IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JONATHAN PAUL BOYD, Plaintiff, v. CAROL H. STECKEL, in her official capacity as Commissioner of the Alabama Medicaid Agency, Defendant.	))))))))))	Civil Action Number: 2:10-cv-00688-MEF-TFM

COMMISSIONER STECKEL'S OPPOSITION TO PLAINTIFF'S AMENDED MOTION FOR PRELIMINARY INJUNCTION (DOC. 15)

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I. INTRODUCTION

Mr. Boyd is understandably anxious to live on his own, at any cost. Indeed, he argues that cost is not a legitimate barrier to his goal, and that the State must reimburse him for all medical services and equipment necessary to enable him to reside independently. The legal ground asserted is the general nondiscrimination language that appears in Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and its implementing regulations, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and its implementing regulations.

There are several reasons why Mr. Boyd's legal argument fails. First, it may be assumed that Mr. Boyd's desire to move out of the nursing home is shared by almost everyone who lives there. As a practical matter, it is not economically advisable to provide constant nursing care for everyone in their private homes, simply because that is what they prefer. Federal law does not require it, and it would bankrupt the Medicaid system to do away with nursing homes and replace them with a home-based system of medical care.

Instead, federal Medicaid law permits the States to create and implement Medicaid Waiver programs that provide reimbursement for limited home-based care, but only when the States can ensure that such programs are a cost-neutral alternative to institutional care. The requirement of cost-neutrality firmly imbedded in federal Medicaid law represents an express Congressional compromise that limits the availability of Medicaid funds to those situations where it makes sense, economically, to provide medical care at home. Mr. Boyd's expansive reading of the anti-discrimination language of the ADA and Rehab Act would repeal this express Congressional mandate of cost-

neutrality, however. Such a reading is contrary to the well-established rules of statutory construction designed to effect true legislative intent.

Second, there are very detailed rules that govern admission to the State's Medicaid Waiver programs, and Mr. Boyd has not followed them. Mr. Boyd has filed a copy of the application of the State's Medicaid Elderly & Disabled (E & D) Waiver, suggesting that he seeks admission to that waiver program. It does not appear that Mr. Boyd has followed the established procedures for admission to that Waiver program, however: His name does not appear on the referral lists maintained by the responsible State agencies.

Moreover, those procedures are not perfunctory: One of the established procedures requires that a care plan be developed by a case worker to ensure Mr. Boyd's safety. The care-plan requirement is mandated by federal Medicaid law. Again, contrary to sound principles of statutory construction, Mr. Boyd reads the non-specific anti-discrimination language of the ADA and Rehab Act in a manner that would repeal the detailed mandates of federal Medicaid law.

Mr. Boyd's reliance on *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999), is misplaced. *Olmstead* addressed the needs of persons with mental disabilities who were required to reside in State-operated mental institutions in order to receive medical services that they needed, while persons without mental illness were not required to be thus confined. In *Olmstead*, the State's own treatment professionals certified that community placement was appropriate. Here, Mr. Boyd has produced no medical opinion suggesting that he does not need the level of care that a nursing home ensures, and his requested modifications to the existing waiver programs are not reasonable.

Alabama operates waiver programs designed to serve disabled persons in the community, but those programs have limits in the number of people they serve and the types and amounts of services offered. None of Alabama's waiver programs provide everything that Mr. Boyd requests. Moreover, when no medical professional has come forth to say that those services would be sufficient, the Court cannot be sure that Mr. Boyd can safely live in the community under the terms he demands.

What Mr. Boyd requests, in essence, is that the State create a waiver program just for him, and a private nursing home of one, providing whatever he needs to live in the community, ignoring costs (although Federal regulations require the State to consider costs), and ignoring procedures designed to ensure the health and safety of participants (although Federal regulations require the State to follow the procedures). Federal law does not require the State to make such fundamental alterations to its existing programs, and if it were to do so, the State will lose federal matching funds, thereby limiting the services it can provide to others.

These arguments are set out in detail in the following sections. In the end, we submit that the Court should not order injunctive relief when there is a complete absence of medical testimony setting out what services Mr. Boyd needs, when Mr. Boyd has not gone through the application process that would enable State case workers to consider a plan of care and cost-effectiveness, and when Mr. Boyd's requests would require a fundamental alteration to a complex, detailed Medicaid program.

II. BACKGROUND

A. THIS LITIGATION

1. Procedural History

Paul Boyd filed his original Complaint in this case on August 12, 2010. Doc. 1. On August 17, 2010, Mr. Boyd filed a motion for preliminary injunction and expedited hearing, doc. 3, as well as a memorandum of law in support of the motion, doc. 4, which was supported by a personal declaration, doc. 4-1. The sole named defendant, the Honorable Carol Steckel, Commissioner of the Alabama Medicaid Agency, timely answered on September 14, 2010. Doc. 1 at ¶ 13; doc. 11.

At that time, the case had been randomly assigned to a United States Magistrate Judge. The case was re-assigned on September 23, 2010. Doc. 13.

Shortly thereafter, on September 29, 2010, Mr. Boyd filed an Amended Complaint. Doc. 14. That same day, he filed an amended motion, doc. 15, and memorandum in support, doc. 16. Mr. Boyd once again sought an expedited hearing. Doc. 15. Mr. Boyd also attached an amended personal declaration. Doc. 16-1.

The next day, the Court granted Mr. Boyd's request for an expedited hearing, setting the hearing for October 13, 2010, and requiring Commissioner Steckel's response be filed by October 7, 2010. Doc. 17.

2. The Claims

The Amended Complaint asserts two claims for relief. First, Mr. Boyd alleges a violation of the anti-discrimination provision in Title II of the Americans with

Disabilities Act of 1990, 42 U.S.C. § 12132, and its implementing regulations.[1] Doc. 14 at ¶¶ 54-58. Second, Mr. Boyd alleges a violation of the anti-discrimination provision in § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and its implementing regulations. *Id.* at ¶¶ 59-61. The amended motion for preliminary injunction relies on both of these claims. Doc. 15 at ¶ 29; doc. 16, *generally*.

B. PLAINTIFF JONATHAN PAUL BOYD

1. Mr. Boyd's Injury and Move to a Nursing Home

Paul Boyd avers that he has quadriplegia as a result of a 1995 accident that left him paralyzed, depriving him of the use of both his arms and legs. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶¶ 1, 3. After an initial period of hospitalization and until 2006, Mr. Boyd was able to remain in his family home, with his mother as his primary caregiver. *Id.* at ¶¶ 1, 4. During this time, Mr. Boyd participated in the Medicaid Home and Community Based Waiver program known as the State of Alabama Independent Living (SAIL) Waiver, which is operated by the Alabama Department of Rehabilitation Services. *Id.* at ¶ 5; Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 12.

In December 2006, Mr. Boyd moved from his mother's home to Chandler Health and Rehab Center in Alabaster, Alabama. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 5; Affidavit of Andria Gaither, doc. 19-2 at 2, lines 9-10. While living at Chandler, Mr. Boyd is not eligible to receive any Medicaid waiver services. Each Medicaid Waiver program is designed to be a cost-effective alternative for persons who

[1] Except where otherwise noted, references to the ADA are to Title II, Part A of the ADA, *codified at* 42 U.S.C. §§ 12131 – 12134. *See also Olmstead*, 527 U.S. at 589 & n.3. It is Title II that applies to public entities. Part B of Title II concerns public transportation services. 42 U.S.C. §§ 12141 – 12165.

otherwise would require more costly institutional care. *See* 42 C.F.R. § 430.25(b); Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 17. Thus, Medicaid reimbursement for nursing home care precludes participation in a Medicaid Waiver program. Accordingly, Mr. Boyd relinquished his participation in the SAIL waiver program when he chose to move away from the family home and into a nursing home.

2. Transportation to and from the University of Montevallo

While living at Chandler, Mr. Boyd completed a bachelor's degree from the University of Montevallo. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶¶ 5, 10. He traveled from Chandler to Montevallo using ClasTran. *Id.* at ¶ 12. The Alabama Department of Rehabilitation Services (Rehab Services) paid for Mr. Boyd's use of ClasTran and also paid $17,469 toward his tuition. Affidavit of Andria Gaither, doc. 19-1, page 2, lines 13-19.

Mr. Boyd has now returned to classes at Montevallo in order to earn a master's degree in counseling. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 11. Mr. Boyd is enrolled as a graduate student, and Rehab Services is paying his tuition and other expenses. Affidavit of Andria Gaither, doc. 19-1, page 3, line 19, to page 4, line 14.

Mr. Boyd asserts that ClasTran is unavailable to transport him to the evening classes required for the master's program. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 12. Accordingly, he has made alternative transportation plans. Affidavit of Andria Gaither, doc. 19-1, page 3, line 19, to page 4, line 14. Specifically, Mr. Boyd has arranged to pay a Chandler employee $500 to transport him to and from his classes for the semester. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 13.

Mr. Boyd got the $500 from a scholarship. *Id.* He need not direct that scholarship toward his tuition expenses because the Rehab Services is paying his tuition. Affidavit of Andria Gaither, doc. 19-1, page 3, line 19-22. Rehab Services has a policy of being the provider of last resort, in order to encourage personal independence; since Mr. Boyd has other means to pay his driver, he should use those before relying on the State. *Id.*, page 4, lines 15-20. Rehab Services has agreed to reimburse Mr. Boyd at a rate of 25¢ per mile for gasoline expenses to and from his master's classes. *Id.*, page 4, lines 6-10.

Mr. Boyd asserts that he has to "travel to campus on six other occasions this semester in order to complete required assignments" and that he is borrowing money from his brother in order to pay persons to transport him at those times. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 14. Mr. Boyd's assertion that he has been "forced" into this position is disingenuous, however, as he failed to request assistance from Rehab Services—which has a history and current practice of assisting him with transportation. Affidavit of Andria Gaither, doc. 19-1, page 3, line 19, to page 4, line 4.

Similarly, although he suggests that his living situation is responsible for his only taking 2 courses, Mr. Boyd is enrolled for 9 credit hours, which is comparable to the course load that he took as an undergraduate, while residing with his mother. *Id.*, page 3, lines 1-20. Mr. Boyd has not shown that a lack of transportation caused him to enroll in too few courses. Insofar as Rehab Services is concerned, transportation is not an obstacle that will be a barrier to his full participation in his rehabilitation program. *Id.*, page 4, lines 15-20.

3. Mr. Boyd's Preference for Community Living

It is understandable, of course, that Mr. Boyd would prefer to live on campus rather than at Chandler. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 15. Like nearly every other college student, he would enjoy spending more time with his friends, *id.* at ¶ 20, he would prefer to be in control of his own schedule, *id.*, and would like to "be[] around people [his] own age and with similar interests and activities," *id.* at ¶ 21.[2] Boyd further asserts that privacy is lacking at Chandler, while noise, screaming, crying, states of undress, and an "unpleasant disinfectant odor" are all too present. *Id.* at ¶ 22. He additionally complains that "[a]s a Medicaid resident in the nursing home, [he] receive[s] only $30 of [his] monthly Social Security Disability check of $897. With such

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[2] The extent to which the fact of living in a nursing home, as opposed to the status of being dependent on others, impacts these preferences remains subject to proof. A news story in the *Shelby County Reporter*, which may not be accurate but which does appear to be based in part on an interview with Mr. Boyd, reports:

> Despite the distance, Boyd still tries to make it to Montevallo several times a week to visit with his friends and family. He can often be found in Eclipse Coffee & Books laughing and hanging out with friends.
>
> "If I don't get out of here to get down there at least once a week, I feel like the walls are caving in on me," he said. "That is a treat. It's something that I don't take for granted."

Katie Hurst, *Quadriplegic man fights for dream*, Shelby County Reporter, August 20, 2010, *available at* http://www.shelbycountyreporter.com/2010/08/20/quadriplegic-man-fights-for-college-dream/ *last visited* August 20, 2010.

limited financial resources, [he is] extremely limited in going to the movies, eating out, or having snacks." *Id.* at ¶ 20.[3]

In short, Mr. Boyd asserts that his quality of life would improve if he had more spending money and if he were able to live independently and closer to campus so that he could attend various University functions. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 15. Mr. Boyd asserts that he "ha[s] located rental housing near the University of Montevallo which would suit [his] accessibility needs and would allow [him] to travel to and from campus readily and independently." *Id.* at ¶ 17. He emphasizes that the housing will be available in January 2011 and that he needs to "secure this housing as soon as possible." *Id.* Mr. Boyd's desire to secure this particular housing is the new basis for his seeking a preliminary injunction.

While Mr. Boyd's stated desire is unquestioned, he has not provided *any* evidence whatsoever that he can safely reside in this housing alone. By his own admission, since the accident, Mr. Boyd has resided either in a facility or in his family home with his mother serving as his primary caregiver. *Id.* at ¶¶ 1, 4. Mr. Boyd seeks to live alone, but offers only his own personal assessment of his care needs, unsupported by any skilled medical assessment or opinion.

Before Mr. Boyd could be discharged from the nursing home, his physician must be satisfied that the planned arrangements will be sufficient to protect Boyd's health and safety. Affidavit of Robert Moon, M.D., doc. 19-2 at ¶ 4. Mr. Boyd has provided no

[3] A monthly Social Security Disability check of $897 yields $10,764 annually. Mr. Boyd's motion estimates that "Alabama's Medicaid nursing home reimbursement is approximately $33,700 a year." Doc. 15 at ¶ 25.

medical assessment, however, and has identified no Medicaid approved provider who is willing to assist him with such care.

Conversely, a Medical Director at the Alabama Medicaid Agency, after reviewing the medical records from Chandler, has identified several medical issues relevant to the analysis that a physician authorizing discharge would conduct—including a number of medical needs that would require skilled medical care and careful, regular observation by a medical professional. Affidavit of Robert Moon, M.D., doc. 19-2 at ¶¶ 4-9.

4. Mr. Boyd's Substantial Needs

Mr. Boyd describes his needs as follows:

> In order to live in the community, I need community-based Medicaid services including ten hours per day of assistance with activities of daily living, assistance with my bowel program twice per week, assistance with changing my catheter twice per month and necessary equipment and supplies.

Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 8.

Mr. Boyd made a request for services through his attorneys, *id.* at ¶ 25, and his attorneys included these settlement discussions in their preliminary injunction materials, doc. 16-3. While Mr. Boyd's counsel's list does not purport to be based on the professional advice of a State treatment professional, *see Olmstead*, 527 U.S. at 602—or any treatment professional—it is useful in that it includes specifics on the desired medical equipment and supplies.[4] Mr. Boyd's list is as follows:

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[4] Mr. Boyd's counsel recognized in his email communication that the list could not be definitive: "With the caveat that we understand that [the Alabama] Medicaid [Agency] should do a 'needs assessment' and work jointly with the discharge planner at Chandler Health and Rehabilitation to develop and implement a 'discharge plan' and 'care plan' for Mr. Boyd, we are providing information concerning what we know about Mr. Boyd's transition needs at this time." Email from Lonnie J. Williams, Alabama Disabilities

- "Ten hours of assistance per day (for activities of daily living, operating a lift for transfers, changing bed pads, ***giving medication***, etc." Doc. 16-3 at 4 (emphasis added). ***Ten hours per day translates into seventy (70) hours per week.***
- "***Nursing assistance*** once every two weeks for changing his catheter." *Id.* (emphasis added).
- "***Nursing assistance*** twice per week for his bowel program." *Id.* (emphasis added).
- "A bed/mattress that turns him." *Id.*
- "An environmental control unit to allow him to operate his telephone, television, bed, and other electronics in his home, along with the attachment for the unit to make it mobile so Mr. Boyd can operate the unit from his wheelchair." *Id.*
- "An automatic door opener that Mr. Boyd can operate from his wheelchair." *Id.*
- "A Hoyer Heavy Duty Power Patient lift with cloth sling for transfers between the bed and wheelchair." *Id.*
- "Supplies including lotion, soap, ointment, two disposable pads per night, one 60cc syringe per day, and three catheters per month." *Id.*
- A nebulizer. *Id.* at 3.

Mr. Boyd acknowledges that he requires nursing assistance for his bowel program and catheter replacements. Doc. 16-3 at 4. What is not clear is the extent to which Mr. Boyd would also need skilled nursing care to meet some of his other healthcare

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Advocacy Program ("ADAP"), to Stephanie McGee Azar, General Counsel, Alabama Medicaid Agency, and Margaret L. Fleming, Assistant Attorney General, Office of the Alabama Attorney General (August 3, 2010, 4:45 p.m.), Doc. 16-3 at 4.

needs, *e.g.,* administration of medications and treatment of pressure sores.[5] Moreover, a Medical Director at the Alabama Medicaid Agency has identified a number of medical concerns that would have to be addressed. Affidavit of Robert Moon, M.D., doc. 19-2 at ¶¶ 4-9.

Mr. Boyd has not yet produced medical evidence to show that his physician would recommend his living independently in the community. The resolution of that issue is complex and fact-driven. It might, for example, depend on whether Mr. Boyd is able to take advantage of a regulatory exception[6] that would permit a nurse to delegate

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[5] Mr. Boyd asserts he has suffered from five pressure sores during his time at Chandler, as compared to only one pressure sore during the eleven years following the accident when he was living in his family home. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 19. While unfortunate, if true, Chandler is not a named defendant and the Complaint states no claims for medical malpractice, *see* doc. 1, generally—nor could it since Commissioner Steckel does not provide medical care; she oversees an agency that provides financial reimbursement for medical care. The thrust of Boyd's Complaint is on the "institutional" structure of the nursing home, as opposed to the actual care provided within its walls. Moreover, there is no evidence to support an inference that the care given by an unsupervised personal attendant in Mr. Boyd's private home would be of superior quality than the care administered by the staff at Chandler.

[6] *Cf.* Ala. Code § 34-21-20 ("In order to safeguard life and health, any person practicing or offering to practice professional nursing or practical nursing in this [S]tate, for compensation, shall hereafter be required to submit evidence that he or she is qualified so to practice and shall be licensed as hereinafter provided. . . ."); Ala. Code § 34-21-26 (declaring the practice of professional nursing or practical nursing by unlicensed persons to be a public nuisance and authorizing the Board of Nursing to seek injunctive relief to restrain it); Ala. Code § 34-21-80 ("declar[ing] that the . . . regulation of all areas of advanced practice nursing . . . [is] essential to protect and maintain public health and safety"); Ala. Code § 34-21-81(3) (defining an advanced practice nurse as "[a] registered nurse [who] has gained additional knowledge and skills . . . and has been certified by the Board of Nursing to engage in the practice of advanced practice nursing."); Ala. Code § 34-21-91 (authorizing the Board of Medical Examiners and the Board of Nursing to seek injunctions to restrain the unauthorized practice of advanced practice nursing); Ala. Admin. Code § 610-X-6-.04(1) (providing a non-comprehensive

some aspects of his care to unlicensed personnel. That will, in turn, depend on Mr. Boyd's specific needs (including whether these needs make him suitable for services through the SAIL Waiver program), and on the professional judgment of licensed nurse.[7] It is much too soon to know how this issue will be resolved, but it is important to know that the issue exists, and to recognize that this possibility is a narrow exception to the otherwise controlling requirement for nursing care. Interestingly, the *Shelby County*

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list of activities involved in the practice of professional nursing); Ala. Admin. Code § 610-X-6-.05(1) (providing a non-comprehensive list of activities involved in the practice of practical nursing); Ala. Admin. Code § 610-X-6-.07 (concerning "Medication Administration and Safety"; requiring, among other things, "applied knowledge of medication administration and safety," the "exercise [of] decision-making skills," which includes an "[a]ssessment of patient's health status and complaint prior to and after administering medication included as needed (PRN) medications," and the exercise of skills concerning matters such as "[m]easuring medication dosages" and "[m]ath calculations"); Ala. Admin. Code § 610-X-6-.09 (concerning "Assessment Standards"); Ala. Admin. Code § 610-X-6-.13 (concerning "Standards for Wound Assessment and Care").

[7] The Alabama Board of Nursing has promulgated a regulation specific to the SAIL Program. Ala. Admin. Code § 610-X-7-.03. SAIL is the waiver program through which Boyd previously received some services while living in the family home. Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 12. It is not the waiver program which Boyd has attached to his memorandum. *See* doc. 16-6 (Elderly & Disabled Waiver).

The regulation allows "[r]egistered nurses employed by the State of Alabama a Independent Living (SAIL) Program administered by the Department of Rehabilitation Services" to "delegate tasks to a patient's designated caregiver if each [of the listed] conditions is met." Ala. Admin. Code § 610-X-7-.03(1). The conditions include training and demonstrated competency. *Id.* Moreover, "[t]he specific delegated tasks shall not require the exercise of independent nursing judgment or intervention." Ala. Admin. Code § 610-X-7-.03(2). The nurse remains involved, Ala. Admin. Code § 610-X-7-.03(3), and is ultimately "accountable and responsible for the nursing care," Ala. Admin. Code § 610-X-7-.03(5); *see also* Ala. Admin. Code § 610-X-6-.11 (concerning "Assignment, Delegation and Supervision"). Such a delegation may be withdrawn or suspended. Ala. Admin. Code § 610-X-7-.03(4).

Reporter story, which, again, may not be accurate and certainly does not amount to a medical professional's opinion but which does appear to be based on interviews with Mr. Boyd and his counsel, reports that Mr. Boyd requires " *at least* 10 hours a day of ***nursing*** care." Katie Hurst, *Quadriplegic man fights for dream*, Shelby County Reporter, August 20, 2010, *available at* http://www.shelbycountyreporter.com/ 2010/08/20/quadriplegic-man-fights-for-college-dream/ *last visited* August 20, 2010 (emphasis added).

The level of care that Mr. Boyd requires as well as the quantity of care that a physician believes he needs are keys to assessing whether Mr. Boyd is a suitable candidate for any of Alabama's existing waiver programs, as well as for assessing whether he can be served in the community in a fiscally responsible matter.

Lacking that information, we do know that Mr. Boyd admits he needs at least seventy hours of care per week, plus some regular hours of skilled nursing care each week, plus substantial adaptive equipment. The needs identified by Mr. Boyd alone, without considering additional needs dictated by a physician, exceed the care that would be reimbursable under any of Alabama's existing waiver programs. Affidavit of Marilyn Chappelle, doc. 19-3 at ¶¶ 8-14.

Moreover, Medicaid Waiver programs are mutually exclusive, in accordance with federal law. *Id.* at ¶ 16. Such exclusivity is consistent with the requirement that each Waiver program be, in fact, cost neutral. Thus, Boyd's request that his needs be met through a "combination of waivers," doc. 15 at 1, would be contrary to federal law.

C. ALABAMA'S MEDICAID HOME AND COMMUNITY BASED WAIVER PROGRAMS[8]

1. Medicaid and the State Plan

"Medicaid was established by Title XIX of the Social Security Act of 1965, 79 Stat. 343, as amended, 42 U.S.C. § 1396 *et seq*. Medicaid is a joint [S]tate-[F]ederal funding program for medical assistance in which the Federal Government approves a [S]tate plan for the funding of medical services for the needy and then subsidizes a significant portion of the financial obligations the State has agreed to assume. Once a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations." *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985) (citing *Harris v. McRae*, 448 U.S. 297, 301 (1980)). *See also Susan J. v. Riley*, 254 F.R.D. 439, 445 (M.D. Ala. 2008) ("Medicaid is a joint federal and [S]tate program under Title XIX of the Social Security Act. 42 U.S.C. § 1396 *et seq.* The federal government reimburses a portion of the expenditures incurred by [S]tates . . . .").

It is undisputed that the Federal Government funds a substantial portion of what Alabama spends on Medicaid. *See* doc. 14 at ¶ 53 (alleging that "Federal Medicaid funds pay for approximately 68.54% of the cost of Alabama's Medicaid program, increasing as an enhanced [F]ederal match of approximately 77.91% effective October 1, 2010"); Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 19 ("Currently, the federal government pays approximately 70% of Alabama's costs for reimbursement of services provided through its State Plan and Waiver programs.").

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[8] Much of this information is taken from briefing in the long-running *Susan J. v. Riley* litigation, which just concluded last year. *Susan J. v. Riley*, Case No. 2:00-cv-918-MEF (M.D. Ala., closed). *Susan J.* involved challenges to two Medicaid waiver programs operated by the Department of Mental Health, specifically the Intellectual Disabilities Waiver (formerly—and then—known as the Mental Retardation (MR) Waiver), and the Living at Home (LAH) Waiver.

2. The Creation of Home and Community Based Waiver Programs

Alabama's home and community based waiver programs operate pursuant to Section 1915(c) of the Social Security Act, *see* Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, § 2176, 95 Stat. 812-13, *codified as amended at* 42 U.S.C. § 1396n(c), which Congress enacted in 1981. Section 1915(c) gives the Secretary of the Department of Health and Human Services the power to waive certain requirements of the Medicaid Act. It provides in pertinent part:

> The Secretary may by waiver provide that a State plan approved under this subchapter may include as "medical assistance" under such plan *payment for part or all of the cost of home or community-based services* (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that 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 plan. . . .

42 U.S.C. § 1396n(c)(1) (emphasis added).[9]

Section 1915(c) gives States the flexibility to offer the home and community based services that an individual needs in order to avoid institutionalization. *See* 42 C.F.R. § 441.300 ("Section 1915(c) of the Act permits States to offer, under a waiver of statutory requirements, an array of home and community-based services that an individual needs to avoid institutionalization. Those services are defined in § 440.180 of this subchapter. This subpart describes what the Medicaid agency must do to obtain a waiver.").

[9] As 42 U.S.C. § 1396n(c)(1) makes clear, the Alabama Medicaid Agency does not provide medical services; it pays for medical services.

As 42 C.F.R. § 430.25(b) provides,

> Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the *efficient and cost-effective* delivery of health care services, or to *adapt their programs to the special needs of particular areas or groups of recipients*. Waivers allow exceptions to State plan requirements and permit a State to implement innovative programs or activities on a time-limited basis, and subject to *specific safeguards for the protection of recipients and the program*. Detailed rules for waivers are set forth in subpart B of part 431, subpart A of part 440, and subpart G of part 441 of this chapter.

42 C.F.R. § 430.25(b) (emphasis added). *See Bryson v. Shumway*, 308 F.3d 79, 82 (1st Cir. 2002) ("The waiver program is designed to allow [S]tates to experiment with methods of care, or to provide care on a targeted basis, without adhering to the strict mandates of the Medicaid system.").

Thus, beginning in 1981, States were encouraged to "try new or different approaches," taking into account the array of services that are actually available in each community. 42 C.F.R. § 430.25(b). Waiver "programs [are to be adapted] to the special needs of particular areas or groups of recipients," *id.*, as opposed to customized to meet individual needs. *See also Alexander v. Choate*, 469 U.S. at 303 (rejecting a Rehab Act claim; " . . . Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services . . . .").

Alabama soon took advantage of the waiver option, creating the Intellectual Disabilities Waiver in 1981 and the Elderly & Disabled Waiver in 1982; the other waiver programs have followed in the years since. Doc. 16-4 (chart summarizing Alabama's six waiver programs and indicating their start dates; this chart is available on the Alabama Medicaid Agency's website at http:// www.medicaid.alabama.gov/documents/Program-

LTC/3D-3c-2-HCBS_Waivers_Matrix_Chart_revised_4-10.pdf (*last visited* October 1, 2010)).

3. Waiver Programs Are Flexible, Yet Constrained

Under their waiver programs, the States are expressly permitted to deviate from certain other Medicaid requirements. *See* 42 U.S.C. § 1396n(c)(3).[10] For example, under the waiver, unlike a State plan, "home and community-based services do not have to be provided throughout the State." *See* Medicaid Program; Home and Community-Based Services, 50 Fed. Reg. 10,013, 10,013 (Mar. 13, 1985). Moreover, "a State can choose to provide home and community-based services to a limited group of eligibles, such as the developmentally disabled." *Id.* Also, "[t]he State is not required to provide the services to all eligible individuals who require an ICF [intermediate care facility] or SNF [skilled nursing facility] level of care." *Id.* Importantly, "[u]nder the waiver, *the State may exclude those individuals for whom there is a reasonable expectation that home and community-based services would be more expensive than the Medicaid services the individual would otherwise receive*." *Id.* (emphasis added).

States are encouraged to implement "innovative" waiver programs, subject to "specific safeguards for the protection of recipients and the program." 42 C.F.R. § 430.25(b). The State's flexibility to design and administer Medicaid waiver programs is not unbounded; the State must takes steps to ensure that its delivery of health care services is "efficient and cost-effective." *Id.*

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[10] In pertinent part, 42 U.S.C. § 1396n(c)(3) provides: "A waiver granted under this subsection may include a waiver of the requirements of section 1396a(a)(1) of this title (relating to statewideness), section 1396a(a)(10)(B) of this title (relating to comparability), and section 1396a(a)(10)(C)(i)(III) of this title (relating to income and resource rules applicable in the community)."

4. Cost Neutrality

The State must demonstrate that its waiver program is "cost neutral"; that is, the State must demonstrate that the average cost per person served in a waiver program will not be greater than the average cost that would have been spent if the person had been instead served in, for instance, a nursing home. This requirement is made clear in the statutes:

> A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that— . . . (D) under such waiver the average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individuals does not exceed 100 percent of the average per capita expenditure that the State reasonably estimates would have been made in that fiscal year for expenditures under the State plan for such individuals if the waiver had not been granted . . . .

42 U.S.C. § 1396n(c)(2)(D).

The requirement for cost neutrality is also made clear in the regulations:

> Unless the Medicaid agency provides the following satisfactory assurances to CMS [Centers for Medicaid and Medicare Services], CMS will not grant a waiver under this subpart and may terminate a waiver already granted:
>
> . . .
>
> e) Average per capita expenditures. Assurance that the average per capita fiscal year expenditures under the waiver will not exceed 100 percent of the average per capita expenditures that would have been made in the fiscal year for the level of care provided in a hospital, NF [nursing facility], or ICF/MR [intermediate care facility for the mentally retarded] under the State plan had the waiver not been granted.
>
> (1) These expenditures must be reasonably estimated and documented by the agency.
>
> (2) The estimate must be on an annual basis and must cover each year of the waiver period.
>
> (f) Actual total expenditures. Assurance that the agency's actual total expenditures for home and community-based and other Medicaid

> services under the waiver and its claim for FFP [Federal financial participation] in expenditures for the services provided to recipients under the waiver will not, in any year of the waiver period, exceed 100 percent of the amount that would be incurred by the State's Medicaid program for these individuals, absent the waiver, in--
>
> (1) A hospital;
>
> (2) A NF [nursing facility]; or
>
> (3) An ICF/MR [intermediate care facility for the mentally retarded].
>
> . . .

42 C.F.R. § 441.302(e)-(f). It is for this reason that Alabama's Medicaid waiver programs contain various limits on services and expenses, and thus on total costs for the programs.[11]

5. The Cap

Both Medicaid statutes and regulations contemplate that State waiver plans will limit the number of eligible participants in any year, *i.e.,* there is a cap on the number of persons served in a waiver program in any year. *See* 42 U.S.C. § 1396n(c)(9) (" *In the case of any waiver under this subsection which contains a limit on the number of individuals who shall receive home or community-based services* , the State may substitute additional individuals to receive such services to replace any individuals who die or become ineligible for services under the State plan.") (emphasis added); 42. C.F.R. § 441.303(f)(6) ("The State *must* indicate the number of unduplicated beneficiaries to

[11] The email communications between counsel engaged in settlement discussions, which Mr. Boyd attached to his briefing, reflect the impact of these limits. *See* Email from Margaret L. Fleming, Assistant Attorney General, Office of the Alabama Attorney General, to Lonnie J. Williams, ADAP, James Tucker, ADAP, and Steve Gold, Attorney at Law (August 4, 2010, 4:20 p.m.), Doc. 4-3 at 2 ("There are limitations on the equipment and services that are reimbursable under the SAIL Program which appear to exceed, substantially, the needs you have identified.").

which it intends to provide waiver services in each year of its program. *This number will constitute a limit on the size of the waiver* program unless the State requests and the Secretary approves a greater number of waiver participants in a waiver amendment.") (emphasis added).

This Court has held that "[t]he cap itself is clearly proper," *Susan J. v. Riley*, 616 F.Supp.2d 1219, 1239 n. 17 (M.D. Ala. 2009), and that it serves as a constraint on eligibility for a waiver program, *id.* at 1239.[12]

6. Federal Approval

The State's waiver programs, as well as any amendments thereto, must be approved by the Centers for Medicaid and Medicare Services (CMS), which is within the United States Department of Health and Human Services; CMS was formerly the Health Care Financing Administration (HCFA). 42 C.F.R. § 430.25(e)-(f). A State's application for a waiver may be approved or denied. *See* 42 C.F.R. § 430.25(f)(2) ("CMS regional and central office staff review waiver requests and submit a recommendation to the Administrator, who—(i) Has the authority to approve or deny waiver requests; and (ii) Does not deny a request without first consulting the Secretary.") (formatting altered). This makes complete sense because Federal money—indeed, a good deal of Federal money—is being spent. *See* Section II.C.1, *supra*.

7. Alabama's Six Home and Community Based Waiver Programs

As set out in the chart attached to Mr. Boyd's briefing, *see* doc. 16-4, Alabama operates six waiver programs: the Elderly & Disabled (E&D) Waiver; the Intellectual

[12] The *Susan J.* plaintiffs had unsuccessfully sought to bust the cap on the Intellectual Disabilities Waiver and the Living at Home Waiver. Mr. Boyd makes statements suggesting that he might also be thinking about trying to bust the cap on one of Alabama's existing waiver programs. See doc. 14 at ¶ 42.

Disabilities Waiver, which was formerly known as the Mental Retardation (MR) Waiver; the Living at Home (LAH) Waiver; the State of Alabama Independent Living (SAIL) Waiver; the HIV/AIDS Waiver, which is also known as the 530 Waiver; and the Technology Assisted (TA) Waiver for Adults. *Id.*

One need only glance at the chart to see that the different waivers have different purposes, serve different populations, provide different services, and have different age requirements. Doc. 16-4. In addition, each one targets individuals who would otherwise need either the level of care provided in a nursing facility or the level of care provided in an intermediate care facility for the mentally retarded (ICF/MR). *Id.* Finally, and returning to the idea that these are limited programs with enrollment caps, each waiver has a different number of slots available. The E&D Waiver is the largest of the programs, serving up to 9,205 persons. *Id.* By contrast, SAIL Waiver has 660 slots. *Id.*

As previously noted, Mr. Boyd has received services through the SAIL Waiver in the past, Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 12; by his references and attachments, he seems to be focused on the E&D Waiver now, *see* doc. 14 at ¶ 42, doc. 16-6. The Alabama Medicaid Agency website has links to more information on each of these six waiver programs, including copies of waiver applications submitted to CMS. Mr. Boyd has already filed a 132-page document that purports to be the application for the E&D Waiver. Doc. 16-6. The 102-page application for the SAIL Waiver is available at http://www.medicaid.alabama.gov/documents/Program-LTC/3-D-1-e-2-CMS-SAIL_Waiver_rev_1-05-09.pdf *last visited* October 7, 2010; due to the length of the document, it is not being filed at this time. Still, as the length of these and the other applications make clear, administering a Medicaid home and community-based waiver

program is not without its complexity. Indeed, federal financial participation essential to each Medicaid Waiver program is earned – and retained – through the State's strict and faithful compliance with a host of federal Medicaid regulations.

III. PRELIMINARY INJUNCTION STANDARD

"The purpose of . . . a preliminary injunction is 'merely to preserve the relative positions of the parties until a trial on the merits can be held.'" *U.S. v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983) (*quoting University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). *See also Canal Authority of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974) ("[T]he court must remember that a preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion. The primary justification for applying this remedy is to preserve the court's ability to render a meaningful decision on the merits.").[13]

Sometimes, as in this case, a plaintiff seeks to use a preliminary injunction not to preserve the *status quo* but to change it—essentially jumping to his preferred end-game. In such a situation, the Court should be particularly hesitant to act, not only because this is contrary to the purpose of a preliminary injunction but also because "[a] preliminary injunction is a 'material alteration of the legal relationship of the parties' . . . ," and one which, under the right circumstances, may be sufficient to support an award of attorney's fees. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009). Mr. Boyd seeks "costs of this action and reasonable attorney's fees." Doc. 14 at 13.

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[13] *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*) ("We hold that the decisions of the United States Court of Appeals for the Fifth Circuit . . . , as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.").

"To secure an injunction, a party must prove four elements: (1) a substantial likelihood of success on the merits; (2) irreparable injury absent an injunction; (3) the injury outweighs whatever damage an injunction may cause the opposing party; and (4) an injunction is not adverse to the public interest." *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213, 1217 (11th Cir. 2009) (reversing the grant of a preliminary injunction barring enforcement of a Florida statute challenged on First Amendment grounds).

"The preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant 'clearly carries the burden of persuasion' as to the four prerequisites. 'The burden of persuasion in all of the four requirements is at all times upon the plaintiff.'" *U.S. v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983) (internal citations to *Canal Authority* omitted). And, "[b]ecause a preliminary injunction is 'an extraordinary and drastic remedy,' its grant is the exception rather than the rule . . . ." *Lambert*, 695 F.2d at 539 (citing *Texas v. Seatrain International, S.A.*, 518 F.2d 175, 179 (5th Cir.1975)).

IV. SUMMARY OF THE ARGUMENT

Mr. Boyd has not met—and cannot meet—his burden to demonstrate a strong likelihood of success on the merits. Mr. Boyd seeks to use the general anti-discrimination provisions of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), as well as their respective implementing regulations, to circumvent Medicaid's more specific statutory and regulatory scheme. Commissioner Steckel contends that Mr. Boyd's reading of the ADA, the Rehab Act, and their regulations would raise grave concerns

about the constitutionality of those provisions, and, in any event, is inconsistent with basic principles of statutory construction. Mr. Boyd's reading is also inconsistent with a specific ADA regulation that provides that a public entity is not required to provide "services of a personal nature including assistance in eating, toileting, or dressing." 28 C.F.R. § 35.135.

Additionally, Mr. Boyd is not entitled to a preliminary injunction because he cannot demonstrate that he is likely to suffer irreparable injury. Indeed, the urgency behind this litigation and the original preliminary injunction request, doc. 3, was tied to Mr. Boyd's desire to start classes at the University of Montevallo; however, his current living arrangements did not prevent him from starting classes, doc. 14 (Amended Complaint) at ¶ 26. Now, Mr. Boyd asserts that he needs immediate relief in order to secure housing arrangements for next semester. Doc. 15 at ¶ 17. While housing in Montevallo may be more convenient, that is no reason to jump to the end-game by altering the *status quo* (of "more than three years," Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 1) at the preliminary injunction stage—especially where it is unclear that Mr. Boyd's health and safety can be assured in a community setting.

Furthermore, neither the balance of hardships nor the public interest favors, at the preliminary injunction stage: (1) allowing Mr. Boyd to line-jump within an existing Medicaid waiver program (should any be appropriate for his needs), (2) an overhaul of the expensive and complex Federal-State Medicaid waiver program, or (3) the creation of a new, *sui generis* State-funded program.

For these reasons, and as more fully set out below, Mr. Boyd's motion for a preliminary injunction should be denied.

V. MR. BOYD IS NOT LIKELY TO PREVAIL ON THE MERITS

Mr. Boyd relies on both his ADA and Rehab Act claims as the basis for his motion for preliminary injunction. *See* doc. 16, generally. For purposes of this response, Commissioner Steckel is prepared to *generally* assume, as Mr. Boyd asserts, doc. 16 at 6 n.2, that there is no difference in the analysis between an ADA claim and a Rehab Act claim, especially where, as here, a plaintiff is seeking "*Olmstead*" relief. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). There are differences between the two provisions, however, and the Commissioner reserves the right to argue that those differences matter as the litigation advances.[14]

A. The ADA & Rehab Act: Statutes and Regulations

In sharp contrast to the detailed Medicaid statutory and regulatory scheme discussed above, Title II of the ADA and the Rehab Act are sparse.

[14] One difference was identified by the *Olmstead* Court, which said: "Unlike the ADA, § 504 of the Rehabilitation Act contains no express recognition that isolation or segregation is a form of discrimination. Section 504's discrimination proscription, a single sentence attached to vocational rehabilitation legislation, has yielded divergent court interpretations." *Olmstead*, 527 U.S. at 600 n. 11 (citation omitted); *see also id.* at 589 n.1 ("In the ADA, *Congress for the first time* referred expressly to 'segregation' of persons with disabilities as a 'for[m] of discrimination,' and to discrimination that persists in the area of 'institutionalization.'") (emphasis added; alteration by the Court); doc. 16 at 6 ("In enacting the ADA, *Congress for the first time* stated that 'institutionalization' was a 'critical area' where discrimination persisted.") (citation omitted). Given the early stage of the proceedings, and that claims are raised under both Acts, this response does not explore the implications of this difference. On the other hand, the fact that § 504 of the Rehab Act is Spending Clause legislation is discussed briefly below, insofar as it relates to arguments made there.

1. The Statutes

The anti-discrimination provision of Title II of the ADA provides: **"Subject to the provisions of this subchapter, 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 (emphasis added). There are definitions for a "public entity" and a "qualified individual with a disability," 42 U.S.C. § 12131, but that single sentence is the heart of Title II.[15]

"Qualified individual with a disability" is defined as **"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.A. § 12131(2) (emphasis added).[16]

The anti-discrimination provision of the Rehab Act, § 504, provides in pertinent part: **"No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or *be subjected to discrimination* under any program or activity receiving Federal financial assistance** or under any program or activity conducted by any Executive agency . . . ." 29 U.S.C. § 794(a) (emphasis added).

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[15] "Public entity" includes any State and any Department or Agency of a State. 42 U.S.C. § 12131(1).

[16] Contrary to Mr. Boyd's assertions, doc. 16 at 7, whether he is a qualified individual insofar as the ADA and Rehab Act define that term, is contested. *See* Section V.F.1., *infra*.

"Program or activity" is broadly defined, 29 U.S.C. § 794(b), and we assume for present purposes that it applies to Alabama's Medicaid waiver programs.

2. The Regulations

"Congress instructed the Attorney General to issue regulations implementing provisions of Title II" of the ADA and provided that the regulations "'shall be consistent with this chapter and with the coordination regulations . . . applicable to recipients of Federal financial assistance under [§ 504 of the Rehab Act].' § 204, as set forth in 42 U.S.C. § 12134(b). One of the § 504 regulations requires recipients of federal funds to **'administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.'** 28 CFR § 41.51(d) (1998)." *Olmstead*, 527 U.S. at 591-92 (all alterations by the Court, except emphasis).

The Attorney General responded with, among other regulations, the ADA's *"integration regulation,"* which provides: **"A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."** 28 C.F.R. § 35.130(d). *See also Olmstead*, 527 U.S. at 592.

The *Olmstead* Court instructs that "[t]he *preamble* to the Attorney General's Title II regulations defines 'the most integrated setting appropriate to the needs of qualified individuals with disabilities' to mean **'a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.'** 28 CFR pt. 35, App. A, p. 450 (1998)." *Olmstead*, 527 U.S. at 592 (emphasis added).

Finally, the *Olmstead* Court noted the existence of a fundamental alteration defense, under the ADA, in the form of the *"reasonable-modifications regulation." Id.*

That regulation provides: **"A public entity shall make *reasonable modifications* in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity."** 28 C.F.R. § 35.130(b)(7) (emphasis added).

The ADA's reasonable-modifications regulation was based on the following regulation promulgated pursuant to § 504 of the Rehab Act: **"A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an *undue hardship* on the operation of its program."** 28 C.F.R. § 41.53. *See also Olmstead*, 527 U.S. at 606 n. 16 (plurality).

According to the *Olmstead* Plurality, "While the part 41 [Rehab Act] regulations do not define 'undue hardship,' other § 504 regulations make clear that the 'undue hardship' inquiry requires not simply an assessment of the cost of the accommodation in relation to the recipient's overall budget, but a 'case-by-case analysis weighing factors that include: (1)[t]he overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2)[t]he type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3)[t]he nature and cost of the accommodation needed.' 28 CFR § 42.511(c) (1998); see 45 CFR § 84.12(c) (1998) (same)." *Olmstead*, 527 U.S. at 606 n.16 (Plurality Opinion) (alterations by the Court).

3. The Statutes and Regulations Collected

THE ADA	THE REHAB ACT
Antidiscrimination Statute	
"Subject to the provisions of this subchapter, 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.	"No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of , or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . ." 29 U.S.C. § 794(a).
Integration Regulation	
"A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).	"Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 CFR § 41.51(d).
Fundamental Alteration Defense	
"A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).	"A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program ." 28 C.F.R. § 41.53.

B. The *Olmstead* Decision

Mr. Boyd's case is built on *Olmstead*, which concerned two women who "ha[d] a history of treatment in institutional settings"; both were persons with mental retardation, and one had a diagnoses of schizophrenia while the other had a diagnosis of personality disorder. *Olmstead*, 527 U.S. at 593. The Opinion includes references to voluntary admission to facilities, as well as repeated references to confinement and institutionalization. *See e.g., id.* Eventually, each woman's treatment professional concluded that she had reached a point where she could be treated in the community, but each woman remained "institutionalized" for some time after her treatment professional reached that conclusion. *Id.* The women did not oppose being treated in the community, and in fact desired it. Moreover, Georgia apparently had a waiver program that was suitable to them, and that contained 2,109 slots, of which only 700 were in use. *Id.* at 601.

The fractured[17] *Olmstead* Court held that "undue institutionalization qualifies as discrimination 'by reason of . . . disability'" under the ADA. *Olmstead*, 527 U.S. at 597, *id.* at 597-601. In reaching this conclusion, the Court reasoned:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and

[17] Most of the main opinion does command a majority of the Court, but the discussion of the fundamental alteration defense is a plurality opinion only. There are three additional opinions.

> cultural enrichment. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with *mental* disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without *mental* disabilities can receive the medical services they need without similar sacrifice.

Olmstead, 527 U.S. at 600-01 (internal citations omitted; emphasis added).[18]

Not every person with a disability is entitled to relief under *Olmstead*. "Title II provides only that 'qualified individual[s] with a disability' may not 'be subjected to discrimination.' 42 U.S.C. § 12132." *Olmstead*, 527 U.S. at 602. "[T]he State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program" such that he or she is a "qualified individual." *Olmstead*, 527 U.S. at 602. And, importantly, "The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of 'reasonable modifications' to avoid discrimination, and allows States to resist modifications that entail a 'fundamental alter[ation]' of the States' services and programs." *Id.* at 603 (Plurality Opinion) (alterations by the Court).

The *Olmstead* Court did *not* hold that plaintiffs had prevailed; instead, the Court remanded for re-consideration of the State's fundamental alteration defense, to which the lower courts had previously been insufficiently deferential. *Id.* at 607; *id*. at 605 ("To maintain a range of facilities and to administer services with an even hand, the State must

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[18] When Mr. Boyd quotes this language, he omits the reference to persons with *mental* disabilities. Doc. 16 at 10.

have more leeway than the courts below understood the fundamental-alteration defense to allow.") (Plurality Opinion).[19]

And, importantly, the Court did not address the constitutionality or general validity of the quoted regulations. *Id.* at 592 (" *We recite these regulations with the caveat that we do not here determine their validity*. While the parties differ on the proper construction and enforcement of the regulations, we do not understand petitioners to challenge the regulatory formulations themselves as outside the congressional authorization."). Nor was the constitutionality of the ADA generally at issue.[20]

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[19] Though Justice Kennedy concurred in the judgment, he would have "remand[ed] the case for a determination of the questions the Court poses *and for a determination whether [plaintiffs] can show a violation of 42 U.S.C. § 12132's ban on discrimination* based on the summary judgment materials on file or any further pleadings and materials properly allowed." *Olmstead*, 527 U.S. at 611 (Kennedy, J., concurring in judgment) (emphasis added); *see also id.* at 612 ("If they can show that persons needing psychiatric or other medical services to treat a mental disability are subject to a more onerous condition than are persons eligible for other existing [S]tate medical services, and if removal of the condition would not be a fundamental alteration of a program or require the creation of a new one, *then the beginnings of a discrimination case would be established*.") (emphasis added).

[20] *Cf. Olmstead*, 527 U.S. at 612-13 (Kennedy, J., concurring in judgment) ("Of course, it is a quite different matter to say that a State without a program in place is required to create one. No State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities. If, for example, funds for care and treatment of the mentally ill, including the severely mentally ill, are reduced in order to support programs directed to the treatment and care of other disabilities, the decision may be unfortunate. The judgment, however, is a political one and not within the reach of the statute. *Grave constitutional concerns are raised when a federal court is given the authority to review the State's choices in basic matters such as establishing or declining to establish new programs.* It is not reasonable to read the ADA to permit court intervention in these decisions. In addition, as the Court notes, *ante,* at [592], by regulation a public entity is required only to make 'reasonable modifications in policies, practices, or procedures' when necessary to avoid discrimination and is not even required to make those if 'the modifications would fundamentally alter the nature of the

Consequently, while *Olmstead* may have been significant in many ways when it was decided, it stands on uncertain ground, and its scope is routinely over-read by plaintiffs' counsel around the country and sometimes by the lower courts. And, in fact, the fundamental alteration defense has seemingly been read out of existence by some lower courts that failed to heed the warnings about federalism in the separate opinions filed in *Olmstead*. For instance, Justice Kennedy, who concurred in the judgment, noted that "Grave constitutional concerns are raised when a federal court is given the authority to review the State's choices in basic matters such as establishing or declining to establish new programs." *Olmstead*, 527 U.S. at 612-613. Justice Thomas wrote in dissent for himself, Chief Justice Rehnquist, and Justice Scalia, when he said: "We previously have recognized that constitutional principles of federalism erect limits on the Federal Government's ability to direct [S]tate officers or to interfere with the functions of [S]tate government." *Id.* at 624.

C. Constitutional Limitations

Commissioner Steckel does *not* concede that the ADA, the Rehab Act, or their implementing regulations are valid, if they can be read to require the expansive relief that Mr. Boyd seeks. Instead, she encourages the Court to read the provisions in a constitutional manner and reserves the right to argue their unconstitutionality at a later point in these proceedings.

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service, program, or activity.' 28 CFR § 35.130 (b)(7) (1998). It follows that a State may not be forced to create a community-treatment program where none exists. See Brief for United States as Amicus Curiae 19-20, and n. 3. *Whether a different statutory scheme would exceed constitutional limits need not be addressed*.") (emphasis added).

As the Supreme Court has explained:

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate. As was stated in *Hooper v. California*, 155 U.S. 648, 657 (1895), "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 575 (1988)) (citations and parallel citations omitted; second alteration by the Court); *see also Miller v. Johnson*, 515 U.S. 900, 926 (1995) ("There is no indication Congress intended such a far-reaching application of § 5 [of the Voting Rights Act of 1965], so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises.") (citation omitted); *id.* at 923 ("[W]e think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act. Although we have deferred to the Department's interpretation in certain statutory cases, . . . we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions.") (citations omitted).

1. The ADA

Taking the ADA first, Congress said it was "invok[ing] the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

As to the Commerce Clause, it is simply inconceivable that the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. Const. Art. I, § 8, is a grant of general health, safety, and welfare power of the sort that Congress would need to mandate the changes Mr. Boyd envisions. Such a reading is inconsistent with our federal form of government, with the limited enumerated powers of the national government, and with the retained and expansive powers of the States. *See e.g.,* U.S. Const. Amend. 10 ("The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) ("Under our Constitution, the Federal Government is one of enumerated powers.") (citing *M'Culloch v. Maryland*, 4 Wheat. 316 (1819); The Federalist No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison)); *see also Alexander v. Choate*, 469 U.S. 287, 307 (1985) (in a Rehab Act case, recognizing "the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by [S]tate Medicaid.").

As to the Fourteenth Amendment, Congress could only have been referring to the Equal Protection Clause. Since the disabled are not a recognized class entitled to heightened scrutiny, the State need only articulate a rational basis for its actions to be in compliance with the Constitution. *Cf., City of Cleburne, Tex. v. Cleburne Living Center*,

473 U.S. 432, 442-43 (1985); *Klingler v. Director, Missouri Dep't of Revenue,* 455 F.3d 888, 894 (8th Cir. 2006) ("Disparate treatment based on disability is subject to rational basis review."). The ADA, through *Olmstead* and the regulations, has been interpreted to require defending States not to assert a rational basis, but to instead mount a fundamental alteration defense. *Olmstead*, 527 U.S. at 603; 28 C.F.R. § 35.130(b)(7) (ADA's reasonable-modifications regulation, quoted in Section V.A.2., *supra*); *see also* 28 C.F.R. § 41.53 (Rehab Act's comparable regulation, quoted in Section V.A.2., *supra*). The burden has, in some courts, been unbearably and impermissibly high.

Reading the ADA's anti-discrimination provision to require an overhaul of the State's Medicaid system, when a rational basis would authorize the State's current system, lacks a congruence and proportionality to the constitutional provision the ADA purports to enforce. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.").[21]

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[21] *See also Tennessee v. Lane*, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting) ("I would replace 'congruence and proportionality' with another test – one that provides a clear, enforceable limitation supported by the text of § 5. Section 5 grants Congress the power 'to *enforce*, by appropriate legislation,' the other provisions of the Fourteenth Amendment. U.S. Const., Amdt. 14 (emphasis added). [*Katzenbach v.*] *Morgan*[, 384 U.S. 641 (1966),] notwithstanding, one does not, within any normal meaning of the term, 'enforce' a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, 'enforce' a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit-even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit.").

2. The Rehab Act

Insofar as § 504 of the Rehab Act is applicable to federal financial recipients, *see* 28 C.F.R. § 41.51, and, as such, is Spending Clause legislation like Medicaid, a whole different set of issues arise. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). *See also Barnes v. Gorman*, 536 U.S. 181, 186 ("Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.' . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.'") (citations omitted; alterations in original).

Here, Mr. Boyd has sued Commissioner Steckel seeking Medicaid waiver services. As outlined in Section II.C., *supra*, there are extensive statutory and regulatory standards in place for running a Medicaid waiver program. In addition, each waiver program is to be operated in accordance with an application submitted to, and approved by, CMS. 42 C.F.R. § 430.25(e)-(f). The applications are detailed, describing different purposes, different target populations, different services, and different enrollment limits. The Rehab Act's anti-discrimination provision does not unambiguously require the State of Alabama to ignore both the extensive statutory and regulations provisions in place under Medicaid and its own CMS-approved (and partially federally-funded) waiver

programs. Nor, under the terms of Medicaid, is the State permitted to do so.[22] Accordingly, to the extent that Mr. Boyd seeks to expand the scope of Alabama's existing Medicaid waiver programs, the Rehab Act, like the ADA, is constitutionally inadequate to deliver the relief that he seeks.

Because Mr. Boyd's interpretation of the ADA, the Rehab Act, and their implementing regulations call the constitutionality of those provisions into question, he is not likely to prevail on the merits.

D. Statutory Interpretation

The conflict between Medicaid, on the one hand, and the ADA and the Rehab Act, on the other, suggests the need to resolve this case using basic principles of statutory construction (and, thereby, avoid the larger constitutional concerns). It is also another reason why Mr. Boyd is not likely to prevail on the merits.

In *Olmstead* there was no conflict apparent between the anti-discrimination provision of the ADA and the Medicaid Act. Indeed, the only reference to Medicaid in the Majority Opinion points out that, under the facts of that case, the two statutory

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[22] Because Medicaid is also Spending Clause legislation, and because the federal government is the other party to that "contract," it is not at all clear that this Court could order the State to unilaterally alter that contract, in asmuch as it is clear that the State lacks the power to comply with such an order. *Cf. United States v. Rylander*, 460 U.S. 752, 757 (1983) ("In a civil contempt proceeding such as this, of course, a defendant may assert a present inability to comply with the order in question. While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.") (internal citations omitted); *Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984) ("Thus, inability to comply is a complete defense to a contempt citation.") (citations omitted). Accordingly, it is not all reasonable to expect Commissioner Steckel to "readily develop Medicaid-funded services" for Mr. Boyd, Amended Complaint at ¶ 6; any services would have to be paid for out of purely State funds, which is obviously *not* the Medicaid program.

schemes were harmonious: "Since 1981, Medicaid has provided funding for [S]tate-run home and community-based care through a waiver program," of which the federal government "*encourage[d]* States to take advantage." *Olmstead*, 527 U.S. at 601 (emphasis added). That was consistent with the *Olmstead* plaintiffs' request for services in the community pursuant to the ADA where Georgia had an appropriate waiver program and had used only 700 of the 2109 approved slots. *Id.*[23] Under those circumstances, the Court probably thought that the Federal Government was speaking with a clear voice. The cacophony that actually results from the collision of Mr. Boyd's interpretation of the ADA and the Rehab Act against a State's federally-approved Medicaid waiver program was not obvious in *Olmstead*, but it is now.

Here, Mr. Boyd seeks to force the alteration or expansion of one or more existing waiver programs or the design of an entirely new waiver program,[24] and he asserts that

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[23] *The ARC of Washington State, Inc. v. Braddock*, 427 F.3d 615, 619 (9th Cir. 2005) ("The Supreme Court in *Olmstead* did not consider whether a forced change in the waiver program's cap would constitute a fundamental alteration, because the [S]tate's program in that case was far from full.") (citation omitted); *Townsend v. Quasim*, 328 F.3d 511, 527 n. 44 (9th Cir. 2003) (Beezer, J., dissenting) ("It should be noted that Olmstead involved a situation where the [S]tate already had a community care program for which the plaintiffs were qualified. *See* 527 U.S. at 593, 601. In *Olmstead* the [S]tate was simply not moving the plaintiffs into the program. 527 U.S. at 601 (recognizing that Georgia had over 1400 unused waiver slots by 1996). This is a far cry from the situation here.") (internal parallel citations omitted).

[24] This litigation was filed before it was definitively determined whether there is a currently existing Waiver program capable of serving Mr. Boyd, and, if so, whether there is a slot in that program available to him, or, whether, it would require the development of a new program to serve Boyd. *Cf.* doc. 14 at ¶ 6 ("Defendant has or could readily develop Medicaid-funded services, through [her] waivers, a combination of waivers, or reasonable modifications of waivers, that would permit Mr. Boyd to live in the community."); doc. 16-3 at 1 ("For what it is worth, my email below was not a 'final offer', but rather the fruits of our initial effort to determine whether an existing waiver

the ADA and the Rehab Act *require* this. As against that, Federal Medicaid law provides that the waiver programs are *optional*, allows (and, in fact, requires) the States to cap the programs, *see* 42 U.S.C. § 1396n(c)(9), 42 C.F.R. § 441.303(f)(6), and allows the States to determine which services will be provided to which target populations, *see* 42 U.S.C. § 1396n(c)(3), 42 C.F.R. § 430.25, Medicaid Program; Home and Community-Based Services, 50 Fed. Reg. 10,013, 10,013 (Mar. 13, 1985). Medicaid also requires that the State's waiver programs be approved by CMS, 42 C.F.R. § 430.25(e)-(f), which is consistent with the fact that the Federal Government picks up a large portion of the costs, *cf. Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985); *Harris v. McRae*, 448 U.S. 297, 301 (1980); *Susan J. v. Riley*, 254 F.R.D. 439, 445 (M.D. Ala. 2008); doc. 14 at ¶ 53. Accordingly, Alabama's Medicaid waiver programs are operated pursuant to a detailed statutory and regulatory Medicaid scheme and are explicitly approved by the Federal Government.

"Whenever two federal statutes may be in tension or conflict, [the courts] are required to reconcile the two statutes." *Townsend v. Quasim*, 328 F.3d 511, 523 (9th Cir. 2003) (Beezer, J., dissenting). "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum, unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all." *Traynor v.*

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program might possibly work for Mr. Boyd."). Admittedly, if—in the judgment of a treatment professional—Mr. Boyd requires 70 hours of personal and nursing care per week, there is no existing Alabama Waiver program that can serve him, Affidavit of Marilyn Chappell, doc. 19-3 at ¶ 8; however, the possibility that services currently exist that would meet his needs has not been fully exhausted.

Turnage, 485 U.S. 535, 547-48 (19 88) (internal quotation marks and citations om itted; alterations by the Court); *see also Radzanower v. Touche Ross & Co.* , 426 U.S. 148, 153 (1976) ("Where there is no clear inten tion otherwise, a specific statute will not be controlled or nullified by a general one, reg ardless of the priority of enactment.") (internal quotation marks, footnote and citation omitted; emphasis added). [25]

Applying these principles he re, it is clear that, to th e extent there is tension between Medicaid, on the one hand, and the ADA and Rehab Act, on the other, Medicaid trumps[26]:

- "Thus, to the extent that the statutes point in opposite directions, one of them must prevail. In this case, the Med icaid statute should receive the laurel wreath because, '[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *The ARC of Washington State, Inc. v. Braddock* , 403 F.3d 641, 644 (9th Cir. 2005), *withdrawn but adopted by Fernandez, J. as concurring opinion in*

[25] Medicaid was established in 1965, and the first Waiver programs came into being in 1981. The Rehabilitation Act was enacted in 1973, and the ADA was enacted in 1990.

Specific Waiver programs are approved for only three or five years at a tim e, depending on whether it is an initial Waiver or a renewal. *See, e.g.,* doc. 16-6 at 1 ("The Alabama Medicaid Agency is requesting a five year renewal of the Home and Community Based Wavier . . . ."). Accordingly, each of Alabama's Waiver programs has been specifically approved by CM S since the passage of both the Rehab Act and the ADA. Additionally, som e of those W aiver programs, and the stat utory and regulatory framework allowing them, pre-date the ADA.

[26] In fact, the ADA and the Rehab Ac t have a field of operation that is consistent with Medicaid, but it must be read more modestly than Mr. Boyd proposes. If Mr. Boyd forces the statutes into conflict, it is Medicaid that must prevail.

The ARC of Washington State, Inc. v. Braddock, 427 F.3d 615, 622 (9th Cir. 2005) (alterations by Fernandez, J., citations omitted)[27];

- "If [the plaintiffs] were correct, the general ADA injunction against discrimination would repeal the specific Medicaid provisions for limited waiver programs. That cannot be." *Id.*
- "The Medicaid Act establishes a comprehensive framework regulating the Medicaid program." *Townsend v. Quasim*, 328 F.3d 511, 524 (9th Cir. 2003) (Beezer, J., dissenting). "Applying *Traynor*, the Americans with Disabilities Act should not transform [the State of] Washington's exercise of congressionally-conferred discretion into discrimination." *Id.* at 525.

See also Traynor, 485 U.S. at 551 ("In sum, we hold that a construction of [38 U.S.C.] § 1662(a)(1) that reflects the original congressional intent that primary alcoholics not be excused from the 10-year delimiting period for utilizing 'GI Bill' benefits is not inconsistent with the prohibition on discrimination against the handicapped contained in § 504 of the Rehabilitation Act. Accordingly, since we 'are not at liberty to pick and choose among congressional enactments . . . when two statutes are capable of co-existence,' *Morton v. Mancari*, 417 U.S. [535,] 551 [(1974)], we must conclude that the earlier, more specific provisions of § 1662(a)(1) were neither expressly nor implicitly repealed by the later, more general provisions of § 504.") (footnote and parallel citation omitted; ellipsis by the Court); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005) ("Title III [of the ADA] requires barrier removal if it is 'readily achievable.' . . .

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[27] Lest the fact that the opinion was withdrawn be misinterpreted, the substituted opinion ruled for the State on different grounds. It is for that reason that Judge Fernandez was able to adopt the earlier opinion as a concurrence, as opposed to a dissent.

Surely a barrier-removal requirement under Title III that would bring a vessel [a cruise ship] into noncompliance with the International Convention for the Safety of Life at Sea (SOLAS), or any other international legal obligation, would create serious difficulties for the vessel and would have a substantial impact on its operation, and thus would not be 'readily achievable.' This understanding of the statute, urged by the United States, is eminently reasonable.") (citations and paragraph break omitted)[28]; *Vaughn v. Sullivan*, 83 F.3d 907, 913 (7th Cir. 1996) (Easterbrook, J.) ("Neither the Rehabilitation Act nor the ADA repeals § 209(b) [of the Social Security Act] or forbids all distinctions in public welfare benefits based on physical condition. The Medicaid program is rife with these distinctions, which, the Court held in [*Alexander v. Choate*, 469 U.S. 287 (1985)], are compatible with the Rehabilitation Act. *Traynor* added: 'There is nothing in the Rehabilitation Act that requires that any benefits extended to one category of handicapped persons also be extended to all other categories of handicapped persons.' 485 U.S. at 549. It follows that distinctions permitted by § 209(b) were not made unlawful by the Rehabilitation Act or the ADA.") (parallel citation omitted); *Save Our Summers v. Washington State Department of Ecology*, 132 F.Supp.2d 896, 911-12 (E.D. Wash. 1999) ("In order to entirely disregard the CAA [Clean Air Act] in favor of the ADA as Plaintiffs urge, the Court would have to conclude that the ADA implicitly repealed the CAA with regard to air pollution affecting disabled persons. Repeals by implication are 'heavily disfavored,' and may be found in only two circumstances: (1) where one statute entirely displaces another; or (2) where two statutes are in irreconcilable conflict. '[I]n either case, the intention of the legislature to repeal must be

[28] *Spector* is a fractured opinion, but the quoted language did garner the support of a majority of the Court.

clear and manifest.'") (internal citations omitted); *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1353 (10th Cir. 1987) (following the lead of a New York District Court in declining to allow the Rehab Act to effect a repeal of § 202 of the National Housing Act of 1959).

Because Mr. Boyd's interpretation of the ADA, the Rehab Act, and their implementing regulations place those provisions in tension with the more-specific provisions of Medicaid law, he is not likely to prevail on the merits.

E. 28 C.F.R. § 35.135, Personal Devices and Services

There is another ADA regulation at issue in this case, and it also suggests that Boyd will not prevail on the merits. Specifically, 28 C.F.R. § 35.135 provides: **"This part does not require a public entity to provide to individuals with disabilities *personal devices*, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; *or services of a personal nature including assistance in eating, toileting, or dressing.*"** (emphasis added). These are exactly the sorts of things that Mr. Boyd is asking for.

Mr. Boyd's declaration states that he will need "services including ten hours per day of assistance with activities of daily living, assistance with my bowel program twice per week, assistance with changing my catheter twice per month and necessary equipment and supplies." Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶ 8. *See also id.* at ¶ 18 (Mr. Boyd's most recent request, through his attorneys, included the same). Mr. Boyd's counsel listed his known "transition needs at this time" to include various equipment and supplies, namely a bed/mattress, an environmental control unit, an

automatic door opener, a lift for transferring Mr. Boyd between his bed and wheelchair, a nebulizer, and various disposable supplies. Doc. 16-3 at 3-4.

To be clear, 28 C.F.R. § 35.135 is an ADA regulation that applies here. Indeed, 28 C.F.R. § 35.102(a) provides: "Except as provided in paragraph (b) of this section [relating to public transportation services], this *part* applies to all services, programs, and activities provided or made available by public entities." (emphasis added). *See also* 28 C.F.R. § 35.101 ("The purpose of this *part* is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131) [sic], which prohibits discrimination on the basis of disability by public entities.") (emphasis added). Section 13.135 is within the *part* referred to in § 35.102(a) and § 35.101, specifically "Part 35, Nondiscrimination on the Basis of Disability in State and Local Government Services."

And 28 C.F.R. § 35.135 was intended to have broad application. As Appendix A to Part 35, the Preamble, says:

> Section 35.135 Personal Devices and Services
>
> The final rule includes a new § 35.135, entitle[d] "Personal devices and services," which states that the provision of personal devices and services is not required by title II. *This new section, which serves as a limitation on all of the requirements of the regulation*, replaces § 35.160(b)(2) of the proposed rule, which addressed the issue of personal devices and services explicitly only in the context of communications. *The personal devices and services limitation was intended to have general application in the proposed rule in all contexts where it was relevant. The final rule, therefore, clarifies this point by including a general provision that will explicitly apply not only to auxiliary aids and services but across-the-board to include other relevant areas such as, for example, modifications in policies, practices, and procedures (§ 35.130(b)(7)).* The language of § 35.135 parallels an analogous provision in the Department's title III regulations (28 CFR 36.306) but preserves the explicit reference to

> "readers for personal use or study" in § 35.160(b)(2) of the proposed rule. This section does not preclude the short-term loan of personal receivers that are part of an assistive listening system.

28 C.F.R. Part 35, App. A. The reference to 28 C.F.R. § 35.130(b)(7) is to the regulation requiring reasonable modifications but not fundamental alterations.

In short, there is an ADA regulation that specifically says that the ADA does not require the Alabama Medicaid Agency to provide the personal care services and equipment that Boyd seeks to force under the ADA's integration regulation. Mr. Boyd will no doubt argue that § 35.135 is not relevant to his particular claim; however, the fact of the matter is that the regulation is clear and it is clearly applicable, while Mr. Boyd is arguing for an interpretative expansion of both 42 U.S.C. § 12132's general prohibition against "discrimination" and *Olmstead* itself.

Relatedly, as § 35.135 is present, it is useful to note what is not. Nowhere in the entire ADA[29], in the ADA regulations, or in the appendix to those regulations does the word "Medicaid" appear. In light of the fact that there are regulations on the illegal use of drugs, 28 C.F.R. § 35.131, and smoking, 28 C.F.R. § 35.132, and that the ADA itself takes time to specify that, *inter alia*, voyeurism and kleptomania are not disabilities within the meaning of the statute, 42 U.S.C. § 12211(b)(1), it is truly remarkable to argue, as Mr. Boyd does, that the ADA's integration mandate has such a dramatic impact on Medicaid law.

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[29] In this paragraph, the reference to the ADA is not limited to Title II, Part A. The reference is to the entire ADA, which is readily available and searchable, courtesy of the United States Department of Justice, at http://www.ada.gov/pubs/adastatute08.htm *last visited* August 23, 2010.

Because the structure of the ADA and its implementing regulations, most particularly 28 C.F.R. § 35.135, demonstrate that Congress did not mean for the ADA to upend Medicaid and because § 35.135 specifically prohibits the provision of the services and equipment that Mr. Boyd seeks, he is not likely to prevail on the merits.

F. Mr. Boyd's Claim Fails Under His Own Analysis

Even assuming *arguendo* that *Olmstead* applies to the present case, without any constitutional or statutory construction concerns, and putting aside 28 C.F.R. § 35.135, Mr. Boyd cannot prevail on the merits.

The ADA and the Rehab Act prohibit discrimination on the basis of disability. 42 U.S.C. § 12131 (ADA: "no qualified individual with a disability shall, by reason of such disability, . . . be subjected to discrimination . . . ."); 29 U.S.C. § 794(a) (Rehab Act: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability . . . be subjected to discrimination . . . ."). *Olmstead* held that, under the ADA, "undue institutionalization qualifies as discrimination 'by reason of . . . disability.'" *Olmstead*. 527 U.S. at 597.[30] But that is the beginning, not the end, of the analysis. What follows is generally regarded as a 3-step regime.

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[30] As previously noted, the same may not be true for the Rehab Act, and the Commissioner reserves the right to make that argument later in these proceedings. *See Olmstead*, 527 U.S. at 589 n.1 ("In the ADA, *Congress for the first time* referred expressly to 'segregation' of persons with disabilities as a 'for[m] of discrimination,' and to discrimination that persists in the area of 'institutionalization.'") (emphasis added; alteration by the Court); *id.* at 600 n.11 ("Unlike the ADA, § 504 of the Rehabilitation Act contains no express recognition that isolation or segregation is a form of discrimination. Section 504's discrimination proscription, a single sentence attached to vocational rehabilitation legislation, has yielded divergent court interpretations. See Brief for United States as *Amicus Curiae* 23-25.").

1. Qualified Individual

First, it is necessary to assess whether Mr. Boyd is a qualified individual; he is not.[31] To be a "qualified individual" means much more than simply possessing a disability. That distinction is key because "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Olmstead*, 527 U.S. at 601-602. Instead, "Title II provides only that 'qualified individual[s] with a disability' may not 'be subjected to discrimination.' 42 U.S.C. § 12132. 'Qualified individuals,' the ADA further explains, are persons with disabilities who, 'with or without reasonable modifications to rules, policies, or practices, . . . meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.' § 12131(2)." *Olmstead*, 527 U.S. at 602 (alterations by the Court); *see also* Section V A.1., *supra*, setting out the ADA's definition. "Consistent with these provisions," the Supreme Court instructed, "*the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program.* Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting."

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[31] Mr. Boyd asserts that Commissioner Steckel "does not dispute that Plaintiff Boyd is a qualified person with a disability who meets the eligibility requirements for Alabama's Medicaid nursing home 'level of care' as well as for its waiver and Medicaid programs." Doc. 16 at 7. This statement is rather confusing, and is at least partially inaccurate. Mr. Boyd certainly is qualified for nursing home level of care, and that is why the State of Alabama is helping to pay the expenses related to his living at a private nursing home. On the other hand, the issue of whether Mr. Boyd is qualified for Medicaid Waiver services, insofar as the ADA and Rehab Act define that term, is contested.

Olmstead, 527 U.S. at 602 (emphasis added; citations omitted). Recall, in *Olmstead* itself, the States' treatment professionals had concluded that the plaintiffs could be treated in the community, but they nonetheless remained institutionalized in a State facility, *id.* at 593, possibly involuntarily.

In this case, Mr. Boyd has offered no evidence that he "meets the essential eligibility requirements' for habilitation in a community-based program." *Olmstead*, 527 U.S. at 602. In particular, he has not put forward any evidence from a State treatment professional—or, indeed, any medical professional—indicating that he is eligible for participation in any of Alabama's Medicaid waiver programs. Relatedly, Mr. Boyd has not offered the opinion of a medical professional as to what services he will need in the community. *See* Section II.B., *supra*.

Instead, Mr. Boyd has approached this case with the presumption that *any* limits on these programs should be lifted as a "reasonable modification" to meet his needs, as he has defined them (and subject to future refinement). His counsel made this presumption clear in the email communications concerning settlement negotiations. Doc. 16-3 at 2. The presumption is also apparent in the Amended Complaint and briefing, which focus entirely on Mr. Boyd's asserted needs without so much as an acknowledgement of—much less a comparison to—the legitimate limits imposed on the various waiver programs.

It is Commissioner Steckel's general view that the various limits imposed on the E&D Waiver, the SAIL Waiver, and any other waiver that this litigation might evolve to consider, are legitimate and that Mr. Boyd's failure to meet the terms of those waiver programs—as demonstrated through the medical judgment of a State treatment

professional—means that he is not a qua lified individual. Mo re specifically, Commissioner Steckel addresses Bo yd's alternative claims in the order they are m ade: "Defendant has or could readily develop Medicaid-funded services, through [her] waivers, a com bination of waivers, or reas onable medications of wa ivers, that would" allow him to be served in the community. Doc. 14 at ¶ 6.

Initially, Mr. Boyd has not proven that Al abama currently has a Medicaid waiver program which, as designed, meets his needs. Boyd focuses on the E&D Waiver, doc. 14 at ¶ 42, doc. 16-6, but he does not discuss what services are provided by the E&D Waiver or whether those serv ices meet his needs. Similarly, while settlem ent discussions centered around the SAIL W aiver—at least from the defense position—Boyd does not discuss the servic es provided by th at waiver or whether th ose services meet his needs. *See* doc. 16-3 at 2-3. Boyd states th at he "has been on the waiting list . . . since October 2008" but does not reveal for which waiver. Doc. 14 at ¶ 6. In fact, it appears that he has not applied for the E&D W aiver, Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 15, despite his current focus on that program.

If we assum e, for the sake of argum ent, that the E&D W aiver, as curren tly designed, is appropriate for serving Mr. Boyd's needs and that he has properly applied, it seems that his com plaint goes to an allegedly insufficient num ber of slots.[32] Both Medicaid statutes and regula tions contemplate that State waiver pla ns will cap the

[32] *E.g.,* Doc. 14 at ¶ 42 ("Defendant has [a] community-based Medicaid waiver[] but its cap is limited, providing 9,205 slots, which has not been increased since 2008, despite a waiting list far in excess of the number of slots. According to the Kaiser Comm ission, there were 7,094 people on the waiting lis t for these community-based services."); doc. 16 at 14 ("Defendant has capped [her] waiver and has not increased it for a num ber of years to meet the needs of people on the wa it list generally, in cluding Mr. Boyd's needs in the community.").

number of people served through a waiver program. *See* 42 U.S.C. § 1396n(c)(9); 42 C.F.R. § 441.303(f)(6) ("The State *must* indicate the number of unduplicated beneficiaries to which it intends to provide waiver services in each year of its program. *This number will constitute a limit on the size of the waiver* program unless the State requests and the Secretary approves a greater number of waiver participants in a waiver amendment.") (emphasis added). And, this Court has held that "[t]he cap itself is clearly proper." *See Susan J. v. Riley*, 616 F.Supp.2d 1219, 1239 n. 17 (M.D. Ala. 2009). Because, Medicaid law requires the State to set a cap, the general prohibition against discrimination in the ADA and Rehab Act cannot be read to make that cap discriminatory; for these reasons, Mr. Boyd is not likely to prevail on the merits.

Mr. Boyd's alternative argument is that the Commissioner should combine or modify waivers in order to allow Boyd to be served in the community. Doc. 14 at ¶ 6. He insists that altering an existing program to meet his asserted needs is a reasonable modification. Docs. 14 & 16, generally. As Boyd has delineated his needs, the E&D Waiver is inadequate because it does not reimburse for the equipment Mr. Boyd requests and "skilled" care (provided by a nurse or other health-care professional), is not available on a regular basis under the E&D Waiver. Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 14. Similarly, as Mr. Boyd delineated his needs, the SAIL Waiver is inadequate because reimbursement for in-home personal care and assistance is limited to 25 hours per week, while Mr. Boyd is requesting seventy (70) hours per week. Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 13. Moreover, skilled nursing care is not available at all under the SAIL Waiver, and it appears that Boyd also needs skilled nursing care. *Id.*; Affidavit of Robert Moon, M.D., doc. 19-2 at ¶¶ 7-9.

All of those limits on the E&D Waiver and the SAIL Waiver are legitimate limits imposed consistent with Medicaid law. *See* 42 C.F.R. § 430.25(b) ("Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to *adapt their programs to the special needs of particular areas or groups of recipients* . . . .") (emphasis added); *see also Bryson v. Shumway*, 308 F.3d 79, 82 (1st Cir. 2002) ("The waiver program is designed to allow [S]tates to experiment with methods of care, or to provide care on a targeted basis, without adhering to the strict mandates of the Medicaid system."). The limits are necessary both to target the population being served and to ensure the "efficient and cost-effective delivery of health care services." 42 C.F.R. § 430.25(b); *see also* 42 U.S.C. § 1396n(c)(2)(D); 42 C.F.R. § 441.302(e)-(f).

As the Supreme Court stated in rejecting a Rehab Act claim:

> . . . Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the general aim of assuring that individuals receive necessary medical care, but the benefit provided remains the individual services offered—not "adequate health care."

Alexander v. Choate, 469 U.S. 287, 303 (1985).

Moreover, the State is permitted to "exclude those individuals for whom there is a reasonable expectation that home and community-based services would be more expensive than the Medicaid services the individual would otherwise receive." Medicaid Program; Home and Community-Based Services, 50 Fed. Reg. 10,013, 10,013 (Mar. 13, 1985). Mr. Boyd asserts that it would be cheaper to serve him in the community, doc. 16 at 14-15, but he offers no evidence on that point.

Stepping back from the Medicaid-specific view of the "reasonable modification" analysis, and looking at analysis more generally, it is clear that Mr. Boyd misunderstands any requirements that the ADA and the Rehab Act and their implementing provisions might put on the State. For one thing, he cites to *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and *Alexander v. Choate*, 469 U.S. 287 (1985), without ever acknowledging that the plaintiffs lost their Rehab Act[33] claims in those cases.

Davis concerned a woman who wanted to attend nursing school but "suffer[ed] from a serious hearing disability" which made her incapable of safely engaging in the practice of nursing. *Davis*, 442 U.S. at 400, *id.* at 400-02, 407. The Supreme Court took a very modest view of the Rehab Act:

> Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.

Davis, 442 U.S. at 405. The *Davis* Court further explained that **"An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."** *Id.* at 406 (emphasis added); *see also id.* at 406-07. Not surprisingly then, the Court recognized that "an interpretation of the regulations that required extensive modifications necessary to include [Davis] in the nursing program would raise grave doubts about their validity," *id.* at 410, and, indeed, went on to "hold that even if HE W

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[33] These cases pre-date the ADA.

[the Department of Health, Education, and Welfare [34]] has attempted to create such an obligation itself, it lacks the authority to do so," *id.* at 411-12. Instead, § 504 requires only "evenhanded treatment." *Id.* at 410. Mr. Boyd's reliance on *Davis* is misplaced.

Alexander v. Choate concerned the State of Tennessee's "propos[al to] reduc[e] the number of annual days of inpatient hospital care covered by its [S]tate Medicaid program." 469 U.S. at 289. The disabled plaintiffs contended that any cuts in services would hit them the hardest, *i.e.,* "have a discriminatory effect on the handicapped," *id.*, and they proposed alternative policy choices for the State to adopt. *Id.* at 289-91. Again, the Supreme Court took a modest view of § 504 of the Rehab Act, specifically noting that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives *and the desire to keep § 504 within manageable bounds*." *Alexander*, 469 U.S. at 299 (emphasis added).

Alexander is also the case, quoted earlier, which makes clear that Medicaid does not provide individually-tailored services, *id.* at 303, and it notes that there is nothing in the legislative history to "suggest[] that Congress desired to make major inroads on the *States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by [S]tate Medicaid . . .*," *id.* at 307 (emphasis added). The Court further explained:

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[34] HEW is now the Department of Health and Human Services. President Ford tasked HEW with coordinating the federal government's implementation of § 504 of the Rehab Act in Exec. Order No. 11,914 (April 28, 1976). President Carter transferred that responsibility to the Attorney General in Exec. Order No. 12,250 (Nov. 2, 1980). In doing so, President Carter revoked the earlier Executive Order and provided that the existing regulations "shall be deemed to have been issued by the Attorney General pursuant [to] this Order and shall continue in effect until revoked or modified by the Attorney General." Exec. Order No. 12,250 (Nov. 2, 1980).

> Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). The Act does not, however, guarantee the handicapped equal results from the provision of [S]tate Medicaid, even assuming some measure of equality of health could be constructed. *Ibid.*

Alexander, 469 U.S. at 304 (parallel citations omitted). Applied here, the Rehab Act never meant that the State has to do anything and everything necessary to serve Mr. Boyd in his home.

For the proposition that "preferences will sometimes prove necessary to achieve the [ADA's] basic equal opportunity goal," Mr. Boyd relies on a third Supreme Court case that actually does not support him. Doc. 16 at 15 *citing US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002). *Barnett* arises under Title I of the ADA, 42 U.S.C. §§ 12111 – 12117, which concerns employment but speaks in terms of reasonable accommodations and undue hardship.[35] The issue in *Barnett* was whether the ADA "requires an employer to assign a disabled employee to a particular position even though another employee is entitled to that position under the employer's 'established seniority system.'" *Id.* at 406.

The *Barnett* Court determined that the ADA would generally allow employers to invoke their seniority systems as reason for not granting an accommodation, and that this would be sufficient in the majority of cases to end the matter. *Barnett*, 535 U.S. at. 403-05, 406. The Court did leave open the possibility that the employee might be able to prove in a particular case that the accommodation should be made in spite of the seniority

[35] 42 U.S.C. § 12112(b)(5)(A) ("As used in subsection (a) of this section, the term 'discriminate against a qualified individual on the basis of disability' includes-- . . . (5)(A) not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of the business of such covered entity . . . .") (emphasis added).

system. *Id.* at 405-06. Justice O'Connor filed a concurring opinion wherein she took the position that it should matter whether the seniority system was legally enforceable. *Id.* at 408-11. Under either the Majority Opinion or Justice O'Connor's concurrence, Alabama's Medicaid waiver programs—which are clearly defined in the waiver documents themselves and which are approved by the Federal Government, 42 C.F.R. § 430.25(e)-(f)—are sufficient to make Mr. Boyd's requested modifications unreasonable.

Admittedly, Mr. Boyd cites a number of lower court cases which he says support his views. Assuming that they stand for the propositions for which he cites them, the decisions cannot be correct in light of the Supreme Court's decisions in *Olmstead*, *Davis*, *Alexander,* and *Barnett*. Given the length of this response, Commissioner Steckel will reserve for later any particularized rebuttals of those lower court decisions.

Mr. Boyd has not put forth any evidence that he is a qualified individual. And, insofar as the legal analysis goes, he has an uphill battle ahead of him in arguing either that the cap on an existing waiver program should be busted or that a new waiver should be individually tailored to meet his needs. He is not likely to prevail on the merits.

2. Consent

The second step in the *Olmstead* analysis is to look at whether Mr. Boyd desires treatment in the community, since "there is [not] any federal requirement that community-based treatment be imposed on patients who do not desire it." *Olmstead*, 527 U.S. at 602. Commissioner Steckel is prepared to concede, for preliminary injunction purposes only, that Mr. Boyd wants to be served in the community as he avers in his personal declaration, doc. 16-4 at ¶¶ 15, 23.

3. **Fundamental Alteration**[36]

The third step in the *Olmstead* analysis is to consider the State's affirmative defense that any desired change amounts not to a "reasonable modification[]," which is required, but to a "fundamental[] alter[ation]," which is not. 28 C.F.R. § 35.130(b)(7), reproduced at Section V.A., *supra*. *See also* 28 C.F.R. § 41.53 (also reproduced at Section V.A., *supra*); *Olmstead*, 527 U.S. at 603 ("The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of 'reasonable modifications' to avoid discrimination, and allows States to resist modifications that entail a 'fundamenta[l] alter[ation]' of the States' services and programs. 28 CFR § 35.130(b)(7) (1998).") (Plurality Opinion) (alterations by the Court).

In the view of the *Olmstead* Plurality, "Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Olmstead*, 527 U.S. at 604. Accordingly, it disapproved of the Eleventh Circuit's more limited reading of the defense. *Id.* at 603 ("The Court of Appeals' construction of the reasonable-modifications regulation is unacceptable for it would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she

[36] Whether Mr. Boyd is a qualified individual turns on whether he can be served with reasonable modifications. *See* 42 U.S.C. § 12131(2). Similarly, the State's fundamental alteration defense turns on whether the requested modifications/alterations are fundamental or reasonable. *See* 28 C.F.R. § 35.130(b)(7). Accordingly, to the extent applicable, we incorporate here our earlier discussion of why Mr. Boyd is not a qualified individual (and vice-versa).

seeks. If th e expense entailed in placi ng one or two people in a comm unity-based treatment program is properly m easured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the funda mental-alteration defense, could ever prevail.").

In his opinion concurring in the judgment, Justice Kennedy notes that "[i]t is of central importance, then, that courts apply t oday's decision with gr eat deference to the medical decisions of the responsible, treating physicians and, as the Court m akes clear, with appropriate deference to the program funding decisions of state policym akers." *Id.* at 610 (separate opinion of Kennedy, J.).[37] He further em phasized "that a State m ay not be forced to create a community-treatment program where none exists." *Id.* at 613. (This proposition is an additio nal answer to Mr. B oyd's insistence that a new program should be tailored to him .) "Grave constitutional c oncerns are raised when a federal court is given the authority to review the State's choices in bas ic matters such as estab lishing or declining to establish new programs. It is not reasonable to read the ADA to permit court intervention in these decisions." *Id. at* 612-13.

Justice Thomas' dissent in *Olmstead* stressed principles of federalism, stating that "the appropriate course would be to respect the States' his torical role as the dom inant authority responsible for pr oviding services to individua ls with disabilities." *Olmstead*, 527 U.S. at 625 (dissent of Thomas, J., joined by Rehnquist, C.J., and Scalia, J.).[38]

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[37] Justice Breyer joined in this part of Justice Kennedy's opinion, but not in the remaining portions cited in this paragraph.

[38] The Dissent raised other valid points as well. For one, it m akes no sense to speak of discrimination when a plaintiff asse rts he is being discrim inated against *vis-à-vis* member of the same class, *i.e.,* persons with disabilities. *See Olmstead*, 527 U.S. at 616-24 (dissent). After all, we are not talking he re about building a ramp so that persons with

Hence, the *Olmstead* Court agreed that there were real limits to what States could be ordered to do pursuant to the anti-discrimination provision of the ADA. That lesson has been lost on some lower courts, but it should not be here.

To the extent that Mr. Boyd seeks to force the alteration or expansion of an existing waiver program or the design of an entirely new waiver program, he seeks a fundamental alteration. *See* Section II.C., *supra, esp.* 42 C.F.R. § 430.25(e)-(f) (waivers are submitted to CMS for approval); 42 C.F.R. § 430.25 (States may "adapt their programs to the special needs" of targeted groups); 42 U.S.C. § 1396n(c)(9) (reference to cap on program); 42. C.F.R. § 441.303(f)(6) (requirement of cap on program); *Olmstead*, 527 U.S. at 612-613 (Kennedy, J., concurring in the judgment); *id.* at 613 ("a State may not be forced to create a community-treatment program where none exists"); *Easley v. Snider*, 36 F.3d 297, 305 (3rd Cir. 1994) ("The proposed alteration would create a program that the State never envisioned when it enacted the Care Act. The modification would create an undue and perhaps impossible burden on the State, possibly jeopardizing the whole program, by forcing it to provide attendant care services to all physically disabled individuals, whether or not mentally alert.").

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mobility issues can access a government building as easily as the non-disabled; we are talking about whether the ADA anti-discrimination provision allows a Federal Court to micro-manage a program created exclusively for the disabled.

The Dissent is also persuaded that Georgia "did not 'discriminate' against [the plaintiffs] 'by reasons of [their] disabili[ties],' as § 12132 requires," because proximate causation is lacking. *Id.* at 626 (alterations by the Court, except the first). "Continued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement does not establish that the denial of community placement occurred 'by reason of' their disability. Rather, it establishes no more than the fact that [Georgia has] limited resources." *Id.*

To the extent that Mr. Boyd seeks to be served in the community when it is less expensive to serve him in the nursing home, he seeks a fundamental alteration. *See* Section II.C., *supra, esp.* Medicaid Program; Home and Community-Based Services, 50 Fed. Reg. 10,013, 10,013 (Mar. 13, 1985) ("the State may exclude those individuals for whom there is a reasonable expectation that home and community-based services would be more expensive than the Medicaid services the individual would otherwise receive").

In the alternative, assuming that the ADA, the Rehab Act, and their implementing regulations can force modifications in the design of Medicaid waiver services in terms of either the services provided or the number of persons served, the alterations Mr. Boyd seeks in this particular case are so excessive as to amount to a fundamental alteration. As he has delineated his needs, the E&D Waiver is inadequate because the E&D Waiver does not reimburse for the long list of equipment Mr. Boyd requests and "skilled" care is not available, other than as a respite for another primary caregiver. Affidavit of Marilyn Chappelle, doc. 19-3, ¶ 14. Similarly, as Mr. Boyd delineated his needs, the SAIL Waiver is inadequate because reimbursement for in-home personal care and assistance is limited to 25 hours per week under the SAIL Waiver, and Mr. Boyd is requesting seventy (70) hours per week. *Id.* at ¶ 13. Moreover, skilled nursing care is not available at all under the SAIL Waiver, and it appears that Mr. Boyd also needs skilled nursing care. *Id.*; Affidavit of Robert Moon, M.D., doc. 19-2 at ¶¶ 7-9.

In addition, assuming that some or all of the changes that Mr. Boyd seeks are required by the ADA, the Rehab Act, and their implementing regulations, it would still be a fundamental alteration to order Commissioner Steckel to undertake the changes. The Alabama Medicaid Agency oversees Alabama's Medicaid program pursuant to the State

plan and the six waivers. Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 5. As previously set out, the Medicaid program is in cooperation with the Federal Government, which must approve any waiver program and which provides the bulk of the funds for the program. *See* Section II.C., *supra*; doc. 14 at ¶ 53. Commissioner Steckel lacks the authority to unilaterally amend any Medicaid waiver program. Section II.C., *supra*; 42 C.F.R. § 430.25(e)-(f). That means that the only way to move Mr. Boyd into the community in the short term is to do it outside the Medicaid program, with State money. Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 20. Doing so would limit the State funds available to assist other Medicaid recipients, and would also impede Alabama Medicaid's ability to draw down federal matching funds. *Id.* And, if it is not Medicaid money that is being spent, the Alabama Medicaid Commissioner is not the appropriate defendant.

For all of these reasons, Mr. Boyd has not demonstrated that he is likely to prevail on the merits.

VI. MR. BOYD IS NOT SUFFERING ANY IRREPARABLE INJURY

Mr. Boyd asserts that his quality of life would improve if he lived in Montevallo, and that he needs to move quickly to secure certain accessible housing which he has located. Amended Declaration of Jonathan Paul Boyd, doc. 16-1 at ¶¶ 15-17, 20-22. Mr. Boyd does not personally allege any physical or emotional danger that would justify jumping to the end-game in this litigation. Instead, he simply wants to uproot the *status quo* as soon as possible. *But see U.S. v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983) ("The purpose of . . . a preliminary injunction is 'merely to preserve the relative positions of the parties until a trial on the merits can be held.'") (*quoting University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)); *Canal Authority of State of Fla. v. Callaway*, 489

F.2d 567, 573 (5th Cir. 1974) ("[T]he court must remember that a preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion. The primary justification for applying this remedy is to preserve the court's ability to render a meaningful decision on the merits.").

Moreover, unless his statements were misrepresented in the *Shelby County Reporter*, ". . . Boyd still tries to make it to Montevallo several times a week to visit with his friends and family. He can often be found in Eclipse Coffee & Books laughing and hanging out with friends." Katie Hurst, *Quadriplegic man fights for dream*, Shelby County Reporter, August 20, 2010, *available at* http://www.shelbycountyreporter.com/2010/08/20/quadriplegic-man-fights-for-college-dream/ *last visited* August 20, 2010. In that interview, Mr. Boyd apparently went on to talk about how important that time is to him, but the point is that he seems to have it. Mr. Boyd has also reached into the world through technology while he has been at Chandler. *See* http://www.myspace.com/paulboyd/blog *last visited* August 20, 2010. And, we also know he attends graduate level classes at the University of Montevallo through a vocational rehabilitation program offered by the Alabama Department of Rehabilitation Services. Doc. 14 at ¶¶ 26, 28; Affidavit of Andria Gaither, doc. 19-1, page 3, line 19, to page 4, line 14. His current living arrangement is not a barrier to his full participation in that program. *Id.*, page 4, lines 15-20.

For all the reasons set out in Section V., Mr. Boyd is not suffering discrimination at the hands of Commissioner Steckel. That Mr. Boyd prefers community living should not entitle him to it while the litigation progresses. *See U.S. v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983); *Canal Authority of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th

Cir. 1974). That is especially true here, given (a) there is no medical evidence that community living can be a safe alternative to nursing home care, (b) there is no medical evidence of what services Mr. Boyd actually requires, and (c) there has been no opportunity to develop the Medicaid-mandated plan of care.

VII. THE BALANCE OF HARDSHIPS DOES NOT FAVOR MR. BOYD

Mr. Boyd asserts that the balance of hardships is in his favor because he "is threatened with continued institutionalization" while Commissioner Steckel's "only possible damages are money." Doc. 16 at 22. Mr. Boyd's argument ignores the fact that the State appropriations to Commissioner Steckel's agency are limited, and any expenditure for Mr. Boyd's care would be lost to another potential Medicaid recipient. Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 20. Moreover, if Mr. Boyd could not be served in an existing Waiver program, his care would have to be funding with 100% State dollars, causing the State – and thus other potential Medicaid recipients – to lose federal matching funds. *Id.*

Also, Mr. Boyd's assertion ignores the fact that the State has not confined Mr. Boyd to an institution, which fact distinguishes this case from those situations involving involuntary confinement by the State. This is not a case where the government has taken custody of Mr. Boyd or is affirmatively infringing on Mr. Boyd's rights; it is a case about how much help the Government has undertaken to provide to its citizens. *Cf. Olmstead*, 527 U.S. at 593. (references to voluntary admission to facilities, *as well as references to confinement and institutionalization*). While Commissioner Steckel will focus her argument on her side of the balance and on distinguishing the inapplicable case law, it is important to note that the anti-discrimination provisions of the ADA and the Rehab Act prohibit discrimination, not residence in a rehabilitation facility. While Mr. Boyd

understandably does not want to reside in a nursing home all of his life, there is no free-standing constitutional, statutory, or regulatory provision that would require the government to provide alternative housing. It may well turn out that no agency of the Federal, State, or local government is prepared to pay the costs associated with Mr. Boyd's living in the community, and that the only way for him to avoid living at the nursing home is for him to bear the costs of independent living. In that respect, Mr. Boyd's situation is indeed unfortunate, but not more so than that of other nursing home residents who must enter the nursing home when their private resources are depleted.

To the extent that Mr. Boyd is suggesting that the costs associated with his care are minimal compared to the overall State Medicaid budget, the *Olmstead* Plurality specifically rejected that analysis: "The Court of Appeals' construction of the reasonable-modifications regulation is *unacceptable* for it would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she seeks. If the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail." *Olmstead*, 527 U.S. at 603 (emphasis added).

Thus, in balancing the hardships in this case, it is important to consider the cumulative monetary effect of mandating home-based care for every similarly-situated Medicaid recipient. The cumulative effect of expending State Medicaid funds without drawing down the corresponding federal matching funds could be devastating to Alabama's Medicaid population. If Mr. Boyd must be served outside the limits of a Medicaid Waiver program, other individuals would no doubt request the same treatment.

Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 21. The loss of federal matching funds would apply to each person who receives a 100% State-funded reimbursement for non-covered Medicaid services. *Id.* As more and more persons received 100% State-funded care, the State's ability to draw down federal matching funds would diminish, and the overall budget of the Medicaid program would shrink dramatically.

When a physician certifies Mr. Boyd's actual medical needs, including both skilled and unskilled care, it might very well be that it will cost a great deal more to serve him in a private residence than it does to serve him at Chandler. And, despite Mr. Boyd's insistence that the Commissioner can and should provide him with Medicaid-funded services, doc. 14 at ¶ 6, Medicaid is a joint program between the State and Federal Governments, *see* Section II.C., *supra.* Alabama's Medicaid waiver programs are very structured in terms of designating the services and equipment available through them, and they were consciously designed to be cost-effective. *Id.* Commissioner Steckel has no authority to unilaterally change any of the waiver programs in order to individually tailor one to Boyd. *Id.*, *see esp.* 42 C.F.R. § 430.25(e)-(f) (CMS must approve any State waiver). An improper expenditure of Medicaid funds could have severe consequences for the Alabama Medicaid program. Violations of federal law could subject the State "to sanction by the federal regulatory authority, including charge-backs, or suspension or termination of a program." Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 18.

Mr. Boyd's cases provide him no support. First, he cites *Edmonds v. Levine*, 417 F.Supp.2d 1323 (S.D. Fla. 2006), for the proposition that "harm to plaintiffs of being deprived of essential medical services outweighs any harm to [S]tate." Doc. 16 at 22. In that case, however, plaintiffs were being denied essential medications, placing them at a

risk of "imminent and irreparable" harm. *Edmonds*, 417 F. Supp. 2d at 1341. Here, there is no allegation that Mr. Boyd is not getting all the medical services he needs. Instead, he complains that he should be getting those medical services in his own private housing, instead of at Chandler.

Furthermore, in *Edmonds*, the Court held a preliminary injunction hearing while summary judgment briefing was on-going. *Id.* at 1325. The Court concluded that the question was one of statutory interpretation which could be decided on summary judgment, *id.*, and the cited opinion does just that —granting judgment for the plaintiffs and granting a *permanent* injunction. *Id.* Consequently, when the *Edmonds* Court assessed irreparable harm, it did so in the context of "ha[ving] already concluded that [the State's] Neurontin policy violates the Medicaid Act . . . ." *Id.* at 1342. Indeed, that contextual piece was front-and-center in the Court's irreparable harm analysis. *Id.*

Next, Mr. Boyd cites *Illinois Hospital Association v. Illinois Department. of Public Aid*, 576 F.Supp. 360, 371 (D.C. Ill. 1983), which says: "Once a [S]tate has voluntarily elected to participate in the Medicaid program, . . . it must comply with all federal Medicaid standards. Accordingly no [S]tate may characterize its duty to comply with the requirements of an elective program such as Medicaid as constituting a hardship to its citizens." (citation omitted). *See* doc. 16 at 22. Mr. Boyd does not ask Commissioner Steckel to comply with the State's Medicaid Plan, however. On the contrary, Mr. Boyd seeks to compel the Commissioner to ignore the entire Medicaid superstructure by spending Medicaid money to serve him – whatever his needs might turn out to be and whatever their costs – either by expanding the scope of existing Medicaid Waiver programs, or by creating a new Waiver program for him.

Finally, Mr. Boyd cites *Kansas Hospital Association v. Whiteman*, 835 F.Supp. 1548 (D. Kan. 1993), for the proposition that "threatened injuries to plaintiffs outweighed any harm to defendant that would result from issuing the temporary restraining order because changing Medicaid coverage 'significantly alters the status quo to the detriment of the individual plaintiffs, while its positive budgetary impact on [S]tate coffers is negligible in a relative sense.'" Doc. 16 at 22. *Whiteman* is inapposite for two reasons.

First, in *Whiteman*, the State was about to implement a new rule that would increase the co-pay required for hospital stays. *Whiteman*, 835 F. Supp. at 1551. The Court's injunction maintained the *status quo*. Here, Commissioner Steckel was not on the verge of taking any action to Mr. Boyd's detriment. Instead, Mr. Boyd seeks to alter the *status quo*, jumping straight to his desired end-game at the start. *See* Section III, *supra,* especially *U.S. v. Lambert*, 695 F.2d 536, 539, 540 (11th Cir. 1983), and *Canal Authority of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

Second, the balancing in *Whiteman* is, of course, specific to the facts of that case, and those facts are nothing like these. The *Whiteman* Court looked at the fact that hospitals would be required to continue treating Medicaid recipients irrespective of whether those patients could pay their co-pays, and so the hospitals would incur losses if the rule went into effect. *Whiteman*, 835 F. Supp. at 1552. That balancing tells this Court nothing about how to proceed here.

When all relevant factors are considered, Mr. Boyd has not demonstrated that the balance of hardships tilts in his favor.

VIII. A PRELIMINARY INJUNCTION WOULD NOT BE IN THE PUBLIC INTEREST

Mr. Boyd contends that the public interest favors the grant of a preliminary injunction because the ADA and the Rehab Act reflect a strong public policy against discrimination on the basis of disability. Doc. 16 at 23. Accepting that the ADA and the Rehab Act reflect a strong national policy against discrimination on the basis of disability does not end the inquiry, however.

Here, Commissioner Steckel strenuously denies that she is discriminating against Mr. Boyd in any way. That Mr. Boyd receives medical services in a nursing home does not, without more, mean that he is institutionalized in the *Olmstead* sense[39] or that he has been the victim of discrimination. Moreover, given the outstanding questions—what are Mr. Boyd's true medical needs, as determined by a medical treatment professional? does either the E&D Waiver or the SAIL Waiver provide reimbursement for the medical services Mr. Boyd needs? if not, what changes would be required and at what cost?—it is not at all clear what impact the desired injunction would have on Alabama's waiver programs or on others seeking or receiving services pursuant to it.

An expenditure of State funds only, without the benefit of any federal matching funds, would more than double the State's cost for Boyd's medical care. Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 20. Such an expenditure of State funds would also significantly reduce the State and federal funds available for other Medicaid recipients. *Id.* Mr. Boyd does not concern himself with the costs to the State, dismissing it as

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[39] *Olmstead* includes references to voluntary admission to facilities, *as well as repeated references to confinement and institutionalization.* 527 U.S. at 593. Chandler is a private facility. The Alabama Medicaid Agency simply pays the bill, and it does that mostly with Federal money.

unimportant. But we are talking about taxpayer dollars in a tight economy, and they are dollars that should not be spent for all the reasons detailed in Section V., *supra.*

If there is a currently existing waiver program which can serve Mr. Boyd's actual medical needs—that is, provide whatever services are required for him to live independently in a manner which assures his health and safety—that program needs to be identified, as does the reason he is not currently being served by that program. If there is a slot available and if Mr. Boyd is the person who should be in the slot, pursuant to whatever rules exist to dole out this limited resource, that is one matter—and a simple one at that.

If there is a slot and Mr. Boyd is not the one entitled to it, then he is seeking to line-jump, and it is not in the public interest to allow that. The provision of Medicaid-funded services should not be based on a willingness to file litigation. As the *Olmstead* Plurality explained:

> *To maintain a range of facilities and to administer services with an even hand*, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. See Tr. of Oral Arg. 5 (State's attorney urges that, *"by asking [a] person to wait a short time until a community bed is available, Georgia does not exclude [that] person by reason of disability, neither does Georgia discriminate against her by reason of disability"*); see also *id.*, at 25 *("[I]t is reasonable for the State to ask someone to wait until a community placement is available."). In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions.*

527 U.S. at 605-06 (Plurality Opinion) (footnote omitted; emphasis added); *see also id.* at 626 (Thomas, J., dissenting) ("Continued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement does not establish that the denial of community placement occurred 'by reason of' their disability. Rather, it establishes no more than the fact that petitioners have limited resources.").

If there is no slot and so Mr. Boyd is seeking to bust the cap, it is not in the public interest to allow that. Busting the cap is abandoning the requirements of Medicaid law, as set out in Section II.C., *supra*, especially 42 C.F.R. § 441.303(f)(6); *Susan J. v. Riley*, 616 F.Supp.2d 1219, 1239 n. 17 (M.D. Ala. 2009) ("The cap itself is clearly proper."), and in any event, cannot be unilaterally undertaken by sole defendant in this litigation, Section II.C., *supra*, *esp.* 42 C.F.R. § 430.25(e)-(f).

Alternatively, the Commissioner would be forced to reimburse providers for Mr. Boyd's medical care using 100% State dollars, and sacrificing federal matching funds. *Id.* at ¶ 20. Doing so would be contrary to the mission and purpose of the Alabama Medicaid Agency, which exists in order to take advantage of the federal matching funds made available to the States that comply with the rigors of the federal Medicaid program. Doing so would also be contrary to the public interest, as well as the private interests of those who are actually served by Alabama's limited Medicaid appropriations. *Id.* at ¶ 21.

If there is no program in place, designing one for Mr. Boyd's benefit is not in the public interest. Again, it would be an abandonment of the Medicaid program, which does not allow for Commissioner Steckel to unilaterally design new Medicaid-funded services

and does not encourage designing programs around a specific individual. *See* Section II.C., *supra.* And, again, serving Mr. Boyd outside the Medicaid program is not what this defendant does, and any attempt to do so could be harmful to the State's Medicaid program, resulting in a significant loss of federal matching funds. Affidavit of Marilyn Chappelle, doc. 19-3 at ¶ 18.

IX. CONCLUSION

Mr. Boyd's motion for a preliminary injunction should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that on the 7th day of October, 2010, a copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system , which will electronically send a copy of the sa me to the f ollowing: Jam es Tucker (jtucker@adap.ua.edu); Lonnie J. W illiams (lwilliams@adap.ua.edu); and Steve Gold (stevegoldada@cs.com).

s/Margaret L. Fleming_____

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