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, in her official Capacity as the Interim Secretary of Florida Agency for Health Care Administration

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

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS COMPLAINT

The Defendants, ELIZABETH DUDEK, in her official capacity as the Interim 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 undersigned counsel, hereby move pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P., to dismiss this cause for failure to state a claim upon which relief can be granted. As grounds therefore, Defendants state as follows:

1. On August 18, 2010, Plaintiffs Luis Cruz and Nigel De La Torre filed their Complaint, which was served on Defendants on August 19, 2010. The Complaint alleges that Defendants violate Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132

(ADA), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) (Rehab Act) by denying in-home health services to Plaintiffs.

2. This Court should dismiss the Complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., because Plaintiffs fail to allege any clear violation of the ADA, Rehab Act, or the Medicaid Act, the claim for provision of personal care services exceeds the scope of the ADA, the ADA neither abrogates nor amends the Medicaid Act, and Plaintiff's requested relief would constitute a fundamental alteration of the Florida Medicaid Program, which the ADA does not require.

3. As further support for this Motion, the Defendants submit the following Memorandum of Law, which is attached hereto and incorporated herein by reference.

MEMORANDUM OF LAW

I. Plaintiffs Fail to State a Claim Upon Which Relief Can be Granted Because They Fail to Allege Any Clear Violation of the ADA, Rehab Act, or Medicaid Act

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." 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.

Because Plaintiffs do not allege violations of the ADA, Rehab Act, or Medicaid Act, Plaintiffs fail to state a claim upon which relief can be granted and the Complaint should be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.

II. 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.

A. 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" as 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 services (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, Autism, 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 the federal Medicaid Act does not require states to do create HCBS waivers. 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 these programs. The Secretary of the Department of Health and Human Services "***may*** by waiver" allow states to create HCBS programs. Id. (emphasis added).

The Florida Medicaid program does not provide in-home personal care assistance for adults like the Plaintiffs at the level they are seeking. 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, Plaintiffs do not allege that Florida has violated the Medicaid Act by failing to

provide them with in-home personal care assistance. However, they are requesting that the Court order Defendants to provide them with such services. Such an order would effectively nullify one or more provisions of the Medicaid Act.

B. 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." 42 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.

In Olmstead, the Supreme 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. The Court found that 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 is 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 where 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. Note that this 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. 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[1].

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

Plaintiffs' claims would require the Court 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.

It is clear that an inherent assumption of Plaintiffs' 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 capable of co-existence, and the ADA contains no clear congressional intent to amend the Medicaid Act.

[1] It should also be noted that the "comprehensive, effectively working plan" described in Olmstead is one of *deinstitutionalization*, not a plan for ensuring that no individual with a disability ever has to enter an institution.

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.

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. Of course, no regulation can amend a statute.

Even if it were found that the ADA, or more specifically, the "integration mandate" in its 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). Indeed, 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 [HCBS] 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 the HCBS waiver programs would not survive.

A grant of the relief requested in Plaintiffs' Complaint will 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. Because the ADA neither abrogates nor amends the Medicaid Act, the Plaintiffs' Complaint fails to state a cause of action upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.

III. Plaintiffs' Claims for Community-Based Personal Care Services under the ADA and the Rehab Act Fail to State a Claim Upon Which Relief Can Be Granted Because the ADA Does Not Require a Public Entity to Provide Services of a Personal Nature

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. Indeed, 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.

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 (i.e., "[t]his part"), 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. Plaintiffs' Complaint therefore fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.

IV. Plaintiff's Claim Fails to State a Claim Upon Which Relief Can Be Granted Because It Would Result in an Impermissible Fundamental Alteration to the Florida Medicaid Program in Violation of the ADA

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 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 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.

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).

A. 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. Here, the immediate placement of the Plaintiffs in the TBI/SCI Waiver program cannot be reasonably accommodated.

The Plaintiffs argue that it would cost less to provide services in the community than in a nursing home. This is irrelevant. 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.[2] 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.

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.

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[2] 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.

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. This would constitute a fundamental alteration to the Florida Medicaid Program.

B. Florida's Comprehensive and Effective Plan

The requested relief would also 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, a comprehensive, effectively working plan is **not necessary** for a showing of fundamental alteration[3]. 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 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 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. Affidavit of S. Michele Morgan, dated September 8, 2010. Of those, only about 45,000, or 14%, were residing in nursing facilities in any given month. Id.

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

In addition to this expansion, the Florida Medicaid Program has instituted the Nursing Home Transition Program, which implements the policy of Olmstead. 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 HCBS waiver programs for the purpose of transitioning 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.

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

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 and environmental home modifications to certain HCBS waivers 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.

Because the relief requested under the ADA would fundamentally alter the Florida Medicaid Program, it is not required by the ADA and Plaintiffs have failed to state a claim upon which relief can be granted. This Court should dismiss the Complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P.

CONCLUSION

For the reasons stated above, this Court should dismiss Plaintiffs' Complaint pursuant to Rules 12(b)(6), Fed. R. Civ. P.

Respectfully submitted this 9th day of September, 2010.

DEPARTMENT OF HEALTH

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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
ANDREW T. SHEERAN
ATTORNEY