UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

LUIS CRUZ and NIGEL DE LA TORRE,

Plaintiffs,

vs. CASE NO. 1:10-cv-23048-UU

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

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

Defendants.
_____/

DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The Defendants, ELIZABETH DUDEK, in her official capacity as the Interim Secretary of the Florida Agency for Health Care Administration (AHCA), and DR. ANA VIAMONTE ROS, in her official capacity as Surgeon General, Florida Department of Health, by and through the undersigned counsel, hereby submit this reply, with incorporated memorandum of law, to Plaintiffs Luis Cruz and Nigel De La Torre's response in opposition to the Defendants' Motion to Dismiss Complaint, and further state as follows:

1. Plaintiffs' claim that the requested relief would not constitute a fundamental alteration because "Defendants will use Medicaid funds to provide services either in a nursing home or in the community" and "[t]here is nothing in the federal Medicaid statute that prohibits

using [funds from the nursing home line item], if necessary, to provide services to Plaintiffs in the community."

Plaintiffs imply that Defendants can access the same source(s) of funding whether Plaintiffs are served in a nursing facility or they are immediately placed in the Florida Medicaid Traumatic Brain Injury/Spinal Cord Injury Waiver Program (TBI/SCI Waiver). Defendants have demonstrated that this is *not* the case. As such, the question is whether it would constitute a fundamental alteration to place Plaintiffs immediately in the TBI/SCI Waiver using the funding specifically allocated to the TBI/SCI Waiver (*not* the nursing home line item funding, as Defendants do not have the authority to access this funding source for these services). This would require the Defendants to (1) bypass the 51 and 205 individuals, respectively, who are ahead of Plaintiffs on the waiting list; and (2) access a funding source that is already exhausted. This cannot be "reasonably accommodated" and is thus by definition a fundamental alteration.

2. Plaintiffs further indicate that the requested relief would not constitute a fundamental alteration because, "[o]bviously, Defendants have available slots for Plaintiffs." This fails to take into account the fact that the number of open slots on the waiver is far less than the number of individuals who are above both Plaintiffs on the waiting list. If these "available" slots could be said to be "for" anyone, it would be for those individuals who are highest on the waiting list, not the Plaintiffs.

3. Plaintiffs fail to explain fully the 375 slots and the difference between the cap under the waiver of 375 and the present enrollment of 341. The 375 slots are a number of unduplicated beneficiaries to which the State of Florida intended to provide waiver services on an incrementally increasing basis over each of the five years of the waiver program. The

current five year program has an inception date of July 1, 2007. As shown by the affidavits of Kristen Russell, the 375 number of unduplicated beneficiaries in the waiver program is projected on the basis of collections in the Brain and Spinal Cord Injury Program (BSCIP) Trust Fund.

The importance of the 375 figure lies in its role in explaining AHCA's estimate of average per capita expenditures for services over the five year term of the waiver. 42 CFR § 441.303(f). To invoke this number facilely without detailed explanation is problematic. It, 375, is an upper range figure reflecting the State of Florida's intention based on the BSCIP Trust Fund's expected collection experience over a five year period. It is fundamentally used as part of the estimated calculation of average per capita expenditure. Plaintiff's argument fails to deal effectively with the 375 number as part of the calculation of a spending concept dictated by CMS.

The collections experience of the BSCIP Trust Fund on July 1, 2007 is a snapshot in time. At that inception date of the current waiver, the Trust Fund's collections experience permitted the statement of the State of Florida's intention of an incremental increase over time at the upper range level of 375. The collections experience permitted expansion of the filled slots from 245 on July 1, 2007, to the present 341 in the second quarter of the fourth year of the five year waiver cycle. See Affidavit of Susan Michele Morgan, ¶ 14. But the projections for the out years (the balance of July 1, 2010-June 11, 2011 and July 1, 2011-June 30, 2012) do not support additional placements into the Brain Injury/Spinal Cord Injury Waiver program. See Affidavit of Kristen Russell, ¶12.

The Plaintiff's failure to parse the nuances of the 375 cap and its tie to projections of BSCIP Trust Fund collections ignores the fact that average per capita expenditures for services is an estimate. It obscures the clear fact that the 375 figure is a dated figure tied to the July 1, 2007, inception date of the current waiver. This failure overlooks the five year term of the waiver cycle. Finally, it denies the State of Florida the benefit of its expansion of the number of waiver slots in the relatively abundant years of Trust Fund collections and its maintenance of that expanded number of slots into the lean period of such collections in the out years of the five year waiver cycle.

The Court should consider the basic mathematical purpose of the intended number of unduplicated beneficiaries to be served (375) as established in the Code of Federal Regulations. It should recognize the role of this number in explaining AHCA's estimate of average per capita expenditures for services. Based on this analysis, the Court should reject the baseless assertion that there are available slots for Plaintiffs.

Respectfully submitted this 1st day of October, 2010.

AGENCY FOR HEALTH CARE ADMINISTRATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of the filing to the following: Stephen F. Gold, 1709 Benjamin Franklin Parkway, Second Floor, Philadelphia, PA 19103, and Steven R. Browning and Jay M. Howanitz, SPOHRER & DODD, P.L., 701 West Adams Street, Suite 2, Jacksonville, Florida 32204 this 1st day of October, 2010.

/s/ Andrew T. Sheeran
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