UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

LUIS CRUZ and NIGEL DE LA TORRE,

Plaintiffs,

vs. CASE NO. 1:10-cv-23048-UU

ELIZABETH DUDEK[1], in her official
Capacity as the Interim Secretary of
The Florida Agency for Health Care
Administration

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

Defendants.
____/

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

The Defendants, ELIZABETH DUDEK, in her official capacity as the Interim Secretary of the Florida Agency for Health Care Administration (AHCA), 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 response in opposition to Plaintiffs Luis Cruz and Nigel De La Torre'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.

[1] Pursuant to Rule 25, Fed. R. Civ. P., Elizabeth Dudek is automatically substituted as named Defendant as the successor in office of Thomas W. Arnold.

MEMORANDUM OF LAW

I. Legal Standard for Mandatory Injunctions

To obtain a preliminary injunction, Plaintiffs, Luis Cruz and Nigel De La Torre must demonstrate that: (1) they have a substantial likelihood of prevailing on the merits; (2) they will suffer irreparable harm unless the injunction issues; (3) the threatened injury to Plaintiffs 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). Plaintiffs have the burden of persuasion in all of the four requirements for preliminary injunctive relief, and they 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 Plaintiffs' homes). 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).

It is anticipated that Plaintiffs' will argue that the requested injunction is prohibitory because Plaintiffs want the Court to "restrain" Defendants from continuing to (allegedly) violate Title II of the Americans with Disabilities Act ("ADA"). But the alleged discrimination lies precisely in the Defendants' *inaction* (i.e., the "failure" of the Defendants to provide in-home personal care assistance services to the Plaintiffs), and such "discrimination" could only be "restrained" by this Court ordering the Defendants to **take positive action** (i.e., to provide in-home personal care assistance services to the Plaintiff).

The Plaintiffs want the Court to order the Defendants to undertake an *affirmative act* (i.e., to provide in-home personal care assistance services to the Plaintiffs), which Defendants are not currently doing. The *status quo* is that the Plaintiffs are *not* receiving the services they want. The Plaintiffs want to *change* the status quo by an order of this Court requiring Defendants to undertake a **positive act**. As held in Schrier v. University of Colorado, 427 F.3d 1253, 1261 (C.A. 10 (Colo.) 2005):

> We characterize an injunction as mandatory if the requested relief "affirmatively require[s] the nonmovant to act in a particular way, and as a result ... place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction."

> *Id.* at 979 (quoting SCFC ILC, Inc., 936 F.2d at 1099). While merely seeking restoration of the status quo, Dr. Schrier's requested relief nonetheless "affirmatively require[s] the [University] to act in a particular way," *id.,* that is, to reinstall him as Chair of the Department of Medicine. Moreover, we agree with defendants that "reinstatement would place the court in position where it may have to provide supervision." Aple. Br. at 48. Thus, the relief sought here is properly characterized as mandatory and, as a result, constitutes a specifically disfavored injunction.

As demonstrated below, Plaintiffs 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 Plaintiffs. As such, this Court should deny Plaintiffs' Motion for Preliminary Injunction.

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

Plaintiffs do not have a substantial likelihood of prevailing on the merits in this case. First, Plaintiffs do not and cannot allege any violation of the black letter law of the Medicaid Act, the ADA, or the ADA's implementing regulations. Second, Plaintiffs' Motion for Preliminary Injunction assumes that the ADA partially amends the federal Medicaid Act, though there is no basis for such an assumption. Third, the implementing regulations of the ADA specifically exclude the services that Plaintiffs request. Fourth, the Patient Protection and Affordable Care Act of 2010, together with the federal Money Follows the Person program, clearly show that a sixty day period in the nursing home prior to transition to a community-based program does not constitute a violation of the ADA. Fifth, under standards set forth by the U.S. Supreme Court in Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999), immediate relief is not appropriate in Plaintiffs' cases.

A. Plaintiffs Do Not Allege a Clear Violation of the Medicaid Act or the ADA.

This Court must first note that Plaintiffs do not and cannot point to any violation of the black letter of the Medicaid Act or of the ADA in bringing their claim. As the Defendants will discuss further herein, the federal Medicaid statute specifically makes the type of service Plaintiffs seek here, personal care assistance, an optional Medicaid service. The federal Medicaid Act 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, Plaintiffs do not point to any statutory provision of the ADA that supports their 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." 28 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. 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, federal funds constitute approximately 68% of the funding for 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 Plaintiffs, they are 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 Home and Community-Based (HCBS) waivers. See 42 U.S.C. § 1396n(c). Under waiver programs such as the Traumatic Brain Injury / Spinal Cord Injury Waiver (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 may 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 the Plaintiffs. 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 Plaintiffs applied and they were thus placed on a waiting list. In the Complaint and Motion for Preliminary Injunction, Plaintiffs do not allege that Florida has violated the Medicaid Act by failing to provide them with in-home personal care assistance. However, in both the Complaint and Motion for Preliminary Injunction they are requesting the Court to order Defendants to provide them with such services. Such an order would effectively nullify one or more provisions of the Medicaid Act.

2. Americans with Disabilities Act

The ADA became law in 1990. 42 U.S.C. § 12101, *et seq*. Title II applies to public entities, the definition of which includes the Defendants. 42 U.S.C. § 12131(1). The Title II provision most relevant to this lawsuit, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

The regulations implementing Title II of the ADA require a public entity to "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). Thus, where a modification

would constitute a fundamental alteration to the service, program, or activity at issue, it is not required under the ADA.

The Supreme Court's authoritative interpretation of Title II's prohibition of discrimination, as it relates to the institutionalization of persons with disabilities, is found in Olmstead. In Olmstead, the Court was faced with the question of whether the proscription of discrimination found in Title II of the ADA may require placement of persons with (mental) disabilities in community settings rather than institutions. See Olmstead, at 587. The Court held that the answer is "a qualified yes." Id. According to the Olmstead Court, the ADA requires the placement of a person with a disability in community settings rather than institutions when (1) the State's treatment professionals have determined that community placement is appropriate, (2) the transfer from the institution to the community is not opposed by the individual, and (3) the placement can be reasonably accommodated, taking into account (a) the resources available to the State, and (b) the needs of others with disabilities. Id. Reading Olmstead together with Title II's implementing regulations, it becomes clear that the question of whether a modification constitutes a fundamental alteration must necessarily take into account the resources available (e.g., funding) and the needs of others with disabilities (e.g., the number of persons who must be served with those resources).

Justice Ginsburg's opinion in Olmstead suggests that a fundamental alteration would lie were a Court is asked to disrupt a State's "comprehensive, effectively working" plan of deinstitutionalization. "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." Id., at 605-606. A few points about this passage should be noted. First, it is not part of the Court's opinion. Only three other justices joined Justice Ginsburg in Part III-B, so this passage is not part of the Court's holding. Nor has the Eleventh Circuit Court of Appeals adopted the substance of this provision in any case. As such, while this provision may be instructive, it does not constitute binding law that this Court must follow. Second, even if Part III-B were part of the Supreme Court's opinion, it still remains that this passage does not require a showing of a comprehensive, effectively working plan in order to demonstrate that a requested modification would constitute a fundamental alteration. Rather, a comprehensive, effectively working plan is *one example* of a showing of fundamental alteration[2].

3. Analysis of Interplay Between the ADA and the Medicaid Act

To grant Plaintiffs' Motion for Preliminary Injunction, the Court will have to find 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.

[2] It should also be noted that the "comprehensive, effectively working plan" described in Olmstead is one of

As such, the only way that Plaintiffs' 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

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deinstitutionalization, not a plan for ensuring that no individual with a disability ever has to enter an institution.

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 Plaintiffs are not even alleging that the ADA has amended the Medicaid Act, but rather that a DOJ *regulation* has amended the Medicaid Act. Essentially Plaintiffs are 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 Plaintiffs' position as to the character and effect of that amendment. The Plaintiffs want 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 Plaintiffs, however, fail 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 Plaintiffs' 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 is nonsensical. 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.

C. The ADA Regulations Do Not Require a Public Entity to Provide Personal Care Services.

Here, Plaintiffs seek assistance transferring to and from their beds, toileting, and with other activities of daily life. Complaint, ¶ 16, 34. Plaintiffs contend 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). It is anticipated Plaintiffs will argue that 28 C.F.R. § 35.135 affords no defense here because § 35.135 only clarifies that Title II does not require a State to provide personal services in programs that do not already provide personal care.

Simply stated, such an 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 Plaintiffs want this Court to say that the regulation contains an exception for public entities that provide personal care services.

However, 28 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.

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 Plaintiffs are requesting here, because the "integration mandate" is itself from 28 C.F.R. Part 35, and § 35.135 states that "[t]his part does not require a public entity to provide…services of a personal nature such as eating, toileting, or dressing ." The ADA does not require the provision of these services.

D. <u>A Period of 60 Days in a Nursing Home Does Not Violate the ADA.</u>

If the Plaintiffs were to enter a nursing home, they would be eligible for the Nursing Home Transition Program after a period of 60 days. The Motion for Preliminary Injunction and Plaintiff Cruz's Declaration both indicate that Plaintiff Cruz was informed that he could be transitioned after a period of 90 days. Motion for Preliminary Injunction, ¶ 8; Plaintiff Luis J. Cruz Declaration In Support of His Motion for Preliminary Injunction, ¶ 15. Whatever Plaintiff Cruz was told, this is not accurate.[3] As indicated in the Affidavit of Elizabeth Y. Kidder, dated September 9, 2010, the Nursing Home Transition Program becomes available to an individual in a nursing home after 60 days, not 90 days.

[3] Perhaps Plaintiff Cruz confused Florida Medicaid's Nursing Home Transition Program with the federal Money Follows the Person program, discussed below, which requires 90 days in a nursing home.

Plaintiffs cite Fisher v. Oklahoma Health Care Authority, 335 F.3d 1175 (10th Cir. 2003), to support their argument that a 60 day period in a nursing home would violate the ADA. However, in the passage cited by Plaintiffs, the Fisher court was rejecting an assertion from the defendant in that case that the plaintiffs were required to enter a nursing home in order to have standing. Defendants make no such argument here. In addition, the plaintiffs in the Fisher case were faced with having to enter a nursing home *indefinitely*. That is not the case here, as the Nursing Home Transition Program would provide a funded mechanism for transition after 60 days.

What is more, Congress has definitively shown that requiring a minimum of 60 days in a nursing home before providing community-based services does not violate the ADA. In the Deficit Reduction Act of 2005 (DRA), Congress established the Money Follows the Person Rebalancing Demonstration project (MFP), which authorized the Department of Health and Human Services to authorize grants to States for demonstration programs designed to, among other things, increase the use of HCBS programs over institutional programs, and eliminate barriers to the flexible spending of Medicaid funds. Public Law 109-171; 120 Stat. 102. The MFP program essentially permits an increased federal share of Medicaid funding for nursing home transition programs. Under the DRA, the MFP funds were only available for "eligible individuals", which was defined as individuals who had resided in an inpatient facility for a period of *not less than six months*. 120 Stat. 103. In Section 2403 of the Patient Protection and Affordable Care Act of 2010 (PPACA), Congress reduced this minimum time period to "a period of not less than 90 consecutive days." Public Law 111-148; 124 Stat. 304.

The implications of this cannot be overstated. Through the DRA and PPACA, Congress has created a program whereby states are paid **more** to transition individuals to the community after spending 90 days in a nursing home than the states would receive if they transitioned such individuals before they reached 90 days. Congress is thus financially inducing states to keep individuals in nursing homes for at least 90 days before transitioning them to the community. If the 90 day period itself constitutes a violation of the ADA and Olmstead, that means that Congress is paying states to violate its own law. If even one day in a nursing home constitutes a violation of the ADA and Olmstead, as Plaintiffs seem to suggest, then the provision in the PPACA establishing a minimum time period in a nursing home before an individual can be eligible for transition simply makes no sense. Congress would be incentivizing an infraction of the ADA. A more sensible interpretation is to read the ADA, Olmstead, the DRA, and the PPACA together, and conclude that requiring a minimum amount of time in a nursing home (e.g., not less than 90 days) before transitioning an individual to a HCBS program does not violate the ADA.

It is important to note that the Department of Health and Human Services, Centers for Medicare and Medicaid Services, explicitly connect the MFP program to the implementation of Olmstead. See MFP Initial Announcement and Invitation to Apply for FY2011, dated July 26, 2010, and attached as Exhibit A to the Affidavit of Elizabeth Y. Kidder ("The passage of the Affordable Care Act (ACA) provides new and expanded opportunities to serve more individuals in home and community-based settings and adds to the tools already available so States can implement the integration mandate of the ADA as required by the *Olmstead* decision").

These provisions must also be read in light of Florida's Nursing Home Transition Program. Under Florida's program, an individual need only reside in a nursing home for 60 days before becoming eligible for transition to a HCBS waiver. So the Plaintiffs are arguing that Florida's Nursing Home Transition Program, which as it currently exists would not be eligible for MFP funding (which funding is intended to assist states in *complying* with Olmstead) because it is too *lenient,* is in violation of Olmstead because it is not lenient enough.

E. 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).

1. The Resources of the State and Needs of Others with Disabilities

As noted above, the Olmstead decision would only require the placement of an individual in a community setting as opposed to an institutional one where "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with [ ] disabilities." Olmstead, at 587. The Plaintiffs have failed to show that immediately placing them in the TBI/SCI Waiver program can be reasonably accommodated.

The Plaintiffs argue that it would cost less to provide services in the community than in a nursing home. They provide no evidence of this. Regardless, it is irrelevant, because the costs of institutional services and community services are not comparable, because they are independently funded and the Defendants have no authority to transfer funds from one

source to the other.[4] While institutional services may cost less from an absolute perspective, the Defendants do not have the authority or ability to appropriate funds as they see fit. That authority belongs to the Florida Legislature, which is not and cannot be a party to this case. The Defendants can only utilize the funds appropriated by the Legislature as directed by the Legislature.

When this Court takes into account the available resources, it must look not at all the resources of the State, but those resources of the State which are *available* to the Defendants for the purposes at hand. The TBI/SCI Waiver is funded both from General Revenue appropriations and from the Brain and Spinal Cord Injury Rehabilitation Trust Fund. 2010 General Appropriations Act, Specific Appropriation 563, Chapter 2010-152, Laws of Florida. For Fiscal Year 2010-2011, the Florida Legislature has authorized a total budget of $12,880,214. Of this, $1,168,470 comes from General Revenue and $11,711,744 from the Brain and Spinal Cord Injury Rehabilitation Trust Fund. See Affidavit of Kristen Russell, dated September 9, 2010. In fact, the TBI/SCI Waiver only has $8,469,066 available for Fiscal Year 2010-2011. Id. As of September 9, 2010, there are currently 341 individuals enrolled in the TBI/SCI Waiver. Id. Of these, 28 are funded through the Nursing Home Transition Program. Id. For the remaining 313, it is estimated that their services for FY 2010-2011 will require the full $8,469,066, and, indeed, may run over budget. Id. There would thus be no additional funds to enroll the Plaintiffs (not to mention those individuals above the Plaintiffs on the waiting list) into the TBI/SCI Waiver. Id.

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[4] The exception to this is the Nursing Home Transition Program, addressed below, which permits AHCA to transfer funds from the nursing home line item to Medicaid HCBS waiver programs. However, such transfers can only be made for individuals who have been in a nursing facility for at least 60 days.

Consistent with the rules and policies governing the TBI/SCI Waiver and the Florida Medicaid Program, Defendants have assessed both Plaintiffs. TBI/SCI Waiver personnel conducted an assessment of Plaintiff Luis Cruz on April 28, 2010. At that time, Plaintiff Cruz received a prioritization score of 86. Id. As of August 19, 2010, there were eight other individuals on the waiting list for the TBI/SCI Waiver Program with the same score as Mr. Cruz. Id. Of these, seven have been on the waiting list longer than Mr. Cruz and are thus considered to have a higher priority. Id. As of August 19 2010, there were 44 individuals on the waiting list for the TBI/SCI Waiver Program with scores greater than 86. Id. TBI/SCI Waiver personnel conducted an assessment of Plaintiff Nigel De La Torre on May 4, 2010. Id. At that time, Plaintiff De La Torre received a prioritization score of 70. Id. As of August 19, 2010, there were 17 other individuals on the waiting list for the TBI/SCI Waiver Program with the same score as Mr. De La Torre. Id. Of these, 16 have been on the waiting list longer than Mr. De La Torre and are thus considered to have a higher priority. Id. As of August 19, 2010, there were 189 individuals on the waiting list for the TBI/SCI Waiver Program with scores greater than 70. Id.

Whatever the needs of Plaintiffs may be, an analysis of the resources available to the Defendants together with the needs of other individuals with disabilities demonstrates that the relief requested by Plaintiffs cannot be reasonably accommodated. Rather, granting immediate relief to the Plaintiffs would be grossly inequitable given the many individuals on the TBI/SCI Waiver waiting list with greater needs than the Plaintiffs.

2. Florida's Comprehensive and Effective Plan

As shown above, the relief requested by Plaintiffs cannot be reasonably accommodated given the resources of the Defendants and the needs of others with disabilities. For this reason, the requested preliminary injunction would constitute a "fundamental alteration" to the Florida Medicaid Program. In addition, the requested relief would constitute a fundamental alteration because it would disrupt Florida's comprehensive, effectively working plan to place qualified persons with disabilities in less restrictive settings. See Olmstead, at 605-606. As noted above, a comprehensive, effectively working plan is **not necessary** for a showing of fundamental alteration[5], because (1) the portion of the Olmstead opinion describing such plans is not part of the majority's opinion and has not been adopted by the Eleventh Circuit; and (2) the portion of the Olmstead opinion describing such plans does not purport to require them, but only offers such plans as an "example" of how "the reasonable-modifications standard would be met." Id.

However, Florida does in fact have a comprehensive and effectively working plan of deinstitutionalization. This plan has included systematic expansion of Florida's HCBS waiver programs over the past 30 years, as well as implementation of the Nursing Home Transition Program, which is specifically tailored to implement the ADA as set forth in the Olmstead decision.

The Florida Medicaid Program has consistently expanded its HCBS waiver programs. As shown in the Affidavit of Elizabeth Y. Kidder, dated September 9, 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

[5] All that is necessary is a showing that the community placement cannot be reasonably accommodated,

waiver programs in 1982, 1985, 1989, 1991, 1995, 1998, 1999, 2004, 2006, and 2008. As shown in the Affidavit of S. Michele Morgan, dated September 8, 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 within them in any given month. See Affidavit of S. Michele Morgan, dated September 8, 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 September 9, 2010, Affidavit of Kristen Russell, the TBI/SCI Waiver program is operating at full capacity. 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 Supplemental Security Income eligible (SSI) population in the Florida Medicaid Program is 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. Affidavit of S. Michele Morgan, dated

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taking into account the resources available to the State and the needs of others with disabilities. See Olmstead, at 587.

September 8, 2010. Of those, only about 45,000, or 14%, were residing in nursing facilities in any given month. Id.

In addition to HCBS waiver expansion, the Florida Medicaid Program has instituted the Nursing Home Transition Program, which directly implements the policy behind the Olmstead decision. The Nursing Home Transition Program is based upon an appropriation by the Florida Legislature which permits AHCA to transfer funds from the nursing home line item to the various HCBS waiver programs for the purpose of transitioning the greatest number of appropriate eligible beneficiaries from skilled nursing facilities to community based alternatives. Chapter 2010-152, Laws of Florida; Specific Appropriation 219. AHCA has created a Draft Nursing Home Transition Plan (attached to the Affidavit of Elizabeth Y. Kidder as Exhibit B) to maximize the use of these funds by establishing a process to increase awareness of the Nursing Home Transition Program, identify individuals who wish to transition, assess such individuals for eligibility, and determine whether the Florida Medicaid Program has a HCBS waiver program sufficient to meet their needs. A report outlining the status of the implementation of the Nursing Home Transition Plan is attached to the Affidavit of Elizabeth Y. Kidder, dated September 9, 2010, as Exhibit C.

The Nursing Home Transition Program has been a success so far. For the period from January 1, 2009, to June 30, 2010, a total of 933 individuals were transitioned from nursing facilities to HCBS waiver programs through the Nursing Home Transition Program. See Affidavit of Elizabeth Y. Kidder, dated September 9, 2010. A total of $9,794,744.78 was spent during this period for the transition and HCBS waiver services of these 933 individuals. Id.

AHCA is continuing to expand the Nursing Home Transition Program. This expansion includes the additions of transition case management and increased home modifications. The Florida Medicaid Program submitted amendments to add transition case management to certain HCBS waivers to certain HCBS waivers and increased funding for environmental home modifications in the TBI/SCI waiver to facilitate successful community transitions. The Centers for Medicare and Medicaid Services approved those amendments and we are in the process of amending the program handbooks and contracts to account for this additional service when necessary to assist in transitioning a recipient. Id.

III. Plaintiffs Will Not Incur Any Irreparable Harm.

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

Even if Plaintiffs did enter a nursing home, this harm would not be "irreparable" as they would be eligible after 60 days for the Nursing Home Transition program, which is funded and which would allow Plaintiffs to be transferred to the TBI/SCI Waiver. This fact distinguishes the Plaintiffs' situation from those of the individuals in the cases Plaintiffs cite. In Long v. Benson, 4:08CV26-RH/WCS, 2008 WL 4571903 (N.D. Fla. Oct. 14, 2008) aff'd, 08-16261, 2010 WL 2500349 (11th Cir. June 22, 2010) , the plaintiff was faced with *indefinite* institutionalization. That is not the case here. See Affidavit of Kristen Russell, dated September 9, 2010.

Plaintiffs claim that they will lose their housing if they enter a nursing facility and will thus face irreparable harm as they will not have a home to transition back to. However, given the short amount of time that Plaintiffs would have to spend in a nursing facility before they would be eligible for the Nursing Home Transition Program, this does not seem a likely result. The Plaintiffs expect the Court to believe that they have absolutely no money in savings and that they have no social supports that could assist them in paying two months' worth of rent. Plaintiff Cruz "socializes with neighbors and friends," but wants the Court to believe that no one will be able to assist him with his apartment. Motion for Preliminary Injunction, ¶ 14. Indeed, if Plaintiff Cruz has been hospitalized for 30 and 40 day periods over the past year, he must have had some assistance at least in ensuring that his rent was paid. Plaintiff De La Torre lives with his mother, who is currently staying in the United States to care for him though her husband has moved to Spain (the Motion for Preliminary Injunction is somewhat confused on whether she has moved already, See ¶ 23, 36, p. 17), but expects the Court to believe that his mother will not ensure that his rent is paid during the short period of time he would spend in a nursing home.

As noted above, the federal MFP program only applies to individuals who have resided in a nursing facility for at least 90 consecutive days. If Congress is incentivizing such a program, it would be absurd to conclude that a more lenient program, such as Defendants', could constitute irreparable harm in violation of Olmstead.

The sad reality is that the Plaintiffs have already suffered irreparable harm, and will continue to suffer such harm, as a result of their tragic injuries. The issuance of the requested relief will not change this. Indeed, nothing the Defendants can do will change this.

What the Defendants can do is utilize their resources in the most efficient way, taking into account the needs of other individuals with disabilities (who also suffer irreparable harm as a result of their injuries), to minimize the experience of this irreparable harm by the Plaintiffs and others with disabilities. This is precisely what the Defendants are doing.

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

The Court must balance the harms in determining whether a preliminary injunction should be issued. Plaintiffs contend that the threatened harm to them outweighs any harm to Defendant. Contrary to Plaintiffs' assertions, they are not asking the Defendants to simply spend less of their Medicaid funds and permit them to continue to reside in the community. To the extent that the Plaintiffs are 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.

In addition, it should be noted that, in granting the requested injunctions, all the Court will be doing is shifting the harm (of having to wait for enrollment in the TBI/SCI Waiver) to those individuals who are higher than Plaintiffs on the waiting list. The Court would thus be shifting the harm to individuals (51 individuals in the case of Mr. Cruz and 205 individuals in the case of Mr. De La Torre) who the Defendants have determined have a **greater need** for the TBI/SCI Waiver services that Defendants would be forced to provide to Plaintiffs. Every dollar spent on services for the Plaintiffs would be a dollar that cannot be spent on individuals with greater needs.

V. The Public Interest Will Be Harmed if Plaintiffs are Granted Preliminary Injunctions.

A grant of Plaintiffs Motion for Preliminary Injunction would be contrary to the public interest. The difference in the cost of institutional versus community placement is irrelevant to the question of public interest, because, as explained above, the Defendants do not have the authority to draw from one source to pay for the other. The Legislature has determined that the current funding structure is in the public interest, and the Legislature is the body charged with making such determinations.

Furthermore, it would certainly be contrary to the public interest to "jump" Plaintiffs to the front of the line – ahead of others who have **greater needs** – simply because they filed a lawsuit. See Olmstead, at 606. The public has a strong interest in the fair and equitable distribution of scarce resources, an interest that would be thwarted by a grant of the requested injunctions.

CONCLUSION

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

Respectfully submitted this 9th day of September, 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 Steven R. Browning and Jay M. Howanitz, SPOHRER & DODD, P.L., 701 West Adams Street, Suite 2, Jacksonville, Florida 32204 this 9th day of September, 2010.

/s/ Andrew T. Sheeran
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