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

MICHELE HADDAD, Plaintiff, v. THOMAS ARNOLD, in his official capacity as Secretary, Florida Agency for Health Care Administration Dr. ANNA VIAMONTE ROSS, in her official capacity as Secretary, Florida Department of Health, Defendants.	Case No. 3:10-CV-414-J-99MMH-TEM

SUPPLEMENTAL STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States respectfully submits this Supplemental Statement of Interest, pursuant to 28 U.S.C. § 517, in further support of Plaintiff Michele Haddad's Motion for Preliminary Injunction. As noted in the United States' first Statement of Interest in this matter, this case involves the proper interpretation and application of Title II of the Americans with Disabilities Act (ADA) and Title II's integration mandate. *See* 42 U.S.C. § 12131 *et seq.*; *Olmstead v. L.C.*, 527 U.S. 581 (1999). The Department of Justice has authority to enforce Title II and to issue regulations implementing the statute. *See* 42 U.S.C. §§ 12133-34. The United States thus has a strong interest in this matter.

ARGUMENT

Defendants' arguments in their Response and Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction are insufficient to overcome Plaintiff's

showing that she meets the requirements for a preliminary injunction.[1] The United States emphasizes the emergency nature of the relief sought by Ms. Haddad, the absence of which will irreparably harm her through unnecessary institutionalization, and the fact that this Court is being asked to provide that remedy for a single individual in this case. Accordingly, Ms. Haddad's Motion for Preliminary Injunction should be granted.

I. Ms. Haddad is Likely to Succeed on the Merits of Her Title II Claim

A. Ms. Haddad May Enforce the Integration Mandate of Title II by Private Right of Action.

The Defendants correctly assume that Ms. Haddad is not attempting to independently enforce the "integration regulation" without its statutory foundation. (Defs.' Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 5-6). Indeed, Ms. Haddad is relying on the ADA's broad prohibition of discrimination, authoritatively interpreted by the Attorney General's integration regulation, 28 U.S.C. § 35.130(d), and by the Supreme Court in *Olmstead*. 527 U.S. at 607. The integration mandate is an authoritative interpretation of Title II of the ADA, and therefore is enforceable through a private right of action. *See Alexander v. Sandoval*, 532 U.S. 275 (2001).[2]

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[1] The Defendants' argument that Ms. Haddad seeks relief that is beyond the status quo is misguided. (Defs. Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 2) Ms. Haddad seeks to *remain* in the community and receive services that she would otherwise be entitled to receive in a more expensive and restrictive setting – a nursing home. An order from this court granting the relief that Ms. Haddad seeks would therefore impose no new affirmative or mandatory obligations on the Defendants and, as discussed more fully below, would be less costly to the Defendants than providing the care in a nursing home.

[2] The Eleventh Circuit's recent decision in *American Association of People with Disabilities v. Harris*, 2010 U.S. App. LEXIS 9615 (11th Cir. Fla. May 11, 2010) is not controlling. There, the panel held that 28 C.F.R. § 35.151 was not enforceable as a private right of action. The panel's overly broad ruling applied *Sandoval* where such a discussion was patently unnecessary. There, as here, the regulation at issue is fully consistent with, and an authoritative interpretation of, a statutory provision that is enforceable through a private right of action. Indeed, the Court in *Sandoval* recognized that "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284 (internal citations omitted).

The United States outlined the statutory and regulatory framework of Title II's integration mandate in its initial Statement of Interest. (See Statement of Interest of the United States at 3-5, 8-11). Congress recognized in enacting the ADA that "institutionalization" was one of the "critical areas" in which discrimination against individuals with disabilities persists, and that discrimination in the form of "isolat[ion]" and "segregat[ion]" of these individuals "continue[s] to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2), (3). Congress directed the Attorney General to issue regulations implementing Title II, 42 U.S.C. § 12134, and consistent with the goals of eliminating the forms of discrimination identified by Congress, the Attorney General has done so. *See* 28 C.F.R. Part 35. The "integration regulation" requires public entities to administer services to individuals with disabilities in the most integrated setting appropriate to their needs. 28 C.F.R. § 35.130(d).

The Supreme Court in *Olmstead* examined the scope of a state's obligations under the ADA and recognized that the discrimination forbidden under Title II of the ADA includes "unnecessary segregation" and "[u]njustified isolation." *See* 527 U.S. at 600-01. Where an individual is "qualified" for community placement and the affected individual does not oppose community placement, the state must provide community-based services. *Id.* at 601-03. This obligation may be excused only where a state can demonstrate that the relief sought would result in a "fundamental alteration" of the state's service system. *Id.*

The Defendants nonetheless argue that the state escapes the ADA's integration mandate because the Traumatic Brain Injury / Spinal Cord Injury (TBI/SCI) Waiver program is only available to individuals with one particular disability. (Defs.' Mem. in

Opp'n to Pl.'s Mot. for Prelim. Inj. at 5). The Defendants assert that because the TBI/SCI Waiver is only open to individuals with the same disability, their failure to provide Ms. Haddad this service cannot be "because of" her disability under the text of Title II. (Id. at 5-6). This argument amounts to nothing more than the Defendants' attempt to extract the integration mandate from its firmly rooted foundation in Title II of the ADA and to limit the breadth of discrimination expressly targeted by Congress. The Supreme Court squarely rejected such an argument in *Olmstead,* recognizing that "Congress had a more comprehensive view of the concept of discrimination" when it crafted the ADA. *See* 527 U.S. at 598, n. 10 (noting that in other contexts the Court had recognized discrimination between members of the same class).

The discrimination contemplated by Congress in enacting Title II, and recognized in *Olmstead*—unnecessarily relegating individuals with disabilities to segregated facilities—is *exactly* what Ms. Haddad faces. But for Ms. Haddad's disability, she would not be seeking the services under the TBI/SCI Waiver or any other Medicaid program. And she is "qualified" for community placement – the Defendants have admitted that she is "medically eligible for [Home and Community-Based Services.]" (Kidder Affidavit ¶ 10). The Defendants thus cannot shirk their responsibility under Title II to provide Ms. Haddad services in the most integrated setting appropriate to her needs merely because the services that she seeks are available to other individuals with a similar disability.

B. The Defendants' Provision of Personal Care Services Must Comply with Title II's Integration Mandate.

The Defendants further argue that applying the requirements of the *Olmstead* integration mandate in this case would require the court "to hold that the ADA has

invalidated one or more provisions of the Medicaid Act." (Defs.' Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 14). Neither the Plaintiff nor the United States have argued that the ADA's integration mandate in any way modifies or alters the substantive requirements of the Medicaid Act itself. To the contrary, the ADA stands entirely apart from the Medicaid Act and establishes its own independent requirement that, when a state provides *any* services to individuals with disabilities, it must do so in the most integrated setting appropriate to the individuals' needs unless doing so would fundamentally alter the nature of the service. *See Olmstead*, 527 U.S. at 607. Indeed, nothing in the Medicaid Act would bar requirements set forth in the ADA, and the state can easily comply with the requirements of both statutes. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974).

C. The ADA Personal Devices and Services Regulation Does Not Conflict With the State's Duty Under *Olmstead* to Provide Ms. Haddad Services in the Community

The Defendants next assert that the ADA's Personal Devices and Services Regulation, 28 C.F.R. § 35.135, exempts Florida from having to provide "services of a personal nature." (Defs.' Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 7-9). As the United States explained in its initial Statement of Interest, this regulation merely establishes that Title II does not require a state to provide personal services where such services are *not "customarily provided." See* U.S. Dept. of Justice, ADA Title II Technical Assistance Manual § II-3.6200.

The case law examining this regulatory provision supports this interpretation. Indeed, courts that have held that §35.135 imposes any limits on a state's duty to provide reasonable accommodations have only done so, as the Department's interpretation

contemplates, where such devices or services are not "customarily provided." *See, e.g., McCauley v. Winegarden*, 60 F.3d 766, 767 (11th Cir. 1995) ("environmental filtering" device in a courtroom); *Kerry M. v. Manhattan School Dist. #114*, 2006 WL 2862118, at *10 (N.D. Ill. 2006) (collapsible wheelchair in school district's bus service); *Blatch ex rel. Clay v. Hernandez*, 360 F. Supp. 2d 595, 630 (S.D.N.Y. 2005) (expert representatives in tenancy termination proceedings); *Rivera v. Delta Air Lines, Inc.*, 1997 WL 634500, at *1-2 (E.D. Pa. 1997) (wheelchair to board airplane); *Adelman v. Dunmire*, 1996 WL 107853, *3 (E.D. Pa. 1996) (wheelchair in courtroom).[3]

Thus, where, as here, the services sought by a plaintiff are customarily provided in the institutional setting into which she will be relegated absent a reasonable modification of the Defendants' waiver admission policies, the limitation expressed by 28 C.F.R. § 35.135 has no bearing.

D. The State Failed to Demonstrate that Ms. Haddad's Request Would Fundamentally Alter the Nature of Services Being Provided

The Defendants have not shown that Ms. Haddad's request would constitute a fundamental alteration of the nature of Florida's Medicaid program. The *Olmstead*

[3] Other courts have interpreted § 35.135 very broadly. For example, in *A.P. ex rel. Peterson v. Anoka-Hennepin Independent School District No. 11*, 538 F. Supp. 2d 1125, 1152-53 (D. Minn. 2008), the court held that § 35.135 does not bar a diabetic child's parents from requesting that school district staff be trained and authorized to provide glucagon injections to the child. The judge observed, "[f]rankly, the Court has difficulty understanding the purpose and reach of §35.135, as many otherwise reasonable accommodations requested by disabled persons--and routinely provided by school districts and other public entities-- could be considered 'services of a personal nature.'" *Id.* Similarly, in *Purcell v. Pennsylvania Department of Corrections*, 1998 WL 10236, at *9 (E.D. Pa. 1998), the court rejected the state's argument that it was not required under the ADA to provide a plastic chair for support in shower to accommodate plaintiff's joint disease. The court explained "[i]f the terms of the regulations requiring "reasonable accommodations in policies," .... are to have any effect at all, defendants should have "accommodated" Purcell's joint disease by allowing him to remain in a handicapped-accessible cell or have a chair in his cell and the shower room." *Id.*

plurality explained that a state can establish a fundamental alteration defense by demonstrating that it has 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.

Olmstead, 527 U.S. at 605-06. *See also, e.g., Pennsylvania Prot. & Advocacy, Inc. v. Dep't of Pub. Welfare*, 402 F.3d 374, 381 (3d Cir. 2005) (*requiring* the state to demonstrate the existence of a plan before it may even raise a fundamental alteration defense); *Disability Advocates, Inc. v. Paterson*, 635 F. Supp. 2d 184, 271 (E.D.N.Y. 2009) (rejecting state's fundamental alteration defense where it does not "have a comprehensive or effective plan to enable [segregated] residents to receive services in more integrated settings, but instead was committed to maintaining the status quo); *Frederick L. v. Dep't of Pub. Welfare*, 422 F.3d 151 (3d Cir. 2005) (vacating district court ruling in favor of state defendants where fundamental alteration defense was premised on vague assurance of future deinstitutionalization rather than a meaningful commitment with measurable goals for community integration).

The Defendants claim that the state of Florida has a "comprehensive, effectively working" *Olmstead* plan. However, the Defendants point to no evidence of the plan's name, its implementation date, any administrator(s) or supervisor(s), or stated and measurable goals for the deinstitutionalization of persons with disabilities. Instead, in a piecemeal and *post hoc* fashion, the Defendants offer a parade of affiants outlining the Florida Medicaid program's various Medicaid Waivers. This evidence falls far short of what is required to demonstrate that a state has a comprehensive, effectively working

plan under *Olmstead*. *See, e.g., Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487 (3d Cir. 2004) (rejecting defense premised on the state's limited economic resources).

Here, Ms. Haddad seeks the personal care services that are only offered under the TBI/SCI Waiver program and, without which, she will have no choice but to enter a nursing home. The Defendants assert that the TBI/SCI Waiver has "expanded" in monthly caseload and expenditures over the past four years, (Defs.' Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 20), but they do not refute that the program has remained capped at 375 persons and will remain at this cap until at least 2012.[4] Any assessment of the relative merits of a state's efforts to deinstitutionalize individuals with disabilities must be viewed not in "dollar" terms, but in actual evidence that the plan is effectively moving individuals from institutions and preventing them from becoming at risk of institutionalization. The Defendants have thus offered no measurable evidence of "expansion" in view of the number of individuals on the TBI/SCI waiting list, or the length of time that these individuals remain on the waiting list.

The Defendants also mischaracterize Ms. Haddad's request as one that seeks to "displace" other persons on the TBI/SCI Waiver waitlist. (Defs.' Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 21). Ms. Haddad is not attempting to circumvent any of the Defendants' requirements to receive the services that she needs to remain in the

[4] As the United States suggested in its initial Statement of Interest, and as the Centers for Medicare and Medicaid Services (CMS) has indicated in technical assistance to the states, the mere fact that a state is permitted to "cap" the number of individuals it serves on a particular waiver under the Medicaid Act does not by itself determine whether a requested modification would result in a fundamental alteration under the ADA. See CMS, Olmstead Update No. 4, at 4 (Jan. 10, 2001), available at http://www.cms.hhs.gov/smdl/downloads/smd011001a.pdf ("If other laws (e.g., ADA) require the State to serve more people, the State may...request an increase in the number of people permitted under the HCBS Waiver).

community. Ms. Haddad in fact followed these procedures, but her efforts were to no avail. Ms. Haddad remains on the waiting list despite her first joining it in 2007.

Indeed, as Ms. Haddad has learned, the only way to extract herself from Florida's immovable TBI/SCI waitlist is, per the Defendants' suggestion, to first suffer irreparable harm by entering an institution for at least sixty days. Services that would allow Ms. Haddad to remain in the community are, by the Defendants' own admission, less costly than services provided in an institutional setting. (Hudson Affidavit ¶ 15). Thus, Ms. Haddad's request -- that the state provide her with less-costly community-based services, without requiring her to first enter a nursing home, until the court can complete a full evaluation of Defendants' fundamental alteration defense – is eminently reasonable.

II. Ms. Haddad Satisifies the Requirements For a Preliminary Injunction

The Defendants have not presented evidence sufficient to overcome Ms. Haddad's showing that she meets the requirements for a preliminary injunction. The harm to Ms. Haddad from even temporarily entering a nursing home will be irreparable. The Defendants argue that "even if Plaintiff did enter a nursing home, this harm would not be "irreparable" as Ms. Haddad would be eligible after 60 days for the Nursing Home Transition Program." (Defs.' Mem. in Opp. to Pl.'s Mot. for Prelim. Inj. at 23). This characterization discounts the Supreme Court's rationale in *Olmstead,* in which it recognized that institutional placement "perpetuates unwarranted assumptions" that institutionalized individuals are "incapable or unworthy of participating in community life." 527 U.S. at 600. Even temporary institutionalization can rise to the level of irreparable harm warranting injunctive relief. *See, e.g., Marlo M. v. Cansler*, 679 F.

Supp. 2d 635, 638 (E.D.N.C. 2010) (recognizing that plaintiff would "suffer regressive consequences if moved [to a nursing home] *even temporarily*.") (emphasis added).

The balance of hardship also tips strongly in Ms. Haddad's favor. The Defendants assert that the plaintiff is asking the court to "uncap" the TBI/SCI Waiver. (Defs.' Mem. in Opp. to Pl.'s Mot. for Prelim. Inj. at 24). As noted above, Ms. Haddad is asking the court for relief of an emergency nature for the purpose of this preliminary injunction – that the Defendants reasonably modify their policies to accommodate her in view of her extreme and urgent needs. In any event, should the Defendants not provide services to Ms. Haddad in the community they will most assuredly have to provide them to her in an institution – which they have admitted is a more costly setting. (*See* Hudson Affidavit ¶ 15). Thus, in the absence of injunctive relief in this matter, it is only Ms. Haddad who will bear a significantly added burden. Should the narrow, emergency relief that Ms. Haddad seeks be granted, both parties may in fact be better off.

Lastly, issuing the preliminary injunction that Ms. Haddad seeks is in the public interest. As noted above, the ADA identifies unnecessary segregation as discrimination. *See Olmstead*, 527 U.S. at 600. In addition to the public interest in eliminating this type of discrimination, the public would benefit in seeing the services that Ms. Haddad seeks provided in a less-expensive community-based setting, rather than an institution, at greater expense. For the foregoing reasons the Court should grant Ms. Haddad's Motion for Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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