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

JACQUELINE JONES, on behalf of herself and all others similarly situated, Plaintiff, v. THOMAS ARNOLD, in his official capacity as Secretary, Florida Agency for Health Care Administration, and Dr. ANA VIAMONTE ROS, in her official capacity as Secretary, Florida Department of Health, Defendants.	)	Case No. 3:09-CV-1170-J34-JRK Class Action

UNITED STATES' MOTION TO INTERVENE

The United States hereby moves this Court for leave to intervene in this action as of right, pursuant to Federal Rule of Civil Procedure 24(a)(2) or, alternatively, in permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). As grounds therefore, the United States states as follows:

1. The United States' Motion to Intervene is timely because the litigation is in its early stages. The defendants' motion to dismiss and the plaintiff's motion for class certification are pending, and the United States' intervention will not create any delay.

Thus, intervention by the United States at this juncture will not prejudice the existing parties.

2. The United States has a substantial legal interest in the subject matter of the action because it involves claims asserted under title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973. The United States Department of Justice is the agency with primary regulatory and enforcement responsibilities under title II of the ADA and, as such, plays a unique role in enforcing and interpreting the statute and its implementing regulations on behalf of the broad public interest. It also has a significant interest in enforcing the Supreme Court case, *Olmstead v. L.C.*, 527 U.S. 581 (1999), which held that unnecessary institutionalization violates the ADA and the Rehabilitation Act.

3. Disposition of the action without the United States' participation may impede its enforcement and regulatory interests. Because there are relatively few cases interpreting *Olmstead*, the outcome of this case implicates *stare decisis* concerns that warrant the United States' intervention.

4. The United States' interests are not adequately protected by the existing parties to the litigation. Because the United States represents the public interest on a national scale, its interests do not necessarily align with the interests represented by private plaintiffs.

5. The United States also satisfies the requirements for permissive intervention because its claims against the defendant have questions of law and fact in common with the claims and facts at issue in the main action, and the action involves the interpretation

of statutes that the Attorney General is entrusted by Congress to administer. *See* Fed. R. Civ. P. 24(b)(2).

6. Pursuant to Local Rule 3.01(g), counsel for the United States conferred with counsel for the defendant by telephone on August 19, 2010 concerning the United States' motion to intervene. Counsel for defendant did not consent to the United States' request for intervention. Counsel for plaintiff consents to the United States' Motion to Intervene.

7. As further support for this Motion, the United States respectfully directs the Court to the following Memorandum of Law, which is attached hereto and incorporated herein by reference.

MEMORANDUM OF LAW IN SUPPORT OF
UNITED STATES' MOTION TO INTERVENE

I. INTRODUCTION

The proposed Complaint in Intervention alleges that the State of Florida fails to provide necessary community-based services so that Medicaid-eligible individuals with spinal cord injuries who are at risk of institutionalization may be served in the "most integrated setting appropriate to their needs."[1] The State continues to fund costly, institutional care, rather than provide sufficient community-based services to persons with spinal cord injuries, placing them at risk of unnecessary institutionalization. As a result, Florida is in violation of title II of the Americans with Disabilities Act (ADA), 42

[1] Pursuant to Fed. R. Civ. P. 24(c), the proposed Complaint in Intervention is attached hereto as Exhibit 1.

U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and their implementing regulations (as interpreted in *Olmstead v. L.C.*, 527 U.S. 581 (1999)).

Congress enacted the ADA in 1990 "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). As Congress stated in the Findings and Purposes of the ADA, "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 these reasons, Congress prohibited discrimination against individuals with disabilities by public entities, including discrimination in the form of segregation. *Olmstead v. L.C.*, 527 U.S. 581, 588 (1999).

Congress sought "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(2), and explicitly stated that one of the purposes of the ADA was "to ensure that the Federal Government plays a central role in enforcing the standards established [in the Act] on behalf of individuals with disabilities…." 42 U.S.C. § 12101(b)(3). The United States' prominent enforcement role is reflected in the statutory authorization given the Attorney General to commence a legal action when discrimination prohibited by the ADA takes place. 42 U.S.C. § 12133.

The Department of Justice thus has a unique role in enforcing and interpreting title II and its implementing regulations on behalf of the broad public interest. This case directly implicates the United States' interest in enforcing title II of the ADA and the

Department's goal of ensuring that the integration mandate of *Olmstead* is met. The United States also has a substantial interest in ensuring that recipients of federal financial assistance, such as the defendant, do not violate Section 504's similar prohibition of disability discrimination.

The private lawsuit was filed on December 2, 2009, in the U.S. District Court for the Middle District of Florida, on behalf of Jacqueline Jones, a 35-year old woman with quadriplegia, who alleged that the State of Florida failed to provide her with home and community-based services. The denial of community-based services put her at risk of institutionalization in violation of title II of the ADA and Section 504 of the Rehabilitation Act.[2] Shortly after filing the Complaint on behalf of the individual plaintiff, the Complaint was amended to include class claims. The proposed class consists of Florida residents with disabilities resulting from

> spinal cord injur[ies] who are Medicaid recipients; reside in the community; desire to continue to reside in the community instead of a nursing facility; could reside in the community with appropriate Medicaid-funded services; and are at risk, as determined by the recipient's treating physician or other treating health professional, of being forced to enter a nursing home because defendants do not provide adequate community-based services.

(Amended Complaint at ¶34.)

On December 29, 2009, defendants moved to dismiss the Amended Complaint and on January 6, 2010, plaintiffs filed a motion for class certification. The motion to dismiss and motion for class certification remain pending. On June 14, 2010, the Court

[2] The private lawsuit names in their official capacities, Thomas Arnold, the Secretary of the Florida Agency for Health Care Administration (AHCA) and Dr. Ana Viamonte Ros, Secretary of Florida's Department of Health (DOH), as defendants. Thomas Arnold resigned from his position in August 2010, and Elizabeth Dudek is serving as Interim Secretary of AHCA.

issued an order granting a joint motion to extend discovery and expert witness disclosure deadlines. On August 25, 2010, the parties filed another joint motion to extend the discovery deadlines. Accordingly, very little discovery has occurred to date, and the proceedings are at an early stage.

II. ARGUMENT

A. The United States Satisfies the Requirements for Intervention of Right

Federal Rule of Civil Procedure Rule 24(a) provides that upon timely application, anyone shall be permitted to intervene in an action:

> When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1302-03 (11th Cir. 2008) (quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989)); *see also Stone v. First Union Corp.*, 371 F. 3d 1305, 1308-09 (11th Cir. 2004).

Here, the United States' request for intervention satisfies the requirements of Rule 24(a)(2) for intervention as of right. The United States has a substantial legal interest in the subject matter of the action because this case directly implicates the United States' responsibility for enforcing title II of the ADA and Section 504 of the Rehabilitation Act. The United States is timely seeking to intervene in this action, as the case is still in its early stages, and its intervention will not disrupt the proceedings or prejudice either party. Moreover, the United States Department of Justice—as the agency with primary

regulatory and enforcement responsibilities under title II of the ADA—has direct and significant interests in this action that cannot be adequately protected by private parties.

1. The United States' Motion to Intervene is Timely

The Eleventh Circuit has identified several factors relevant to determining whether a request for intervention is timely:

> (1) the length of time during which the proposed intervenor knew or reasonably should have known of the interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties as a result of the proposed intervenor's failure to move for intervention as soon as it knew or reasonably should have known of its interest; (3) the extent of prejudice to the proposed intervenor if the motion is denied; and (4) the existence of unusual circumstances militating either for or against a determination that their motion was timely.

Georgia v. U.S. Army Corps of Engineers, 302 F.3d 1242, 1259 (11th Cir. 2002) (quoting *Chiles*, 865 F.2d at 1213).

The Supreme Court has emphasized that "[t]imeliness is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973). This Circuit has also recognized that the requirement of timeliness "must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice." *U.S. Army Corps of Engineers*, 302 F.3d at 1259 (citing *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970).

In *Chiles v. Thornburgh*, a motion to intervene was held to be timely where the motion "was filed only seven months after [the plaintiff] filed his original complaint, three months after the government filed its motion to dismiss, and before any discovery had begun." *Chiles*, 865 F.2d at 1213; *see also Diaz v. Southern Drilling Corp.*, 427 F.2d

1118, 1125-26 (5th Cir. 1970) (motion to intervene more than a year after the action was commenced was timely when there had been no legally significant proceedings other than the completion of discovery and intervention would not cause any delay in the process of the overall litigation).

Applying these factors to the instant case, the United States' application for intervention is timely. Since the filing of the initial complaint in December 2009, the parties have engaged in only limited discovery. Under the current scheduling order, discovery is not scheduled to close until December 2010, and the parties recently filed a joint motion to extend the discovery deadlines. Thus, this litigation remains at an early stage and the United States' decision to intervene at this point will not prejudice either party.[3] *Davis v. Southern Bell Tel. & Tel. Co.*, 149 F.R.D. 666, 670 (S.D. Fla. 1993) (allowing intervention "[a]lthough the case has been pending for more than two years, discovery on the merits has not been completed and dispositive motions have not been filed. As a consequence, there is no indication that this litigation is close to conclusion.").

While the existing parties to the litigation will not be prejudiced by the United States' intervention, the United States will be prejudiced if its request for intervention is denied. Its interests in enforcing title II of the ADA and the integration mandate will undoubtedly be impaired if it is not permitted to intervene in this action. Moreover, the Department of Justice's extensive experience with the statutes at issue will benefit the existing parties in presenting facts and arguments that will help frame the issues. By

[3] Because the pending motions to dismiss and for class certification are fully briefed, the United States does not seek to participate in the briefing of those motions.

avoiding multiple lawsuits and coordinating discovery, intervention will lend efficiency to the proceedings.

2. The United States has a Substantial Legal Interest in this Litigation

For an applicant's interest in the subject matter of the litigation to be cognizable under Rule 24(a)(2), it must be "direct, substantial and legally protectable." *U.S. Army Corps of Engineers*, 302 F.3d at 1249. *See also Chiles*, 865 F.2d at 1212-13 (noting that the focus of a Rule 24 inquiry is "whether the intervenor has a legally protectable interest in the litigation.") The inquiry on this issue "is 'a flexible one, which focuses on the particular facts and circumstances surrounding each [motion for intervention].'" *Chiles*, 865 F.2d at 1214 (quoting *United States v. Perry County Bd. of Educ.*, 567 F.2d 277, 279 (5th Cir. 1978)).

The United States has a legally protectable interest in this litigation. As the agency with primary regulatory and enforcement responsibilities under title II of the ADA, the United States Department of Justice has significant interests in enforcing and interpreting title II and ensuring that the integration mandate of *Olmstead* is met. *Olmstead*, 527 U.S. at 607. Accordingly, the Department of Justice has recently brought, intervened in, or participated as an amicus or an interested party in *Olmstead* litigation in cases in Connecticut, Florida, Georgia, Illinois, New York, New Jersey, North Carolina, California, Arkansas, Pennsylvania, and Virginia. Similarly, the Department of Justice has the authority to coordinate the implementation and enforcement of Section 504 of the Rehabilitation Act. Executive Order 12250, "Leadership and Coordination of

Nondiscrimination Laws," Nov. 2, 1980; 28 C.F.R. Pt. 41, App. A. The central issues of this case are critical to the Department of Justice's efforts to advance national goals of community integration and enforce the civil rights of persons with disabilities. Thus, the United States' interest in the pending litigation merits intervention as of right.

3. The Disposition of the Instant Litigation May Impair the United States' Ability to Protect Its Interest

The United States' ability to protect its substantial legal interest would be impaired absent intervention. Because the ADA is a relatively young statute, federal decisions interpreting and applying the provisions of the Act are an important enforcement tool. Specifically, because there has been relatively little case law defining the contours of a state's fundamental alteration defense under *Olmstead*, an unfavorable disposition of this case may, as a practical matter, impair the United States' interest in eliminating unnecessary segregation. The outcome of this case, including the potential for appeals by existing parties, implicates *stare decisis* concerns that warrant the United States' intervention. *See Stone*, 371 F. 3d at 1309-10 (recognizing that potential for a negative *stare decisis* effect "may supply that practical disadvantage which warrants intervention of right.") (citing *Chiles*, 865 F.2d at 1214); *see also United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 400 (9th Cir. 2002) (holding that amicus curiae status may be insufficient to protect the rights of an applicant for intervention "because such status does not allow [the applicant] to raise issues or arguments formally and gives it no right of appeal").

4. The Existing Parties Do Not Adequately Represent the United States' Interests

The fourth and final element to justify intervention of right is inadequate representation of the proposed intervenor's interest by existing parties to the litigation. This element is satisfied if the proposed intervenor "shows that representation of his interest 'may be' inadequate." *Chiles*, 865 F.2d at 1214 (citing *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972)). The burden on the proposed intervenor to show that existing parties cannot adequately represent its interest is "minimal." *Stone*, 371 F.3d 1311; *U.S. Army Corps of Engineers*, 302 F.3d at 1259 (citing *Trbovich*, 404 U.S. at 538 n. 10). Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action. *Lloyd v. Alabama Dep't of Corrections*, 176 F.3d 1336, 1341 (11th Cir. 1999); *Federal Sav. and Loan Ins. Corp. v. Falls Chase Special Taxing Dist*., 983 F.2d 211, 216 (11th Cir. 1993).

In this case, the United States' interest is in enforcing the ADA and Section 504 to advance the public interest in eliminating discrimination in the form of unjustified institutionalization from a state's failure to provide adequate home and community-based services. The private plaintiff cannot and does not represent the Department's views on the proper interpretation and application of title II and Section 504, and will not be able to make all the arguments that the United States will make if allowed to intervene. As the Ninth Circuit recognized in a case allowing private parties to intervene alongside government agency defendants, "[t]he interest of government and the private sector may diverge." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 823-24 (9th

Cir. 2001); *see also San Juan County v. U.S.*, 503 F.3d 1163, 1228-29 (10th Cir. 2007); *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancharia v. United States*, 921 F.2d 924, 926-27 (9th Cir. 1990) (recognizing that city government's interest could not be adequately represented by another entity).

B. The United States Meets the Requirements for Permissive Intervention

Rule 24(b) of the Federal Rules of Civil Procedure provides an alternative basis for the United States' intervention in this action. Rule 24(b) states, in relevant part:

> Upon timely application anyone may be permitted to intervene in an action …when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). The Eleventh Circuit has established a two-part test to guide the Court's discretion as to whether a party may intervene pursuant to Rule 24(b)(2): the applicant must show that "(1) his application to intervene is timely; and (2) his claim or defense and the main action have a question of law or fact in common." *Chiles*, 865 F.2d at 1213 (citing *Sellers v. United States*, 709 F.2d 1469, 1471 (11th Cir. 1983)).

As discussed above, the United States' application for intervention in this litigation is timely and the United States' participation would neither unduly delay the proceedings nor prejudice the adjudication of the rights of the original parties. Additionally, the United States' claims against the Defendant—namely, that its failure to

provide adequate community-based services to individuals with spinal cord injuries renders them at risk of institutionalization in violation of the ADA and the Rehabilitation Act—share common questions of law and fact with the private plaintiffs' claims.

Additionally, Federal Rule of Civil Procedure 24(b)(2) permits intervention by a government agency if a party's claim is based on a statute administered by the agency. As the agency tasked with enforcing title II of the ADA, the Department of Justice's intervention falls squarely within the language of Rule 24(b)(2). *See Halderman v. Pennhurst State School & Hosp*., 612 F.2d 84, 92 (3d Cir. 1979) (rev'd on other grounds) (stating that Rule 24(b)(2) makes "specific provision for intervention by governmental agencies interested in statutes, regulations or agreements relied upon by the parties in the action"); *Disability Advocates, Inc. v. Paterson*, No. 03-3209, 2009 WL 4506301 at *2 (E.D.N.Y. Nov. 23, 2009) (permitting intervention by the United States under Fed. R. Civ. P. 24(b)(2) in an action based on title II's integration mandate). Accordingly, the United States meets the requirements for permissive intervention.

III. CONCLUSION

For the foregoing reasons, the Court should grant the United States' motion to intervene (i) as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, (ii) permissively pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

Dated: September 10, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2010 a true and correct copy of the foregoing has been served by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of filing to the following: Stephen F. Gold, 1709 Benjamin Franklin Parkway, Second Floor, Philadelphia, PA 19103; Jay M. Howanitz, Spohrer & Dodd, P.L., 701 West Adams Street, Suite 2, Jacksonville, FL 32204; Enoch Jonathan Whitney, Office of the Attorney General, 400 South Monroe St. # PL-01, Tallahassee, FL 32399; and Andrew T. Sheeran, Agency for Health Care Administration, 2727 Mahan Drive, Building MS#3, Tallahassee, FL 32308.

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