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

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,

Defendants.

PLAINTIFF MICHELE HADDAD'S MOTION FOR PRELIMINARY INJUNCTION, EXPEDITED HEARING AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to Fed. R. Civ. P. 65, individual Plaintiff Michele Haddad, through her counsel, moves for a preliminary injunction to enjoin Defendants from denying her with Medicaid home and community-based services ("HCBS"), in order to prevent Plaintiff Haddad's unnecessary institutionalization in a nursing home. Due to the emergency nature of her situation, Plaintiff Haddad further moves for an expedited hearing. As grounds therefore, Plaintiff Haddad states:

1. This action is brought on behalf of a Florida resident who has quadriplegia as a result of a car accident. Plaintiff Haddad is on Medicaid. Plaintiff Haddad has successfully lived in the community since the accident and desires to continue to reside in her own home and community instead of having to enter a nursing facility. S he could continue to reside in the community with appropriate services

provided with Medicaid funds. She is at imminent risk of being unnecessarily institutionalized because of Defendants' failure to administer their Medicaid services, programs and activities in an appropriate, integrated community setting.

2. Michele Haddad is a named plaintiff in this action. She was born on August 1, 1960 and is forty-nine years old. *See Declaration of Michelle Haddad*, attached hereto as exhibit 1.

3. Plaintiff Haddad lives in a fully accessible home in Jacksonville, Florida. When she was 47, on September 7, 2007, she was in a motor cycle accident caused by an intoxicated car driver. She broke her spine as a result of the accident. *Id*.

4. On or about November, 2007, when she was still hospitalized in Brooks Rehabilitation, Ms. Haddad applied to Defendants' Brain and Spinal Cord Injury Program to receive home health care through the Spinal Cord Injury Medicaid Waiver. She has been on the "wait list" for in-home Waiver services nearly three years. *Id*.

5. Miss Haddad was recently contacted by the Spinal Cord Injury Waiver and told they have no funds to provide her with services. However, if she would enter a nursing home for 60 days, then Defendants would provide her with 10 hours a day of attendant care services in the community. *Id*.

6. Miss Haddad does not want to live in a nursing home but wants services in the community. *Id*.

7. She is unable to open her right hand and she cannot close her left hand. As a result she has minimal manual dexterity. *Id*.

8. Ms. Haddad uses a motorized wheelchair for ambulation. *Id*.

9. Between January 2008, when Ms. Haddad was discharged from Brooks Rehabilitation Hospital, and March 2010, Ms. Haddad's husband was her primary caregiver. In November, 2009, after

24 years of marriage, the Haddads divorced. Mr. Haddad remained in the family home and continued to serve as her primary caregiver until March 2010, when he left the home. *Id*.

10. One of Ms. Haddad's two adult sons, Anthony, 24, has left his home in Miami to temporarily move in with his mother to provide her with the care she requires in order to remain in the community. *See Declaration of Michelle Haddad*.

11. Ms. Haddad's son Anthony now is responsible for the tasks that her husband had provided since the accident: transferring her out of bed to a wheelchair, bathing her, helping her with her hygiene needs, dressing her, shopping for food, preparing meals, assisting her with eating, and at the end of the day performing the same functions to assist her to get into bed. *Id*.

12. Further, Ms. Haddad uses a catheter and requires a bowel program. Her husband was responsible for these toilet needs. Since March, when Ms. Haddad's husband left the house, her son, Anthony, has had to perform the exact same very personal care for her. *Id*.

13. In early March, 2010, Ms. Haddad again contacted Defendants' Brain and Spinal Cord Injury Program. She notified the Program that her husband and primary caregiver had moved out and she desperately required Medicaid Waiver services because the only help she was receiving was from her son, Anthony. *Id*.

14. Anthony cannot continue to provide services to his mother and has only temporarily returned home from Miami. Anthony recently graduated from Florida International University in December, 2009, majoring in international relations and marketing. Anthony only returned home to care for his mother due to the exigent circumstances -- his parents' divorce, his father leaving the house, and his mother having no one to care for her. Anthony intends to move back to Miami, and without the

services he has been providing in the home, Ms. Haddad will be forced to enter an unnecessarily segregated setting. *See Declaration of Michelle Haddad*.

15. Ms. Haddad does not want to go into a nursing home; instead, she wants to continue residing in the community, where she has an active life. *Id*.

16. In the community, she attends church, goes to the movies, visits friends and goes shopping. She uses the gymnasium at Brooks Rehabilitation Hospital's out-patient unit for exercise. *Id*.

17. She does not think it is appropriate for her son to provide the activities of daily living which she requires (including very private tasks). *Id*.

18. She owns her house which is accessible with a ramp, roll-in shower, and a hoyer lift. Her sole source of income is her monthly Social Security Disability Insurance, and she is eligible for and receives both Medicare and Medicaid. *Id*.

19. Without community-based Spinal Cord Waiver services, Ms. Haddad is at risk of being institutionalized, even though she desperately does not want to reside in a nursing facility. Ms. Haddad has lost her primary caregiver and lacks the natural supports that she previously relied on in order to live in the community. *Id*.

20. Despite Defendants knowing that Ms. Haddad is at imminent risk of institutionalization, they have not offered her any Medicaid services so she could remain in the community. *Id*.

21. Ms. Haddad has been eligible for Florida's Medicaid nursing home services since she broke her spine in 2007. She still meets Florida's level of care for nursing home eligibility. *Id*.

22. Florida's Medicaid nursing home reimbursement is approximately $178 per diem.

23. Defendants have a community-based Medicaid Traumatic Brain Injury/Spinal Cord Medicaid Waiver but its capacity is limited, providing 375 slots. *Id*.

24. Defendants have certified to the federal Medicaid agency, the Centers for Medicare and Medicaid Services, that for each person Florida diverts from the nursing home and provides Waiver services in the community, the State and the federal government save approximately $20,000 a year. *Id*.

25. Despite these savings and knowing that Plaintiff Haddad is in imminent risk of nursing home placement, Defendants have refused to provide Miss Haddad with services in her home. *Id*.

26. Plaintiff Haddad needs Defendants' Medicaid HCBS benefits to assist her with activities of daily living. These services could be provided to Plaintiff Haddad either pursuant to "waiver" services or "personal care services," *see* 42 U.S.C. §§1396n(c) and 1396d(a)(24), both of which are part of the Florida's Medicaid program.

27. Unfortunately, Waiver services have not been made available to Plaintiff Haddad, even though she applied for home and community-based services and is on a waiting list. Michele Haddad's advocates have telephoned Defendants' Jacksonville Medicaid Waiver office regarding waiver services, but none have been provided and no one could tell her when services would be provided for her in the community.

28. Further, the personal care option service under the state plan is currently unavailable to Ms. Haddad in her community placement because the service is limited in Florida to persons with disabilities who reside only in assistive living facilities (not to individuals who live in their own apartments or houses).

29. To obtain the necessary services, Defendants require that Plaintiff Haddad leave the community and enter a Medicaid-funded nursing facility setting. Defendants' Medicaid program will only provide the services she requires by paying for her institutionalization in a nursing facility.

30. Plaintiff Haddad will imminently have no option other than to enter into a nursing home where Defendants' Medicaid program will pay for the same services she can and has received in the community.

31. Defendants refuse to offer her the services in the community and instead are requiring her to enter a nursing facility to receive those services, in violation of both 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, in particular the "integration mandate," which requires that "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).

WHEREFORE Plaintiff Haddad seeks a preliminary injunction to enjoin Defendants from denying her services in the community to assist her with her daily living activities.

I. Plaintiff Meets the Standards for 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 hearing 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 Haddad 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 in her favor. Accordingly, Plaintiff Haddad 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 states to provide home and community-based services to individuals with disabilities who would otherwise need

[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. Haddad meets the eligibility criteria for Florida's Traumatic Brain Injury/Spinal Cord Injury Waiver ("TBI/SCI").

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 Ms. Haddad's imminent institutionalization. The other Medicaid program is the "personal care services" benefits, a/k/a "personal care option." 42 U.S.C. § 1396n(a)(24). Under the program, states like Florida provide personal attendant services such as Plaintiff Haddad requires. However, Florida has opted to limit its personal care services benefits to only those 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. <u>The ADA and Section 504</u>

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 recipients of federal funding, such as Defendants. 29 U.S.C. § 794(a). Extending the prohibitions of Section 504, in 1990, Congress enacted the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. (ADA), 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.

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

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]

Title II of the ADA prohibits public entities from discriminating against persons with disabilities.

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

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 Haddad 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 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.

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[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).

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 Haddad will suffer discrimination. There can be no doubt that for Plaintiff Haddad that the "most integrated setting" for her is her own home. 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 to move to a nursing home solely to receive the personal attendant care services that Plaintiff Haddad needs for her activities of daily living is exactly the sort of discrimination recognized in *Olmstead* (recognizing discrimination where "[i]n 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 [] disabilities can receive the medical services they need without similar sacrifice. See Brief for United States as Amicus Curiae 6-7, 17." *Olmstead*, 527 U.S. at 601. Defendants' refusal to provide Medicaid funds for her in the community and its failure to grant a reasonable modification to its

existing Medicaid programs that would allow her to remain in the community plainly falls within the disability discrimination condemned by the Supreme Court in *Olmstead*. The ADA and Section 504 clearly prohibit conditioning receipt of a public service or program on a person being institutionalized. That was the bedrock of the *Olmstead* decision. It also demonstrates 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 Haddad is at imminent risk of being forced into a nursing home. Due to Defendants' failure to provide services in the most integrated setting, she will be forced to relinquish her independence in order to receive necessary assistance with her activities of daily living. Ms. Haddad's unjustified isolation triggers the concerns driving the Court in Olmstead, of (1) "perpetuat[ing] unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and (2) "severely diminish[ing]" plaintiff's "everyday life activities…including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead*, 527 U.S. at 601. Forcing Ms. Haddad to receive services in a nursing home setting will cut her off from the community activities she enjoys, including attending church, going to the movies, visiting friends, going shopping, and exercising.

Further, Plaintiff Haddad need not wait until she enters the nursing home to bring a suit under Olmstead: the risk of institutionalization that plaintiff faces is itself 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 an unlimited number of prescriptions. 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 (M.D. Tenn. 2008).

This same principle applies to Plaintiff Haddad. 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 Haddad 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 on living in an institutional 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*); Crabtree, supra*.

In the present action, Defendants' failure to make reasonable modifications and accommodations results in Plaintiff Haddad being denied "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 Haddad 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 for a number of years to meet the needs of people on the wait list generally, including Ms. Haddad's 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. Haddad 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), *Long v. Benson*, 2008 WL 4571904 (N.D. Flo, Oct. 14, 2008), on appeal; *Disability Advocates Inc. v. Paterson*. 598 F.Supp.2d 289 (E.D.N.Y.2009).

E. Plaintiff Haddad's Requests for Modifications 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 Haddad 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 Haddad. Despite the significant increase in the

number of people on the wait list for the TBI/SCI waiver, Defendants have failed to increase the number of Medicaid TBI/SCI waiver slots so that Plaintiff Haddad could reside in the community instead of in a nursing facility.[5]

Courts have held that increasing expenditures and increasing the numbers of people who receive waiver services in the community is not an unreasonable accommodation. *See e.g., Radaxzewski*, 383 F.3d at 613-15; Frederick *L. v. Dept't of Public Welfare*, 364 F.3d 487, 500 (3rd Cir. 2004); *Fisher* , 335 F. 3d at 1182-83, and *Makin v. Hawaii*, 114, F. Supp. 2d 1017, 1034 (D. Haw. 1999).

Plaintiff Haddad has done all she can to live integrated into the community. She has received attendant care services from her parents and from her husband (now ex-husband) for as long as they could provide the care and services. She does not have money to pay for personal care services and without services provided through Defendants' programs, she will be forced to enter an unnecessarily segregated setting to receive needed 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 Haddad 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. W ere she to enter a nursing home, Defendants' per

[5] Similarly, Defendants have restricted their Medicaid personal care services benefits, 42 USC § 1396d(a)(24), to persons residing in assisted living facilities. D efendants could easily expand this program to persons who reside in their own homes and apartments.

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 Haddad 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 Haddad 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 Haddad can continue to reside in her home.

III. Irreparable Injury

Courts have recognized irreparable injury as a result of institutionalization in a nursing facility. Ms. Haddad will irreparably suffer if she is must go into an institution. Forcing her to go into a nursing home, even for 60 days, will have a very negative emotional impact. Courts have recognized that institutionalization "will inflict an enormous psychological blow. Also, because of the very substantial difference in [plaintiff's] perceived quality of life in the apartment as compared to the nursing home, each day [s]he is required to live in the nursing home will be an irreparable harm." *Long v. Benson*, No.

08cv26, 2008 WL 4571903 *2 (N.D. Fla. Oct. 14, 2008). Institutionalization has been recognized will also negatively impact on her care - "forcing … Plaintiff[] into nursing homes … would be detrimental to [her] care, causing, inter alia, mental depression, and …, a shorter life expectancy or death." *Crabtree v. Goetz*, No. 08-0939, 2008 WL 5330506 *25 (M.D. Tenn. Dec. 19, 2008)(Haynes, J.)

It is also 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, 65 6 (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 Haddad 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 Ms. Haddad 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 Haddad against possible damage to Defendants. *Micshel-Trapaga v. City of Gainesville,* 907 F. Supp. 1508, 1513 (N.D. Fla. 1995). While Plaintiff Haddad is threatened with institutionalization, Defendants' only possible damages are monetary. The harm to Plaintiff Haddad 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 Haddad 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 Haddad 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 Haddad 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 Haddad.

V. The Public Interest

A preliminary injunction to provide services to Plaintiff Haddad 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 (11th 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 Haddad. 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, 617 (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 Haddad 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 Haddad to give security.

VII. Conclusion

For the reasons and on the authority cited above, Plaintiff Haddad 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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LOCAL RULE 3.01 (g) CERTIFICATION

The undersigned counsel has attempted to discuss the matters raised with counsel for Agency for Health Care Administration and Florida Department of Health and has been informed by their office that they object to the relief sought herein.

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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** and **William T. Blocker, II**, Agency for Health Care Administration, Office of the General Counsel, 2727 Mahan Drive, Building 3, MS # 3, Tallahassee, Florida 32308; **George L. Waas** and **Enoch J. Whitney,** Florida Department of Health, Office of the Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399, this 15th day of April, 2010.

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