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

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF GEORGIA, *et al.*, Defendants.	))))))))	Civil Action No. 1:10-CV-0249-CAP

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant the State of Georgia and the individual Defendants who are named in their official capacities (collectively, "the State" or "Georgia") respectfully file this Memorandum of Law in Support of their Motion to Dismiss Plaintiff's Complaint, filed on January 28, 2010 [dkt. 1].

INTRODUCTION

The State of Georgia operates the Department of Behavioral Health and Developmental Disabilities ("DBHDD"). DBHDD provides services to thousands of Georgians who have been diagnosed with a developmental disability, mental illness, or substance abuse. With this lawsuit, the U.S. Department of Justice ("DOJ") seeks nothing short of a hostile takeover of DBHDD and a total supplanting of Georgia's policy decisions, management, and provision of such

services. In its place, the DOJ seeks to implement a new federal vision, which is not based on law, ignorant of the limits of federal power, and inconsistent with the proper role of states in our federal system. To make matters worse, the DOJ seeks this sea change by offering a tortured reading of a straightforward statute (the Americans with Disabilities Act or "ADA") that does not provide the proper basis for a disguised class-action lawsuit like this one. ADA allegations like those in the Complaint necessarily rely on an individual's specific needs, clinical conditions, and assessments, all of which make a final determination on systemic claims highly improbable. Put differently, by trying to mandate systemic change through a narrow statute, the DOJ is using too blunt a tool for the precision needed for an appropriate inquiry.

Ultimately, the DOJ's bold attempt to take over a state system through a cumbersome legal theory renders the Complaint fatally flawed and subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). The DOJ's rhetoric attempts to shift this Court's focus from the simple question properly before it: does the Complaint sufficiently allege that Georgia discriminates against individuals with disabilities by keeping such individuals unjustifiably isolated in state institutions? Rather than focusing on this dispositive question, the DOJ aggressively, but wrongly, seeks to expand the ADA to cover individuals' potential

hospitalization at some unknown point in the future. That risk is not actionable under the ADA because there is no discrimination; ADA rights vest when an individual resides in a state hospital when he otherwise could be treated in the community and wants to be treated in the community. See Olmstead v. Zimring, 527 U.S. 581, 602-06 (1999). In other words, the ADA is a remedial and not prophylactic law. The DOJ's advocacy and new legal theory fail to state a claim for which relief can be granted because the Complaint raises an unrecognized theory of ADA liability, seeks a remedy not authorized by the ADA, and implicates an affirmative defense. The Complaint also fails to present this Court with a case or controversy within the meaning of Article III of the United States Constitution. Further, the Complaint is barred by operation of the Settlement Agreement entered into between Plaintiff and Georgia in January 2009.

PROCEDURAL HISTORY AND STATEMENT OF RELEVANT FACTS[1]

A. The Settlement Agreement and the Related Case

The Complaint fails to mention the Settlement Agreement, which was executed by the State and the United States on January 15, 2009, after extensive

[1] Facts regarding Georgia's mental health program are stated in Defendants' Response in Opposition to Plaintiff's Motion for Immediate Relief (Preliminary Injunction) in the Related Case [dkt. 71] at pages 13-26. For the sake of brevity, the facts are not restated in this motion.

and frequent negotiations. On the same day, Plaintiff filed a complaint under CRIPA (the "Related Case"), which alleged that conditions in the Georgia Psychiatric Hospitals violated (1) substantive due process; (2) Social Security provisions; (3) the **ADA**; (4) the Individuals with Discrimination in Education Act; and (5) Title VI of the 1965 Civil Rights Act. [Related Case, dkt. 1.] On the same day, the parties filed a joint motion for this Court to enter the parties' Settlement Agreement and dismiss the complaint. [Related Case, dkt. 2.]

On February 10, 2009, the parties jointly moved the Court to adopt the Settlement Agreement and dismiss the complaint pursuant to Federal Rule of Civil Procedure 41(a)(2) because "[t]he Parties agree that it is in the best interest of the Parties and the individuals residing in the Facilities that the Settlement Agreement's reforms be implemented as soon as possible." (Related Case, Joint Mot. [dkt. 7] at 2.) On February 11, 2009, the Court "adopt[ed] the proposed settlement agreement [Doc. no. 7-2] as the temporary order of the court so that the parties can proceed with implementation and enforcement of its terms pending final approval." (Related Case, 2/11/2009 Order [dkt. 9].)

While some advocacy groups expressed their support of the Settlement Agreement, other advocates opposed it, primarily based on their belief that financial resources should be shifted from improving conditions at Georgia's

hospitals to funding community services. [Related Case, dkts. 4-2, 10 & 11.] Plaintiff defended the Settlement Agreement in its original response to the objecting advocacy groups. Plaintiff affirmatively stated that it would monitor the Settlement Agreement, provide advice and assistance to the State, and "notify the State and work together to develop an effective plan" before instituting judicial remedies, should Plaintiff believe that the State was out of compliance with the Settlement Agreement. (Related Case, U.S. Resp. to Concerns of Ga. Advocates [dkt. 12] at 12.) Importantly, Plaintiff represented to this Court that it "did not seek to prescribe the exact method by which the State would obtain compliance with the Agreement," that it was "within the State's discretion" to develop plans to achieve compliance, and that it was "not the United States' intention . . . to dictate to the State how its mental health system should be designed." (Id. at 13.) With respect to potential ADA/Olmstead concerns, Plaintiff referenced the Voluntary Compliance Agreement ("VCA"), between the federal Health and Human Services Office of Civil Rights ("OCR") and the State (since terminated by OCR), which contained a separate enforcement mechanism. (Id. at 15-16.)

The Court directed the parties and interested *amici curiae* to meet in an attempt to resolve the *amici's* concerns. (Related Case, 4/6/2009 Order [dkt. 16]; Related Case, 6/1/2009 Order [dkt. 24].) On June 12, 2009, the parties and the

amici filed a Joint Status Report detailing those discussions and agreeing to additional periodic meetings and certain actions, including the State's filing an initial implementation plan concerning the Settlement Agreement. (Related Case, Joint Status Report [dkt. 26] at 3-6.) The State requested that the Court enter the Settlement Agreement as a final order; Plaintiff and the *amici* requested instead that the Court simply take no further action at that time. (Id. at 10.)

On September 30, 2009, the Court dismissed the parties' joint motion for entry of the Settlement Agreement because Plaintiff "indicated that it no longer agrees with the motion." (Related Case, 9/2/2009 Order [dkt. 29] at 2.) In dismissing the joint motion, the Court "applaud[ed] the initiative and cooperation" of the parties and the *amici*, "strongly encourage[d] all of the parties to maintain their level of commitment and effort," and stated that "the parties should continue to meet, as agreed, every six months to update/monitor progress and to provide feedback." (Id.) The Court also indicated that the parties could resubmit a motion "for the court to permanently adopt the settlement agreement." (Id.)

That same day, Plaintiff and the *amici* filed a status report with the Court indicating they had "grave concerns" concerning the State's ability to comply with the Settlement Agreement, but Plaintiff chose "not [to] seek enforcement of the Agreement at this time" because the first deadline for the State to come into

compliance with certain provisions of the Settlement Agreement was not until one year from its effective date. (Related Case, Joint Status Report [dkt. 30] at 1-2, 23.) This provided the initial indication that Plaintiff was shifting its interest from improving conditions within Georgia's psychiatric hospitals to the *amici's* position that the State should be required to undertake significant actions in developing community services in accordance with their view of Olmstead. (Id. at 2 ("The State's unwillingness to take seriously its obligations under Olmstead . . . and the discharge planning provisions of the Agreement is a fundamental cause of the constitutional violations that the United States has identified.").)[2]

On October 8, 2009, during a telephone conference with the Court, an attorney for the State specifically asked Plaintiff's counsel whether Plaintiff intended to abide by the terms of the Settlement Agreement:

> UNIDENTIFIED SPEAKER [for Defendants]: My question is do we still have an agreement, and its the intent of the Department of Justice to move forward with that agreement and we'll try to resolve the issues about the *Amici* as we go along.
>
> UNIDENTIFIED SPEAKER [for Plaintiff]: Yeah, we believe that the agreement is still in place pursuant to the February 11 Order and we are going to continue to try and address the concerns raised by the *Amici*, yeah.

[2] Unlike the four priority areas, the discharge planning provisions are not required to be fulfilled at any specific time within the Settlement Agreement's five-year term.

(Related Case, Tr. of 10/8/2009 Tel. Conf. [dkt. 35] at 5.) That same day, the Court made abundantly clear that its February 11, 2009 Order which "temporarily adopted the proposed settlement agreement is in full force and effect." (Related Case, 10/8/2009 Order [dkt. 34].)

On December 8, 2009, Plaintiff informed the Governor of Georgia by letter that "the State Psychiatric Hospitals fail to provide adequate discharge planning to insure placement in the most integrated setting and to provide adequate supports and services necessary for successful discharge," citing the ADA and Olmstead (Compl. Ex. 3 at 2), even though the discharge planning provisions of the Settlement Agreement were still in force with four years remaining for compliance, and the VCA was still in effect for the remaining three-and-a-half years of its term.

Governor Sonny Perdue responded to this letter with an invitation for the DOJ to meet with him and his senior staff. Before the Governor and DOJ representatives met, the Court held another telephone conference on December 30, 2009. The Court ordered Plaintiff to file a motion "outlining their concerns regarding conditions of state facilities," with responses from the State and *amici*, after which the Court would determine when to hold a hearing. (Related Case, Minute Entry for 12/30/2009 Tel. Conf. [dkt. 44].)

Governor Perdue and DOJ representatives met on January 8, 2010, at which time U.S. Assistant Attorney General for Civil Rights Thomas E. Perez advised the Governor that Plaintiff was considering filing a new lawsuit based on the ADA, notwithstanding the Settlement Agreement in this case and the VCA between the OCR and the State addressing ADA issues separately. The Office of the Governor sent letters to Mr. Perez on both January 8 and 15, 2010, containing specific information in a good faith attempt to address Plaintiff's concerns and resolve the ADA issues cooperatively. [Related Case, dkts. 52-3 & 52-8.]

Plaintiff responded on January 22, 2010, with a proposed 50-page consent decree that would have effectively voided both the Settlement Agreement and the VCA, with an ultimatum that the State must execute the proposed consent decree or an "additional action" would be filed by the end of January. [Related Case, dkt. 52-10.] In response, the State asked for more time to review the proposal and assess the significant costs associated with it, but Plaintiff denied that request and then actually <u>shortened</u> the State's time to review the proposed consent decree, stating that it would file a new ADA lawsuit on January 28, 2010. [Related Case, dkt. 52-12.] In an effort to undermine completely the VCA and the Settlement Agreement, Plaintiff then filed not only this new ADA Complaint on January 29, 2010, but also a motion to amend the complaint in the Related Case, a motion to

consolidate this lawsuit into the Related Case, and a motion for immediate injunctive relief in the Related Case. The parties attempted to settle this lawsuit, but after four months of negotiations, were unable to reach accord.

ARGUMENT AND CITATION OF AUTHORITY

The DOJ's attempt to dramatically expand the reach of the ADA presents this Court with a fatally flawed complaint that fails to state a claim for relief for several reasons and should be dismissed. First, the Complaint seeks remedy for a new injury that is not actionable discrimination under the ADA: re-hospitalization of qualified individuals. Second, the remedy sought by Plaintiff exceeds the scope of a properly pled ADA discrimination claim. Third, the allegations in the Complaint explicitly implicate an affirmative defense that bars relief under the ADA altogether. Fourth, the Complaint does not present this Court with a case or controversy under Article III of the U.S. Constitution. Fifth, the Settlement Agreement bars Plaintiff from bringing an ADA claim or at least key allegations in the Complaint, without which, the entire Complaint fails.

A. Standard of Review

To survive a motion to dismiss, a complaint must set forth sufficient factual detail to support a legal right to relief. Those factual allegations "must be enough to raise a right to relief above the speculative level on the assumption that all the

allegations in the complaint are true." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). On a motion to dismiss, courts must accept all well-pleaded facts as true, but are not required to accept a plaintiff's legal conclusions. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). "A complaint may be dismissed if the facts as pled do not state a claim for relief that is plausible on its face." Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009).

B. The Complaint Should Be Dismissed Because It Fails To State a Claim Under the ADA for Which Relief May Be Granted.

Title II of the ADA, which applies to public services provided by governmental entities, 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 any such entity." 42 U.S.C. § 12132. In Olmstead v. Zimring, 527 U.S. 581, 597 (1999), the Supreme Court of the United States concluded that "unjustified isolation" in a state institution can be actionable discrimination prohibited by the ADA. To be "unjustified," the individual must remain in a state hospital after (a) state professionals determine the individual can safely and appropriately be treated in a community setting, and (b) the individual has expressed a preference to receive treatment in the community. Id. at 602-03. If discrimination exists, public entities like states must 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). Another regulation, the "integration mandate," provides that state services must be provided "in the most integrated setting appropriate to the needs of the qualified individuals with disabilities." 28 C.F.R. § 35.130(d).[3]

1. Re-Institutionalization Is Not a Cognizable Injury Under the ADA.

As a basis for its ADA claim, Plaintiff alleges the injury of "re-hospitalization" or "re-institutionalization." Specifically, Plaintiff alleges that Georgia violates the ADA by not keeping qualified individuals in the community and out of the State Psychiatric Hospitals, whether or not those qualified individuals are receiving state services. The introductory paragraph to the Complaint says as much: "the State … fails to provide adequate support and services to individuals who are discharged from the institutions <u>or</u> who are at risk of institutionalization." (Compl. at 1-2 (emphasis added).) Paragraphs 35 to 41 of the Complaint discuss readmissions to the State Psychiatric Hospitals and blame

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[3] The "integration mandate" regulation does not appear to have been challenged in the U.S. Supreme Court or the U.S. Court of Appeals for the Eleventh Circuit. <u>See</u> <u>Olmstead</u>, 527 U.S. at 592-93 ("We recite these regulations with the caveat that we do not here determine their validity.").

the readmissions on the State's alleged failure to make "sufficient supports available in the community." (Compl. ¶ 37.) Paragraph 44 also alleges a purported harm of "repeated hospitalization" (Compl. ¶ 44), and Paragraph 66 cites the same for persons with a diagnosis of substance abuse (Compl. ¶ 66).

Neither the text of the ADA, the integration mandate, nor the Olmstead decision supports the DOJ's new re-hospitalization theory of liability. Put simply, if a qualified individual is not receiving state services, the ADA imposes no obligation for the State to provide them; also, if the qualified individual is receiving services in the community, a claim against the State for discrimination based on the ADA cannot lie. Accordingly, the threat of re-hospitalization is not a cognizable injury under the ADA. This fact is apparent based on the ADA itself, the regulations, and the Olmstead opinion.

Title II is silent as to the location of where qualified individuals will receive state services. Consequently, to the extent that the DOJ argues something other than the "unjustified isolation" claims addressed in Olmstead, it is forced to rely only on the integration regulation found in 28 C.F.R. § 35.130(d). That provision, however, makes plain that a person not receiving State services has no claim under the ADA. The trigger—the State's provision of services—is not activated.

Likewise, the integration regulation does not create liability for qualified individuals receiving services in the community. The regulation speaks to the location of services: "the most integrated setting." 28 C.F.R. § 35.130(d) (emphasis added). So long as persons are receiving services in the community, the setting phrase is satisfied. See Buchanan v. Maine, 469 F.3d 158, 173 (1st Cir. 2006) (recognizing a goal of the ADA is treatment in the community). The quality, quantity, or sufficiency of services needed to prevent unjustified isolation for persons in the community is not a relevant inquiry under the ADA. Even allegedly inadequately funded community services satisfy the ADA. See Olmstead, 527 U.S. at 603 n.14 ("We do not in this opinion hold that the … ADA requires States to 'provide a certain level of benefits to individuals with disabilities.'") (citation omitted); see also Lincoln CERCPAC v. Health & Hosps. Corp., 147 F.3d 165, 168 (2d Cir. 1998) (noting that "the disabilities statutes do not guarantee any particular level of medical care for disabled persons, nor assure maintenance of service previously provided").

Last, and for two reasons, Olmstead does not provide a basis for ADA liability based on "re-institutionalization." First, the Olmstead case itself acknowledged that "[s]ome individuals … may need institutional care from time to time 'to stabilize acute psychiatric symptoms.'" 527 U.S. at 605. The Complaint

does not allege that those readmitted to the State Psychiatric Hospitals do not need institutional care. Second, while Olmstead identified a type of discrimination under the ADA, nothing in Olmstead changes the ADA from a remedial law to a prophylactic one. Prevention is simply not a requirement of the ADA; amelioration of discrimination is. By the terms of Olmstead, discrimination does not happen (and cannot be remedied) until after someone is (1) hospitalized in a state facility, (2) remains in the state facility after he or she has expressed a desire to leave, and (3) is deemed by the State's professionals to be able to live safely in the community. Olmstead, 527 U.S. at 602-03. Thus, ADA rights based on "unjustified isolation" cannot vest while someone is in the community, even if that individual is subject to a high risk of reentering a state facility. See Maine, 469 F.3d at 173. Accordingly, because re-hospitalization is not a cognizable, statutory injury, the Complaint must be dismissed.

2. The ADA Does Not Require States To Create Additional Capacity for Community-Based Services or Narrow the Scope of Services Provided in State Psychiatric Hospitals.

The Court should dismiss the Complaint for the additional, independent reason that the provision of more community services or different roles for the State Psychiatric Hospitals—the relief that Plaintiff requests—is not required by or an enforceable remedy under Title II of the ADA.

Plaintiff generally alleges that the State "fails to provide services in sufficient quality, quantity, and geographic diversity to enable individuals with mental illnesses, substance abuse diagnosis, or developmental disabilities to be served in the least restrictive setting appropriate to their needs." (Compl. ¶ 72.) Although not specifically alleged in the Complaint, in effect, the only way for the State to remedy the alleged deficiency is for the State to fund and create additional capacity for community-based services. (See Related Case, Tr. of 2/4/2010 Tel. Conf. [dkt. 61] at 21 (Mr. Mygatt's comments) (conceding that the relief Plaintiff seeks is a significantly increased appropriation of state dollars to build a larger network of community-based services).) Plaintiff also asks for a policy-shifting judicial fiat: "transition each of the Hospitals to a resource center that supports delivery of community services and serves as a last resort in a continuum of care for those for whom community-based services and supports have been exhausted." (Compl., Prayer for Relief.) Both requests are futile and disregard the proper respect afforded to states in the federal judiciary. If this Court rejects Plaintiff's sought-after relief, what would remain would be so vague as to be an unenforceable "obey the law" injunction. For these reasons, an appropriate remedy cannot be fashioned, and relief cannot be granted in this case.

As an initial matter, "federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs." Milliken v. Bradley, 433 U.S. 267, 280-1 (1977) (school desegregation). "In exercising their equitable powers, federal courts must recognize '[the] special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (addressing claims under 42 U.S.C. § 1983) (citations omitted).[4]

Within this framework, injunctive remedies must be tailored to do only so much as is required to cure the offending condition. Rogers v. Lodge, 458 U.S. 613, 628 (1982) (addressing constitutional voting rights claim). The decree must be "remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" Milliken, 433 U.S. at 280 (emphasis added). Put differently, only those persons receiving services in the State Psychiatric Hospitals who have been deemed able to be treated in the community and desire to be placed

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[4] Particularly given Georgia's recent endeavors to reorganize the Department of Human Resources and spin off the DBHDD to focus solely on behavioral health and developmental disabilities issues, this Court should defer to Georgia's recent acts and give them time to work. "[A] federal court … is not the proper forum to press general complaints about the way in which government goes about its business." Allen v. Wright, 468 U.S. 737, 760 (1984) (citing Lyons, 461 U.S. at 111-12) (ellipsis in original).

in the community (in other words, have been discriminated against because of their disability) can reasonably be deemed victims of discriminatory conduct and entitled to relief under the ADA or Olmstead.[5]

First, failure to prevent re-institutionalization is not actionable under Title II of the ADA, so at least that portion of the Complaint that asserts rights for persons not currently in the State Psychiatric Hospitals should be dismissed. To allow any other claims to proceed would permit a potential remedy absent actionable discrimination.

Second, Georgia has not violated the ADA by not funding the amount or type of community services preferred by Plaintiff.[6] Olmstead itself states that the ADA does not require states to "provide a certain level of benefits to individuals with disabilities"; instead, Olmstead holds only that "States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide." 527 U.S. at 604 n.14 (emphasis added). In the wake of Olmstead, Circuit courts also have opined against attempts to use the ADA as a tool to require states to provide additional behavioral health services. See Maine, 469 F.3d at

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[5] Georgia does not concede, however, that persons in the State Psychiatric Hospitals are victims of discrimination or other unlawful conduct by the State.

[6] See Complaint ¶¶ 54-56 (undefined "supported housing"), 63 (employment services), 64-65 (transportation services), 66 (substance abuse services), and 71 (*inter alia*, the quantity of services).

173; Doe v. Pfrommer, 148 F.3d 73, 83-84 (2d Cir. 1998). Nor does the ADA "assure maintenance of service previously provided." Lincoln CERCPAC, 147 F.3d at 168; see also Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993) ("[I]f Congress had actually intended to require states to provide community based programs for mentally disabled individuals currently residing in institutional settings, it surely would have found a less oblique way of doing so."). Thus, the relief sought by Plaintiff is not compelled by the ADA, and the Court should dismiss the Complaint.

Third, Plaintiff's criticisms that the community-based services that the State currently provides are insufficient in both quantity and quality do not state a discrimination claim under the ADA. Plaintiff does not allege that the State's policies or practices with respect to the community treatment that it now provides are unjustified or discriminatory in violation of the ADA. Rather, Plaintiff's ADA claim focuses on what modifications the State could make to improve its mental health program. However, such aspirational desires, which are shared by the State and all mental health professionals, do not show that a state agency's community services are so inadequate as to violate the ADA. See Johnson v. Murphy, 2001 U.S. Dist. LEXIS 24013, at *55 (M.D. Fla. June 28, 2001) ("[W]hile the plaintiffs offered evidence that community services and facilities could be different and in

some instances better, they have failed to prove that the defendants' mental health program, as administered, results in unnecessary isolation of patients into segregated settings.").

Fourth, the ADA does not require states to supplement state hospitals, nor does the statute mandate any preferred role for them. "Title II [of the ADA] provides only that 'qualified individual[s] with a disability' may not 'be subjected to discrimination.'" Olmstead, 527 U.S. at 602 (quoting 42 U.S.C. § 12132). Limiting the reach of its opinion, the Olmstead majority specifically provided that "the ADA is not reasonably read to impel States to phase out institutions." Id. at 604. Thus, Olmstead itself provides the basis to reject the Complaint: the Prayer for Relief seeks a remedy not required by the ADA, namely, the transitioning of the State Psychiatric Hospitals to mere receiving facilities on a "continuum of care." (Compl., Prayer for Relief.)

Without the impermissible ordering of increased or different community services or transformation of the State Psychiatric Hospitals, what remains in the Complaint is a prayer to obey the law, which the Eleventh Circuit has repeatedly held to be unenforceable. Fla. Ass'n of Rehab. Facilities v. State of Fla. Dep't of Health & Rehab. Servs., 225 F.3d 1208, 1223 (11th Cir. 2000). For example, in SEC v. Smyth, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005), the Eleventh Circuit

deemed unenforceable an injunction that tracked the provisions of the Securities Exchange Act. Plaintiff here makes the same error as the SEC in Smyth. The prayer for relief tracks the regulatory language of the ADA almost verbatim: it asks this Court to "[e]njoin Defendants (1) from administering behavioral health services in a setting that unnecessarily isolates and segregates individuals with disabilities from the community, [and] (2) to administer behavioral health services in the most integrated setting appropriate to the needs of the individuals with disabilities." (Compl., Prayer for Relief.) Such relief cannot be had as it represents "a quintessential 'obey-the-law' injunction" and is thus unenforceable. Smyth, 420 F.3d at 1233 n.4. Indeed, Plaintiff's own difficulty in articulating a valid, enforceable remedy to alleged ADA violations demonstrates the ill-suited nature of this class-action-like lawsuit, which therefore should be dismissed.

3. The Complaint Implicates an Affirmative Defense That Bars Plaintiff's ADA Claim.

The ADA regulations provide a defense for states, specifically against "reasonable modifications in policies, practices, or procedures . . . necessary to avoid discrimination on the basis of disability … would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). Olmstead acknowledged the defense, opining that the "State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not

boundless." 527 U.S. at 603. The Court also clarified that the defense allows states to "show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." Id. at 604.

Thus, a state complies with the ADA if it makes a reasonable modification through its "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." Id. at 605-06. And a State is not required to make a requested modification if the relief sought amounts to a "fundamental alteration" of its program. Id. at 603-04; see Easley *ex rel*. Easley v. Snider, 36 F.3d 297, 305 (3d Cir. 1994); Messier v. Southbury Training Sch., 1999 U.S. Dist. LEXIS 1479, at *36 (D. Conn. Jan. 5, 1999); Williams v. Wasserman, 937 F. Supp. 524, 531 (D. Md. 1996); Dees v. Austin Travis County Mental Health & Mental Retardation, 860 F. Supp. 1186, 1190 n.7 (W.D. Tex. 1994).

Paragraph 79 of the Complaint alleges that the relief sought by Plaintiff "would not constitute a 'fundamental alteration' of the State's behavioral health service system because the State already provides the services that the Patients

require to live in a more integrated setting." (Compl. ¶ 79.) By raising the fundamental alteration defense, Plaintiff put the defense before this Court for consideration on a motion to dismiss. "A district court . . . may dismiss a complaint on a rule 12(b)(6) motion 'when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint.'" Fortner v. Thomas, 983 F.2d 1024, 1028 (11th Cir. 1993) (quoting Quiller v. Barclays American/Credit, Inc., 727 F.2d 1067, 1069 (11th Cir. 1984), cert. denied, 476 U.S. 1124 (1986)).

Plaintiff's representations about a fundamental alteration are belied by other allegations in the Complaint that seek to require the State to increase and enhance community services. Specifically, the Complaint contains:

- a request for relief that seeks nothing short of a transition of the State Psychiatric Hospitals to having a different mission based on increased community services (Compl., Prayer for Relief);

- allegations that the State should do more to meet the DOJ's own definition of "Supported Housing," a concept not defined by the ADA, its regulations, or controlling case law (Compl. ¶¶ 54-56);

- allegations that the State "does not offer sufficient Supported Employment Programs" (id. ¶ 63);

- allegations that transportation services are not available in all areas of the State (thereby acknowledging they would need to be added) (id. ¶ 64-65);

- allegations that there are insufficient treatment services for persons diagnosed with substance abuse (id. ¶ 66); and
- a catch-all allegation that the State "fails to provide services in sufficient quality, quantity, and geographic diversity" (id. ¶ 72).

Individually and collectively, these allegations demonstrate the breadth of DOJ's requested remedy and how it is facially a fundamental alteration to Georgia's mental health system.

C. The Complaint Does Not Present a Case or Controversy, and Plaintiff Therefore Lacks Article III Standing.

Article III standing requires a plaintiff to demonstrate (1) an injury in fact; (2) "fairly traceable … [to] the complained-of conduct"; and (3) redressibility, or a "likelihood that the requested relief will redress the alleged injury." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103-04 (1998).[7] The Complaint alleges that ADA-based discrimination is the injury in fact, purportedly caused by Georgia's lack of services in the community, and that an order imposing the provision of additional community services would remedy the injury. This construct is flawed because the remedy that is actually available—mandating

[7] Plaintiff not only fails to state a claim for which relief can be granted, but also lacks Article III standing. The inquiries are distinct. The latter concerns a court's jurisdiction, while the former considers the right to a particular remedy. See Steel Co., 523 U.S. at 89-90. Similarly, while Plaintiff may have statutory standing to bring the ADA claim, the Complaint presently before the Court lacks Article III standing. See, e.g., Amchem Prods. v. Windsor, 521 U.S. 591, 612-13 (1997) (distinguishing between statutory standing and Article III standing).

integration of persons in state hospitals into the community at a reasonable pace—does not address much of the Complaint's allegations. Moreover, Plaintiff pleads only tenuous causal links between the State's conduct and the alleged injury.

For Article III purposes, redressibility means that the relief sought provides a remedy for the injury suffered. Steel Co., 523 U.S. at 107. A basic question, though, is whether the sought-after relief is available. In this case, and as demonstrated above, it is not. Assuming only for the purposes of the motion to dismiss that such relief would be warranted, the type of relief that could be available is limited to that which compels the State to move persons in the State Psychiatric Hospitals into the community at a reasonable pace—something that the law already requires. See Olmstead, 527 U.S. at 604-05. The Complaint does not allege that Georgia is not moving persons out of institutions at a reasonable pace.

Even if this Court were to grant some sweeping type of relief (which the ADA does not require), it cannot impose an order on independent third parties who are not parties to this lawsuit but provide the overwhelming majority of state services in the community. Unlike the State Psychiatric Hospitals, where the State both provides and funds the care, the State only funds community services that are provided by third parties. (Compare Compl. ¶ 14 with id. ¶ 15.) Relief aimed

solely at the State would not fully address the injury alleged in the Complaint, because there is no guarantee that qualified individuals will have a place to go.

This involvement of third parties prevents standing in this case, as a remedy cannot be had for the injury allegedly caused by the State. See Allen v. Wright, 468 U.S. 737, 757 (1984). In Allen, advocates claimed an injury of interference with the right to receive an education in a desegregated school. They further alleged that the Internal Revenue Service caused the injury by failing to adopt "sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools." Id. at 739. The Court concluded that the plaintiffs lacked Article III standing because the link between the injury (private schools preventing integration) was too speculatively tied to the official action (tax status determination). Id. at 758-60. The Court specifically noted several problems with the complaint, including (1) whether the removal of tax-exempt status would force private schools to more quickly integrate; (2) whether any parent would transfer a child from a private school if it lost tax-exempt status; or (3) whether such decisions would be sufficient in the aggregate to provide substantive change. Id. at 758. Consequently, the allegations made

> the chain of causation between the challenged Government conduct and the asserted injury … far too weak for the chain as a whole to sustain respondents' standing [becau se] . . . [i]t involve[d] numerous third

> parties who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect.

Id. at 759.

Examples are plenty of how the same causal weakness applies to this lawsuit. First, the Complaint does not allege that there is sufficient capacity in Georgia to treat all qualified individuals in the community. Accordingly, it is entirely speculative that an order mandating increased community capacity is feasible or that increased State spending would result in such greater capacity. Second, the Complaint does not allege that third parties providing services in the community will accept the individuals currently residing in state hospitals. Thus, it is unclear if increased resources would provide community locations for persons with a history of challenging behaviors. (See, e.g., Compl. ¶ 35.) Third, the Complaint alleges that "lack of income and employment are identified as barriers to successful community integration for people with disabilities." (Compl. ¶ 62.)[8] Georgia is not required to provide qualified individuals with jobs, and hiring

[8] Paragraph 62 plainly demonstrates the far-reaching aspects of the Complaint. The federal Bureau of Labor Statistics said that in May 2010, Georgia currently had an unemployment rate of 10.2%. Bureau of Labor Statistics, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LASST13000003 (last visited June 28, 2010). Despite the high unemployment rate, and the utter lack of legal authority for its proposition, the DOJ reads the ADA as imposing on states the obligation to provide jobs for qualified individuals.

decisions necessarily involve even more third parties that are not part of this lawsuit. Fourth, Paragraphs 54-56 set up an artificial and baseless definition of a term "supported housing," and then allege that Georgia does not provide sufficient housing services. (Compl. ¶¶ 54-56.) The Complaint does not allege, however, that sufficient housing is available in the State, that landlords would accept qualified individuals, or that such qualified individuals could afford they type of housing described in the Complaint with the current provision of state services. Thus, too much of Plaintiff's alleged injury results "from the independent action of some third party not before the court," and the Complaint should therefore be dismissed for lack of standing. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-2 (1976).

D. The Settlement Agreement Bars the Complaint.

Plaintiff voluntarily entered into the Settlement Agreement after conducting its own investigations and after extensive negotiations with the State. The Settlement Agreement is binding on Plaintiff, and despite its recent change of policy and priorities, Plaintiff cannot re-negotiate the agreement through litigation. This Court must enforce the Settlement Agreement and dismiss the Complaint, which was filed in breach of the Settlement Agreement.

The DOJ has repeatedly claimed that ADA claims are part of the Settlement Agreement it entered into with the State of Georgia. (See, e.g., Related Case, dkt. 12 at 14-15; dkt. 37 at 2; dkt. 42 at 3; dkt. 54 at 5; dkt. 55-2 at 3-4; dkt. 72 at 2.) Accepting the DOJ's argument for the purposes of this Motion to Dismiss, the Settlement Agreement bars the ADA lawsuit.

Whatever the status of the ADA in the Settlement Agreement, it is beyond doubt that the allegations in the Complaint reach the subject matter that is covered by the Settlement Agreement. Specifically, the Settlement Agreement contained provisions about discharge planning (Settlement Agreement § III.F) and treatment plans (id. § III.B.2). The Settlement Agreement gave the State five years to comply with the discharge planning and treatment plan provisions. (Id. § III.E.) Although the time for the State to comply has not expired, the DOJ ignored the Settlement Agreement and filed this lawsuit, which alleges deficiencies in the State's discharge planning (see Compl. ¶¶ 37, 39, 40, 41, 43, 69 & 70) and assessments (see Compl. ¶¶ 42-47). Should this Court allow the ADA claim in general, it should dismiss any claim based on discharge planning and treatment plans, as the time to comply has yet to expire. Enforcement of the Settlement Agreement necessitates this result.

Federal courts favor and encourage settlements as a means of resolving disputes. See Murchison v. Grand Cypress Hotel Corp., 13 F.3d 1483, 1486 (11th Cir. 1994); see also In re U.S. Oil & Gas Litig., 967 F.2d 489, 493 (11th Cir. 1992) (class action); Ins. Concepts, Inc. v. W. Life Ins. Co., 639 F.2d 1108, 1111 (5th Cir. 1981); Cia Anon Venezolana De Navegacion v. Harris, 374 F.2d 33, 35 (5th Cir. 1967); J. Kahn & Co. v. Clark, 178 F.2d 111, 114 (5th Cir. 1949) (citing Williams v. First Nat'l Bank, 216 U.S. 582 (1910)).[9] And settlements are presumed to be valid. See United States v. City of Miami, 614 F.2d 1322, 1333 (5th Cir. 1980) (addressing proposed consent decree).

When settlements are "fairly arrived at and properly entered into, they are generally viewed as binding, final, and as conclusive of rights as a judgment." Ins. Concepts, Inc., 639 F.2d at 1111. Thus, "a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced." Harris, 374 F.2d at 35. Parties to settlement agreements may not back out of them because they change their minds after execution of the agreements. See Murchison, 13 F.3d at 1487 ("We cannot allow a litigant to attack the integrity of the settlement process by attempting to recharacterize the focus of his litigation after he decides

[9] All decisions of the former Fifth Circuit prior to October 1, 1981, are binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

he is unhappy with the settlement."). And a different litigation strategy or unreached potential results do not provide a basis to breach a settlement agreement: "courts will enforce the compromise without regard to what the result might, or would have been, had the parties chosen to litigate rather than settle." Harris, 374 F.2d at 35; see also Thomas v. Blue Cross & Blue Shield Assoc., 2010 WL 174765, at *7 (11th Cir. Jan. 20, 2010) (addressing contempt of court for violation of class action settlement).

Sound policy supports the strong preference for enforcing settlement agreements. Settlements conserve judicial and taxpayer resources. See Murchison, 13 F.3d at 1486. Though describing a class action between commercial parties, the Eleventh Circuit's words in the In re U.S. Oil & Gas Litigation opinion apply equally here: complex litigation "can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive." 967 F.2d at 493.

Settlements are also preferred in anti-discrimination lawsuits like this case. First, settlements reach a faster result. By contrast, the costs of lengthy litigation "to all sides of a full blown trial can be enormous," and "the progress of remedying illegal discrimination is likely to slow to a snail's pace[, a] result [which] would be entirely contrary to the goals of" anti-discrimination legislation. City of Miami,

614 F.2d at 1334 (discussing Title VII of the 1964 Civil Rights Act). Second, settlement agreements are better for achieving the results sought by Plaintiff; when an "agreement is reached by consent, voluntary compliance is rendered more likely, and the government may have expeditious access to the court for appropriate sanctions if compliance is not forthcoming." Id. at 1333. Third, in addition to preserving judicial resources, settlement agreements allow governments to focus their resources on providing care or remedying discrimination, instead of litigating for years. See id.

Moreover, Plaintiff cannot reap the benefits of the Settlement Agreement—enhanced information, reporting, transparency, and access to state hospitals and personnel—while at the same time Plaintiff attempts to litigate against the State in violation of those agreements. For example, Plaintiff sent the State a series of letters in 2008 and 2009, requesting information about community-based treatment and discharge planning, as well as other information about conditions and services at the State Psychiatric Hospitals. (See, e.g., Compl. Exs. 1-6.) The State complied with all of Plaintiff's requests, but little did the State know that Plaintiff was using the requests to provide a purported factual basis to file new claims in violation of the Settlement Agreement. Such conduct should not be rewarded by permitting Plaintiff to escape its obligations under the Settlement Agreement.

"[O]ne who agrees to settle his claim cannot subsequently seek both the benefit of the settlement and the opportunity to continue to press the claim he agreed to settle." Kirby v. Dole, 736 F.2d 661, 664 (11th Cir. 1984).

Ultimately, Plaintiff cannot overcome the strong presumption in favor of enforcing settlement agreements. The Settlement Agreement remains valid, enforceable, and the current order of this Court. (See Settlement Agreement § I.E.) The Settlement Agreement expressly binds the State of Georgia *and* Plaintiff. (Id. § VI.A.) There can be no dispute that the parties began implementing the Settlement Agreement immediately upon its effective date, and the five-year term of the Settlement Agreement has not expired. (See id. §§ IV.A & V.E.) Moreover, the Settlement Agreement cannot be modified unless both parties consent to the proposed amendment (see id. § V.A), and neither party has sought to modify the agreement. Here, the Settlement Agreement remains in effect, and Plaintiff has not alleged anything to the contrary.

Put simply, Plaintiff's filing of this Complaint is in total breach of the Settlement Agreement, and the law does not allow such brazen disregard for negotiated settlement agreements. The Settlement Agreement prohibits Plaintiff from "initiating any court proceeding" without providing the State an opportunity

to cure any alleged non-compliance. (See id. § V.D.) Enforcement of the Settlement Agreement requires dismissal of the Complaint.

CONCLUSION

The facial weakness of the Complaint can be directly traced to the DOJ's attempt to use a highly individualized inquiry—whether qualified persons are receiving services in the most integrated setting according to their needs—to achieve systemic change based on new policies at the DOJ. By seeking to do too much, it fails to accomplish anything. The Complaint fails to state a claim for which relief may be granted, because it attempts to raise an unrecognized cause of action (re-hospitalization), seeks relief not required by the ADA (increased services and system transformation), and implicates an affirmative defense that necessitates its own dismissal. Moreover, the Complaint fails to state a case or controversy under Article III of the Constitution, and the Settlement Agreement bars the lawsuit completely. For any of these reasons, the State of Georgia respectfully asks this Court to dismiss Plaintiff's Complaint.

(signatures on next page)

Respectfully submitted, this 1st day of July, 2010.

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Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

/s/ Mark H. Cohen
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing ***Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint*** was electronically filed with the Clerk of Court using the CM/ECF system, which automatically serves notification of such filing to all counsel of record.

This 1st day of July, 2010.

/s/ Mark H. Cohen
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