IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

LUIS CRUZ and NIGEL DE LA TORRE,

Plaintiffs,

v. Case No. 1:10CV-23048-UU

ELIZABETH DUDEK, in her official capacity as Interim Secretary, Florida Agency for Health Care Administration, and

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

Defendants.

PLAINTIFFS CRUZ AND DE LA TORRE'S REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO THE PRELIMINARY INJUNCTION

I. Facts

1. In FY 2009, Florida spent 79.5% of all of its aged and disabled Medicaid long-term care expenditures on institutionalized nursing homes as compared to the national average of 66.2%. *See Pl. Ex. A* ("Medicaid Long-Term Expenditures in FY 2009," Table V, Distribution of Medicaid LTC Expenditures, Aging/Physical Disabilities), ranking Florida the 28th highest State for its Medicaid spending for older people and adults with physical disabilities in expenditures to nursing facilities. In FY 2009 in dollars, Florida expended $2.4 billion on nursing home Medicaid expenditures. In contrast to its institutional Medicaid expenditures on nursing homes, Florida expended 20.5% of its entire long-term care expenditures for community-based services

for all its Medicaid's community-based services, i.e., Home Health, Personal Care Option and its Waivers targeted for older adults and people with disabilities, or $620 million.[1] *Id.*

2. Defendants' Spinal Cord Injury waiver is capped at 375 people, the number of available slots has not been increased since 2007, and will not increase through June 30, 2011. *See Pl. Ex. B* (CMS 10/23/2007 letter approving SCI waiver).[2]

3. On December 3, 2008, Defendant AHCA prepared a document entitled Home and Community Based Services Waivers and Long Term Care in which AHCA acknowledged that there was a waiting list for SCI Waiver services of 544 people. *See Pl. Ex. C* (AHCA HCBS Waivers and Long Term Care, 12/4/2008) at 2.

4. The Florida Office of Program Policy Analysis & Government Accountability, an office of the Florida Legislature, prepared a report entitled "Profile of Florida's Medicaid Home and Community-Based Services Waivers," Report No. 10-10, January, 2010, at 11 and 6, stating that the Traumatic Brain and Spinal Cord Injury Waiver had a waiting list of 605 people, where the Nursing Home Diversion Waiver had no waiting list. *See Pl. Ex. D.*

5. On February 8, 2010, the Florida Department of Health Brain and Spinal Cord Injury Program issued "A Needs and Resources Assessment" in which it stated that the "Biggest Issues for SCI in Florida" were, *inter alia*, "access to services that promote independence e.g., personal care and transportation," and the report stated that the SCI Incidence in Florida in 2009 was 761 "New SCI." *See Pl. Ex. E* ("Spinal Cord Injury in Florida: A Needs and Resources Assessment") at 2 and 3.

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[1] These figures exclude people with mental retardation and other developmental disabilities, because those people are not institutionalized in nursing homes. Defendants' affidavits erroneously include these people.

[2] According to Defendant's Affidavit of Kristen Russell Declaration, as of September 9, 2010, there were only 341 people in this waiver. (Doc. No. 34 ¶ 12). The unfilled 34 slots are apparently still available.

6. Defendants mailed a form letter on January 8, 2010, to persons on the Spinal Cord Injury waiting list informing persons, like Plaintiffs Cruz and De La Torre, on the waiting list for SCI waiver that:

> [p]resently, the Department of Children and Families does not have funds available (or available openings) to serve additional individuals through these programs…. Placement on the waiting list does not ensure future eligibility. Funding is very limited in these programs, and *the amount of funding allocated to these programs has not been increased in many years*. Unfortunately, *moving individuals off the waiting list* into these programs *does not occur frequently*, therefore we encourage you to continue seeking services from other programs.

See Pl. Ex. F, (Jan. 8, 2010 letter)(emphasis added).

II. Plaintiffs Cruz and De La Torre's Motion for a Preliminary Injunction Falls Within the Legal Standards for Its Issuance

Defendants ignore that preventing Plaintiffs Cruz and De La Torre's unnecessary segregation and institutionalization is critical and basic protection under the Americans with Disabilities Act, 42 USC § 12101, et seq. (hereinafter "ADA") and the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (hereinafter "Section 504"). The relief Plaintiffs request is precisely to prevent the discrimination of unnecessary institutionalization in a nursing home, a fundamental form of discrimination under the ADA and Section 504, from occurring in the future. Defendants mischaracterize the relief Plaintiffs Cruz and De La Torre request by stating that the Preliminary Injunction "asks the Court to order the Defendants to undertake an activities they are not currently undertaking (i.e., to provide for personal care assistance in Plaintiffs' homes)." (Doc. No. 36 at 2). Defendants currently provide personal care assistance as part of its Medicaid Home Health program to Messrs. Cruz and De La Torre in their homes, but the number of hours of these services is inadequate. It is the amount of care that the injunction seeks; an amount that will permit them to reside safely in their homes instead of being forced to go into a nursing facility for the same quantity of services they seek in the community. While Defendants' Home

Health care program is limited to four hours a day, its Waiver program provides significantly more services, an amount that will enable Messrs. Cruz and De La Torre to remain in their homes and communities.[3]

Defendants' preliminary injunction arguments misunderstand the importance of enforcing the ADA and Section 504, the civil rights statutes for persons with disabilities. The Supreme Court has recognized the duty to enjoin civil rights violations and the prospective enforcement of such Congressional mandates, holding that:

> the purpose of Congress in vesting broad equitable powers in Title VII courts was to "make possible the 'fashion[ing of] the *most complete relief possible*,'" and that the district courts have "'not merely the power but *the duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as *bar like discrimination in the future*.'"

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 364 (1977)(emphases added)(Title VII of Civil Rights Act of 1964); *quoting Albermale Paper Co. v. Moody*, 422 U.S. 405, 421, 418 (1975)(Title VII); *see also, Louisiana v. U.S.*, 380 U.S. 145, 154 (1965)(affirming the propriety of an injunction against existing discriminatory voting practices and quoting *International Brotherhood*); *see also, U.S. v. City and County of San Francisco*, 310 U.S. 16, 30 (1940)(holding that, where an injunction is needed to ensure that states do not act contrary to restrictions provided by Congress, injunctive relief may be granted without the traditional "balancing of equities").

The Eleventh Circuit has also recognized the necessity to enjoin violations of civil rights violations and prospective affirmative enforcement of such Congressional mandates, following

[3] Under the Spinal Cord Injury Waiver, people can receive 3 hours per day of attendant care services, 6 hours per day of companion services, and 4 hours per day of personal care. See Florida Medicaid, Brain and Spinal Cord Injury Waiver Provider Handbook, 4.1.2006. Under Florida's Aged and Disabled Adult Waiver, a person can receive10 hours per day of attendant care services, 8 hours per day of homemaker, 12 hours per day of personal care and 8 hours per day of companion services. See Florida Medicaid, Aged and Disabled Adult Waiver, Provider Handbook, 5.1.2009.

the *International Brotherhood, supra,* principle. In *Sec'y, U.S. Dept. of Housing and Urban Dev. v. Blackwell*, 908 F.2d 864, 874 (11th Cir. 1990)(Fair Housing Act), the Eleventh Circuit, quoting *Marable v. Walker*, 704 F. 2d 1219, 12 21 (11th Cir. 1983)(race discrimination under Civil Rights Act of 1964), stated that "injunctive relief should be structured to achieve the twin goals of insuring that the [civil rights] Act is not violated *in the future* ...."(Emphasis added).

Defendants raised the same issue in *Haddad v. Arnold and R oss*, #3:10-cv-414-J-99MMH, Middle District of Florida, July 9, 2010. The Honorable Marcia Morales Howard's opinion, supporting the preliminary injunction she had issued on June 22, 2010, s tate that "[b]ecause the Court determined that Plaintiff satisfied the heightened burden of demonstrating her entitlement to mandatory preliminary injunctive relief, the Court did not resolve the parities' dispute as to the applicable standard." (Doc. No. 29, Ex. B at 17-18).

III. Plaintiffs Cruz and De La Torre Have a Substantial Likelihood of Prevailing on the Merits

A. Unnecessarily Institutionalization and Segregation is a Clear Violation of the ADA and Constitutes Discrimination Under the ADA

Title II of the ADA bars unnecessary institutionalization and segregation of people with disabilities and prohibits such discrimination by public entities. 42 U.S.C. § 12132. The ADA's congressional findings specifically listed "institutionalization" as a "cr itical area" where discrimination persisted. 42 U.S.C. § 12101(a)(3). Congress explicitly noted that discriminatory practices continued through both "outright intentional exclusion" and "segregation." 42 U.S.C. § 12101(a)(5).[4]

Congress directed the Department of Justice (DOJ) to promulgate regulations to implement Title II. 42 U.S.C. § 12134. A dhering to the congressional mandate, DOJ adopted regulations to implement Title II including "the most integrated" regulation. 28 C .F.R. §

[4] Plaintiffs have not argued a violation of the Medicaid statute, see *supra.*

35.130(d). In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court faced the question of whether a state has an obligation under the ADA to provide community services to people with disabilities who were segregated and unnecessarily institutionalized. The Supreme Court, in *Olmstead*, concluded that "unjustified isolation ... is properly regarded as discrimination on the basis of disability." *Id.* at 597. Explaining that "unjustified institutional isolation of persons with disabilities is a form of discrimination," the Court wrote that "[c]onfinement 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." *Id.* at 600.[5]

Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175, 1180-81 (10th Cir. 2003) is on point with the facts in the instant case. In *Fisher*, Oklahoma would limit the prescriptions Plaintiffs could receive in the community to five per month. The state would provide needed Medicaid services, i.e., the requisite number of prescriptions a disabled person needed to survive, but only if the plaintiffs went into nursing homes. The plaintiffs wanted to remain integrated in the community

The *Fisher* plaintiffs, similar to Messrs. Cruz and De La Torre, challenged the state policy that put them at risk of being institutionalized. Like Messrs. Cruz and De La Torre, the plaintiffs in *Fisher* were receiving Medicaid-funded medical care. *Fisher* sought a preliminary injunction arguing that the change in state policy violated the integration mandate of Title II,

[5] *Olmstead* has been applied by a number of federal appellate courts in cases involving individuals with disabilities who are at risk of unnecessary institutionalization. *See, e.g., Radaszewski*, 383 F.3d at 602 (7th Cir. 2004); *Townsend v. Qasim*, 328 F.3d 511, 523 (9th Cir. 2003); *Pennsylvania Protection & Advocacy, Inc. v. Pennsylvania Dep't of Public Welfare*, 402 F.3d 374, 379 (3d Cir. 2005).

because it would force them out of their communities and into nursing homes to obtain the care they needed. *See id.* at 1177-78. Plaintiffs Cruz and De La Torre seek a preliminary injunction, because Defendants violate the integration mandate of Title II because the failure to provide adequate personal care services in the community will force them out of their homes and into nursing homes to obtain the same services they could receive in the community. The Tenth Circuit noted that the ADA's integration "protections would meaningless if plaintiffs were required to segregate themselves by entering an institution….[N]othing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements. *Id*. at 1181.

Institutionalization before assistance with independent living is precisely what Defendants' policy requires. Namely, Defendants propose that Cruz and De La Torre enter an institution for 60 days before they will receive the same services Plaintiffs seek to obtain today in the community without first being institutionalized.

Many district courts have similarly concluded that *Olmstead/Fisher* applies to situations where the plaintiffs are not institutionalized and do not wish to enter an institution in order to receive the services. In *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1170 (N.D.Cal. 2009), the court pointed out that "the risk of institutionalization is sufficient to demonstrate a violation of Title II." Also, in *Makin v. Hawaii*, 114 F. Supp. 2d 1017, 1034 (D Haw.1999), the court concluded that plaintiffs, who resided at home while on the waiting list for community-based services offered through the State's Medicaid program, could challenge administration of the program as violating Title II's integration mandate, because it "could potentially force Plaintiffs into institutions." Further, in *Ball v. Rodgers*, No. 00-cv-67, 2009 WL 1395423, at *5 (D.Ariz. April 24, 2009), the court concluded that state defendants violated Title II's integration mandate,

because their "failure to provide Plaintiffs with the necessary services threatened Plaintiffs with institutionalization." *See also*, *Marlo M. v. Cansler*, No 5:09-cv-535-BO, 2010 WL 148849, at *2 (E.D.N.C. Jan. 17, 2010) (termination of funding "will force Plaintiffs from their present living situations, in which they are well integrated into the community, into group homes or institutional settings"); *Mental Disability Law Clinic v. Hogan*, No. 06-cv-6320, 2008 W L 4104460, at *15 (E.D.N.Y. Aug. 28, 2008("[E]ven the risk of unjustified segregation may be sufficient under *Olmstead*"); *Crabtree v. Goetz*, 2008 WL 5330506, *30 (M.D. Tenn. 2008) ("Plaintiffs have demonstrated a strong likelihood of success on the merits of their [ADA] claims that the Defendants' drastic cuts of their home health care services will force their institutionalization in nursing homes.")

B. Defendants' Reliance on 28 C.F.R. § 35.135 Is Misplaced.

Defendants argue that 28 C.F.R. § 35.135 e xempts them from providing personal attendant care services to keep Plaintiffs Cruz and De La Torre out of an institution. (Doc. No. 36 at 15-16).[6] Defendants' argument reflects a profound misunderstanding of the ADA. Section 35.135 was simply and plainly designed to assure that public entities that do not otherwise provide personal services are not required to provide those services. For example, the ADA would not require a public library to assist a patron with toileting when she uses the library because that is not the function of the library. On the other hand, DOJ made clear that the regulation does not prohibit a public entity from providing personal care and devices to people with disabilities when that is a function of the public entity already provides. *See* 28 C.F.R. Pt. 35, App., § 35.135.

In the instant case, Defendants plainly have chosen to provide personal care services to people with disabilities -- both in nursing homes, as well as in the community through, *inter alia*,

[6] The *Haddad* court rejected this argument. See supra at 26-27.

its Medicaid Spinal Cord Injury Waiver and other waivers, Home Health Care, and nursing homes. Since personal care services are the precise services that Defendants already provide in both an institutional and community-based setting, they cannot rely on 28 C.F.R. § 35.135 to relieve themselves of their obligation to provide those services to people with disabilities, including Plaintiffs Cruz and De La Torre, in the most integrated setting appropriate to their needs – as required by the ADA and Section 504. This interpretation, unlike Defendants', is consistent with the fundamental tenet of statutory and regulatory construction, which requires courts to construe statutes and regulations to give effect to all provisions so that none is rendered inoperative, superfluous, insignificant, or void. *See Calzadilla v. Banco Latino Internacional*, 413 F.3d 1285, 1287 (11th Cir. 2005).

If the Court accepts Defendants' argument that 28 C.F.R. § 35.135 precludes courts from requiring states to provide the type of personal services at issue in this case, and similar ADA integration cases, then it will eviscerate the ADA's integration mandate and render 28 C.F.R. § 35.130(d) superfluous. Instead, the Court can readily give meaning to both 28 C.F.R. § 35.135 and 28 C.F.R. § 35.130(d) by following DOJ's direction that the former only protects states from providing personal services with respect to programs, services, and activities that do not involve such services, while the latter requires states to provide such personal services in an integrated setting when they otherwise provide such services. Where, as here, the state "services" at issue are personal care services, they must be provided such services in the most integrated setting.

C. Compliance with the Medicaid Statute does not Relieve a State from Compliance with the ADA

Despite Defendants' lengthy arguments, Plaintiffs do not argue a violation of the Medicaid statute. (see Doc. No. 36 at 5-9 and 11-15).[7] Plaintiffs do not "want the ADA's

[7] Defendants' Medicaid argument was rejected in *Haddad*. See *supra* at 27-28.

prohibition of discrimination to slice into the Medicaid Act and, with surgical precision, add, change, or remove a word or two here and there, leaving the overall structure of the Medicaid Act and the HCBS waiver programs intact." *Id.* at 13.

Defendants misunderstand the interplay between the ADA and the Medicaid statute. If Defendants did not participate in the Medicaid program, they would have no legal duty to implement it in conformity with the ADA. However, as long as Defendants participate in Medicaid, they cannot structure the Florida Medicaid program or deny the benefits of Medicaid services in the most integrated setting – that is prohibited discrimination under the ADA. 42 U.S.C. § 12132.

Defendants similarly misunderstand Plaintiffs' arguments regarding how the implementation of the Spinal Cord Injury waiver discriminates on the basis of disability. (Doc. No. 36 at 14). While it is accurate that waivers are targeted to specific disabilities, that is not the discrimination Plaintiffs allege. The discrimination under the ADA at issue in the instant action is a combination of Defendants' apparent unwillingness to use all 375 slots under the Spinal Cord Injury Waiver, which Defendants notified CMS they would provide, [8] while at the same time require people to enter nursing homes to receive the services that are provided in the community in the Spinal Cord Injury Waiver. Defendants effectively require Plaintiffs Cruz and De La Torre to enter a nursing home to both receive the personal attendant care services they require and also to then become eligible to receive those services in the community. The discrimination is Defendants' requirement that Plaintiffs submit to unnecessary

[8] Given both Defendants' knowledge of the extremely large waiting list for Spinal Cord Waiver services and the ease that CMS has provided for amendments to increase the number of people served in a Waiver, assuming arguendo the Spinal Cord Injury Waiver was full at 375 people, Defendants could readily amend it to provide more slots and therefore avoid unnecessary institutionalization.

institutionalization to receive services, precisely the harm the Supreme Court in *Olmstead* found violated the ADA.

Plaintiffs Cruz and De La Torre have never contended that Defendants are violating the Medicaid Act. Their claims are based on Defendants violating the ADA and Section 504 of the Rehabilitation Act. The Center for Medicare and Medicaid, the federal funding agency, recognizes that Medicaid is only one statute that must be complied with. CMS made clear to state Medicaid officials that compliance with Medicaid will not relieve them of liability under the ADA's integration mandate:

> *May a State establish a limit on the total number of people who may receive services under an HCBS waiver?* Yes. Under 42 U.S.C. § 441.303(f)(6), States are required to specify the number of unduplicated recipients to be served under the HCBS waivers. ... The State does not have an obligation under Medicaid law to serve more people in the HCBS waiver than the number requested by the State and approved by the Secretary. *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 ... Failure to seek or secure Federal Medicaid funding does not generally relieve the State of an obligation that might be derived from other legislative sources (beyond Medicaid), such as the ADA).*

CMS, *Olmstead Update No. 4,* at 4 (Jan. 10, 2001) (emphasis in original and added), *available at* http://www.cms.hhs.gov/smdl/downloads/smd011001a.pdf. Thus, under Medicaid, a state can set a cap on the number of people who will receive Waiver services. That cap does not violate the ADA or Section 504, as long as it does not require people with disabilities who, but for the cap, could reside in the community with the Waiver services. The ADA and Section 504 are triggered only when the Medicaid cap forces unnecessary institutionalization.

Since Defendants have chosen to provide personal care services -- both in nursing homes and in the community -- they cannot evade their obligations under the ADA's integration mandate to provide those services in the most integrated setting appropriate to their needs. Defendants miss the point when they argue that nursing home services are "mandatory"

Medicaid services while personal care services and HCBS Waiver services are not. Once a state has decided to provide services, whether mandatory or optional, it must provide those services in the most integrated setting appropriate to the needs of the individual -- even if it requires the state to change its Medicaid program by expanding its "optional" community waiver programs. In other words, the state's Medicaid program is not exempt from compliance with the ADA any more than it is exempt from other civil rights laws. Defendants cannot avoid liability under the ADA integration mandate in this case simply because compliance might require it to make changes to its Medicaid program.

D. Defendants 60 Day Nursing Requirement is Not Similar to the Money Follows the Person Requirement

Defendants' argument that 60 days of unnecessary institutionalization is permissible because Congress, in the Deficit Reduction Act of 2005 and the recently enacted Affordable Care Act of 2010, authorize a 60 day requirement that eligible persons for the Money Follows the Person's increased federal match. It is important to understand that under these two statutes Congress has significantly increased the federal Medicaid match to States that transition people *out of* nursing homes. Defendants correctly state that "Congress has created a program whereby states are paid **more** to transition individuals to the community after spending 90 days in a nursing homes than the states would receive if they transitioned such individuals before they reached 90 days." (Doc. No. 36 at 18)(emphasis in original). However, Defendants' next sentence is both incorrect and directly contradicts what their affiant writes. Defendants' state that "Congress is thus financially inducing states *to keep individuals in nursing homes* for at least 90 days before transitioning them to the community." *Id.*(emphasis added). That is *not* why Congress established a 90 day minimum. Instead, as Defendants' Affidavit of Elizabeth Y. Kidder states, "The 60 day time period was selected because it ensures that transition services are

provided *only* to those individuals who *are not likely to transition* to the community on their own. In our experience, individuals who reside in a nursing facility for more than 60 days are significantly less likely to leave on their own." (Doc. No. 33 at ¶8)(emphasis added). Ms. Kidder is correct. The increased federal match is to be used for the most difficult persons to transition – those who have been in nursing homes for at least 90 (or 60) days. Congress' intent is to award states that go the extra yard and transition out of nursing homes the most difficult residents.

That purpose is totally flipped upside-down with what Defendants propose for Messrs. Cruz and De La Torre. The Plaintiffs do not want to enter a nursing home for any time, let alone 60 or 90 days. They are not "less likely to leave [the nursing home] on their own," but to the contrary do not want to go into a nursing home whatsoever. To require them to go into a nursing home so that they will stay 60 days and therefore be put into the category, as Ms. Kidder suggests, "less likely to transition into the community," is directly contrary to the purpose of the two recently enacted statutes. There simply is no connection between, on one hand, the increased federal match to transition the most difficult people *out of a nursing home* and, on the other, requiring people to *go into a nursing home* so that the State can then receive an increased federal match.

E. <u>Modification of a State's Medicaid Plan Is Not a Fundamental Alteration</u>.

The mere fact that Defendants would increase the number of hours Plaintiffs receive in the community, even assuming *arguendo* that this would require Defendants to amend their Medicaid SCI Waiver to expand the number of persons eligible in order to serve Messrs. Cruz and Mr. De La Torre, is simply not a *fundamental* alteration.[9] Keeping Messrs. Cruz and De La Torre in the community setting instead of segregating and institutionalizing them in a nursing

[9] Defendants provide the number of hours Mr. Cruz and De La Torre require as part of the Spinal Cord Injury Waiver. See *supra* at n. 3.

facility setting is only a "reasonable modification" of Florida's program. *Olmstead*, 527 U.S. at 603. Furthermore, per *Olmstead,* it is a reasonable modification to expand existing community programs to keep people from being unnecessarily segregated. *See*, *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 269 (E.D.N.Y. 2009)("[w]here individuals seek to receive services in a more integrated setting – and the state already provides services to others with disabilities in that setting – assessing and moving the particular plaintiffs to that setting, in and of itself, is not a 'fundamental alteration.'"); *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 345 (D. Conn.2008)(holding that where community placement can be accommodated through existing programs, it would not be a fundamental alteration to require the state to determine whether plaintiffs were appropriate for those programs).

Modification of the Medicaid waiver would not be difficult, costly, or otherwise a fundamental alteration.[10] States have discretion in designing their Medicaid HCBS waivers and have authority to seek amendments from CMS, and such amendments have been held not to be a "fundamental alteration." *See Grooms v. Maram*, 563 F. Supp. 2d 850, 857 (N.D. Ill. 2008); *accord Radaszewski*, 2008 WL 2097382 at *10, *15 (noting that federal government has always approved state's waiver amendments, court held that state "could modify or alter the waiver ... to meet the community integration contemplated by *Olmstead*").

Defendants' "resource" argument is not sound when they state that "Plaintiffs argue that it would cost less to provide services in the community than in a nursing home. They provide no evidence of this." (Doc. No. 36 at 20). Defendants apparently ignore or forget that there is a federal Medicaid statutory requirement that Waivers be "cost neutral", i.e., that the "medical assistance [reimbursement] provided with respect to the individual under such waiver will *not exceed* the amount of such medical assistance [reimbursement] provided for such individual if

[10] The *Haddad* court rejected Defendants' fundamental alteration argument. See *supra* at 31-33.

the waiver did not apply." 42 U.S.C. § 1396n (c)(4)(emphasis added). In simpler language, the Waiver must cost less than what Medicaid would pay in the nursing home.

Defendant's Spinal Cord Injury Waiver application at "Appendix J: Cost Neutrality Demonstration," shows that in year 4 (July 2010-June 2011), the total cost in the community, Column 4, is about $31,000 whereas the cost in a nursing home would be about $52,200, for a saving of about $20,700 a year. *See Pl. Ex. B*. There is absolutely no question that, if Messrs. Cruz and De La Torre went into a nursing home, Defendants would find the funds to pay for their institutionalization and would pay more than if they stayed in the community. Conversely, by statutory mandate, Defendants will pay less for Messrs. Cruz and De La Torre under the Spinal Cord Injury Waiver in the community – about $20,700 less.

Defendants' argument that there are other people on the Spinal Cord Injury waiting list, some allegedly longer than Cruz and De La Torre, and even assuming *arguendo* some may have an assessment score higher (Doc. No. 36 at 22),[11] only suggests that Defendants' ADA and Section 504 violations may extend much further than only to Messrs. Cruz and De La Torre. It does not suggest that their ADA/Section 504 rights are not being violated, that they are not being discriminated against, or that a preliminary injunction for them is not appropriate.

F. Defendants Lack A Comprehensive, Effectively Working Plan

Defendants argue that providing Plaintiffs Cruz and De La Torre with relief constitutes a fundamental alteration because it would "disrupt Florida's 'comprehensive, effectively working plan'" to provide services. In support, Defendants list all the waivers that they currently have, and the funds they expend per program. With all due respect, such a *list* is not a *plan*, let alone an "effectively working" one. Defendants' only reference to a "Plan" is with regards to the

[11] Mr. Cruz was assessed on April 28, 2010, nearly five months and at least three hospitalizations ago. Mr. De La Torre was assessed on May 4, 2010, when he still had his mother at home and available to shop, clean, prepare meals, and turn him at night.

"draft" Nursing Home Transition Plan in Defendants' Kidder affidavit. However, by its express terms, this refers only to the "transfer of an eligible Medicaid beneficiary already *residing in* a nursing home for a minimum of 60 days, *to a community setting*…." (Emphasis added). It is not a "comprehensive … plan," because it does not deal with people like Plaintiffs Cruz and De La Torre who are *at risk* of being institutionalized. To prevent unnecessary institutionalization and segregation of Plaintiffs Cruz and De La Torre, who are in the community and at risk of being forced to go into a nursing facility to receive services, an "effectively working" plan would have to address the at risk disabled population.

In *Frederick L. v. Dep't of Public Welfare*, 364 F.3d 487 (3d Cir. 2004) (*Frederick L. I*), the Court of Appeals vacated the district court's ruling that the state had established its fundamental alteration defense. The court rejected the defendants' argument that the state's history of deinstitutionalization and expansion of community mental health services was sufficient *per se* to establish a fundamental alteration defense. The court wrote: "One of our principal concerns is the absence of anything that can fairly be considered a *plan for the future*... [The State] must be *prepared to make a commitment to action* in a manner for which it can be held *accountable*." *Id.* at 499-500 (emphasis added). On the second appeal, the court wrote: "Although we are aware of [the State']s strong commitment in the past to deinstitutionalization ..., [the State's] post-remand submission amounts to a vague assurance of the individual patient's future deinstitutionalization rather than some *measurable goals for community integration for which [the State] may be held accountable*." *Frederick L v. Dep't of Public Welfare*, 422 F.3d 15,156 (3d Cir. 2005) (*Frederick L. II*) (emphasis added). The court reasoned:

> a comprehensive working plan is a n ecessary component of a successful "fundamental alteration" defense in these proceedings.... DPW may not avail itself of the "fundamental alteration" defense to relieve its obligation to deinstitutionalize eligible patients without establishing a plan that adequately

> demonstrates a *reasonably specific and measurable commitment* to deinstitutionalization for which DPW may be held accountable. *Id.* at 157. (Emphasis added).

Nothing in Defendants' supporting affidavits demonstrate any commitment in the future. Defendants' Spinal Cord Injury Waiver expires in June 2012. Nowhere do Defendants suggest that even then they will increase the available slots in that waiver for the 605 people whom the Legislative Committee recognized in January, 2010, were on a waiting list for such services. Defendants know there is a need for expanded SCI services but have not increased the number of people to be serviced. Accordingly, notwithstanding Florida's existing waivers or even its Transition Plan for people in nursing homes, it has failed to articulate this commitment in the form of an adequately specific comprehensive plan for preventing unnecessary institutionalization and segregation of people like Plaintiffs Cruz and De La Torre.[12] Until such a comprehensive plan is established, Defendants' failure to commit to "community-based programs by a target date places the 'fundamental alteration' defense beyond its reach." *Id.* at 158.

IV. Plaintiff Cruz and De La Torre Will Suffer Irreparable Injury

Requiring Plaintiffs Cruz and De La Torre to be institutionalized, even for "only" 60 days, will cause them irreparable injury.[13] Plaintiffs Cruz and De La Torre are both young people. Mr. Cruz previously experienced the injuries that institutions cause. Mr. De La Torre

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[12] Though clearly relevant, budgetary constraints alone are insufficient to establish a fundamental alteration defense. *See Fisher, supra* at 1182-83 ("the fact that [a state] has a fiscal problem, by itself, does not lead to an automatic conclusion that [the provision of integrated treatment] will result in a fundamental alteration…. If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed").

[13] In *Haddad*, the Court noted that "[t]he requirement that Plaintiff first enter a nursing home in order to be transitioned out sometime thereafter presents Plaintiff with exactly the kind of uncertain, indefinite institutionalization that can constitute irreparable harm." *Supra* at 36.

would probably be the youngest person in a nursing home. Given their extremely active community lives and their vehemence against institutionalization, it is not unreasonable that they will quickly become depressed, and their health will most likely deteriorate. That is exactly the type of injury which was found irreparable in *Long v. Benson*, 2008 WL 4571904 *2 (N.D. Fla., Oct. 14, 2008)(such placement "will inflict an enormous psychological blow"). In *Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010), the Court recognized that "even temporally" moving to a nursing home would cause "regressive consequences." *See also Crabtree*, 2008 WL 5330506 at *30 (irreparable injury of mental depression and shorter life expectancy if plaintiffs institutionalized in nursing facility.)

With regards to Mr. Cruz's statement that he will lose his apartment, Defendants apparently do not appreciate what happens when a person is institutionalized in a Medicaid nursing home. (Doc. No. 36 at 27). For everyone who enters a nursing home which is paid for by Medicaid, their entire Supplemental Security and/or Social Security Disability checks are transferred automatically to the nursing home. Mr. Cruz in a nursing home, for even 60 days, will receive only about $35 a month for all his incidentals, including paying for his apartment.[14] Even though he "socializes with neighbors," *id.,* does not mean these neighbors will pay for his rent.

Mr. De La Torre's mother moved to Spain on September 8, 2010, and he has no one to provide the assistance she did, including shopping, laundry, cleaning, meal preparation, as well as other activities of daily living.

IV. The Public Interest Will Be Served With a Preliminary Injunction

[14] No such requirement exists for hospitalization, including hospitalizations paid for by Medicaid. Thus, when Mr. Cruz has been hospitalized in 2010, he continued to receive his full SSI/SSDI payments from which he could pay his rent on the apartment to which he returned after each hospitalization.

Preventing unnecessary segregation is in the public interest. *Olmstead*, 537 U.S. at 600. Enforcing the ADA, the civil rights statute for people with disabilities, is as much in the public interest as the enforcement of all civil rights' statutes. *Long*, 2008 WL 4571904 at *3.

V. Conclusion

For the above reasons, this Court should grant a preliminary injunction and waive costs.

Respectfully submitted,

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CERTIFCATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served this 13th day of September, 2010, by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of the filing to the following: Andres T. Sheeran, Agency for Health Care Administration, 2727 Mahan Drive, Building MS#3, Tallahassee, Florida, 32308, Morris Shelkofsky, Assistant General Counsel, Florida Department of Health, 4052 Bald Cypress Way, Bin A-02, Tallahassee, FL, 32399.

/s/ Steven R. Browning