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

REPLY BRIEF 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 submit this reply brief in support of their Motion to Dismiss Plaintiff's Complaint [dkt. 28] pursuant to Federal Rule of Civil Procedure 12(b)(6).

INTRODUCTION

The mandatory, sweeping injunctive relief that Plaintiff seeks in this case is neither required nor authorized by the Americans with Disabilities Act ("ADA"). Plaintiff attempts to expand dramatically the reach of the ADA. In doing so, however, Plaintiff's position itself lays bare how its fatally flawed Complaint fails to state a claim for relief: it fails to explain how a remedial statute requiring precise and discrete inquiries about individualized discrimination provides a basis to take

over a state's mental healthcare delivery system, and Plaintiff cannot allege any cognizable discrimination under the ADA. The ADA is simply not a means for Plaintiff to exact policy changes in a state's mental health program without some initial showing of cognizable discrimination. Moreover, Plaintiff's Response Brief [dkt. 30] articulates exactly why the Settlement Agreement bars relief.

First, the injury that Plaintiff alleges in the Complaint—the State's alleged failure to provide additional community services in accordance with Plaintiff's wishes for a systemic overhaul—is not actionable discrimination under the ADA or the related regulations. Second, the remedy that Plaintiff seeks exceeds the scope of an ADA discrimination claim, even if properly pled.[1] Third, the allegations in the Complaint implicate an affirmative defense that bars relief under the ADA altogether. Fourth, the Complaint fails to present a case or controversy as required by Article III of the U.S. Constitution. Fifth, the Settlement Agreement, entered into between Plaintiff and the State in January 2009, bars Plaintiff from either asserting an ADA claim or at least key allegations in the Complaint, without which the entire Complaint fails. Because Plaintiff for all of these reasons fails to state a

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[1] This civil action is, in essence, a disguised class-action lawsuit, and even Plaintiff does not dispute that it seeks systemic relief. Indeed, several of the cases upon which Plaintiff relies are class actions seeking class-wide relief (see infra note 2). If the Court allows Plaintiff's ADA claim to proceed, Plaintiff should be required to follow the strict guidelines of Federal Rule of Civil Procedure 23.

claim upon which relief can be granted, its ADA Complaint should be dismissed pursuant to Rule 12(b)(6).

ARGUMENT AND CITATION OF AUTHORITY

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

1. The Risk of Re-Institutionalization Because the State Cannot Provide New or Additional Community Services Is Not a Cognizable Injury Under the ADA.

Significantly, in its Response Brief, Plaintiff admits that the gravamen of its Complaint is that "Defendants fail to provide adequate services both in the Hospitals and in the community" (Pl.'s Resp. at 6 (emphasis added)), which Plaintiff alleges runs afoul of the integration regulation, 28 C.F.R. § 35.130(d). Yet, nowhere in the Complaint does Plaintiff allege discrimination in the administration of the services that the State actually provides—in other words, Plaintiff does not and cannot allege that community-based services are otherwise available and that the State is preventing certain patients from getting those services. That spells demise for Plaintiff's ADA claim.

In its attempts to counter the State's arguments and survive a motion to dismiss, Plaintiff overreaches and misses the point. Plaintiff's contention that Defendants have a "fundamental lack of understanding about the ADA" (Pl.'s Resp. at 6), is nothing more than smoke and mirrors to shield Plaintiff's

misapplication of integration mandate case law. As its Response Brief demonstrates, Plaintiff attempts to use factually distinguishable cases as square pegs for the round hole of its new, unsupported theory of ADA liability and requested relief in this case.

The cases upon which Plaintiff relies generally involve circumstances in which a state was already providing services to eligible individuals who relied on those services to stay in their homes, the state cut the funding or authorization for those services, and the impacted individuals faced the identifiable and quantifiable risk of institutionalization.[2] In those cases, though, the plaintiffs were simply

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[2] See Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175, 1181-82 (10th Cir. 2003) (finding that the state's imposition of cap on the number of prescription medications, except in nursing homes, placed participants in community-based program at high risk for premature entry into nursing homes, which presented a genuine issue of material fact as whether such action violated the integration mandate); Marlo M. v. Cansler, 679 F. Supp. 2d 635, 638-39 (E.D.N.C. 2010) (preliminarily enjoining state funding cuts that would have terminated the in-home services that the plaintiffs were already receiving and would have forced them into institutions); V.L. v. Wagner, 669 F. Supp. 2d 1106, 1119-20 (N.D. Cal. 2009) (granting preliminary injunction to prevent state from applying a change in the law to reduce or terminate in-home services already provided to plaintiffs, which would have forced them to receive the services in hospitals and institutions, because such action would violate the integration mandate); Brantley v. Maxwell-Jolly, 656 F. Supp. 2d 1161, 1175 (N.D. Cal. 2009) (class action) (preliminarily enjoining implementation of funding cuts that would have reduced in-home services that the plaintiffs were already receiving and put the plaintiffs at risk of hospitalization); Ball v. Rodgers, 2009 U.S. Dist. LEXIS 45331, at *15-17 (D. Ariz. Apr. 24, 2009) (class action) (granting injunctive relief because an existing

asking the courts to maintain the status quo and prevent the state from terminating or reducing community or in-home services that the plaintiffs were already receiving under existing state programs, so that they could avoid unnecessary institutionalization. They were not demanding new or separate services that were not already provided by the states.[3]

Unlike the plaintiffs in those cases, Plaintiff here asks the Court to totally reorganize the State's mental healthcare delivery system by forcing the State to increase funding and provide new, additional services in the community and in the Hospitals to a level that Plaintiff believes constitutes "adequate" quantity, quality,

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and available state Medicaid program failed to provide the plaintiffs with needed services, which "threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care" in violation of the ADA); Crabtree v. Goetz, 2008 U.S. Dist. LEXIS 103097, at *67-68, 83 (M.D. Tenn. Dec. 18, 2008) (preliminarily enjoining funding cuts and reductions of in-home health care services that the plaintiffs were already receiving through the state's Medicaid waiver program, and which would have resulted in institutionalization in order to receive the necessary care); Mental Disability Law Clinic v. Hogan, 2008 U.S. Dist. LEXIS 70684, at *50-54 (E.D.N.Y. Aug. 26, 2008) (class action) (denying motion to dismiss the plaintiffs' claims that defendants failed to use a new law to authorize available involuntary outpatient services, which the defendants were already providing to others, in lieu of involuntary hospitalization).

[3] The other cases that Plaintiff cites address challenges to the number of Medicaid waivers that the state provided, not an overhaul of the entire mental health system, like in this case. See Makin v. Hawaii, 114 F. Supp. 2d 1017, 1034-35 (D. Haw. 1999); M.A.C. v. Betit, 284 F. Supp. 2d 1298, 1304, 1309 (D. Utah 2003); Haddad v. Arnold, No. 3:10-CV-414-J-99, slip op. at 7 (M.D. Fla. June 23, 2010).

or sufficiency of services. But neither the text of the ADA or the integration regulation nor the Olmstead decision supports Plaintiff's theory of liability. See Olmstead v. Zimring, 527 U.S. 581, 603 n.14 (1999) ("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); Townsend v. Quasim, 328 F.3d 511, 517 (9th Cir. 2003) (noting that Olmstead controls when the issue is the location of services, but not when the issue is the whether services will be provided). The ADA is not violated when an individual is "den[ied] a benefit that it provides to no one." Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir. 1999). Olmstead stands only for the proposition that "[s]tates must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide." Olmstead, 527 U.S. at 603 n.14 (emphasis added).

If a qualified individual is not receiving state services, the ADA imposes no obligation for a state to provide them. Moreover, if the qualified individual is receiving services in the community, a claim against the state for discrimination based on the ADA cannot lie unless the State stops providing those services and puts that person at risk of institutionalization (see supra note 2). Accordingly, a threat of continued hospitalization or re-hospitalization simply because the State will not provide or fund a greater quantity of community services in accordance

with Plaintiff's wishes for a systemic overhaul is not a cognizable injury under the ADA, and the Complaint must be dismissed.[4]

2. The Court Cannot Afford Plaintiff the Relief That It Seeks Because the ADA Does Not Require States To Create New, Additional Community Services or Reduce the Services Provided in Hospitals.

The relief that Plaintiff seeks—the funding of and provision of more community services and changed roles for the State Psychiatric Hospitals—is not an enforceable remedy under the ADA and therefore cannot be ordered in this case. Plaintiff seems to recognize this fatal flaw in its allegations and uses tortured semantics to try to avoid dismissal. Plaintiff argues that because the State provides community supports and services to some people, it should be forced to provide those services to all people. (Pl.'s Resp. Br. at 13, 17.) Although not specifically alleged in the Complaint, Plaintiff admits in its Response Brief that what it seeks is "that the Court order the State to develop additional community supports and

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[4] Although Plaintiff argues that the State discriminates against those who are re-institutionalized or who are at risk of institutionalization (Pl.'s Resp. Br. at 8 n. 1), Plaintiff does not allege that those readmitted to the State Psychiatric Hospitals do not need institutional care. See Olmstead, 527 U.S. at 605 (acknowledging that "[s]ome individuals … may need institutional care from time to time 'to stabilize acute psychiatric symptoms'"). Nothing in Olmstead changes the ADA from a law designed to remedy discrimination to a law designed to prevent institutionalization under all circumstances.

services." (Pl.'s Resp. Br. at 13.) That is not required by the ADA, and certainly implicates the fundamental alteration defense.

As discussed above and in Defendants' opening brief, the State has not violated the ADA by not funding community services at the dollar amount or of the type preferred by Plaintiff. Olmstead itself states that the ADA does not require states to "provide a certain level of benefits to individuals with disabilities"; instead, as noted above, 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 603 n.14.

Plaintiff's criticism that the community-based services that the State currently provides are insufficient in both quantity and quality does 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. There is no allegation in the Complaint that community services are available but not being used by the State. Rather, Plaintiff's ADA claim focuses on what modifications the State could make to improve its mental healthcare delivery system by adding services

and revising the focus and function of the Hospitals.[5] Such aspirational desires are shared by the State and all mental health professionals, but the State's community services are not so inadequate as to violate the ADA without them. See Johnson v. Murphy, 2001 U.S. Dist. LEXIS 24013, at *54-55 (M.D. Fla. June 28, 2001) (finding that, while the plaintiffs "presented evidence that the community services offered by the defendants could be better, broader and more intense, . . . [they] failed to show that the community services provided by the defendants are inadequate to the point that they result in unnecessary isolated segregation in violation of the ADA"). Indeed, one of the cases that Plaintiff cites in its Response Brief actually supports Defendants' position: in Arc of Washington State Inc. v. Braddock, 427 F.3d 615 (9th Cir. 2005), the Ninth Circuit affirmed dismissal of the ADA claim and held that forced expansion and added funding of the state's Medicaid waiver program was not required because the state was using all of its

[5] 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.) 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.)

allocated slots and making open slots available to eligible individuals as they became available. Id. at 618.

Georgia also has not violated the ADA by continuing the operation of its Hospitals. The ADA does not require states to supplement state hospitals, nor does the statute mandate any preferred role for them or define what Plaintiff describes as their "the proper function." (See Pl.'s Resp. at 13 n.2.) The Olmstead majority specifically provided that "the ADA is not reasonably read to impel States to phase out institutions." 527 U.S. at 604. The Prayer for Relief, however, specifically seeks a remedy not required by the ADA and in contravention of Olmstead, namely, the transitioning of the State Psychiatric Hospitals to mere receiving facilities on a "continuum of care." (Compl., Prayer for Relief.) Olmstead itself thus provides the basis to reject the Complaint.

Without such relief, all that could remain is an unenforceable "obey the law" injunction. (See Compl., Prayer for Relief.) As Plaintiff does not dispute, the Eleventh Circuit has repeatedly held that such "obey the law" injunctions are unenforceable. See SEC v. Smyth, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005); Fla. Ass'n of Rehab. Facilities v. State of Fla. Dep't of Health & Rehab. Servs., 225 F.3d 1208, 1223 (11th Cir. 2000). The relief that Plaintiff seeks is prohibited by

law, no other appropriate remedy can be fashioned or granted in this case, and the Court should dismiss the Complaint.

3. The Fundamental Alteration Defense Bars Plaintiff's ADA Claim.[6]

Even if the Court were to assume that Plaintiff can establish discrimination in the administration of services that the State actually provides—which Plaintiff cannot do—the remedy that Plaintiff seeks in this case would go far beyond any reasonable accommodation that the ADA requires and would instead constitute a fundamental alteration of the State's mental health program that the ADA does not require. The State is not unwilling to make reasonable modifications to its programs, but it rightly objects to a complete overhaul of its mental health system when Plaintiff has not "raise[d] a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

The Court's consideration at the motion to dismiss stage is not about what evidence the parties will be able to present, if the case proceeds, but rather about what is alleged or not alleged in the Complaint. While Plaintiff complains about the quantity of services provided, Plaintiff has not alleged that the current mental health system fails to deinstitutionalize individuals with an "even hand" or that the

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[6] Paragraph 79 of the Complaint specifically raises the "fundamental alteration" defense and therefore puts the defense before this Court for consideration on a motion to dismiss. See Fortner v. Thomas, 983 F.2d 1024, 1028 (11th Cir. 1993).

State lacks a genuine, comprehensive, and reasonable commitment to deinstitutionalization. Absent these allegations, and in light of the drastic relief sought in the Complaint, there can be no dispute that such relief "would fundamentally alter the nature of the service[s], program[s], [and] activit[ies]" provided by the State. 28 C.F.R. § 35.130(b)(7).

The State's budgets are never infinite, and even less so in the current economic environment. "[I]n the allocation of available resources, [and] given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities," providing the relief that Plaintiff requests in this case would indisputably qualify as a fundamental alteration. (See Defs.' Mem. Supp. Mot. to Dismiss at 23-24 (recounting allegations in the Complaint that seek to require the State to increase and enhance community services).) See also Olmstead, 527 U.S. at 604. As such, Plaintiff's broad, class-action-type relief as set forth on the face of its Complaint is a fundamental alteration to Georgia's mental health system not required by the ADA or Olmstead. Accordingly, the Court should dismiss the Complaint.

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

Plaintiff misses the standing argument almost entirely. It devotes several pages to describing how it contends the State "administers" services. It never

addresses the questions raised about causation and whether the State can force third parties to contract with it to provide community services to qualified individuals. Plaintiff does not even attempt to clarify (1) if the injury alleged is caused by State action or insufficient capacity; (2) whether alleged inadequate State funding causes the alleged injuries; (3) how an order of this Court would or could compel the State to provide jobs to qualified individuals; or (4) how the State can control what the Supreme Court described as "the independent action of some third party not before the court." Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976). Because it cannot demonstrate that remedial orders can reach third parties with whom the State must contract, the Complaint lacks Article III standing. (See Defs.' Mem. Supp. Mot. to Dismiss at 27-28.)

C. The Settlement Agreement Bars the Complaint.

The farce of Plaintiff's contention that the Settlement Agreement is not valid is addressed in the Reply Brief in Support of Defendants' Motion to Dismiss filed in the Related Case (No. 1:09-CV-119-CAP) and will not be repeated here for purposes of judicial economy. Simply put, the State's position is that the Settlement Agreement, which Plaintiff voluntarily entered into, is binding on Plaintiff, and despite its recent change of policy and priorities, Plaintiff cannot re-negotiate the agreement through litigation.

Plaintiff's arguments have all been addressed in the Related Case, so only Plaintiff's silence will be addressed here. Plaintiff never challenges, and continues to expound, that the discharge planning provisions of the Settlement Agreement provide the basis for its ADA claims (a position that Plaintiff also takes in the Related Case). (See Compl. ¶¶ 37, 39, 40, 41, 43, 69 & 70 (discharge planning) and Compl. ¶¶ 42-47 (assessments).) Plaintiff continues to ignore that the State has an additional 42 months to comply with the discharge planning section of the Settlement Agreement. (See Settlement Agreement § V.E.) Plaintiff's silence to this point is deafening.

Plaintiff's reliance on the discharge planning provisions renders its lawsuits premature and subject to dismissal if this Court enforces the Settlement Agreement. At the very least, should this Court allow the ADA claim to proceed at all, it should dismiss any claim based on discharge planning and treatment plans, as the time to comply under the Settlement Agreement has yet to expire.

CONCLUSION

For the reasons above and in the State's opening brief filed on July 1, 2010, the State of Georgia respectfully asks this Court to dismiss Plaintiff's Complaint.

(signatures on following page)

Respectfully submitted, this 2nd day of August, 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.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing ***Reply Brief 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 2nd day of August, 2010.

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