IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUSIANA

HELEN PITTS, et al.	)	
	)	C.A. No. 3:10-cv-00635-JJB-SCR
Plaintiffs,	)	
	)	JUDGE JAMES J. BRADY
v.	)	
	)	MAGISTRATE JUDGE STEPHEN
BRUCE GREENSTEIN, et al.	)	C. RIEDLINGER
	)	
Defendants	)	CLASS ACTION

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517,[1] because this litigation implicates the proper interpretation and application of title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), and in particular, its integration mandate. *See* 28 C.F.R. § 35.130(d); *Olmstead v. L.C.*, 527 U.S. 581 (1999). The Department of Justice has authority to enforce title II, 42 U.S.C. § 12133, and to issue regulations implementing the statute, 42 U.S.C. § 12134. The United States thus has a strong interest in the resolution of this matter.

This lawsuit alleges that the State of Louisiana's reduction of the maximum number of weekly available hours of service in its Long-Term Personal Care Services ("LT-PCS") program will place individuals with disabilities who receive these community-based services at risk of institutionalization in violation of the ADA. (Compl. ¶¶ 1-5, 38, 103-07.) *See* 36 La. Reg. 1752 (Aug. 2010) (announcing reduction in maximum number of weekly LT-PCS services from 42 to 32 hours per week.) Plaintiffs propose to bring this suit on behalf of a class defined as current

[1] 28 U.S.C. § 517 permits the Attorney General to send any officer of the Department of Justice "to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

and prospective Medicaid-eligible Louisiana residents receiving LT-PCS services, "who desire to live in the community instead of in a nursing facility[,] who can reside in the community with appropriate Medicaid-funded LT-PCS services[,] and who are at risk of being forced to enter a nursing home" because of Defendants' reduction of available LT-PCS services. (Compl. ¶ 97.)

Each of the four named plaintiffs and putative class member Cleo Lancaster (collectively, "Plaintiffs") currently live in their own homes in the community and have been able to do so because Defendants provide reimbursement for Plaintiffs' personal care services through the State's LT-PCS program. (*Id*. ¶ 3.) The LT-PCS program provides hourly reimbursement for medically necessary assistance to each of the Plaintiffs, including eating, bathing, toileting, transferring, preparing meals, managing medication, and arranging for transportation and medical appointments. (*Id*. ¶ 31.) Defendants' reduction of the maximum number of weekly hours of service available to individuals in the LT-PCS program offers no appeals process to individuals who require greater than 32 hours of service to remain in the community. 36 La. Reg. 1752 (Aug. 2010). Plaintiffs allege this reduction presents a grave threat to their ability to remain safely in their homes and in the community – placing them and others in the putative class at risk of deteriorating health conditions, repeated hospitalizations and emergency room visits, and, ultimately, entry into a segregated, institutional setting. (Compl. ¶¶ 1-5, 38-39, 103-107.) Plaintiffs request that the State reasonably modify the LT-PCS program to permit Plaintiffs and members of the proposed class to retain their present level of hours, or to allow new enrollees to exceed the 32-hour cap (up to 42 hours) to the extent that level of service is necessary to enable them to live in the community settings. (*Id.* ¶ 105; Pls.' Mem. in Opp. to Defs.' Mot. for Sum. J. ("Pls.' Mem.") at 31-32.) Defendants refuse to make the reasonable

modifications requested by the Plaintiffs, asserting that the reduction is necessary in light of budgetary shortfalls. (Defs.' Mem. in Supp. of Defs' Mot. to Dismiss ("Defs.' Mem.") at 2.)

Plaintiffs commenced this lawsuit on September 22, 2010, to prevent Defendants from reducing LT-PCS services as to named plaintiffs and putative class members, each of whom they allege will be placed at risk of institutionalization due to the reduction in services. (Compl. ¶¶ 37-39, 96-102.) Defendants filed a Motion to Dismiss on October 21, 2010. On December 3, 2010, this Court converted that motion into a Motion for Summary Judgment, pursuant to Federal Rule of Civil Procedure 12(d). Plaintiffs responded to the Defendants' converted Motion for Summary Judgment on March 14, 2011. Defendants filed their Reply on March 30, 2011.

The United States respectfully urges this Court to deny Defendants' converted Motion for Summary Judgment. Plaintiffs have presented ample disputed material facts supporting their ADA claim, including the potentially devastating effects of Defendants' reduction of available hours in the State's LT-PCS program and the inadequacy of Defendants' efforts to ensure long-term care is provided in the most integrated setting appropriate to the needs of individuals with disabilities. Moreover, Defendants' presentation of the law fundamentally mischaracterizes the State's obligations under title II of the ADA.

Statutory and Regulatory Background

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "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 social problem."

42 U.S.C. § 12101(a)(2). For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

As directed by Congress, the Attorney General issued regulations implementing title II, which are based on regulations issued under section 504 of the Rehabilitation Act.[2] *See* 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Executive Order 12250, 45 Fed. Reg. 72995 (1980), *reprinted in* 42 U.S.C. § 2000d-1. The title II regulations require 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 preamble discussion of the "integration regulation" explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . ." 28 C.F.R. Pt. 35, App. A (2010) (addressing § 35.130).

Twelve years ago, the Supreme Court applied these authorities and held that title II prohibits the unjustified segregation of individuals with disabilities. *Olmstead*, 527 U.S. at 596. There, the Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others

[2] Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."). Claims under the ADA and the Rehabilitation Act are treated identically unless one of the differences in the two statutes is pertinent to a claim. *Kemp v. Holder*, 610 F.3d 231, 234-35 (5th Cir. 2010); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

who are receiving disability services from the entity. *Id.* at 607. The Court explained that this holding "reflects two evident judgments." *Id*. at 600. "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." *Id*. "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." *Id*. at 601.

To comply with the ADA's integration requirement, a state must reasonably modify its policies, procedures or practices when necessary to avoid discrimination. 28 C.F.R. § 35.130(b)(7). The obligation to make reasonable modifications may be excused only where a state demonstrates that the requested modifications would "fundamentally alter" the programs or services at issue. *Id.*; *see also Olmstead*, 527 U.S. at 604-07.

SUMMARY OF FACTS

A. Louisiana's Long-Term Care System

The Medicaid program is a medical assistance program cooperatively funded by the federal and state governments. *See Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985); 42 U.S.C. § 1396 *et seq*.. The Louisiana Department of Health and Hospitals ("DHH") is the "single state agency" that administers Louisiana's Medicaid program. (Defs.' Mem. at 3); s*ee also* 42 U.S.C. § 1396a(a)(5). The Office of Aging and Adult Services ("OAAS"), which is within DHH, directs the management and administration of services for long-term care of the elderly and persons with adult onset disabilities in Louisiana. (Ex. 1 to Defs' Mem., Declaration of Hugh R. Eley ("Eley Decl.") ¶ 1). These services include those provided in public and private nursing facilities and several programs providing home and community-based services

("HCBS"), which allow recipients to remain integrated in the community and receive services at home. (*Id*. ¶¶ 1, 7-13.)

In fiscal year 2009, Louisiana spent nearly $717 million on reimbursement for care provided in private nursing facilities, serving a population of 30,137 individuals. (Ex. 1 to Pls.' Mem., Transcript of Deposition of Hugh Eley ("Eley Dep."), p. 216, ll. 12-15; Doc. Pitts_0001188, attached to Pls.' Mem. at DKT 38-5 ("Pitts_0001188"), pp. 179-180.) By contrast, in fiscal year 2009, the State spent approximately $313 million on its various HCBS programs, serving a population of 14,798 individuals. (Pitts_0001188.) OAAS administers four primary HCBS programs: the LT-PCS program, two "waivers" authorized by the federal Centers for Medicare and Medicaid Services ("CMS"),[3] and the Program for All Inclusive Care for the Elderly ("PACE") . (Eley Decl. ¶ 7.)[4]

While Louisiana serves fewer than 6,000 individuals through its two waiver programs[5] and the PACE program,[6] Louisiana's LT-PCS program provided home and community-based

[3] The waiver authority permits the Secretary of Health and Human Services, or her designee, to waive certain requirements of the Medicaid Act in order for the state to offer home and community-based services. *See* 42 U.S.C. § 1396n(c)(3); 42 U.S.C. §1396n(d)(3).

[4] Defendants note in their brief that Louisiana participates in the federal "Money Follows the Person" demonstration program. (Defs.' Mem. at 8.) The Money Follows the Person program provides enhanced federal financial participation to assist states in transitioning currently institutionalized individuals into the community. *See* Pub. L. 109-171, Title VI, § 6071, Feb. 8, 2006, 120 Stat. 102. To be eligible to participate in the program, an individual must reside in a nursing facility for at least 90 days. *See* Pub.L. 111-148, Title II, § 2403(a), (b)(1), Mar. 23, 2010, 124 Stat. 304. The program does not provide any additional "slots" in the Defendants' HCBS programs.

[5] Louisiana's Elderly and Disabled Adults ("EDA") waiver program has been approved by CMS to offer 4,603 "slots." (Eley Decl. ¶ 18). The Adult Day Health Care ("ADHC") waiver program, which provides at least five hours of care per day for one or more days per week in an adult day care center, is also capped at 825 "slots" and is available only to individuals within a geographically limited area surrounding each center. (*Id*. ¶¶ 22, 25.) Because each of the slots in these waivers is currently occupied, the state operates a "Request for Services Registry," which is a waiting list for services for each of the waiver programs. (*Id*. 18, 25.)

[6] The PACE program operates out of two State-run centers in New Orleans and Baton Rouge. (Eley Decl. ¶27.) Services from each PACE center are only available to individuals over the age of 55 who live within a geographically-limited area surrounding the center and who require a nursing facility level of care. (*Id*.) The program is also space-limited, serving a maximum of 380 individuals. (*Id.*) None of the named plaintiffs is eligible

services to more than 12,000 individuals in fiscal year 2009-10. (Eley Decl. ¶ 35.) The LT-PCS program provides reimbursement for medically necessary assistance with activities of daily living ("ADLs"), including eating, bathing, dressing, grooming, transferring, ambulation and toileting. (*Id*. ¶ 31.) Services also include assistance with instrumental activities of daily living ("IADLs"), such as housekeeping, food preparation and storage, shopping, laundry, scheduling medical appointments, accessing transportation, and medication reminders. (*Id.*) To be eligible for services in the LT-PCS program, an applicant must meet the program's criteria for medical necessity, which, for individuals not currently in a nursing facility, include (1) meeting the medical standards for admission to a nursing facility, and (2) being assessed as at risk of nursing facility placement. (*Id*. ¶ 32.) Because LT-PCS is a service provided through the State's Medicaid State Plan for Medical Assistance, rather than through a waiver, there is no limit on how many eligible individuals may receive LT-PCS, and there is therefore no waiting list for LT-PCS services. (*Id*. ¶ 33.)

At its inception in 2004, the LT-PCS program provided up to 56 hours of personal care hours per week. (Eley Decl. ¶ 36.) In March 2009, pursuant to a modification of the *Barthelemy* settlement agreement,[7] and to bring the State's EDA waiver program into compliance with federal law requiring cost-neutrality of waiver programs, Defendants reduced the maximum number of hours of LT-PCS services to 42 hours per week. (Eley Dep., p. 66, l. 9 – p.67, l. 17); *see also* 35 La. Reg. 32-34 (Jan. 2009). In September 2010, Defendants announced another reduction in the number of maximum available weekly LT-PCS hours from 42 to 32. 36 La.

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for this program, either due to their age or because they do not reside within the geographic area served by either of the centers. (*See* Pls.' Mem. at 16-17).

[7] OAAS developed each of its current HCBS programs in part to comply with the requirements of a 2001 settlement agreement in the lawsuit *Barthelemy v. Hood*, No. 00-1083 (E.D. La.). (*See* Eley Decl. ¶ 13; Ex. 14 to Pls.' Mem., *Barthelemy* Settlement Agreement, at 9-12, 16-17.)

Reg. 1752 (Aug. 2010.) The new cap on the number of available hours will take effect when each recipient receives his or her annual reassessment, in which the number of weekly hours of service is determined.[8] (Eley Decl. ¶ 37.) There are no exceptions to Defendants' 32-hour cap on LT-PCS hours for individuals who require additional hours to prevent their institutionalization. (Eley Decl. ¶39.) According to the Defendants, approximately 28% of the individuals receiving services in the LT-PCS program (all people currently receiving over 32 hours) will be affected by the new cap on weekly hours. (*Id*. ¶ 37.) Defendants admit that LT-PCS services are less costly than nursing facility services. (Exhibit 16 to Pls.' Mem., Letter from Caroline Brown dated March 4, 2011, at p. 2, ¶4.) Defendants believe that the cut in the maximum available hours will save the State approximately 1.6% in its overall budget for HCBS services. (Eley Decl. ¶ 41.)

B. Plaintiffs Reside in the Community and Depend Upon Personal Care Services for Their Essential Needs

The named Plaintiffs, Helen Pitts, Kenneth Roman, Denise Hodges, and Rickii Ainey, and proposed class member Cleo Lancaster, are qualified individuals with disabilities who are eligible for and receive services through Defendants' Medicaid program. (*See* Ex. 3 to Pls.' Mem., Declaration of Helen Pitts ("Pitts Decl.") ¶ 13; Ex. 4 to Pls.' Mem., Declaration of Kenneth Roman ("Roman Decl.") ¶ 7; Ex. 5 to Pls' Mem., Declaration of Denise Hodges ("Hodges Decl.") ¶ 8; Ex. 6 to Pls.' Mem., Declaration of Rickii Ainey ("Ainey Decl.") ¶ 19; Ex. 7 to Pls.' Mem, Declaration of Cleo Lancaster ("Lancaster Decl.") ¶ 12.) Each currently receives services through Defendants' LT-PCS program and, because of their participation in this program, is able to reside in their own home in the community. (Pitts Decl. ¶¶ 22-23; Roman

[8] Only Plaintiff Rickii Ainey's and putative class member Cleo Lancaster's reassessment dates have been reached. (Pls.' Mem. at 4, n. 11.) The parties have reached a temporary agreement maintaining their services at prior levels, rather than requiring plaintiffs to seek preliminary relief from this Court. (*Id*.)

Decl. ¶¶ 19-20; Hodges Decl. ¶¶ 9, 16; Ainey Decl. ¶¶ 28-29; Lancaster Decl. ¶¶ 13, 16.) Each has been individually assessed by Defendants to require the level of care available in a nursing facility and to receive a certain number of LT-PCS hours to prevent them from entering into a nursing facility. (Pitts Decl. ¶ 15; Roman Decl. ¶¶ 19-20; Hodges Decl. ¶¶ 15-16; Ainey Decl. ¶¶ 27-28; Lancaster Decl. ¶ 13.) Each currently receives at least 39 hours of services per week in the LT-PCS program, and if Defendants' reduction of the maximum number of available LT-PCS hours is put into effect, will no longer be eligible to receive their current levels of services.[9] (Pitts Decl. ¶ 22; Roman Decl. ¶ 20; Hodges Decl. ¶ 16; Ainey Decl. ¶ 28; Lancaster Decl. ¶ 13.)

ARGUMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A genuine issue of material fact exists if a reasonable jury could return a judgment for the non-moving party based on the evidence. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 325; *see also Norman v. Apache Corp.,* 19 F.3d 1017, 1023 (5th Cir. 1994). If the moving party fails to meet this burden, the motion for summary judgment must be denied, "regardless of the nonmovant's response." *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010) (citing *Quorum Health Res., L.L.C. v. Maverick County Hosp. Dist*., 308 F.3d 451, 471 (5th Cir. 2002). In evaluating a

[9] Since the filing of this lawsuit, Plaintiffs Helen Pitts and Denise Hodges, and proposed class member Cleo Lancaster, have been offered and accepted slots in Defendants' EDA Waiver program, for which they have been on the waiting for over three years. (*See* Pls.' Mem. at 5, n.16, 28, n. 148.) As of March 14, 2011, they had not started receiving services under the EDA waiver and were each still receiving services under Louisiana's LT-PCS program. (*Id.*)

motion for summary judgment, the court "construe[s] all facts and inferences in the light most favorable to the nonmoving party." *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2005) (*quoting Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005)).

Defendants have failed to establish that they are entitled to judgment as a matter of law. As discussed below, Plaintiffs have presented ample evidence of disputed issues of material fact as to whether Defendants' reduction in available LT-PCS services will place them and others similarly situated at risk of institutionalization. Defendants have not demonstrated as a matter of law that Plaintiffs' requested modification would fundamentally alter Defendants' long-term care programs or Defendants' purported plan for deinstitutionalizing individuals with disabilities. Lastly, Plaintiffs have a private right of action to enforce title II of the ADA, as interpreted by the integration regulation. The integration regulation is a valid and authoritative interpretation of title II of the ADA.

A. Disputed Issues of Material Fact Exist Regarding Whether Defendants' Reduction in Available LT-PCS Hours Will Place Plaintiffs and Members of the Proposed Plaintiff Class at Risk of Institutionalization in Violation of the ADA

1. *Policies that place individuals with disabilities at risk of institutionalization violate the ADA*

Defendants argue that Plaintiffs' allegations that the alterations to the LT-PCS program will place them at risk of institutionalization "are not equivalent to allegations of systemic 'unjustified isolation' under *Olmstead*." (Defs.' Mem. at 20; Defs.' Reply at 12-16.) But, as numerous courts have recognized, policies that place individuals with disabilities at risk of institutionalization are discriminatory under the ADA.[10]

[10] Defendants' assertion that Plaintiffs have not stated a claim for relief under the ADA or Rehabilitation Act because the ADA does not "require states to provide a certain level of benefits to individuals with disabilities" is equally without merit. (Defs.' Mem. at 16.) While the ADA does not mandate what specific services a state must offer, it does require states to refrain from adopting policies or engaging in practices that discriminate, including

In *Fisher*, for example, the State of Oklahoma adopted a policy of providing unlimited coverage of medically necessary prescription drugs to individuals in institutions, but only limited coverage for individuals receiving services in community-based waiver programs. 335 F.3d at 1177. Plaintiffs argued that, because of the policy change, many of the plaintiffs would be placed at risk of institutionalization, remaining in their homes only "until their health ha[d] deteriorated" and "eventually end[ing] up in a nursing home." 335 F.3d at 1185. The Tenth Circuit agreed, reversed the district court's award of summary judgment to the state, and noted that "nothing in the Olmstead decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements." *Id*. at 1181. The court remarked that "*Olmstead* does not imply that disabled persons who, by reason of a change in state policy, stand imperiled with segregation, may not bring a challenge to the state policy under the ADA's integration mandate without first submitting to institutionalization." *Id.* at 1182. Similarly, in *Brantley v. Maxwell-Jolly*, the court concluded that "the *risk* of institutionalization is sufficient[,]" to state a claim for violation of the integration mandate and granted the plaintiffs' motion for preliminary injunction. 656 F. Supp. 2d 1161, 1170 (N.D. Cal. 2009). (quotation marks omitted).[11]

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those that will render individuals at risk of institutionalization. *See Radaszewski v. Maram*, 383 F.3d 599, 614-15 (7th Cir. 2004); *Fisher v. Oklahoma*, 335 F.3d 1175, 1181 (10th Cir. 2003).

[11] *See, e.g., Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 985 (N.D. Cal. 2010) *appeal docketed,* No. 10-15635 (9th Cir. Mar. 24, 2010) and *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1109 (N.D. Cal. 2009), *appeal docketed* No. 09-17581 (9th Cir. Nov. 18, 2009) (granting preliminary injunctions to plaintiffs facing risk of institutionalization because of reductions in various community-based services); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1309 (D. Utah 2003) (holding that the "integration mandates of the ADA and § 504 apply equally to those individuals already institutionalized and those at risk of institutionalization"); *Makin v. Hawaii*, 114 F. Supp. 2d 1017, 1034 (D. Haw. 1999) (individuals on waiting list for community-based services offered could challenge state's administration of the program as violating title II's integration mandate because it "could potentially force Plaintiffs into institutions"); *Ball v. Rogers*, No. CV 00-67, 2009 WL 1395423, at *5 (D. Ariz. Apr. 24, 2009) (holding state liable under the ADA for failure to provide adequate services to avoid unnecessary institutionalization); *Crabtree v. Goetz*, No. 3:08-0939, 2008 WL 5330506, at *30 (M.D. Tenn. Dec. 19, 2008) ("Plaintiffs have demonstrated a strong likelihood of success on the merits of their [ADA] claims that the Defendants' drastic cuts of their home health care services will force their institutionalization in nursing homes.").

Defendants suggest that LT-PCS recipients who are unable to remain in the community due to Defendants' reduction in LT-PCS services can enter a nursing facility and, after 90 days, will be placed in a "priority" status to expedite receipt of services through the EDA waiver program. (*See* Defs.' Reply at 19-21.) They thus dispute that "temporary institutional placements" are discriminatory. (*Id.*; Defs.' Mem. at 20.) But even policies that risk temporary institutionalization are discriminatory under the ADA. *See, e.g., Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010) (granting preliminary injunction where evidence demonstrated that plaintiffs would suffer regressive consequences if "even temporarily" returning to an institutional setting); *Cruz v. Dudek*, No. 10-23048, 2010 WL 4284955, at *3-7 (S.D. Fla. Oct 12, 2010) (granting preliminary injunction where state's denial of community-based services placed plaintiffs at risk of institutionalization and state had proposed entry into nursing home for sixty days prior to providing community-based services) (Order adopting Magistrate's Report and Recommendation, Nov. 24, 2010, attached as Exhibit A); *Haddad v. Arnold*, No. 3:10-00414 (M.D. Fla. July 9, 2010) (granting preliminary injunction after finding that the plaintiff would suffer irreparable injury if forced to enter a nursing home) (Attached as Exhibit B). Just as long-term isolation and segregation in an institutional setting deprives an individual of his or her freedom to interact with others in the community, temporary unjustified institutionalization similarly disrupts the individual's established life in the community, placing at risk the individual's psychological, emotional, and physical wellbeing.

Thus, the ADA requires a state to reasonably modify policies to avoid placing individuals with disabilities at risk of even temporary institutionalization.

2. *Plaintiffs have submitted evidence of key issues of disputed material fact as to whether Defendants' reduction in available LT-PCS hours will place Plaintiffs and others similarly situated at risk of institutionalization*

Defendants' alteration to the LT-PCS program lowers the maximum number of weekly available hours from 42 to 32. 36 La. Reg. 1752 (Aug. 2010). Plaintiffs each currently receive 39 or more hours of LT-PCS services per week and therefore their services will be reduced upon their yearly reassessment. (Pitts Decl. ¶ 15, 22; Roman Decl. ¶¶ 19-20; Hodges Decl. ¶¶ 15-16; Ainey Decl. ¶¶ 27-28; Lancaster Decl. ¶ 13.) Because of their disabilities, Plaintiffs rely on these services for medically necessary assistance with activities such as eating, bathing, grooming, toileting, transferring to and from bed, and cleaning after incontinence episodes. (*See* Pitts Decl. ¶¶ 24, 28; Roman Decl. ¶¶ 15, 18; Ex. 10 to Pls.' Mem., Oct. 18, 2010 Letter from Alireza Minagar, M.D., ("Minagar Letter") at 1; Ainey Decl. ¶ 5; Lancaster Decl. ¶¶ 17, 20.)

Plaintiffs have submitted substantial evidence demonstrating disputed issues of material fact regarding the effect of Defendants' reduction in LT-PCS services. Each of the Plaintiffs' treating physicians asserts that decreasing the availability of weekly personal care hours would place Plaintiffs at risk of deteriorating health conditions, increasingly frequent hospital and emergency room visits, and ultimately, institutional care. (*See* Ward Decl. ¶¶ 9, 11-15; Whitney Decl. ¶¶ 8, 11, 13; Minagar letter at 2; Ancira Decl. ¶¶ 9-10; Lafleur Decl. ¶¶ 15, 17.) The declaration of Mitchell LaPlante, PhD, a nationally-recognized expert in personal assistance needs of persons with disabilities, supports the assessments of Plaintiffs' treating physicians. (*See* Ex. 24 to Pls.' Mem, Declaration of Mitchell LaPlante, PhD ("LaPlante Decl.") ¶¶ 1-7.) Dr. LaPlante attests that going without adequate levels of assistance compromises the safety, comfort, and hygiene of persons requiring help with ADLs and IADLs, which "reduc[es] their

ability to live independently and increas[es] their risk of institutionalization and death." (LaPlante Decl. ¶ 9-10.) Based on his review of Louisiana's reduction of the available maximum number of hours in its LT-PCS program, he opines that the reduction is "of sufficient magnitude that it is likely to create unmet needs," which will "increase institutionalization and other health care costs, including hospitalization costs, resulting from treating these unmet needs." (*Id*. ¶ 23.)

Plaintiffs have thus submitted substantial evidence of disputed facts as to whether Defendants' reduction in available LT-PCS services, which is without any exceptions process, threatens to place Plaintiffs and others similarly situated at risk of institutionalization. Defendants do not squarely dispute that Plaintiffs will be placed at risk, but rather strain logic to assert that, because a previous reduction in available hours from 56 to 42 hours per week did not lead to an overall increased rate of entry into nursing facilities, there is no reason to believe that the instant reduction will place those individuals whose services are reduced at risk of institutionalization. (*See* Defs.' Mem. at 8-9; Eley Decl. ¶ 40; Defs.' Reply at 10-11.) Unlike in the first service reduction, in which only 941 individuals were affected, the instant reduction allegedly will affect over 4,000 individuals. (Eley Decl. ¶ 37.) Defendants assert that from September to December of last year, only 512 of the affected individuals have had their services reduced. (Defs.' Reply at 11.) Defendants assert that during the same period, the overall rate of institutionalization among LT-PCS recipients was 2%, but they decline to offer the rate of institutionalization for the 512 impacted individuals. (*See Id.*) As discussed above, Plaintiffs have submitted ample evidence, including the assessments of their treating physicians and declarations of experts who specialize in meeting personal assistance needs of individuals with disabilities, suggesting that many individuals subject to the instant reductions in LT-PCS

services will be placed at risk of institutionalization. There thus remain issues of material fact in dispute as to the potential impact of Defendants' reduction in LT-PCS services.

3. *Disputed issues of fact exist as to Defendants' efforts to make available alternative services to prevent Plaintiffs from being placed at risk of institutionalization after Defendants' reduction in LT-PCS services takes effect*

Defendants suggest that alternative, "more appropriate" services are available if LT-PCS services are inadequate to meet the Plaintiffs' needs. (*See* Defs.' Mem. at 21; Eley Decl. ¶ 35). The Plaintiffs have submitted evidence disputing the assertion that services will, in fact, be available for each of the Plaintiffs and proposed class members to prevent them from being institutionalized. For example, among Defendants' other HCBS programs, each has a set cap on the number of enrolled individuals and a substantial waiting list. *See supra* at 6, n. 6. The EDA waiver program has identified "priority" groups for whom services may be made available on an expedited basis, but priority status is limited to individuals who are victims of abuse and neglect and those who enter a nursing facility and remain there for at least 90 days. (*Id*.) *see also* 36 La. Reg. at 2218 (establishing 90-day length-of-stay requirement to meet "priority" criteria for EDA waiver program). As of January 2011, for individuals who do not meet the State's criteria for these priority groups, the waiting period to become enrolled in the EDA waiver program was over three years. (*See* Eley Dep., p. 78, ll. 7-19.) Should Plaintiffs wish to avail themselves of "priority" status, they would have to enter a nursing facility and remain there for, at a minimum, 90 consecutive days. (*See id.* p. 78, l. 7 – p. 79, l. 5.) As noted above, courts have considered the risk of even temporary institutionalization to be discriminatory under the ADA. *See Marlo M.*, 679 F. Supp. 2d at 638; *Cruz*, No. 10-23048, 2010 WL 4284955, at *3-7; *Haddad*, No. 3:10-00414 (M.D. Fla. July 9, 2010). Moreover, Defendants' ADHC waiver program and the PACE program, in addition to being capped in size, limit enrollment to individuals within a geographic

area served by the programs.[12] (Eley Decl. ¶¶ 22, 25, 27.) Defendants have established no safeguards or put plans in place to transition individuals to other programs to ensure that the reductions at issue here do not place individuals at risk of institutionalization. (*See* Defs.' Mem. at 21.) And the Defendants have announced no plans to increase the size of these programs as the reductions at issue take effect.[13]

In *Brantley,* a court rejected vague assurances, similar to those of the Defendant here, made in rebuttal to the plaintiffs' evidence that a reduction in adult day services would place individuals at risk of institutionalization:

> [T]he Court is persuaded by Plaintiffs' concern that Defendants have failed to implement any means of ensuring that, if and when the cuts take effect, the necessary alternative services will be identified and in place . . . .
> . . .
> [Defendants] have taken an arguably cavalier approach to ensuring their continuing compliance with the ADA . . . . Defendants refuse to specify how they will ensure their continuing compliance with the ADA . . . in the event that the ADHC programs fail to comply with their "expectation" to secure alternative services for their participants. . . . Defendants certainly bear the burden of ensuring more than a "theoretical" availability of services.

656 F. Supp. 2d at 1174; *see also Ball v. Rodgers*, No. 00-cv-67, 2009 WL 1395423, at *5 (D. Ariz. Apr. 24, 2009) (holding that defendants violated title II's integration mandate by "fail[ing]

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[12] Defendants argue that all but one of the Plaintiffs are eligible for and reside within the service area covered by the ADHC waiver program. (*See* Defs.' Reply at 17-18.) Even assuming these individuals would be able to avail themselves of Defendants' ADHC services before being institutionalized, the remaining Plaintiff, Kenneth Roman, and presumably numerous class members, reside outside the geographic area served by ADHC-centers. The availability of the ADHC waiver program or other alternative services are disputed facts material to whether Plaintiffs are being placed at risk of institutionalization, thus this issue is inappropriate for disposition at the summary judgment stage.

[13] Defendants point to two proposed, but not yet approved, waiver programs. (Defs.' Mem. at 10-11.) One proposed waiver is designed to entirely supplant the existing EDA waiver and will offer several additional services, but will not add any slots to provide services to additional individuals. (Eley Dep., p. 117, ll. 4-16.) The other program, the proposed Adult Residential Care waiver, will add 200 slots of HCBS services to the State's system, but it has not yet been approved by CMS. (Eley Dep., p. 92, ll. 1-3.) Pursuant to Defendants' regulations, the ARC waiver program will provide reimbursement for 24-hour supervision in a DHHS-licensed facility. *See* 50 La. Admin. Code §§ 30101-30907. Participants in the ARC waiver program will not be able to remain in their own homes, as participants of the LT-PCS program are able to do. *Id.* The extent to which either of these programs may alleviate the Plaintiffs' alleged risk of institutionalization is thus a disputed issue of fact and improper for disposition at the summary judgment stage.

to provide adequate services to avoid unnecessary gaps in service and [because the] institutionalization was discriminatory"); *Fisher,* 335 F.3d at 1181-84; *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 364 F.3d 487, 500 (3d Cir. 2004) ("[The State] must be prepared to make a commitment to action in a manner for which it can be held accountable by the courts.").

B. Defendants Have Not Established that the Plaintiffs' Requested Modification is a Fundamental Alteration of their Programs

Defendants have the burden of proving that Plaintiffs' requested reasonable modifications would constitute a fundamental alteration of the State's services. *Olmstead,* 527 U.S. at 603-04. Plaintiffs' requested modification to Defendants' LT-PCS program is simple: that each of the Plaintiffs and members of the proposed Plaintiff class retain their existing level of service in the LT-PCS program, and to allow new enrollees to exceed the 32-hour cap (up to 42 hours), to the extent that the receipt of that level of service is necessary to prevent their institutionalization.[14] (*See* Pls.' Mem. at 31.)

As their primary fundamental alteration defense, Defendants assert that they *entirely avoid* the ADA's obligation to reasonably modify the State's programs to avoid discrimination because they allegedly have a comprehensive, effectively working plan to address unnecessary institutionalization. (*See* Defs.' Mem. at 2; 17-18.) In support of their argument, Defendants point to home and community-based programs that the State offers other than the LT-PCS program. (*See* Defs.' Mem. at 2; 17-18.) The existence of these other programs, they incorrectly contend, permits them to adopt policies that will place Plaintiffs at risk of institutionalization.

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[14] Defendants selectively quote Plaintiffs to assert that Plaintiffs "have not consistently articulated" the modification they seek. (*See* Defs.' Reply at 22-23.) Their request, however, is merely to ensure that, subject to the prior maximum of 42 hours per week, current and prospective recipients of LT-PCS services are able to receive the lelvel of service necessary to remain in the community. (Pls.' Mem. at 31.) Defendants misread Plaintiffs' class definition when they suggest that Plaintiffs' requested modification would allow the cap to be applied, without an exceptions process, to new enrollees. (*See* Compl. ¶ 97 (defining proposed class as "current and prospective recipients of Medicaid-funded services through the LT-PCS program… who are at risk of being forced to enter a nursing home because Defendants plan to reduce the level of community-based services.").)

(*Id*. at 17-18, 20.) This is both a fundamental misreading of the obligations imposed by the ADA and a mischaracterization of the fundamental alteration defense.

The Court in *Olmstead* suggested that where a state has clearly demonstrated that it has in place a "comprehensive, effectively working plan for placing qualified persons with . . . disabilities in less restrictive settings, and a wait list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated" a federal court may have no basis to order displacement of institutionalized persons at the top of a state's waiting list for community-based services. *Id.* at 605-06; *see also Frederick L. v. Department of Public Welfare of Pa. ("Frederick L. II.")*, 422 F.3d 151, 157-59 (3d Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051, 1063 (9th Cir. 2005); *ARC of Washington*, 427 F.3d at 619.[15]

The logic underpinning the comprehensive, effectively working plan defense is clear: a federal court should not force a state to immediately expand services, or to permit individuals to receive priority in deinstitutionalization or the receipt of community-based services because those individuals "commenced civil actions," *Olmstead*, 527 U.S. at 604, when, in light of its obligations to all disabled individuals, the State can establish that it has a comprehensive, effectively working plan to address its unnecessary reliance on institutional care. However, that logic fails where, as here, a State seeks to reduce or eliminate services already in existence, and upon which Plaintiffs depend to prevent their institutionalization. Indeed, it is difficult to

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[15] Courts have strictly interpreted the requirement that a state demonstrate it has in place a comprehensive, effectively working plan in offering an alleged fundamental alteration defense. *See, e.g., Pennsylvania Prot. & Advocacy, Inc. v. Dep't of Pub. Welfare*, 402 F.3d 374, 381 (3d Cir. 2005) (requiring the state to demonstrate the existence of a plan before it may even raise a fundamental alteration defense); *Frederick L. II*, 422 F.3d at 157-59 (vacating district court ruling in favor of state defendants where fundamental alteration defense was premised on "vague assurance of future deinstitutionalization" rather than a meaningful commitment with measurable goals for community integration); *Disability Advocates, Inc. v. Paterson,* 653 F. Supp. 2d 184, 271 (E.D.N.Y. 2009) (rejecting state's fundamental alteration defense where it does not "have a comprehensive or effective plan to enable [segregated] residents to receive services in more integrated settings, but instead was committed to maintaining the status quo) *appeal docketed*, No. 10-235-cv (L) (2d Cir. Jan. 20, 2010).

imagine any scenario where placing individuals at risk of institutionalization by reducing their services could properly be considered part of a state's comprehensive, effectively working *Olmstead* plan. If anything, the State undermines its own purported *Olmstead* plan by reducing the very services that maintain the Plaintiffs in the community.

The only Circuit Courts of Appeals that have addressed the issue of what constitutes a comprehensive, effectively working plan have done so in the context of requests to expand existing services for the purpose of either preventing plaintiffs' institutionalization or expediting their transition out of a facility (as was the case of the *Olmstead* plaintiffs). *See, e.g., Sanchez v. Johnson*, 416 F.3d 1051, 1063 (9th Cir. 2005) (request to enhance reimbursement rates to community-based providers); *ARC of Washington*, 427 F.3d at 619 (request for expansion of existing HCBS waiver); *Frederick L. II.*, 422 F.3d 151, (requested expansion of services to expedite deinstitutionalization). By contrast, Plaintiffs here do not seek to expand the number of HCBS programs that the State offers, or the number of slots in these programs. Rather, in the face of Defendants' plan to drastically reduce the scope of one of the State's core HCBS services, Plaintiffs seek only to ensure that the State does not alter its LT-PCS program in a manner that places them at risk of institutionalization.

Even if this Court were to hold that a fundamental alteration defense based upon a comprehensive, effectively working plan is a defense that can be properly raised in this case, the Plaintiffs have put forward substantial evidence disputing Defendants' assertion that the State's alleged plan for deinstitutionalization is actually "comprehensive" and "effectively working" and have raised a number of factual issues that contest Defendants' asserted fundamental alteration defense. (*See* Pls.' Mem. at 34-37; Pls.' Mem. at 38; Pls.' Separate Statement of Disputed Issues

of Fact ¶¶ 5-7.) Accordingly, these issues are inappropriate for disposition at the summary judgment stage.

C. Because the Integration Regulation Reasonably Interprets Title II of the ADA, It Is Enforceable Through Private Right of Action to Enforce the Statute

Defendants argue that Plaintiffs have no right of action to enforce the integration mandate because that mandate is codified in regulations implementing title II of the ADA. (*See* Defs.' Repl. Br. at 34-35.)[16] This argument misunderstands the nature of regulations such as those implementing title II. The Supreme Court in *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001), held that regulations that implement a statutory prohibition are "covered by the cause of action to enforce that [statutory] section."[17] As the Court explained:

> Such regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.

532 U.S. at 284 (citations omitted); *see also S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 607 (5th Cir. 2004); *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 905-913 (6th Cir. 2004). Thus, if the regulations implementing title II – including the integration mandate – are valid and reasonable, they are enforceable to the same extent as the statute itself.

As outlined above, pp. 3-5, Congress directed the Attorney General to issue regulations implementing title II, 42 U.S.C. § 12134; consistent with the goals of eliminating the forms of discrimination identified by Congress, the Attorney General has done so. *See* 28 C.F.R. Part 35.

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[16] Defendants have not challenged the enforceability of title II itself; it is well established that title II is enforceable through a private right of action. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

[17] The holding in *Sandoval* was that the disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* may not be enforced through the private right of action to enforce the statute, because those regulations did not apply the statute's ban on intentional discrimination. 532 U.S. at 284-85. That conclusion does not apply to title II's integration regulation because that regulation directly applies the statute's ban on discrimination, for the reasons expressed in the text of this brief.

The Supreme Court has held that where "Congress explicitly delegated authority to construe the statute by regulation," courts "must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, 834 (1984); *see also NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995). In *Olmstead*, the Supreme Court noted that, "[b]ecause the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect." 527 U.S. at 597-98 (internal citations omitted). The title II regulations, the Court acknowledged, "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id*. at 598.

On its face, the integration regulation, 28 C.F.R. §35.130(d), is a reasonable implementation of title II. It is clear from the text of the ADA that Congress intended its prohibition on disability-based discrimination to encompass a prohibition on the isolation and segregation of individuals with disabilities. In the "Findings" section of the statute, Congress defines the "forms of discrimination" it seeks to eliminate as including "isolat[ion]" and "segregation." 42 U.S.C. §§ 12101(a)(2), (a)(5). Indeed, the Supreme Court in *Olmstead* relied in part on these very findings, holding that prohibiting "unjustified isolation" is "properly regarded" as part of prohibiting "discrimination based on disability." 527 U.S. at 597, 600. Because the integration mandate directly implements Congress' prohibition on this type of discrimination, it is a valid construction of title II and may be enforced by a private right of action to enforce title II. *Helen L. v. DiDario*, 46 F.3d 325, 331-33 (3d Cir. 1995); *see also Arc of Washington*, 427 F.3d at 618 (finding that Title II's integration mandate "serves one of the principal purposes of Title II of the ADA: ending the isolation and segregation of disabled persons"); *Townsend v. Quasim*, 328 F.3d 511, 516 (9th Cir. 2003) ("The Department of

Justice's integration regulation implements the isolation and segregation concerns that, in part, underlie Title II.")

Thus, Plaintiffs have properly asserted a cause of action, relying on the ADA's broad prohibition of discrimination, authoritatively interpreted by the Attorney General's integration regulation, 28 U.S.C. § 35.130(d), and by the Supreme Court in *Olmstead*. 527 U.S. at 607. The discrimination contemplated by Congress in enacting title II, and recognized in *Olmstead*—unnecessarily relegating individuals with disabilities to segregated facilities—is *exactly* what Plaintiffs face if they are placed at risk of unnecessary institutionalization by Defendants' reduction in services in the LT-PCS program.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' converted Motion for Summary Judgment.

Dated: April 7, 2011

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