IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Helen Pitts, Kenneth Roman, Denise Hodges, and Rickii Ainey, on behalf of themselves and all others similarly situated, Plaintiffs, v. Bruce Greenstein, in his official capacity as Secretary of the Lousiana Department of Health and Hospitals, and Louisana Department of Health and Hospitals, Defendants,	C.A. No. 3:10-cv-00635-JJB-SCR Judge James J. Brady Magistrate Judge Stephen C. Riedlinger CLASS ACTION

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. Introduction

When reviewing a motion to dismiss, the court accepts all well-pleaded factual allegations as true, and construes the complaint liberally, with "all reasonable inferences drawn in the light most favorable to the plaintiff." *Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368, 371-72 (5th Cir. 2008); *Woodward v. Andrus*, 419 F.3d 348, 351 (5th Cir. 2005). Motions to dismiss under Rule 12(b)(6) are disfavored and are rarely granted. *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009); *Priester v. Lowndes County*, 354 F.3d 414, 418 (5th Cir. 2004). A claim will survive an attack under Rule 12(b)(6) if it "may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563

(2007). Applying this strict standard, Plaintiffs' allegations demonstrate a valid claim for relief and the motion to dismiss must not be granted.

The Americans with Disabilities Act ("ADA") construes unnecessary institutionalization and segregation as prohibited forms of discrimination against individuals with disabilities. 42 U.S.C. § 12101(a)(3) and (5). As such, the ADA requires public entities to administer services to qualified individuals in "the most integrated setting appropriate." 28 C.F.R. § 35.130(d). It has been determined that the unjustified isolation of individuals in institutions, thus limiting their exposure to the community, constitutes discrimination based on disability. *Olmstead v. L.C.*, 527 U.S. 581, 596-597 (1999).

Plaintiffs, as well as other class members, are individuals with severe disabilities who are qualified to receive, and who currently receive, services under Louisiana's Medicaid-funded Long-Term Personal Care Services ("LT-PCS") program. This program currently provides critical home-care services for a maximum of 42 hours per week to people who are eligible for nursing home care, and who would be at risk of having to enter a nursing home for care, if they did not receive home services. If the State cuts the maximum number of program hours to 32, as it has announced it plans to do, then Plaintiffs will not have access to the care that is necessary for them to remain in their homes. As such, Defendants' actions place Plaintiffs at risk of unwarranted institutionalization and segregation in violation of the ADA and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a)("Section 504").

Since Plaintiffs' pleadings set forth viable claims, dismissal under F. R. Civ. Pro. 12(b)6) is improper. The Memorandum in Support of Defendants' Motion to Dismiss,

Doc. No. 11-1 ("Defendants' Memorandum") presents, at pp. 4-14, a slew of factual assertions in an attempt to convince the Court that Defendants have an effectively working plan to provide community services as an alterative to nursing home care. As Plaintiffs will show, this Court may not consider these factual assertions in connection with a Rule 12(b)(6) motion.

Plaintiffs will be able to show, on the merits, that Defendants' plans in fact do not even address the issue of allowing persons with disabilities, like the Plaintiffs and the putative class, to avoid nursing home placement by promptly providing adequate Medicaid personal care services for them in their homes and communities. Plaintiffs will be able to show, among other things, that there are over 17,000 people on a waiting list for the Elderly and Disabled Adults waiver (the "comprehensive" service that Defendants contend is more appropriate for individuals like Plaintiffs with a "higher level of need" [Defendants' Memorandum at p. 8]), and that the 2 ½-year wait for services under that program is the same now as it was in March of 2006. Plaintiffs will further be able to show that while they, and others with disabilities who want to receive services in their homes, must wait years for adequate services, people who are willing to go into segregated institutional facilities for services can receive them immediately, and that recent budget cuts in long term care have primarily targeted home- and community-based services rather than institutional services. In sum, Plaintiffs will show that Defendants do not have an affirmative defense to their claims. However, these are matters to be addressed on the merits—not in connection with a motion to dismiss.

II. Plaintiffs' Factual Allegations

Before the Court are four named Plaintiffs, Helen Pitts, 78, Kenneth Roman, 47, Denise Hodges, 53, and Rickii Ainey, 30, representing themselves and a proposed class of similarly situated individuals. They all are disabled and are qualified individuals under both the ADA, 42 U.S.C. § 12101 *et seq*., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). [1]

All the Plaintiffs have extremely severe impairments, with multiple chronic conditions such as paralyses, strokes, chronic heart failures, arthritis, and multiple sclerosis. They all require assistance with multiple activities of daily living (sometimes abbreviated "ADL's"), including, but not limited to, assistance with bathing, dressing, toileting, eating, bowel and bladder care, meal preparation and clean up, shopping, and laundry. They all have been receiving such assistance for multiple activities of daily living in their homes as part of Defendants' LT-PCS Program.

Defendants have proposed to change the maximum number of LT-PCS from 42 hours a week to 32. The reduction in maximum hours in the LT-PCS program is being imposed for purely budgetary reasons, is not based on the needs of the persons who have been receiving LT-PCS services, and does not it take into account the Supreme Court's admonition in *Olmstead v. L.C.*, 527 U.S.581, 597 (1999) that "[u]njustified isolation … is properly regarded as discrimination based on disability." With the proposed reduction of hours of LT-PCS, all of the Plaintiffs are at serious and imminent risk of requiring institutionalization and segregation in nursing homes, where they will receive the exact same services that they presently receive in the community. None of the Plaintiffs want to

[1] 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." *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005); *Zulke v. Regents of the Univ. of Calif.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999).

reside in an institution. They have active lives in the community and want to continue to reside in their own homes and apartments.

What distinguishes the named Plaintiffs and putative class from most other people with disabilities is the severity of their disabilities and the concomitant assistance with activities of daily living they require. It is critical to understand that many, if not most ,people with disabilities, could adequately reside in the community with a maximum of 32 hours a week of LT-PCS. It is only the minority of people with disabilities who have the severest disabilities, who require more than 32 hours – to wit, the named Plaintiffs and the proposed class. [2]

Defendants have in the past administered the LT-PCS to require "prior authorization" of the number of LT-PCS hours Plaintiffs have received. That is, Defendants have determined that the named Plaintiffs require more than 32 hours of LT-PCS services, up to 42 hours a week. The number of hours each Plaintiff has been receiving has been determined by Defendants to be required both to reside safely in the community and to avoid institutionalization. Plaintiffs need for assistance with their ADLs has not changed or diminished. Plaintiffs have not been receiving unnecessary hours of service, but have been receiving the bare minimum number of hours up to 42 a week each requires. For example, at the present time, Plaintiff Helen Pitts has been approved to receive 39 hours a week of LT-PCS, Kenneth Roman 39 hours a week, Denise Hodges 39 hours a week and Rickii Ainey 41 hours of LT-PCS a week.

The pleaded facts are:

- Plaintiff Helen Pitts is 78 years old. She is divorced and lives alone. Ms. Pitts has had osteo- and rheumatoid arthritis, fibromyalgia, and congestive heart

[2] According to Defendants' memorandum at pg. 9, 28% of the people on the LT-PCS currently receive between 32 and 42 hours of service per week.

failure and lymphedema. She requires the use of oxygen daily and at night. She is in constant pain in her legs, arms, shoulders and back. Plaintiff Pitts needs assistance getting in and out of bed and getting in and out of her motorized scooter. She needs help going to the bathroom because she cannot get on and off the toilet without help, needs help pulling her clothes up and down, and needs help cleaning herself (in part to avoid decubitus ulcers). She has incontinent episodes daily. She needs help bathing, dressing and performing most of her personal hygiene. Ms. Pitts is unable to prepare meals, do her laundry or attend to household chores.

- Plaintiff Kenneth Roman is 47 years old. Plaintiff Roman has had several strokes which has caused left side hemiparesis. He also has diabetes, congestive heart failure, peripheral vascular disease, hypertension, coronary artery disease, renal failure and irritable bowel syndrome, as well as several heart attacks, the most recent of which was in 2009. Mr. Roman is currently separated from his wife. One of the primary reasons they are separated is because his wife did not want to be his caregiver any longer. Due to his impairments, Plaintiff Roman needs assistance with all of his activities of daily living. He is incontinent and needs assistance cleaning after an incontinence episode. This is even more important when his irritable bowel syndrome occurs. He is often incontinent of bowel and bladder at night and often must wait until his personal care worker arrives in the morning to assist with cleaning. Plaintiff Roman needs assistance changing to a standing position from a sitting position. He needs help bathing, washing his face and brushing his teeth. Often he is not able to move in bed when he has no assistance. Not moving during the night causes him severe pain. As a result of the pain, he often falls in the morning when he tries to walk.

- Plaintiff Denise Hodges is 53 years old. She was diagnosed with transverse myelitis in 1989 that left her paralyzed from the waist down, and in 2001, was diagnosed with multiple sclerosis. Due to her multiple sclerosis, Ms. Hodges has frequent extreme fatigue and loss of stabilitiy and requires extensive assistance transferring, dressing, toileting and bathing. She cannot push her manual wheelchair and needs assistance with personal hygiene, meal preparation, shopping, laundry and household chores. Plaintiff Hodges requires digital stimulation in order to have a bowel movement and needs help with cleaning herself and any laundry that must be done as a result of bowel movements. Ms. Hodges developed decubitis ulcers on one of her heels and on her lower spine during a period of time when she was not receiving adequate assistance.

- Plaintiff Rickii Ainey is 30 years old and lives alone. Ms. Ainey has arthrogryposis (a congenital form of arthritis), is paralyzed from the waist up and has limited mobility in her legs. She has limited range of motion in her legs and the range of motion is deteriorating. Ms. Ainey needs assistance with all activities of daily living, including but not limited to bathing her upper

> body, including her face, arms and torso, and washing her hair; dressing in the morning and undressing when she goes to bed; adjusting her clothing before and after toileting; getting on and off the toilet and cleaning herself after toileting; feminine hygiene; eating and drinking; transferring from any surface to a standing position; and moving once in bed. Plaintiff Ainey cannot prepare meals and cannot shop without assistance. In addition, she requires assistance to do all household chores and laundry.

None of the Plaintiffs have family or friends who can provide the Medicaid services they receive from LT-PCS. They all fervently want not to have to go into a nursing home or institution to receive the same assistance with activities of daily living that they currently receive.

III. Argument

A. Defendants Inappropriately Reference Materials Outside the Complaint in the Motion to Dismiss.

In deciding a rule 12(b)(6) motion, a district court may not go outside the complaint, except in one "limited exception." *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). This exception allows the movant to attach to its motion, and the court to consider, documents that are "referred to in the plaintiff's complaint and are central to the plaintiff's claim." *Boyd v. Driver*, 579 F.3d 513, 515 n. 4 (5th Cir. 2009); *Scanlan* at 536. Further, a court may take judicial notice of facts of public record in deciding a rule 12(b)(6) motion only when the facts are not subject to reasonable dispute in that they are either generally known within the territorial jurisdiction of the trial court, or are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. FED. R. EVID. 201(b).

The declaration and documents that are repeatedly referenced in Defendants' motion to dismiss do not fall within the exception, are not subject to judicial notice, and cannot be relied upon in deciding this motion. The declaration and documents are not

mentioned or referenced at all in the complaint, an important factor in cases interpreting the exception. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (explaining that the exception in this and other jurisdictions requires that the plaintiff's complaint have referred to the documents attached to the Defendant's motion to dismiss and that the documents be central to the plaintiff's claim), *Scanlan*, 343 F.3d at 537 (finding that the defendant's document not being referenced in the complaint was an important distinction from cases where the exception was applied). Moreover, it would have been impossible for Plaintiffs to reference the declaration, as it was a document created by Defendants specifically for this case, a fact which precludes it from being subject to judicial notice. *See Scanlan*, 343 F.3d at 537 (holding that a document created by the movant for its own use cannot be characterized as "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). Finally, the declaration and documents are not central to Plaintiffs' claim, but are in fact more relevant to the Defendants' defenses, a distinguishing factor specifically referenced by the *Scanlan* court. *Id.* ("certainly [it] alone is not central to their claims. Indeed, it is much more central to [defendant's] defenses. Consequently, the district court's first error was going outside the plaintiffs' complaints."). [3]

While the declaration and documents may be relevant at a hearing on the merits, they are not relevant or appropriate in a motion to dismiss. At the hearing on the merits, Plaintiffs will have the opportunity to cross-examine Defendants' witnesses and to introduce evidence to show inaccuracies in and irrelevance of Defendants' documents.

[3] These documents are also hearsay and /or contain hearsay statements, which have not been shown to be within any hearsay exception. They are therefore objectionable under Rule 802, Fed.R.Evid.

These documents are not appropriate for consideration at this time.

B. Plaintiffs' Pleadings Allege Discrimination in Violation of the ADA and Section 504

The Supreme Court in *Olmstead* and lower courts have held that the ADA prohibits unnecessary segregation in institutions and requires states to provide services to individuals with disabilities in the most integrated setting appropriate to their needs, unless the state can prove that doing so would result in an undue burden or in a fundamental alteration to their programs.

Defendants fund the provision of personal care services to individuals with disabilities both in nursing homes and in the community. It is important to point out that Plaintiffs' claims that Defendants' actions violate the ADA and Section 504 are not *per se* because Defendants have reduced the maximum LT-PCS benefit from 42 to 32 hours a week. That reduction implicates ADA and Section 504 prohibited discrimination only when it puts people with disabilities at risk of being institutionalized. That is, if the reduction of hours does not cause such risk, then at least for purposes of the instant action it may not run afoul of the ADA and Section 504 Therefore, Plaintiffs' claims are very limited: if the reduction of LT-PCS hours causes the risk of unnecessary institutionalization, then the ADA and Section 504 are violated.

Moreover, it is also important to point out that presently Defendants' Medicaid pays for Plaintiffs' LT-PCS in the community. When Plaintiffs are institutionalized, Defendants' Medicaid will pay for their nursing home care. To the extent these expenditures equal or exceed the expenditures on LT-PCS, there will be no cost savings

for Defendants but there will be unnecessary institutionalization and segregation for Plaintiffs – precisely what Congress prohibited and wanted to end. *See infra*.

i. Background of the ADA

In enacting the Americans with Disabilities Act (ADA) in 1990, Congress made explicit findings that plainly delineated its concern that people with disabilities had been long isolated from society and its goal to promote integration of those individuals. Specifically, Congress found: that discrimination against individuals with disabilities persists in "such critical areas as institutionalization [and] health services"; that people with disabilities "continually encounter various forms of discrimination, including ... segregation"; that "the Nation's proper goals regarding individuals with disabilities are to ensure equal opportunity, full participation, independent living, and economic self-sufficiency"; and that the continuing existence of unfair and unnecessary discrimination ... costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. §§ 12101(a)(3), (5), (7), and (8). These findings reflect Congress's understanding that "[i]ntegration is fundamental to the purposes of the ADA." H.R. Rep. No. 101-485, pt. 3, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 479; *see also* S. Rep. No. 101-116 at 20 (1989) (there is a "compelling need to provide a clear and comprehensive national mandate .. for the integration of persons with disabilities into the economic and social mainstream of American life.").

ii. Title II of the ADA, as the Supreme Court Has Held, Bars Unnecessary Institutionalization and Segregation of People with Disabilities.

Title II of the ADA prohibits discrimination against people with disabilities by public entities, such as Defendants. 42 U.S.C. § 12132. Rather than delineate the specific forms of prohibited discrimination barred by Title II, Congress directed the Department of Justice (DOJ) to promulgate regulations to implement Title II and, in doing so, to adhere to specific regulations promulgated under Section 504 of the Rehabilitation Act. 42 U.S.C. §§ 12134(a)-(b). Adhering to the congressional mandate, DOJ adopted regulations to implement Title II including the following integration mandate that requires 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). [4]

The integration mandate was analyzed and interpreted by the United States Supreme Court in the landmark *Olmstead* decision. 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

[4] The ADA's integration mandate is virtually identical to 28 C.F.R. § 41.51(d) promulgated by DOJ pursuant to Section 504 of the Rehabilitation Act, which accords with Congress's direction that the Title II ADA regulations must be consistent with the coordination regulations. 42 U.S.C. § 12134(b); *see also Helen L. v. DiDario*, 46 F.3d 325, 332 (3d Cir.), *cert. denied*, 516 U.S. 813 (1995). Plaintiffs asserted claims under the integration mandates of both the ADA and Rehabilitation Act. Since courts have held that these provisions have the same scope and effect, *see, e.g., Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 601, 607 (7th Cir. 2004); *Grooms v. Maram*, 563 F. Supp. 2d 840, 851 (N.D. Ill. 2008), Plaintiffs' discussion focuses on the ADA but applies as well to Section 504 of the Rehabilitation Act.

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. *Olmstead, Id.* at 587.

The Court faced the question of whether a state has an obligation under the ADA's integration mandate, 28 C.F.R. § 35.130(d), to provide community services to people with disabilities who were unnecessarily institutionalized. Explaining that "unjustified institutional isolation of persons with disabilities is a form of discrimination," *id.* at 600, the Court wrote:

> [C]onfinement 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. [citation omitted] Dissimilar treatment exists in this 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 ... disabilities can receive the medical services they need without similar sacrifice.

Id. at 600-01. [5]

The facts of the case at bar clearly demonstrate that Plaintiffs will suffer discrimination. There can be no doubt that for Plaintiffs, the "most integrated settings appropriate" are their own homes. By living at home and participating in their communities, they have been able to experience and benefit from church activities, social

[5] Following *Olmstead*, a number of federal appellate courts have applied the ADA's integration mandate in cases involving individuals with disabilities who are unnecessarily institutionalized or at risk of unnecessary institutionalization. *See, e.g., Radaszewski*, 383 F.3d at 602 (7th Cir. 2004); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180-81 (10th Cir. 2003) (individuals at risk of institutionalization in nursing facilities); *Townsend v. Qasim*, 328 F.3d 511, 523 (9th Cir. 2003); *Pennsylvania Protection and Advocacy, Inc. v. Pa. Dep't of Public Welfare*, 402 F.3d 374, 379 (3d Cir. 2005).

contacts, educational advancement, and cultural enrichment of which the Supreme Court spoke. Forcing them to move to nursing homes solely to receive the personal attendant care services that they need for their activities of daily living is exactly the sort of discrimination recognized in *Olmstead*.

DOJ's ADA integration regulation is consistent with Congress's findings and goals in enacting the ADA. Congress's clear goal in enacting in the ADA -- as evidenced by its extensive findings -- was to end unnecessary segregation and institutionalization of people with disabilities and, concomitantly, to promote their full integration and participation in society. Plaintiffs have clearly stated a claim for relief under the ADA and Section 504.

Defendants claim that Plaintiffs have not alleged sufficient facts to establish a violation of the ADA's integration mandate because Louisiana has a plan "oriented to prevent the isolation and segregation of individuals in institutions" (Defendants' Memorandum at 18). They argue that the fact that their expenditures on home- and community based services have grown dramatically in the past decade,[6] and that they have published documents designated as "plans" dealing with long-term care, conclusively establish that Louisiana has "a comprehensive, effectively working plan to serve individuals with disabilities in their homes and communities…" (Defendants' Memorandum, p. 2). The defense they seek to establish, however, involves more than the existence of a "plan"—it requires that the plan be "effectively working" to place qualified people in less restrictive settings, and that waiting lists "move at a reasonable pace" to

[6] Defendants' offerings of home- and community based services as an alternative to nursing facility services essentially began a decade ago as a result of another ADA class action lawsuit, *Barthelemy v. Louisiana Department of Health and Hospitals*, C.A. No. 00-1083 in the U.S. District Court for the Eastern District of Louisiana, *see* 2001 WL 1254859 (approval of settlement agreement); 2003 WL 1733534 (modifying settlement agreement). The cutback at issue in this case represents a significant retreat from the services instituted as a result of that lawsuit.

ensure that persons leave institutions. *Olmstead*, 527 U.S. at 605-606. Defendants' reduction in community-based services will have the opposite effect – it will increase unnecessary institutionalization. Neither Congress nor the Supreme Court intended more unnecessary institutionalization and segregation but intended less.

Plaintiffs are aware of no reported case in which a State has been held to have established this defense at the pleadings stage. The "plans" to which Defendants allude are clearly outside the pleadings and are not relied on or referred to in any way in Plaintiffs' Complaint. If the Court were to review them, however, it would find that they do not even address the issue of allowing persons with disabilities like the Plaintiffs and the putative class to avoid nursing home placement by promptly providing adequate Medicaid personal care services for them in their homes and communities. They contain no plans to address the problem of the lengthy, and growing, waits for community-based services, and certainly do not include the current cutbacks, which will only exacerbate those waits.

Currently, Plaintiffs are able to receive up to 42 hours of personal care services in their homes. The cutback that is the subject of this action will result in their inability to receive adequate services in their homes and will force them (and others similarly situated) into institutions. While Defendants claim that one of the named Plaintiffs will soon be offered the "more comprehensive" services that will keep her from having to enter a nursing home (Defendants' Memorandum, p. 6), it admits that the current wait for services under that program is 2 ½ years, and does not suggest when the other named Plaintiffs, or members of the putative class, will be able to obtain these services. [7]

[7] Defendants state that approximately 28% of the 12,000 people receiving LT-PCS are currently receiving more than 32 hours (Defendants' Memorandum p. 9), and that there are 4,603 EDA waiver slots (*Id*. at 5). Since Defendants admit that the wait for an EDA slot is over 2 ½ years (*Id*. at 6), it is logical to infer that most, if not all, of the 4,603 slots are currently occupied. While one of the named Plaintiffs may soon be reached on the waiting list, slots will not be available for many other named Plaintiffs and class members who are put at risk of institutionalization as a result of these cutbacks.

Defendants do not state that they plan to add EDA slots to prevent the unnecessary institutionalization of Plaintiffs and the members of the putative class.

In a very similar recent case, the court in *Brantley v. Maxwell-Jolly*, 656 F.Supp.2d 1161 (N.D.Cal. 2009)(on appeal) entered a preliminary injunction against a cutback in the amount of Adult Day Health Care services that seniors and adults with disabilities were able to receive. It found that these cutbacks threatened the plaintiffs and the putative class with a serious risk of institutionalization, and that "..[T]o the extent that Defendants are claiming that alternative services satisfy their obligations under the integration mandate, Defendants certainly bear the burden of ensuring more than a "theoretical" availability of such services." *Id*. at 1174. *See also V.L. v. Wagner*, 669 F. Supp. 1106, 1120 (N.D. Cal. 2009) (enjoining change in eligibility standards that would reduce or terminate in-home personal care services, creating a risk of institutionalization for people with disabilities, where the record demonstrated that alternative services would not be available for a large portion of class members who face a risk of institutionalization).

Here, Defendants do not even suggest that alternative services will actually be available to replace the services that Plaintiffs (other than possibly Ms. Hodges) and the other class members will lose in the cutback. The "plans" that Defendants tout certainly do not provide for this. The facts that Defendants offer some other long-term care services, and that it has documents entitled "plans" for long-term care, do not negate Plaintiffs' claims.

C. Defendants Have Not Established a Fundamental Alteration Defense

Given that the Plaintiffs have alleged that the community -- not a nursing home – is the most integrated setting in which to provide them with personal care services, and that a reasonable accommodation (*i.e.*, the provision of up to 42 hours a week of personal care services in the community) is feasible, they have satisfied their burden of pleading that Defendants violated the ADA's integration mandate. *See Olmstead*, 527 U.S. at 602-03, 607; *Frederick L.*, 364 F.3d at 492 n.4. To avoid liability under the integration mandate, the burden at trial will shift to the Defendants to establish that the requested accommodation of up to 42 hours a week of personal care services would constitute an undue burden or fundamental alteration of its programs. *Olmstead*, 527 U.S. at 602-03, 607; *Frederick L.*, 364 F.3d at 492 n.4; *Townsend*, 328 F.3d at 520. Defendants cannot meet that burden. [8]

First, Defendants have not shown that it will in fact cost the State of Louisiana more to provide the named and class Plaintiffs with personal care services in their own homes than it would cost to fund their care in nursing homes. The State will have to pay for nursing home care for each person who requires such care as a result of the reduced hours in the community. At the current hourly LT-PCS rate of $12.28, it may cost the

[8] "Fundamental alteration" is essentially the flip side of a "reasonable accommodation." If something is a reasonable accommodation, it cannot be a fundamental alteration and vice versa. Courts have applied these concepts in ADA cases that did not involve the integration mandate, stressing the breadth of the ADA's requirement for reasonable accommodation and, concomitantly, the narrowness of the fundamental alteration defense. *See, e.g.*, *American Council of the Blind v. Paulson*, 525 F.3d 1256,1268-69 (D.C. Cir. 2008) (holding it is not a fundamental alteration to require the Treasury Department to use currency that is accessible to blind persons); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (in ADA employment case, court noted that reasonable accommodation sometimes requires "preferences" to people with disabilities to achieve equal opportunity); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (in holding that allowing a player to ride in a golf cart during a tournament was not a fundamental alteration, the court refused to the defer to the "expertise" of the PGA and stressed that the PGA's refusal "to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA.")

Medicaid program $24,903 per year to provide home services to a person who, like Helen Pitts, receives 39 hours a week of care in her home. A recent DHH report showed that the average cost of care to people receiving services in Medicaid-funded nursing homes is $33,915. Thus, a cutback in Ms. Pitts' services from 39 to 32 hours a week would actually cost the State over $9,000 if she is forced into an institution as a result. If only 147 of the class members enter a nursing facility as a result of these cuts, the $5 million in savings the State projects from these cutbacks will evaporate.

Second, courts in other ADA integration cases have afforded relief to allow individuals with disabilities to receive community services even when the state might incur greater costs for such services than it would absent the relief. 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*, 335 F.3d at 1182.

> [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 (emphasis added); *accord Pennsylvania Protection and Advocacy, Inc.*, 402 F.3d at 381; *Radaszewski*, 383 F.3d at 613-15; *Crabtree*, 2008 WL 5330506 at *26;

Messier, 562 F. Supp. 2d at 345; *Cota v. Maxwell-Jolly*, 688 F.Supp. 2d 980, 995 (N.D. Cal. 2010).

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 Plaintiffs in the instant case. In *Radaszewski*, 2008 WL 2097382 at *6, *14-*15, 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. In *Crabtree*, 2008 WL 5330506 at *2-*12, *31, 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. *See also Grooms*, 563 F. Supp. 2d at 847, 859-63 (granting judgment to provide in-home care at cost of more than $16,000 per month to person with disability to avoid institutionalization).

Third, this is not a case in which Defendants would have to create "new" services for Plaintiffs. Defendants currently provide 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 the Plaintiffs. *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).

Fourth, 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)).

Plaintiffs agree that they have the burden to propose a reasonable accommodation, see Memorandum in Support of Defendants' Motion to Dismiss at 21. The reasonable accommodation proposed is to continue to assess each person with a disability individually and to authorize only the number of hours, up to 42 per week, that the person requires to avoid institutionalization.

Defendants' only response is that it will cost $5 million annually to provide more than 32 hours and less than 42 hours a week of LT-PCS. See Memorandum in Support of Defendants' Motion to Dismiss at 21. What Defendants fail to inform the Court is that their Medicaid nursing home budget in FY 2010 was $744 million dollars – nearly twice the amount expended on all their community-based programs for people with disabilities. Further, as noted above, they do not present to the Court the additional nursing home costs that will be incurred by reducing LT-PCS to a maximum of 32 hours.

The concept of reasonable accommodation or reasonable modification recognizes that strictly "equal" treatment of people with disabilities will not assure meaningful access to services. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 273-75 (2d Cir. 2003).

Accordingly, the ADA and Section 504 require accommodations assuring that otherwise neutral policies (e.g., limiting the number of hours to 32) 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").

In addition to violating "the most integrated setting" mandate, Defendants also violate Section 504 and the ADA's prohibition against discriminating 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 Wagner v. Fair Acres Geriatric Center*, 49 F. 3d 1002, 1016 n. 15 (3d Cir. 1995) (reversing the dismissal of a Rehabilitation Act claim by a woman who had been turned down for admission to a nursing home based on the severity of her disability); *Cable v. Department of Developmental Services*, 973 F. Supp. 937, 942 (C. D. Cal. 1997) (State's choice of certain patients for community placement because they were more disabled than others may constitute discrimination under the ADA); *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").

Accordingly, 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 severe 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.

Since Defendants have chosen to provide personal care services -- both in nursing homes and in the community via the LT-PCS and the Waiver programs -- they cannot evade their obligations under the ADA's integration mandate to provide those services to Plaintiffs in the most integrated setting appropriate to their needs. The state's Medicaid program is not exempt from compliance with the ADA any more than it is exempt from other civil rights laws.

D. Plaintiffs' Due Process and Medicaid Claims May be Premature.

Defendants acknowledge that "individual notices have not been issued," but that when they are, sometime in the future, "each recipient whose hours will be reduced as a result of the reassessment will receive an individual notice stating the basis of the State's action." Memorandum in Support of Defendants' Motion to Dismiss at 23. Plaintiffs base their Complaint on draft notices that Defendants have provided, but agree that until the notices are actually issued, this claim may be premature.

E. None of Plaintiffs' Claims are Barred by the Eleventh Amendment

It is settled law in the Fifth Circuit that a state department waives its Eleventh Amendment immunity from suit in federal court under §504 of the Rehabilitation Act of 1973 when it accepts federal funds, which are granted by Congress under authority of the Constitution's Spending Clause, and are expressly conditioned on waiver of immunity from §504. *Miller v. Texas Tech Univ. Health Sciences Ctr.*, 421 F.3d 342, 345 (5th Cir. 2005) (*en banc*), and *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir.2005) (*en banc*).

Defendants' citation to *In Re Soileau*, 488 F. 3d, 302, 305 (5th Cir. 2007) for the proposition that Louisiana enjoys 11th Amendment immunity from suit is misplaced. That case concerned a bankruptcy action and whether the Bankruptcy clause of the Constitution validly abrogates states' immunity. This case, which involves claims under the Rehabilitation Act, is controlled by *Miller* and *Pace*.

To the extent that Plaintiffs' Complaint asserts claims against the Louisiana Department of Health and Hospitals under the ADA, these claims are not necessary for the relief Plaintiffs seek. It is well settled that Title II of the Americans with Disabilities

Act can be enforced through suits for prospective relief against state officers pursuant to the *Ex parte Young* doctrine. *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 413 (5th Cir. 2004) (affirming denial of motion to dismiss in ADA action against state officers alleging that they failed to adequately provide community-based living options to individuals with mental retardation and other developmental disabilities); *Bd. of Trustees. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n. 9 (2001). Plaintiffs' ADA Title II claims for prospective injunctive and declaratory relief are appropriate against Bruce Greenstein, Secretary of the Louisiana Department of Health and Hospitals, in his official capacity.

IV. Conclusion

For the foregoing reasons, Plaintiffs request that Defendants' Motion to Dismiss be denied, except as to Plaintiffs' Due Process claims. Plaintiffs reserve the right to re-file these claims if warranted after individualized notices have been issued.

Date: November 11, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2010, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/EDF system. Notice of this filing will be sent to all counsel by operation of the court's electronic filing system.

/s/ Nell Hahn