UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

STEVEN HILTIBRAN, by and through his Mother and guardian, Debra Burkhart; NICHOLAS TATUM, by and through his Mother and next friend, Stacy Tatum; RONALD COONTZ, by and through his Mother and guardian, Patricia Coontz; and NENA HAMMOND, Plaintiffs, v. RONALD J. LEVY, in his official capacity As Director of the Missouri Department of Social Services; and IAN McCASLIN, M.D., in his official Capacity as Director of the MO HealthNet Division, Defendants.	))))))))))))))))	Case No. 10-4185-CV-C-NKL

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517, because this litigation implicates the proper interpretation and application of the integration mandate of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et. seq*. *See Olmstead v. L.C.*, 527 U.S. 581 (1999).[1] The Attorney General has authority to enforce Title II of the ADA, and pursuant to Congressional mandate, to issue regulations setting forth the forms of discrimination prohibited by Title II. 42 U.S.C § 12134. Accordingly, the United States has a strong interest in the resolution of this matter.

Plaintiffs are four individuals with disabilities who live in the community with their families but are at risk of unnecessary institutionalization because of defendants' discriminatory policies. Plaintiffs each have medical incontinence and require the use of incontinence supplies, particularly adult diapers. (Decl. of Debra Burkhart, attached to Pltfs.' Sugg. as Exh. 13, ¶¶1,4; Decl. of Patricia Coontz, attached to Pltfs.' Sugg. as Exh. 14, ¶1; Decl. of Stacy Tatum, attached to Pltfs.' Sugg. as Exh. 15, ¶¶1-2; Decl. of Nena Hammond, attached to Pltfs.' Sugg. as Exh. 16, ¶3.) Defendants have refused to provide plaintiffs with incontinence briefs so long as they reside in the community. Yet if plaintiffs were willing to leave their own homes and enter a nursing home – at a cost of nearly $40,000 per year (about 20 times the cost of providing incontinence briefs in the community) – defendants would provide them with these medically necessary services. (Burkhart Decl. ¶17; Coontz Decl. ¶6; Hammond Decl. ¶5; Tatum Decl. ¶3.) The

[1] 28 U.S.C. § 517 states that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General 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, or in a court of a State, or to attend to any other interest of the United States."

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ADA does not, however, permit the State to require plaintiffs to be unnecessarily institutionalized merely to gain access to covered services. Missouri's policy is nearly identical to that at issue in *Fisher v. Oklahoma Health Care Auth.,* 335 F.3d 1175, 1185 (10th Cir. 2003), where the Court held that the State of Oklahoma violated the ADA by having a policy to limit the number of prescription drugs available to Medicaid recipients who resided in the community but not to those in nursing homes and other institutions, which placed plaintiffs at risk of entering a nursing home to obtain needed medications. *Id*. at 1185.

Plaintiffs have established a strong likelihood of success on the merits of their claim that Missouri's failure to provide community-based services to individuals at risk of institutionalization violates Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131-12134, Section 504 of the Rehabilitation Act, 29 U.S.C. §794, and their implementing regulations (as interpreted in *Olmstead,* 527 U.S. 581). Furthermore, absent an injunction, plaintiffs will face irreparable harm. The balance of equities weighs in plaintiffs' favor, and granting this injunction is in the public interest.

ARGUMENT

A. *Olmstead* and the Integration Mandate

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It 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. 42 U.S.C. § 12132.[2]

One form of discrimination prohibited by the ADA is a violation of the "integration mandate." The integration mandate arises out of Congress's explicit findings in the ADA, the regulations of the Attorney General implementing Title II,[3] and the Supreme Court's decision in *Olmstead,* 527 U.S. at 586. In *Olmstead*, the Supreme 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 other persons with disabilities. *Id*. at 607.

The risk of institutionalization itself is sufficient to demonstrate a violation of Title II. *Fisher*, 335 F.3d at 1181. In *Fisher*, the Tenth Circuit rejected defendants' argument that plaintiffs could not make an integration mandate challenge until they were placed in the institutions. The court reasoned that the protections of the integration mandate "would be

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[2] The ADA requires that "[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." 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"). The rights, procedures, and enforcement remedies under Title II are the same as under section 504. *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994).

[3] The regulations provide that "a public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d); *see also* 28 C.F.R. § 41.51(d). The preamble discussion of the ADA "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. § 35.130(d), App. A. at 571 (2009).

meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation." *Id*. *See also Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 637 (E.D.N.C. 2010) (granting preliminary injunction in case where plaintiffs were at risk of institutionalization).[4]

B. Plaintiffs Satisfy the Requirements for a Preliminary Injunction

A movant must establish four elements before a preliminary injunction may issue: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc,* __ U.S. __, 129 S.Ct. 365, 374 (2008); *Dataphase Sys., Inc., v. C L Sys., Inc*., 640 F.2d 109, 113 (8th Cir. 1981). While "[n]o single factor is dispositive," *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006), the "most significant" of the four factors is whether the plaintiff is likely to be successful on the merits. *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp*., 59 F.3d 80, 83 (8th Cir. 1995) (quoting *S & M Constrs., Inc. v. Foley Co*., 959 F.2d 97, 98 (8th Cir. 1992), *cert. denied*, 506 U.S. 863 (1992)). Courts should first determine whether the movant has made a "threshold showing that it

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[4] *See also Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1164 (N.D. Cal. 2009); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 985 (N.D. Cal. 2010); and *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1109 (N.D. Cal. 2009) (all granting preliminary injunctions where plaintiffs were at risk of institutionalization due to cuts in community-based services); *Ball v. Rogers*, 2009 WL 13954235, at *5 (D. Ariz. April 24, 2009) (holding that defendants' failure to provide adequate services to avoid unnecessary institutionalization was discriminatory); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1309 (D. Utah 2003) (ADA's integration mandate applies equally to those individuals already institutionalized and to those at risk of institutionalization); *Crabtree v. Goetz*, 2008 WL 5330506, at *30 (M.D. Tenn. Dec. 19, 2008) (unpublished decision) ("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.").

is likely to prevail on the merits" and then "proceed to weigh the other *Dataphase* factors." *Planned Parenthood Minn., N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008). Plaintiffs have met the standard for a preliminary injunction.

1. Plaintiffs Are Likely to Succeed on the Merits of Their ADA Claims

Plaintiffs satisfy the three fundamental requirements of a claim under *Olmstead*. *Olmstead*, 527 U.S. at 607. The first two elements—that plaintiffs are appropriate for and do not oppose community placement—are not in dispute. Finally, plaintiffs' request that the State provide medically necessary incontinence supplies to Medicaid recipients in order to avoid institutionalization is reasonable given the State's resources and its ability to serve others with disabilities.

Missouri, through its Medicaid program, covers medically-necessary incontinence briefs for individuals aged four through twenty years. *See* Allen Letter, February 23, 2010 (Attached as Exh. 1 to Pls.' Mem. In Supp. of Mot. for Prelim. Inj., ECF No. 5-2).[5] However, upon an individual's 21st birthday, the State automatically stops providing the incontinence supplies. *Id.* Inexplicably, according to the State, when a person with a disability who is a recipient of Early and Periodic Screening Diagnostic and Treatment ("EPSDT") services[6] turns twenty-one and becomes ineligible for EPSDT services, the incontinence briefs transform from a medical supply into a "personal hygiene item." *Id.* But the State covers incontinence briefs for individuals of all

[5] Specifically, "[i]ncontinence supplies for participants age 20 and under are covered through the HCY (Healthy Children And Youth) Program, under the Durable Medical Equipment (DME) program . . . Disposable underpads, diapers, pull-ons, and protective underwear/briefs are limited to age 4-20 and require precertification . . . The state regulation 13 CSR 70-60.010 for DME is available on the Secretary of State's website at www.sos.mo.gov."

[6] EPSDT benefits are mandatory services for all Medicaid eligible children that states who chose to accept Medicaid funds must provide. 42 U.S.C. § 1396d(r)(1)-(5).

ages who reside in *nursing homes or hospitals*. *Id*. Thus, in order for plaintiffs to obtain medically necessary incontinence briefs, they must submit to a nursing home or hospital; they cannot live in the community.

Plaintiffs, Steven Hiltibran, Nicholas Tatum, Ronald Coontz and Nena Hammond, currently reside in the community and receive Medicaid. They have severe disabilities including cerebral palsy, static encephalopathy and seizure disorders, mental retardation, and spinal cord injuries which render them incontinent. (Burkhart Decl. ¶¶1,4; Coontz Decl. ¶1; Decl. of Stacy Tatum, attached to Pltfs.' Sugg. as Exh. 15, ¶¶1-2; Hammond Decl. ¶ 3.) Plaintiffs range in age between 22 and 49. (Burkhart Decl. ¶1; Tatum Decl. ¶1; Coontz Decl. ¶1; Hammond Decl. ¶2.)

Plaintiffs' treating doctors have all certified that their medical conditions require incontinence briefs. (Decl. of Dr. Harper, attached to Pltfs.' Sugg. as Exh. 17 ¶ 7; Decl. of Dr. Belancourt, attached to Pltfs.' Sugg. as Exh. 19 ¶¶ 7-11; Decl. of Dr. Porter, attached to Pltfs.' Sugg. as Exh. 18. ¶¶ 6-9; Decl. of Dr. Anzalone, attached to Pltfs.' Sugg. as Exh. 20 ¶¶ 3-7.) Without the briefs, plaintiffs would suffer skin breakdowns, ulcers, sepsis (an overwhelming bacterial infection that can trigger an "uncontrollable immunological and hormonal cascade" potentially leading to septic shock and death), full-body fungal infections, urinary tract and kidney infections, staph and yeast infections, permanent changes to the groin, and increased susceptibility to cancer. (Dr. Harper Decl. ¶ 7; Dr. Belancourt Decl. ¶¶ 7-11; Dr. Porter Decl. ¶¶ 6-9; Dr. Anzalone Decl. ¶¶ 3-7; Decl. of Dr. Huskey, attached to Pltfs.' Sugg. as Exh. 21 ¶¶ 7-9; Decl. of M. Yadria Hurley, attached to Pltfs.' Sugg. as Exh. 22 ¶¶ 6-9.) Indeed, Ms. Tatum has already experienced skin breakdowns and infections because she re-uses incontinence briefs to

save money. (Hammond Decl. ¶¶ 6-8.) These medical complications necessitate hospitalizations and nursing home placements. (Decl. of David B. Gray, Ph.D, ECF No. 5-24 ¶10.) For example, Dr. Huskey states that "incontinence is one of the leading causes of institutionalization, and individuals suffering from incontinence are at serious risk of institutionalization." (Dr. Huskey Decl. ¶¶ 10-13, 24.) *See also* CMS State Operations Manual, CMS publication number 100-07, Appendix PP, § 483.25(d), available at www.cms.gov/Manuals/IOM/list.asp ("Urinary incontinence and related loss of independence are prominent reasons for a nursing home admission.")

Plaintiffs, who desperately want to avoid nursing home placement, have struggled to pay for the incontinence supplies in the face of overwhelming financial hardship and have barely managed to pay for them through a combination of donations from charities and family members. However, any minor change in the plaintiffs' support networks would leave the plaintiffs no choice but to enter a nursing home or risk severe medical complications. Plaintiffs' families know it is likely that they may have to place plaintiffs in nursing homes to ensure that they receive sufficient incontinence supplies. (Burkhart Decl. ¶¶17,21; Tatum Decl. ¶11; Coontz Decl. ¶12; Hammond ¶13.) Such a precarious situation renders the plaintiffs at risk of institutionalization.

Each of the plaintiffs receives Supplemental Security Income (SSI) of approximately $674 per month which is intended to provide a "standard of living at the established Federal minimum income level." 20 C.F.R. § 416.110. SSI covers only enough for the basic necessities of life, and forcing plaintiffs to pay for medical supplies requires them to dip below this established Federal minimum income level. *See Atkins v. Rivera,* 477 U.S. 154, 157 (1986)

("SSI assistance [is] intended to cover basic necessities, but not medical expenses. Thus, if a person in this category also incurs medical expenses during that month, payment of those expenses would consume funds required for basic necessities.") For instance, Mr. Hiltibran's mother already must forgo other necessities to provide for Steven's care. (Burkhart Decl. ¶18.)[7] Mr. Tatum's mother "has trouble meeting all of [her] expenses every month and sometimes ha[s] to do without eating in order to afford the diapers and all of the related costs of caring for Nicholas and [her] other two children." (Tatum Decl. ¶9.) Similarly, Mr. Coontz's mother is "struggling to pay for his diapers" and states that the additional expense has "taken a toll on [their] lives." (Coontz Decl. ¶¶8,10.) And Ms. Hammond often has "difficulty paying [her] rent, utilities, and other bills, as well as purchasing food and other necessary items. It is a constant financial struggle to get by, trying to pay for diapers and also meet all of [her] other basic needs." (Hammond Decl. ¶10.) Indeed, because of this cost, Ms. Hammond re-wears used diapers. (Id.)

The monthly cost of diapers imposes a significant hardship on plaintiffs as it consumes an out-sized share of their near-poverty-level incomes. For instance, the cost of Mr. Hiltibran's diapers ($80 per month) represents approximately 12% of his limited income ($674 per month in SSI benefits). (Burkhart Decl. ¶¶1,17.) The cost of Mr. Tatum's diapers ($100 per month) represents 18% of his income (SSI benefits of $547 per month). (Tatum Decl. ¶¶1,3.) The cost of Mr. Coontz's diapers (approximately $300 per month) represents approximately 43% of his income (SSI and SDI benefits totaling $694 per month). (Coontz Decl. ¶¶3,6.) And the cost of Ms. Hammond's diapers (approximately $18-$90 per month) represents between 2% and 13% of

[7] Steven and his mother live together in a home built by Habitat for Humanity and pay $225 a month for the mortgage. (Burkhart Decl. ¶17,18.) Steven and his mother live off of Steven's SSI benefits of $674.00 per month as his mother cannot work because she must supervise her son's care 24 hours per day. (Id. ¶1,18,19.)

her total monthly income ($694 per month from SSI and Social Security). (Hammond Decl. ¶¶4,5.)

Plaintiffs here, like the plaintiffs in *Fisher*, are barely avoiding institutionalization under the burden of paying for their incontinence supplies due to their "precarious health and finances." *Fisher*, 335 F.3d at 1184. In *Fisher,* the court found that a five-prescription cap imposed on individuals living in the community, but not those living in nursing homes, placed them at "high risk for premature entry into a nursing home." *Id.* The court examined each plaintiff's financial situation to determine the impact of the prescription cap. *Id.* at 1184-85. As a result of the state's policy, one *Fisher* plaintiff would spend 36.6% of her $547 monthly income on prescriptions, an amount the court found "will place a severe burden on her finances and could easily force her to enter a nursing home." *Id.* at 1184. Thus the court found there was "no question" that she would be harmed absent an injunction. *Id.* For two other *Fisher* plaintiffs who would devote 8.28% and 8% of their total monthly income (SSI totaling $725 and $313 per month, respectively) towards prescriptions, the court found that "[t]his may not be devastating, but it will likely have a real effect on [plaintiffs'] finances given their poverty. . ." *Id.* As a result, the Tenth Circuit Court of Appeals reversed the lower court's denial of a preliminary injunction and found that due to the plaintiffs' precarious health and finances, the state's prescription drug cap placed them at risk of institutionalization. *Id.*

Plaintiffs here are in the same precarious position as the plaintiffs in *Fisher* and are devoting between approximately 7.5% and 43% of their SSI income to pay for incontinence supplies. That plaintiffs have thus far avoided institutionalization due to their emphatic "desire

to remain in the community does not mean that they do not face a substantial risk of harm." *Id.* at 1184-85.

Defendants provide adult briefs to nursing home residents, but not to persons with disabilities who reside in the community.[8] Courts have routinely recognized that a request to receive services in the community when the individual is entitled to those same services in an institution is a reasonable modification and not a fundamental alteration of a state's program. For instance, in *Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003), the court stated that *Olmstead* controls where the issue centers on "what location these services will be provided. Mr. Townsend simply requests that the services he is already eligible to receive under an existing state program (assistance in dressing, bathing, preparing meals, taking medications, and so on) be provided in the community-based adult home where he lives, rather than the nursing home setting the state requires." *Id.* at 517. Similarly, in a pre-*Olmstead* case, *Helen L. v. DiDario*, 46 F.3d 325, 337-39 (3d Cir. 1995), the court determined that the state had violated the ADA's integration mandate by failing to provide state-funded attendant care services for plaintiff in her

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[8] Plaintiffs have repeatedly communicated with case managers, counsel from the Missouri Department of Social Services and even pursued an administrative appeal only to be told repeatedly that Missouri does not provide briefs to adults. (Correspondence from Director of DSS, Exhs. 2 and 3; Administrative Judge's ruling, Exh. 4.; Coontz Decl. ¶8, Tatum Decl. ¶7, Hammond ¶11, Burkhart Decl. ¶¶9, 15-16.) In their brief, defendants now suggest that plaintiffs "*may* qualify for waiver programs that provide incontinence briefs" and that if a plaintiff were to face institutionalization, "it is *likely* that the plaintiff would qualify for a waiver program that would provide such coverage," while also stating that "it is not clear whether [plaintiffs] would be admitted to the [waiver] program[s]." (Defs.' Br. at 9,10.) (emphasis added). This Court should reject defendants' attempt to avoid the issuance of a preliminary injunction based on a new litigation position completely inconsistent with defendants' prior actions. Moreover, irrespective of the defendants' new litigation position plaintiffs are at serious risk of institutionalization because defendants have consistently denied their requests for coverage of incontinence supplies.

own home, rather than in a nursing home. *See also Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004), 2008 WL 2097382 at *39-41 (N.D. Ill. March 26, 2008) (finding the plaintiff demonstrated a likelihood of success and later proved a Title II claim at trial where the requested accommodation of private-duty nursing care in the community would be the same as the service provided in the institution).[9]

Additionally, defendants cannot evade their duty to provide services in the most "integrated setting appropriate to the needs of qualified persons with disabilities" by relying upon plaintiffs' sporadic and uncertain ability to secure supplies through other sources such as a church or other charities (Burkhart Decl. ¶17; Hammond Decl. ¶10). Defendants bear the burden of providing more than just the "'theoretical' availability" of alternative services and must ensure that plaintiffs can secure necessary services in order to avoid the risk of institutionalization. *See Brantley*, 656 F. Supp. 2d at 1174; *V.L.*, 669 F. Supp. 2d at 1120.

Defendants argue that because their state Medicaid plan is approved by CMS, plaintiffs cannot prevail on their ADA and Rehabilitation Act claims. (Def. Sugg., Doc. 17 at 8.) Defendants' argument is flawed for two reasons. First, the approved State Medicaid plan does not indicate any limitation on the coverage of medical supplies, such as incontinence briefs.[10] Instead, the approved State Medicaid plan expressly provides that "Medically necessary supplies, which are not routinely furnished in conjunction with patient care visits and which are direct,

[9] *See also Jones v. Dept. of Public Aid*, 867 N.E.2d 563, 573 (Ill. App. 3d 2007) (reasonable modification to require a state to offer services in a home or community-based setting that are available in an institution.); *Fisher* 335 F.3d at 1182.

[10] Under 42 U.S.C. § 1396a(a)(10)(D), "home health services" is a mandatory benefit for anyone who, under the State Medicaid plan, is entitled to nursing facility services. Explicitly included within "home health services" are "medical supplies, equipment, and appliances suitable for use in the home." 42 C.F.R. § 440.70(b)(3).

identifiable services to an individual patient, are reimbursable to the [patient's home health] agency." *See* June 3, 2010 Amendment to Missouri State Medicaid plan, Att. 3.1-A ¶ 7.c., *available at* http://www.cms.gov/MedicaidGenInfo/downloads/MO-10-02-179.pdf (attached hereto as Exhibit B.).

Second, the State's obligations under the ADA are not defined by the scope of the federal-state Medicaid program. Title II of the ADA is an independent legal obligation on states to operate programs, services, and activities in ways that do not discriminate on the basis of disability. *See Townsend*, 328 F.3d at 518, n.1. Complying with the Medicaid Act is not sufficient to comply with the ADA. Quite the contrary, courts have routinely held that a state may run afoul of the ADA even while carrying out CMS approved state plans, waiver services, and amendments. *See e.g.*, *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004) (plaintiffs' claims allowed to proceed without regard to HHS' approval of state's Medicaid plan and waiver programs); *Crabtree v. Goetz*, No. Civ. A. 3:08-0939, 2008 WL 5330506, at *2, 31, (M.D. Tenn. Dec.19, 2008) (same); *Haddad v. Arnold*, No. 10-414, slip op. at 29 (S.D. Fla. July 9, 2010) (attached as Exhibit A.) (The *Haddad* Court held that CMS' approval of defendants' waiver program did not prevent plaintiff's claim under the ADA, citing HHS guidance clarifying that while a state can be in compliance with Medicaid law, it may need to take additional steps to ensure that it is in compliance with other federal statutes, including the ADA.); *Grooms v. Maram*, 563 F. Supp. 2d 840 (N.D. Ill. 2008) (allowing plaintiff's integration claim to move forward despite the fact that HHS had approved the underlying waivers).

2. Plaintiffs Will Suffer Irreparable Harm if Defendants Are Not Enjoined

This Court should order a preliminary injunction because there is a threat of irreparable harm if injunctive relief is not granted, and that harm is not compensable by money damages in this case. *Doe v. LaDue*, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007) (citing *Northland Ins. Co. v. Blaylock*, 115 F. Supp. 2d 1108, 1116 (D. Minn. 2000)). The harms plaintiffs face – serious deterioration of their health and physical conditions and institutionalization – are exactly such incompensable harms. As discussed above, without incontinence supplies, plaintiffs' physicians have recognized that each individual is at serious risk of skin deterioration, pressure sores, and infection, as well as institutionalization.

Unnecessary institutionalization—even temporarily—results in irreparable harm. *See Marlo M.*, 679 F. Supp. 2d at 638; *Crabtree*, 2008 WL 5330506, at *25 (unnecessary institutionalization "would be detrimental to [plaintiffs'] care, causing, inter alia, mental depression, and for some Plaintiffs, a shorter life expectancy or death"); *Long v. Benson*, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008) (moving from the community to a nursing home would be an "enormous psychological blow").[11] Further, once an individual enters an institution, it becomes much more difficult to transition back into the community. (Gray Decl. ¶13.)

3. <u>The Balance of Hardships Tips in Plaintiffs' Favor</u>

The state may not be heard to argue hardship from providing medically necessary incontinence supplies through Medicaid when it already makes these supplies available to

[11] The *Olmstead* Court itself recognized another harm that results from unnecessary institutionalization. Specifically, the Court recognized that needless institutionalization perpetuates "unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and that severing individuals from their communities "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead*, 527 U.S. at 600-01.

individuals under 21 in the community and to all individuals living in institutional settings. Any cost saved by offering them to eligible Medicaid recipients living in the community is negligible and is clearly outweighed by the benefit of allowing plaintiffs to remain in their homes. *Long*, 2008 WL 4571903, at *3 ("If … ultimately … the Secretary prevails in this litigation, little harm will have been done. To the contrary, [plaintiff's] life will have been better, at least for a time."). Furthermore, allowing plaintiffs to receive incontinence supplies in their homes will save money because the costs of providing the incontinence supplies to plaintiffs at home (approximately $480 to $1,800 per year[12]) are significantly less than the total cost of plaintiffs' care in a nursing home (approximately $40,000 per year). (Gray Decl. ¶12.) Furthermore, the cost for unnecessary hospitalizations due to infections and other medical complications that are likely without proper incontinency care "could cost an average of $1,768 for one day which can exceed the cost of covering the adult diapers for a disabled individual for an entire year." (Id.) The lack of hardship to defendants is in stark contrast to the significant hardship the plaintiffs face if no injunction is granted.

4. Granting a Preliminary Injunction is in the Public Interest

There is a strong public interest in granting the injunction to eliminate the discriminatory effects that arise from segregating persons with disabilities into institutions. As the Supreme Court in *Olmstead* explained, the unjustified segregation of persons with disabilities can stigmatize them as incapable or unworthy of participating in community life. *Olmstead,* 527 U.S. at 600. In *V.L.,* the court stated that the public interest inquiry was satisfied where "'[i]t

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[12] These estimates are based upon plaintiffs' costs of diapers of $80 to $300 per month. However, the State would only be responsible for a portion of the total cost as the federal Medicaid program would contribute approximately one-half towards the costs.

would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential [public] benefits for any period of time.'" *V.L.*, 669 F. Supp. 2d at 1122 (citing *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir.1983)). *See also Haddad*, slip op. at 38 ("[T]he public interest favors preventing the discrimination that faces Plaintiff so that she may avoid unnecessary institutionalization … [and] upholding the law and having the mandates of the ADA and Rehabilitation Act enforced…."); *Accord Marlo M*., 679 F. Supp. 2d at 639; *Crabtree*, 2008 WL 5330506, at *30; *Heather K. v. Mallard*, 887 F.Supp. 1249, 1260 (N.D. Iowa 1995); *Benjamin H. v. Ohl*, 1999 WL 34783552, at *16-17 (S.D. W.Va. Jul. 15, 1999).

CONCLUSION

For the reasons stated above, the Court should grant Plaintiffs' Motion for Preliminary Injunction. With the Court's permission, counsel for the United States will be present at any upcoming hearings.

Dated: October 15, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2010, a copy of foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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Exhibit A

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

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[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

[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

[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.

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[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

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[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,

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[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

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[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.

Exhibit B

DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION

FORM APPROVED
OMB NO. 0938-0193

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
FOR: HEALTH CARE FINANCING ADMINISTRATION

1. TRANSMITTAL NUMBER: 1 0 – 0 2

2. STATE Missouri

3. PROGRAM IDENTIFICATION: TITLE XIX OF THE SOCIAL SECURITY ACT (MEDICAID)

TO: REGIONAL ADMINISTRATOR
HEALTH CARE FINANCING ADMINISTRATION
DEPARTMENT OF HEALTH AND HUMAN SERVICES

4. PROPOSED EFFECTIVE DATE

October 1, 2010

5. TYPE OF PLAN MATERIAL *(Check One)*:

☐ NEW STATE PLAN ☐ AMENDMENT TO BE CONSIDERED AS NEW PLAN ☒ AMENDMENT

COMPLETE BLOCKS 6 THRU 10 IF THIS IS AN AMENDMENT *(Separate Transmittal for each amendment)*

6. FEDERAL STATUTE/REGULATION CITATION:
1902(a)(10)(D)

7. FEDERAL BUDGET IMPACT:
a. FFY 2011 $ 365
b. FFY 2012 $ 365

8. PAGE NUMBER OF THE PLAN SECTION OR ATTACHMENT:

Attachment 3.1-A, pages 13, 14

9. PAGE NUMBER OF THE SUPERSEDES PLAN SECTION OR ATTACHMENT (If Applicable):

Attachment 3.1-A, pages 13, 14

10. SUBJECT OF AMENDMENT:

This amendment will eliminate the "confined to the home" requirement of the MO HealthNet home health program as required by the Centers for Medicare and Medicaid Services February 26, 2010 letter in order to maintain federal financial participation.

11. GOVERNOR'S REVIEW (Check One)

☑ GOVERNOR'S OFFICE REPORTED NO COMMENT
☐ COMMENTS OF GOVERNOR'S OFFICE ENCLOSED
☐ NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL
☐ OTHER, AS SPECIFIED:

12. SIGNATURE OF STATE AGENCY OFFICIAL:

13. TYPE NAME: Ronald J. Levy

14. TITLE: Director

15. DATE SUBMITTED: April 12, 2010

16: RETURN TO:

MO HealthNet Division
P.O. Box 6500
Jefferson City, MO 65102

FOR REGIONAL OFFICE USE ONLY

17. DATE RECEIVED: April 12, 2010

18. DATE APPROVED: June 3, 2010

PLAN APPROVED – ONE COPY ATTACHED

19. EFFECTIVE DATE OF APPROVED MATERIAL: October 1, 2010

20. SIGNATURE OF REGIONAL OFFICIAL:

21. TYPED NAME: James G. Scott

22. TITLE: Associate Regional Administrator for Medicaid and Children's Health Operations

23. REMARKS:

FORM HCFA-179 (07-92)

State Missouri

Home health services are only covered for a Medicaid recipient if provided in the recipient's home. Home health visits will be limited to the number of visits on a Plan of Care. The number of home health visits (skilled nurse and aide) during one year may not exceed 100, except skilled nurse visits as approved by the MO HealthNet Division or their designee. These services are restricted to performance by a registered or licensed practical nurse, home health aide, physical therapist, occupational therapist, or speech therapist, in the employ of or under contract to a home health agency licensed by the State of Missouri. To be eligible for home health services, a recipient must require the services of a skilled nurse or therapist, as defined in paragraphs 7.a and d below. The services which are required must be reasonable and necessary for the treatment of an illness or injury and must require performance by the appropriate licensed or qualified professional to achieve the medically desired result.

7.a. Intermittent or part-time nursing service

Intermittent skilled nursing care by a registered or licensed practical nurse which is reasonable and necessary for the treatment of an injury or illness is covered when delivered in accordance with the plan of treatment. Purely preventive care is not covered.

7.b. Home-health aide services

Home health aide services must be specified on the plan of care and needed concurrently with covered skilled nursing or physical, occupational, or speech therapy services. The services of the aide must be reasonable and necessary to maintain the recipient at home and there must be no other person who could and would perform the service.

7.c. Medical supplies, equipment, and appliances

Medically necessary supplies which are not routinely furnished in conjunction with patient care visits and which are direct, identifiable services to an individual patient are reimbursable to the agency. Examples include: Ostomy sets and supplies, irrigation sets and supplies, tapes, catheters and supplies.

Needed items of medical equipment prescribed by a physician are available to all recipients including recipients of home health, through the Durable Medical Equipment program.

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State Missouri

7.d. Physical therapy, occupational therapy, and speech therapy:

Skilled therapy services as defined under 42 CFR 440.70(b)(4) will be considered reasonable and necessary for treatment under the home health program if the following conditions are met.

(A) The Services:

1. Must be consistent with the nature and severity of the illness, and the recipient's particular medical needs, and;

2. Must be considered, under accepted standards of medical practice, to be specific and effective treatment for the patient's condition, and;

3. Must be provided with the expectation, based on the assessment by the attending physician of the recipient's rehabilitation potential, that the recipient's condition will improve materially in a reasonable and generally predictable period of time, and;

4. Are necessary for the establishment of a safe and effective maintenance program, or for teaching and training a caregiver.

(B) Therapy services may be delivered for one certification period (up to 62 days), if services are initiated within 60 days of onset of the condition or within 60 days from date of discharge from the hospital, if the recipient was hospitalized for the condition. Prior authorization to continue therapy services beyond the initial certification period may be requested by the home health provider. Prior authorization requests will be reviewed by MO HealthNet Division, and approval or denial of the continuation of services will be based on the services' continued adherence to the criteria used in the original determination.

9. Clinic services

Clinic services are payable to a clinic only if

(1) The clinic has signed a participation agreement and has been set up as a participating provider under one of the following provider types: Independent Clinic, Public Health Department Clinic, Planned Parenthood Clinic, Professional Clinic Optometry, Community Mental Health Center, Adult Day Health Care Center.

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