UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DISABILITY RIGHTS FLORIDA, Inc., a Florida non-profit corporation,

Plaintiffs,

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

DUDEK, et al.,

Defendants.
_____/

PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT

The Plaintiff, Disability Rights Florida, Inc., d/b/a Disability Rights Florida (the "P&A"), by and through its undersigned attorneys, moves 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 P&A is entitled to judgment as a matter of law. In support of its motion, the P&A submits herein its memorandum of law.

STANDARD OF REVIEW

The Court may grant summary judgment if the P&A shows there is no genuine dispute as to any material fact and it is 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. *See 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. *See 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). 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' Second Statement of Undisputed Facts (Doc. No. 145), which has been filed contemporaneously with this motion, is incorporated by reference as if fully set forth herein. References to the Exhibits in the P&A's Amended Statement of Undisputed Facts are designated herein as "Doc. No. 145, Ex. [letter(s)]."

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. *See Alexander v. Choate*, 469 U.S. 287, 290 n.1

(1985). 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.

The Medicaid state plan must identify the required and optional health care services that are available through the state Medicaid program. Optional services identified in the state plan 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 opted to provide to persons who meet level of care criteria for placement in an ICF/DD. *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).

B. 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 ("DD Waiver") programs 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. 42 U.S.C. § 1396n(c)(3).

States apply to the Centers for Medicare & Medicaid Services ("CMS") for permission to operate a home and community based waiver, which must be approved before it can be effective. 42 U.S.C. § 1396n(c)(3). The "Application for a § 1915(c) Home & Community Based Waiver [version 3.5], Instructions, Technical Guide and Review Criteria" (Release Date January 2008) (Doc. No. 145, 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.

C. Florida's DD Waiver and ICF/DD 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). Dudek and Hansen operate five waivers for persons with developmental disabilities; they are called "Tier Waivers", consisting of Tiers One through Four and an Individual Budgeting Waiver. One waitlist is maintained for all of the five waivers that the Defendants operate.

D. The Waitlist

Currently there are over 20,000 individuals, both children and adults, on the waitlist for the DD Waivers. (Doc. No. 145, Ex. "I", ¶ 3, at 4; & Ex. "N", Vol. I, 25:16-18). Dudek has final authority on the DD Waiver applications and the determination of any unduplicated recipients requested to CMS. (Doc. No. 145, Ex. "C", Sect. B.4.a, at 5). Hansen is responsible for new Medicaid admissions to ICF/DDs and also conducts the Preadmission Screening and Resident Review ("PASRR")[1] for persons residing in nursing homes that have a developmental disability or mental illness. (Doc. No. 145, Ex. "E", 26:11-21). *See also* 42 U.S.C. § 1396r; 42 C.F.R. § 483.100.

APD has adopted rules to define seven waitlist categories. *See* Fla. Admin. Code R. 65G-11.002 & § 393.065(5), Fla. Stat. The first category is for those determined by APD to be in "crisis" (*i.e.*, homeless, without a caregiver or a danger to themselves or others). (Doc. No. 145, Ex. "I", ¶ 3). The Defendants have no plans to begin enrollment from categories other than "crisis." (Doc. No. 145, Ex. "I", ¶ 15 & Ex. "N", Vol. I, 116:25 – 117:1-3). Only those applicants or individuals on the waitlist that APD determines to have met the crisis criteria have access to DD Waiver services. (Doc. No. 145, Ex. "I", ¶ 3, at 5; & Ex. "N", Vol. I, 116:25 – 117:3). Absent a crisis, individuals on the waitlist must seek admission to an ICF/DD in order to secure services or remain in the

[1] 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).

community on the waitlist and hope that APD will subsidize temporary or ongoing services through the Individual Family Supports program ("IFS") similar to the relief obtained by Joshua Woodward and Amanda Pivinksi. (Doc. No. 136, ¶ 4).

APD agreed to provide AHCA with the number of waiver recipients disenrolled along with corresponding demographic data, and to maintain waiver wait lists that accurately reflect wait list changes due to enrollments. (Doc. No. 145, Ex. "C", Sect. B.5.h & i, 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.

II. THE P&A'S CONSTITUENTS ARE ELIGIBLE FOR SERVICES

To be eligible for entry onto the DD Waiver, the P&A's constituents must show that they "both (1) meet the preliminary eligibility requirements for participation in the Waiver program, as indicated by their presence on the waiting lists, and (2) are entitled to one of the few Waiver slots." *Susan J. v. Riley*, 616 F. Supp. 2d 1219, 1241 (M.D. Ala. 2009). *See also Bryson v. Shumway*, 308 F. 3d 79, 88 (1st Cir. 2002).

The P&A's constituents meet the first element as they await DD Waiver services either in institutions, or without meaningful supports in the community. (Doc. No. 145, Ex. "U", ¶ 6). To begin with, Hansen has admitted there are 198 persons with developmental disabilities residing in private ICF/DD facilities while waiting for DD Waiver services and another 69 persons with developmental disabilities waiting for DD Waiver services in state-operated ICF/DDs. *Compare* Doc. No. 30, ¶¶ 153 & 155, *with* Doc. No. 62, ¶¶ 153 & 155. Additionally, the P&A included an explicit statement of

representation on behalf of Pivinski and Woodward who had continued to wait for DD Waiver services while receiving the stop-gap temporary provision of state-only funded services. Doc. No. 30, ¶ 90. Finally, the P&A has constituents waiting for services in other privately run ICF/DDs, nursing facilities, and family homes that it continues to advocate on behalf of in order to obtain services. (Doc. No. 145, Ex "U", ¶¶ 6-9). All of these identified waitlisted individuals have been found to have a qualifying developmental disability, pursuant to Section 393.063(9) of the Florida Statutes, that makes them eligible for the DD Waiver. (Doc. No. 145, Ex. "N", Vol. I, 117:9-12).

The second element from the *Susan J.* and *Bryson* decisions is the key to this entire matter. (Doc. No. 60, at 4). Enrollment in the DD Waiver is capped at the number of unduplicated individuals proposed by the state and approved by CMS. *See* 42 C.F.R. § 441.303(f)(6). In a state's waiver application 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.

(Doc. No. 145, Ex. "Q", at 7) (emphasis added). CMS gives explicit guidelines on what the number of unduplicated individuals means and how it is to be applied to waiver applicants seeking 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.

(Doc. No. 145, Ex. "Q", at 82) (emphasis supplied). The number of unduplicated individuals serves as both the ceiling and the floor for a waiver program—ensuring that a state does not exceed its agreed to limit on waived service provisions, while simultaneously ensuring that the waiver is at capacity so long as there are eligible individuals to fill the slots.

Section f of Appendix B-3 for each of the Florida waiver applications, states that individuals shall be enrolled onto the DD Waiver "[w]hen the level of funding appropriated by the Florida Legislature provides funding for additional vacancies on the waiver." While the Defendants may seek to read their section f assertion to tie slots or available vacancies to the funding provided by the Florida Legislature, CMS provides specific instructions to Appendix B-3, stating:

> ***A state may find it necessary to reduce the maximum number of participants because legislative appropriations are insufficient to support the number of persons specified in the approved waiver. In order to effect such a reduction, a state must submit a waiver amendment and the amendment must be formally approved by CMS.*** As previously noted, in the past, states have been permitted to tie the number of participants to legislative appropriations and notify CMS in writing of the reduction in the number of participants due to legislative appropriations without submitting an amendment. ***This alternative is no longer available***. ***The waiver is considered to be in effect as approved unless CMS has formally approved an amendment submitted by the state.*** If a state finds it necessary to freeze waiver enrollment or place a moratorium on new entrants to the waiver, the state also must submit an amendment to CMS to revise the unduplicated participant cap for the affected waiver year.

Doc. No. 145, Ex. "Q", at 82 (emphasis added).

The directions for Appendix B-3, section f, further state that "[e]ntrance to the waiver may ***not*** be deferred when there is unused waiver capacity." *Id.* (emphasis added). Nor is it "appropriate to base policies for the selection of otherwise eligible individuals on factors such as the expected costs of waiver services or the types of services that an individual might require post-entrance." Doc. No. 145, Ex. "Q", at 88. While the Defendants may assess individuals to determine who is in crisis or in foster care and should gain priority entrance, they cannot consider "an analysis of a particular pool of applicants, their needs, and the available funds." Doc. No. 123, at 5.

Based upon the most recently approved DD Waiver applications, the Defendants sought and received approval for the enrollment of at least 39,200 individuals in Tiers 1 through 4. (Doc. No. 145, Ex. "V" [DO 18893, Appx. B-3.a (4,000); DO 18897; DO14084, Appx. B-3.a (4,200); DO18907; DO14085, Appx. B-3.a (16,000); DO14118, Appx. B-3.a (15,000). In March 2011, there were 30,033 individuals enrolled. (Doc. No. 145, Ex. "A", ¶ 23; Doc. No. 145, Ex. "B", ¶ 23; Review of the Home and Community-Based Care Waiver Program, dated 3/31/2011, *http://apd.myflorida.com/news/news/2011/hcsbw-review.pdf*, at 2). In November 2011, there were 29,624 individuals enrolled, (Doc. No. 145, Ex. "A", ¶ 21 & Ex. "B", ¶ 21), evidencing the declining number individuals served annually by the DD Waiver. Not including the iBudget figures, this leaves 9,576 slots for non-crisis waiver applicants.

"Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX [of the

Medicaid Act]." *Harris v. McRae,* 448 U.S. 297, 301 (1980). To the extent that the Defendants rely on their own eligibility and crisis rules or Florida Statutes to support the limitation on the availability of resources, such authority is in contravention of the Medicaid Act and cannot be enforced without violating federal law. After opting to participate in the program, and agreeing to a State Plan with CMS, the requirements of the Medicaid Act are mandatory and are the "supreme" law, which invalidates conflicting State law under the Supremacy Clause. *See Dalton v. Little Rock Family Planning Servs.,* 516 U.S. 474, 478 (1996) (injunction against enforcement of State law to the extent of conflict with Medicaid Act). *Cf. Blum v. Bacon*, 457 U.S. 132, 138 (1982) (supremacy clause issue). The Supremacy Clause requires invalidation of any state constitutional or statutory provision that conflicts with federal law, *see Reynolds v. Sims,* 377 U.S. 533, 584 (1964), and compels compliance by participants in Title XIX federal aid programs with federal law and regulations. *See King v. Smith,* 392 U.S. 309, 316-17 (1968).

As the maximum CMS-approved enrollment has not been reached, waiver slots are available for the P&A's constituents. The P&A's constituents, having met both elements of *Susan J.* and *Bryson*, are eligible for services, and are entitled to reasonably prompt delivery of their chosen method to receive those services.

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

The P&A's constituents have suffered and continue to suffer injuries consisting of their unnecessary segregation in institutional settings and their unnecessary languishing and regression of capabilities while waiting for community services. These injuries are directly traceable to the Defendants' conduct of enforcing a crisis-only enrollment policy;

categorization of institutionalized but waitlisted persons with developmental disabilities; and a refusal to enroll eligible applicants up to the approved intended recipient count.

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 v. Arnold*, 784 F. Supp. 2d 1284, 1298 (M.D. Fla. 2010) (*citing Fisher*, 335 F. 3d at 1181).

A. Community-based services are appropriate for the P&A's constituents residing in institutions

The Defendants' placement of Dykes, Young, Davis, and other constituents on the DD Waiver waitlist is tacit recognition that these persons are qualified individuals with a disability who could be served in the community. Dykes's and Davis's recent transitions to community settings demonstrate that community-based services were appropriate for them; thus, satisfying the first prong. Young was also placed on the waitlist by APD. In 2001, her CMAT team first noted that a less restrictive setting may be more appropriate and continued that documentation through April 2008 without ever obtaining community services. Not until this lawsuit was filed was Young finally accepted and transitioned to the DD Waiver. Dykes, Davis, and Young are but three of the identified 198 individuals residing in ICF/DDs and the 115 individuals residing in nursing homes that requested and were waiting for DD waiver services. But for the Defendants' omission of routinely identifying and assessing ICF/DD and nursing home residents who can live in the community and desire to do so, these individuals and the apparently 14 individuals recently identified by the Defendants would have had their choice of community services effectuated in a reasonably prompt manner. (Doc.123, p.12). This also satisfies the first prong for community based treatment.

B. The P&A's constituents residing in institutions do not oppose community-based services

The P&A's constituents also satisfy the second prong - no opposition to receipt of in-home services - because they have affirmatively been seeking community services by applying for them and languishing on the waitlist. The P&A's constituents, including

Dykes, Davis and Young, have demonstrated their willingness to transition and their continued successful transition evidences the lack of opposition. (Doc. No. 145, Ex "U".) This satisfies the second prong of the analysis.

C. Taking into account the resources available to the state and the needs of others with disabilities, the services can reasonably accommodate the P&A's constituents residing in institutions

The remaining question is whether institutionalized constituents can be reasonably accommodated in the community, taking into account the resources available to the state and the needs of others with disabilities. The requested accommodation, receipt of in-home services, requires the transfer of funds from the ICF/DDs to the DD Waiver. The accommodation is reasonable in light of the Defendants' resources and their obligations to other disabled individuals. By previously using proviso language to assist transfers from institutions to the community, the Defendants have recognized funds transfers as a reasonable accommodation. There is no reason to believe, however, that the Defendants will have a permanent diversion and transition mechanism in place, as the only known individuals transitioned since the inception of the lauded proviso language were the two individually named Plaintiffs in this matter. The proviso language expires at the end of each fiscal year[2] and the Defendants have failed to demonstrate any effective commitment to transition persons eligible for the DD Waiver out of institutional settings.

Thus far, AHCA has analyzed the savings potential of the only two clients transferred from institutions to the community — Dykes and Davis (Doc. No. 145, Ex

[2] The State may not enact substantive law through an appropriations act without violating Fla. Const. art. III, § 12. *See Department of Admin. v. Horne*, 269 So. 2d 659, 660 (Fla. 1972) (citations omitted). *See also Chiles v. Milligan*, 682 So. 2d 74, 77 (Fla. 1996) (same).

"H"). For roughly one-half of the year, AHCA has realized a potential savings of $61,416.00. Annualized, the savings brought about from these two transitions totals $133,622.85.[3] Assuming the same rate of savings for every two individuals identified as being on the waitlist and residing in ICF/DDs (currently 196 individuals), there is a potential annual savings of more than $13 million. The projected $13 million saved would allow for 436 individuals on the waitlist to be added to the DD Waiver with a $30,000 average cost plan. These savings also fail to account for transitions from other institutions, including nursing homes, which could further add to the potential savings and allow for more enrollees from the waitlist.

However, AHCA has affirmed that any savings realized from transitions will remain respectively in the Medicaid Nursing Home and the Medicaid ICF/DD budget categories. (Doc. No. 145, Ex. "J" ¶¶ 12 & 13). 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 use Quality Assessment Fees ("QAFs") to compensate for any rate cuts since 2008. *See* § 408.9083(3), Fla. Stat. Similarly, Nursing Homes are able to buy back rates through the use of QAFs as well. *See* § 409.9082, Fla. Stat.

Dykes, Davis, Young, and other constituents have been injured by their institutionalization, despite being eligible for community-based DD Waiver services.

[3] Dykes: ICF/DD daily rate = $373.10 ($373.10 x 365 = $136,181.50 annually) & number of days out of the institution for FY2011-12 = 149 ($26,538 in approved FY2011-12 waiver costs ÷149 = $178.10 per day on DD Waiver; $65,006.50 annually on DD Waiver; savings of $71,175.00 per annum post transition. Davis: ICF/DD daily rate = $351.83 ($351.83 x 365 = $128,417.95 annually) & number of days out of the institution in FY2011-12 = 195 ($35,245 in approved FY2011-12 waiver costs ÷195 = $180.74 per day on DD Waiver; $65,970.10 annually on DD Waiver; savings of $62,447.85 per annum post transition). Total saving per year for Dykes & Davis = $133,622.85.

Placement in an institution precludes crisis-enrollment for other identified constituents residing in privately run ICF/DDs, state run ICF/DDs and skilled nursing facilities. The causal connection for them is clear, "they will never fall into the [the crisis category]." (Doc. No. 80, at 9).

For institutionalized constituents, there are no undisputed facts upon which the Defendants can rely to support their defenses. In fact, no affirmative defenses were presented in their Answer to the Amended Complaint. (Doc. Nos. 62 & 63). Institutionalized constituents are eligible individuals with developmental disabilities that must be evaluated by APD staff to determine if community services are appropriate. §§ 393.13(2)(d)2, 3, & 7, Fla. Stat. While Dykes, Davis, and Young no longer require transition due to their recent community placements, at least another 196 individuals in private ICF/DDs, 69 individuals in state-run ICF/DDs, and 114 individuals in nursing homes still desire transition, but cannot achieve it due to the challenged administrative barriers of the Defendants. (Doc. 145, Ex. "O" & "U"). For institutionalized P&A constituents affirmatively seeking placement on the DD Waiver waitlist, thereby making their lack of opposition to community services known, the Defendants have failed to routinely conduct evaluations independent of the institution's staff determining the ongoing appropriateness of community services. (Doc. No. 145, Ex. "C", Sect. C., at 12).

D. The P&A's constituents 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

The P&A's not-yet-institutionalized constituents seek to maintain their independence and community involvement. Pivinski and Woodward, as well as other

constituents of the P&A, are persons with developmental disabilities, as defined in Section 393.063 of the Florida Statutes, who are eligible for the DD Waiver. Some constituents, like Pivinski, Woodward, and A.Q. reside in their families' home. (Doc. No. 30, at ¶¶ 57 & 65; Doc. No. 145, Ex. "W", ¶ 2. This Court has already acknowledged these persons as incurring injuries by "languishing on the waitlist without services." (Doc. No. 80, at 5).

The Defendants' policies unreasonably and arbitrarily deny community services to the not-yet-institutionalized constituents waiting for services. First, crisis enrollments are shrinking despite being below the number of approved CMS slots. (Doc. No. 145, Ex. "S", 162:1-11). Second, APD's policies that use General Revenue funds to alleviate certain crisis situations through limited services otherwise deny the full panoply of DD Waiver services to otherwise crisis eligible individuals. (Doc. No. 145, Ex. "N", Vol. I, 122:8-12). Third, through retention of the savings from actual deinstitutionalizations in the institutions' budget, the Defendants further enlarge the existing imbalance of funding. (Doc. No. 145, Ex. "J", ¶¶ 12 & 13). Finally, the Defendants have not used or planned to use the savings achieved from deinstitutionalization for non-crisis enrollments or to otherwise move the waitlist. (Doc. No. 145, Ex. "I", ¶ 15 & Ex. "N", Vol. I, 116:25 - 117:3).

The Defendants' policies and practices preclude not-yet-institutionalized constituents from obtaining needed services. By transferring the individuals in ICF/DDs (198), in nursing homes (115), and the state-run ICF/DDs (69) to community placements, the savings realized could feasibly serve those persons who are neither in crisis nor

institutionalized and eradicate any financial defenses the Defendants seem to claim. The savings, however, do not follow the exiting individuals from the institution to the DD Waiver in the budget allowing the Defendants to claim this arbitrary and state-created barrier as a defense to reaching its intended unduplicated recipient count as stated in its DD Waiver applications. *Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1353 (S.D. Fla. 1999)("Underfunding of the Home and Community–Based Waiver program compels institutionalization, thus negating a meaningful choice.")

Based upon the foregoing, there is no genuine issue of material fact as to the Defendants' violations of the ADA and Section 504; thus, this Court should grant the P&A's motion for summary judgment on Count III of the Amended Complaint

IV. COUNT I: REASONABLE PROMPTNESS

In Count I of the Amended Complaint, the P&A has filed a claim on behalf of its constituents under 42 U.S.C. § 1983 seeking to enforce the reasonable promptness provision of the Medicaid Act. *See* 42 U.S.C. § 1396a(a)(8) & 42 C.F.R. § 435.930. The Eleventh Circuit has held that there is "a federal right to a reasonably prompt provision of assistance under section 1396a(a)(8) of the Medicaid Act, and that this right is enforceable under section 1983." *Doe 1-13*, 136 F. 3d at 719.

A. APD's and AHCA's administrative procedures cause delay and prevent the P&A's constituents from receiving services in a reasonably prompt manner

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) (emphasis added). 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.

The Defendants' statutes, rules and policies for management of the waitlist force the P&A's constituents currently residing in the community to forgo services completely, while waiting for one of the three desperate and dangerous categories of crisis to take hold. Despite Florida's express legislative intent, there has been no expansion of DD Waiver enrollments available to non-crisis Medicaid eligible recipients. As recently as July 2010, 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. (Doc. No. 62, ¶¶ 142 & 143). *See also* Doc. No. 145, Ex. "U", ¶¶ 6-9.

There are no non-crisis enrollments and fewer crisis enrollments, creating an even more competitive crisis enrollment process. Other not-yet-institutionalized constituents of the P&A have been placed on a lengthy waitlist and continue to wait while the Defendants reduce community services for them. IFS funds are diverted to squelch crisis situations deemed not critical enough for DD Waiver services, thereby depriving those funds for services, such as Supported Employment. (Doc. No. 145, Ex. "N", Vol. II; 150:17-18). The unavailability of services in the community relegates Medicaid eligible persons with developmental disabilities to a waitlist placement for years in violation of the "reasonable promptness" provisions. *See* 42 U.S.C. § 1396a(a)(8) & 42 C.F.R. § 435.930.

Institutionalized P&A constituents will never qualify for the Defendants' crisis definitions as long as they remain in the institution. There are at minimum 196 individuals and at most 233 individuals on the waitlist residing in ICF/DDs. (Doc. No. 30, ¶ 153; Doc. No. 62, ¶ 153; & Doc. No. 145, Ex. "K", 24:1 - 25:1). Additionally, 69 persons with developmental disabilities registered for the DD Waivers waitlist reside in state-run ICF/DDs. (Doc. No. 30, ¶ 155; Doc. No. 62, ¶ 155).

The Defendants have been able to utilize a proviso granting permission to transfer funds from private or state-operated ICF-DDs to the DD Waivers since its original insertion into the state's appropriations bill in 2011. *See* Ch. 2011-69, § 3, at 55, Laws of Fla. To date, the P&A is aware of the physical transition from ICF-DD to community placement for only two individuals—Dykes and Davis, who were originally named as plaintiffs in this suit.

For the P&A's constituents in nursing homes, there is no Nursing Home Transition proviso language to bring the funds to the DD Waiver that pay for the nursing home stay. While a Nursing Transition Program exists for another Florida Medicaid waiver, that waiver does not offer residential supports similar to the DD Waiver. As of September 2010, there were at least 115 persons with developmental disabilities on the waitlist residing in Nursing Facilities. (Doc. No. 145, Ex. "P").

The Defendants' continued neglect and apathy of realizing savings through transition of those persons in institutions who want community services to the DD Waiver is problematic. For example, 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 – through realized savings, the Defendants could meet their obligations and have a waitlist that moves at a reasonable pace. The consequence of the Defendants' actions is the complete absence of a moving waitlist. This Court should grant the P&A's claim for violation of the reasonable promptness provision.

V. COUNT II: FREEDOM OF CHOICE

In Count II of the Amended Complaint, the P&A seeks to enforce 42 U.S.C. § 1396n(c)(2)(C) — the freedom of choice provision of the Medicaid Act applicable to waiver programs, which is a federally enforceable right under 42 U.S.C. § 1983. *See, e.g., Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1351 (S.D. Fla. 1999) (§ 1396n(c)(2)(C) met elements to create enforceable right under § 1983); *Ball v. Rodgers*, 492 F. 3d 1094, 1117 (9th Cir. 2007); & *Wood v. Tompkins*, 33 F. 3d 600, 612 (6th Cir. 1994).

A. The P&A's constituents have not been informed of the 'feasible alternatives' for the provision of services to persons with developmental disabilities

The Defendants must inform those 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 of the feasible alternatives available under the waiver. *See* 42 U.S.C. § 1396n(c)(2)(C). Both Dudek and Hansen are responsible for the operation of the DD Waivers and have taken responsibility to "assure that individuals have freedom of choice between home and community-based services or institutional services." (Doc. No. 145, Ex. "C", Sect. B.3.c, at 4). *See also* 42 C.F.R. § 440.180 and 42 C.F.R. 441, subpart G. Instead, 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.

While implementing their Medicaid waiver service programs, a state must comply with the Medicaid freedom of choice provision. At some time after 1999, when the Supreme Court issued its ruling in *Olmstead*, the Defendants knew or should have known that placement in an institution while simultaneously being on the waitlist could violate the ADA. The Defendants failed to inform those persons in ICF/DDs, including the P&A's constituents, of the "feasible alternatives" to an institutional setting and that they could receive services through the DD Waiver.

In seemingly furtherance of its obligation, APD agreed to:

> 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.

(Doc. No. 145, Ex. "C", Sect. C.3.j & k, at 12) (emphasis added).

Yet, Dykes, Davis, and other P&A constituents needed client advocates to assist them in applying for the DD Waiver and being subsequently registered on the waitlist. Hansen failed to identify that Dykes, Davis, and other P&A constituents are able to live in the community, pursuant to the Medicaid freedom of choice provision. 42 U.S.C. §

1396n(c)(2)(C). Similarly, despite having the ability to reside in the community, Young lived in a nursing home for more than a decade, while a Children's Multidisciplinary Assessment Team ("CMAT") sought a community placement for her through the DD Waiver program. Young was eligible for the DD Waiver based on her disability and should have been informed of the possibility to receive services through the DD Waiver. Only after this suit was filed did the Defendants provide a community placement for Young. There are another 114 P&A constituents who are now in the same position as Young. (Doc. No. 145, Ex."P" & Ex. "U", ¶ 9).

The Defendants have failed (1) to identify all institutionalized persons that are eligible to receive services through the DD Waiver and (2) to routinely and continuously offer choice counseling to ensure the appropriate integrated setting for those individuals. Therefore, the Court should grant the P&A's motion for summary judgment as to Count II of the Amended Complaint.

VI. COUNT IV: DENIAL OF DUE PROCESS

In Count IV of the Amended Complaint, the P&A seeks a remedy via 42 U.S.C. § 1983 for the Defendants' violation of procedural due process. "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 the P&A's constituents 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* Doc. No. 30, ¶ 99 *with* Doc. No. 62, ¶ 99 & Doc. No. 63, ¶ 99. Accordingly, the sole dispute here is whether notices of a right to hearing were ever provided to the P&A's constituents 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 P&A's constituents 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).

The P&A's constituents applied for services through the DD Waiver. (Doc. No. 145, Ex. "N", Vol. I; 9:1-25; 11:21 - 12:5; 13:8-16; Ex. "U", ¶¶ 6-9). Each of their applications for DD Waiver services was either denied or not acted on with reasonable promptness as evidenced by their maintenance on the waitlist for numerous years. (Doc. No. 145, Ex. "U"; ¶¶ 6-9; & Ex. W, ¶ 7). Moreover, there is no evidence that any of the Plaintiffs ever received notification of their assigned waitlist prioritization category. (Doc. No. 145, Ex. "N", Vol, I, 117:9-12 & Ex. "W", ¶ 6). *Compare* Doc. No. 30, ¶¶ 23, 39, 47, 54 & 229 *with* Doc. No. 62, ¶¶ 23, 39, 47, 54 & 229 & Doc. No. 63, ¶¶ 23, 39, 47, 54 & 229. Accordingly, the P&A has satisfied all of the elements for a denial of procedural due process, *see Cramer,* 33 F. Supp. 2d at 1352 (granting summary judgment), and have satisfied a claim for violation of 42 U.S.C. § 1983.

CONCLUSION

The P&A, on behalf of its constituents, should be granted summary judgment on Counts I-IV of the Amended Complaint. Where, as here, the P&A's constituents are subjected to the acts or omissions at issue, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62. Declaratory and injunctive relief are available to remedy the acts and omissions. Alternatively, the court should adjudicate those facts that are not genuinely in dispute. In conformance with Fed. R. Civ. P. 56(a) & (c), the P&A has supported its motion with admissible evidence, as set forth in its Second Statement of Undisputed Facts, Doc. No. 145. As there can be no dispute as to the facts alleged, the P&A requests the court to adjudicate its undisputed facts as established facts

in the case. When a party fails to properly address another party's assertion of fact, as required by Fed R. Civ. P. 56(c), the court may "consider the fact undisputed for purposes of the motion." See also *Celotex*, 477 U.S. at 324. Violations under 42 U.S.C. § 1983 warrant reasonable attorney's fees and costs under 42 U.S.C. § 1988.

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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 26th day of June, 2012.

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