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 C. RIEDLINGER
BRUCE GREENSTEIN, et al.	)	
	)	
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

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[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

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[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]

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[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.

[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

UNITED STATES OF AMERICA, by

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-23048-CIV-UNGARO

LUIS CRUZ and NIGEL DE LA TORRE,

Plaintiffs,

v.

THOMAS ARNOLD *et al.*,

Defendants.
_______________________________/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATIONS

THIS CAUSE came before the Court upon Plaintiffs' Motion for Preliminary Injunction and Expedited Hearing (D.E. 2.)

THE MATTER was referred to the Honorable Andrea Simonton, United States Magistrate Judge (D.E. 14.) Magistrate Judge Simonton issued a Report and Recommendation on October 12, 2010, recommending that Plaintiffs' Motion be granted (D.E. 47.) Defendants filed objections to the Report and Recommendation on October 19, 2010 (D.E. 50.) Plaintiffs filed their response to Defendants' objections on October 26, 2010 (D.E. 52.) The matter is ripe for disposition.

THIS COURT has made a *de novo* review of the entire file and record herein and is otherwise fully advised in the premises.

By way of background, Plaintiffs Luis Cruz and Nigel De La Torre are Medicaid recipients with spinal cord injuries suffering from quadriplegia. Plaintiffs argue that Defendants' refusal to provide them home and community-based services (HCBS) is a violation of both the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*(ADA), and the Rehabilitation Act of

1973, 29 U.S.C. § 794a ("Section 504 "), and the ADA and Section 504's "integration mandate," which requires that "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). Plaintiffs seek declaratory and injunctive relief ordering Defendants to provide home and community-based Medicaid services that will allow Plaintiffs to continue to reside in their community rather than a nursing facility. Plaintiffs argue that they could live in the community with appropriate Medicaid-funded services, however, Defendants have denied them the HCBS services for which they are eligible under the Traumatic Brain Injury/Spinal Cord Injury waiver program (hereinafter "TBI/SCI Waiver Program").

In her exceedingly thoughtful and well-reasoned Report and Recommendations, Magistrate Judge Simonton recommended that Plaintiffs' Motion be granted such that Defendants are enjoined from denying them Medicaid HCBS under the Traumatic Brain Injury/Spinal Cord Injury Medicaid Waiver Program; and that no security bond be required pursuant to Rule 65(c).

The Magistrate Judge concluded the following: (1)Plaintiffs' ADA claims have a strong likelihood of success because Plaintiffs are at risk of institutionalization if they do not receive services available under the TBI/SCI Waiver Program; (2) Plaintiffs have established that they would suffer irreparable injury if institutionalized in a nursing home, such that they would be severed from the communities in which they live and participate, lose their independence, and lose their homes; (3) community-based care rather than institutionalized nursing home care; (4) there is a strong public interest in allowing Plaintiffs to remain in their homes, eliminating the discriminatory effects that arise from segregating persons with disabilities into institutions, and providing care at the least possible cost; (5) Defendants have not demonstrated that the requested

relief would fundamentally alter the Florida Medicaid Program , and the waiver program in particular, or affect the program's ability to provide for others with disabilities; (6) the Court should waive the requirement that Plaintiff post a bond, pursuant to Fed. R. Civ. P. 65(a).

Defendants object to her findings. First, Defendants object to the Magistrate Judge's use of *Olmstead v. Zimring* to support its analysis that Plaintiffs have a strong likelihood of success of their ADA claims. *See* 527 U.S.581 (1999). Defendants argue that the Supreme Court's analysis of the ADA in *Olmstead* was limited to mental disability. Second, Defendants object to the Magistrate Judge's finding that Plaintiffs would suffer irreparable injury, contending that Plaintiffs have not offered any evidence that they would lose their homes. Third, Defendants argue that the Magistrate Judge failed to take into account that it is against the public interest to "jump two recipients" to the top of the waiting list (*See* D.E. 50 at 12.)
Fourth, Defendants contend that the requested relief would fundamentally alter the Florida Medicaid Program because: (a) there are insufficient funds specifically allocated under the TBI/SCI waiver program to pay for Plaintiffs' participation, and Defendants are not permitted to access state Medicaid funds not allocated to the waiver program; and (b) Plaintiffs' participation in the waiver program would prevent individuals higher on the waiting list from accessing the program. Fifth, Defendants argue that the settlement under *Dubois, et al. v. Calamas & Francois* ("Dubois Settlement"), which resolved claims of a class defined as "all individuals with traumatic brain or spinal cord injuries who the state has already determined or will determine to be eligible to receive services from Florida's Medicaid Waiver Program for persons with traumatic brain and spinal injuries and have not yet received such services," precludes Plaintiff Cruz from obtaining injunctive relief. *See* 4:03-cv-001107-SPM-AK, at DE 212 (N.D. Fla. Jan.

4, 2007).

After carefully reviewing the parties' objections, the Court agrees that Plaintiffs' Motion for Preliminary Injunction should be granted. Plaintiffs have shown a clear likelihood of success on the merits. Plaintiffs are qualified persons with disabilities eligible to receive community-based services from the TBI/SCI waiver program. Without these services Plaintiffs are at risk of undue institutionalization prohibited by the ADA. *See Olmstead v. Zimring*, 527 U.S. 581 (1999); *see also Haddad v. Arnold*, Case No. 3:10-cv-414-J-99MMH-TEM, at DE 49 (M.D. Fla. Jul. 9, 2010); *Long v. Benson*, 2008 WL 4571903 (N.D. Fla. Oct. 14, 2008). Moreover, as Magistrate Simonton noted, Defendants have not demonstrated that they have a comprehensive working plan to address unnecessary institutionalization. *Olmstead*, 527 U.S. at 605-606.[1] In fact, it appears that to be eligible currently for the TBI/SCI waiver program, an individual has to first enter a nursing home for sixty days. This means that to receive the protections afforded to him under the ADA and *Olmstead*, an individual would have to be subjected to the very form of instutionalization that the Supreme Court in *Olmstead* held illegal under the ADA. Accordingly, not only have Defendants failed to demonstrate that they have a plan to address unnecessary institutionalization, but also they have brought to light the State's flagrant disregard for Supreme Court precedent and utter failure to comply with the ADA.

Plaintiffs have established that they would suffer irreparable psychological harm if placed

[1] The Court disagrees with Defendants' contention that the *Olmstead* analysis is limited only to individuals with mental disabilities. *Olmstead* applies broadly to those "qualified individuals with disabilities" under Title II of the ADA. *See Olmstead*, 527 U.S. at 600 (holding that "unjustified institutional isolation of *persons with disabilities*" is a form of discrimination proscribed by the ADA)(emphasis added); *see also Haddad* op at 30.

in a nursing home. *See Olmstead*, 527 U.S. at 600-01; *see also Long*, 2008 WL 4571903 at * 2. Plaintiffs have also established that they would suffer irreparable harm because they likely would lose their homes during the sixty-day period they would have to spend institutionalized. Defendants fixate on the possibility that Plaintiffs could keep their homes, yet present no evidence to support their hypothesis. Regardless of whether or not Plaintiffs could keep their homes, there is no doubt that institutionalization would cause them irreparable psychological harm, and Defendants have not argued to the contrary.

The harms that Plaintiffs would suffer if institutionalized outweighs any hardship the State would incur in providing them with HCBS. In fact, as Magistrate Judge Simonton's factual findings indicate, the State would incur less expense providing Plaintiffs home and community-based care than it would in institutionalizing them. Furthermore, there is a strong public interest in eliminating the discriminatory effects of institutionalization, as well as providing care at the lowest cost possible. *See Olmstead*, 527 U.S. at 599-01; *see also Long* 208 WL 4571903, at *3 . This public interest outweighs any public interest arguments against "jump[ing] two recipients" to which Defendants allude but fail to support with facts and case law.

Defendants have also failed to satisfy their burden of demonstrating that Plaintiffs' requested relief would constitute a fundamental alteration of the Florida Medicaid Program. First, Defendants' explanation of the TBI/SCI waiver program's budgetary mechanism is woefully inadequate, as are their arguments for how the budget cannot accommodate the inclusion of otherwise eligible Plaintiffs. Defendants' argument that they cannot fund HCBS using money from state Medicaid funds not specifically allocated to the TBI/SCI waiver program is misguided. *See Disability Advocates, Inc.v. Patterson*, 598 F.Supp.2d 350 (E.D.N.Y.

2009)(holding that the relevant budget for funding integration programs pursuant to ADA Title II included the state's Department of Health budget which included the Medicaid program). Moreover, as Magistrate Judge Simonton points out, arguments about budgetary constraints cannot relieve Defendants from compliance with the ADA. *See Pa. Prot. & Advocacy, Inc.v. Pa. Dep't of Public Welfare,* 402 F.3d 374, 381 (3d Cir. 2005); *see also Haddad* op.at 32-33.

Second, Defendants have not established that Plaintiffs' participation in the waiver program would prevent individuals higher on the waiting list from accessing the program. In light of the fact that it costs less to provide Plaintiffs with community-based services than it does to institutionalize them, Plaintiffs' participation would not reduce the availability of services for those individuals currently in the program, nor necessarily prevent those who are ahead on the waiting list from accessing the services. In fact, Defendants have not even filled all the slots available in the TBI/SCI program, and they concede that no one on the waiting list will be moved into the waiver program unless they submit to at least sixty days of institutionalization, a requirement that may be unlawful in light of *Olmstead*. Therefore, the likelihood of moving from the waiting list to the waiver program is actually more dependent on whether he submits to sixty days of institutionalized care and the State's eligibility determination thereafter, rather than on these Plaintiffs' acceptance into the TBI/SCI waiver program. Accordingly, Defendants have not demonstrated that these Plaintiffs' participation in the waiver program would constitute a fundamental alteration Florida Medicaid Program.

The Court also finds that Defendants have failed to provide sufficient proof that the Dubois Settlement applies to Plaintiff Cruz. Defendants did not introduce the settlement into evidence. A mere *reference* to the Dubois Settlement in the *Haddad* case, which appears in

Plaintiffs' Notice of Filing Cited Authority is not appropriate evidence that the Court will consider. Even if the Court were to consider the Dubois Settlement, Defendants have not defined the class to which the settlement applies, nor have they sufficiently demonstrated how Plaintiff Cruz is part of the class. They have not provided details on whether the defined class is an opt-in class that Mr. Cruz opted into or whether the defined class is an opt-out class from which Mr. Cruz failed to opt out of. Therefore, Defendants have not demonstrated that the DuBois Settlement precludes Plaintiff Cruz from injunctive relief.

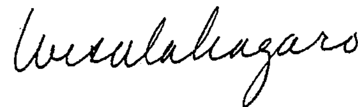
Finally, the Court agrees with Magistrate Judge Simonton that Plaintiffs, due to their indigent status, need not post bond. Defendants do not oppose this relief.

For the foregoing reasons, it is hereby

ORDERED and ADJUDGED that United States Magistrate Judge Simonton's Report and Recommendation of October 12, 2010 (D.E. 47) is RATIFIED, AFFIRMED and ADOPTED and Plaintiffs' Motion for Preliminary Injunction (D.E. 2) is GRANTED. It is further

ORDERED AND ADJUDGED that Defendants are enjoined from denying Plaintiffs the Medicaid home and community-based services that are received by persons who receive such services under the Traumatic Brain Injury/Spinal Cord Injury Medicaid Waiver Program; and that Plaintiff not be required a security bond pursuant to Rule 65 (c).

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of November, 2010.



URSULA UNGARO

UNITED STATES DISTRICT JUDGE

copies provided:
U.S. Magistrate Judge Simonton
Counsel of Record

EXHIBIT B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MICHELE HADDAD,

Plaintiff,

vs. Case No. 3:10-cv-414-J-99MMH-TEM

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

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

Defendants.

_________________________________/

OPINION

THIS CAUSE came before the Court on Plaintiff Michele Haddad's[1] Motion for Preliminary Injunction, Memorandum in Support Thereof, and Expedited Hearing (Doc. No. 2; Motion),[2] filed on May 13, 2010. Plaintiff is suing Defendants, under 42 U.S.C. § 12133 and 29 U.S.C. § 794(a), alleging that they are discriminating against her on the basis of her disability in violation of the Americans with Disabilities Act (the "ADA") and the Rehabilitation

[1] Plaintiff is also involved in the related case of Jones v. Arnold, 3:09-cv-1170-J-34JRK, as a member of a putative class sought to be certified. See May 7, 2010 Order (3:09-cv-1170-J-34JRK Doc. No. 62) at 1. She initially filed a motion for preliminary injunction in the Jones case, but the Court denied that motion without prejudice because, as an unnamed class member in an uncertified class, Plaintiff was not yet a party to the action and lacked standing to seek preliminary injunctive relief therein. See id. at 1-3. Subsequently, Plaintiff filed the present action and the instant motion in her own name.

[2] Attached to the Motion are Plaintiff Michele Haddad's Declaration in Support of her Motion for a Preliminary Injunction (Doc. No. 2-1; Haddad Dec.), the Declaration of Jeffery S. Johns, M.D. (Doc. No. 2-2; Johns Dec.), and the Affidavit of Kristen Russell (Doc. No. 2-3; Russell Aff. I), which was originally filed in the related Jones case.

Act (the "Rehab Act"). See Complaint (Doc. No. 1) at 1, 11-13. In the Motion, Plaintiff requested that the Court enjoin Defendants from denying her Medicaid in-home services in order to prevent her from being forced into unnecessary institutionalization in a nursing home. See Motion at 1.

I. PROCEDURAL HISTORY

Upon review of the Motion, the Court entered an order taking the Motion under advisement and directing Plaintiff to serve the Motion and supporting materials on Defendants. See May 13, 2010 Order (Doc. No. 4) at 1. While Plaintiff was complying with the Court's order, the United States filed a motion seeking leave to submit a brief in this action, see United States' Motion for Leave to Appear Specially (Doc. No. 6) at 1, and the Court granted that request, see May 21, 2010 Order at 1-2. As such, the United States filed its brief on May 24, 2010.[3] See Statement of Interest of the United States of America (Doc. No. 10; Statement of Interest).

Once Plaintiff accomplished service of process,[4] the Court entered another order scheduling a hearing on the Motion for June 7, 2010, and set an expedited briefing schedule due to the urgency of this matter. See May 25, 2010 Order (Doc. No. 13) at 1-2. In the May

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[3] Attached to the Statement of Interest are the following: an additional copy of the Russell Affidavit I (Doc. No. 10-1 at 5); a letter dated February 23, 2010 (Doc. No. 10-1 at 7-9; February 23, 2010 Letter); Defendants' Response and Memorandum of Law in Opposition to Michele Haddad's Motion for Preliminary Injunction (Doc. No. 10-1 at 11-29), originally filed in the Jones case; Initial Brief from Holly Benson, in her Official Capacity as Secretary, Florida Agency for Health Care Administration, and Douglas Beach, in his Official Capacity as Secretary, Florida Department of Elder Affairs (Doc. No. 10-1 at 31-88; Benson Brief), from the Eleventh Circuit Court of Appeals action, Benson v. Long, Case No.: 08-16261AA; January 25, 2010 Memorandum and Order Doc. No. 38 (Doc. No. 10-1 at 90-98; Benjamin Order), from the United States District Court for the Middle District of Pennsylvania action, Benjamin v. Dep't of Pub. Welfare, Commonwealth of Pa., 09-cv-1182; and a copy of Olmstead v. L.C. ex rel Zimring, 527 U.S. 581 (1999).

[4] See Returns of Service (Doc. Nos. 11 and 12) filed May 25, 2010.

25, 2010 Order, the Court directed Defendants to respond to the Motion by May 28, 2010, and permitted Plaintiff to submit a reply brief on or before June 2, 2010. See id. at 2-3. However, on May 27, 2010, Defendants filed an emergency motion requesting an extension of time in which to file their response. See Emergency Motion for Extension of Time (Doc. No 20; Emergency Motion) at 1-2. That same day, the Court held a telephonic hearing on the Emergency Motion. See May 27, 2010 Order (Doc. No. 21) at 1. During the hearing, Plaintiff's counsel advised that Plaintiff was, at that time, hospitalized due to medical complications unrelated to the alleged denial of services that are the subject of this action. Although counsel did not know when she would be medically able to be discharged, he indicated that Plaintiff was in limbo and would be unable to go home without the provision of the services at issue in the instant litigation. After hearing from the parties, the Court granted Defendants' requested extension and continued the hearing on the Motion until June 15, 2010. See Clerk's Minutes (Doc. No. 22) at 1. However, in light of Plaintiff's circumstances, the Court directed Plaintiff's counsel to immediately file a notice if Plaintiff was medically able to be released from the hospital, but not able to do so because of the unavailability of in-home health care services. In accordance with the Court's directives from the May 27, 2010 hearing, the parties timely filed their responsive memoranda, see Defendants' Response and Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction (Doc. No. 27; Response); Plaintiff Michele Haddad's Response to

Defendants' Memorandum in Opposition to the Preliminary Injunction (Doc. No. 29; Reply), which are supported by various documents.[5]

The Court held a hearing on the Motion on June 15, 2010. See Clerk's Minutes (Doc. No. 39; Preliminary Injunction Hearing). At the beginning of the hearing, Plaintiff's counsel advised that Plaintiff's medical condition was improving. Indeed, Plaintiff was able to leave the hospital for a period of time to attend a portion of the hearing in person. Her counsel also advised the Court that he had spoken to Plaintiff's social worker who indicated that Plaintiff was expected to be discharged from the hospital in two to three weeks. At the conclusion of the hearing, after again confirming that Plaintiff was expected to remain hospitalized for reasons unrelated to the allegations in this action for an additional period of two to three weeks, the Court requested additional briefing from the parties on one legal issue. The parties have filed those memoranda. See Plaintiff Michele Haddad's

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[5] The Response is supported by the following: the Affidavit of Elizabeth Y. Kidder in Support of Defendant's [sic] Response and Memorandum of Law in Opposition to Motion for Preliminary Injunction (Doc. No. 24-1; Kidder Aff.); a draft copy of the Florida Nursing Home Transition Plan (Doc. No. 24-2; Transition Plan); a copy of the Settlement Agreement from Long v. Benson, 4:08cv26-RH/WCS in the United States District Court for the Northern District of Florida (Doc. No. 24-3; Long Settlement); the Affidavit of Kristen Russell in Support of Defendant's [sic] Response and Memorandum of Law in Opposition to Motion for Preliminary Injunction (Doc. No. 25-1; Russell Aff. II); the Affidavit of Susan Michele Hudson in Support of Defendant's [sic] Response and Memorandum of Law in Opposition to Motion for Preliminary Injunction (Doc. No. 26-1; Hudson Aff.); and another copy of the Russell Affidavit I (Doc. No. 27-1).

The Reply is accompanied by copies of the following: SSI-Related Programs Fact Sheets January 2010 (Doc. No. 29-1; Fact Sheets); Appendix C-Eligibility and Post-Eligibility Medicaid Eligibility Groups Served (Doc. No. 29-2; Medicaid Eligibility); Appendix B-4: Medicaid Eligibility Groups Served in the Waiver (Doc. No. 29-3; Waiver Eligibility); AARP Across the States Profiles of Long-Term Care and Independent Living (Doc. No. 29-4; AARP Profile); Florida Medicaid Nursing Homes January, 2010 Rate Semester Initial Per Diems (Doc. No. 29-5; Per Diem); a series of documents related to Defendants' October 2007 amendment of Florida's Home- and Community-Based Waiver for Individuals (aged 18 and older) with Traumatic Brain or Spinal Cord Injuries (Doc. No. 29-6; Waiver Amendment); Home and Community Based Service Waivers and Long Term Care (Doc. No. 29-7; Waiver List); Kaiser Commission on Medicaid and the Uninsured November 2009 (Doc. No. 29-8; Kaiser Report); Spinal Cord Injury in Florida, a Needs and Resources Assessment (Doc. No. 29-9; Assessment); and a letter dated January 8, 2010 (Doc. No. 29-10; January 8, 2010 Letter).

Memorandum in Response to the Court's Request Regarding Preliminary Injunction Standards (Doc. No. 41; Plaintiff's Memorandum); Defendants' Memorandum of Law on the Standard for Injunctive Relief (Doc. No. 43-1; Defendants' Memorandum); United States' Memorandum of Law Regarding the Preliminary Injunction Standard (Doc. No. 44; United States' Memorandum).

In addition to filing Plaintiff's Memorandum as directed on June 21, 2010, Plaintiff's counsel filed a notice indicating that he had "just received notice that Brooks Rehabilitation Hospital plans to discharge Michele Haddad on Thursday, June 24, 2010." See Notice of Status Regarding Michele Haddad (Doc. No. 40; Plaintiff's Notice of Status). By the time the Court reviewed Plaintiff's Notice of Status, having had the benefit of the parties' briefing and the arguments presented at the hearing, the Court had determined that preliminary injunctive relief was warranted and was in the process of preparing a written opinion and order which would grant Plaintiff relief and set forth the Court's reasons for doing so. However, upon review of Plaintiff's Notice of Status, the Court determined that the urgency of the circumstances required the issuance of an order resolving the Motion without a delay solely necessary to complete the preparation of a written opinion. Thus, the Court granted the Motion with the intention of providing an opinion setting forth its reasoning at a later date. See June 23, 2010 Order (Doc. No. 46) at 8. The Court fulfills that intention here.

II. FACTUAL BACKGROUND[6]

Plaintiff is a forty-nine-year-old resident of Florida. See Haddad Dec. at 1. On September 7, 2007, when she was forty-seven, Plaintiff was in a motorcycle accident caused by an intoxicated driver. See id. As a result of the accident, Plaintiff is paralyzed from the chest down and has a diagnosis of quadriplegia, with a spinal injury at the c6-c7 vertebrae. See Johns Dec. at 3; see also Haddad Dec. at 2. Plaintiff is mentally alert and fully aware of her surroundings, but she has minimal manual dexterity. See Johns Dec. at 4; see also Haddad Dec. at 3. Her right hand remains closed, and her left hand remains open. See Johns Dec. at 4; Haddad Dec. at 3. However, she has some limited ability to use her arms. See Johns Dec. at 4. After her accident, Plaintiff required a tracheotomy, which has been removed, but Plaintiff cannot speak and breathe at the same time. See id. Additionally, she is required to take various medications, and is at risk for injury and infection due to her catheterization. See id. Plaintiff uses a motorized wheelchair for mobility, and resides in a wheelchair-accessible home with a roll-in shower. See id.; Haddad Dec. at 2-3. Nevertheless, Plaintiff is completely dependent on others to help her perform most of her activities of daily living, including transferring from her bed to her wheelchair, dressing, bathing and showering, toileting, bladder management, assistance with bowel movements, including digital stimulation, and shopping for, preparing, and eating food. See Johns Dec.

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[6] The Court notes that, as the Motion was one for preliminary injunctive relief and necessarily before the Court on an expedited schedule, the factual record contained herein may not be completely developed. Therefore, the following facts and conclusions of law do not necessarily reflect what may be established on a record more fully developed following trial on these issues. Accordingly, the determinations in this Order are expressly limited to the record before the Court at the time of the Preliminary Injunction Hearing and do not indicate or limit the ultimate outcome of the issues presented in this matter.

at 4; see also Haddad Dec. at 3. She requires ten to twelve hours a day of in-home assistance to remain in the community.[7] See Johns Dec. at 5.

Plaintiff's rehabilitation is ongoing, and she uses the out-patient equipment and facilities at Brooks Rehabilitation Hospital ("Brooks") in Jacksonville, Florida, where she was a patient from November 2007 to January 2008, after her accident. See Johns Dec. at 3-4. Despite her dependence on the care from others, Plaintiff has maintained an active life in the community. See Haddad Dec. at 4; see also Johns Dec. at 5. She attends church, goes to the movies, visits friends, goes shopping, and exercises at the Brooks gymnasium. See Haddad Dec. at 4; see also Johns Dec. at 5. At the telephonic hearing on May 27, 2010, Plaintiff's counsel represented that Plaintiff had experienced medical complications requiring another tracheotomy and had been hospitalized at Brooks where she would remain for an unknown length of time. On June 21, 2010, Plaintiff's counsel notified the Court that Plaintiff was scheduled to be discharged from Brooks on June 24, 2010. See Plaintiff's Notice of Status at 1.

After Plaintiff's initial discharge from Brooks in January 2008, her husband was her primary care giver. See Haddad Dec. at 3; see also Johns Dec. at 5. In November 2009, Plaintiff and her husband divorced, yet he continued to provide Plaintiff's care until he moved out of their home in March 2010. See Haddad Dec. at 3; Johns Dec. at 5. After that time, one of Plaintiff's adult sons, who was living in Miami, Florida and had recently graduated

[7] In the Complaint, which is not verified, Plaintiff asserts that she would require "about seven hours a day for all her activities of daily living." See Complaint at 5. However, Plaintiff's physician's declaration indicates that, in his medical opinion, Plaintiff "requires about 10-12 hours a day of in-home assistance in order to meet her needs." See Johns Dec. at 5. Likewise, in her declaration verifying the Motion, Plaintiff indicates that Defendants offered her 10 hours a day of services in the community if she would move into a nursing home. See Haddad Dec. at 3-4.

from college, temporarily moved back home in order to provide Plaintiff the care she needed to remain in the community. See Haddad Dec. at 3; Johns Dec. at 5. From that time until Plaintiff's hospitalization, her son became responsible for all of the tasks Plaintiff's husband had performed, including very personal care, such as hygiene and administering Plaintiff's bowel program. See Haddad Dec. at 3-4; see also Johns Dec. at 5. Plaintiff's son returned to care for Plaintiff because of her exigent circumstances, but would be unable to provide these services to Plaintiff indefinitely. See Haddad Dec. at 4. Indeed, he intended to return to his responsibilities in Miami. See id.; Johns Dec. at 5. Upon such occurrence, absent other assistance, Plaintiff would be forced to leave the community and enter a nursing home in order to receive the care she requires. See Haddad Dec. at 4-5; Johns Dec. at 5.

Defendants are responsible for administering Florida's in-home services waiver programs, see Kidder Aff. at 1; Hudson Aff. at 1; Russell Aff. II at 1, including the Traumatic Brain Injury/Spinal Cord Injury Waiver ("TBI/SCI Waiver") program implemented in 1999, see Kidder Aff. at 2; Hudson Aff. at 1-3. Through this program, the state delivers in-home services, such as home health care and related services, to Medicaid eligible persons with traumatic brain or spinal cord injuries so that they can remain in the community. See Russell Aff. II at 1-2. The TBI/SCI Waiver program grew from a monthly caseload of 245 persons and yearly expenditures of $5,874,815 in fiscal year 2005 to 2006, to 309 persons and $10,066,381 in 2008 to 2009. See Hudson Aff. at 3. Defendants have various other waiver programs that deliver services to persons with other physical and mental disabilities. See id. at 1-3; Kidder Aff. at 2. These programs have increased in size and scope over the course of their existence. See Hudson Aff. at 1-3. In fiscal year 2008 to 2009, the average

monthly caseload of Medicaid recipients in nursing homes was approximately 50,000, and the average monthly caseload in in-home services waiver programs was approximately 61,000. See id. at 4.

In November 2007, while Plaintiff was still at Brooks, she applied to receive services under Defendants' TBI/SCI Waiver. See Haddad Dec. at 2-3; see also Johns Dec. at 5. However, Plaintiff has not received any TBI/SCI Waiver services despite having been on the waiting list for approximately two-and-a-half years. See Haddad Dec. at 3-5. In a letter dated January 8, 2010, Defendants acknowledged that Plaintiff was on a waiting list to receive in-home services, but explained:

> [p]resently, the Department of Children and Families does not have funds available (or available openings) to serve additional individuals through these programs. . . . Placement on the waiting list does not ensure future eligibility. Funding is very limited in these programs, and the amount of funding allocated to these programs has not been increased in many years. Unfortunately, moving individuals off the waiting list into these programs does not occur frequently, therefore, we encourage you to continue seeking services from other programs.

January 8, 2010 Letter at 1.

Plaintiff's income is limited to her Social Security Disability Insurance, and she is eligible for, and receives, Medicare and Medicaid. See id. at 4. With her other sources of assistance withdrawing, Plaintiff faced the risk of institutionalization without in-home services through Defendants' TBI/SCI Waiver.[8] See id. at 5; Johns Dec. at 5. Accordingly, Plaintiff

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[8] Plaintiff argues that an additional potential source of assistance is Defendants' personal care services waiver, but contends that this program is only available to individuals residing in nursing homes. See Motion at 5-6, 19 n.5; Transcript of June 15, 2010 Hearing (Doc No. 47; Tr.) at 8. However, at the hearing, Defendants argued that there is no personal care services program. See Tr. at 33-35, 100-02. Instead, services of a personal nature, such as those Plaintiff requires, which are rendered to individuals in nursing homes are incidental to the nursing home placement. See id. They are not the (continued...)

contacted Defendants in early March 2010, to notify them of the change in her circumstances, and that she desperately required in-home services. See Haddad Dec. at 4. In late April 2010, Defendants informed Plaintiff that there were no funds for in-home services, but if she would move into a nursing home, after sixty days in the nursing home, she would be eligible to receive ten hours a day of in-home services through the Florida Nursing Home Transition Plan (the "Transition Plan"). See id.; Russell Aff. I at 2; Tr. at 109-15; see also Transition Plan at 1-12; Long Settlement at 1-13. However, Plaintiff does not wish to enter a nursing home; she wishes to receive the in-home services for which she is medically and financially eligible and to remain in the community, where she leads an active life. See Haddad Dec. at 3-4. Additionally, Plaintiff's physician opines that, even if she meets the criteria for nursing home care, Plaintiff will quickly become depressed and her health will most likely deteriorate if she is placed in a nursing home. See Johns Dec. at 5.

Plaintiff is eligible for the TBI/SCI Waiver, see Kidder Aff, at 3; Medicaid Eligibility at 1-2; Waiver Eligibility at 1-2; Fact Sheets at 4-5, and would benefit from the program, see Johns Dec. at 5, however, Defendants have represented that there are no funded slots available in the program at this time, see January 8, 2010 Letter at 1; Russell Aff. I at 2; Haddad Dec. at 4. Priority of placement on the TBI/SCI Waiver waiting list is based on the probability, given the individual's level of community support and severity of needs, that, but for the TBI/SCI Waiver, the non-institutionalized individual will be institutionalized or the

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[8](...continued)
subject of an independent waiver or funding source. See id. Plaintiff focused her argument on the waiver program and provided little argument regarding her entitlement to in-home services based on the fact that such services would otherwise be incidental to institutionalization. As such, the Court's ruling addresses only Plaintiff's primary argument at this time.

institutionalized individual will not be deinstitutionalized. See Russell Aff. II at 2. At the Preliminary Injunction Hearing, defense counsel was unsure of Plaintiff's exact position on the waiting list, but represented to the Court that she was not in the top forty-five spots. See Tr. at 51-52. Defendants did not know the average wait time for individuals on the waiting list or the average turnover. See id. at 54, 57, 102-03. However, Defendants explained that, because movement on the waiting list is based on an individual's needs, rather than time spent on the waiting list, the wait time can vary greatly from person to person. See id. at 102-03. If a person's needs change, they can request reassessment which can change their position on the waiting list. See id. at 102-03, 115. Nevertheless, despite Plaintiff's contact with Defendants in March 2010, advising them of her change in circumstances, Plaintiff has not been reassessed since January 2010. See id. at 115-16.

Although Plaintiff has been on the waiting list for waiver services since at least early 2008, and Defendants have represented to Plaintiff that the TBI/SCI Waiver program is full, the data from 2008 to 2009 may conflict with this representation. The TBI/SCI Waiver has been approved for 375 persons for the period beginning July 1, 2007, through June 30, 2012. See Waiver Amendment at 1. According to the Waiver List, which summarizes information regarding the utilization and cost of the state's various waiver programs, as of November 1, 2008, the TBI/SCI Waiver had an enrollment of only 343 persons and a waiting list of 554 persons. See Waiver List at 2. Additionally, the Hudson Affidavit represents that, at the end of fiscal year 2008 to 2009, enrollment in the TBI/SCI Waiver was 309 persons. See Hudson Aff. at 3. Thus, it is unclear whether all 375 funded slots in the TBI/SCI Waiver Program are fully utilized.

Even if the program is full, Defendants readily acknowledge that they could expand the number of slots in the program before 2012, see id. at 59-60, but that would only guarantee money from the federal government. Defendants would still need to provide Florida's portion of the funding, as well as the expanded provider network necessary to support such an expansion, see id. at 65-66. However, Defendants provided no evidence as to the cost or impact of such an expansion on other programs or its ability to provide adequate services to the state's disabled population. Nevertheless, Defendants do assert that placing Plaintiff into the program would violate the TBI/SCI Waiver rules because Plaintiff is not next on the waiting list, and that if Defendants were forced to place Plaintiff in the TBI/SCI Waiver, they would have to reduce services that others in the program are currently receiving. See Russell Aff. I at 2; see also Tr. at 49-50, 66-67.

Nursing home care is a mandatory service under Medicaid, and if Plaintiff is required to enter a nursing facility, Defendants would have to pay for such care irrespective of budgetary constraints. See Tr. at 111. Defendants admit that, "[i]n most cases, when a Medicaid recipient is diverted or transitioned from a nursing facility to an [in-home services] waiver program, costs to Medicaid for providing care to that individual are reduced." Hudson Aff. at 3. Indeed, for budgeting purposes, Defendants assume a two-to-one savings for those diverted from nursing homes. See id. at 3-4. However, because of Defendants' budget structure, Defendants would require Plaintiff to enter a nursing home, where funding comes from the state's nursing home line item which the state is required to pay. See Tr. at 111. Then, after at least sixty consecutive days in a nursing facility, Plaintiff would be

eligible for the in-home services she requires from the TBI/SCI Waiver through the Transition Plan. See Kidder Aff. at 2; Tr. at 110-14.

The Transition Plan is independently funded by the Florida legislature through the nursing home line item, see Kidder Aff. at 2; Tr. at 112, and was implemented to give Defendants a funding source to deinstitutionalize individuals who are qualified for in-home services but are languishing in nursing homes because of full waiver programs, see Tr. at 110-11. Essentially, the Transition Plan gives Defendants' budget flexibility. See id. at 111. The sixty-day requirement was implemented to avoid gamesmanship, such as individuals entering nursing facilities for a day and then jumping out immediately into a waiver program, see id. at 112-14, and Defendants contend that the requirement assures that an individual would legitimately, but for in-home services, enter a nursing home and be institutionalized, see id. at 104-06 ("Well, if somebody is going to spend 60 days in a nursing home, that makes it much more likely that they would have had to, without these waiver services, go into a nursing home. It's essentially an assessment of need."). Additionally, Defendants explain that the policy reflects Florida's focus on deinstitutionalization as a priority over diversion. See id. at 106-07. Notably, however, Defendants do not assure that Plaintiff will be transitioned into the TBI/SCI Waiver immediately after sixty consecutive days in a nursing facility. See id. at 19, 73-75. Instead, Defendants state that Plaintiff would have to be institutionalized for "at least" sixty days, but then would have to be assessed and be determined to be safe for community placement. By this action, Plaintiff seeks injunctive relief requiring Defendants to provide her with in-home services without first subjecting herself to unnecessary institutionalization.

III. DEFENDANTS' "STANDING" CHALLENGE

As an initial matter, Defendants assert that Plaintiff lacks standing to pursue this action because she has not been discriminated against "by reason of . . . disability" and because any claims she has are precluded by a settlement reached in the case of Dubois v. Levine, Case No. 4:03-CV-107-SPM from the United States District Court for the Northern District of Florida. See Defendants' Motion to Dismiss Complaint (Doc. No. 32; Motion to Dismiss).[9] Although Defendants did not raise these arguments as a challenge to Plaintiff's standing to sue in response to the Motion, they did present them in their Motion to Dismiss and during the Preliminary Injunction Hearing. While Defendants suggest that their arguments present a challenge to Plaintiff's standing to pursue this action, that contention is simply without merit.

Standing is a jurisdictional requirement, and the party invoking federal jurisdiction has the burden of establishing it. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). In order to establish standing under Article III of the United States Constitution, a plaintiff must "allege such a personal stake in the outcome of the controversy as to warrant [her] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [her] behalf." Watts v. Boyd Properties, 758 F. 2d 1482, 1484 (11th Cir. 1985) (quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975)). Specifically, a plaintiff must prove three elements in order to establish standing: (1) that he or she has suffered an "injury-in-fact," (2) that there is a "causal connection between the asserted injury-in-fact and the challenged

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[9] Plaintiff has responded to the Motion to Dismiss. See Plaintiff Michele Haddad's Memorandum of Law in Opposition to Defendants' Motion to Dismiss Complaint (Doc. No. 35; Response to Motion to Dismiss).

action of the defendant," and (3) that a favorable decision by the court will redress the injury. See Shotz v. Cates, 256 F. 3d 1077, 1081 (11th Cir. 2001) (internal citations omitted). "These requirements are the 'irreducible minimum' required by the Constitution for a plaintiff to proceed in federal court." Id. at 1081 (quoting Northeastern Fla. Chapter of Associated Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 664 (1993)) (internal citations omitted). Additionally, in an action for injunctive relief, a plaintiff has standing only if the plaintiff establishes "a real and immediate–as opposed to a merely conjectural or hypothetical–threat of future injury." See Wooden v. Board of Regents of University System of Georgia, 247 F. 3d 1262, 1284 (11th Cir. 2001). A complaint that includes "only past incidents of discrimination" is insufficient to allege a real and immediate threat of future injury. See Shotz, 256 F. 3d at 1081.

Defendants do not attempt to contest that Plaintiff can satisfy each of these requirements. Instead, they appear to present a challenge to Plaintiff's ability to state a claim for relief under the ADA, as well as a potential defense - that Plaintiff's claims are barred by issue preclusion - or collateral estoppel. See Motion to Dismiss at 4; see Cope v. Bankamerica Hous. Serv., Inc., No. Civ.A. 99-D-653-N., 2000 WL 1639590, at *4 (M.D. Ala. Oct. 10, 2000). Upon review of Plaintiff's claims, the Court is fully satisfied that she has alleged an injury in fact, which is purportedly caused by the Defendants' actions, and for which a favorable decision by the Court would provide redress. Moreover, Plaintiff alleges a real and immediate threat of future injury. Thus, the Court determines that Plaintiff has standing to pursue the claims raised in this action. Moreover, neither of the challenges raised by Defendants in their "standing" discussion is actually a challenge to the Court's

subject matter jurisdiction. Thus, the Court will consider these arguments as challenges to Plaintiff's ability to succeed on the merits of her claims.

IV. STANDARD FOR RELIEF

A party seeking preliminary injunctive relief must establish that "(1) it has a substantial likelihood of success on the merits, (2) the movant will suffer irreparable injury unless the injunction is issued, (3) the threatened injury to the movant outweighs the possible injury that the injunction may cause the opposing party, and (4) if issued, the injunction would not disserve the public interest" before the district court may grant such relief. Horton v. St. Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001) (citing Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000)); see also Int'l Cosmetics Exch. v. Gapardis Health & Beauty, Inc., 303 F.3d 1242, 1246 (11th Cir. 2002) (citing Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995)). Additionally, "[i]t is well established in this circuit that a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to all four elements." Siegel, 234 F.3d at 1176 (internal quotations and alterations omitted).

A typical preliminary injunction is prohibitive in nature and seeks simply to maintain the status quo pending a resolution of the merits of the case. See Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC, 605 F. Supp. 2d 1189, 1196 (N.D. Ala. 2009). When a preliminary injunction is sought to force another party to act, rather than simply to maintain the status quo, it becomes a "mandatory or affirmative injunction" and the burden on the moving party increases. Exhibitors Poster Exch. v. Nat'l Screen Serv. Corp., 441 F.2d 560, 561 (5th Cir. 1971). Indeed, a mandatory injunction "'should not be granted except in rare instances in

which the facts and law are clearly in favor of the moving party.'" Id. (quoting Miami Beach Fed. Sav. & Loan Ass'n v. Callander, 256 F.2d 410, 415 (5th Cir. 1958)); see also Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976)[10] ("Mandatory preliminary relief, which goes well beyond simply maintaining the status quo pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party."). Accordingly, a plaintiff seeking such relief bears a heightened burden of demonstrating entitlement to preliminary injunctive relief. See Verizon Wireless Pers. Commc'n LP v. City of Jacksonville, Fla., 670 F. Supp. 2d 1330, 1346 (M.D. Fla. 2009) (quoting the Southern District of New York, "Where a mandatory injunction is sought, 'courts apply a heightened standard of review; plaintiff must make a clear showing of entitlement to the relief sought or demonstrate that extreme or serious damage would result absent the relief.'"); Mercedes-Benz, 605 F. Supp. 2d at 1196; OM Group, Inc. v. Mooney, No. 2:05-cv-546-FtM-33SPC, 2006 WL 68791, at *8-9 (M.D. Fla. Jan. 11, 2006).

Here, the parties disagree as to the nature of the relief sought. Plaintiff contends that because she merely seeks to prohibit unlawful discrimination, the injunctive relief she requests is prohibitive in nature and does not seek to change the status quo. However, Defendants argue that because Plaintiff is not currently receiving in-home health care services from Defendants, and requests that this Court order Defendants to provide her with such services, she seeks to change the status quo by requiring them to act. Because the Court determined that Plaintiff satisfied the heightened burden of demonstrating her

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[10] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

entitlement to mandatory preliminary injunctive relief, the Court did not resolve the parties' dispute as to the applicable standard.

V. DISCUSSION

A. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Title II of the ADA provides that "no 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."[11] 42 U.S.C. § 12132. In the decision of Olmstead v. L.C. ex rel Zimring, 527 U.S. 581 (1999), the Supreme Court considered the application of this anti-discrimination provision in a rather unique context:

> we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions.

Id. at 587. The Court answered this question with a "qualified yes." See id. In doing so, the Court held that the unjustified institutional isolation of persons with disabilities is a form of discrimination by reason of disability. See id. at 597, 600-01. The Court explained:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . . Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. Dissimilar

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[11] Plaintiff's Rehab Act claim is essentially the same as her ADA claim, and discrimination claims of this kind are analyzed similarly under the two acts. See Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1316 n.3 (11th Cir. 2009) ("Because the same standards govern discrimination claims under the Rehabilitation Act and the ADA, we discuss those claims together and rely on cases construing those statutes interchangeably."). Accordingly, the Court will refer primarily to the ADA for the sake of brevity.

> treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.

Id. at 600-01 (internal citations omitted). To avoid the discrimination inherent in the unjustified isolation of disabled persons, public entities are required to make reasonable modifications to policies, practices, and procedures for services they elect to provide. Nevertheless, the Olmstead Court recognized that a state's responsibility, once it determines to provide community-based treatment, is not without limits. See id. at 603.[12] Rather, the regulations implementing the ADA require only "reasonable modifications" and permit a state to refuse alterations to programs that will result in a fundamental alteration of the program or service. See id.

In considering whether a proposed modification is a reasonable modification, which would be required, or a fundamental alteration, which would not, the Olmstead Court determined that a simple comparison showing that a community placement costs less than an institutional placement is not sufficient to establish reasonableness because it overlooks other costs that the state may not be able to avoid. See id. at 604. The Court explained,

> Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

[12] "'[W]hile "[t]he section of Justice Ginsburg's opinion discussing the state's fundamental alteration defense commanded only four votes . . . [b]ecause it relied on narrower grounds than did Justice Stevens' concurrence or Justice Kennedy's concurrence, both of which reached the same ultimate result, Justice Ginsburg's opinion controls."'" Arc of Washington State Inc. v. Braddock, 427 F.3d 615, 617 (9th Cir. 2005) (quoting Sanchez v. Johnson, 416 F.3d 1051, 1064 n.7 (9th Cir. 2005), quoting Townsend v. Quasim, 328 F.3d 511, 519 n.3 (9th Cir. 2003)).

Id. Indeed, the Court recognized that the fundamental alteration defense must be understood to allow some leeway to maintain a range of facilities and services. See id.

> If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. . . . In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions.

Id. at 605-06. Thus, having considered the ADA as well as the applicable regulations, the Court concluded that the ADA requires states to provide community based treatment for persons with disabilities when: (1) the state's treatment professionals have determined that community-based services are appropriate for an individual; (2) the individual does not oppose such services; and (3) the services can be reasonably accommodated, taking into account (a) the resources available to the state, and (b) the needs of others with disabilities. See id. at 602-04, 607; Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare, 402 F.3d 374, 379-80 (3d Cir. 2005); Frederick L. v. Dep't of Pub. Welfare of the Commonwealth of Pa., 364 F.3d 487, 493 (3d Cir. 2004); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003). When these requirements are met, states must provide services to individuals in community settings rather than in institutions. See Fisher, 335 F.3d at 1181.

Before addressing the Court's conclusion that Plaintiff has established that she has a substantial likelihood of satisfying these requirements such that Defendants should be ordered, at this stage of the proceedings, to provide her with in-home services, the Court will first discuss Defendants' general challenges to Plaintiff's ability to pursue this action.

Defendants first argue that Plaintiff cannot state a claim of discrimination under the ADA because she is not being discriminated against "by reason of such disability" here because all in-home services waiver programs discriminate by their nature, providing services solely to disabled individuals and not to non-disabled individuals. See Response at 5-6; Motion to Dismiss at 4. However, the Eleventh Circuit and the Supreme Court have squarely rejected this argument. See Olmstead, 527 U.S. at 597-601 (affirming the finding of disability-based discrimination in L.C. v. Olmstead, 138 F.3d 893, 897-901 (11th Cir. 1998)). The unjustified institutional isolation of persons with disabilities is a form of disability-based discrimination that need not be accompanied by dissimilar treatment of non-disabled persons. See id. Indeed, in rejecting this same argument by the state in Olmstead, the Court specifically stated, "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA," id. at 598, than the view espoused by the state. Therefore, Defendants' argument is not well taken.

Next, Defendants assert that Plaintiff's claims are barred by the doctrine of collateral estoppel. See Motion to Dismiss at 3-5. Specifically, Defendants explain that the issues underlying Plaintiff's claims were previously adjudicated by the settlement in the Dubois litigation, see Motion to Dismiss at 3-5, which resolved the claims of a class defined as encompassing "all individuals with traumatic brain or spinal cord injuries who the state has already determined or will determine to be eligible to receive services from Florida's Medicaid Waiver Program for persons with traumatic brain and spinal cord injuries and have not yet received such services," see Settlement (Doc. No. 32-2; Dubois Settlement) at 1.

The doctrine of collateral estoppel, also referred to as issue preclusion, bars the relitigation of issues that previously have been litigated and decided. See Irvin v. United States, 335 F. App'x 821, 822-23 (11th Cir. 2009); Christo v. Padgett, 223 F.3d 1324, 1339 (11th Cir. 2000). To apply collateral estoppel, the following elements must be present: "(1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been 'a critical and necessary part' of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding." See Christo, 223 F.3d at 1339 (quoting Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1359 (11th Cir. 1998)). The principles of collateral estoppel are generally applicable to judgments entered in class actions like Dubois. See Cope, 2000 WL 1639590, at *5. However, while Defendants have provided the Court with a copy of the Dubois Settlement which was approved by the court, this single document is insufficient to establish that the first three prerequisites for collateral estoppel have been satisfied.[13] However, even if they are satisfied, a review of the Dubois

[13] Indeed, a cursory review of the Dubois Settlement raises significant questions about the Defendants' ability to satisfy the second and third elements. Paragraph H(2) of the Dubois Settlement agreement provides "all legal representations, including agreements based on legal claims, attributable to the Defendants as set out herein are solely and exclusively for the purpose of this settlement and shall not be binding on these Defendants or Plaintiffs in any other action or proceeding. . . ." See Dubois Settlement at 11. Thus, it appears that the parties to the Dubois Settlement specifically intended that their agreement not have any prospective preclusive effect. Moreover, the Dubois Settlement affirmatively provides "this agreement is not an admission of any wrongdoing or misconduct on the part of Defendants nor is it an admission by Plaintiffs that Defendant would have prevailed in this litigation." See id. at 8. In Cope, the court found the second element of collateral estoppel lacking where the settlement agreements at issue contained provisions indicating that the settlements did not constitute admissions of fault, liability or wrongdoing or an admission that the claims were valid. In doing so, the court noted that in accepting the prior settlement agreements, the reviewing court did not actually "determine" any issues bearing on the defendant's liability. See Cope, 2000 WL 1639590, at *9-10. Therefore, the common issues had not actually been litigated. See id. Here, the parties did not present
(continued...)

Settlement establishes that Defendants cannot satisfy the fourth element. Thus, their collateral estoppel defense fails.

The Eleventh Circuit has found the "opportunity to litigate" element satisfied where a litigant was a party to the previous action, and was afforded a full and fair opportunity to address the issues in question. See Irvin, 335 F. App'x at 823; Christo, 223 F.3d at 1340. However, where a particular claim has not accrued at the time of the earlier proceeding, litigants cannot be said to have had a full and fair opportunity to litigate the issues. See In re Jennings, 378 B.R. 687, 696 (M.D. Fla. 2006) (full and fair opportunity to litigate requirement not satisfied where party had not yet been authorized to pursue a claim when the preceding adjudication occurred). Plaintiff was not a party to the Dubois litigation, nor was she a member of the class who would have had an opportunity to object to the settlement. This is so because Plaintiff did not suffer her injury until September 7, 2007, after the Dubois action was filed and even after the Dubois Settlement was signed and approved by the court. Accordingly, she had no opportunity to litigate her claims which had not yet accrued. See In re Jennings, 378 B.R. at 696.

Defendants' authorities in support of issue preclusion based on the Dubois Settlement are unavailing. In Reyn's Pasta Bella, LLC v. Visa USA, Inc., class members who were parties to the judicial proceedings were precluded from collaterally attacking a settlement agreement where they were part of the class and represented by counsel at the fairness hearing on the settlement agreement. See 442 F.3d 741, 746-47 (9th Cir. 2006). Similarly,

[13](...continued)
argument regarding the satisfaction of these elements of collateral estoppel in any detail. Because the Court finds that the final element required for collateral estoppel is clearly lacking, it need not address these elements further.

in Carter v. Rubin, the court noted that "[c]ollateral estoppel, or issue preclusion, . . . bars 'relitigation of [an] issue in a suit on a different cause of action involving a party to the first case.'" See 14 F. Supp. 2d 22, 34 (D.D.C. 1998) (second alteration in original underline supplied). Unlike these plaintiffs, Plaintiff Haddad was not a party to the Dubois litigation.

In an effort to overcome this deficiency, Defendants assert that a strict reading of the class certified in Dubois establishes that Plaintiff is bound by that adjudication because she falls within the class definition which included "all individuals with traumatic brain or spinal cord injuries who the state has already determined or will determine to be eligible to receive services from Florida's Medicaid Waiver Program . . . and have not yet received such services." See Dubois Settlement at 1. However, Plaintiff could not have been a member of that class because, at the time the complaint was filed and the Dubois Settlement was signed and approved, she had no such injury. The language "who the state has already determined or will determine to be eligible to receive services" does not extend the class, ad infinitum, to all those for whom the state will ever make such a determination even though they had no injury at the time the Dubois Settlement was contemplated. Rather, this language plainly refers to those with such injuries at the time of the action, whether or not the state had determined their eligibility for services. Accordingly, Plaintiff's claims in this action are not barred by the Dubois Settlement.

Defendants also contend that the motion for preliminary injunction must be denied because the implementing regulations of the ADA do not create a private right of action, and therefore, Plaintiff has no claim. Defendants cite Am. Ass'n of People with Disabilities v. Harris, 605 F.3d 1124 (11th Cir. 2010) in support of this contention, but Harris is inapplicable

to the present case. In Harris, the plaintiffs filed suit against various state actors for failure to provide handicapped-accessible voting machines. See Harris, 605 F.3d at 1126-27. The district court dismissed the plaintiffs' claims under the ADA, Rehab Act, and the Florida Constitution and statutes, but permitted them to amend their complaint. See id. at 1127-28. The plaintiffs then filed a two-count amended complaint, asserting claims under the ADA and the Rehab Act. See id. at 1128. After a bench trial, the district court issued a declaratory judgment and an injunction against the Supervisor of Elections ("Supervisor") based not on a finding that he or any defendant violated the ADA or the Rehab Act, but rather based on a conclusion that the Supervisor of Elections violated the ADA's implementing regulation, 28 C.F.R. § 35.151(5), which deals with nondiscrimination on the basis of disability in state and local services. See id. at 1128-29. The Supervisor appealed the injunction, but while that appeal was pending, other circumstances rendered it moot. See id. at 1130. The district court then entered final judgment against the Supervisor in accordance with the declaratory judgment and injunction, which the Supervisor appealed. See id. at 1130-31.

In vacating the district court's judgment, the Eleventh Circuit noted that, although the amended complaint contained claims under the ADA and the Rehab Act, the judgment did not declare that the defendants had violated either of those statutes. See id. at 1131. In fact, there was no finding at all in regard to the ADA or the Rehab Act. See id. The district court's judgment was, instead, limited to finding a violation of the ADA's implementing regulation. See id. The Eleventh Circuit opined that it was unclear where the district court had found the authority to order the Supervisor to comply with the implementing regulation without first determining whether the ADA, itself, authorized such relief. See id. Indeed,

after performing such an analysis, the Eleventh Circuit held that there was no private right of action arising from the implementing regulation alone because congress placed available recourse within the ADA's express statutory right of action. See id. at 1132-35. Thus, absent a violation of the ADA, a violation of its implementing regulations would not create a private right of action and remedy. See id. at 1135-36.

Nevertheless, Harris' holding presents no bar to Plaintiff's claims because she is asserting a violation of the ADA, which does afford a private right of action. Indeed, Harris recognized that the ADA includes an express statutory right of action. See id. Moreover, the Supreme Court in Olmstead specifically found that unjustified isolation, under certain circumstances, can constitute a violation of the ADA. See 527 U.S. at 597. This is the basis of Plaintiff's action–not a violation of the ADA's integration mandate, separate from the ADA or the Rehab Act, as in Harris. Therefore, Harris presents no bar to Plaintiff's assertion of her right of action for a violation of the ADA based on unjustified isolation. See id. at 596-602; see also Crabtree v. Goetz, NO. CIV.A. 3:08-0939., 2008 WL 5330506, at *24 (M.D. Tenn. Dec. 19, 2008); Grooms v. Maram, 563 F. Supp. 2d 840, 851-854, 854 n.3 (N.D. Ill. 2008); Radaszewski v. Maram, No. 01 C 9551., 2008 WL 2097382, at *14 (N.D. Ill. Mar. 26, 2008). Defendants' arguments to the contrary simply reflect a mischaracterization of Plaintiff's claims. See Response at 5-6; Tr. at 36-38.

Alternatively, Defendants argue that Plaintiff cannot pursue her ADA claim because the Court must respect the plain language of the ADA regulations which instruct that a public entity need not provide personal care services. See Response at 6-10. Specifically, they rely on 42 C.F.R. § 35.135 which states that public entities are not required to provide

"services of a personal nature including assistance in eating, toileting, or dressing." Defendants contend that in light of this regulation, the ADA cannot be interpreted to require them to provide such services to Plaintiff. See id. at 6. However, Defendants' argument misses the mark. The ADA does not require states to provide a level of care or specific services, but once states choose to provide certain services, they must do so in a nondiscriminatory fashion. See Olmstead, 527 U.S. 581, 603 n.14; see also Fisher, 335 F.3d at 1182 (state may not amend optional programs so as to violate the ADA); cf. Rodriguez v. City of New York, 197 F.3d 611, 619 (2d Cir. 1999) (no ADA violation where plaintiffs requested service not already provided by defendant). Here, Defendants have elected to provide the services that Plaintiff requests through the TBI/SCI Waiver program. Having done so, they must provide them in accordance with the ADA's anti-discrimination mandate. Therefore, if Plaintiff is entitled to Medicaid services and is otherwise qualified for, desires, and requires TBI/SCI Waiver services in order to avoid unnecessary institutionalization, the ADA may, indeed, require Defendants to provide Plaintiff with such services if doing so would not result in a fundamental alteration of its programs.

Defendants last broad challenge to the sufficiency of Plaintiff's claims is their argument that the ADA cannot abrogate or amend the Medicaid Act to make personal care services mandatory or to require Defendants to uncap their TBI/SCI Waiver program. See Response at 14-17. Specifically, Defendants contend that "the only way that Plaintiff's claims could be sustained is if the ADA were interpreted to amend (or partially repeal) the Medicaid Act by implication, by either amending/repealing 42 U.S.C. § 1396a(a)(10)(A), which makes personal care services optional for states" or by requiring states to provide

services under waiver programs. Response at 14. Indeed, Defendants conclude, "if the ADA's prohibition of discrimination 'by reason of . . . disability' amends the Medicaid Act, then surely the HCBS waiver programs would not survive." Response at 17. This is so, they argue, because waiver programs by their nature discriminate based on disability. The Court concludes that Defendants' arguments are unavailing.

First the Court rejects Defendants' contention that the success of Plaintiff's action requires a finding that the ADA invalidates or amends the Medicaid Act by mandating the provision of personal care services which are otherwise an optional benefit. Plaintiff's claim requires no such finding. A determination that Plaintiff Haddad should be provided the services at issue to avoid imminent institutionalization does not require a finding that states are required to provide personal care services as a mandatory Medicaid benefit. Indeed, Plaintiff is not seeking an order requiring Defendants to provide particular services through a waiver program, nor does she contend that the ADA prohibits states from imposing any limit on such programs. Instead, she contends that because Defendants have chosen to provide personal care services through the TBI/SCI Waiver to persons such as herself, Defendants must administer its provision of those services in compliance with the ADA. A state that chooses to provide optional services, cannot defend against the discriminatory administration of those services simply because the state was not initially required to provide them. Indeed, Defendants have provided no authority for the proposition that a state that chooses to provide Medicaid services, even if otherwise optional, would not be required to comply with the ADA in the provision of those services, just as it would have to comply with the ADA for any other "services, programs, or activities" provided by a public entity.

The Court finds similarly unavailing Defendants' contention that Plaintiff's claim requires the Court to invalidate 42 U.S.C. § 1396n(c)(1), (9) and (10), which make waiver programs voluntary and permit states to cap the enrollment in such programs.[14] No such relief is sought in this action. Plaintiff's claim simply addresses the question of whether these Defendants, having opted to provide particular services via the mechanism of a Medicaid Waiver Program, may be required, under the ADA, to provide those same services to her if necessary to avoid imminent, unnecessary institutionalization. Defendants attempt to characterize such a finding as an invalidation of the Medicaid Act is without merit.

Having dispensed with Defendants' general challenges to Plaintiff's ability to pursue the instant cause of action, the Court turns its attention to the determination set forth in the June 23, 2010 Order that Plaintiff has clearly established that she has a substantial likelihood of prevailing on the merits of her claims. As previously noted, the Olmstead Court determined that the ADA requires states to provide community based treatment for persons with disabilities when: (1) the state's treatment professionals have determined that community-based services are appropriate for an individual; (2) the individual does not

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[14] The Department of Health & Human Services, Center for Medicaid and State Operations Olmstead Update No: 4 supports this determination:

> May a state establish a limit on the total number of people who may receive services under an [in-home services] waiver? Yes. . . . The State does not have an obligation under Medicaid law to serve more people in the [in-home services] waiver than the number requested by the State and approved by the Secretary. If other laws (e.g., ADA) require the State to serve more people, the State may do so using non-Medicaid funds or may request an increase in the number of people permitted under the [in-home services] waiver. Whether the State chooses to avail itself of possible Federal funding is a matter of the State's discretion. Failure to seek or secure Federal Medicaid funding does not generally relieve the State of an obligation that might be derived from other legislative sources (beyond Medicaid), such as the ADA.

http://www.cms.gov/smdl/downloads/smd011001a.pdf ("Olmstead Update"); Reply at 9 (emphasis in original omitted; underline supplied).

oppose such services; and (3) the services can be reasonably accommodated, taking into account (a) the resources available to the state and (b) the needs of others with disabilities. See Olmstead, 527 U.S. at 602-604, 607.

It is undisputed that Defendants are public entities. Likewise, Defendants do not dispute that Plaintiff is a "qualified individual with a disability" who could be served in the community. Additionally, Plaintiff has provided ample evidence that she will have to enter an institution in order to receive the in-home services that would allow her to remain in the community and which Defendants provide through their TBI/SCI Waiver program. Indeed, Defendants have denied Plaintiff in-home services to date unless she first enters a nursing home so that funding for her services can be obtained from the Transition Plan. Thus, there is no dispute over the first two Olmstead factors. Plaintiff is on the waiting list as a qualified individual and Defendants admit she is medically eligible for institutional and waiver program care. Not only does Plaintiff not oppose receipt of in-home services, she describes herself as desperately seeking them. The only factor in question, then, is whether Plaintiff's requested accommodation, receipt of in-home services, is a reasonable accommodation in light of Defendants' resources and their obligations to other disabled individuals.

Defendants do not dispute that providing in-home services costs less than nursing home placement. As Plaintiff is qualified, and desires, to receive in-home services, and the provision of in-home services is cost-neutral,[15] the Court turns to the question of whether Plaintiff's requested accommodation would result in a fundamental alteration of Defendant's programs. See Radaszewski v. Maram, 383 F.3d 599, 614 (7th Cir. 2004) (reversing

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[15] Indeed, in-home services are cost-saving rather than merely cost-neutral.

judgment in defendant's favor and remanding for consideration of whether the requested relief "is unreasonable or would require a fundamental alteration of the State's programs and services for similarly situated disabled persons."); Townsend v. Quasim, 328 F.3d 511, 519-20 (9th Cir. 2003) (reversing judgment and remanding for consideration of whether the modification requested would fundamentally alter the nature of services provided by the state); see also Fisher, 335 F.3d at 1180-81; Messier v. Southbury Training Sch., 562 F. Supp. 2d 294, 323 (D. Conn. 2008).

Defendants argue that Plaintiff's requested relief would constitute a fundamental alteration of its program because providing services to Plaintiff would cost more than Plaintiff's cost analysis indicates, as there are costs in the form of expanding its waiver program provider network which would be in addition to the added burden on their budget. Defendants also assert that they realize no savings unless an individual first enters a nursing home for a sufficiently long period of time. However, Defendant provided no evidence to support these arguments.[16] Beyond conclusory statements in the Response and at the hearing, Defendants have not shown how Plaintiff's cost analysis is flawed, how much an expansion of their provider network would cost, or why an individual must enter a nursing home facility for a certain period of time before Defendants realize any savings. While Defendants may be able to support these contentions on a more developed record, they have not done so here.

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[16] In the May 25 Order originally scheduling the Preliminary Injunction Hearing, the Court ordered the parties to submit all necessary evidence in advance of the hearing in accordance with Rule 4.06(b), Local Rules, United States District Court, Middle District of Florida (Local Rule(s)). Indeed, the hearing was continued in part to allow Defendants to obtain the necessary affidavits to present to the Court.

Additionally, the Court notes that if it costs less on a per day basis to provide in-home services instead of nursing facility care, it is unclear why Defendants would not realize some savings from the start. Defendants' contention appears to be based on the idea that if individuals are able to request and receive in-home services without first submitting to institutionalization, persons who are not truly at risk of institutionalization without state services, would nevertheless request provision of services at state expense. Thus, Defendants would be forced to spend funds for in-home services where no expenditure would otherwise be required. While this concern may have merit in the abstract, it has no application here. Based on the current record, Plaintiff has lost the provider of her necessary care. While her son stepped in to provide that care due to the exigent circumstances, his home and responsibilities in Miami, Florida will not permit him to continue to do so, and Plaintiff has no other source of care. While Defendants have suggested that they believe Plaintiff's actual risk of institutionalization is somewhat speculative, see id. at 62-63, the only evidence in the record supports a finding that Plaintiff is, indeed, on the threshold of involuntary institutionalization, see Haddad Dec. at 4-5; Johns Dec. at 5. Thus, while Defendants may be able to present testimony or evidence clarifying and supporting their concern, they have not done so at this time, and the evidence before the Court strongly suggests that such a concern has no application as to this particular Plaintiff.[17]

Moreover, to the extent Defendants' refusal to provide services is based on its financial structure, the Court notes that budgetary constraints, taken alone, are not enough

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[17] The Court expresses no opinion as to the merit of such a challenge by others, under different circumstances, or where the challenge to Defendants' program is mounted on a more global basis.

to establish a fundamental alteration defense. See Pa. Prot. & Advocacy, Inc., 402 F.3d at 381. Factors relevant to a fundamental alteration defense certainly include the state's available resources, as well as its responsibility to other individuals. See Olmstead 527 U.S. at 604; Pa. Prot. & Advocacy, Inc., 402 F.3d at 380. However, Defendants have pointed to no evidence, save for the single statement in the Russell Affidavit I that "[i]f the TBI/SCI Waiver Program were forced by court order to place Ms. Haddad in the program, we would have to reduce services that others in the TBI/SCI Waiver Program are currently receiving." Russell Aff. I at 2. However, where as here, the evidence is in conflict as to whether the TBI/SCI Waiver is actually full, this assertion is insufficient to support a fundamental alteration affirmative defense. Moreover, Defendants have failed to address other funding alternatives or to explain how being required to provide services to Plaintiff will undermine their ability to provide proper care to the state's disabled population. Indeed, Defendants provided no evidence that providing services to Plaintiff would cause their programs to suffer or be inequitable given the state's responsibility to provide for the care and treatment of its diverse population of persons with disabilities. Such evidence would certainly have been relevant to Defendants' fundamental alteration defense.

Additionally, the Court finds that on the current limited record, Defendants have simply failed to show that they have a comprehensive, effectively working plan in place to address unnecessary institutionalization. See id. at 381-82 (finding a comprehensive effective plan to be a prerequisite to mounting a fundamental alteration defense). In discussing the fundamental alteration defense, the Court in Olmstead recognized that if a state "had a comprehensive, effectively working plan for placing qualified persons with

[disabilities] in less restrictive settings, and a waiting list that moved at a reasonable pace, not controlled by the state's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met" and the Court would have no reason to interfere. Olmstead, 527 U.S. at 605-606. Following this guidance, in Arc of Washington State Inc. v. Braddock, 427 F.3d 615, 621 (9th Cir. 2005), the Ninth Circuit determined that the state of Washington's waiver program provided such an effective comprehensive plan such that the ADA required no modification. In doing so, the court noted that the waiver program was full, had a waiting list with turnover, all eligible individuals had an opportunity to participate in the program once space became available, slots had been increased when appropriate, expenditures more than doubled despite significant cutbacks or minimal budget growth in the agencies, and the institutionalized population declined by 20%. See id. at 621.

The record before the Court contains no similar evidence. Defendants have only shown that the various waiver programs have increased in size and expenditures. See Hudson Aff. at 1-3; see also Makin ex rel. Russell v. Haw., 114 F. Supp. 2d 1017, 1035 (D. Haw. 1999) (only showing an effort to decrease waiting list by increasing slots, without evidence of a plan, did not show that the state was complying with the ADA). However, this does not address the effectiveness of the TBI/SCI Waiver program. Indeed, Defendants were unable to provide the Court with even the most basic factual information in regard to the waiver program and its waiting list. Defendants did not know Plaintiff's place on the waiting list beyond the fact that she was not in the top forty-five. See Tr. at 51-52. Defendants provided no information as to the average time spent on the waiting list or the rate of turnover, see id. at 54, 102-03, although Plaintiff has been waiting for approximately

two-and-a-half years. Defendants' evidence was in conflict as to whether the TBI/SCI Waiver program was full. See id. at 60-62; 96-98. While Defendants argued that they are committed to decreasing the institutionalized population, they did not present evidence that it has steadily declined.[18] Indeed, contrary to Defendants' assertion of a comprehensive effective plan, the evidence suggests that Defendants' plan may well be ineffective given that their last representation to Plaintiff advised:

> [p]resently, the Department of Children and Families does not have funds available (or available openings) to serve additional individuals through these programs. . . . Placement on the waiting list does not ensure future eligibility. Funding is very limited in these programs, and the amount of funding allocated to these programs has not been increased in many years. Unfortunately, moving individuals off the waiting list into these programs does not occur frequently, therefore, we encourage you to continue seeking services from other programs.

January 8, 2010 Letter at 1. Moreover, despite Plaintiff having informed Defendants of the change in her circumstances in March 2010, Plaintiff has not been reassessed in regard to her priority on the waiting list for the TBI/SCI Waiver. See Haddad Dec. at 4; Tr. at 115-16.

Instead of providing evidence that they have in place an efficient comprehensive plan to avoid institutionalization, Defendants offer the alternative that Plaintiff enter a nursing home for at least sixty days and then be transitioned out of the institution and provided in-home services thereafter. See Tr. at 73-75. This proposal simply gives Defendants an alternative funding source for provision of the services Plaintiff requires. Thus, to satisfy Defendants' budgetary structure, an individual must run the gauntlet of institutionalization for at least sixty days in order to receive in-home services. See id. 105-07. Defendants

[18] Counsel made some representations regarding numbers based on "his understanding" but presented no evidence in support of that understanding.

have, on the current record, failed to show that such a deprivation is necessary to effectively provide care and treatment for the diverse population of persons with disabilities. Rather than providing for a proper assessment of need which may obviate the need for individuals to meet such a threshold, Defendants appear to be shifting the unnecessary burden of institutionalization onto Medicaid recipients. Accordingly, on the current record, Defendants' fundamental alteration defense is not sufficiently supported, and Plaintiff established that the law and facts at this stage clearly indicate she is likely to prevail on the merits of her case.

B. IRREPARABLE INJURY

Defendants argue that Plaintiff is unlikely to suffer irreparable injury because she will only be institutionalized temporarily. However, Defendants candidly acknowledge that they cannot assure the length of time in question, or that it is truly finite. Indeed, Defendants admit that upon the expiration of the sixty-day period, Plaintiff, who has been living successfully in the community for the last two and a half years, would have to be assessed by the state and be found to be safe for community placement. Accordingly, all Defendants can guarantee is that Plaintiff will face at least sixty days of institutionalization. See id. at 19, 73-75. The requirement that Plaintiff first enter a nursing home in order to be transitioned out sometime thereafter presents Plaintiff with exactly the kind of uncertain, indefinite institutionalization that can constitute irreparable harm. See Katie A. v. L.A. County, 481 F.3d 1150, 1156-57 (9th Cir. 2007) (though it applied an erroneous legal interpretation of the Medicaid statute, district court found unnecessary institutionalization that would occur absent a preliminary injunction to be irreparable harm); Long, 2008 WL 4571903, at *2 (if preliminary injunction was not issued, plaintiff would have to re-enter

nursing facility, which would inflict irreparable injury); McMillan v. McCrimon, 807 F. Supp. 475, 479 (C.D. Ill. 1992) ("possibility that the plaintiffs would be forced to enter nursing homes constitutes irreparable harm that cannot be prevented or fully rectified by a judgment later"). Moreover, Plaintiff's physician has indicated that institutionalization will be detrimental to Plaintiff's health and well-being. See Johns Dec. at 5 ("if [Plaintiff] were placed in a nursing home she would quickly become depressed and her health would most likely deteriorate"); see also Marlo M. v. Cansler, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010) (plaintiffs would suffer regressive consequences); Long, 2008 WL 4571903, at *2 (plaintiff would suffer "enormous psychological blow"). Therefore, Plaintiff clearly established that she is at risk of irreparable injury if required to enter a nursing home.

C. BALANCE OF HARMS

Additionally, Defendants admit that "if [Plaintiff] were to go into a nursing home tomorrow, okay, or today or next week or whatever, then clearly the balance of hardships would tip in her favor. . . . Hypothetically, that if she were to enter a nursing home, then yes, the balance of hardships would tip in her favor." Tr. at 65. But Defendants argue that Plaintiff's entry into a nursing home is speculative, and therefore, if Plaintiff would not be institutionalized for months or a year, the balance of harm would swing in Defendants' favor. See id. However, as previously noted, the Court is satisfied that Plaintiff established that she is, indeed, on the threshold of unnecessary institutionalization. See Haddad Dec. at 4-5; Johns Dec. at 5; Tr. at 83. Accordingly, the balance of harms clearly lies in Plaintiff's favor.

D. THE PUBLIC INTEREST

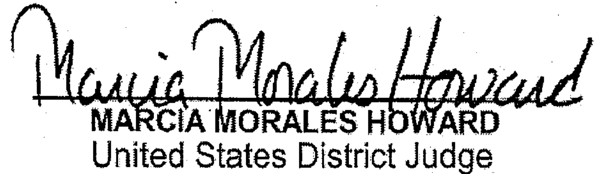
Likewise, the public interest favors preventing the discrimination that faces Plaintiff so that she may avoid unnecessary institutionalization. See Olmstead, 527 U.S. at 599-01. The public interest also favors "upholding the law and having the mandates of the ADA and Rehabilitation Act enforced," as well as in providing injunctive relief that "will cost less than the alternative care proposed by Defendants. As the funding originates from tax dollars, the public interest clearly lies with maintaining Plaintiffs in the setting that not only fulfills the important goals of the ADA, but does so by spending less for Plaintiffs' care and treatment." See Marlo M., 679 F. Supp. 2d at 638-39; see also Long, 2008 WL 4571903, at *3.

VI. CONCLUSION

In consideration of the foregoing, the Court determined that Plaintiff made a clear showing that she has a significant and substantial likelihood of succeeding on the merits of her claim, that Defendants' refusal to provide her with in-home based health care services for which she is financially and medically eligible, and which Defendants provide to others through the TBI/SCI Medicaid waiver program violates the ADA; that she will suffer irreparable injury unless the injunction is issued in that she is at imminent risk of being institutionalized in order to obtain the necessary services which Defendants refuse to provide her outside the institutional setting; that the threatened injury to Plaintiff outweighs the possible injury that the limited injunctive relief ordered here may cause Defendants; and

that such an injunction would not disserve the public interest.[19] Accordingly, the Court entered its June 23, 2010 Order granting preliminary injunctive relief in this action.

DONE AND ORDERED in Jacksonville, Florida, this 9th day of July, 2010.



MARCIA MORALES HOWARD
United States District Judge

Copies to:

Counsel of Record

[19] Again, the Court cautions that its findings in this Opinion are strictly limited to the unique circumstances currently facing Plaintiff, Michele Haddad, and are based upon the limited record now before the Court. Thus, this Court's determination that preliminary injunctive relief is appropriate should not be interpreted as suggesting that the Court will find such relief warranted under circumstances different from those here, or that Defendants, on a more complete record, cannot establish that such relief would constitute a fundamental alteration of their programs or that they have a comprehensive, effectively working plan for providing services to qualified individuals with disabilities obviating the need for such relief.