**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 10-23048-CIV-UNGARO/SIMONTON**

**LUIS CRUZ, and**
**NIGEL DE LA TORRE,**

**Plaintiffs,**

**v.**

**ELIZABETH DUDEK, in her official capacity as Secretary, Florida Agency for Health Care Administration,[1] and**

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

**Defendants.**
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**REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

**Presently pending before this Court is Plaintiffs' Motion for Preliminary Injunction and Expedited Hearing (DE # 2). This motion is referred to the undersigned Magistrate Judge (DE # 14). The motion has been fully briefed (DE ## 36, 38). On September 14, 2010, the United States of America filed a Statement of Interest (DE # 40). On September 16, 2010, the undersigned held a hearing on the motion.[2]**

**In support of their motion, Plaintiffs have submitted: the Declaration of Charlene Harrington, Ph.D., dated September 9, 2010 (DE # 32)[3]; the Declaration of Luis Cruz,**

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[1] Pursuant to Fed. R. Civ. P. 25, Elizabeth Dudek is automatically substituted as named Defendant as the successor in office to Thomas W. Arnold (DE # 36 at 1 n.1).

[2] At a status and scheduling conference held on September 13, 2010, the parties stated that they did not wish to present evidence at the September 16, 2010 hearing because the facts relevant to the motion were not disputed (DE # 41).

[3] Charlene Harrington is a Professor Emeritus of Sociology and Nursing at the University of California, San Francisco (DE # 32 at 1, ¶2). She has done extensive research in the areas of nursing care, and home and community services, with an

**dated August 5, 2010 (DE # 3); the Supplemental Declaration of Luis Cruz, dated September 9, 2010 (DE # 31); the Declaration of Nigel De La Torre, dated August 5, 2010 (DE # 4); the Declaration of Alejandrina Padro (De La Torre's mother), dated August 6, 2010, (DE # 5); and the Supplemental Declaration of Nigel De La Torre, dated September 9, 2010 (DE # 30).**

**In opposition to the motion, Defendants have submitted: the Affidavit of Elizabeth Y. Kidder, dated September 9, 2010 (DE # 33)[4]; the Affidavit of Kristen Russell, dated September 9, 2010 (DE # 34)[5]; the Affidavit of Susan Michelle Morgan, dated September 8, 2010 (DE # 35)[6] and the Affidavit of Kristen Russell, dated September 16, 2010 (Defendants' Exhibit 1, admitted into evidence at the 9/16/10 Evidentiary Hearing).**

**For the reasons stated below and stated on the record at the oral argument, the undersigned Magistrate Judge recommends that Plaintiffs' motion for preliminary injunction be granted.**

**I. <u>Introduction</u>**

**1. Plaintiffs Luis Cruz and Nigel De La Torre are both Florida residents with spinal cord injuries suffering from quadriplegia. Plaintiffs are both Medicaid recipients who reside in the community and wish to continue to do so. Plaintiffs could live in the community with appropriate Medicaid-funded services. Plaintiffs are at risk of being**

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**primary emphasis on Medicaid funded programs and services (DE # 32 at 2, ¶3).**

**[4] Elizabeth Y. Kidder is employed by the Florida Agency for Health Care Administration ("AHCA") as the Bureau Chief for Medicaid Services, and oversees all of Florida's home and community based ("HCBS") programs, including the Traumatic Brain Injury/Spinal Cord Injury Waiver Program (DE # 33-1 at 1-2, ¶¶1, 2).**

**[5] Kristen Russell is employed by the Florida Department of Health as the Medicaid Waiver Administrator for the Program (DE # 34-1 at 2, ¶1; Deft. Ex. 1 at 1, ¶1).**

**[6] Susan Michelle Morgan is employed by AHCA as the Bureau Chief for Medicaid Program Analysis, and her bureau is responsible, *inter alia*, for retaining and tracking date relating to HCBS waivers (DE # 35-1 at 1-2, ¶¶1, 2).**

**forced to enter a nursing home because Defendants do not provide adequate community-based services. Defendants limit community-based Medicaid services to 375 persons with spinal cord injuries, even though, as of December 2009, there were about 605 other persons with spinal cord injuries on a wait list for community-based Medicaid services under the Traumatic Brain Injury/Spinal Cord Injury waiver program (DE # 1).**

**2. Defendant Elizabeth Dudek is sued in her official position as Secretary, Florida Health Care Administration (AHCA). Defendant Dr. Ana Viamonte Ros is sued in her official position as Surgeon General, Florida Department of Health.**

**3. Plaintiffs are proceeding under a two-count Complaint, contending that Defendants have violated Title II of the Americans with Disabilities Act (hereafter ADA), 42 U.S.C. § 12132, et seq. (Count 1), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and 28 C.F.R. § 41.51(d) (Count 2), by failing to administer Medicaid in the most integrated setting appropriate to Plaintiffs and by unlawfully discriminating against Plaintiffs by improperly denying Medicaid funding for the in-home health services that Plaintiffs require to avoid being placed in nursing homes against their will. Plaintiffs also allege that Defendants cannot meet their burden of proving their affirmative defense that providing these community-based services to Plaintiffs is a fundamental alteration of Defendants' programs. Plaintiffs seek declaratory and injunctive relief ordering Defendants to provide community-based Medicaid services which will allow Plaintiffs to continue to reside in the community rather than enter a nursing facility (DE # 1).[7]**

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**[7] Plaintiffs are proposed class Plaintiffs in *Jones v. Arnold*, Case No. 3-09-cv-1170-J-34JRK, pending in the Middle District of Florida (DE # 1 at 1, ¶2). Specifically, in *Jones*, the named Plaintiff filed a motion to add Mr. Cruz and Mr. De La Torre as named Plaintiffs. However, that motion was denied without prejudice due to a pending motion to dismiss. Plaintiffs Cruz and De La Torre then filed the present action in the Middle District of Florida, and subsequently the case was transferred to this Court (DE # 10).**

**II. Findings of Fact[8]**

**Since the facts in this case must be viewed in the context of the regulatory framework of the Medicaid Act and Title II of the Americans With Disabilities Act ("ADA"), it is useful to describe those provisions at the outset.**

**Title II of the ADA, which prohibits discrimination against individuals with disabilities by public entities, specifies 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 promulgated by the Department of Justice ("DOJ") to implement the ADA contain what is commonly referred to as the "integration mandate." Those regulations provide that "a public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.150(d). The preamble to the regulations describe "the most integrated setting" as one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. § 35.130(d), App. A.**

**The Medicaid program is a medical assistance program funded by the federal and state governments. 42 U.S.C. § 1396 *et seq.* In order to participate in the Medicaid program, a state must submit a plan to the federal government outlining its program. If approved, the federal government then subsidizes a portion of the program. *See Harris v. James*, 127 F.3d 993, 996 (11th Cir. 1997). The Medicaid Act lists twenty-eight services**

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[8] **Any Findings of Fact that are more properly considered to be Conclusions of Law shall be treated as such, and *vice versa*. Where citations with respect to certain facts are made to the Motion, the pages of the Motion cited are supported by specific references to the applicable paragraphs of the Declarations of Plaintiffs.**

**which may be provided by the State as part of its plan, but makes only seven of those services mandatory for inclusion in the State's plan. 42 U.S.C. § 1396a(a)(10)(A). The mandatory services include inpatient and outpatient hospital care, laboratory and x-ray services, nursing facility services, nurse-midwife services, and certified nurse practitioner services. 42 U.S.C. § 1396a(a)(10(A). Thus, as stated by Defendants, Florida is required by federal law to make nursing facility services available if those services are medically necessary for individuals who are qualified to participate in the Medicaid program (DE # 36 at 7). Moreover, as stated by defense counsel at the hearing, if the money budgeted by the State for nursing facility services is inadequate to meet the needs of all qualified participants, the State must allocate additional money from other sources to meet this need.**

**In addition to the Medicaid Services offered under a State's plan, a State may enter into an agreement with the federal government to offer services under a waiver program, such as the Home and Community Based Services ("HCBS") waiver program. 42 U.S.C. § 1396n(c). Waiver programs allow states to provide home and community based services to individuals with disabilities who would otherwise require the level of care provided in institutions such as nursing homes (DE # 40 at 4 n.5). Under waiver programs, such as the Traumatic Brain Injury/Spinal Cord Injury ("TBI/SCI") Waiver program at issue in the case at bar, the federal government agrees to "waive" certain requirements of the Medicaid Act without jeopardizing federal financial participation in the State's plan. 42 U.S.C. § 1396n(c)(3). One of the requirements waived is the "comparability" requirement that requires state plans to offer services of all Medicaid recipients in the same amount, duration and scope. 42 U.S.C. § 1396(a)(10)(B). In addition, a State is permitted to "cap" the number of persons receiving waiver services,**

**42 U.S.C. § 1396n(c)(9)-(10); and, may elect not to offer such waiver services on a statewide basis. 42 U.S.C. § 1396n(c)(3). However, a state may submit a request to amend its cap if necessary, for example, to comply with the provisions of the ADA (DE # 40 at 15 n.17, and Ex. 6).**

**A. Facts as to Plaintiff Luis Cruz**

**4. Plaintiff Cruz was born in 1957. On March 6, 1992, he was in a car accident, and required hospitalization for a year for a spinal cord injury (DE # 2 at 2, ¶1).**

**5. Plaintiff Cruz is a qualified person with a disability, within the meaning of the ADA, in that he has quadriplegia (C-2/C-7), is paralyzed from the neck down, and cannot use his hands or fingers. He uses a wheelchair for mobility (DE # 2 at 2, ¶2).**

**6. Plaintiff Cruz lives alone in an accessible apartment in Miami, Florida, with a shower that has a bench attached to the wall for him to sit on. He requires assistance with all activities of daily living, including help transferring to and from bed and to and from a toilet, bathing, cooking and shopping for food. He wears a special condom catheter which connects to a urinary bag (DE # 2 at 2, ¶3).**

**7. Plaintiff Cruz has lived in the community since the March 6, 1992 car accident. He was married prior to the accident, and was divorced in 1997. For nearly five years after he became paralyzed, Cruz lived in institutions. He was in Florida's Adult Congregate Living Facilities and was in a mental hospital for severe clinical depression. In the Adult Congregate Living Facilities, he was forced to share a room with four or five persons and had no privacy. (DE # 2 at 2, ¶4).**

**8. Plaintiff Cruz desires to continue to reside in his own apartment and community instead of entering a nursing facility. If Cruz enters a nursing facility, he will not be able to afford to pay rent and will lose his apartment. There are very few**

**accessible apartments that Cruz can afford, and he does not want to lose the apartment in which he has resided for the past 12 years (DE # 2 at 2-3, ¶5).**

**9. Plaintiff Cruz is eligible for and receives Medicaid assistance. In January 2006, he applied to Defendants for Spinal Cord Waiver services. Since then, he has been on a waiting list (DE # 2 at 3, ¶6; DE # 31 at 2, ¶7).**

**10. Since January 2010, Plaintiff Cruz has been hospitalized approximately five times. Florida's Medicaid assistance paid for those hospitalizations. During two of his hospitalizations, he was a patient for 40 days and then 30 days because he had developed a bedsore. At the time the instant motion was filed, Cruz was hospitalized after his leg became caught in his wheelchair and he fell, breaking his tibia. He was discharged from the hospital on August 20, 2010. All of his hospitalizations in 2010 were either directly or indirectly a result of not receiving adequate in-home health care services (DE # 2 at 3, ¶7; DE # 31, at 1, ¶1).**

**11. While Plaintiff Cruz was hospitalized in March, 2010, he telephoned Defendants' Spinal Cord Injury Waiver program and again requested services. Cruz spoke to Beth Herra, who told him that there were no funds available in the Waiver program, but if he went into a nursing home for 90 days, he would then receive Waiver services. During another hospitalization, Cruz telephoned Defendants' Medicaid Waiver office regarding the availability of waiver services, but no one there could tell him what waiver services would be provided in the community if he did not enter a nursing home. Cruz has averred that he will not enter a nursing home. He wants to continue residing in the community and could do so with appropriate waiver services provided with Medicaid funds (DE # 2 at 3, ¶8).**

**12. At present, Defendants' Medicaid program pays HealthMed, a private home-health agency, for assistance with Plaintiff Cruz's daily living. Cruz receives one hour per day of skilled nursing care and three hours per day of home health aide services. However, these are not sufficient to meet many of his living activities. During his most recent hospitalization, Cruz was told that on release, he would receive four hours per day of personal care assistance and one hour of registered nurse care. However, when he was released, he was told that the maximum is a total of four hours a day for personal care assistance and registered nurse care combined (DE # 2 at 3-4, ¶9; DE # 31 at 1-2, ¶¶2-3).**

**13. Plaintiff Cruz needs help with the following daily needs: transferring from bed to wheelchair (5-10 minutes); transferring from wheelchair to toilet (5-10 minutes); toileting (30-50 minutes); shaving (10 minutes); eating (each meal is 30-45 minutes); condom catherization and urinary bag (several times a day, each time is 20-30 minutes); dressing (45 minutes in the morning and 20 minutes in the evening); and range of motion exercising (1.5 hours). Cruz also needs help with: housekeeping, including sweeping, mopping and washing dishes (1 hour); meal preparation (three times a day); grocery shopping and laundry (because Cruz's urinary catheter leaks, his clothes need to be frequently washed) (DE # 2 at 4, ¶10),**

**14. Since Plaintiff Cruz has returned home, the three hours of home health care he receives are not adequate to provide for all his needs. For example, there is not sufficient time to perform laundry, meal preparation and house cleaning tasks. In the morning, Cruz has to try to use the bathroom, take a shower and get dressed in less than an hour, which is rushed and often not completed. Sometimes he does not have enough time to take a bowel movement. Furthermore, due to lack of services,**

**sometimes Cruz has to stay in his wheelchair while he sleeps at night. Cruz worries that he will develop another pressure sore from sleeping in his wheelchair. However, Cruz would rather develop ulcers and even die than return to a nursing home (DE # 31 at 2-3, ¶¶5, 6, 8) .**

**15. Plaintiff Cruz has no family or other informal support to assist with any of these activities of daily living. Because he does not receive an adequate number of hours of assistance, he has, on occasion, fallen from his wheelchair and stayed on the floor until the next day, when someone arrived to assist him. On one occasion, he slept on the bathroom tile floor for about 36 hours when the person scheduled to provide assistance did not arrive. Cruz has also slept in his wheelchair and has urinated on himself when his leg bag was not emptied and overflowed because no one was available to assist him (DE # 2 at 4, ¶11).**

**16. Plaintiff Cruz does not want to go into a nursing home but wants to continue residing in the community where he has an active life. Without community-based Spinal Cord Waiver services, he is at significant risk of being institutionalized (DE # 2 at 4, ¶12).**

**17. Plaintiff Cruz avers without contradiction that he is thriving in the community. He has volunteered with Park and Recreation officials from several counties to train their employees about how to interact with people with spinal cord injuries and also with children who have mental illness. Cruz has also volunteered with an aquatic program for people with disabilities to overcome their fears of swimming by showing them how they could swim, and has given seminars for medical and physical therapy students at the University of Miami and Florida International University, for their fertility programs (DE # 2 at 5, ¶13).**

**18. Plaintiff Cruz socializes with neighbors and friends and goes out for meals and movies. He visits friends and watches sports with them on television (DE # 2 at 5, ¶14).**

**19. While Defendants do not dispute that Plaintiff Cruz is at significant risk of institutionalization, he has not been offered Spinal Cord Injury waiver services with sufficient hours of personal care assistance so he can remain safely in the community (DE # 2 at 5, ¶15).**

**20. Plaintiff Cruz has been eligible for both Florida's Medicaid nursing home services and waiver services since he broke his spine, and Cruz continues to meet Florida's level of care for nursing home eligibility (DE # 2 at 5, ¶16).**

**21. Persons in the United States with Plaintiff Cruz's level of disability receive a mean amount of 85.9 hours of personal assistance per week. Plaintiff Cruz receives 21 hours of paid home health care per week. This is far below what other persons with similar levels of disabilities require to reside safely in the community (DE # 32 at 5, ¶¶15, 16, 18, 20).**

**B. Facts as to Plaintiff Nigel De La Torre**

**22. Plaintiff De La Torre was born in Cuba in 1983. He came to the United States in 1991 with his mother and brother, and lives in Miami, Florida. In July 2007, De La Torre was shot and robbed. As a result of the shooting, he is paralyzed (DE # 2 at 5, ¶¶17-18).**

**23. Plaintiff De La Torre is a qualified person with a disability in that he has quadriplegia, is paralyzed from the chest down, and cannot use his hands or fingers. He uses a motorized wheelchair, and lives in an apartment with an accessible bathroom (DE # 2 at 5-6, ¶18).**

**24. In October 2007, during Plaintiff De La Torre's five-month hospitalization in Jackson Memorial Hospital in Miami, his mother applied for Spinal Cord Injury Waiver services. For almost two and a half years, De La Torre has been on the waiting list for in-home Spinal Cord Injury Waiver services (DE # 2 at 6, ¶19; DE # 5 at 1, ¶2; DE # 30 at 3, ¶11).**

**25. On a number of occasions, Plaintiff De La Torre has telephoned and contacted the Florida Spinal Cord Injury Waiver program because he needs the services provided under the Waiver program to continue living in the community. For example, on May 10, 2010, he telephoned the Spinal Cord Waiver program and was told that there were no funds to provide him with Waiver services, and that he would be sent something in writing to confirm this. However, De La Torre has not received anything or heard from the Spinal Cord Waiver program since then (DE # 2 at 6, ¶20).**

**26. Until Plaintiff De La Torre started receiving two hours a day of personal care from Nurse Care early in 2010, his mother was his only care giver. This was in addition to her full time job as a therapist (DE # 5 at 1, ¶3)**

**27. At present, Defendants' Medicaid Assistance state agency pays Nurse Care, a private home-health agency, for one hour of personal care assistance in the morning and one hour at night for Plaintiff De La Torre. Nurse Care will provide a maximum of four hours a day of services. De La Torre's Nurse Care coordinator is Rosie Nieves, with whom De La Torre has regularly discussed his need for more personal care assistance. Nieves has told De La Torre that he needs much more help than Medicaid Assistance can provide, including homemaker and respite services, as well as skilled care to change his catheter and suppository (DE # 2 at 6, ¶21; DE # 30 at 1, ¶1).**

**28. Beginning on September 2, 2010, Plaintiff De La Torre started to receive registered nursing care for his catherization (DE # 30 at 2, ¶5).**

**29. Rosie Nieves recently requested an increase in the amount of personal care for Plaintiff De La Torre, but this request was denied, even though on July 26, 2010, De La Torre's treating doctor recommended that he receive four hours of home care per day (DE # 30 at 1, ¶¶2-4).**

**30. In the past, Plaintiff De La Torre's mother provided many hours of personal care assistance, including changing De La Torre's catheter and administering a suppository to him every other day. On September 8, 2010, Plaintiff De La Torre's mother moved to Spain, where De La Torre's stepfather has lived for months. De La Torre's 21-year-old brother provides some assistance, but he has enlisted in the Marines and is waiting to be called to active duty. In addition, De La Torre's brother is often not at home. Thus, De La Torre frequently has no one to provide the care he needs and is at imminent risk of going into a nursing facility, even though he does not want to enter one (DE # 2 at 6-7, ¶¶22, 23; DE # 5 at 1,2, ¶5, ¶8; DE # 30 at 2, ¶¶6-7, 12).**

**31. Plaintiff De La Torre requires assistance with all activities of daily living. He is over six feet tall and weighs 200 pounds. Due to his size, he is not easy to lift or transfer. Although his mother often helped with transferring him to and from his wheelchair to his bed, when no one else was available to help, she injured her back and elbow doing so. It was also very difficult for his mother to turn him at night so that De La Torre did not develop bedsores (DE # 2 at 7, ¶24; DE # 5 at 1, ¶4).**

**32. Plaintiff De La Torre requires help with the following daily needs: transferring from bed to shower chair and then back to bed (20 minutes); showering and being washed (30-45 minutes); shaving (10-15 minutes); brushing teeth and other oral hygiene**

**(15 minutes); skin maintenance (5 minutes); eating (each meal is 30-45 minutes); bowel program (1.5 hour); catheter (several times a day); dressing (30-45 minutes in the morning and 20 minutes in the evening); transferring in the evening and after shower in the morning (20 minutes); and range of motion exercise (45 minutes). De La Torre also wants to stand in a "Standing Frame" machine for an hour per day, which will require assistance (DE # 2 at 7, ¶25). Now that his mother has moved to Spain, De La Torre needs help with: housekeeping; meal preparation; grocery shopping and laundry (DE # 2 at 7, ¶26; DE # 5 at 1, ¶6).**

**33. Even though Plaintiff De La Torre has a Medicaid reimbursed personal attendant for one hour in the morning and one hour in the evening from Nurse Care, two hours a day is not adequate to meet his needs and fully assist him (DE # 2 at 7, ¶27).**

**34. At times during the day, when his mother was at work and no one was available to assist him, Plaintiff De La Torre's bladder filled and he was not able to have it catheterized. De La Torre has had one urinary tract infection and is afraid of contracting another one (DE # 2 at 7, ¶28).**

**35. During the day, Plaintiff De La Torre needs assistance transferring from his wheelchair to the toilet so he can have a bowel movement. If no one is available and he has a bowel movement, he will sit in soiled clothing until he gets assistance (DE # 2 at 8, ¶29). Also, when no one is available to assist him during the day, De La Torre is unable to prepare lunch, take medication in the order prescribed or go to medical appointments, and also cannot accomplish other activities of daily living (DE # 2 at 8, ¶30).**

**36. Nurse Care has told Plaintiff De La Torre that only the Spinal Cord Injury Waiver program can offer the number of hours he needs, including assistance with**

**shopping, cleaning and food preparation, and paying for an air mattress pump which will lessen his chance of developing pressure sores (DE # 30 at 3, ¶¶8-10).**

**37. Crediting his Declaration, Plaintiff De La Torre does not want to reside in a nursing home. He is young, and very much enjoys the freedom he has by living in the community. He goes fishing with friends, as well as to the movies and to malls. He participates in many other activities with friends who visit him, such as playing dominoes and watching movies on television (DE # 2 at 8, ¶¶34-35; DE # 30 at 3, ¶12).[9]**

**38. Now that his mother has moved to Spain, Plaintiff De La Torre is afraid he will have to enter a nursing facility to receive the same services he could receive in the community through the Spinal Cord Injury Waiver. Even though De La Torre is at imminent risk of institutionalization, the State of Florida Medicaid program has not offered any increased services so that he can remain in the community (DE # 2 at 8, ¶36).**

**39. De La Torre has been on the Spinal Cord Injury Waiver waiting list since March, 2007. On May 10, 2010, Plaintiff De La Torre telephoned the Spinal Cord Medicaid Waiver program regarding waiver services, but no Waiver services have been provided to him and no one at the Spinal Cord Waiver office could tell De La Torre when services would be provided for him in the community. Defendants' Medicaid program will only provide the services De La Torre needs by paying for his institutionalization in a nursing facility (DE # 2 at 8-9, ¶37).**

**40. Persons in the United States with Plaintiff De La Torre's level of disability receive a mean amount of 118.5 hours of personal assistance per week. Plaintiff De La Torre receives 14 hours of paid home health care per week. This is far below what other**

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**[9] Plaintiffs' motion is missing paragraphs 31 through 33. *See* DE # 2 at 8.**

**persons with similar levels of disabilities require to reside safely in the community (DE # 32 at 5, ¶¶15, 17, 18, 20).**

**C. Facts Relating to Defendants' Spinal Cord Injury Waiver Program**

**41. The State of Florida's Traumatic Brain Injury/Spinal Cord Injury Waiver Program (hereafter "the Program"), is funded both from General Revenue Appropriations and from the Brain and Spinal Cord Injury Rehabilitation Trust Fund. For the current fiscal year, the Program has a total budget of $12,880,214, with $1,168,470 coming from General Revenue and $11,711,744 from the Brain and Spinal Cord Injury Rehabilitation Trust Fund (DE # 36 at 21). However, the Program is projected to have only $8,469,066 available for the current fiscal year (DE # 34-1, at 3, ¶10; DE # 36 at 21).**

**42. The Program was implemented in 1999 and has expanded from an average monthly caseload of 245 persons in Fiscal Year 2005-06 to an average monthly caseload of 309 persons in Fiscal Year 2008-09. Program expenditures have increased from $5,874,815 in Fiscal Year 2005-06 to $10,066,381 in Fiscal Year 2008-09 (DE # 36 at 24).**

**43. The Program is presently operating at full capacity, at least in terms of its funding (DE # 36 at 24).**

**44. As of September 9, 2010, there are 341 individuals enrolled in the Program. Twenty-seven of these individuals are funded through the Nursing Home Transition**

**Program.[10] It is estimated that costs relating to the remaining 313 individuals will require the full $8,469,066 and may run over budget (DE # 36 at 21; Deft. Ex. 1 at 2, ¶2).**

**45. On April 28, 2010, the Program assessed Plaintiff Cruz, giving him a prioritization score of 86. As of August 19, 2010, there were eight other individuals on the waiting list for the Program with the same score, seven of whom have been on the waiting list longer than Cruz and, thus, have a higher priority. As of August 19, 2010, there were 44 individuals on the waiting list with scores greater than 86 (DE # 36 at 22).**

**46. On May 4, 2010, the Program assessed Plaintiff De La Torre, giving him a prioritization score of 70. As of August 19, 2010, there were 17 other individuals on the waiting list for the Program with the same score, 16 of whom have been on the waiting list longer than De La Torre and, thus, have a higher priority. As of August 19, 2010, there were 189 individuals on the waiting list with scores greater than 70 (DE # 36 at 22).**

**47. There are 602 persons currently on the waiting list for the Program. Fifty-two of them are currently in a nursing facility (Deft. Ex. 1 at 2, ¶3).**

**48. In most cases, when a Medicaid recipient is diverted or transitioned from a nursing facility to a HCBS waiver program, costs to Medicaid for providing care to that individual are reduced (DE # 35-1 at 3, ¶15).**

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**[10] As described *infra.*, the Nursing Home Transition Program is funded by the Florida Legislature through a nursing home line item, and permits the State to transfer persons who have been in a nursing home for at least 60 consecutive days into a HCBS waiver program, such as the TBI/SCI waiver program at issue in the case at bar (DE # 33, Ex. 1 at ¶7-10). It provides a separate source of funding, and thus individuals such as Plaintiffs in the case at bar, can enter the TBI/SCI waiver program after spending 60-days in a nursing home, although they would otherwise be barred from the TBI/SCI waiver program due to funding constraints.**

**D. Facts Relating to Defendants' Nursing Home Transition Program**

**49. 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 Home and Community Based (HCBS) waiver programs for the purpose of transitioning the greatest number of appropriate eligible beneficiaries from skilled nursing facilities to community based alternatives (DE # 36 at 25).**

**50. The Nursing Home Transition Program becomes available after an individual has spent 60 days in a nursing home (DE # 36 at 16).**

**51. For the period from January 1, 2009 to June 30, 2010, 933 individuals were transitioned from nursing facilities to all HCBS waiver programs through the Nursing Home Transition Program. A total of $9,794,744.78 was spent during this period for the transition and waiver services relating to the 933 individuals (DE # 36 at 25). For budgeting purposes, AHCA assumes that it costs the same to have two persons diverted from a nursing home into a HCBS waiver program, as it does to have one person remain in a nursing home (DE # 35-1, at 3-4, ¶16). The average per capita rate at which Medicaid reimburses nursing homes for Medicaid services is $6,276.00 per month; whereas the average monthly cost of services in the TBI/SCI waiver program during 2008-2009 was $2,361.47 (DE # 40 at 5-6).**

**52. AHCA has created a Draft Nursing Home Transition Plan to maximize the use of these funds, to increase awareness of the Nursing Home Transition Program, to identify individuals who wish to transition, assess such individuals for eligibility, and determine whether Florida Medicaid has a HCBS waiver program sufficient to meet their needs (DE # 36 at 25).**

**III. Conclusions of Law**

**A party seeking a preliminary injunction must establish four elements: 1) a substantial likelihood that it will prevail on the merits of its claim; 2) a substantial threat that it will suffer irreparable harm; 3) that the threatened injury to movant outweighs any threatened harm to the alleged respondent; and 4) that granting the preliminary injunction would serve the public interest. *Horton v. St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001) (citing *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000)).**

**When a motion for preliminary injunction goes beyond seeking to maintain the status quo, and seeks some relief beyond the status quo, it becomes an affirmative or mandatory injunction, and the burden placed on the moving party is increased. *See Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC*, 605 F.Supp.2d 1189, 1196 (N. D. Ala. 2009). Mandatory preliminary injunctions are disfavored. *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976).[11] A mandatory preliminary injunction should not be granted unless 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. 1971).**

**The parties disagree as to the nature of the relief sought. Plaintiffs contend that because they seek to prohibit unlawful discrimination, the injunctive relief they seek is prohibitive in nature and does not seek to change the status quo. Defendants contend that because Plaintiffs do not presently qualify for the Program, and ask this Court to order Defendants to provide them with the services provided to individuals in the Program, Plaintiffs seek to change the status quo by requiring Defendants to act. The**

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[11] **In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.**

**undersigned has determined that Plaintiffs have satisfied the heightened burden of demonstrating their entitlement to mandatory preliminary injunction relief, relying on the District Court's ruling in *Haddad v. Arnold*, Case No. 3:10-cv-414-J-99MMH-TEM, at DE # 49 (M.D. Fla. Jul. 9, 2010) (hereafter *Haddad)*. Therefore, the undersigned need not resolve the parties' dispute as to the applicable standard.**

**A. Plaintiffs Have Shown a Clear Likelihood of Success on the Merits**

**To establish a violation of Title II of the ADA, Plaintiffs must prove that they, are 1) both qualified individuals with a disability; 2) who were either excluded from participation or denied the benefits of the public entity Defendants' services, programs or activities or were otherwise discriminated against by Defendants; and 3) such exclusion, denial of benefits or discrimination was by reason of Plaintiffs' disabilities. *See Raines v. Florida*, 983 F.Supp. 1362, 1371 (N.D. Fla. 1997). It is undisputed that both Plaintiffs are qualified individuals with disabilities.**

**In *Olmstead v. Zimring*, 527 U.S. 581 (1999), the United States Supreme Court expressly held that the anti-discrimination provisions of the Americans with Disabilities Act may, in some circumstances, require the placement of persons with disabilities in community settings rather than in institutions. Specifically, the Court stated: "Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."[12] 527 U.S. at 587.**

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**[12] The disability at issue in *Olmstead* was a mental disability; however, the nature of the disability is not material to the analysis.**

**In reaching this result, the Court first reviewed the Congressional findings and definitions contained within the ADA, emphasizing the express Congressional purpose in eliminating all forms of discrimination against persons with disabilities, including "discrimination against individuals . . . in such critical areas as . . . institutionalization." 527 U.S. at 588-89, *quoting* 42 U.S.C. § 12101(a)(3). The Court then noted that Congress had instructed the Attorney General to issue regulations implementing the ADA, and that pursuant to this statutory authority, the Attorney General had promulgated 28 C.F.R. § 35.130(d), which requires recipients of federal funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 527 U.S. at 592. In this context, the Court noted:**

> **The preamble to the Attorney General's Title II regulations defines "the most integrated setting appropriate to the needs of qualified individuals with disabilities" to mean "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35, App. A, p. 450 (1998). Another regulation requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," unless those modifications would entail a "fundamenta[l] alter[ation]; called here the "reasonable-modifications regulation," it provides:**
>
> > **"A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (1998).**

**With these provisions in mind, the Court turned to their application in the context of the case at hand.[13] The plaintiffs in *Olmstead* were institutionalized due to their**

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[13] **The Court noted, however, that although the parties had disputed the proper construction of these regulations, they had not challenged their validity, and therefore**

**mental disabilities. They claimed that the State's failure to place them in a community based program, with the ultimate goal of integrating them into the mainstream of society, violated Title II of the ADA. The District Court granted partial summary judgment in favor of the mentally disabled plaintiffs, holding that the State had violated the ADA, and rejected the State's defense that inadequate funding, rather than discrimination, was the reason for retaining the plaintiffs in an institution. The District Court also rejected the State's defense that, since the State was already using all available funds to provide services to other persons with disabilities, requiring immediate transfers would "fundamentally alter" the State's activities. On appeal, the Eleventh Circuit affirmed the judgment of the District Court, but remanded for a reassessment of the State's cost based defense. The Eleventh Circuit held that the District Court erred in absolutely ruling out lack of funding as a defense, stating that the State could prevail on this theory if it could prove that requiring it to provide community based integrated services to the plaintiffs would cost so much that, given the demands of the State's mental health budget, it would fundamentally alter the services provided by the State.**

**On review, the Supreme Court affirmed the Eleventh Circuit in substantial part, stating:**

> **Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand. Accordingly, we further hold that the Court of Appeals' remand instruction was unduly restrictive. In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides**

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**the Court did not expressly determine their validity. 527 U.S. at 592.**

> **others with mental disabilities, and the State's obligation to mete out those services equitably.**

**527 U.S. at 597. Justice Stevens joined the opinion of the Court up to this point, but would have simply affirmed the decision of the Eleventh Circuit to remand the case to the District Court for consideration of the fundamental-alteration defense. A plurality of four justices then explained how a state could meet its burden of establishing this defense. Specifically, the plurality recognized:**

> **To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.**

**527 U.S. at 606.**

**Although *Olmstead* involved plaintiffs who were seeking to be removed from institutions, the holding applies equally to plaintiffs who are seeking to avoid institutionalization. *See Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003). In *Fisher*, the plaintiffs, in a community-based Medicaid program, objected to their limit of five prescriptions per month, regardless of medical necessity, while individuals in nursing homes had no limit on their prescriptions. The plaintiffs contended that imposition of this limit would force them into nursing homes to obtain medically necessary care. *Id.* at 1177-78. The appellate court rejected the defendants' argument that the plaintiffs could not make an integration mandate challenge until they were placed into the nursing homes, reasoning that the protections of the integration mandate "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or**

**policy that threatens to force them into segregated isolation." *Id*. at 1181. *Accord Haddad*, at 20 (granting a preliminary injunction to a plaintiff who was at risk of institutionalization); *Mario M. v. Cansler*, 679 F.Supp.2d 635, 637 (E.D.N.C. 2010) (granting preliminary injunction where the plaintiffs were at risk of institutionalization).**

**Following *Olmstead*, District Courts in both the Middle District of Florida and the Northern District of Florida have granted preliminary injunctive relief in circumstances almost identical to those presented here. In *Haddad, supra.,* the Court in the Middle District of Florida entered a preliminary injunction which required Florida to provide the quadraplegic plaintiff with services under the TBI/SCI waiver program. Plaintiff Haddad, like Plaintiffs in the case at bar, was a quadriplegic who had applied to receive Medicaid services under Florida's TBI/SCI Waiver program, and was placed on a waiting list. Defendants in *Haddad*, as in the case at bar, took the position that there were no funds for in-home services under the Waiver program, but that if she resided in a nursing home for at least 60 days, she would be eligible to receive in-home services through Florida's Nursing Home Transition Plan. Plaintiff Haddad, like Plaintiffs in the case at bar, claimed that Defendants were discriminating against her on the basis of her disability, in violation of the ADA. In a lengthy and thorough opinion, relying primarily on *Olmstead*, the District Court agreed and granted Plaintiff Haddad's motion for a preliminary injunctive relief. Specifically, the Court found that the ADA requires states to provide community based treatment for persons with disabilities when: 1) the state's treatment professionals have determined that community based services are appropriate for an individual; 2) the individual does not oppose such services, and 3) the services can be reasonably accommodated, taking into account a) the resources available to the state and b) the needs of others with disabilities. *Haddad* op. at 21, citing *Olmstead*, 527 U.S.**

**581, 602-04; *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 379-80 (3d Cir. 2005); *Frederick L. v. Dep't of Pub. Welfare of the Commonwealth of Pa.*, 364 F.3d 487, 493 (3d Cir. 2004); *Fisher*, 335 F.3d at 1181.**

**The United States District Court for the Northern District of Florida reached the same result in *Long v. Benson*, No. 4:08cv26-RH/WCJ, 2008 WL 4571903 (N.D. Fla. Oct. 14, 2008), and entered a preliminary inunction which required Florida to provide the paralyzed plaintiff, who was on a waiting list for an unspecified Medicaid waiver program, with four hours of personal attendant care per day, isolated emergency personal attendant care, and the same outside medical care that would be covered if Plaintiff was in a nursing home. Moreover, the Eleventh Circuit Court of Appeals summarily affirmed the preliminary injunction entered by the District Court in *Long*, finding no abuse of discretion. *Long v. Benson*, No. 08-16261, 2010 WL 2500349 (11th Cir. Jun. 22, 2010).**

**In the case at bar, it is clear that Plaintiffs are at risk of institutionalization if they do not receive the services available under the TBI/SCI Waiver Program. Both Plaintiffs in the case at bar are individuals with disabilities who are eligible to and do receive services from Florida's Medicaid program. Each Plaintiff desires to and is able to live in their own home with adequate support services. However, because of the way Florida administers its Medicaid program, they are at risk of institutionalization. Plaintiff De La Torre has recently lost his caregiver, and without additional community-based services from Florida's Medicaid plan, he will have to enter a nursing home to receive the services he needs to survive. Plaintiff Cruz is also at risk of institutionalization, as demonstrated by his repeated hospitalizations in recent months due to the fact that he does not receive adequate services from Florida's Medicaid plan. At the hearing,**

**Defendants conceded that Plaintiffs are qualified persons with disabilities who want to and are able to receive community-based services from Florida's Medicaid plan. Defendants, however, contend that Plaintiffs are required to enter a nursing home for at least 60 days before they are eligible to receive these services because they are too far down on the waiting list to receive the services through the TBI/SCI waiver program, and the only other avenue is through the nursing home transition program.**

**This is precisely the type of discrimination prohibited by the Supreme Court in *Olmstead*, by the Middle and Northern District Courts of Florida in *Haddad*, and *Long*, and by other lower courts following *Olmstead*. *See Makin v. Hawaii*, 114 F.Supp. 2d 1017, 1034 (D. Haw. 1999) (individuals in the community on the waiting list for community based services offered through Hawaii's Medicaid program could challenge administration of program for violating Title II integration mandate because the program could potentially force the plaintiffs into institutions); *M.A.C. v. Betit*, 284 F.Supp.2d 1298, 1309 (D. Utah 2003) (ADA integration mandate applies equally to individuals at risk of institutionalization and to individuals already institutionalized); *Crabtree v. Goetz*, 2008 WL 5330506 at *30 (M.D. Tenn. Dec. 19, 2008) (the plaintiffs have demonstrated a strong likelihood of success on their ADA claims because the defendants' drastic cuts of the plaintiffs' home health care services will force the plaintiffs into nursing homes); *accord Brantley v. Maxwell-Jolly*, 656 F.Supp. 2d 1161, 1164 (N.D. Cal. 2009); *Cota v. Maxwell-Jolly*, 688 F.Supp. 2d 980, 985 (N.D. Cal. 2010) and *V.L. v. Wagner*, 669 F.Supp. 2d 1106, 1109 (N.D. Cal. 2009)(all granting preliminary injunctions where the plaintiffs were at risk of institutionalization due to cuts in community-based services). Defendants have not cited any cases which support their contrary position.**

**Morever, Defendants also have not shown that the requested relief would fundamentally alter the Florida Medicaid program or affect the Florida Medicaid program's ability to provide services to others with disabilities. Defendants agreed at the hearing that they have the burden of proof as to a fundamental-alteration defense.**

**Defendants have produced no evidence that placing Plaintiffs in the TBI/SCI Waiver program would reduce the availability of services to individuals ahead of Plaintiffs on the waiting list or already in the program. It is undisputed that the Florida Medicaid program saves money when a Medicaid recipient is served in a home and community based program rather than in a nursing home. Defendants conceded that it would cost at least twice as much for Medicaid to place an Plaintiffs in a nursing home instead of placing Plaintiffs in the TBI/SCI Waiver program. *Accord Haddad* op at 12.**

**Defendants' argument that the costs of institutional services and community based services are not comparable because they are independently funded by the Florida legislature must fail. The relevant resources for evaluating a fundamental alteration defense here consists of all money which Florida receives, allots or spends to provide services to persons, like Plaintiffs, who have spinal cord injuries. *See Disability Advocates, Inc. v. Patterson*, 598 F.Supp.2d 350 (E.D.N.Y. 2009) (the Court rejected the State's argument that the relevant budget was the budget of one state agency, when other state agencies and programs also spent money on services to disabled individuals). Similarly, Defendants' argument about the details of the state budgetary process does not allow them to avoid compliance with the ADA. *Haddad* op. at 32-33 (the Court noted that budgetary constraints, standing alone, were insufficient to establish a fundamental alteration defense) (quoting *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d at 381).**

**In addition, Defendants have not demonstrated that they have a comprehensive, effectively working plan in effect to address unnecessary institutionalization. *Olmstead*, 527 U.S. at 605-06;[14] *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d at 381-82. Defendants have not shown that the TBI/SCI Waiver program has been expanded or adjusted to reduce the lengthy waiting list, or that there is a basis for not seeking such an expansion. As stated in the facts, there is express guidance from the federal government which permits a State to submit a request to amend its cap to comply with provisions of the ADA (DE # 40 at 15 n.17 and Ex. 6). Defendants have only provided evidence that they are expanding or seeking to expand other waiver programs which have removal of persons from institutions as their goal. In *Haddad*, the Court found that evidence of expansion of other waiver programs did not address the effectiveness of the TBI/SCI Waiver program, and the same applies here. *Haddad* op. at 34. Requiring institutionalization of persons before they can receive assistance which will enable them to reside in the community runs counter to the express provisions of the integration mandate promulgated pursuant to the ADA, and does not constitute an effective working plan to address unnecessary institutionalization.**

**Moreover, Defendants have not filled the number of slots available in the TBI/SCI Waiver program. Defendants have also not provided any information concerning the average amount of time on the waiting list, the rate of turnover, or when, if ever Plaintiffs can expect to move off the waiting list. Indeed, the TBI/SCI Waiver program appears**

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**[14] The undersigned recognizes that this is the test established only in the plurality opinion; however, the plurality opinion is persuasive in this regard. In any event, the State has not otherwise established a fundamental alteration of its Medicaid program since it agrees that Plaintiffs would be entitled to such services after spending 60 days in a nursing home, provided that Plaintiffs were still able to maintain themselves in the community with assistance provided by the TBI/SCI program.**

**stagnant. Defendants appear to concede that no one presently on the waiting list will be moved off the waiting list unless they agree to submit to at least 60 days of institutionalization. Therefore, Defendants have shown that they have no plan or commitment to avoid unnecessary hospitalization of persons, like Plaintiffs, who qualify for the TBI/SCI Waiver program.**

**To conclude, Defendants have not supported their assertion that providing community-based services to Plaintiffs instead of services in a nursing home would establish a fundamental alteration.**

**B. Plaintiffs Have Made A Showing of Irreparable Injury**

**The undersigned finds that requiring Plaintiffs to enter a nursing home, even for 60 days, to receive adequate and necessary services will result in irreparable injury. As summarized by the United States in its Statement of Interest (DE # 40), many courts, including the United States Supreme Court, have recognized the irreparable harm suffered by individuals who are required to submit to unnecessary institutionalization in order to receive state services. *See, e.g.*, *Marlo M. v. Cansler*, 679 F. Supp. 2d at 638 (finding irreparable harm from even temporary institutionalization, recognizing the regressive consequences of such placements); *Crabtree v. Goetz*, No. 08-0939, 2008 WL 5330506 at *25 (M.D. Tenn. Dec. 19, 2008) (same); *Long v. Benson*, No. 08-26, 2008 WL 4571903 at *2 (N.D. Fla. Oct. 14, 2008) (finding irreparable harm if individual was forced to leave community placement and enter nursing home due to adverse psychological consequences). As stated by the Supreme Court in *Olmstead*, 527 U.S. at 600-01, "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . . Second, confinement in an institution**

**severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."**

**Plaintiffs have established that they would suffer irreparable injury by having to enter a nursing home, in that they would be severed from their communities, and lose their independence and freedom. Plaintiffs have also shown a likelihood that they each would lose their residence if they had to reside in a nursing home, even for 60 days.[15] It is undisputed that when an individual goes into a nursing home, the individual must sign over to Medicaid his assets and government benefits, and that Medicaid will then pay the difference to the nursing home. Moreover, because Plaintiff Cruz has previously been in nursing homes and suffered depression therefrom, the undersigned finds that Plaintiff Cruz would become depressed if he was forced to enter a nursing home to receive adequate and necessary services.**

**C. Balancing of the Harms**

**In the case at bar, at set forth above and in the Statement of Facts, both Plaintiffs have demonstrated the serious adverse consequences they would suffer if institutionalized. In addition to the psychological harm, both Plaintiffs have demonstrated that their institutionalization will at a minimum seriously jeopardize their ability to maintain their present living quarters since they will have no funds to pay rent while they are institutionalized, and there is an extreme shortage of alternative**

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**[15] While Defendants speculate that Plaintiffs could keep their current residences if they had to reside in a nursing home for 60 days, they provide no evidence to support this assertion. Moreover, Defendants have conceded that it is not certain that Plaintiffs would be released into the community with adequate community-based services after 60 days in a nursing home, since their ability to live independently would be re-assessed at that time.**

**accessible housing. In contrast, the harm to the State in granting the preliminary relief sought here is minimal. It is clear that with respect to these two Plaintiffs, it will cost the State less to provide community-based care rather than institutional care in a nursing home, and this relief will not fundamentally alter any of the State's programs. If it turns out that, considering the needs of the State as a whole, this does result in fundamental alteration of the Medicaid program, and the Defendants prevail, the services not otherwise available can be terminated.**

**D. The Public Interest**

**As described by the Court in *Olmstead*, there is a strong public interest in allowing persons such as Plaintiffs to remain in their homes and eliminating the discriminatory effects that arise from segregating persons with disabilities into institutions. In addition, there is a strong public interest in providing care at the least cost possible. Both of these considerations lead the undersigned to conclude that granting the preliminary injunction in the case at bar serves the public interest.**

**E. The Bond Amount**

**In their motion, Plaintiffs request that the Court waive the requirement that Plaintiffs post a bond, pursuant to Fed.R.Civ.P. 65(c) (DE # 2 at 20-21). Defendants do not appear to oppose this relief as they did not address the issue either in their Response or at oral argument. "The amount of an injunction bond is within the sound discretion of the district court." *Carillion Importers, LTD v. Frank Pesce International Group*, 112 F.3d 1125, 1127 (11th Cir. 1997); *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 302-03 (5th Cir. 1978) ("The amount of security required [in support of an injunction] is a matter for the discretion of the trial court; it may elect to require no security at all"). The Record here indicates that Plaintiffs are indigent. Because of these**

representations, and in the absence of any opposition by Defendants, it is recommended that the requirement that Plaintiffs post a bond be waived.

**IV. Conclusion**

In consideration of the foregoing, the undersigned has determined that: Plaintiffs have made a significant and substantial likelihood of succeeding on the merits of their claims; Defendants' refusal to provide Plaintiffs with in-home based health care services for which they are financially and medically eligible, and which Defendants provide to others through the Traumatic Brain Injury/Spinal Cord Injury Medicaid Waiver Program violates the ADA; that Plaintiffs will suffer irreparable injury unless the preliminary injunction is granted in that Plaintiffs are at imminent risk of being institutionalized to obtain the necessary services which Defendants refuse to provide Plaintiffs outside of the institutional setting; that the threatened injury to Plaintiffs outweighs the possible injury that the preliminary injunction may cause Defendants; and entering the requested preliminary injunction would not disserve the public interest.

Therefore, for the reasons stated above, it is hereby

**RECOMMENDED** that Plaintiffs' Motion for Preliminary Injunction (DE # 2), be **GRANTED** such that Defendants are enjoined from denying Plaintiffs the Medicaid home and community-based services that are received by persons who receive such services under the Traumatic Brain Injury/Spinal Cord Injury Medicaid Waiver Program; and, that no security bond be required pursuant to Rule 65(c).

Pursuant to S. D. Fla. Magistrate Judge Rule 4(b), the parties shall have seven days from the service of this Report and Recommendation to file written objections to this Report and Recommendation. Failure to file objections timely shall bar the parties from attacking on appeal any factual findings contained herein. ***RTC v. Hallmark***

***Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988).**

**DONE AND SUBMITTED in chambers at Miami, Florida, on October 12, 2010.**

Andrea M. Simonton

**THE HONORABLE ANDREA M. SIMONTON**
**UNITED STATES MAGISTRATE JUDGE**

**Copies furnished to:**
**The Honorable Ursula Ungaro,**
**United States District Judge**
**All counsel of record**