against the state defendants fail for multiple reasons.

First, plaintiffs' complaint for damages fails to allege any past injuries fairly traceable to actions by the State, and their request for injunctive relief fails to allege any imminent or threatened harm warranting an injunction. Thus these claims all fail for lack of standing and ripeness. For example, the State cannot be held responsible for plaintiffs' own decision to postpone Paul and Hava's marriage until a placement in marital group home housing could be secured for them. And plaintiffs have not shown Paul and Hava's three-month wait for cohabitational housing after their marriage was due to wrongful conduct by the State, as opposed to the relative scarcity of private group home housing—an issue that plaintiffs acknowledge in their amended complaint. Plaintiffs thus lack standing to sue the State for damages.

Plaintiffs also lack standing to sue for their requested injunction because they allege no current injury and the future injury they posit is entirely hypothetical. Specifically, they speculate that some future

event could cause plaintiffs to seek a different group home placement and that, if this occurred, they might be unable to secure an acceptable alternative due to discrimination—as opposed to oversubscription.

Moreover, even if the claims were justiciable and ripe, they would fail because plaintiffs do not state a legally cognizable claim for relief under Title II of the ADA, Section 504 of the Rehabilitation Act, the FHA, or the Fourteenth Amendment. Plaintiffs' claims for intentional discrimination fail because their amended complaint is devoid of allegations showing that the State exhibited animus or ill will towards Paul and Hava on account of their disability. And their claims for violations of the Medicaid statute and failure to provide reasonable accommodation fail because a marital living arrangement in a private group home is not an existing service or benefit already offered by the State under the Medicaid HCBS waiver program or otherwise. The Medicaid waiver program on which they seek to rely expressly provides that the "room and board" of a person with intellectual disabilities is not a covered program service. 42 U.S.C. § 1396n(c)(1).

There are three fundamental flaws underlying plaintiffs' suit against the state defendants that cause the specific legal defects just enumerated. The complaint mistakenly treats the group homes as state agencies, thereby obscuring the issues of standing and ripeness and seeking to hold the State liable for allegedly discriminatory actions and statements by those private entities. Second, the complaint mistakenly asserts that adults with intellectual disabilities in New York have a statutory, regulatory or constitutional right to a marital housing arrangement, thereby purporting to create causes of action where there are none.

Third, far from opposing their desire to cohabit after marriage or treating plaintiffs in a discriminatory manner, OPWDD is in fact described in plaintiffs' amended complaint as working to identify ways for Paul and Hava to cohabit after their marriage. The complaint also notes that OPWDD facilitated Paul and Hava's move to the group home where they are now cohabiting, and that OPWDD officials were supportive about the prospect of Paul and Hava's marriage and have been generally supportive of marriage and cohabitation by persons with intellectual disabilities. (A. 77-79, 87, 94, 96, 98, 99.) Plaintiffs' attempt to recover

against the State by now characterizing OPWDD's actions as discriminatory is contradicted by the specific factual allegations in their pleadings.

ARGUMENT

POINT I

MARYHAVEN AND IGHL ARE PRIVATELY OPERATED GROUP HOMES, NOT STATE AGENCIES

As a preliminary matter, it is necessary to understand the relationship between the state defendants and the group home defendants in this case. Plaintiffs' briefing characterizes the group home defendants as state agencies and repeatedly conflates the conduct of those defendants with the conduct of the State. *See, e.g.*, Brief for Appellants ("Br.") at 11, 14, 20, 36, 45, 60. That is incorrect.

Maryhaven and IGHL are private, not-for-profit entities, incorporated in New York. (A. 68.) Like many private entities in various contexts, they are licensed by the State and subject to state regulation. (A. 70-75.) But state licensing and regulation does not make the group homes into state agencies—or transform the housing they provide into "a program or activity of a public entity." *Noel v. N.Y. City Taxi &*

Limousine Comm'n, 687 F.3d 63, 72 (2d Cir. 2012) (quotation marks omitted) (State's licensing of private taxis did not transform taxi medallion owners into state actors or otherwise make the State legally responsible for their actions.).

As this Court has noted in a case involving IGHL, "facilities licensed by the state to provide care and treatment to the mentally disabled are subject to regulation, licensing, and oversight" by the State, but are nevertheless purely private entities, not state actors. *Sybalski*, 546 F.3d at 258. Allegations of discriminatory conduct by the group homes—whether or not well-founded—simply do not state a claim that the State itself has discriminated. *See, e.g., Noel*, 687 F.3d at 73 (where taxi licensing scheme is not itself discriminatory, State's "failure to use its regulatory authority" to address alleged disability discrimination by taxi operators "does not amount to discrimination within the meaning of the ADA or its regulations").

POINT II

PLAINTIFFS' CLAIMS AGAINST THE STATE DEFENDANTS ARE BARRED BY LACK OF STANDING AND RIPENESS, AND BY SOVEREIGN IMMUNITY.

A. Plaintiffs Lack Standing to Bring their Damage Claims Because They Have Not Alleged a Sufficient Causal Connection Between the State's Conduct and their Alleged Past Injuries.

To establish Article III standing, a plaintiff must show "a causal connection" between his claimed injury and the defendant's alleged wrongdoing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Put another way, the plaintiff must show that his injury is "'fairly . . . trace[able] to the challenged action of the defendant.'" *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Plaintiffs' amended complaint seeks money damages for several claimed past injuries: (1) the fact that Paul and Hava "delayed their marriage plans for approximately three years" out of concern that they would "have no place to live as a married couple, except in one of their parents [sic] homes" (A. 105); (2) their departure from their prior group home residences, which they characterize as a "constructive eviction" (A. 106); (3) the costs incurred by plaintiffs "for counseling and other services related to . . . sexuality consent evaluations, helpful

relationship counseling and sex education, and psychological evaluations" (A. 106); and (4) Paul and Hava's inability to cohabit from April 7, 2013—the date when they were married—until July 1, 2013 (A. 106). Plaintiffs' factual allegations to some extent contradict these purported injuries, and in any event do not show that these injuries are traceable to any conduct of the state defendants.

1. Plaintiffs' allegations do not show that the state defendants caused their marriage- and cohabitation-related injuries.

Plaintiffs' attempt to recover for the purported delay in Paul and Hava's marriage seeks to hold the State liable for damages beginning in 2010, when Paul and Hava announced to their parents that they desired to marry. (A. 105-106.) But plaintiffs have stated elsewhere that Paul and Hava did not formally become engaged until May 2011. (A. 40.) And plaintiffs have also alleged that it was not until July 2012 that Paul's and Hava's parents—who were the legal guardians of their children—formally ceded back to Paul and Hava the authority to decide whether to marry. *See* Coleman Aff. in Support of Pls' Mot. for Prelim. Inj., Exhs. 10 & 12 (Dist. Ct. ECF Nos. 34-1, 34-3).

To the extent that Paul and Hava elected to delay their marriage still further, that delay was likewise the result of plaintiffs' own choice. Plaintiffs do not allege that the state defendants denied them the right to marry at any point before or after July 2012. Indeed, plaintiffs' amended complaint describes OPWDD officials as being supportive of marriage and cohabitation by adults with intellectual disabilities adults. (A. 77-79, 87, 94, 96, 99.) And the complaint further acknowledges that OPWDD worked with plaintiffs to identify ways for Paul and Hava to cohabit after marriage, and ultimately facilitated Paul and Hava's move to East End. (A. 79, 83, 85-87, 95, 97-99.)

Plaintiffs' own factual allegations undercut the assumption on which their marriage- and cohabitation-related damages claims are premised—namely, that Paul and Hava should have been provided with a marital housing arrangement in an OPWDD-certified group home as soon as they expressed a wish for such a placement. As plaintiffs' amended complaint recognizes, the demand for group home housing in New York far outstrips supply, and eligible individuals can wait for "up to several years" for a placement to become available. (A.77-78, 93, 108.) Plaintiffs do not allege there were suitable units for Paul and Hava to

cohabit at either of the group homes where they resided, except to suggest that they should have been allowed to move into what was apparently an employee apartment at IGHL.[4] (A. 94; *see also* A. 117.) Thus, plaintiffs have failed to show that even Paul and Hava's inability to cohabit from April to July 2013 was attributable to some wrongful conduct by the state defendants.

Plaintiffs therefore cannot seek damages from the State for these claimed injuries. The Supreme Court's caselaw supports that analysis. For example, the Court has held that would-be charity patients lacked standing to challenge a tax policy change for hospitals because they could not show that "the earlier [policy] would have assured the medical care they desire," given that "the number of such patients accepted, and whether any particular applicant would be admitted, would depend upon the financial ability of the hospital to which admittance was sought." *E. Ky. Welfare Rights Org.,* 426 U.S. at 42 n.23. Similarly, the Court has held that would-be tenants lacked standing to challenge

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[4] *See also* Pls' Mem. of Law at 3 n.7 (acknowledging that the Maryhaven group home where Hava lived prior to marriage was all-female).

allegedly unconstitutional zoning practices where they could not establish that appropriate housing would have been constructed and available to them without the challenged zoning restrictions. *See Warth v. Seldin* 422 U.S. 490, 505-06 (1975).

2. Plaintiffs' other claimed injuries likewise cannot be attributed to the state defendants.

Plaintiffs' suggestion that the State is liable for any damages attributable to Paul and Hava's departure from their prior group home residences (A. 106) is undercut by their repeated assertions that Paul and Hava wished to move in together after marriage (A. 84-87, 91, 94, 95, 98, 102). Plaintiffs' amended complaint makes clear that cohabitation in a housing unit suited to married couples, a unit which did not exist in their prior group home residence, was a goal that Paul and Hava actively sought—not an arrangement that was in any way forced upon them by the state defendants.

Plaintiffs likewise cannot recover from the State for the costs of "counseling and other services related to . . . sexuality consent evaluations, helpful relationship counseling and sex education, and psychological evaluations." (A. 106.) Their amended complaint

establishes that they incurred these costs voluntarily, because they were dissatisfied with the consent evaluations performed by Maryhaven and IGHL (A. 88-93), and because they believed that the results of an alternative evaluation might "persuade OPWDD, IGHL, and Maryhaven that fulfillment of Paul and Hava's marriage desires would have a very positive effect on achievement of their life goals, independence, and integration into their communities." (A. 31).

B. Plaintiffs' Request for Injunctive Relief Is Barred by Their Failure to Show Any Present or Imminent Injury.

1. Plaintiffs must establish standing for the relief requested in their amended complaint.

Plaintiffs argue that as long as they had standing for the injunctive relief requested in their original complaint, the district court was required to consider the different injunction requested in their amended complaint. Br. at 22-23. That is incorrect.

Standing doctrine looks to the connection between the plaintiff's alleged injury, defendant's alleged conduct, and the relief requested from the court. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Lujan,* 504 U.S. at 560-61. Thus, where a plaintiff amends

his complaint to request new or additional relief, his standing to request that relief must be assessed anew.

It is well established that "a plaintiff must demonstrate standing for each claim he seeks to press" and "'for each form of relief'" that is sought. *DaimlerChrysler Corp.*, 547 U.S. at 352 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000)). Moreover, "an amended complaint ordinarily supercedes the original, and renders it of no legal effect." *Dluhos v. Floating and Abandoned Vessel, Known as "New York,"* 162 F.3d 63, 68 (2d Cir. 1998) (quotation marks omitted); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (evaluating standing as of "the time the second amended complaint was filed"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 100, 106 n.7 (1983) (same, with respect to "first amended complaint").

Plaintiffs are mistaken in seeking to analogize their case to *Olmstead v. Zimring*, 527 U.S. 581 (1999). That case considered whether a post-complaint transfer to a community-based program *mooted* the plaintiffs' request for an order requiring them to be placed in such a program. *See id.* at 593-94 & n.6. It did not excuse the plaintiffs from demonstrating their *standing* to seek that relief. Because

mootness and standing are distinct doctrines, a plaintiff may be able overcome mootness without also establishing standing. *Friends of the Earth,* 528 U.S. at 191. Indeed, the Supreme Court has emphasized that *Olmstead* illustrates exactly that point. As the Court has explained, although the transfer in *Olmstead* did not moot that action, the plaintiffs there would have lacked standing to sue for an injunction "had [they] filed the complaint after the transfer." *See Friends of the Earth,* 528 U.S. at 191.

2. Plaintiffs' claims of future harm are too speculative and hypothetical to establish standing.

A plaintiff seeking "forward-looking relief" must establish his standing to sue through a showing of "'actual or imminent'" injury. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 210, 211 (1995) (quoting *Lujan,* 504 U.S. at 560). Here, plaintiffs have alleged no current injuries. They acknowledge that Paul and Hava were married in April 2013 and have been co-residing in marital housing since July 1, 2013. (A. 67-68.) Indeed, in recognition of these facts, plaintiffs' amended complaint seeks an injunction directed solely towards circumstances that they allege could arise in the future.

Specifically, plaintiffs allege that Paul and Hava could in the future need to or choose to move out of their current placement at East End. (A. 122, 125, 128.) For example, Paul and Hava might have a conflict with East End staff and therefore desire to leave, they might develop an orthopedic impairment that could not be accommodated in their current apartment, or East End might close for financial or other reasons. (A. 107.)

Plaintiffs allege that were any of these circumstances to occur, Paul and Hava might not be able to find suitable replacement housing. (A. 125, 128.) Plaintiffs note, for example, that although several OPWDD-certified group homes in Suffolk County have shown an interest in providing marital housing to couples with developmental disabilities, the demand for group home placements in New York far outstrips supply. (A. 77-78, 93.) As plaintiffs recognize, it can take "up to several years" for a place to become available. (A. 93.) Plaintiffs nonetheless press this Court for an order prohibiting any future denial of joint marital housing in an OPWDD-certified group home in the event Paul and Hava need or desire to leave East End. (A. 122, 125, 128.)

Plaintiffs' demand for injunctive relief thus rests on a doubly speculative theory of purported future harm. Their theory first requires the occurrence of some contingency disrupting Paul and Hava's current placement. And it then requires that Paul and Hava's inability to secure alternative marital housing result from discriminatory conduct, rather than oversubscription or a change in Paul's or Hava's suitability for cohabitational housing. The "speculative nature of [this] claim of future injury" falls far short of the "immediate threat" that a plaintiff must show to establish his need for equitable relief. *Lyons*, 461 U.S. at 111. As the district court accurately observed, plaintiffs request an injunction to "prevent alleged harm that Paul and Hava may or may not suffer in the future," "based on nothing more than speculation and conjecture that the services currently being provided by East End may at some point become unavailable to Paul and Hava as a result of any number of circumstances that may or may not occur." (A. 169.)

C. Plaintiffs' Request for Injunctive Relief Is Also Barred by the Ripeness Doctrine.

As the district court correctly observed, for the same reasons that plaintiffs lack standing, their request for prospective relief against the state defendants is also not ripe. (A. 169.) *See also Warth*, 422 U.S. at 499 n.10 (standing inquiry "bears close affinity to questions of ripeness"); *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 130 n.8 (2d Cir. 2008) (noting that the standing and ripeness doctrines "overlap"). The ripeness doctrine's basic rationale "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *N.Y. Civil Liberties Union*, 528 F.3d at 130-31 (quotation marks omitted).

Plaintiffs seek an injunction prohibiting the State from refusing marital housing to Paul and Hava in the event they need to leave East End. Yet the reasonableness of any future placement for Paul and Hava will necessarily turn on the factual circumstances present at the time the placement is sought. At a minimum, a fact-finder would need to consider the availability of IRA group home residential opportunities, the particular eligibility restrictions for those group homes, and Paul and Hava's then-existing physical, mental, and emotional health.

Where the future state of the facts is so uncertain, it is simply unclear how OPWDD would handle a future request to intercede with a particular private group home on the issue of cohabitational housing. *Cf. Connecticut v. Duncan*, 612 F.3d 107, 114 (2d Cir. 2010) ("We do not yet have a clear picture of the solutions the [defendant] Secretary might propose" to solve the problems identified by the plaintiff State, "or, for obvious reasons, the State's position on any such solutions.").

Constitutional ripeness requirements are jurisdictional, and "prevent[] courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it." *N.Y. Civil Liberties Union*, 528 F.3d at 131 (quoting *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003)). Constitutional ripeness therefore requires some showing that the plaintiff faces "immediate injury," and that the issues to be adjudicated are not "abstract on account of "prematurity." *Simmonds*, 326 F.3d at 358 (quotation marks omitted). Plaintiffs have failed to make such a showing here.

The prudential ripeness doctrine also weighs in favor of dismissing plaintiffs' request for prospective relief. Prudential ripeness

seeks to avoid entangling the courts with issues that would benefit from further factual development or would for some other reason be easier to adjudicate in the future. *N.Y. Civil Liberties Union*, 528 F.3d at 133-34; *Simmonds*, 326 F.3d at 359. An issue is prudentially unripe for adjudication if it is "'contingent on future events or may never occur'" and the parties will endure no hardship if decision is withheld. *Simmonds*, 326 F.3d at 359 (quoting *Isaacs v. Bowen*, 865 F.2d 468, 478 (2d Cir. 1989)). Moreover, for these purposes, "[t]he mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship." *Id.* at 360.

Here, as noted, plaintiffs have alleged no immediately impending injury. Instead, they have alleged only that a series of contingent events could lead to a possible future injury. Additionally, "[u]nlike 'a purely legal question that is eminently fit for judicial review,'" plaintiffs' demand for injunctive relief implicates a host of factual matters "beyond the prescience of this court." *United States v. Balon*, 384 F.3d 38, 46 (2d Cir. 2004) (quoting *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 227 (2d Cir. 1998)).

D. Plaintiffs Concede that Many of Their Claims Are Also Barred by the State's Sovereign Immunity.

As plaintiffs recognize, unless waived by the State or validly abrogated by Congress, the State's sovereign immunity bars all claims against it by private parties, *see College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999), and also bars claims for damages against state officials sued in their official capacities, *see Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985).[5]

In the proceedings below, citing sovereign immunity, plaintiffs expressly abandoned their claims for injunctive or monetary relief against the State directly, and their claims for damages against the Commissioner, under the FHA and Medicaid Act. *See* Pls' Mem. of Law at 13. Thus, these particular claims have not been preserved for appellate review and are not before the Court. *See Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1077 (2d Cir. 1993).[6]

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[5] Under *Ex Parte Young*, 209 U.S. 123 (1908), suits for prospective relief for violations of federal law against state officials sued in their official capacities are not barred by sovereign immunity. *See Mary Jo C. v. N.Y. State and Local Ret. Sys.*, 707 F.3d 144, 166 (2d Cir. 2013).

[6] Plaintiffs have also failed to press these claims in their opening brief on appeal, providing an additional reason why they are not before

(*continued on the next page*)

The district court correctly held (A. 170-171) that 42 U.S.C. § 1983, through which plaintiffs assert Medicaid and Fourteenth Amendment claims, does not abrogate sovereign immunity, *see also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989); *Quern v. Jordan*, 440 U.S. 332, 338 (1979). Although plaintiffs now assert that they may seek damages against the State directly under the Fourteenth Amendment itself, Br. at 58, this Court has squarely rejected the proposition that the Fourteenth Amendment abrogates sovereign immunity. *See Santiago v. N.Y. State Dep't of Corr. Srvcs.*, 945 F.2d 25, 30-31 (2d Cir. 1991). The district court also correctly held (A. 170), that the FHA does not purport to abrogate sovereign immunity, *see also Gregory v. S. Carolina Dep't of Transp.*, 289 F. Supp. 2d 721, 724-25 (D.S.C. 2003), *aff'd*, 114 F. Appx. 87 (4th Cir. 2004).

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this Court. *See Jackler*, 658 F.3d at 233. Plaintiffs also abandoned their claims for damages under the Rehabilitation Act. *See* Pls' Mem. of Law at 13. The district court recognized this, but nonetheless dismissed them. (A. 171-172.)

POINT III

PLAINTIFFS' ALLEGATIONS DO NOT STATE VIABLE CLAIMS UNDER THE ADA, FHA, REHABILITATION ACT, MEDICAID STATUTE OR FOURTEENTH AMENDMENT

Even if the Court were to conclude that plaintiffs have established their standing to sue the state defendants, it should nonetheless affirm the district court's dismissal of their suit. Plaintiffs' factual allegations do not support their claims against the state defendants under Title II of the ADA, the FHA, section 504 of the Rehabilitation Act, the Medicaid statute, or the Fourteenth Amendment. Moreover, most of those claims are premised on the incorrect assumption that a cohabitational living arrangement in a private group home is a Medicaid-funded habilitation service to which federal or state law guarantees access. (A. 103, 115, 118-122, 123.)

A. Private Group Home Housing Is Not a Medicaid Habilitation Service.

Plaintiffs repeatedly assert that because various federal laws prohibit discrimination in the provision of Medicaid habilitation services—or require reasonable accommodation in the provision of such services—those laws necessarily entitle Paul and Hava to a cohabitational

living arrangement in a private group home certified by OPWDD. Br. at 3, 45, 48, 54, 56. They are incorrect in their underlying assumption that private group home housing is a Medicaid-covered habilitation service.

Medicaid covers the costs of habilitation services through its HCBS waiver program. *See* 42 U.S.C. § 1396n(c)(5). And the statutory provision governing that program expressly provides that the "room and board" of persons with intellectual disabilities is not a covered program expense. *Id.* § 1396n(c)(1). Rather, living expenses for such persons must be funded from other sources, such as Social Security disability benefits and the Supplemental Nutritional Assistance Program. *See* OPWDD, *How to Pay for OPWDD Services*, www.opwdd.ny.gov/node/419. (*See also* A. 152.)

The other legal and policy documents cited by plaintiffs likewise do not treat private group home housing as a habilitation service to be provided or subsidized by the State. Section 33.01 of New York's Mental Hygiene Law (cited at Br. at 6 n.4) confirms that persons receiving social and medical services from the State do not lose their preexisting civil rights. Similarly, the state regulatory provisions listing the community residential habilitation services for which government reimbursement is available, 14 N.Y.C.R.R. § 671.5(a)(4)(v) & (vi) (cited

at Br. at 18), do not address housing and do not purport to grant enforceable legal rights. These provisions instead discuss the types of services allowable as "[f]unctional skills training" and "[a]ssertiveness/self-advocacy skills training." 14 N.Y.C.R.R. § 671.5(a)(4)(v) & (vi). Finally, plaintiffs cite an appendix to OPWDD's handbook for providers concerning abuse and reportable incidents. Br. at 18-19, 32 n.21. Nothing in the document purports to grant or recognize a right to cohabitational housing.[7]

[7] This document discusses the freedom of adults with intellectually disabilities to engage in sexual conduct if they have the ability to make informed decisions about that issue, their rights to privacy and confidentiality about their sexuality, and the need to provide education about sexuality and other related issues such as "birth control and family planning, parenting, [and] premarital and marital counseling" adults with intellectual disabilities. *See* OPWDD, *Putting People First, The Part 624 Handbook: Reportable Incidents, Serious Reportable Incidents, and Abuse*, Appx. 3, at 280-85 (Oct. 27, 2011), www.opwdd.ny.gov/opwdd_resources/incident_management/the_part_624_handbook.

B. Plaintiffs' Allegations Do Not Support Their Claims Under the ADA, Rehabilitation Act, or FHA.

Plaintiffs have failed to state a claim for either of their theories of recovery—intentional discrimination and a failure to provide reasonable accommodations—under the ADA, FHA or Rehabilitation Act.

1. Plaintiffs' claim of intentional discrimination by the state defendants fails because plaintiffs allege no facts supporting that claim.

A plaintiff seeking to establish intentional discrimination under Title II of the ADA and the FHA must show that discriminatory animus or ill-will stemming from plaintiff's disability was a significant or motivating factor in the challenged decision making. *See Powell v. Nat'l Bd. of Med. Exam'rs,* 364 F.3d 79, 89 (2d Cir. 2004), *as corrected*, 511 F.3d 238 (2d Cir. 2004); *Reg'l Econ. Cmty. Action Program, Inc., v. City of Middletown*, 294 F.3d 35, 49 (2d Cir. 2002), *superseded by statute on other grounds*, ADA Amendments of 2008, Pub. L. No. 110–325, 122 Stat. 3553; *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 112 (2d Cir. 2001).

To establish intentional discrimination under section 504 of the Rehabilitation Act, a plaintiff must show that defendants took the

challenged action "solely" because of the plaintiff's disability. 29 U.S.C. § 794(a); *see also Bryant v. N.Y. State Educ. Dep't*, 692 F.3d 202, 216 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013). Intentional discrimination under the Rehabilitation Act does not require an allegation of personal animosity, but rather may be inferred if the government acted with "at least deliberate indifference to the strong likelihood" of a violation of federally protected rights. *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009) (quotation marks omitted); *accord Powell,* 364 F.3d at 89; *Garcia*, 280 F.3d at 115. Deliberate indifference, in turn, requires a deliberate decision not to institute corrective measures, made by an official empowered to do so, in the face of "'actual knowledge of discrimination'" occurring. *Loeffler*, 582 F.3d at 276 (quoting *Gebster v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)).

Plaintiffs' factual allegations fail to show that animus or ill will because of Paul and Hava's disabilities was a factor in the State's decisionmaking, much less a significant or motivating factor. And plaintiffs' allegations are also insufficient to show deliberate indifference by the state defendants.

Plaintiffs' amended complaint acknowledges that an OPWDD employee worked with plaintiffs to identify ways for Paul and Hava to cohabit after marriage, and that OPWDD ultimately facilitated Paul and Hava's move to East End. (A. 79, 83, 85-87, 95, 97-99.) The complaint also recognizes that this OPWDD employee supported their marriage, and that OPWDD officials have been generally supportive of marriage and cohabitation by adults with intellectual disabilities. (A. 77-79, 87, 94, 96, 98, 99.)

Indeed, plaintiffs' opening brief on appeal does not reference any conduct by the state defendants when setting out "evidence of intentional discrimination." Br. at 35-39. Plaintiffs do assert that an OPWDD employee suggested Paul and Hava's marriage should not take place until they were found to be able to validly consent to sexual activity. (A. 88.) *See also* Br. at 6, 60. But in light of the State's declaration that adults with intellectual disabilities in state-regulated facilities should have a a "safe" environment "free[] from abuse or mistreatment by . . . other residents," N.Y. MHL § 33.02(a)(1) & (5), it was plainly appropriate—and not in any way suggestive of animus—for OPWDD to be concerned about Paul and Hava's ability to consent to sexual activity.

2. Plaintiffs' reasonable accommodation claims fail because they seek new or different services, not reasonable access to services the State already offers.

Plaintiffs also allege a failure to provide reasonable accommodations under the ADA, Rehabilitation Act and FHA. Because Title II of the ADA and section 504 of the Rehabilitation Act allow money damages from the State only for intentional discrimination, s*ee* *Loeffler*, 582 F.3d at 275; *Powell,* 364 F.3d at 89; *Garcia*, 280 F.3d at 112, plaintiffs are limited to seeking injunctive relief for their reasonable accommodation claims under those statutes.

But even if the Court concludes that plaintiffs have established standing to bring their request for injunctive relief, and have shown that this request is ripe, the Court should nonetheless affirm the district court's dismissal of plaintiffs' reasonable accommodation claims under each of the three statutes because plaintiffs have failed to state a viable claim.

Because the standards for reasonable accommodation discrimination adopted by the ADA, Rehabilitation Act and FHA are very similar, courts typically consider the claims together. *See McElwee v. County of Orange*, 700 F.3d 635, 640 (2d Cir. 2012) (Title II of the

ADA and § 504 of the Rehabilitation Act); *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573 n.4 (2d Cir. 2003); (Title II of the ADA and FHA). As relevant here, all three statutory schemes prohibit a failure to make a reasonable accommodation or modification to rules, policies, services or programs if necessary to permit a person with a disability to have equal access to the services or programs at issue. *See Tsombanidis*, 352 F.3d at 578 (citing 42 U.S.C. § 12131(2) and 42 U.S.C. § 3604(f)(3)(B)); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir. 2003) (citing regulations issued pursuant to the Rehabilitation Act, 28 C.F.R. § 41.53).

A reasonable accommodation claim has a "comparative component," requiring plaintiffs to allege a denial of access to specific benefits or services that "are available both to those with and without disabilities." *Henrietta D.*, 331 F.3d at 276-77; *see also Rodriguez v. City of N.Y.*, 197 F.3d 611, 618 (2d Cir. 1999) (same); *Doe v. Pfrommer*, 148 F.3d 73, 83-84 (2d Cir. 1998) (same). Stated differently, plaintiffs must identify an already-existing benefit or service to which they seek access that the State currently provides to both individuals with and without disabilities; they may not use these antidiscrimination statutes to challenge "'the substance

of the services provided'" exclusively to persons with disabilities. *Rodriguez*, 197 F.3d at 618 (quoting *Doe*, 148 F.3d at 84).

In determining whether plaintiffs seek access to already existing services or benefits for persons with and without disabilities—or are instead impermissibly challenging the State's failure to offer persons with disabilities a new and different benefit or service—the Supreme Court and this Court have emphasized that the relevant program, service, or benefit must be defined narrowly and with specificity. *See Alexander v. Choate*, 469 U.S. 287, 303 (1985); *Rodriguez*, 197 F.3d at 618. Courts must look "to a plaintiff's facial legal entitlements" and the service or program's "formal legal eligibility requirements." *Henrietta D.*, 331 F.3d at 277.

Here, as noted, plaintiffs seek to challenge the substance and adequacy of New York's private group home housing for adults with intellectual disabilities by characterizing a particular living arrangement as a habilitation service funded through the Medicaid HCBS program. Br. at 9, 11, 16, 18, 54-55. But that program is exclusive to persons with disabilities. *See* 42 U.S.C. § 1396n(c) (program provides benefits where "but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate

care facility for the mentally retarded[,] the cost of which could be reimbursed under the State [Medicaid] plan"). Moreover, as noted, a particular living arrangement in private group home housing is not an existing service or benefit offered under that program in any event.

"In a string of recent decisions brought under the disabilities statutes at issue here, this Circuit has . . . distinguished between (i) making reasonable accommodations to ensure access to an existing program and (ii) providing additional or different substantive benefits." *Wright v. Giuliani*, 230 F.3d 543, 548 (2d Cir. 2000). The Supreme Court has also done so. For instance, the Court has held that the Rehabilitation Act does not require a State to cover a greater number of inpatient hospital days for disabled as opposed to nondisabled Medicaid beneficiaries, even if that would be necessary to ensure their "meaningful access to Medicaid services." *Choate*, 469 U.S. at 302-03. The "thrust" of these multiple decisions "is that the disabilities statutes do not require

that substantively different services be provided to the disabled, no matter how great their need for the services may be." *Wright*, 230 F.3d at 548.[8]

Contrary to plaintiffs' assertions, *Olmstead* does not call for a different analysis. *See Rodriguez*, 197 F.3d at 619 ("*Olmstead* reaffirms that the ADA does not mandate the provision of new benefits."); *Henrietta D.*, 331 F.3d at 276 (recognizing, post-*Olmstead* "that the basic analytical framework of the ADA includes . . . a comparative component").

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[8] *See Rodriguez*, 197 F.3d at 618-19 (holding that the ADA and Rehabilitation Act did not require municipality to provide intellectually disabled Medicaid recipients with special safety-monitoring services because those statutes only apply "'with regard to the services [the State] in fact provide[s]'" (quoting *Olmstead*, 527 U.S. at 603 n.14); *Forest City Daly Housing, Inc. v. Town of N. Hempstead*, 175 F.3d 144, 151-52 (2d Cir. 1999) (developer of housing for disabled not entitled to permit to build in an area where housing for nondisabled was not allowed by zoning rules); *Doe*, 148 F.3d at 83-84 (Office of Vocational Educational Services for Individuals With Disabilities (VESID) not required to provide disabled plaintiff with different and additional services such as a job coach to help him participate in the office's programs); *Lincoln CERCPAC v. Health & Hosp. Corp.*, 147 F.3d 165, 166, 166-68 (2d Cir. 1998) (rejecting challenge to closing of specialized healthcare facility for disabled children because there was no allegation that plaintiffs were "being denied care furnished to people without disabilities"); *Flight v. Gloeckler*, 68 F.3d 61, 63-64 (2d Cir. 1995) (per curiam) (rejecting challenge to VESID's refusal to fund alterations to plaintiff's vehicle in a dollar amount higher than what agency regulations allowed because plaintiff was "not being denied a benefit which is made available to nonhandicapped individuals").

Plaintiffs also misplace their reliance on *Hargrave v. Vermont*, 340 F.3d 27 (2d Cir. 2003), which addressed a generally applicable State program—"Vermont's program of permitting its citizens to execute DPOAS [durable powers of attorney for health care]." *Id.* at 38.

C. Plaintiffs' Medicaid Claims Fail in Several Respects.

As relevant to the state defendants, plaintiffs' claims under the Medicaid Act seek only injunctive relief from Commissioner Burke in her official capacity. *See* Br. at 18; *see also* Pls. Mem. of Law at 13 (recognizing that Eleventh Amendment sovereign immunity bars plaintiffs from suing the State and OPWDD under 42 U.S.C. § 1983 for purported violations of the Medicaid Act); *Ford v. Reynolds,* 316 F.3d 351, 354-55 (2d Cir. 2003) ("The Eleventh Amendment bars the award of money damages against state officials in their official capacities.").

But as noted earlier (see *supra* at 25-32), plaintiffs have failed to establish standing to bring their request for injunctive relief, and have failed to demonstrate that this request is ripe. Even assuming that plaintiffs can somehow satisfy those requirements, plaintiffs' Medicaid claims nonetheless fail on multiple levels.

Plaintiffs first purport to rely on 42 U.S.C. § 1396a(a)(1)(B)(i), (ii), which requires "that the medical assistance made available to any [Medicaid recipient] . . . shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." That reliance is misplaced, however, because the Medicaid HCBS statute specifically provides that the "room and board" of persons receiving Medicaid-funded home or community-based services is not "medical assistance" covered by the Medicaid program. 42 U.S.C. § 1396n(c)(1). Plaintiffs' reliance on the Medicaid Act's reasonable standards provision, 42 U.S.C. § 1396a(a)(17), fails for the same reason. Br. at 54 ("Plaintiffs [sic] Reasonable Standards claim . . . focuses on policy or regulatory standards that govern the Medicaid service at issue.").

Even if plaintiffs were able to show that the Medicaid statute contained some guarantee of a marital housing arrangement in a private group home, they cannot in any event demonstrate a private right of action or an enforceable right under 42 U.S.C. § 1983. The Supreme Court has noted that Spending Clause legislation, such as the Medicaid statute, is typically enforced not by private rights of action but by the federal government's withholding of funds. *See Gonzaga Univ. v.*

Doe, 536 U.S. 273, 280 (2002); *see also Torraco v. Port Auth. of N.Y. and N.J.*, 615 F.3d 129, 136-39 (2d Cir. 2010) (applying the Supreme Court's recent case law). And plaintiffs have not shown that the referenced provisions of the Medicaid statute evidence an "unambiguous" intent by Congress to confer (1) an enforceable individual entitlement (2) on a specific class of beneficiaries that is (3) "couched in mandatory, rather than precatory terms" and (4) "not so vague and amorphous that its enforcement would strain judicial competence." *Gonzaga*, 536 U.S. at 280, 282-84 (quotation marks omitted).

D. Plaintiffs Have Not Stated a Claim Under the Fourteenth Amendment.

Plaintiffs do not allege any cognizable claim under Fourteenth Amendment equal protection or substantive due process theories. Claims of disability discrimination in violation of the Fourteenth Amendment's Equal Protection Clause are evaluated under very deferential rational basis review. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). Thus, a plaintiff seeking to state a constitutional claim for disability discrimination must show

wholly irrational State action or actions "motivated by discriminatory animus or ill will based on the plaintiff's disability." *Garcia*, 280 F.3d at 111. As discussed above (see *supra* at 39-41), plaintiffs have not alleged any facts that would satisfy that requirement.

Plaintiffs' amended complaint also fails to support any claim that the state defendants interfered with their fundamental right to marry and thus violated the substantive due process component of the Fourteenth Amendment. The complaint instead shows that the state defendants acknowledged that Paul and Hava had the right to marry, and supported their desire to marry. (A. 77-78, 87, 94, 96, 99.) Indeed, plaintiffs' own arguments make clear that it was their own choice to delay Paul and Hava's marriage, in order to ensure that Paul and Hava could obtain a group home placement in which to cohabit after marriage. Br. at 60 ("The only substantial impediment to [Paul and Hava's] marriage was the need to ensure that they had a home they could live together in as husband and wife . . . ").[9]

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[9] (*See also* A. 85-86 (meeting on August 24, 2010 about "desire to marry and live together"); A. 86-87 (meeting on August 24, 2010 about "housing Paul and Hava" and their ability to "marry and cohabit");
(*continued on the next page*)

CONCLUSION

For the foregoing reasons, the district court's judgment dismissing the amended complaint should be affirmed.

A. 93 (plaintiffs contact other group home providers about "providing housing to married couples"); A. 94 (disputed issue is "desire to live together as a married couple"); A. 95 (phone call with State identified issue as ability to "live together as a married couple"); A. 97-98 (meeting on July 30, 2012 concerned ability to "live together in one of [the group homes] when they get married"); A. 98 (State understood issue to be ability to "live together"); A. 99 (issue understood to be "request to reside together"); A. 102 (issue is "ability to reside together as a married couple").)

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Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for State Appellees

By: /s/ Andrew Kent
ANDREW KENT
Senior Counsel to
the Solicitor General

120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8018

BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General
ANDREW KENT
Senior Counsel to the Solicitor General of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Andrew Kent, an attorney in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 9,454 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Andrew Kent
Andrew Kent