UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-23048-CIV-UNGARO

LUIS CRUZ and NIGEL DE LA TORRE,

Plaintiffs,

v.

THOMAS ARNOLD *et al.*,

Defendants.
_____/

ORDER ON MOTION TO DISMISS

THIS CAUSE came before the Court upon Defendants' Motion to Dismiss (D.E. 37) The motion has been fully briefed (D.E. 44 & 45.)

THE COURT has reviewed the Motion and the pertinent portions of the record and is otherwise fully advised in the premises.

I. Background

A. Facts

Plaintiffs Luis Cruz and Nigel De La Torre seek declaratory and injunctive relief under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*.(ADA) and the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Section 504 "), ordering Defendants to provide them home and community-based Medicaid services as part of the Traumatic Brain Injury/Spinal Cord Injury waiver program (hereinafter "TBI/SCI Waiver Program" or "waiver program").

Plaintiffs are Medicaid recipients with spinal cord injuries suffering from quadriplegia (Complaint, D.E. 1, hereinafter "Compl." ¶ 1.) Luis Cruz alleges that he lives alone and requires assistance with daily activities, including help transferring from his bed to the toilet, bathing, cooking, and shopping for food (Compl. ¶¶ 15-16.) Mr. Cruz applied for the TBI/SCI Waiver

Program in January 2006 and has been on the waiting list since (Compl. ¶18.) The current home and community-based assistance that Mr. Cruz receives does not provide sufficient services to meet his daily needs (Compl. ¶ 17.) He alleges that he has been hospitalized numerous times for conditions related to lack of personal assistance care (Compl. ¶ 21.)

Nigel Del La Torre, like Mr. Cruz, alleges that he requires assistance with daily living activities, including showering, transferring to and from his bed, and assistance with a bowel program and urinary catheter (Compl. ¶ 34.) Mr. De La Torre applied for the TBI/SCI Waiver Program in January 2006 but still remains on the waiting list (Compl. ¶ 28.) He alleges that he presently receives only two hours of Medicaid home and community-based assistance a day, which is insufficient to meet his needs (Compl. ¶ 29.)

B. The Americans with Disabilities Act and the Medicaid Program

Title II of the Americans with Disabilities Act (ADA) 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 such entity." 42 U.S.C. §12132. The regulation implementing Title II of the ADA, 28 C.F.R. § 35.101 *et seq*., mandates that a public entity administer its services, programs and activities in "in the most integrated setting appropriate" to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d) (hereinafter "integration mandate"). "The most integrated setting" is 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.

State governments receiving Medicaid funding are obligated to comply with the ADA. *See* 42 C.F.R. § 35.135(a). Medicaid is a medical assistance program established by the Medicaid Act, 42 U.S.C. § 1396 *et seq*, and funded by federal and state governments. The federal

government must approve a state's Medicaid program plan for the state to receive federal funds subsidizing its program. *See Harris v. James*, 127 F.3d 993, 996 (11th Cir. 1997). A state may also enter into an agreement with the federal government to offer services under a waiver program, including the TBI/SCI Waiver Program in this case. 42 U.S.C. § 1396.

C. The parties' arguments

In their two-count Complaint, Plaintiffs contend that Defendants have violated Title II of the ADA, 42 U.S.C. §1232, *et seq.* (Count I), and Section 504 of the Rehabilitation Act, 29 U.S.C. §794(a) (Count 2), by failing to administer Medicaid in the most integrated setting appropriate to Plaintiffs, by unlawfully discriminating against Plaintiffs by improperly denying Medicaid funding for home and community-based services, and by requiring Plaintiffs to be unlawfully institutionalized in nursing homes against their will as a condition precedent to receiving home and community-based services.

Defendants have moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim under the ADA for the following reasons: (I) Plaintiffs have failed to specify a black letter provision of the ADA that Defendants allegedly violated, (ii) Plaintiffs' claim for personal care services exceeds the scope of what Defendants are required to provide, (iii) the relief requested by Plaintiffs assumes that the ADA invalidates provisions of the Medicaid Act, and (iv) the relief requested by Plaintiffs would fundamentally alter Defendants' Medicaid Program.

II. Legal Standard

In order to state a claim, Fed. R. Civ. P. 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." While a court, at this stage of the litigation, must consider the allegations contained in the plaintiff's complaint as true, this rule "is

inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). In addition, the complaint's allegations must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. (citing *Twombly*, 550 U.S. at 555).

In practice, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id*. (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*. (citation omitted). The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id*. (citation omitted). Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id*. (internal quotations and citation omitted). Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw on its judicial experience and common sense. *Id*. (citation omitted).

III. Analysis

A. Plaintiffs have adequately alleged that Defendants violated the black letter of the ADA.

Defendants argue that Plaintiffs have failed to specify the black letter provisions of the ADA that Defendants violated, thus Plaintiffs have failed to state a claim. In their response brief, Plaintiffs contend that they specified in their Complaint that Defendants violated Title II of the ADA, 42 U.S.C. § 12132, as interpreted by the Supreme Court in *Olmstead v. Zimring*, 527 U.S. 581 (1999).

The Court agrees with Plaintiffs. To receive Medicaid funding for waiver programs, such as the TBI/SCI Waiver Program, a public entity is obligated to comply with Title II of the ADA and the integration mandate that states that a public entity must administer services, programs, and activities in "the most integrated setting appropriate" to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d); *see Olmstead,* 527 U.S. at 599 (noting that the ADA both requires all public entities to refrain from discrimination and specifically identifies unjustified "segregation" of persons with disabilities as a "for[m] of discrimination"). To allege a violation of Title II of the ADA, Plaintiffs must demonstrate that they are qualified individuals with disabilities, who were either excluded from participation or denied the benefits of the public entity's services, or were otherwise discriminated against such exclusion, and that the denial of benefits or discrimination was by reason of Plaintiffs' disabilities. *See Raines v. Florida*, 983 F.Supp. 1362, 1371 (N.D. Fl. 1997).

Plaintiffs have adequately alleged that Defendants receive Medicaid funds to operate the TBI/SCI Waiver Program. They have also adequately alleged that they are qualified individuals with disabilities and that Defendants' denial of Medicaid funding for HCBS and requirement that Plaintiffs are institutionalized in nursing homes against their will before receiving HCBS through the TBI/SCI Waiver Program violates Title II of the ADA and the integration mandate. Accordingly, Plaintiffs adequately allege that Defendants have violated the black letter of the ADA, i.e. Title II, and thus have stated a claim upon which relief can be granted.

B. Plaintiffs have stated a claim for home and community-based personal care services.

Defendants argue that because subsection 135 of the ADA's implementing regulation states that the ADA "does not require a public entity to provide individuals with disabilities...services of a personal nature including assistance in eating, toileting, or dressing,"

the ADA does not require Defendants to provide home and community-based personal care services; thus Plaintiffs have failed to state a claim for personal care services. *See* 42 C.F.R. §35.135. Plaintiffs correctly contend that subsection 135 is inapplicable to this case.

Subsection 135 states that public entities that are not already providing personal services are not required to do so. However, when entities already provide personal services funded by Medicaid, subsection 130 of the implementing regulation applies, because subsection 130 is directed at "the [existing] services, programs, or activities of a public entity"and requires entities that provide personal services to provide them in the "most integrated setting." 42 C.F.R. §35.135(a) &(d). Since Defendants already provide home and community-based personal services to individuals participating in the TBI/SCI Waiver Program, subsection 130, not subsection 135, applies. Thus, Defendants' reliance on subsection 135 is misguided and subsection 135 is irrelevant to the the issue of whether Plaintiffs have stated a claim for community-based personal services under the ADA.

C. Plaintiffs' claims do not assume that the ADA invalidates the Medicaid Act.

Defendants argue that granting the relief requested in Plaintiffs' Complaint will require a finding that the ADA invalidates one or more provisions of the Medicaid Act, and since the ADA neither abrogates nor amends the Medicaid Act, Plaintiffs have failed to state a claim upon which relief can be granted. However, Defendants fail to explain exactly how the relief requested in Plaintiffs' Complaint would force such a finding, particularly in light of *Olmstead*. In holding that the mentally disabled respondents in *Olmstead* were qualified for community-based personal care, essentially the same type of relief requested by Plaintiffs in this case, the Supreme Court treated Title II of the ADA and the integration mandate as applicable to public entity programs created by the Medicaid Act, i.e. Medicaid funded programs, like the TBI/SCI Waiver Program,

without invalidating any provisions of the Medicaid Act. *See Olmstead v. Zimring*, 527 U.S. 581 (1999). In light of *Olmstead,* the Court rejects Defendants' contention that Plaintiffs construction of the ADA, if adopted by the Court, would invalidate the Medicaid Act.

D. Relief requested by Plaintiffs would not fundamentally alter Defendants' Medicaid Program.

Defendants contend that Plaintiffs have failed to state a claim under the ADA, because the relief Plaintiffs request would fundamentally alter Defendants' Medicaid program for the following reasons: (a) the waiver program does not have the necessary funds to accommodate Plaintiffs, (b) allowing Plaintiffs to participate in the waiver program before others higher on the waiting list would be inequitable, and (c) Plaintiffs' participation in the waiver program would disrupt Defendants' "comprehensive and effective working plan," the Nursing Home Transition Program, which Defendants have tailored to implement the ADA, as provided in *Olmstead*. Plaintiffs contend that relief can be granted without fundamentally altering Defendants' Medicare Program, because (a) Defendants can pay for accommodating Plaintiffs using Defendants' Medicaid budget, (b) placing Plaintiffs into the waiver program would not be inequitable because there are still available slots in the program, and (c) Plaintiffs cannot disrupt Defendants working plan, because the plan is unlawful. These arguments arguably raise factual issues outside the pleadings and, therefore, are premature. Nonetheless the Court notes the following:

Subsection 130(b)(7) of the ADA's implementing regulation provides 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); *see Olmstead* 527 U.S. at 603 ("The

State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless."). In both their Motion and at the preliminary injunction hearing, Defendants failed to demonstrate that Plaintiffs' participation in the waiver program would fundamentally alter the nature of Defendants Medicaid Program.

First, Defendants' have yet to offer a persuasive explanation of the TBI/SCI waiver program's budgetary mechanism and funding sources. For example, Defendants' assertion that they cannot fund HCBS using money from Medicaid not specifically allocated to the waiver program is incorrect. *See Disability Advocates, Inc.v. Patterson*, 598 F.Supp.2d 350 (E.D.N.Y. 2009)(holding that the relevant budget for funding integration programs pursuant to ADA Title II includes the state's Department of Health budget which included Medicaid programs). Moreover, arguments about budgetary constraints do not appear to relieve defendants from compliance with the ADA. *See Pa. Prot. & Advocacy, Inc.v. Pa. Dep't of Public Welfare*, 402 F.3d 374, 381 (3d Cir. 2005).

Second, Defendants have not persuaded the Court that Plaintiffs' participation in the waiver program would prevent others higher on the waiting list from accessing the program. Defendants do not refute Plaintiffs' contention that it costs less to provide Plaintiffs with home and community-based services than it does to institutionalize them. Therefore, the Court infers that Plaintiffs' participation in the program would not necessarily prevent those ahead on the waiting list from accessing the services. Moreover, Defendants admit that they have not filled all the slots available in the TBI/SCI program, and as indicated by Defendants' explanation of the Nursing Home Transition Program, Defendants will not move individuals into the waiver program unless they submit to sixty days of institutionalization in a nursing home. Accordingly, an individual's likelihood of gaining access to the waiver program appears to be more dependent

on whether he participates in the Nursing Home Transition Program than on whether individuals lower on the waiting list are accepted into the program before him.

Third, Defendants' argument that Plaintiffs' participation in the waiver program would disrupt their comprehensive working plan fails, because as Plaintiffs correctly point out, Defendants do not appear to have a lawful working plan. *Olmstead*, 527 U.S. at 605-606. The Nursing Home Transition Program that Defendants describe as their "comprehensive and effective working plan" apparently subjects an individual to at least sixty days in a nursing home before he can be eligible for the waiver program. This is precisely the form of institutionalization held illegal in *Olmstead*. Morever, even if Defendants' working plan is somehow lawful, they have not adequately demonstrated how Plaintiffs' participation in the waiver program would disrupt the working plan. In sum, Defendants have failed to persuade the Court that dismissal is warranted pursuant to Rule 12(b)(6) because Plaintiffs' participation in the waiver program would fundamentally alter Florida's Medicaid Program .

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss (D.E. 37) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 14th day of January, 2011.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

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