**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**TALLAHASSEE DIVISION**

**JOANNA DYKES; LORETTA DAVIS,** by and through her next friend, Trish Mlekodaj; **HEATHER YOUNG,** by and through her next friend Robert Stark; **MICHELLE CONGDEN; AMANDA PIVINSKI; JOSHUA WOODWARD;** and **DISABILITY RIGHTS FLORIDA, Inc.,** a Florida non-profit corporation,

**Plaintiffs,**

**v.** **CASE NO.: 4:11-CV-116-RS-CAS**

**ELIZABETH DUDEK** in her official capacity as Secretary of the Florida Agency for Health Care Administration, and **MIKE HANSEN** in his official capacity as Director of the Florida Agency for Persons with Disabilities,

**Defendants.**
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**PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT**

The Plaintiffs, Joanna Dykes ("Dykes"), Loretta Davis ("Davis"), Heather Young ("Young"), Michelle Congden ("Congden"), Amanda Piviniski ("Pivinski"), Joshua Woodward ("Woodward"), and Disability Rights Florida, Inc., d/b/a Disability Rights Florida (the "P&A"), by and through their undersigned attorneys, move for entry of summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the grounds that there are no genuine issues of material fact, and based upon the undisputed facts, the Plaintiffs are entitled to judgment as a matter of law. In support of their motion, the Plaintiffs submit herein their memorandum of law.

## STANDARD OF REVIEW

The Court may grant summary judgment if the Plaintiffs show there is no genuine dispute as to any material fact and they are entitled to judgment as a matter of law based upon the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). An issue of fact is "material" if it could affect the outcome of the case. *Hickson Corp. v. Northern Crossarm Co., Inc.*, 357 F. 3d 1256, 1259 (11th Cir. 2004) (citations omitted). The court must review the record, and all its inferences, in the light most favorable to the nonmoving party. *See United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). The opposition to a motion for summary judgment

> may not rest upon the mere allegations or denials in its pleadings. Rather, its responses, either by affidavits or otherwise as provided by the rule, must set forth specific facts showing that there is a genuine issue for trial. A mere "scintilla" of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party."

*Walker v. Darby*, 911 F. 2d 1573, 1576-77 (11th Cir. 1990) (*citing Anderson v. Liberty Lobby*, 477 U.S. 242 (1986)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is 'no genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (citation omitted).

## UNDISPUTED FACTS

Pursuant to Northern District Local Rule 56.1, the Plaintiffs' Statement of Undisputed Facts, which has been filed contemporaneously with this motion, is incorporated by reference as if fully set forth herein. References to the Exhibits in the

Plaintiffs' Statement of Undisputed Facts are designated herein as "Dkt. No. XXX, Ex. (letter)."

## MEMORANDUM OF LAW

### I. FLORIDA'S MEDICAID PROGRAM

a. Medicaid Statutory and Regulatory Framework

Medicaid is a joint federal/state program authorized by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v. The Medicaid program allows states to furnish persons, including those with developmental disabilities, "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self care." 42 U.S.C. § 1396-1(2).

The Medicaid state plan must identify the required and optional health care services that are available through the state Medicaid program. Once an optional service is identified in the state plan, the service must be provided consistent with all federal requirements. *See Doe 1-13, by and through Doe, Sr. 1-13 v. Chiles*, 136 F. 3d 709, 721 (11th Cir. 1998) (and citations therein). Placement in an Intermediate Care Facility for persons with developmental disabilities ("ICF/DD") is an optional Medicaid service that Florida has elected to provide where level of care placement criteria are met. *See* § 409.906(15), Fla. Stat. Thus, placement and receipt of services in an ICF/DD are entitlements. *See, e.g.*, *Doe 1-13*, 136 F. 3d at 719 (enforceable right).

An ICF/DD client must receive a continuous active treatment program, including

> aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services [...], that is directed toward—

(i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and
(ii) The prevention or deceleration of regression or loss of current optimal functional status."

42 C.F.R. § 483.440(a)(1). *See also* Fla. Admin. Code R. 59G-4.171(4).

**Medicaid Waivers and Developmental Disabilities Service Delivery System**

Medicaid home and community-based services waiver programs are authorized by 42 U.S.C. § 1396n(c) and governed by 42 C.F.R. §§ 441.300-.310. Developmental Disability Waiver programs ("DD Waiver") enable states to provide home and community-based services to individuals with developmental disabilities who would otherwise need the ICF/DD level of care. A state's DD Waiver program must comply with all federal Medicaid requirements that are not specifically waived.

States apply to the Centers for Medicare & Medicaid Services ("CMS") for permission to operate a home and community based waiver. The waiver must be approved before it can be effective. The "Application for a § 1915(c) Home & Community Based Waiver [version 3.5], Instructions, Technical Guide and Review Criteria" (Release Date January 2008) (Dkt. No. 125, Ex. "Q") is the most recent federal manual on the application process, requirements, forms, definition of terms for the application for, renewal, or amendment of a Medicaid waiver program.

**Florida's Developmental Disability Waiver Program**

Florida has declared "the greatest priority shall be given to the development and implementation of community-based services that will enable individuals with developmental disabilities to achieve their greatest potential for independent and

productive living, enable them to live in their own homes or in residences located in their own communities, and permit them to be diverted or removed from unnecessary institutional placements." § 393.062, Fla. Stat. (emphasis added). The Defendants operate five waivers for persons with developmental disabilities. They are the Tier Waivers consisting of tiers One through Four and the Individual Budgeting Waiver. One waitlist is maintained for all of the five waivers that Defendants operate.

**The Waitlist**

Currently there are over 20,000 individuals, both children and adults, on the waitlist for the DD Waiver program. (Arnold Depo., I, 25:16-18).[1] AHCA has final authority on the DD Waiver application and the determination of any unduplicated recipients requested to CMS. (Dkt. No. 125, Ex. "C", at 5). APD is responsible for new Medicaid admissions to ICF/DDs and conducts the Preadmission Screening and Resident Review ("PASRR")[2] for persons residing in nursing homes that have a developmental disability or mental illness. (Smith Depo., 26:11-21).[3] 42 U.S.C. § 1396r; 42 C.F.R. § 483.100.

APD has adopted rules to define the waitlist categories pursuant to Section 393.065(5) of the Florida Statutes. *See* Fla. Admin. Code R. 65G-11.002. The first

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[1] Dkt. No. 125, Ex. "N"

[2] PASRR requires states to assess whether "mentally retarded" individuals (1) need the level of care nursing homes provide and (2) require specialized services. *See* 42 U.S.C. § 1396r(e)(7)(B)(ii). States had to review all mentally retarded nursing home residents when the NHRA was enacted and still must review new admissions and residents whose conditions change significantly. *Id.* § 1396r(e)(7)(B)(ii)-(iii). Generally nursing homes may not admit or must discharge anyone found not to need their services. *See id.* §§ 1396r(b)(3)(F)(ii), (e)(7)(C)-(D).

[3] Dkt. No. 125, Ex. "E".

category is for those determined by the agency to be in "crisis." Those in crisis have the designation of being homeless, without a caregiver or a danger to themselves or others. (Dkt. No. 125, Ex. "I", ¶ 3). Only those applicants determined by APD to meet this criteria have access to DD Waiver services. (Arnold Depo., I, 116:25 – 117:11-3) (Dkt. No. 125, Ex. "I", ¶ 3). Without a crisis, a person must seek admission to an ICF/DD in order to secure services or may remain in the community on the waitlist and hope that APD will subsidize temporary or intermittent services through the Individual Family Supports program ("IFS"). The Defendants do not plan to enroll from categories other than "crisis." (Dkt. No. 125, ¶ 15) (Arnold Depo., I, 116:25 – 117:3).

APD agreed to provide AHCA with monthly reports of newly enrolled waiver recipients by district, recipient's name, Medicaid Identification number and by age, as well as the number of waiver recipients disenrolled along with corresponding demographic data. (Dkt. No. 125, Ex. "C", at 8). Further, APD agreed to maintain waiver waitlists that accurately reflect waitlist changes due to enrollments. (Dkt. No. 125, Ex. "C", at 8). Therefore, the Defendants have joint responsibilities for the admissions and continued residency of eligible persons with developmental disabilities in institutions and the preclusion of services to those on the waitlist. The Defendants' policies evidence an imbalance of the service delivery systems for persons with developmental disabilities that belie the legislative intent of Florida Statutes § 393.062.

Dykes, Davis, Young, Congden, Pivinski and Woodward are individuals with developmental disabilities, as defined by Section 393.063(9) of the Florida Statutes, who

are eligible to receive services through Florida Medicaid in ICF/DDs and in the community under Florida's DD Waivers.

## II. COUNT I: REASONABLE PROMPTNESS

### a. Enforcement under § 1983

Plaintiffs bring this claim having been deprived of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. To allow Plaintiffs' action under § 1983, the violation of the statute must harm an individual right through a showing that (1) Congress intended the statute to benefit the Plaintiff; (2) the right to be enforced is not "vague or amorphous," preventing clear enforcement; and (3) the statute "must unambiguously impose a binding obligation on the States." *Blessing v. Freestone*, 520 U.S. 329, 340-341 (1997). Plaintiffs here seek to enforce 42 U.S.C. § 1396a(a)(8), the reasonable promptness provision of the Medicaid Act. The Eleventh Circuit has stated that there is "a federal right to reasonably prompt provision of assistance under section 1396a(a)(8) of the Medicaid Act, and that this right is enforceable under section 1983." *Doe v. Chiles*, 136 F.3d 709, 719 (11th Cir. 1998).

### b. All Plaintiffs are eligible individuals

Each individual Plaintiff is eligible to receive community services through the DD Waiver based upon their disabilities. (Dkt. No. 125, Ex. "A", ¶¶ 1 & 9-12 & Ex. "B", ¶¶ 1 & 9-12). The Defendants argue that they are not eligible because of a limit on the waiver enrollment afforded to them by 42 U.S.C. § 1396n(c)(9). Pursuant to the waiver enabling statute, the state may waive only three portions of the Medicaid program: "the requirements of section 1396a(a)(1) of this title (relating to statewideness), section

1396a(a)(10)(B) of this title (relating to comparability), and section 1396a(a)(10)(C)(i)(III) of this title (relating to income and resource rules applicable in the community)." 42 U.S.C.A. § 1396n. There is no provision within the authorizing statute to waive "reasonable promptness" as provided in 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930. Restricting eligibility to state-imposed arbitrary recipient limits would allow a state to evade the reasonable promptness provision entirely. However, the undisputed facts are that Florida's DD Waivers are meant to provide services to at least 31,500 persons. (Dkt. No. 125, Ex. "R").

In a state's application for a waiver to the federal Centers for Medicaid and Medicare services ("CMS"), the state must identify the "unduplicated number of individuals that the state intends to serve each year the waiver is in effect. It is up to the state to determine this number, based on the resources that the state has available to underwrite the costs of waiver services. As state resources permit, this number may be modified by amendment while the waiver is in effect." (Dkt. No. 125, Ex. "Q" at 2).

In its application to CMS, the state must also assure the cost neutrality of the waiver, meaning "the average per participant expenditures for the waiver and non-waiver Medicaid services must be no more costly than the average per person costs of furnishing institutional (and other Medicaid state plan) services to persons who require the same level of care." (Dkt. No. 125, Ex. "Q" at 8). Appendix B of the waiver application "is designed to answer the question: 'Who receives waiver services?' In this Appendix, a state specifies:[ …] (c) the number of individuals who will be served in the waiver and how this number will be managed during the period that the waiver is in effect; […] (g)

how individuals are afforded freedom of choice in selecting between institutional and home and community-based services[.]" (Dkt. No. 125, Ex. "Q" at18).

The explanation for Appendix B-3 of the waiver application states: "How many individuals will be served each year during the period that the waiver is in effect and how that number is managed (Appendix B-3)." (Dkt. No. 125, Ex. "Q" at 79). CMS gives explicit guidelines on what this number means and how it is to be applied to waiver enrollment:

> Until the maximum number of unduplicated participants in the approved waiver is reached, a state may not deny entry to the waiver of otherwise eligible individuals unless the state elects to establish a point-in-time enrollment limit, adopts a phase-in or phase-out schedule, or reserves capacity for specified purposes (see following items).As a consequence, the number of persons who will be served should be based on a careful appraisal of the resources that the state has available to underwrite the costs of waiver services.

(Dkt. No. 125, Ex. "Q" at 82).

The state sought and received approval for the enrollment of at least 31,500 individuals. (Dkt. No. 125, Ex. "R") In March 2011, there were 30,033 individuals enrolled; in November 2011, there were 29,624 individuals enrolled, evidencing the declining number of DD Waiver recipients. (Dkt. No. 125, Ex. "B", ¶ 21). This leaves 1,876 slots for non-crisis waiver applicants. Therefore, as the Defendants have not reached their maximum CMS-approved enrollment, waiver slots are available for each named individual plaintiff here.

**c. The agency's administrative procedures cause delay and prevent Plaintiffs from receiving services in a reasonably prompt manner.**

The Medicaid Act also requires that a state plan for medical assistance "must ... provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). A state Medicaid agency must "furnish Medicaid promptly to recipients without delay caused by the agency's administrative procedures" and "continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. § 435.930.

Despite Florida's legislative intent, there has been no expansion of DD Waiver enrollments available to non-crisis Medicaid eligible recipients. Indeed, funding for the DD waivers has steadily decreased to 2005-2006 levels. The Defendants' operation of the DD Waiver has resulted in five years of stagnation: an enrolled person would have to die or move out of state to open a DD Waiver slot for a new enrollee in crisis. For the past five years, only those persons deemed to be in "crisis" have been enrolled and receiving services through the DD Waiver. (Dkt. No. 62, ¶ 9). The unavailability of community services relegates Medicaid eligible persons with developmental disabilities to a waitlist placement for years in violation of the reasonable promptness provisions. 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930. As recently as July 2010, as many as 49.4% of those individuals waiting for DD Waiver services had been waiting more than four years. Of those, 37.2% had been waiting longer than five years. (Dkt. No. 62, ¶¶ 142 & 143).

The Defendants' statutes, rules and policies for management of the waitlist force persons who have developmental disabilities and currently reside in the community to forgo services completely, waiting for one of the three desperate and dangerous crisis

categories to take hold. Institutionalized persons will never enroll in the DD Waivers, so long as the State continues to only fund crisis enrollments.

As of March 5, 2012, there are 233 individuals on the waitlist residing in ICF/DDs. (Kidd Depo., 24:1- 25:1). As of September 2010, there were at least 115 persons with developmental disabilities on the waitlist residing in Nursing Facilities. (Dkt. No. 125, Ex. "P"). Additionally, 69 persons with developmental disabilities registered for the DD Waivers waitlist reside in state-run ICF/DDs. Meanwhile, appropriations for privately owned ICF/DDs are assisted in accessing increasing rates through the use of Quality Assessment Fees. *See* §§ 409.9082 & .9083, Fla. Stat. Nonetheless, private ICF/DDs have experienced an overall decline in their census from FY 2004/2005. In that year, the total private ICF/DD population (inclusive of private caseload, clusters caseload, and six bed caseloads) was 2,079 persons. By FY 2010/2011 this census declined to 1,997. There have been no new ICF/DD beds built since 2006. (Dkt. No. 125, Ex. "J", ¶ 24). There has also been a constant existing ICF/DD bed vacancy of approximately 52 since June 2009. Justice Ginsburg's plurality opinion required the state to show that with its available resources, immediate relief for those seeking community services 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." *Olmstead v. L.C.,* 527 U.S. 581, 604 (1999). It can hardly be said that maintaining rates from year 2008 for a declining population of persons who have increasingly sought community services instead is enough to support a fundamental alteration defense to the relief sought here.

Dudek and Hansen have failed to design a comprehensive, effectively working plan that might provide services in a reasonably prompt manner, and instead their policies and administrative rules preclude them from meeting their Medicaid obligation. By assessing the needs of the persons on the waitlist and planning a method to enroll and fund persons in categories other than "crisis" – including those institutionalized in Category 3 and those not yet institutionalized in Categories 3-7 – the Defendants could meet their obligations and have a waitlist that moves at a reasonable pace.

Woodward, Pivinski, and other not yet institutionalized clients of the P&A, have been placed on the lengthy waitlist and continue to wait while the Defendants have acknowledged a reduction in the provision of community services for them. There are no non-crisis enrollments. There are less crisis enrollments creating an even more competitive crisis enrollment process. There is a diversion of IFS funds to squelch less severe crisis situations thereby depriving those funds for services such as Supported Employment. There is a continued neglect and apathy of realizing savings by transitioning those in institutions that want community services to the DD Waiver with appropriate funding mechanisms. The consequence of the Defendants' actions is the complete absence of a moving waitlist. This Court should grant Congden's, Woodward's, Pivinski's, and the P&A's claims for violation of the reasonable promptness provision.

Dykes and Davis would never have qualified as a crisis; without this lawsuit, they would have remained in their institutions, never realizing the benefits of community interaction. Young is in a category all her own: the Nursing Home Transition program has denied her because she needs a residential placement such as those provided in the

DD Waiver (Letter D. Newman); yet, there is no Nursing Home Transition proviso language to bring the funds that keep her in the Nursing Home to the DD Waiver. The Defendants have utterly failed Young. This Court should grant the claims of Dykes, Davis, Young and the P&A for violating Medicaid's reasonable promptness provisions.

## III. COUNT II: FREEDOM OF CHOICE

### a. Enforcement under § 1983

Again, the Plaintiffs bring this claim having been deprived of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. The Plaintiffs seek enforcement of 42 U.S.C. § 1396n(c)(2)(C), the freedom of choice provision of the Medicaid Act applicable to waiver programs. That provision has been found by numerous courts to confer an enforceable right. *Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1351 (S.D. Fla. 1999) (finding that § 1396n(c)(2)(C) met the elements stated in *Doe v. Chiles* to create an enforceable § 1983 right); *see also Ball v. Rodgers*, 492 F. 3d 1094, 1117 (9th Cir. 2007); *Wood v. Tompkins*, 33 F. 3d 600, 612 (6th Cir. 1994).

### b. All Plaintiffs are eligible individuals

The individual Plaintiffs are eligible to receive community services through the DD Waiver based upon their disabilities. (Dkt. No. 125, Ex. "A", ¶¶ 1 & 9-12; Dkt. No. 125, Ex. "B", ¶¶ 1 & 9-12). Each of the Plaintiffs meet the level of care criteria for an ICF/DD. (Dkt. No. 125, Ex. "B", ¶¶ 5-8).

### c. Davis, Dykes and Young have not been informed of the 'feasible alternatives' to services for persons with developmental disabilities.

The Defendants must also do the following for: "such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded." 42 U.S.C. § 1396n(c)(2)(C).

Defendants are jointly responsible for the operation of the DD Waivers according to 42 C.F.R. § 440.180 and 42 D.F.R. 441, subpart G. (Dkt. No. 125, Ex. "C", at 4). Both agencies have taken responsibility to "assure that individuals have freedom of choice between home and community-based services or institutional services." (Dkt. No. 125, Ex. "C", at 4).

The Defendants' pattern and practice violates statutory freedom of choice requirement under the Social Security Act, § 1915(c)(2), as amended, 42 U.S.C. § 1396n(c)(2), as the Defendants require Medicaid eligible individuals to choose between (1) an indefinite and lengthy placement on the DD waiver waitlist without services, or (2) placement in an ICF/DD with services but decreased independence, where they would be frozen in Category 3.

Pursuant to the Defendants' Interagency Agreement, (Dkt. No. 125, Ex. "C"), the APD agreed to do two things when it came to ICF/DD admissions and continued residency:

> Maintain vacancy and waiting lists for placement of clients in ICF/DDs. When clients select an ICF/DD for placement, APD will complete necessary assessments and be responsible for making arrangements with the ICF/DD for admission.

> Conduct utilization and continued stay reviews for all residents of public and private ICF/DD facilities. When review is completed, APD will send a copy of the utilization review and continued stay review documents to the APD Area office and respective ICF/DD facility. For new admissions to a facility, a copy of the review is sent to the facility and to the adult payments worker at DCF to process.

(Dkt. No. 125, Ex. "C", at 12).

42 U.S.C. § 1396n(c)(2)(C) exists within the specific requirements a state must comply with while implementing their Medicaid waiver service programs. The particular obligation absent here was the informing of 'feasible alternatives' to the institutional setting. At some time after 1999, when the Supreme Court issued its ruling in *Olmstead*, the Defendants knew or should have known that, for some, the placement in an institution while simultaneously being on the waitlist could be in violation of the ADA. The Defendants then failed to inform those persons in ICF/DDs that they could receive services through the DD Waiver.

Dykes and Davis were placed in ICF/DDs and required client advocates to assist them in applying for the DD Waiver and being subsequently being registered on the waitlist. Hansen failed to identify Dykes and Davis as able to live in the community, pursuant to 42 U.S.C. § 1396n(c)(2)(C), and to ensure their eligibility and registration for the DD Waivers upon admittance to the institution.

Young was placed in a nursing home despite having the ability to reside in the community and a CMAT team actively trying to find a community placement for her, including through Defendants DD Waiver program. She qualified for the DD Waiver

based upon her disability and should have been informed of the possibility to receive services, or at least register for the waitlist, through the DD Waiver.

The Defendants have failed to identify all of those persons eligible to receive services through the DD Waiver that have been diverted to nursing homes and to routinely and continuously offer choice counseling to ensure a more integrated setting is not appropriate for those individuals. For these reasons, the Court should grant Dykes, Davis, Young, and the P&A summary judgment as to Count II.

## IV. COUNT III: INTEGRATION MANDATE OF THE ADA AND SECTION 504 OF THE REHABILITATIVE ACT

Discrimination claims under the ADA and Section 504 are substantially similar and are analyzed the same way. *See Allmond v. Akal Sec., Inc.*, 558 F. 3d 1312, 1316 n.3 (11th Cir. 2009). The ADA requires "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, program, or activities of a public entity, or be subjected to discrimination by a public entity." 42 U.S.C. § 12132. The unjustified institutional isolation of persons with disabilities is a form of discrimination by reason of disability. *See Olmstead*, 527 U.S. at 597 & 600-01. The ADA requires states to provide community based treatment for persons with disabilities when:

(1) the state's treatment professionals have determined that community-based services are appropriate for an individual;

(2) the individual does not oppose such services; and

(3) the services can be reasonably accommodated, taking into account

(a) the resources available to the state, and

(b) the needs of others with disabilities.

*See Olmstead*, 527 U.S. at 602-04 & 607. "When these requirements are met, states must provide services to individuals in community settings rather than in institutions." *Haddad*, 784 F. Supp. 2d at 1298 (*citing Fisher v. Oklahoma Health Care Auth.*, 335 F. 3d 1175, 1181 (10th Cir. 2003)).

**a. For Dykes, Young, Davis, and other P&A clients residing in institutions, the community-based services are appropriate.**

As APD placed Dykes, Young, and Davis on the DD Waiver waitlist, the Defendants have already recognized that these plaintiffs are "qualified individual[s] with a disability" who could be served in the community. Dykes and Davis were recently transitioned from their institutions to community settings, demonstrating their appropriateness for community-based services and satisfying the first prong.

Young 's Children's Multidisciplinary Assessment Team ("CMAT") in 2001 noted her stability and progress and changed her status from Fragile to Skilled for the continued stay at the nursing home she resided in as a child. It was documented that "Future planning was discussed for [Young], noting that she may be more appropriate for a less restrictive setting." By 2005, the CMAT team noted "Heather would also be eligible for a Developmental Disabilities Group Home, but according to local officials, she cannot be a client of that program until she is discharged from the Nursing facility. There is also a waiting list for placement with the program." In April 2009, Young had her final CMAT staffing as her 19th birthday would occur before her next staffing; on her 19th birthday, Young remained a resident of a nursing facility. Recently, Young was denied enrollment to the Aged and Disabled Adult Waiver—not because she could not

live in the community, but merely because the support she would need, a group home placement, is offered only through the DD Waiver. The CMAT Team's recommendations satisfy the first prong for Heather's community based treatment.

**b. For Dykes, Young, and Davis and other P&A clients residing in institutions, the community-based services are not opposed.**

Dykes, Young, and Davis also satisfy the second prong - no opposition to receipt of in-home services - because they have affirmatively been seeking them by applying for the services and languishing on the waitlist. The process of getting onto the waitlist is not simple. It involves filling out an application with APD. (Arnold Depo., I, 10:14-20). Then, APD reviews documentation, including intelligence tests, to determine if the individual has a qualifying developmental disability. (Arnold Depo., I 11:21-25). APD has 45 days to determine eligibility for children and 60 days for adults. (Arnold Depo., I, 12:11-13). A staff psychologist and other trained personnel to complete the application and eligibility process. (Arnold Depo., I, 13:8-16). Then, APD discusses what services the DD Waiver can provide and what services the person is seeking from the DD Waiver. (Arnold Depo., I, 14:19-14).

Young has specifically requested to be on the waitlist, was found eligible for the DD Waiver, was added to the waitlist, and has voluntarily participated in this lawsuit seeking community services. Dykes' and Davis' willingness to transition and their continued success in the community further evidences their lack of opposition. This satisfies the second prong for all three institutionalized Plaintiffs.

**c. For Dykes, Young, Davis, and other P&A clients residing in institutions, the services can be reasonably accommodated, taking into**

**account the resources available to the state, and the needs of others with disabilities.**

The remaining issue is whether Dykes, Davis, Young and other clients of the P&A residing in institutions can be reasonably accommodated, taking into account the resources available to the state, and the needs of others with disabilities. The requested accommodation, receipt of in-home services, which requires the transfer of funds from the ICF/DDs to the DD Waiver, is a reasonable accommodation in light of the Defendants' resources and their obligations to other disabled individuals. By using the proviso language from the 2011 and 2012 Florida Appropriations Acts, the Defendants have already recognized the transfer of funds as a reasonable accommodation.

AHCA has analyzed the savings of the only two clients transferred to date, Davis and Dykes. For roughly one-half of the year, AHCA sees potential savings of $61,416.00. Annualized, the approximate savings from the two transitions total $131,747.06[4], saving better than 50% of institutional costs. If the Defendants achieved a comparable rate of saving for every two individuals identified as being on the waitlist and residing in ICF/DDs (currently 233 individuals), they could realize potential annual savings around $15,348,532.49. This still does not account for the transition of individuals from nursing homes, such as Young, which could add to the potential savings.

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[4] Dykes: ICF/DD daily rate = $373.10 ($373.10 x 365=$136,181.50 per year for ICF/DD) and number of days out of the institution for FY11-12 = 149 ($26,538 in approved FY11-12 waiver costs/149=$178.10 per day on DD Waiver; $65,009.19 per year on DD Waiver) ; savings of $71,172.31 per year post transition. Davis: ICF/DD daily rate = $351.83 ($351.83x365=$128,417.95 per year for ICF/DD) and number of days out of the institution in FY11-12 = 195($36,245 in approved FY11-12 waiver costs/195=$185.87 per day on DD Waiver; $67,843.20 per year on DD Waiver); savings of $60,574.75 per year post transition. Total savings per year for Dykes and Davis = $131,747.06.

AHCA has affirmed, however, that any savings realized from transitions will remain respectively in the Medicaid Nursing Home and the Medicaid ICF/DD budget categories. Further, the state has another method to protect the services it provides to individuals in institutions. Since 2009, private ICF/DDs have been able to utilize Quality Assessment Fees ("QAF"), a pass-through, Medicaid-allowable cost for the ICF/DD which allows the return of the fee plus the federal match to the ICF/DD to compensate for any rate cuts since 2008. § 409.9083(3), Fla. Stat. Similarly, the Nursing Homes are able to buy back rates through the use of QAFs as well pursuant to § 409.9082, Florida Statutes.

Given the resources the state has to transfer monies from one line item in a budget category to another, the requested accommodation is very reasonable: the funds used to pay for services for the institutions should simply go to the DD Waiver for the provision of services to Dykes, Davis, Young, and other P&A clients desiring community services. In fact, the accommodation saves the state money. Any speculative concerns about the funding of the ICF/DD placements or Nursing Home placements could potentially be alleviated by the use of the QAFs as history has demonstrated.

Dykes, Davis and Young have been injured because they were institutionalized, despite their eligibility for community based services through the DD Waiver. The Defendants' current system enrolls only crisis applicants to the DD Waiver. The legislature authorized the Defendants to define "crisis" by rule. Defendants have defined "crisis" as being homeless, having life-threatening maladaptive behaviors, or without a caregiver of person willing to provide care. Fla. Stat. 393.065(7)&(5)(a); Fla. Admin.

Code R. § 65G-1.047. Placement in an institution precludes crisis for Dykes, Davis, Young, and other waitlisted P&A clients: "they will never fall into the [crisis category]." (Dkt. No. 80, at 9).

For Dykes, Davis, Young and other P&A clients residing in institutions, there are no undisputed facts upon which Defendants can rely to support their defenses. In fact, they did not allege any affirmative defenses in their Answer to Plaintiffs' Amended Complaint. (Dkt. Nos. 62 & 63). These Plaintiffs are eligible individuals with developmental disabilities that should be afforded an evaluation in the ICF/DD by the APD staff to determine if community services are appropriate. Dykes and Davis need not be transitioned due to their recent community placements; Young's CMAT team felt she was appropriate for a less restrictive environment since 2001 and pursued community options for her. Unfortunately, Young's CMAT team stopped when advised there was a waiting list for a Developmental Disabilities group home placement. For institutionalized clients that have affirmatively sought to be placed on the DD Waiver waitlist, thereby making their lack of opposition to community services known, the Defendants can and should conduct evaluations for the appropriateness of community services and reasonably accommodate their transitions to the community. As to Count III, regarding violations of the ADA and Section 504 for Dykes, Davis, Young, and the P&A, this Court should grant the motion for summary judgment.

**d. For Woodward, Congden, Pivinski, and other P&A clients residing in the community waiting for community services can also be reasonably accommodated, taking into account the resources available to the state, and the needs of others with disabilities.**

Pivinski, Woodward, and Congden are persons with developmental disabilities, as defined in § 393.063, Fla. Stat. As such, they are also eligible for the DD Waiver. Pivinski and Woodward reside in their families' homes. Congden applied for crisis in March 2011 and began receiving DD Waiver services in April 2012. While Congden was on the waitlist, she resided in her sister's home, as both of her parents were deceased. This Court acknowledged these Plaintiff's injuries as "languishing on the waitlist without services." (Dkt. No. 80, at 5).

The Defendants' policies unreasonably and arbitrarily deny community services to Woodward, Pivinski, and other P&A clients waiting for services. First, crisis enrollments are shrinking despite not having used all of the approved CMS slots. (Ball Depo., 162:1-11).[5] Second, APD policies using General Revenue funds to alleviate certain crisis situations through limited services ultimately denies the full panoply of DD Waiver services to otherwise crisis eligible individuals. (Arnold Depo., I, 122:8-12). Third, Defendants have retained the savings from actual deinstitutionalizations in the institutions' budget, enlarging the existing imbalance of funding. (Dkt. No. 125, Ex. "J", ¶¶ 12 & 13). Finally, Defendants have not planned to utilize the savings from deinstitutionalization for non-crisis enrollments or to otherwise move the waitlist. (Dkt. No. 125, Ex. "I", ¶ 15) (Arnold Depo., I, 116:25 - 117:3).

These policies and practices preclude Pivinski and Woodward from obtaining their needed services. Pivinski and Woodward seek to maintain their independence and community involvement. Pivinski, Woodward, and other P&A clients who are neither in

[5] Dkt. No. 125, Ex. "S".

crisis or institutionalized could be feasibly served by the savings realized by transferring the 233 individuals out of ICF/DDs. If the savings followed the exiting individuals from the institution to the DD Waiver in the budget as well, then the savings would allow up to 684 waitlisted individuals to be added to the waiver.[6] As of March 2012, the DD Waiver had 31,500 enrollment slots and 29,624 enrolled individuals, resulting in 1,876 open and available slots. The 1,876 slots would easily serve the population on the waitlist seeking to exit institutions (233 in ICF/DDs and 115 in nursing homes) along with the 495 that could be realized though ICF/DD savings alone, resulting in an additional 843 persons on the waiver. Even more individuals could fill the remaining 1,033 slots based on possible savings from nursing home transitions.

The Court in *Olmstead* recognized that if a state "had a comprehensive, effectively working plan for placing qualified persons with [disabilities] in less restrictive settings, and a waiting list that moved at a reasonable pace, not controlled by the state's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met" and the Court would have no reason to interfere. *Olmstead*, 527 U.S. at 605–606. As to Count III, regarding violations of the ADA and Section 504 for Woodward, Congden, Pivinski, and the P&A, this Court should grant the motion for summary judgment.

## V. COUNT IV: DENIAL OF DUE PROCESS

It is a violation of 42 U.S.C. § 1983 for anyone, under color of state law, to deprive a person "of any rights, privileges, or immunities secured by the Constitution and

[6] $21,211,276.66 in approximate savings divided by the average annual waiver cost plan expenditure per capita ($31,000.00) equals 684 individuals.

laws." *Id.* "In this circuit, a § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process." *Arrington v. Helms,* 438 F.3d 1336, 1348 (11th Cir. 2006) (*quoting Grayden v. Rhodes,* 345 F.3d 1225, 1232 (11th Cir. 2003)).

Under the Fourteenth Amendment to the United States Constitution, no state "shall ... deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV, § 1. No person's property rights can be deprived except pursuant to constitutionally adequate procedures. *See Cleveland Bd. of Educ. v. Loundermill,* 470 U.S. 532, 541 (1985). It is beyond dispute that Plaintiffs have a protected property interest in their Medicaid services, *see, e.g., Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 & 264 (1970) (welfare), and the actions and inactions by Dudek and Hansen constitute "state action" under the second element. *Compare* Dkt. No. 30, ¶ 99 *with* Dkt. No. 62, ¶ 99 & Dkt. No. 63, ¶ 99. Accordingly, the sole dispute here is whether notices of a right to hearing were ever provided to the Plaintiffs when they made their initial applications for DD Waiver services.

"The essential requirements of due process ... are notice and an opportunity to respond." *Loudermill*, at 470 U.S. at 546. *See also Dusenbery v. United States,* 534 U.S. 161, 167-68 (2002). In this case, written notice to each of the Plaintiffs was mandatory. *See* 42 C.F.R. §§ 431.206(b) & 431.210. When determining the adequacy of a state's notice of decision under the Due Process Clause, the Eleventh Circuit applies the test set forth in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). *See*

*Arrington,* 438 F. 3d at 1349. Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* 339 U.S. at 314. Although due process is a flexible concept that varies with the particular circumstances of each case and myriad forms of notice may satisfy the *Mullane* standard, *see Grayden,* 345 F. 3d at 1239 n. 17, the failure to provide ***any*** required notice is a violation of due process. *See, e.g., Holmes v. New York City Hous. Auth.,* 398 F. 2d 262, 265 (2nd Cir. 1968).

Each of the Plaintiffs applied for the DD Waiver, which includes medical assistance. Each of their applications for DD Waiver services was either denied or not acted on with reasonable promptness. Each of the Plaintiffs was placed in waitlist categories that precluded their receipt of medical assistance. None of the Plaintiffs received notice of their placement into non-crisis categories or what category they are in. Moreover, there is no evidence that any of the Plaintiffs ever received notification of their assigned waitlist prioritization category. *Compare* Dkt. No. 30, ¶¶ 23, 39, 47, 54 & 229 *with* Dkt. No. 62, ¶¶ 23, 39, 47, 54 & 229 & Dkt. No. 63, ¶¶ 23, 39, 47, 54 & 229. Accordingly, the Plaintiffs have satisfied all of the elements for a denial of procedural due process, *see Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1352 (S.D. Fla. 1999) (granting summary judgment), and have satisfied a claim for violation of 42 U.S.C. § 1983. Violations under 42 U.S.C. § 1983 warrant reasonable attorney's fees and costs under 42 U.S.C. § 1988. *See id.* As to Count IV, regarding due process violations for Dykes, Davis, Young, Woodward, Congden, Pivinski, and the P&A, this Court should grant the motion for summary judgment.

Dated in Tampa, Florida on this second day of May, 2012.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by CM/ECF to all attorneys of record this 2nd day of May, 2012.

By s/ Amanda E. Heystek
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