**UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

MICHELE HADDAD,

Plaintiff

v. Case No: 3:10-cv-414-J-99MMH-TEM

THOMAS W. ARNOLD, in his official Capacity as Secretary, Florida Agency for Health Care Administration, and

DR. ANA VIAMONTE ROS, in her official capacity as Surgeon General, Florida Department of Health,

Defendants

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**DEFENDANTS' RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

The Defendants, THOMAS W. ARNOLD, in his official capacity as the Secretary of the Florida Agency for Health Care Administration, and DR. ANA VIAMONTE ROS, in her official capacity as Surgeon General, Florida Department of Health, by and through the undersigned counsel, hereby submit this, their response in opposition to Plaintiff Michele Haddad's Motion for Preliminary Injunction. As grounds therefore, Defendants submit the following Memorandum of Law, which is attached hereto and is incorporated herein by reference.

## MEMORANDUM OF LAW

### I. Legal Standard

To obtain a preliminary injunction, Plaintiff, Michele Haddad ("Haddad") must demonstrate that: (1) she has a substantial likelihood of prevailing on the merits; (2) she will suffer irreparable harm unless the injunction issues; (3) the threatened injury to Haddad outweighs whatever damage the proposed injunction may cause the Defendants; and (4) the injunction, if issued, would not be adverse to the public interest. Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1354 (11th Cir. Ga. 2005). Plaintiff has the burden of persuasion in all of the four requirements for preliminary injunctive relief, and she must "clearly carry" this burden. United States v. Lambert, 695 F.2d 536, 540 (11th Cir. Fla. 1983) (citing Texas v. Seatrain International, S.A., 518 F.2d 175, 179 (5th Cir. 1975)); See also Canal Authority of Florida v. Callaway, 489 F.2d 567, 573 (5th Cir. Fla. 1974).

In addition, the law distinguishes between preliminary injunctions that seek to maintain the status quo and those that seek some relief beyond the status quo. The instant Motion for Preliminary Injunction falls into the latter category, as it asks the Court to order the Defendants to undertake an activity they are currently not undertaking (i.e., to provide for personal care assistance in Haddad's home). In the Eleventh Circuit, "[w]hen a preliminary injunction goes beyond the status quo and seeks to force one party to act, it becomes a mandatory or affirmative injunction and **the burden placed on the moving party is increased**." Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC, 605 F. Supp. 2d 1189, 1196 (N.D. Ala. 2009) (emphasis added). Indeed, "when a plaintiff applies for a mandatory preliminary injunction, such relief **'should not be granted except in rare**

**instances in which the facts and law are clearly in favor of the moving party**.'" Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 441 F.2d 560, 561 (5th Cir. La. 1971) (quoting Miami Beach Federal Sav. & Loan Asso. v. Callander, 256 F.2d 410, 415 (5th Cir. Fla. 1958)) (emphasis added). Mandatory injunctions are "particularly disfavored" by the courts. Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. Fla. 1976) (emphasis added).

As demonstrated below, Plaintiff cannot clearly carry the heavy burden of persuasion regarding the four requirements for mandatory preliminary injunctions. Neither the facts nor the law "clearly" favor the Plaintiff. As such, this Court should deny Plaintiff's Motion for Preliminary Injunction.

## II. Haddad Cannot Demonstrate a Substantial Likelihood of Prevailing on the Merits

Haddad does not have a substantial likelihood of prevailing on the merits of this case. First, Haddad does not and cannot allege any violation of the black letter law of the Medicaid Act, the ADA, or the ADA's implementing regulations. Second, Haddad's case relies on an "interpretation" of regulatory guidance regarding the ADA to re-write the federal Medicaid statute. And third, the Defendants have consistently expanded home and community-based services for the disabled for three decades, belying any claim of intentional discrimination against Haddad or others similarly situated.

### A. Haddad does not allege a clear violation of the Medicaid Act or the ADA.

This Court must first note that Haddad does not and cannot point to any violation of the black letter of the Medicaid Act or of the ADA in bringing her claim. As the Defendants

will discuss further herein, the federal Medicaid statute specifically makes the type of service Haddad seeks here, personal care assistance, an optional Medicaid service. The federal Medicaid also makes home and community-based waiver services (which can include personal care assistance) optional, and allows states that opt to provide these services to cap the number of persons served. Thus, Florida has inarguably followed federal Medicaid law in choosing not to provide personal care assistance through its Medicaid program, and has followed the law in providing home and community-based services to a limited number of persons.

In addition, Haddad does not point to any statutory provision of the ADA that supports her cause. Title II of the ADA, which pertains to public programs and services, generally states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The regulations to the ADA, moreover, state that the ADA "does not require a public entity to provide to individuals with disabilities … services of a personal nature including assistance in eating, toileting, or dressing." 42 C.F.R. § 35.135. Accordingly, the Defendants' decision to generally exclude personal care services from Medicaid coverage complies with the black letter of the ADA and its implementing regulations.

**B. Defendants' Conduct Does Not Constitute Discrimination Under the ADA**

Rather than point to the black letter of the federal Medicaid Act or the ADA, Haddad bases her case on the ADA implementing regulations. First, Haddad asks this court to

enforce what is known as the ADA's "integration mandate" which is found at 28 C.F.R. Section 35.130(d), and which states: "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." See Complaint, e.g., ¶¶ 49, 52, 74, Relief Requested. Second, Haddad essentially asks this Court to ignore the ADA's explicit exclusion of personal care services from its purview. This Court should reject both arguments. The ADA's implementing regulations do not create a private right of action, and this Court cannot ignore the plain meaning of the regulation excluding personal care assistance from the ADA's reach.

### C. The Regulations Implementing Title II of the ADA, Including the "Integration Mandate", are Not Enforceable by Private Right of Action

The "integration mandate" in Title II of the ADA does not create a private right of action. As the Eleventh Circuit held in a recent decision, "[w]hile the ADA directed the Attorney General to promulgate regulations implementing Part II, 42 U.S.C. § 12134, the purpose of those 22 regulations is to provide standards for compliance with the ADA, id. § 12134(c), **not to give individuals a right to sue if compliance with those standards is not met**." Am. Ass'n of People with Disabilities v. Harris, 2010 U.S. App. LEXIS 9615, at 28 (11th Cir. Fla. May 11, 2010) (emphasis added). Here, Haddad alleges that compliance with the "integration mandate" has not been met and that this confers on her the right to bring an action against the Defendants. As the Eleventh Circuit has held in Am. Ass'n of People with Disabilities, this is not the case.

Plaintiff may argue that she is not seeking to independently enforce the "integration mandate," but is rather attempting to enforce the ADA itself, the scope of which is

interpreted and defined by the "integration mandate" regulation. However, the technical violation of the "integration mandate" that Plaintiff alleges here **cannot** constitute a violation of § 12132, as Plaintiff alleges. Section 12132 provides: "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" (emphasis added). Here, the program from which the Plaintiff alleges she has been "excluded from participating in or [ ] denied the benefits of" (the TBI/SCI Waiver program) is only available to individuals with the same disability as the Plaintiff. By definition, therefore, any exclusion, denial, or discrimination **cannot be** "by reason of such disability." Any such exclusion, denial, or discrimination would have to be for some other reason. The Plaintiff has therefore failed to allege a violation of § 12132, and cannot enforce the "integration mandate."

**D. <u>This Court must respect the plain meaning the of the ADA regulations that do not require a public entity to provide personal care services.</u>**

Here, Haddad seeks assistance transferring from her bed to her wheelchair and from her wheelchair back to her bed, and assistance dressing, grooming, toileting, and with other activities of daily life. Complaint, ¶ 21-22. Plaintiff contends that the ADA requires the provision of such personal care services. This is not the case. To the contrary, the ADA regulations specifically exclude personal care services from the ADA's purview.

Section 35.135 of the ADA's implementing regulations states that the ADA "does not require a public entity to provide to individuals with disabilities…**services of a personal nature including assistance in eating, toileting, or dressing**" (emphasis added). In its Statement of Interest in this case, the United States Department of Justice (DOJ) argues

that 28 C.F.R. § 35.135 "affords no defense here." Statement of Interest of the United States of America, p. 13. The DOJ contends that § 35.135 "simply makes clear that Title II does not require a State to provide personal services *in a program that does not include such services*. (For example, the Department of Motor Vehicles need not provide wheelchairs to those who wait in line for a driver's license.)" Id (emphasis in original). The DOJ implies that, because Florida allegedly provides personal care services to Medicaid recipients in the nursing home, it must also provide these services in the community under the "integration mandate." Id. This is made clear, the DOJ contends, by its own "authoritative interpretation" of 28 C.F.R. § 35.135. Id. This "interpretation," however, is entitled to no deference.

Simply stated, the DOJ's "interpretation" of 28 C.F.R. § 35.135 is not an interpretation at all. It is an attempt to carve out an exception to this regulation that is not present in the text. The DOJ wants this Court to say that the regulation contains an exception for public entities that provide personal care services. This is an improper attempt to **amend** the regulation without complying with the requirements of the federal Administrative Procedures Act.

42 C.F.R. § 35.135 has a plain meaning and is unambiguous. It is not subject to "interpretation" as Courts cannot and do not interpret regulations that have a plain meaning. Nor do courts defer to agency "interpretations" of unambiguous regulations. As the United States Court of Appeals for the Eleventh Circuit stated in Charter Fed. Sav. & Loan Ass'n v. Office of Thrift Supervision, 912 F.2d 1569, 1580-1 (11th Cir. 1990), "where the language selected by the drafters is clear and unequivocal, the courts are bound to give effect to the

plain meaning of the chosen words [of a regulation] and no duty of interpretation arises." Id., (citing KCMC, Inc. v. FCC, 600 F.2d 546, 549 (5th Cir. 1979)).

Likewise, the United States Supreme Court has held that "deference is warranted only when the language of the regulation is ambiguous." Christensen v. Harris County, 529 U.S. 576, 588 (U.S. 2000). In Christensen, the Court found that the regulation at issue was not ambiguous. "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." Id. This would be the case in the instant matter as well.

42 C.F.R. § 35.135 could not be clearer: "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). There is no ambiguity or need for interpretation, and there is no exception for public entities that provide personal care services. Indeed, the DOJ cannot identify a single ambiguous term or phrase in the regulation – and in the absence of ambiguity, federal courts prohibit interpretation.

In its Statement of Interest, the DOJ cites the ADA Title II Technical Assistance Manual, § II-3.6200, which, in reference to the provision in § 35.135, states: "Of course, if personal services or devices are customarily provided to the individuals served by a public entity, such as a hospital or nursing home, then these personal services should also be provided to individuals with disabilities." This statement, which is not itself a regulation, says nothing about the provision of personal care services *in the community*. On its face, it

is clearly referring to the provision of personal care services to individuals with disabilities in a context where such services are "customarily provided to the individuals served by a public entity, *such as a hospital or nursing home*" (emphasis added). The plain meaning of this provision is that a **hospital** or **nursing home** should not take § 35.135 to mean that they can deny personal care services to individuals with disabilities who are in their custody.

Thus, § 35.135 and the Guidance that accompanies it exempt public entities from having to provide personal care services outside of a custodial context such as a nursing home or hospital. The DOJ then employs a classic piece of circular logic. According to the DOJ, once a public entity follows its Guidance and provides personal care assistance in a nursing home, its "interpretation" of § 35.135 takes effect and the public entity is required to provide personal care assistance in the community as well. Section 35.135 and its interpretive Guidance thus become a tautological trap. The Guidance requires nursing homes to provide personal care, but once they do the DOJ will "interpret" its regulations to require personal care in the community. This Court should not allow such games to be played with an unambiguous regulation.

This Court should also note that personal care services are not among the essential "services, programs, and activities" that the Florida Medicaid Program provides in nursing facilities. 42 C.F.R. § 35.130(d). The Florida Medicaid Program pays for "24-hour-a-day **nursing** and **rehabilitative** services for a recipient in a nursing facility licensed under part II of chapter 400." § 409.905(8), Florida Statutes (emphasis added). No doubt, personal care services are provided in nursing facilities. However, nursing facilities provide these services *incidentally* from the custodial relationship between the nursing facility and the Medicaid

recipient, in order to keep the residents in optimum health. Meals and snacks are also incidentally provided in nursing facilities. Under the DOJ's "interpretation" of its regulation, the "integration mandate" would mean that the Florida Medicaid Program has to provide meals and snacks to disabled Medicaid recipients in the community. The Florida Medicaid Program requires nursing facilities to provide "a clean comfortable mattress, pillows, clean linens and bedding appropriate to the weather and climate, towels and washcloths, functional furniture appropriate to the resident's needs, and individual closet space with clothes racks and shelves." Florida Medicaid Nursing Facilities Coverage and Limitations Handbook, p. 2-9. The tautological interpretation of the "integration mandate" that the Plaintiff and DOJ espouse would require the Florida Medicaid Program to assure that all disabled Medicaid recipients in the community have these items in the community; including the requirement for adequate closet space. This clearly goes too far, but it is the same absurd logic that lies behind the Plaintiff and DOJ's claim that the "integration mandate" requires the provision of personal care services in the community.

The regulations implementing Title II of the ADA are clear. Florida is required to administer its services "in the most integrated setting appropriate," but this cannot be read to require the Florida Medicaid Program to provide "services of a personal nature," which is precisely the kind of services Plaintiff is requesting here. The ADA does not require the provision of these services.

### E. The ADA Neither Abrogates nor Amends the Black Letter Provisions of the Medicaid Act

The fundamental question that lies at the heart of this lawsuit relates to the relationship between the ADA and the Medicaid Act. To resolve this case, this Court will

have to examine how these two statutes relate to one another. To do this, this Court will need an understanding of both laws.

**1. Medicaid**

Medicaid is a joint federal-state venture created by federal statute, Title XIX of the Social Security Act of 1965, as amended. 42 U.S.C. § 1396 *et seq*. In order to participate in Medicaid, a state must submit a plan to the federal government outlining its program to fund medical services for the poor and needy in accordance with the federal Medicaid Act. If the federal government approves the plan, it "then subsidizes a certain portion of the financial obligations which the state has agreed to bear." Harris v. James, 127 F.3d 993, 996 (11th Cir. 1997) (citing Silver v. Baggiano, 804 F.2d 1211 (11th Cir. 1986)). Currently, with the addition of stimulus funds pursuant to the American Recovery and Reinvestment Act of 2009, the federal government provides approximately 68% of the money in Florida's Medicaid Program. When the stimulus period ends, the federal contribution will likely return to approximately 55%.

The federal Medicaid Act defines "medical assistance" to mean payment for all or part of the services listed in 42 U.S.C. § 1396d(a)(1) through (28). 42 U.S.C. § 1396d(a). Only seven of the twenty-eight services listed are mandatory, meaning that a state must include these seven services in its state plan to participate in Medicaid. 42 U.S.C. § 1396a(a)(10)(A). Mandatory services for adults over the age of 21 include inpatient hospital services, outpatient hospital services, laboratory and x-ray services, **nursing facility services**, nurse-midwife services, and certified nurse practitioner services. See 42 U.S.C. § 1396a(a)(10)(A) (requiring state plans to provide at least the services listed in § 1396d(a)(1)

through (5), (17) and (21)). Thus, Florida is **required** by federal law to make nursing facility services available and, if these services are medically necessary for Plaintiff, she is entitled to them as a matter of federal law. See e.g., Goldberg v. Kelly, 397 U.S. 254 (1970).

Florida **may** include any of the other twenty-one services listed in 42 U.S.C. § 1396d(a), including personal care services. However, it is essential to note that Florida is **not required** to provide such services to comply with the Medicaid Act, and, to the extent that Florida opts not to provide any of these twenty-one other services, Florida's Medicaid recipients to do not have an entitlement to those services.

In addition to the Medicaid services offered under a state's Medicaid State Plan, a state may also enter into an agreement with the federal government to offer services under a waiver program, such as the HCBS waivers. See 42 U.S.C. § 1396n(c). Under waiver programs such as the TBI/SCI Waiver, the federal government agrees to "waive" certain requirements of the Medicaid Act without jeopardizing federal financial participation. 42 U.S.C. § 1396n(c)(3). Most importantly for the purposes of this case, the Medicaid Act permits waiver of the comparability requirement of 42 U.S.C. § 1396a(a)(10)(B). Id. This provision requires state plans to offer the services in 42 U.S.C. § 1396d(a) to all Medicaid recipients in the same amount, duration and scope. 42 U.S.C. § 1396a(a)(10)(B). By providing for a waiver of the comparability requirement, the Medicaid Act permits states to discriminate on the basis of disability. Indeed, as a result of the various waivers, the Florida Medicaid Program currently provides increased services to persons with disabilities like

HIV/AIDS, Austism, and mental retardation, while simultaneously offering no enhanced services to persons with other types of disabling conditions.

The Medicaid Act also permits waiver of Medicaid requirements with respect to limiting the number of persons receiving waiver services and eliminating the statewideness requirement. While a state must provide services under its State Plan to everyone who meets the state's Medicaid eligibility requirements, the waiver law specifically allows states to "cap" the number of persons receiving waiver services. 42 U.S.C. § 1396n(c)(9)-(10). Waiver of statewideness means that states can limit the provision of HCBS services to certain parts of the state as opposed to persons living throughout the state. 42 U.S.C. § 1396n(c)(3).

It is important to note that while the federal Medicaid Act permits states to create HCBS waiver programs, it does not require states to do so. As the Medicaid Act states, "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 federal government. 42 U.S.C. § 1396n(c)(1) (emphasis added). Neither does the Medicaid Act require the federal government to approve states' HCBS waiver programs. The Secretary of the Department of Health and Human Services "***may*** by waiver" allow states to create HCBS programs. Id. (emphasis added).

It is not disputed that the Florida Medicaid program does not provide in-home personal care assistance for adults like Plaintiff. While Florida does provide in-home personal care assistance through its TBI/SCI Waiver, Florida has opted to place a cap on the number of persons enrolled in this program. The TBI/SCI Waiver program had no available

opening at the time Plaintiff applied and she was thus placed on a waiting list. In the Complaint and Motion for Preliminary Injunction, Plaintiff does not allege that Florida has violated the Medicaid Act by failing to provide her with in-home personal care assistance. However, in both the Complaint and Motion for Preliminary Injunction she is requesting the Court to order Defendants to provide her with such services. Such an order would effectively nullify one or more provisions of the Medicaid Act.

**2. Analysis of Interplay Between the ADA and the Medicaid Act**

To grant Haddad's Motion for Preliminary Injunction, the Court will have to hold that the ADA has invalidated one or more provisions of the Medicaid Act. For example, the Court would have to invalidate the Medicaid Act's explicit statement that the only mandatory services are those found at 42 U.S.C. § 1396d(a)(1) through (5), (17), and (21) by converting personal care assistance from an optional service to a mandatory service. 42 U.S.C. § 1396a(a)(10)(A). In the alternative, an injunction order would invalidate the provision in 42 U.S.C. § 1396n(c)(1) declaring that HCBS waiver programs are optional for states and that states can cap enrollment in such programs.

As such, the only way that Plaintiff's claims could be sustained is if the ADA were interpreted to amend (or partially repeal) the Medicaid Act by implication, by either amending/repealing 42 U.S.C. § 1396a(a)(10)(A), which makes personal care services optional for states, or by converting "may" in 42 U.S.C. § 1396n(c)(1) to "shall" . It is clear that an inherent assumption of Plaintiff's claim is that the Medicaid Act has been impliedly amended by the ADA. However, the criteria for statutory amendment by implication are not met here. The Supreme Court has held that "[a]mendments by implication, like repeals by

implication, are not favored." United States v. Welden, 377 U.S. 95, 103 (U.S. 1964). In a case where "two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551 (U.S. 1974). The Medicaid Act and the ADA are clearly capable of co-existence, and the ADA contains no clear congressional intent to amend the Medicaid Act.

Moreover, as to the administration of the Medicaid program, the Medicaid Act is a more specific statute than the ADA. Indeed, the ADA generally prohibits discrimination, while the Medicaid Act ordinarily prohibits discrimination but waives this prohibition in a specific, public health policy context. According to the U.S. Supreme Court, "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." Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (U.S. 1976). The more specific statute controls "regardless of the priority of enactment." Morton, at 551. See also Ardestani v. United States Dep't of Justice, INS, 904 F.2d 1505, 1513 (11th Cir. 1990) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one").

The ADA does not amend the Medicaid Act. In fact, however, the Plaintiff is not even alleging that the ADA has amended the Medicaid Act, but rather that a DOJ *regulation* has amended the Medicaid Act. Essentially Plaintiff is arguing that the "integration mandate" changes the entire structure of the Medicaid Act. But as noted above, § 12132 does not go nearly as far as the "integration mandate." Lacking this regulatory provision, no

court would find that a state providing nursing facility services to individuals with disabilities through its Medicaid program, as the Medicaid Act *requires* states to do, constitutes exclusion from participation in or a denial of the benefits of the Medicaid program. Of course, no regulation can amend a statute.

Even if it were found that the ADA, or more specifically, the "integration mandate" in the ADA regulations, does in fact amend the Medicaid Act by implication, there is no basis in law or logic to support Plaintiff's position as to the character and effect of that amendment. The Plaintiff wants the ADA's prohibition of discrimination to slice into the Medicaid Act and, with surgical precision, add, change, or remove a word or two here and there, leaving the overall structure of the Medicaid Act and the HCBS waiver programs intact. The Plaintiff, however, fails to provide a rational basis for why the TBI/SCI Waiver program itself would withstand the wrath of the ADA, as the TBI/SCI Waiver program is a service that **blatantly discriminates on the basis of disability**. The TBI/SCI Waiver program is **only** available to persons with a traumatic brain injury or a spinal cord injury. It is not available to persons with any other sort of disability, such as autism or cerebral palsy, nor is it available to individuals who have no disabilities at all.

In fact, **all** HCBS waiver programs discriminate in the class of persons they serve. The Medicaid Act permits and contemplates such discrimination. 42 U.S.C. § 1396n(c)(1), (2), (3), (4), and (7). What is more, regulations of the Centers for Medicare and Medicaid Services (CMS) implementing the Medicaid Act **require** discrimination on the basis of diagnosis (or disability) in the provision of HCBS services. CMS requires that if a State "furnishes home and community-based services… under a waiver granted under this

subpart, the waiver request must…[b]e limited to one of the following target groups or any **subgroup** thereof that the State may define: (i) Aged or **disabled**, or both. (ii) Mentally retarded or **developmentally disabled**, or both. (iii) Mentally ill." 42 C.F.R. § 441.301(b)(6) (emphasis added).

The HCBS waiver programs discriminate based on disability in order to provide persons with disabilities services that would not otherwise be available to them. But they still **discriminate on the basis of disability**. As a result, there are persons with disabilities who are "excluded from participation in or [ ] denied the benefits of" HCBS waiver programs that are targeted to persons with other disabilities. See 42 U.S.C. § 12132. If the ADA's prohibition of discrimination "by reason of…disability" amends the Medicaid Act, then surely the HCBS waiver programs would not survive.

A grant of Plaintiff's Motion for Preliminary Injunction will essentially require a finding that the ADA amends the Medicaid Act by prohibiting a certain kind of discrimination (i.e., institutionalization of persons with disabilities) while permitting another kind of discrimination (i.e., creating an HCBS waiver program exclusively for persons with a spinal cord injury). But this makes no sense. If the ADA trumps Medicaid, it must do so in a comprehensive and coherent way. If the ADA indeed prohibits Florida from denying personal care services in the community, then it must necessarily also prohibit Florida from offering an inherently discriminatory program like the TBI/SCI Waiver program.

### F. The Requested Relief Would Constitute a Fundamental Alteration of Florida's Medicaid Program

The regulations implementing Title II of the ADA provide that a "public entity shall make reasonable modifications in policies, practices, or procedures when the modifications

are necessary to avoid discrimination on the basis of disability, 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). Here, any interpretation that allows the ADA (or its regulations) to trump the Medicaid Act would involve a fundamental alteration of the Medicaid Program. If, contrary to the Medicaid Act, this Court uses the ADA to convert personal care assistance into a mandatory Medicaid service, it will create federal entitlement to personal care assistance in all 2.7 million Medicaid recipients in Florida. If, contrary to the Medicaid Act, this Court uses the ADA to make waiver services mandatory and removes states' ability to cap the waivers, it will destroy the states' reasonably delegated responsibility to ensure the adequacy of its provider networks and to create other safeguards prior to providing community-based services. As far as Defendants are aware, no other court has required a state Medicaid program to expand a waiver based on the ADA or Rehab Act. Finally, if this Court strikes down waivers entirely, it will functionally obliterate Medicaid.

While it does not make sense to interpret the ADA to uphold the HCBS waiver programs but prohibit institutionalization of disabled individuals, if the Court were to find that this is what the ADA requires, such would still constitute a fundamental alteration of the Florida Medicaid Program, because the State of Florida would be required by the federal Medicaid Act to provide assurances to CMS that it will provide "necessary safeguards" for a greatly increased number of recipients and "financial accountability for funds expended" for a greatly increased amount of services. 42 U.S.C. § 1396n(c)(2)(A).

In addition, as demonstrated in the Affidavit of Kristen Russell dated April 29, 2010, and attached to this Response as Exhibit A, if the State of Florida were forced to place Ms. Haddad on the TBI/SCI Waiver program, they would be forced to reduce services that others on the TBI/SCI Waiver program are currently receiving. As those individuals on the TBI/SCI Waiver program are entitled to the services they are receiving, this would surely constitute a fundamental alteration. Such a modification is not reasonable.

The case law Plaintiff cites in the Motion for Preliminary Injunction regarding reasonable modifications is instructive here. In Alexander v. Choate, 469 U.S. 287 (U.S. 1985), the U.S. Supreme Court made clear that while state Medicaid programs may not discriminate against the disabled, neither are such programs bound to provide specialized services to the disabled that are not available to other Medicaid recipients, "as long as care and services are provided in „the best interests of the recipients.'" Alexander v. Choate, 469 U.S. 287, 303 (U.S. 1985) (Citing 42 U. S. C. § 1396a(a)(19)). The Rehab Act, the Court held, does not require states to alter the "definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs." Id., at 304. Here, Plaintiff is essentially asking the Court to order Defendant to redefine the benefits offered under the Florida Medicaid Program to meet the heightened needs of the disabled.

**1. Florida's Comprehensive, Effectively Working Plan**

Plaintiff's requested relief would also constitute a fundamental alteration in that it would disrupt Florida's "comprehensive, effectively working plan" to provide HCBS to those qualified individuals who desire such services. See Olmstead, at 606 ("If, for example, [a] State were to demonstrate that it had a comprehensive, effectively working plan for

placing qualified persons with…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"). In Arc of Wash. State Inc. v. Braddock, 427 F.3d 615 (9th Cir. Wash. 2005), the Ninth Circuit held that Washington was not required by the ADA to expand its waiver program because Washington's HCBS program "(1) [was] sizeable, with a cap that ha[d] increased substantially over the past two decades; (2) [was] full; (3) [was] available to all Medicaid-eligible disabled persons as slots become available, based only on their [health needs] and position on the waiting list; (4) ha[d] already significantly reduced the size of the state's institutionalized population." Arc of Wash. State Inc., at 622.

Florida has a "comprehensive, effectively working plan" to provide HCBS to those qualified individuals who desire such services. As shown in the Affidavit of Elizabeth Y. Kidder, dated June 2, 2010, the Florida Medicaid Program administers 14 HCBS waiver programs. These programs began in the 1980s, and have consistently expanded since that time. Florida added new HCBS waiver programs in 1982, 1985, 1989, 1991, 1995, 1998, 1999, 2004, 2006, and 2008. As shown in the Affidavit of S. Michele Hudson, dated June 2, 2010, the following HCBS waivers have all expanded over the past four years: the Adult Cystic Fibrosis Waiver, the Alzheimer's Disease Waiver, the Developmental Disabilities Waiver (Tier 1), the Family Dysautonomia Waiver, the Family Supported Living Waiver, the Nursing Home Diversion Waiver, and the TBI/SCI Waiver. Indeed, the Florida Medicaid Program now serves more nursing home-eligible persons outside of nursing homes than in them in any given month. See Affidavit of S. Michele Hudson, dated June 2, 2010.

The TBI/SCI Waiver program in particular has grown. Implemented in 1999, the TBI/SCI Waiver program expanded from an average monthly caseload of 245 persons (Fiscal Year 2005-2006) to 309 persons (Fiscal Year 2008-2009). Id. In addition, TBI/SCI Waiver program expenditures have increased from $5,874,815 (Fiscal Year 2005-2006) to $10,066,381 (Fiscal Year 2008-2009). Id. As shown in the April 29, 2010, Affidavit of Kristen Russell (attached to this Response as Exhibit A), the TBI/SCI Waiver program is full, with no funded slots available. In addition, the TBI/SCI Waiver program is available to all Medicaid eligible individuals with a traumatic brain injury or spinal cord injury based only on their health needs and position on the waiting list. What is more, the vast majority of the SSI population in the Florida Medicaid Program are currently in the community and not in institutions. In Fiscal Year 2008-2009, the Florida Medicaid Program had an average monthly caseload of about 311,000 SSI persons. Id. Of those, only about 45,000, or 14%, were residing in nursing facilities in any given month. Id.

It is clear that Florida has a "comprehensive, effectively working plan" to provide HCBS to qualified individuals who desire such services. In such a case, "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." Olmstead v. L.C. ex rel. Zimring, at584. Such "displacement" is precisely what Plaintiff's request in the instant case would cause. Given Florida's "comprehensive, effectively working plan," such would certainly constitute an impermissible fundamental alteration.

### 2. Costs

Plaintiff alleges that the requested relief constitutes a "reasonable modification" because the provision of services would be less expensive in the community than in a nursing facility. See e.g., Motion for Preliminary Injunction, p. 20-21. However, the cost analysis is not as simple as Plaintiff makes it out to be. As the Affidavit of Kristen Russell, dated June 2, 2010, demonstrates, less than 10% of the individuals on the waiting list for the TBI/SCI Waiver program currently reside in a nursing facility. Yet all of these persons are requesting at-home services through the TBI/SCI Waiver program. Unless an individual would have entered a nursing facility for a sufficiently long period of time but for the waiver program, the Defendants realize **no** cost savings by placing such individual in the TBI/SCI Waiver program.

## III. Plaintiff Will Not Incur Any Irreparable Harm

In order to qualify for a preliminary injunction, Plaintiff would have to show that she will suffer irreparable harm. Mony Secs. Corp. v. Vasquez, 238 F. Supp. 2d 1304 (M.D. Fla. 2002). Plaintiff fails to show that any harm she would incur by entering a nursing facility would be irreparable.

The case law cited by Plaintiff is inapplicable to the present situation. She cites McMillan v. McCrimon, 807 F. Supp. 475 (C.D. Ill. 1992), for the principle that the loss of Medicaid benefits constitutes irreparable harm. In McMillan, the district court found that the plaintiffs in that case would not receive the services and care they required in a nursing facility. McMillan, at 479. In the instant case, Plaintiff does not contend that she would not receive the medical services she needs if she were institutionalized in a nursing facility.

Rather, she claims that the fact that such a facility is the *only* place she can receive the services she needs constitutes a failure of the Defendant to provide services in the most integrated setting pursuant to ADA regulations. McMillan does not stand for the principle that receipt of services in a less integrated setting constitutes irreparable harm.

Plaintiff likewise cites Edmonds v. Levine, 417 F. Supp. 2d 1323 (S.D. Fla. 2006), to show that the denial of medical benefits, and the resulting loss of services, constitutes irreparable harm. In the Edmonds case, the state had discontinued coverage of the prescription drugs that the plaintiffs were already receiving. Edmonds, at 1326. The Court held that this denial of medical services constituted irreparable harm. Id., at 1342. This is not the situation in the instant case. Plaintiff is not being denied medical services. To the extent that she needs personal care assistance, she would receive such services in a nursing facility.

Plaintiff also cites Mitson v. Coler, 670 F. Supp. 1568 (S.D. Fla. 1987), which held that a preliminary injunction was appropriate where plaintiffs risked losing their medical services, in this case nursing facility services. The irreparable harm in Mitson, being forced out of a nursing facility, is the exact opposite of the irreparable harm that Plaintiff is alleging: being "forced" to enter a nursing facility. Unlike the plaintiffs in Mitson, Plaintiff does not risk losing any services she is currently receiving. Her complaint is that she cannot receive the services in the setting of her choice.

Even if Plaintiff did enter a nursing home, this harm would not be "irreparable" as Ms. Haddad would be eligible after 60 days for the Nursing Home Transition program, which is funded and which would allow Ms. Haddad to be transferred to the TBI/SCI

Waiver. See April 29, 2010, Affidavit of Kristen Russell, attached to this Response as Exhibit A. The Nursing Home Transition Program is independently funded by the Florida Legislature through the nursing home line item. This program allows for eligible nursing home residents to transition to various HCBS waiver programs once they have been in a nursing facility at least 60 consecutive days. As part of the settlement agreement in Long v. Benson, Case No. 4:08-cv-RH-WCS, a lawsuit in the United States District Court for the Northern District of Florida which was also brought under Title II of the ADA and Section 504 of the Rehab Act, AHCA made several promises and assurances regarding the implementation of the Nursing Home Transition Program. It should be noted that one of Plaintiff's attorneys was involved in the settlement negotiations in Long as counsel for the plaintiffs in that case. He is apparently now taking the position that this compromise constitutes "irreparable harm." See Affidavit of Elizabeth Y. Kidder, dated June 1, 2010.

**IV. The Balance of Hardships Weighs in Favor of the Defendants**

The Court must balance the harms in determining whether a preliminary injunction should issue. Plaintiff contends that the threatened harm to her outweighs any harm to Defendant. Contrary to Plaintiff's assertions, she is not asking the Defendants to simply spend less of their Medicaid funds and permit her to continue to reside in her home. To the extent that the Plaintiff is asking the Court to make personal care assistance services mandatory for Florida or to "uncap" the TBI/SCI Waiver, the state would be forced to assemble a massive personal care assistance provider network.

The case law cited by Plaintiff in this Motion is inapposite. She cites Edmonds as finding that the "harm to plaintiffs of being deprived of essential medical services outweighs

any harm to state." In fact, the defendants in Edmonds never claimed that they would incur any hardship. Since the plaintiffs did claim they would incur hardship, the Court concluded that the balance of hardships weighed in their favor. Edmonds, at 1342. Here, the Defendants would incur significant harm if a preliminary injunction is issued.

Plaintiff also cites Illinois Hospital Asso. v. Illinois Dep't of Public Aid, 576 F. Supp. 360 (N.D. Ill. 1983), for the principle that a state cannot characterize its duties to comply with the requirements of an under an elective program such as Medicaid as constituting a hardship. Id. However, this does not describe the Defendants in the instant case. Defendants are not claiming that any of the duties imposed by the Medicaid program constitute a hardship. Rather, Defendants contend that the *additional* burdens that the Court would be imposing by granting the requested injunctive relief, burdens that go beyond the requirements of the Medicaid program, would constitute a hardship. Furthermore, Illinois Hospital Asso. is not an example of a court weighing burdens in favor of plaintiffs, as the defendant in that case did not claim any hardship.

## V. The Public Interest Will Be Harmed if Plaintiff is Granted a Preliminary Injunction

Plaintiff has the burden of showing that the preliminary injunctive relief they seek would serve the public interest. Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1226 (11th Cir. Fla. 2005). Plaintiff claims that the public interest will be served by an order granting a preliminary injunction in her favor. However, the only person such a preliminary injunction would serve would be Plaintiff. To the extent that the preliminary injunction required the State of Florida to add personal care services to its Medicaid State Plan or

"uncap" enrollment in its TBI/SCI Waiver, Florida would be required to divert funds from other sources, potentially injuring other Medicaid recipients. To the extent that the preliminary injunction required Defendants to "jump" Plaintiff to the head of the TBI/SCI Waiver waiting list, the state would be required to deny or delay benefits to recipients who had been higher on the waiting list. Such a result would be inequitable and contrary to the public interest. Plaintiff fails to address this problem in her Motion.

## CONCLUSION

For the reasons stated above, this Court should deny Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted this 2nd day of June, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of the filing to the following: Stephen F. Gold, 1709 Benjamin Franklin Parkway, Second Floor, Philadelphia, PA 19103, and Jay M. Howanitz, SPOHRER & DODD, P.L., 701 West Adams Street, Suite 2, Jacksonville, Florida 32204 this 2nd day of June, 2010.

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