IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LARS KNIPP by his next friend, Deborah Stone; JAMES KIM, by his next friend, Grace Kim; SUSANNAH TROGDON, by her next friend, Samuel Trogdon; AMBI HEARD; SHAUN MITCHELL; and ROBERT CHAFFIN by his next friends, Tom Chaffin and Lena Margareta Larsson Chaffin,	)	
Plaintiffs,	)	CIVIL ACTION FILE NO. 1:10-CV-2850-TCB
v.	)	
GEORGE ERVIN "SONNY" PERDUE III, in his official capacity as Governor, State of Georgia; CLYDE L. REESE, III in his official capacity as Commissioner, Georgia Department of Community Health; DR. FRANK E. SHELP, in his official capacity as Commissioner, Georgia Department of Behavioral Health and Developmental Disabilities,	)	
Defendants.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

Defendants' response to Plaintiffs' motion for preliminary injunction does not address the overwhelming body of recent case law holding that States may not terminate services needed to insure that individuals with disabilities can live in

community placements. Plaintiffs will address Defendants arguments in turn, but Defendants simply do not rebut this core argument in Plaintiffs' opening brief.

FACTS

Administrative Review

Defendants argue that the existence administrative review proceedings bar this action. Plaintiffs Knipp, Trogdon and Chaffin have received fair hearing through the Georgia Administrative process and have all lost. None has asked for agency review, the process under which the Department of Community Health reviews the administrative decisions made by independent hearing officers. (Trogdon Dec. ¶¶ 23-25; Usher Dec. ¶ 38; Knipp OSAH Decision; Second Dec. Ray Johnson). There is currently no administrative action pending for these plaintiffs.

Plaintiffs Kim and Heard have had their terminations from the SOURCE program reversed on procedural grounds and are currently reinstated. Ms. Heard was sent a second termination on July 19, 2010, which was appealed on August 6, 2010. (7/19/10 Heard Second Term. Letter; 8/6/10 Second Appeal for Heard). The Department of Community Health sent a letter on August 11, 2010 denying the request for an appeal based on the fact that an appeal was pending at the time. (8/11/10 Letter from DCH). Thus, no administrative action is pending for either of these Plaintiffs.

Through a misunderstanding about his ongoing eligibility, Plaintiff Mitchell never requested administrative review of his SOURCE termination. His ALS provider believed he was still on the program and continued to provide him home-based services. He has no administrative appeal pending. (Mason Dec. ¶¶ 92-95).

Source and the Medicaid Program

Defendants' response focuses on the narrow issue of SOURCE history and the Medicaid Category under which the state placed it in 2008. Whatever its initial intention, SOURCE became a major tool in Georgia's effort to provide community services to individuals who otherwise would be institutionalized for mental illness. (Shelp Decl. ¶ 41). Georgia has provided no comparable program to meet the needs of individuals with mental disabilities served under SOURCE.

Defendants' response does not deny that they could continue SOURCE under a Medicaid waiver request pursuant to 42 U.S.C. § 1396n(i). The State of Georgia Planning Initiative on Mental Health and Addictive Services specifically noted, "All parties (state staff, state Medicaid officials, advocates and technical assistance resources) agree that expansion of the state's Medicaid plan in the area of supported housing, supported employment and targeted case management services is desired." Id. p. 2. Defendants neglect alternative delivery methods with federal Medicaid funding, and the possibility of providing services with state funds.

REPLY TO DEFENDANTS' ARGUMENT

A. Plaintiffs Have Standing

Four Plaintiffs have been terminated from the SOURCE program. The relief Plaintiffs seek is continuation of the services they currently receive as SOURCE benefits. This unquestionably gives them standing to contest their termination.

Two Plaintiffs, Kim and Heard, recently had their original notices of termination rescinded through the administrative process for procedural reasons.[1] Defendants have not changed their policy of excluding persons with mental disabilities from the SOURCE program. Defendants have not advised Plaintiffs Kim and Heard they will not again be terminated. These two Plaintiffs reasonably anticipate they will be terminated. (In fact, the July 19, 2010 second termination of Ms. Heard may still be active). These Plaintiffs have standing because "there is a reasonable likelihood that [they] will again suffer the deprivation of [services] that gave rise to this suit." Honig v. Doe, 484 U.S. 305, 318 (1988). *See also* Lynch v. Baxley, 744 F.2d 1452, 1457 (11th Cir. Ala. 1984) (Plaintiff has standing when "realistically threatened by a repetition" of the previous conduct.)

[1] The notice of termination sent to the Plaintiffs did not comport with the notice requirements of the SOURCE Manual or federal regulations. (See e.g. Exhibit C of Defendant's Brief (Heard Admin. Decision). The Administrative decision in Heard stated, "[a]lthough the Court concludes that this particular matter must be dismissed, this decision does not preclude the Respondent from reissuing a Notice of Termination ... as was done on July 19, 2010). (Id. at 10).

B. Plaintiffs Meet the Standard For Granting Preliminary Injunctive Relief.

Plaintiffs seek a preliminary injunction to continue SOURCE services they have all received for some time. They are not asking this Court to design novel relief, but simply to order continuation of benefits to keep them in their current community placements. Some of the Plaintiffs' SOURCE payments have now lapsed due to the loss of administrative hearings, but all remain in the community placements obtained and paid for with SOURCE benefits. Ms. Trogdon of course continues to live at home. It is this status quo they seek to maintain through injunctive relief continuing or reinstating their services.

Defendants cite no authority for the proposition that the standards for preliminary injunction are applied "more stringently than in all of the other circuits." (Def. Brief, p. 7). No matter the standard, Plaintiffs have made an overwhelming showing on all factors.

Defendants have submitted no factually similar cases and have not distinguished the numerous similar cases granting preliminary injunctive relief cited by Plaintiffs in their opening brief. Martin v. MARTA, 225 F. Supp. 2d 1362 (N.D. Ga. 2002), cited by Defendants, grants an extensive mandatory preliminary injunction, far more comprehensive than the basic preservation of the status quo requested in this case.

C. The Existence Of State Remedies Is Not A Bar To Relief

Defendants argue that relief is barred because Plaintiffs have a remedy at law under state law. (Def. Brief, p. 8). Exhaustion of state law remedies is not required under Title II of the ADA. Bledsoe v. Palm Beach County Soil and Water Conservation Dist., 133 F.3d 816, 824 (11th Cir. 1998) ("'An analysis of Title II regulations further makes clear that, while resort to administrative remedies is optional, it is not required.'"); Smith v. Indiana, 904 F. Supp. 877, 880 (N.D. Ind. 1995).

Defendants next argue that comity bars this action. The abstention cases cited rely on several factors not present here. First, there are no administrative actions currently pending. Second, there is no uniquely complicated issue of state law to be resolved. One case cited by Defendants, New Orleans Pub. Serv. In. v. Council of the City of New Orleans, 491 U.S. 350 (1989) rejects abstention under facts closer to meeting the standard than those here. It notes, "there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." Zablocki v. Redhail, 434 U.S. 374, 380, n. 5 (1978). 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003) also does not support abstention. ("[A]n essential part of the . . .abstention analysis is whether the federal proceeding will interfere with an ongoing state court proceeding. If there is no

interference, then abstention is not required." Id. at 1276). Here there is no state court proceeding in progress and currently, no administrative proceedings.

D. Plaintiffs Are Likely To Succeed On The Merits

Defendants suggest that the Eleventh Amendment is a bar to this action. They then rightly recognize that injunctive relief is allowed under Ex parte Young, 209 U.S. 123 (1908). (Def. Brief, p. 9) Since this motion only requests injunctive relief, Defendants appear to acknowledge the availability of the relief requested.

Defendants also argue that Plaintiffs are seeking retrospective relief. (Def. Brief, p. 9). Plaintiffs have requested no such relief in this motion. It is worth noting that the immunity defenses raised by Defendants that may throw obstacles in the way of retrospective relief if preliminary injunctive relief is not granted.[2]

Defendants next argue that Plaintiffs cannot enforce the ADA and 28 C.FR. 35.130. (Def. Brief, p. 9). Olmstead v. LC, 527 U.S. 581 (1999) conclusively answered that argument and enforced these very mandates. Defendants cite no case to the contrary in the face of Plaintiffs' citations to numerous cases enforcing these rights. Plaintiffs have stated a claim against the Defendants under Rule 12(b)(6).

---

[2] Although only injunctive relief is sought here, the State of Georgia has waived its Eleventh Amendment immunity under Section 504, 42 USCS § 2000d-7. Congress has abrogated it for damage awards, at least for constitutional violations under the ADA. United States v. Georgia, 546 U.S. 151, 158-59 (2006). As Plaintiff is not seeking damages in this motion, the extent of those waivers is currently not relevant.

Plaintiffs are qualified people with disabilities. Defendants do not dispute that Plaintiffs are disabled. As in Olmstead, these plaintiffs have shown that they are "'qualified' for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for [them] and [none] opposed such treatment." Olmstead, 527 U.S. at 602-603.

Our case is a direct continuation of Olmstead. The Court there held "Unjustified isolation . . . is properly regarded as discrimination based on disability." Id. at 597. In Olmstead, the plaintiffs were in institutions at the time of filing the case. However, the Court recognized that once appropriate community services were provided, "There may be times [when] a patient can be treated in the community, and others when an institutional placement is necessary." 527 U.S. at 605. In fact, like the plaintiffs here, the Olmstead plaintiffs were repeatedly in and out of institutions. L.C. by Zimring v. Olmstead, 138 F.3d 893, 895 n. 2, 903, n. 9 (11th Cir. 1998). By the time of the Court of Appeals decision, L.C. had been in an appropriate community placement for over two years and E.W. had been since shortly after the District Court decision. Id.

Individuals with mental disabilities are entitled to services in the least restrictive environment in which they can be served. They can sue to avoid the threatened discrimination as well as to escape discrimination. This is why Courts

have repeatedly recognized that individuals in the community are entitled to continuation of their community services if the discontinuation would threaten them with a risk of institutionalization. Fisher v. Okl. Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003) ("protections 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"); Brantley v. Maxwell-Jolly, 656 F. Supp. 2d 1161, 1170 (N.D. Cal. 2009); V.L. v. Wagner, 669 F. Supp. 2d 1106, 1119 (N.D. Cal. 2009); Mental Disability Law Clinic v. Hogan, 2008 U.S. Dist. LEXIS 70684 at *50 (E.D.N.Y. Aug. 28, 2008). All plaintiffs remain qualified people with disabilities because of their ongoing needs for community services to avoid institutionalization.

The Accommodations Plaintiffs Request Are Reasonable

Defendants argue that continuing Plaintiffs' services under the SOURCE program is not a reasonable modification. To evaluate that assertion, the Court should examine SOURCE's place in Defendants' treatment of people with mental illness. Georgia provides institutional services for the mentally ill. Beyond that, SOURCE is the major program allowing for community placement. (Shelp Decl. ¶ 41). It is the primary program that Defendant Dr. Shelp pointed to in his February 2010 Declaration, filed in the lawsuit between the United States Justice Department

and the State of Georgia, in his description of community services for people with mental illness in Georgia. (Shelp Dec. ¶¶ 42-47).

Plaintiffs do not request creation of a new program. Instead, they simply ask to continue to receive services under the SOURCE program that has served them, and that continues to serve people who do not have mental disabilities. No new providers or programs need be set up. Indeed, the opposite is true; providers will be deprived of clients if the services are eliminated. Not only is SOURCE treatment less expensive, it can be funded with Medicaid payments that are paid approximately 70% by the federal government.

Defendants identify no cases where program modifications like those requested here have been found unreasonable. Plaintiffs cited numerous cases in their opening brief that support such modifications. Fisher v. Okla. Health Care Auth., 335 F.3d at 1179 n.3 ; V.L. v. Wagner, 669 F. Supp. 2d at 1119 ; Marlo M. v. Cansler, 679 F. Supp. 2d at 638-39 (Preliminary injunction against reduction of home based Medicaid services for two plaintiffs); Knowles v. Horn, 2010 U.S. Dist. LEXIS 11901 *12-13 (N.D. Tex. Feb. 10, 2010)(Continuation of extensive home based services ordered, noting they can be paid for with entirely state funds if necessary).

In addition to the cases that support all Plaintiffs, Plaintiff Trogdon is also

entitled to services under the analysis of Olmstead and Townsend v. Quasim, 328 F.3d 511 (9th Cir. 2003). Ms. Trogdon has recently been found eligible for the NOW-COMP waiver program. This entails a decision that she is eligible for level of care in a hospital, nursing facility, or institution for individuals with mental retardation. 42 CFR 441.303(f)(5). Like the plaintiff class in Townsend, Ms. Trogdon would prefer to receive the services she is entitled to at home (for far less expense). This is the essence of Olmstead and Ms. Trogdon's case parallels Townsend. Further, Ms. Trogdon is an individual plaintiff making the accommodation far less onerous than the class wide relief in Townsend.

Defendants have not submitted evidence to make out a fundamental alteration defense that accommodating plaintiff would somehow impair provision of services to other individuals in need of mental health series. *See* Olmstead, 527 U.S. at 605-606. No matter what facts Defendants present, they cannot make a fundamental alteration defense because they do not meet the baseline requirement: they cannot show that they have a plan to expand and provide community services to those in need of such services to avoid institutionalization. Frederick L. v. Dep't of Pub. Welfare of Pa., 422 F.3d 151, 177-79 (3d Cir. 2005); Sanchez v. Johnson, 416 F.3d 1051, 1067-1068 (9th Cir. 2005). Instead Defendants are going backward. They are eliminating the program that has provided community placements for mentally ill

individuals with no replacement program and not even any transition services. The fundamental alteration defense is available only if states can show a plan and good faith progress. In regard to the elimination of the SOURCE program, Defendants cannot make this showing.

E. Plaintiffs Have Shown They Are Likely To Suffer Irreparable Harm

Contrary to Defendants' bald assertion, all Plaintiffs have offered substantial evidence of the likelihood of irreparable harm. Dr. Richard Elliot, who examined the Plaintiffs and their medical records stated that Lars Knipp would likely decompensate and be institutionalized if he lost his SOURCE services. (Elliot Decl. ¶¶ 33-34) He stated that Mr. Kim would likely be a threat to himself or others, be hospitalized or incarcerated, and if he failed to take his seizure medications might suffer permanent injury or death. (Elliot Decl. ¶¶ 41-43) He stated Ms. Trogdon would likely be admitted to an institution. (Elliot Decl. ¶ 60). Ms. Heard would likely decompensate and be hospitalized or incarcerated. (Elliot Decl. ¶ 69). Mr. Mitchell would likely become non-compliant with his medication, decompensate and be hospitalized. (Elliot Decl. ¶ 77). Mr. Chaffin was at risk of an exacerbation of his already serious symptoms and institutionalization if he cannot continue in his SOURCE living arrangement. (Elliott Decl. ¶¶ 91-94).

The Plaintiffs' history of institutionalization buttresses this expert evidence.

Mr. Knipp was hospitalized 9 times from July 2006 to December 2009 prior to his current SOURCE placement. (Stone Decl. ¶ 9; Elliott Decl. ¶ 18; Knipp Medical records generally). Since obtaining SOURCE, he has not been institutionalized in 10 months.

Mr. Kim went to his current SOURCE placement in February 2009 after he had been in and out of Summit Ridge Hospital on several occasions for hurting himself and causing property damage. (Kim Decl. ¶¶ 11-17; Mason Decl. ¶ 21; Kim Med. pp. 185-189; 467-68; 617-620; 659-660; 706-710). He has continued to need occasional institutional care while in his SOURCE placement, but the stays have generally been short. The availability of the level of services in the SOURCE placement has facilitated his return to the community from institutions. (Mason Decl. ¶ 26; Elliott Decl. ¶ 39; Kim Med. pp. 906-12; 966).

Ms. Heard came to Gwinnett Homes in December 2007 after being in Anchor Hospital from November 11, 2007 to December 28, 2007. (Mason Decl. ¶49; Heard Medical Records ("Heard") pp. 9-11). She required an additional institutional stay at Summit Ridge from February 23, 2009 to March 3, 2009. Ms. Heard was able to be discharged from Summit Ridge quickly because she had a stable place to which to return where she could receive ALS and other services. (Mason Decl. ¶¶ 57-58).

Mr. Mitchell came to Gwinnett Homes in October 2008 after having been at

Georgia Regional Hospital Atlanta for four months for his mental illness. (Mason Decl. ¶¶ 76-77). The Georgia Regional Hospital social worker and Ms. Mason worked out that Mr. Mitchell would come to the personal care home with the understanding that he would apply for and receive SOURCE funding for ALS. (Mason Decl. ¶ 78).

Mr. Chaffin was hospitalized at least twice in 2003. (Elliot Decl. ¶ 81). Because of intense family support and placement in a SOURCE home, Mr. Chaffin has since avoided institutionalization. However, Dr. Elliott stated that Mr. Chaffin was one of the most severely mentally ill people he had met who was living in the community. (Elliot Decl. ¶ 79).

The Court must bear in mind that the harm of institutionalization presupposes that the Plaintiffs' mental state will deteriorate dramatically. The incomprehensible pain of such decompensation is also irreparable harm.

The fact that Plaintiffs face a likelihood of irreparable harm is also shown by the most recent assessments conducted by the SOURCE program's assessment nurses. (SOURCE assessments for all plaintiffs). The SOURCE nurses found that all of the Plaintiffs needed supervision or cuing at all times. (Id. at § C). They found that, based on their capacity, the Plaintiffs needed assistance or were totally dependent on others for help with managing their medications, shopping for

household items and food, meal preparation, managing finances, and ordinary household work. (Id. at § G). Plaintiffs will suffer irreparable injury if they lose the services that meet these extensive needs.

Finally, the likelihood of institutionalization of Plaintiffs is demonstrated by Defendants' prior findings that all would require institutionalization in determining them eligible for the SOURCE program in the first place. While Defendants have changed the SOURCE program criteria to exclude participants whose needs are a result of mental disabilities, there is no change in the underlying condition of Plaintiffs that led to the determination they needed institutional services.

CONCLUSION

This Court should grant the Motion for a Preliminary Injunction.

Respectfully submitted,

/s/ C. Talley Wells_____
C. Talley Wells
Georgia Bar No. 747657
Atlanta Legal Aid Society, Inc.
246 Sycamore Street
Decatur, GA 30030
404-377-0705 ext. 282 (phone)
404-377-2349 (fax)
ctwells@atlantalegalaid.org

/s/ Charles R. Bliss_____
Charles R. Bliss
Georgia Bar Number 063385
Atlanta Legal Aid Society, Inc.
151 Spring Street NW
Atlanta, GA 30303
(404) 614-3988
(404) 614-3997 (fax)
crbliss@atlantalegalaid.org

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing has been prepared in Times New Roman (14 point) font, as approved by the Court in L.R. 5.1.B.

/s/ C. Talley Wells____
C. Talley Wells
Georgia Bar No. 747657
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I have this day filed electronically, the foregoing Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction with the Clerk of the Court using the CM/ECF system that will automatically send email notification of such filing to the following attorneys of record:

Michelle Townes
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

Penny Hannah
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

/s/ C. Talley Wells_____
C. Talley Wells
Georgia Bar No. 747657
Atlanta Legal Aid Society, Inc.
246 Sycamore Street
Decatur, GA 30030404-377-0705 ext. 282
404-377-2349 (fax)
ctwells@atlantalegalaid.org