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

JACQUELINE JONES,

Plaintiff,

v. Case No. 3:09-CV-1170-J34JRK

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, Class Action

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Defendants assert that because they will provide services to Jacqueline Jones, the named Plaintiff, they are entitled to a motion to dismiss. Defendants' motion should be dismissed because a judicial determination of her substantantive claims is necessary to avoid, at a minimum, any future injury to Miss Jones. This decision is necessary since Miss Jones needs for community-based services will certainly increase and change in the future as her parents age and become weaker. Defendants have not and cannot assure this Court that Defendants will provide her with appropriate community-based services for the inevitable increase in her needs. Therefore, Miss Jones' action is not moot. To date, Miss Jones has not been provided or guaranteed any services. It is difficult to envision how Defendants can argue that Miss Jones' claim is moot, when she remains at home without any services or certainty as to whether Defendants will actually provide services. In addition, since there are more than 500 putative

class members, limited discovery should be permitted to determine if any of the putative class members wish to become a named class representative.

II. PROCEDURAL POSTURE

On September 26, 2007, then Deputy Secretary for Florida Medicaid Thomas W. Arnold, wrote to the federal Centers for Medicare and Medicaid Services, stating that the "Total Number Unduplicated Number of Participants" in Defendants' Traumatic Brain Injury/Spinal Cord Injury Waiver ["TBI/SCI" Waiver] would be a maximum of 375 per year for the five years of the waiver application. [Attachment "A"]. [1] Regardless of the actual number of otherwise eligible and needy people with spinal cord injuries who need and apply for the waiver or who may be on a waiting list for this waiver, Defendants have capped the number at 375.

The Kaiser Commission of Medicaid and the Uninsured recently issued a report entitled "Medicaid Home and Community-Based Service Programs: Data Update." The Kaiser data was based on Defendants' data for FY 2008. At Table 11 the Kaiser Commission reported that there were 434 people on Florida's TBI/SCI waiting list for services. [Attachment "B"]. On December 4, 2008, Defendants wrote a report stating that, as of November 1, 2008, there were 554 people on the TBI/SCI Waiver wait list. [Attachment "C"]. These 434 to 554 people are the putative class members of the instant action.

Plaintiff Jones has been on Defendants' Spinal Cord Injury waiting list for a number of years. She is one of the 434 to 554 people who exceeded the maximum 375 available slots which Defendants have in their SCI waiver. Approximately once a year, Defendants telephoned Miss Jones, asked her questions and then mailed her a "Notice of Decision." Each year, the Notice was virtually the same: "You have been placed on the TBI/SCI Waiver waiting list....

[1] Year 1 was July 1, 2007 - June 30, 2008; Year 2 - July 1, 2008 - June 30, 2009; Year 3 - July 1, 2009 - June 30, 2010; Year 4 - July 1, 2010 - June 30, 2011; and Year 5 - July 1, 2011 - June 30, 2012.

Reason(s) for placement on waiting list: No openings at this time." On July 28, 2009, Miss Jones received another Notice of Decision from Defendants which stated same reason for denial of SCI Waiver services - "No openings at this time." [Attachment "D."] Similarly, on October 17, 2009, less than six weeks before she filed the instant action, she received a Notice of Decision stating again "No openings at this time." [Attachment "E".]

Miss Jones filed her complaint on December 2, 2009. [Dkt.1] She simultaneously filed her motion for a preliminary injunction. [Dkt. 2]. During the first week of December, 2009, counsel learned of the 434 people from the Kaiser report who were similarly situated as Miss Jones. Counsel then obtained Defendants' report which stated there were 554 people on the waiting list. These two documents indicated the existence of a putative class. Defendants do not and cannot realistically dispute that there are hundreds of persons are on waiting lists -- many have waited for years -- for Medicaid services in Defendants' SCI waiver. Nor can they dispute that the SCI waiver is capped at 375 through June 30, 2012, so that, but for a judicial finding in the instant action, no more than 375 people with SCI will receive community-based services.

On December 15, 2009, an amended complaint was filed alleging a class. [Dkt.16]. Miss Jones was not contacted by defendants until *after* her amended complaint was filed. Defendants filed their motion to dismiss on December 29, 2009. [Dkt. 25]. Defendants make four arguments in support of their motion to dismiss. On January 6, 2010, a motion for the class was filed. [Dkt 28].

III. ARGUMENT

A. MOOTNESS

i. Defendants Have Failed to Meet Their Heavy Burden to Demonstrate that Plaintiff's Request for Injunctive and Declaratory Relief is Moot.

Defendants cannot prevail on their claim of mootness because defendants have failed to satisfy their "heavy burden" to demonstrate mootness with "absolute clarity." Indeed, the Supreme Court has made clear that the party asserting mootness bears the heavy burden of proof that the plaintiffs' claims are moot. *See Friends of the Earth, Inc., et al., v. Laidlaw.Environmemtental Serv. (TOC), Inc.,* 528 U.S. 167, 189, 120 S. Ct. 693 (2000).

> A case might become moot if subsequent events make it **absolutely clear** that the allegedly wrongful behavior could not reasonably be expected to recur. . . The **heavy burden** of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

(Internal quotations omitted) (emphases added).

Given this standard, a party who voluntarily stops an illegal activity may not simply assert that its cessation of the challenged activity is sufficient to render injunctive relief moot. Rather, the party must make it absolutely clear that the illegal activity could not and will not reasonably recur.

> The test for mootness in cases such as this is a **stringent** one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways…. A case might become moot if subsequent events made it **absolutely clear** that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the **heavy burden of persuasion which we have held rests upon those in appellees' shoes.**

U.S. v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 203, 89 S.Ct. 361, 364 (1968) (internal. quotations and citations omitted) (emphasis added); *See also U.S. v. W T. Grant Co.,* 345 U.S. 629, 632, 73 S. Ct. 894 (1953) ("voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot."); *United States v. Phosphate Export Assn*., 393 U.S. 199, 203 (1968)("[m]ere voluntary cessation of allegedly illegal conduct does not moot a case"); *City of Erie, et al., v. Pap's A.M Kandyland*, 529 U.S. 277, 287, 120 S.Ct. 382 (2000).

Further, the Eleventh Circuit, in *Secretary of Labor v. Burger King Corp.,* 955 F.2d. 681, 684 (11th Cir. 1992), recognized that courts have a duty to beware of a party's last minute efforts to defeat injunctive relief.

> Because of the possibility that the defendant could merely return to his old ways, the **test for mootness in cases such as this is** a **stringent one.** A case might become moot if subsequent events made it, absolutely **clear** that the allegedly wrongful behavior could not reasonably be expected to recur. As the Supreme Court has noted**, it is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.**

(Internal quotations and citations omitted) (emphasis supplied). *See Reich v. Occupational Safety & Health Review Commission,* 102 F. 3d. 1200 (11th Cir.1997) (employer's cessation of business did not render proceeding moot since existence of case or controversy did not depend on employer's post-violation acts).

Though the Defendants argue that Plaintiff's claims are moot, Defendants have failed to meet their burden to demonstrate that the named Plaintiff (let alone class plaintiffs) will not, in the future, be subject to the same illegal denial of community-based services. *See Friends of the Earth, supra.* Defendants cannot meet their burden because they admit there is a waiting list of more than 500 people and that at least until 2012 they plan to serve in their Spinal Cord Waiver no more than 375 people.

Moreover, given the waiting list, Defendants cannot in good faith say that Plaintiff Jones will not be forced to again wait for community-based services when her needs for services increase. It is undisputed that Miss Jones has significant disabilities and currently relies on her aging and infirm parents for whatever assistance the family can provide. As Miss Jones' needs increase in the future, Defendants cannot assert "there is no reasonable expectation the wrong will not be repeated." *Grant, supra* at 633. Defendants current offer to provide her with Spinal Cord Injury Waiver services will, by necessity, take into account the services which her parents

presently are able to provide her, e.g., cooking her meals and other assistance with activities of daily living. However, it is a certainty that Miss Jones' needs will change in the future as her parents age, pass away or become frailer than they presently are. Sometime in the near future, her parents will not be able to provide her with any assistance or with less assistance then the presently able to provide. Defendants cannot assure the Court that when Miss Jones' needs increase that Defendants will increase her services. Whether they can increase her services will depend on how many other people are receiving services, costs of other people, and many other factors. If Defendants are capped out when Miss Jones' needs increase, they may not be able to provide her with increased services. In the future, plaintiff will be forced to wait for needed services to make up for what her parents provide her at the present. Defendants cannot assure this Court they will be able to provide her with those services. [4]

Because Defendants have failed to meet their burden of proof, Plaintiffs' claims remain justiciable. Without appropriate equitable relief, Plaintiff will be forced to undergo another seemingly endless wait on Defendants' waiting list. If Defendants are not barred from discriminating against Miss Jones in the future, the exact same controversy will present itself to this Court. *See Vitek v. Jones*, 445 U.S. 480, 487 (1980).

ii. Defendants' Motion Should Be Denied Due to the Pendency of Plaintiff's Motion for a Class Action

In their motions to dismiss, Defendants do not -- and cannot -- argue that the named Plaintiff does not have an interest in the relief sought in this case. Likewise, Defendants do not -- and cannot -- assert that no putative class member has an interest in the outcome of Plaintiff's request for class certification. Consequently, Defendants' recent indication that it will provide Miss Jones services does not divest this Court of its jurisdiction over Plaintiff's request for class certification. The continuing nature of the controversy falls within the

[4] This likelihood of reoccurrence of injury to Miss Jones distinguishes Defendants' reliance on *Tucker v. Phyfer,* 819 F.2d 1030 (11th Cir. 1987),

"narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975)(noting there was a "constant existence of a class of persons suffering deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.") In the instant case, there are approximately 545 other class members who suffer discrimination. Defendants should not be allowed to "pick off" a named plaintiff to escape their obligation to end discriminating against people with disabilities.

It is well settled that once a class has been certified, mooting a class representative's individual claim does not moot the entire action, because the class "acquire[s] a legal status separate from the interest asserted by [the named plaintiff]." *Sosna v. Iowa,* 419 U.S. 393, 399, 95 S.Ct. 553 (1975). Significantly, this principle also addresses litigation where, as here, although a class certification has been sought prior to Miss Jones actually receiving services, a determination as to certification has not yet been made. Thus, even though the named Plaintiff's present claims may have remedied, a class action may still be appropriate, and a named plaintiff will retain his or her standing to pursue the action as a class representative.

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to `relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Id. at 402, n.11.

In *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1.03'0 (5th Cir. 1981), [4] the Fifth Circuit applied the principles in *Sosna* when it held that a plaintiff in a putative class

[4] A three-judge panel of the Fifth Circuit: decided the *Zeidman* case on July 27, 1981. Accordingly, this opinion is binding precedent in the Eleventh Circuit until it is overruled by

action whose individual claims became moot prior to class certification may still have standing to pursue the class action if he has filed a motion for class certification and vigorously pursued it. In *Zeidman,* the defendant made a tender of relief to the named plaintiffs after they filed for class status, but before the district court's final certification decision. The district court dismissed the action based on defendant's argument that Article III standing required a named plaintiff to maintain individual standing until the class is certified. The Fifth Circuit reversed, holding that under the circumstances presented a district court's decision to certify a class could "relate back" to the filing of the motion for class certification. *Id.* at 1050-1051. Because the named plaintiffs' claims were not moot when they filed their motion for class certification, the defendant's subsequent offer of settlement did not cause the putative class action to become moot. *Id.*

The Circuit also explained the important policy arguments behind its holding. Where it is financially feasible for a defendant to "pick off" the named plaintiffs by providing relief prior to class certification, defendants would have the option to "preclude a viable class action from ever reaching the certification stage." *Id.* at 1050. Because such a "result is precisely what the relation back doctrine of *Sosna*.... condemns," the court refused to distinguish between mootness "caused by the defendant's purposive acts" and that which is caused "by the naturally transitory nature of the controversy." *Id*. Accordingly, the court held that "a suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims, at least when ... there is pending before the district court a timely filed and diligently pursued motion for class certification." *Id,* at 1051.

Zeidman has been characterized, not as an exception to Article III standing, but rather as a guide for evaluating whether an action remains a live controversy in the class action

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the Eleventh Circuit *en banc*. *See Bowler v. City of Prichard,* 661 F.2d 120&, 1209 (11th Cir. 1981).

context - when the named plaintiff receives full compensation for his individual claims prior to class certification. Under the circumstances existing in *Zeidman* the controversy remains live notwithstanding the pre-certification satisfaction of plaintiffs' individual claims. District courts within the Eleventh Circuit have continued to apply *Zeidman. See Bishop's Property & Investments, LLC v. Protective Life Insurance Company*, 463 F.Supp.2d 1375 (M.D. Ga. 2006) (defendant's tender of refund to named plaintiff before class could be certified did not render controversy moot); *Candy H. v. Redemption Ranch, Inc.,* 563 F. Supp. 505 (D. Ala. 1983) (Named plaintiffs allowed to pursue class representation. even though the requested immediate injunctive relief was moot with respect to the named plaintiffs as both named plaintiffs had been released by defendants and did not plan to return.).

Defendants' conduct amounts to nothing more than an attempt to "pick off" the named plaintiff to avoid class liability. Defendants offered a potential for waiver services to Jacqueline Jones only after she filed both her original complaint and the amended complaint alleging a class and seeking class relief. Such timing suggests that Defendants have engaged in purposive acts designed to avoid the class litigation.

In the instant action, there has been no change in Defendants' policy with regards to the provision of services under their Spinal Cord Waiver program. Defendants have not stated they will end discriminating against people with spinal cord injuries who are on the waiting list. In fact, Defendants' own documents show there are more than 500 people like Miss Jones who need services. Defendants have not made any policy or program-wide changes to ensure that class members will not have to endure lengthy waits for community-based services. The waiting list continues to exist, evincing the continuing controversy in this matter. Defendants have given no reason for their decision to disregard other people on the Spinal Cord Injury Waiver waiting list and to not provide them with community-based

services. Defendants cannot be allowed to artificially moot this action before the Court has had the opportunity to rule on Plaintiff's Motion for Class Certification.

B. REASONABLE MODIFICATION AND FUNDAMENTAL ALTERATION

Defendants Cannot Not Meet Their Burden to Prove A Fundamental Alteration Defense Given the Cost Savings that Florida Will Realize by Serving Ms. Jones and the Class in the Community Instead of in Nursing Homes

Plaintiff Jones and class members want to reside in the community. Despite meeting the level of care for a nursing home, the community by definition is "the most integrated setting" in which to provide them with services as required by both the Americans with Disabilities Act, 42 U.S.C. § 12132 and 28 CFR § 35.130(d)(the integration mandate) and the Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794(a) and 28 CFR § 41.51(d). Plaintiff Jones and the class allege that Defendants refusal to provide them with services in the community, but instead to provide them with the same services but only in nursing facilities, violates the "most integrated setting" mandate.

A reasonable accommodation, i.e., the provision of assistance with daily living activities in the community to persons with spinal cord injuries, is obviously feasible. Defendants already provide these services to some people with spinal cord injuries in the community in both their Medicaid Spinal Cord Injury Waiver and their Medicaid Personal Care Option programs. Named and class plaintiffs request only that these same community-based programs be expanded, instead of requiring named and class plaintiffs to receive the same services in an institution. This is precisely what the "most integrated setting" mandate requires. *See Olmstead*, 527 U.S. 581, 602-03, 607, 119 S.Ct. 2176 (1999).

To avoid liability under the integration mandate, the burden shifts to the Defendants to establish that the requested accommodation of Medicaid services in the community instead in a nursing home would constitute an undue burden or fundamental alteration of its programs.

Olmstead, 527 U.S. at 602-03, 607; *Frederick L.. v Department of Public Welfare,* 364 F.3d 487, 492 n.4 (3rd Cir. 2004), *Townsend v. Quasim*, 328 F.3d 511, 520(9th Cir. 2003). Defendants cannot meet that burden in the instant action.

First, Defendants cannot argue that the costs of community-based waiver services will be more costly than these services in a nursing home. By federal statute, the costs of the Spinal Cord Waiver must be "cost neutral," 42 U.S.C. §1396n(c)(4)(A). The federal Medicaid Act requires that the total costs for all the people in a waiver program cannot exceed the costs of the same number of people in a nursing home.

Courts in ADA integration cases have afforded relief to allow individuals with disabilities to receive community services. For example, the Court of Appeals for the Tenth Circuit rejected Oklahoma's argument that its limitation on a prescription drugs for people receiving services through a Medicaid HCBS waiver in the community (while providing unlimited prescriptions to nursing home residents) was necessary because of the state's fiscal crisis. Oklahoma's desire to save funds, even if reasonable, "does not constitute a defense" to the ADA's integration mandate. *Fisher v. Oklahoma Health Care Auth*., 335 F.3d 1175, 1182 (10th Cir. 2003). In *Fisher*, the court noted "[T]he fact that Oklahoma has a fiscal problem, by itself, does not lead to an automatic conclusion that preservation of unlimited medically-necessary prescription benefits ...will result in a fundamental alteration .... If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed. *Id.* at 1182-83; *Pennsylvania Protection Advocacy, Inc*. *v. Department of Welfare*, 402 F.3d 374, 381 (3d Cir. 2005); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 601, 613-15 (7th Cir. 2004); *Crabtree v. Goetz*, 2008 WL 5330506 at *26 (M.D. Tenn. Dec. 19, 2008).

In fact, courts have held that the ADA's integration mandate requires states to provide far more costly in-home services than those afforded to Miss Jones in this case. In *Crabtree,* the

court granted judgment in an ADA integration mandate case to an individual who needed in-home care at a cost of nearly $21,000 per month. The court granted a preliminary injunction to require the state to continue to provide up to 24 hours per day of skilled care to individuals who faced institutionalization in nursing homes absent such care. In *Radaszewski* and *Grooms v. Maram*, 563 F. Supp. 2d 840.859-63(N.D. Ill. 2008) (granting judgment to provide in-home care at cost of more than $16,000 per month to person with disability to avoid institutionalization), plaintiffs were permitted to seek extensive in-home nursing and home health services.

Second, this is not a case in which Defendants would have to create "new" services for Miss Jones or class members. Defendants currently provide the personal care services both in nursing homes and in the community. As such, the provision of in-home personal care services would not fundamentally alter Defendants' program by forcing them to develop a new service for Miss Jones. *See Fisher*, 335 F.3d at 1183 (noting that the plaintiffs were "simply requesting" a service that the state provided in a nursing home (unlimited prescriptions) to be provided in the community and, thus, "are not demanding a separate service or one not already offered by the state"); *Radaszewski*, 383 F.3d at 611 (holding that it is not a fundamental alteration to require states to simply adapt the location of where services are provided from institutions to the community).

Third, Defendants do not have a "waiting list that move[s] at a reasonable pace" for community services. *Olmstead* at 2189. Defendants' Spinal Cord Injury Waiver program caps the number of people who will receive services in the community at 375 through June 30, 2012, regardless of: (1) the number of people with spinal cord injuries who are waiting for services; (2) how long they will have to wait for services; and (3) the injury this waiting causes them and their families. Despite knowing how many individuals like Miss Jones have been on the "waiting list" for the Spinal Cord Injury Waiver, Defendants, have not sought to expand the number beyond 375. Defendants do not have a waiting list for community services that can

move at a reasonable pace because, as their own documents show, the number of people on the waiting list had not decreased but has increased from 434 to 554 .

Fourth, modification of a State's Medicaid Plan is not a fundamental alteration. Defendants argue that Plaintiffs seek a fundamental alteration in service because in order for them to comply they would have to modify their Medicaid program. This argument is legally unsound. The mere fact that Defendants would have to amend its Medicaid Spinal Cord Injury Waiver to expand the number of persons eligible to serve Miss Jones and the class is simply not a fundamental alteration. There is nothing in *Olmstead* or its progeny that amending a Medicaid plan to comply with the ADA is a fundamental alteration.

Defendants fail to explain how modification of a Medicaid waiver – in the abstract or specifically in this case -- would rise to a fundamental alteration under *Olmstead*. This is not surprising since modifying either its Medicaid waiver or the Personal Care Option would not be difficult, costly, or otherwise a fundamental alteration. States have discretion in designing their Medicaid HCBS waivers and have authority to seek amendments from CMS. *See Grooms*, 563 F. Supp. 2d at 857. Since there is no law or similar barrier that precludes Defendants from seeking a modification of the Spinal Cord Injury Waiver, it cannot possibly be a "fundamental alteration." More importantly, courts have held that it is not a fundamental alteration under the ADA's integration mandate to require states to modify their Medicaid HCBS waivers to provide services to individuals with disabilities in the community. In *Grooms*, the court rejected a fundamental alteration defense in a case filed by an individual with complex disabilities to secure extensive in-home services and avoid institutionalization. *Grooms*, 563 F. Supp. 2d at 856-63. The court specifically rejected the state's assertion that it would be a fundamental alteration to serve the plaintiff in the community because, to do so, the state would have to extend its HCBS Waiver to serve individuals who were eligible for hospital-level care in addition to those eligible for nursing facility level of care. *Id*. at 856-57.

> [R]equiring the State to submit an amendment need not fundamentally alter the ... Medicaid waiver program. ... Defendant here presents no basis to believe that the federal government would deny the State's application for an amendment in this case and the court will not concoct one. ... Accordingly, the requirement that [Defendant] amend its waiver does not constitute a fundamental alteration in the ... program.

Id. at 857; *accord Radaszewski*, 2008 WL 2097382 at *10, *15 (noting that federal government has always approved state's waiver amendments, court held that the state "could modify or alter the waiver ... to meet the community integration contemplated by *Olmstead*").

Finally, Congress' and CMS' policies undermine Defendants' argument that it would be a per se fundamental alteration to require a state to amend an HCBS waiver. As the *Olmstead* Court recognized, the enactment of the HCBS waiver program, 42 U.S.C. § 1396n(c), in 1981, constituted a reversal in the prior congressional Medicaid policy that preferred institutional over community care. *Olmstead*, 527 U.S. at 601. "[T]he United States points out [as amicus curiae] that the Department of Health and Human Services ... „has a policy of encouraging States to take advantage of the waiver program ...." *Id.* Especially following *Olmstead*, "[t]he federal government encourages states to use [HCBS] waivers to attempt to achieve community integration." *Grooms*, 563 F. Supp. 2d at 857.

More specifically, CMS made clear to state Medicaid directors that the simple fact that the federal Medicaid law allows them to cap HCBS waiver services will not relieve them of liability under the ADA's integration mandate:

> May a State establish a limit on the total number of people who may receive services under an HCBS waiver?
>
> Yes. Under 42 U.S.C. § 441.303(f)(6), States are required to specify the number of unduplicated recipients to be served under the HCBS waivers. ... The State does not have an obligation under Medicaid law to serve more people in the HCBS waiver than the number requested by the State and approved by the Secretary. If other laws (e.g., ADA) require the State to serve more people, the State may do so using non-Medicaid funds or may request an increase in the number of people permitted under the HCBS waiver. ... *Failure to seek or secure Federal Medicaid funding does not generally relieve the State of an obligation*

> *that might be derived from other legislative sources (beyond Medicaid), such as the ADA).*

CMS, Olmstead Update No. 4, at 4 (Jan. 10, 2001) (emphasis in original and added), available at http://www.cms.hhs.gov/smdl/downloads/smd011001a.pdf.

CMS has recognized, once a state has decided to provide services, it must provide those services in the most integrated setting appropriate to the needs of the individual -- even if it requires the state to change its Medicaid program by expanding its "optional" community programs. In other words, the state's Medicaid program is not exempt from compliance with the ADA any more than it is exempt from other civil rights laws.

C. PERSONAL SERVICES

When a State Operates a Program that Includes the Provision of Personal Services to Individuals with Disabilities, the ADA's Title II Regulations Require the State to Provide those Services In the Most Integrated Setting Appropriate

Defendants argue that the ADA's implementing regulations preclude ordering a state to provide personal care assistance as a program modification or reasonable accommodation. In support of this argument, Defendants point to 28 C.F.R. 35.135, entitled "Personal Devices and Services," which provides that the regulations do not:

> require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.

According to Defendants, this regulation categorically exempts public entities from having to provide any personal services (such as the types of services Miss Jones and other people with spinal cord injuries require to reside in the community) to a qualified individual with a disability as part of a program modification. However, Defendants over-read this regulation.

The personal devices and services regulation is intended to make clear that public entities are not generally required to provide personal devices and services to individuals with

disabilities, where the provision of such devices and services is not otherwise a part of the program or service the entity provides. In the instant matter, Defendants' Spinal Cord Injury Waiver already provides precisely the personal care services Ms. Jones and class plaintiffs request. Defendants already provide these personal services via their Medicaid program in their Waivers, nursing homes and Personal Care Option in assisted living facilities. Plaintiffs are not requesting a service that is not presently provided. Where a public entity, like Defendants, already operate a program or provide a service that includes the provision of personal services – such as a program providing waiver services and nursing home services – it cannot discriminate against individuals with disabilities in the provision of those services.

The personal services regulation does not alter the State's obligations under the integration regulation. The two provisions must be read together. In order to have the force of law, the regulations implementing Title II – including the personal devices and services regulation – must reasonably enforce Title II's nondiscrimination mandate. The Supreme Court has already held that the prohibition on discrimination in the statute itself encompasses a ban on unjustified isolation or segregation. *Olmstead*, 527 U.S. at 597, 600, 119 S. Ct. at 2185, 2187.

The personal devices and services regulation cannot, therefore, exempt the State from Title II's requirement that public entities provide programs and services in a setting that is neither isolated nor segregated. Indeed, every ADA integration mandate decision involved the provision of personal services to the plaintiffs. In *Olmstead, supra, Radaszewsk, supra, Fisher, supra, Crabtree, supra, and Grooms*, plaintiffs all sought extensive in-home nursing and home health services. In *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995), *cert. denied,* 516 U.S. 813 (1995), the plaintiff sought precisely the same in-home attendant care services that Miss Jones and the other class members seek.

It is true that Title II would not require the State to provide personal services if the State did not already include such services as part of its program. However, Florida already provides

personal services to individuals in need of such services in nursing homes, to almost 375 individuals in need of such services who are living in the community and are enrolled in the State's Spinal Cord Waiver program, and to persons in assisted living facilities who require these services.

The issue in this case is whether, and to what extent, the integration mandate requires Florida to provide services (including personal services) in the community to plaintiff class members who would otherwise receive such services only in nursing homes. Because the integration mandate requires that the personal services provided in nursing homes be provided to class members in the community, the personal services regulation does not bar relief.

D. RES JUDICATA

The *Dubois* Settlement Agreement Is Not *Res Judicata* and Does Not Preclude the Instant Action

Defendants argue that the settlement agreement, class definition and order of dismissal in *Dubois v. Levine*, CA. No. 4:03-cv-107 (N.D. Fla.)(attached to Defendants' motion) raises issue or claim preclusion that bars the instant action. The class definition in *Dubois* was "all individuals with traumatic brain or spinal cord injuries who the state has already determine or will determine to be eligible to receive services from Florida's Medicaid Waiver Program for persons with traumatic brain and spinal cord injuries and have not received such services."

Defendants never discuss the actual terms of the Settlement Agreement, but rather argue that all persons with spinal cord injuries who are or may anytime in the future be eligible for waiver services are barred in perpetuity from litigating claims of discrimination. Defendants' argument consumes all people with a spinal cord injury, whether or not they had had a spinal cord injury when the *Dubois* Settlement Agreement was signed by counsel on October 3, 2006 or when the Court signed the Order of Dismissal on January 4, 2007.

A review of the actual terms of the Settlement Agreement does not support Defendants' broad interpretation. Rather, the explicit terms show that the class and Settlement Agreement were time-limited. By its terms, the *Dubois* Settlement Agreement ended at the end of FY 2008-2009, i.e., June 30, 2009. Specifically, ¶C(1) of the Settlement Agreement states:

> DOH shall make it a priority to seek funding that will be sufficient to expand the TBI/SCI Waiver program by a minimum of 50 slots for FY 2006-07, 75 slots for FY 2007-08 and 75 slots for FY 2008-09. DOH shall use its best efforts to have its legislative budget request, with each of these stated waiver slot increases for each year, included as part of the Governor's recommended budget and to obtain the necessary legislative support and funding for this expansion of waiver slots. DOH shall support this request and shall use its best efforts to obtain legislative approval of the expansion in each of these fiscal years. (Emphases added.)

Defendants have no legal duty under the Settlement Agreement terms after FY 2008-09. Any failure to provide Medicaid services to Miss Jones or anyone else beyond FY 2008-09 was neither covered nor contemplated by the *Dubois* terms. Certainly, until the end of FY 2008-09, persons with a spinal cord injury who were members of the class could not bring individual actions for discrimination. However, there is nothing in the *Dubois* agreement to preclude Miss Jones, or anyone else, from litigating after FY 2008-09. Defendants' argument would prevent anyone with a spinal cord injury in 2020 or anytime in the future from ever litigating a claim of discrimination.

Other references to dates in the Settlement Agreement also show that the parties intended that the *Dubois* agreement have a limited or set application for a set period of time:

> at ¶B(5), it was agreed that "[t]hrough January 2009, DOH shall provide Plaintiffs' counsel with a copy of any proposed changes to IOPs [Internal Operating Procedures] at least 30 days prior to their authorization;"
>
> at ¶B(6), "[t]hrough January 2009, DOH shall provide Plaintiffs' counsel with a copy of any proposed changes to the brochures at least 30 days prior to authorization;"
>
> at ¶B(9), "Plaintiffs agree that all requirements upon Defendants of copies or notice that run through January 2009 contained in this agreement are fully complied by Defendants by sending such copies or notice to Southern Legal Counsel, Inc. At the address supplied below;" and

> at ¶C(3), "through June 2009, AHCA agrees to provide Plaintiffs' counsel with copies of any approved amendments or renewals, to the state's current TBI/SCI Waiver Program application (approved as of June 2002) within 30 days of notification of approval by CMS (for approved amendments), including but not limited to any amendments to the number of waiver slots, applied for and approved by CMS." (Emphases added.)

The terms of the Settlement Agreement do not suggest that it would continue in perpetuity or that persons would be barred after the terms expired. To the contrary, Defendants had no legal duties under the *Dubois* Settlement Agreement after the FY 2008-09 ended. Nevertheless, Defendants now argue that members of the class are somehow bound forever.

"[A] prior judgment is *res judicata* only as to suits involving the same cause of action." *Lawlor v. Nat'l Screen Service Corp*., 349 U.S. 322, 329 (1955). While a "judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been ruled upon in the previous case." *Id.* at 328. Thus, the resolution of the *Dubois* action does not bar a subsequent lawsuit that challenges the conduct that occurred after resolution of the first lawsuit. A new claim of discrimination is created as the conduct continues since a claim cannot be asserted based on facts not yet in existence. *See, e.g., Lawlor,* 349 U.S. at 327-29; A*rizona v. California*, 530 U.S. 392, 414 (2000)(class action settlement agreements cannot result issue preclusion when the issues are not adjudicated on the merits)*, United States v. International Bldg. Co*., 345 U.S. 502 (1953).

Courts may bar the litigation of subsequent claims that were not formally presented to the court only if the settlement reflects an intention to preclude such later and/or unrelated claims (e.g., through a broad release). 18 *Federal Practice & Procedure* § 4443 at 386-87; *e.g., In re Prudential Ins. Co. of America Sales Practice Litig*., 261 F.3d at 366-67. The *Dubois* Settlement Agreement contains no release whatsoever, let alone a release suggesting that the putative class members relinquished claims beyond the terms of the Settlement Agreement. What makes Defendants' claim and issue preclusion arguments even more absurd is that the parties explicitly

recognized and stated that "the execution of this Agreement by Defendants and/or approval of the same [by the Court] shall not operate in any manner to confer continuing jurisdiction." (¶C(7) (Emphasis added).

CONCLUSION

For the above reasons, Defendants' motion to dismiss should be denied.

Respectfully submitted,

s/ Stephen F. Gold
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Counsel for the Plaintiff

January 13, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of filing, to the following: **Andrew T. Sheeran**, Agency for Health Care Administration, Office of the General Counsel, 2727 Mahan Drive, Building 3, MS #3, Tallahassee, Florida 32308; **George L. Waas**, Florida Department of Health, Office of the Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399, this 13h day of January, 2010.

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