IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JACQUELINE JONES,

Plaintiff,

v.

Case No. 3:09-cv-1170-J-34JRK

THOMAS ARNOLD, in his official capacity as Secretary, Florida Agency for Health Care Administration, and

Dr. ANNA VIAMONTE ROSS, in her official capacity as Secretary, Florida Department of Health,

Defendants.

PLAINTIFF JACQUELINE JONES' MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR A PRELIMINARY INJUNCTION

I. Plaintiff Meets the Standards for a Preliminary Injunctive Relief

The criteria for granting a preliminary injunction are (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted; (3) a balance of hardships favoring the plaintiff; and (4) advancement of the public interest. *Schiavo Ex Rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005). The grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probability of ultimate success at final shearing with the consequences of immediate irreparable injury, which could flow from the denial of preliminary relief. *Siegal v. Lepore*, 234 F.3d 1163, 1178 (11th Cir. 2000). If the other factors weigh in favor of granting

relief, Plaintiff has only to show a substantial case on the merits of the claim. *Schiavo,* 403 F.3d at 1226.

In the instant case, Plaintiff Jones raises a very strong likelihood of ultimate success on the merits under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), and the Rehabilitation Act of 1973, 29 U.S.C. § 794a ("Section 504"), and their implementing regulations; a very strong probability of irreparable injury; and both the balance of hardships and public interests weigh significantly for her. Accordingly, Plaintiff Jones is entitled to preliminary injunctive relief

II. Likelihood of Success

A. Defendants' Responsibilities under the HCBS TBI/SCI Waiver

Medicaid is a joint federal/state program authorized by Title XIX of the Social Security Act. 42 U.S.C. §§ 1396-1396v. It provides medical assistance to low income individuals who meet certain eligibility requirements. States are not required to participate in the Medicaid program. If a state elects to participate, however, it is required to comply with all applicable federal statutory and regulatory requirements. 42 U.S.C. § 1396a; *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 502 (1990); *Florida Ass'n of Rehab. Facilities, Inc. v. Florida Dep't of Health & Rehab. Servs.,* 225 F.3d 1208, 1211 (11th Cir. 2000).

Medicaid home and community-based services (HCBS) waiver [1] programs are authorized by 42 U.S.C. § 1396n(c) and governed by 42 C.F.R. §§ 441.300-.310. Waiver programs enable

[1] States that opt to provide waiver services may "waive" the requirements of statewideness, comparability and income requirements for which a state's other Medicaid services and programs must otherwise comply with 42 U.S.C.§1396n(c)(3). The Secretary of the Department of Health and Human Services has approved nine waivers in Florida for people who would otherwise require care in a nursing facility. Ms. Jones meets the eligibility criteria for Florida's Traumatic Brain Injury/Spinal Cord Injury Waiver ("TBI/SCI").

states to provide home and community-based services to individuals with disabilities who would otherwise need the level of care provided in the institutional nursing home. [2] Personal care assistant services (PCA) is one of the services that can be provided through a waiver. 42 U.S.C. § 1396n(c)(4)(6). Medicaid waiver programs must, in the aggregate, be cost-neutral, in that the total average cost of providing care for program participants in the home and community based setting must not exceed the estimated total average cost of providing care in the institutional setting that these participants would require. 42 U.S.C. §1396n(c)(2)(D), 42 C.F.R. §441.302(e).

Florida's Medicaid waiver program is one of the two Medicaid programs which could prevent Mr. Jones's imminent institutionalization. The other Medicaid program is the "personal care services" benefits. 42 U.S.C. § 1396n(a)(24). Under the program, states like Florida provide personal attendant services such as Plaintiff Jones requires. However, Florida has opted to limit its personal care services benefits to persons who reside in its Medicaid funded assisted living facilities and does not provide these services to persons who reside in their own apartments or homes.

B. The ADA and Section 504

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a ("Section 504") is "commonly known as the civil rights bill of the disabled," *Americans Disabled for Accessible Public Transp. (ADAPT) v. Skinner*, 881 F.2d 1184, 1187 (3d Cir. 1989) (en banc), and prohibits disability-based discrimination by federal funding recipients, such as Defendants. 29 U.S.C. § 794(a). Extending the prohibitions of Section 504, Congress enacted the Americans with

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[2] The Florida Medicaid per diem reimbursement is $178.45 on average for an annual average reimbursement o f $ 65, 134.25. See http://www.fdhc.state.fl.us?Medicaid/cost_reim/nh_fates.shtml.

Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA), in 1990 to prohibit discrimination by all public entities, regardless of whether they receive federal funding. H.R. Rep. No. 101-485, pt. 3, at 49 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 472. Like Section 504, Title II of the ADA broadly prohibits discrimination by public entities, such as Defendants. 42 U.S.C. §§ 12131(1), 12132. The ADA and Section 504 are analyzed together since "there is no significant difference in the analysis of rights and obligations created by the two." *Zulke v. Regents of the Univ. of Calif.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999). The ADA provides that the "remedies, procedures, and rights set forth in [Section 504] shall be the remedies, procedures and rights [applicable to ADA claims]." 42 U.S.C. § 12133. Section 504 and the ADA reflect Congress' recognition of the pervasiveness of disability-based discrimination in society. Congress specifically found that "discrimination against individuals with disabilities persists in such critical areas as ... *health services* ...." 42 U.S.C. § 12101(a)(3) (ADA) (emphasis added); *see also* 29 U.S.C. § 701(a)(5) (Section 504).

The concept of "discrimination" under these Acts encompasses more than disparate treatment of people with disabilities vis-à-vis individuals without disabilities. *See Olmstead v. L.C.*, 527 U.S. 581, 598 (1999) (ADA); *Alexander v. Choate*, 469 U.S. 287, 297, 300-01 (1984) (Section 504); *Shelen L. v. DiDario*, 46 F.3d 325, 333, 335 (3d Cir.), *cert. denied*, 516 U.S. 813 (1995) (ADA); *Nathanson v. Medical College of Penn.*, 926 F.2d 1368, 1384 (3d Cir. 1991) (Section 504). The Supreme Court in *Olmstead* made it clear that the state cannot discriminate between people with disabilities while providing such care for "categorically needy" persons. [3]

[3] The ADA also prohibits discrimination against different categories of people between people with disabilities while providing such care for "categorically needy" persons

Title II of the ADA prohibits public entities from discriminating against persons with disabilities. 42 U.S.C. § 12132.[4] A "qualified individual with a disability" is a person who "with or without reasonable modifications to rules, polices or practices" meets the "essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12132(2). Defendants do not dispute that Plaintiff Jones is a qualified person with a disability who meets the eligibility requirements for Florida's Medicaid nursing home "level of care" as well as for its waiver and Medicaid programs.

C. The ADA and Section 504's Integration Mandate

Under both the ADA and Section 504, the Attorney General was directed to promulgate implementing regulations. 42 U.S.C. § 12134(a); 29 U.S.C. § 794(a). *See Helen L., supra.* Congress further directed that the regulations promulgated under Title II of the ADA be consistent with the regulations adopted under Section 504. 42 U.S.C. §12134(b). For purposes of implementing Title II of the ADA, the Attorney General promulgated a regulation requiring

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with disabilities. *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003), *Helen L., supra.* In *Townsend*, the plaintiffs alleged that the state was using Medicaid's home and community based waiver services ("HCBS") to provide essential long term care to some residents with disabilities, but not to others. The Court held that the state violated the ADA by denying community-based long term care for "medically needy" persons.

[4] Similarly, Section 504 prohibits the recipients of federal funds from discriminating on the basis of disability:

> No otherwise qualified individual with a disability...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

29 U.S.C. §794(a).

public entities to "administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The regulation was based upon virtually identical regulatory language promulgated to implement Section 504 with respect to federal financial recipients. 28 C.F.R. § 41.51(d). These two regulations, known as the "integration mandate," are construed and applied in the same manner. *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1179 n.3 (10th Cir. 2003).

The integration mandate was analyzed and interpreted by the United States Supreme Court in the landmark decision of *Olmstead v. L.C.*, 527 U.S. 581 (1999). The *Olmstead* plaintiffs were individuals with mental disabilities who were confined in Georgia's state psychiatric institutions, but who wanted to live in the community. Plaintiffs asserted that the state's refusal to pay for them to live in community settings violated the integration mandate of Title II of the ADA and its implementing regulations. The Court was thus presented with the question of whether the proscription of disability discrimination may require the placement of individuals with disabilities in community settings rather than institutions. *Id.* at 587.

The Court began its analysis by citing the relevant Congressional findings that serve as the underpinnings for the ADA:

> (2) historically, society has tended to *isolate and segregate* individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive societal problem;
> (3) discrimination against individuals with disabilities persists in such critical areas as...*institutionalization*...;
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion...*failure to make reasonable modifications to existing facilities and practices*, [and] *segregation*...

42 U.S.C. §12101(a)(2), (3) & (5) (emphasis added) (quoted in *Olmstead*, 527 U.S.at 588-89).

The Court's decision was premised on the DOJ integration regulation:

> A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

28 C.F.R.§ 35.130(d).

After noting the comprehensive scope of discrimination embraced by the ADA, the *Olmstead* Court explained the nature of discrimination prohibited by Title II of the ADA in the context of the integration mandate:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons *who can handle and benefit from community settings* perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, *confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement and cultural enrichment.* Dissimilar treatment exists in the key respect: In order to receive needed medical services, persons with ... disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without [such] disabilities can receive the medical services they need without similar sacrifice.

527 U.S. at 600-601 (citations omitted; emphasis added). Accordingly, the Court concluded, more than nine years ago, that "unjustified isolation, we hold, is properly regarded as discrimination based on disability." *Id.* at 597.

The facts of the case at bar clearly demonstrate that Plaintiff Jones will suffer discrimination. By living at home and participating in the community, she has been able to experience and benefit from church activities, family relations, social contacts, educational advancement, and cultural enrichment of which the Supreme Court spoke. Being forced unnecessarily to move to a nursing home solely to receive the personal attendant care services

that Plaintiff Jones needs for her activities of daily living constitutes discrimination. Defendants' refusal to provide Medicaid funds for her in the community and its policies and failure to grant a reasonable modification for her to its existing Medicaid programs plainly falls within the disability discrimination condemned by the Supreme Court in *Olmstead.* It also illustrates Judge Ferguson's conclusion that "underfunding of the Home and Community-Based Waiver program compels institutionalization, thus negating a meaningful choice." *Cramer v. Chiles*, 33 F.Supp.2d 1342, 1353 (S.D. Fla.1999).

Plaintiff Jones is at imminent risk of being forced into a nursing home. She will lose independence in order to receive the necessary services so she can meet her activities of daily living. Such an outcome would both violate the ADA and Section 504, and result in irreparable injury to her right to live in the "the most integrated setting appropriate" to her needs. She would be forced to leave her friends and family behind. In a nursing home, she will lose her independence. In a nursing home, she will not be able to participate as intensively or regularly with her religious activities and will likely be further removed from her parents with whom she presently resides.

To prevent discrimination, both the ADA and Section 504 integration mandate requires services "in the most integrated setting appropriate." There can be no doubt that for Plaintiff Jones that setting is her own home. The ADA and Section 504 prohibit conditioning receipt of a public service or program on a person being institutionalized. That was the bedrock of the *Olmstead* decision.

The risk of institutionalization that Plaintiff Jones faces is discrimination. In *Fisher v. Oklahoma Health Care Auth.*, 335 F. 3d 1175 (10th Cir. 2003), Oklahoma had changed its

Medicaid prescription program so that persons in the community would be entitled to receive no more than five prescriptions per month. However, if persons resided in a nursing facility, they could receive whatever number of prescriptions they required. The *Fisher* Circuit emphasized that "failure to provide Medicaid services in a community-based setting may constitute a form of discrimination." *Id.* at 1182. The Tenth Circuit noted that the protections in the ADA's "integration regulation," 28 C.F.R. §35.130(d),

> would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discrimination law or policy that threatens to force them into segregated isolation. [W]hile it is true that plaintiffs in *Olmstead* were institutionalized at the time they brought their claim, nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements.

Id. at 1181. *See also Radaszewski v. Maram*, 383 F.3d 599, 611 (7th Cir. 2004), *Crabtree v. Goetz*, 2008 U.S.Dist. LEXIS 103097 (MD TN, December 19, 2008).

This same principle applies to Plaintiff Jones. In the community, she currently receives no Medicaid-funded personal attendant care services to assist her with her activities of daily living. If she is forced to enter a nursing home in order to receive these services, she will be "unnecessarily institutionalized," precisely the type of discrimination that Congress intended to end with the enactment of the ADA and Section 504. By requiring Plaintiff Jones to move to a nursing facility to receive the same services she could receive in the community, Florida is conditioning the receipt of these Medicaid services to a setting, *i.e.*, the nursing facility, which is segregated, instead of providing them to her in the community.

D. Defendants Violate the ADA and Section 504 by Failing to Make Reasonable Modifications and Accommodations in their Policies, Practices, and Procedures

Section 504 and the ADA prohibit actions by covered entities that have a discriminatory effect on people with disabilities. *See Alexander v. Choate*, 469 U.S. at 297; *Frederick L. v. Department of Public Welfare*, 364 F.3d 487 (3d Cir. 2004), 422 F.3d 151 (3d 2005). Both the ADA and Section 504 affirmatively require that covered entities make reasonable modifications and accommodations to their policies and practices when necessary to accommodate individuals with disabilities, *see Olmstead,* 527 U.S. at 592; *Alexander,* 469 U.S. at 301, and require that people with disabilities have "meaningful access" to covered entities' programs. *Id.; Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850, 857 (10th Cir. 2003).

In the present action, Defendants' failure to make reasonable modifications and accommodations results in Plaintiff Jones not having "meaningful access" to either Florida's Medicaid waiver programs or its Medicaid personal care services benefits. Because Florida has restricted its Medicaid personal care services benefits, 42 USC § 1396d(a)(24), to persons residing in assisted living facilities, Plaintiff Jones is not able to benefit from either Florida's Medicaid waiver program or its Medicaid personal care services program. Similarly, because Florida has capped its TBI/SCI waiver and has not increased it to meet Ms. Jones' needs in the community, an accommodation that is easy to accomplish, Florida's Medicaid program refuses to make the reasonable modification and accommodation in this program which will ensure Ms. Jones remains in her home and is not discriminated against.

Beginning with *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979), the courts have recognized that Section 504 requires publicly funded programs to provide reasonable modifications and accommodations when needed to assure that people with disabilities have meaningful access to its programs and services. *See Alexander,* 469 U.S. at 300-01 & n.20-21.

Title II of the ADA requires:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.

28 C.F.R. § 35.130(b)(7) (authorized by 42 U.S.C. § 12134(b)).

The concept of reasonable modification recognizes that strictly "equal" treatment of people with disabilities will not assure meaningful access. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 273, 274-75 (2d Cir. 2003). Accordingly, the ADA and Section 504 require accommodations assuring that otherwise neutral policies and practices do not, in practice, discriminate against people with disabilities by denying them meaningful access to the covered entity's programs and services. *Id.*; *see also US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (in ADA employment discrimination case, "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal"). For example, Section 504 and the ADA also prohibit discrimination on the basis of the severity of a person's disability. In *Jackson v. Fort Stanton Hosp. & Training School*, 757 F. Supp. 1243 (D.N.M. 1990), *rev'd on other grounds*, 964 F.2d 980 (10th Cir. 1992), plaintiffs with developmental disabilities challenged their exclusion from the state's community services program because of the severity of their disabilities. In that case, people with severe disabilities were precluded from living in community settings because the programs lacked amenities that could be reasonably furnished that were necessary to accommodate their serious needs. The Court found that "Defendants' failure to accommodate the severely handicapped in existing community programs while serving less severely handicapped peers is unreasonable and discriminatory." *Id.* at 1299. It concluded that:

> modifications of the existing community service system in New Mexico would not require an excessive financial burden and that the accommodations would enable severely handicapped residents of [residential facilities] to realize the benefits of community settings. Accordingly, the defendants should require those community programs that receive federal assistance funds to make reasonable accommodations for those severely handicapped residents [of facilities] whose IDTs have determined that a community program could be appropriate, if reasonably modified.

Id. at 1299. *See also Williams v. Wasserman*, 937 F. Supp. 524, 530 (D. Md. 1996) ("while the ADA does not place an affirmative obligation on the state to create or fundamentally alter a program of community-based treatment options, the ADA does oblige the defendants to make those options available to otherwise qualified individuals without regard to the severity ... of their disabilities"); *Martin v. Voinovich*, 840 F. Supp. 1175, 1192 (S.D. Ohio 1993) ("Defendants' failure to accommodate the severely handicapped in existing community programs while serving less severely handicapped peers is unreasonable and discriminatory").

A recent reasonable accommodation case from the Seventh Circuit is quite instructive. In *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004), plaintiff sought 24 hour private duty nursing care under the HCBS waiver program, a service he alleged he would require in a hospital or nursing facility if forced to move there. The State argued that it did not provide that level of service under its waiver, and that plaintiff could only receive $4,593 per month - the equivalent of five hours a day of private-duty nursing care. However, the court found that the state already provided for some private duty nursing care, and further that

> the integration mandate may well require the State to make reasonable modifications to the form of existing services in order to adapt them to community-integrated settings.... If variations in the way services were delivered in different settings [home vs. institution, or assisted living facility vs. an apartment] were enough to defeat a demand for more community integrated care, then the integration mandate of the ADA and the Rehabilitation Act would mean very little.

Id. at 611.

On remand, the district court found that the state's failure to fully fund at home, private duty nursing for the young man under the Medicaid-funded HCBS constituted disability discrimination, and that the state was obligated to provide treatment in the most integrated setting - his home. It rejected the state's claim that such an outcome would result in a fundamental alteration of the state's program. *Radaszewski v. Maram*, 2008 WL 2097382, *15 (N.D. Ill., March 26, 2008); *see also Grooms v. Maram* 2008 WL 2271492, *16 (N.D. Ill., May 30, 2008).

E. Plaintiff Jones's Modification Requests Are Reasonable.

It is well-established that the ADA and Section 504 both require Defendants to make reasonable modifications and accommodations to their policies, practices, and procedures when necessary to avoid discrimination. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7) (ADA). In a reasonable accommodation and modification claim, it is the plaintiff's obligation to articulate a modification that "seems reasonable on its face." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002); *see also Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 284 (3d Cir. 2001) ("plaintiff bears only the burden of identifying an accommodation, the costs of which do not clearly exceed its benefits," *i.e.*, that is not "clearly ineffectively or outlandishly costly"). If the plaintiff articulates a reasonable modification, then the burden shifts to the defendant to prove that the proposed modification would impose an undue burden on its resources or a fundamental alteration of its program. *Olmstead*, 527 U.S. at 603; *Frederick L.*, 364 F.3d at 492 n.4.

Defendants have ignored this obligation to Plaintiff Jones by not providing her with personal attendant care services either through their Medicaid TBI/SCI waiver or through their

Medicaid personal care services program. Defendants obtained permission from the federal Centers for Medicare and Medicaid (CMS) to have a Medicaid TBI/SCI waiver which permitted Florida with the option under Medicaid of providing home and community based services, including in-home care provided by personal attendants, to a person who would otherwise require nursing home level care. 42 U.S.C. § 1396n(c)(1) ("but for the provision of such [waiver] services the individuals would require the level of care provided in ... a nursing facility... the cost of which would be reimbursed under the State plan"). When Defendants obtained this Medicaid waiver, they took on the mandatory obligation to provide such in-home care to qualifying individuals such as Plaintiff Jones. Defendants have failed to increase the number of Medicaid TBI/SCI waiver slots so that Plaintiff Jones could reside in the community instead of in a nursing facility. Similarly, Defendants have restricted their Medicaid personal care services benefits, 42 USC § 1396d(a)(24), to persons residing in assisted living facilities. Defendants could easily expand this program to persons who reside in their own homes and apartments.

Plaintiff Jones has done all she can to live integrated into the community. She has received attendant care services from her parents for as long as they could provide the care and services. She does not have money to pay for personal care services.

The reasonableness of a particular accommodation "depends on the individual circumstances of each case" and "requires a fact-specific, individualized analysis of the disabled individual's circumstances and accommodations that might allow her to meet the program's standards." *Wong v. Regents of the Univ. of Cal.*,192 F.3d 807, 818 (9th Cir. 1999).

Plaintiff Jones has identified the specific program modifications and accommodations she

seeks. She has asked Defendants, as a reasonable accommodation of her disability, to provide Medicaid payments, under either their Medicaid TBI/SCI waiver or Medicaid personal care services programs, for care and services with her daily living activities. Were she to enter a nursing home, Defendants' per diem reimbursement to Medicaid nursing facilities is $178.45 a day or $5,353.50 a month. Under the federal requirements for a waiver, a state must assure the federal agency that the waiver is "cost effective," that is, on the average, the amount spent on community-based services "will not exceed the amount of such medical assistance provided for such individual [in the nursing facility] if the waiver did not apply." 42 USC § 1396n(c)(4)(A). If Defendants were to provide her with services under the TBI/SCI waiver, they would save more than $20,000 a year. The reasonable accommodations that Plaintiff Jones requests fall squarely within the existing duties already assigned to Florida under the HCBS Waiver.

Similarly, under Florida's Medicaid program that provides personal care services, *see* 42 U.S.C. §1396d(a)(24), Defendants limit these services to persons who reside in an assisted living complex. The reasonable accommodation Plaintiff Jones requests is that the same service be provided to her in her own home instead of in an assisted living facility. That would allow her to hire and pay with Medicaid funds personal attendants who would provide the level of care that she needs. As this is a practice that Defendants have approved for persons who reside in assisted living facilities, it could not be an undue burden to extend the practice so that Plaintiff Jones can continue to reside in her home.

III. Irreparable Injury

It is well established that the loss of Medicaid benefits constitutes irreparable harm.

Indeed, "[t]he nature of the claim - a claim against the state for medical services - makes it impossible to say that any remedy at law could compensate" plaintiffs. *McMillan v. McCrimon,* 807 F. Supp. 475, 479 (C.D. III. 1992). *See also Maine Ass'n of Interdependent Neighborhoods v. Petit,* 647 F. Supp. 1312, 1315 (D.Me. 1986) (court found that absent the requested injunction plaintiff would be forced to leave her family and enter a nursing home, irreparably injuring her physical and mental health). *Accord Edmonds v. Levine,* 417 F. Supp. 2d 1323, 1342 (S.D. Fla. 2006) (denial of medical benefits, and resulting loss of medical services, constitutes irreparable harm); *Mitson v. Coler, 670* F. Supp. 1568, 1577 (S.D. Fla. 1987)(potential denial of nursing home service constituted irreparable injury since many in class would be deprived of essential medical care); *Kai v. Ross,* 336 F.3d 650, 656 (8th Cir. 2003) (denial of Medicaid benefits constitutes "a danger to plaintiffs' health, even their lives"); *Massachusetts Ass'n of Older Amer. v. Sharp,* 700 F.2d 749, 753 (1st Cir. 1983) (termination of benefits that causes individuals to forgo medical care is clearly irreparable harm); *Beltran v. Meyers,* 677 F.2d 1317, 1322 (9th Cir. 1982) (irreparable injury is shown when enforcement of a Medicaid rule "may deny [plaintiffs] needed medical care"); *Caldwell v. Blum,* 621 F.2d 491, 498 (2d Cir. 1980), *cert. denied,* 452 U.S. 909 (1981) (Medicaid applicants established harm where they would "absent relief, be exposed to the hardship of being denied essential medical benefits").

If a preliminary injunction is not issued, Plaintiff Jones will not be able to continue to live at home. She will have no option other than to enter to a nursing home and suffer all the injuries listed in *Olmstead.* Such discrimination and irreparable injury are unnecessary, if defendants would only authorize Mr. Jones personal attendant services either under its Medicaid waiver or Medicaid personal care services programs. The irreparable injury includes more than a violation

of her civil rights under the ADA and Section 504. The irreparable injury is that she will be institutionalized in a setting that demeans her by taking away her independence and dignity.

IV. Balance of Hardships

The Court must weigh the harm to Plaintiff Jones against possible damage to Defendants. *Micshel-Trapaga v. City of Gainesville,* 907 F. Supp. 1508, 1513 (N.D. Fla. 1995). While Plaintiff Jones is threatened with institutionalization, Defendants' only possible damages are monetary. The harm to Plaintiff Jones here clearly outweighs any harm to Defendants. *See, e.g., Edmonds,* 417 F. Supp. 2d at 1342 (harm to plaintiffs of being deprived of essential medical services outweighs any harm to state); *Illinois Hosp. Ass'n v. Illinois Dep't of Public Aid,* 576 F. Supp. 360, 371 (N.D. III. 1983) *("once* a state has voluntarily elected to participate in the Medicaid program ... [it cannot] characterize its duty to comply with the requirements of [the program] as constituting a hardship to its citizens"); *Kansas Hosp. Ass'n v. Whiteman,* 835 F. Supp. 1548, 1552-53 (D. Kan. 1993) (threatened injuries to plaintiffs outweighed any harm to defendant that would result from issuing the temporary restraining order because changing Medicaid coverage "significantly alters the status quo to the detriment of the individual plaintiffs, while its positive budgetary impact on state coffers is negligible in a relative sense").

The balance of hardships clearly favors Plaintiff Jones in this case. All that she is asking is that Defendants spend less of their Medicaid funds and permit her to continue to reside in her home with the personal attendants she needs to accomplish her activities of daily living. Providing the requested accommodation falls squarely within the duties imposed upon Defendants by either the Medicaid waiver or the Medicaid personal care option.

By contrast, if Plaintiff Jones must leave her home and go to a nursing facility,

Defendants will expend more Medicaid funds than they would were she in the community. Further, Plaintiff Jones would be institutionalized despite the fact that she has successfully resided in the community since she became disabled nearly 18 years ago..

Plainly, the balance of hardships tips in favor of Plaintiff Jones.

V. The Public Interest

A preliminary injunction to provide services to Plaintiff Jones to avoid institutionalization is not adverse to the public interest. In determining whether the public interest will be disserved by the granting of a request for preliminary injunction, courts may look to the legislative intent in enacting the statute sought to be enforced. As the Eleventh Circuit found in *Johnson v. U.S.D.A.*, 734 F.2d 774, 788 (11 th Cir.1984), cost to the government "alone" is not a reason to deny a preliminary injunction as being against the public interest. In a case challenging foreclosure procedures, the court looked at the legislative purposes of the Housing Act of 1949 and found that the public interest of providing decent housing would be served by preventing premature foreclosures. *Id.*

The public interest also will be served by an order granting a preliminary injunction for Plaintiff Jones. There is a strong public policy expressed in the ADA and Section 504. Congress found that discrimination against people with disabilities is a serious and pervasive social problem, and that people with disabilities have been subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions not truly indicative of the individual ability of such persons to participate in and contribute to society. 42 U.S.C. §12101. The purpose of the ADA's passage was to provide a clear and comprehensive

national mandate for elimination of discrimination against individuals with disabilities. Accordingly, it serves the public interest to issue the requested preliminary injunctive relief.

VI. Waiving the Bond Requirement

Plaintiffs should be exempted from the bond requirement of Fed. R. Civ. P.65(c). The amount of required security is within the discretion of the trial court. *Bell South,* 425 F.3d at 971; *Caterpillar, Inc. v. Nationwide Equipment,* 877 F.Supp. 611, 61 7 (M.D. Fla. 1994); *Baldree v. Cargill, Inc.,* 758 F.Supp. 704 (M.D. Fla. 1990), *aff'd,* 925 F.2d 1474 (11th Cir. 1991). The court may also waive all payment.

Courts have used their discretion to waive the bond requirement for indigent plaintiffs. *E.g., Bass v. Richardson,* 338 F. Supp. 478, 490 (E.D.N.Y. 1971) ("It is clear that indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)"); *Denny v. Shealth & Social Serv. Bd. of State of Wis.,* 285 F. Supp. 526, 527 (E.D. Wis. 1968) ("Poor persons ... are by hypothesis unable to furnish security as contemplated in Rule 65(c), and the court should order no security in connection with the preliminary injunction."). *See also Maine Ass'n of Interdependent Neighborhoods,* 647 F. Supp. at 1319 (court granted waiver of bond, noting impecunious status of plaintiffs, and based on plaintiff's strong case on the merits).

Plaintiff Jones is indigent and seeks injunctive relief to receive services in the community that Defendants already provide in nursing homes. The case implicates the public interest and the balance of hardships tips sharply in favor of the Plaintiff. This Court should not require Plaintiff Jones to give security.

VII. Conclusion

For the reasons and on the authority cited above, Plaintiff respectfully requests that this Honorable Court grant her preliminary injunctive relief. She has demonstrated a substantial likelihood of success on the merits; that she will suffer irreparable injury in the event emergency relief is denied; and that the balance of hardships tip in her favor.

Respectfully submitted,

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