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

MICHELE HADDAD, Plaintiff, v. 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.	)	Case No. 3:10-CV414-J-00 MMH-TEM

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States files this Statement of Interest, pursuant to 28 U.S.C. § 517, because this litigation implicates the proper interpretation and application Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq., ("ADA").[1] In particular, this case involves Title II's integration mandate. See *Olmstead v. L.C.*, 527 U.S. 581 (1999). The Department of Justice has authority to enforce Title II, 42 U.S.C. § 12133, and to issue regulations implementing the statute, *id*. §12134. The United States has a strong interest in the resolution of this matter.[2]

[1] This statute, 28 U.S.C. § 517, does not require the United States to seek leave of the parties to file a statement of interest.

[2]The Administration's commitment to realizing the goals of community integration as set forth in *Olmstead* has led the United States to file briefs in a number of *Olmstead* enforcement cases since 2009 in Connecticut, Virginia, North Carolina, New York, Illinois, Georgia, Arkansas, and California. *See* "President Obama Commemorates Anniversary of Olmstead and Announces New Initiatives to Assist Americans with Disabilities," June 22, 2009, Office of the Press Secretary, *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities/)

This lawsuit alleges that the State of Florida fails to provide community-based services to Medicaid-eligible individuals with spinal cord injuries who are at risk of institutionalization. Instead, the state will fund those services only after an individual relinquishes his or her ties to the community and enters a nursing home. ("Russell Affidavit," *Jones v. Arnold*, No. 09-cv-1170 (M.D. Fla., Dkt. 59) (Attached at Exh. A).) The state continues to fund costly, unnecessary institutional placements when it could instead provide more appropriate, community-based services at a lower cost, in violation of Title II, as interpreted in *Olmstead*.[3]

Since 2007, Ms. Haddad has successfully resided in the community. Her ability to remain in the community was recently imperiled due to changes in her caregiver situation. Ms. Haddad notified defendants of her increased need for services but was told services were not available. However, she was informed that, although there were no funds for community-based services, if she would move into a nursing home for sixty days, then she could receive ten hours of services each day in the community. (Haddad Dec. ¶ 17.) Due to her inability to access services on the Traumatic Brain Injury/Spinal Cord Injury ("TBI/SCI") Waiver, Ms. Haddad is at risk of entry into an unnecessarily segregated setting (e.g. a nursing home).

The state's failure to provide sufficient community-based services to qualified individuals who are at risk of institutionalization and its conditioning of community-based services on entrance into a nursing home violates the ADA. If a state can require

[3] This lawsuit is related to *Jones v. Arnold*, No. 09-cv-1170 (M.D. Fla., filed Dec. 2, 2009). *Jones* was brought on behalf of one individual, Ms. Jones, and the complaint was later amended to add class claims and additional named plaintiffs. Plaintiffs filed for leave to add Ms. Haddad as a named plaintiff in the *Jones* action, however this motion is still pending (as is the motion for class certification). A motion for preliminary injunction was filed on behalf of Ms. Haddad on April 15, 2010. This motion was denied without prejudice on May 7, 2010, due to Ms. Haddad's status as a non-party. Subsequent to that decision and in light of Ms. Haddad's urgent need for services, counsel in *Jones* filed this separate action in order to resolve this Court's concerns about Ms. Haddad's current status as a non-party.

individuals to enter an institution before providing community-based services, the protections of *Olmstead* are meaningless. The facts alleged in Ms. Haddad's complaint, as well as her declaration in support of her motion for preliminary injunction, demonstrate a likelihood of success on the merits of the Title II integration claim. Furthermore, Ms. Haddad's allegations meet the additional requirements for a preliminary injunction: plaintiff's placement in an institutional setting will cause irreparable harm, the balance of equities weighs in favor of Ms. Haddad, and granting this injunction is in the public interest.

Statutory and Regulatory Background

Congress enacted the Americans with Disabilities Act ("ADA") in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities.

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

42 U.S.C. § 12132.

As directed by Congress, 42 U.S.C. § 12134, the Attorney General issued regulations implementing Title II, which are based on regulations issued under section

504 of the Rehabilitation Act.[4] *See* 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Executive Order 12250, 45 Fed. Reg. 72995 (1980), *reprinted in* 42 U.S.C. § 2000d-1. The Title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The preamble discussion of the "integration regulation" explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. § 35.130(d), App. A.

Eleven years ago, the Supreme Court applied these authorities and held that Title II prohibits the unjustified segregation of individuals with disabilities. *Olmstead*, 527 U.S. at 586. *Olmstead* held that public entities are required to provide community-based services for persons with disabilities who would otherwise be entitled to institutional services when a) treatment professionals reasonably determine that such placement is appropriate; b) the affected persons do not oppose such treatment; and c) the

[4] Title II was modeled closely on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination on the basis of disability in federally conducted programs and in all of the operations of public entities that receive federal financial assistance. Title II provides that "[t]he remedies, procedures, and rights" set forth under Section 504 shall be available to any person alleging discrimination in violation of title II. 42 U.S.C. § 12133; *see also* 42 U.S.C. § 12201(a) (ADA must not be construed more narrowly than Rehabilitation Act). The ADA directs the Attorney General to promulgate regulations to implement title II, and requires those regulations to be consistent with preexisting federal regulations that coordinated federal agencies' application of Section 504 to recipients of federal financial assistance, and interpreted certain aspects of Section 504 as applied to the federal government itself. 42 U.S.C. § 12134(a)-(b). Title II thus extended Section 504's pre-existing prohibition against disability-based discrimination in programs and activities (including state and local programs and activities) receiving federal financial assistance or conducted by the federal government itself to all operations of state and local governments, whether or not they receive federal assistance. The ADA and the Rehabilitation Act are generally construed to impose the same requirements. *See Allmond v. Akal Sec., Inc*., 558 F.3d 1312 (11th Cir. 2009); *Cash v. Smith*, 231 F.3d 1301, 1305(11th Cir, 2000). This principle follows from the similar language employed in the two acts. It also derives from the Congressional directive that implementation and interpretation of the two acts "be coordinated to prevent[ ] imposition of inconsistent or conflicting standards for the same requirements under the two statutes." *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468 (4th Cir, 1999) (citing 42 U.S.C. § 12117(b)) (alteration in original). *See also, Yeskey v. Com. of Penn. Dep't of Corrections*, 118 F.3d 168, 170 (3d Cir. 1997) ("[A]ll the leading cases take up the statutes together, as we will."), aff'd, 524 U.S. 206 (1998).

placement can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. *Olmstead*, 527 U.S. at 607.

Summary of Facts

Pursuant to provisions of the Medicaid Act, Florida administers the TBI/SCI Waiver program, which reimburses participants' costs for a range of home-based services provided to Medicaid recipients. *See* 42 U.S.C. § 1396(c).[5] The TBI/SCI Waiver, which was approved by the federal government's Centers for Medicare and Medicaid Services ("CMS") in 2002, caps the number of persons eligible to receive community-based services at 375 people through 2012.[6] (Compl. ¶ 43). Despite the substantial waiting list for these services,[7] defendants have not sought to increase the number of individuals it plans to serve under the waiver.[8] Instead of serving these individuals in the community,

[5] Waiver programs allow states to provide home and community based services to individuals with disabilities who would otherwise require the level of care provided in institutions such as nursing homes.

[6] CMS approved nine waiver programs in Florida for individuals who would otherwise require care in an institutional setting, including the TBI/SCI Waiver and a waiver for individuals with physical disabilities. While Plaintiff Haddad may be eligible for services under the aged and disabled waiver, this waiver also has a substantial waiting list. As of the most recent report from the Kaiser Commission, in 2006 there were 20,712 participants on the aged and disabled waiver, and as of 2008, there were more than 12,684 individuals on the waiting list for the aged and disabled waiver. Medicaid Home and Community-Based Services Report, Table 5 & 11, Date Update, Nov. 2009.

[7] According to a November 25, 2009, Kaiser Commission report, there were 434 people on the TBI/SCI waiver waiting list in 2008. (Compl. ¶ 44.) Another source places this number as high as 554 people by late 2008. (Id. ¶ 46.)

[8] States can submit requests for approval to CMS to increase the number of individuals to be served under a particular waiver. 42 C.F.R. § 441.355. Such requests are regularly granted by CMS. *See Knowles v. Horn*, No. 08-CV-1492, 2010 WL 517591 (N.D. Tex., Feb. 10, 2010) (citing to *Grooms v. Maram*, 563 F. Supp. 2d 840, 857 (N.D. Ill., 2008) (" [T]he federal government has not denied a single waiver application in the last ten years. Defendant here presents no basis to believe the federal government would deny the State's application for an amendment in this case and the court will not concoct one.") In addition to its nine waiver programs, Defendants also deliver personal care assistance services to Florida residents through the Assistive Care Services ("ACS") program, an optional service funded through Medicaid. Unlike most other states that offer personal care assistance services, however, defendants restrict eligibility for these services to Medicaid-eligible individuals who already live in assisted living facilities, qualified residential treatment facilities, or adult family-care homes. *See* Florida Agency for Health Care Administration, Assisted Care Services, *available at*: http://ahca.myflorida.com/medicaid/asc/index.shtml. Defendants' eligibility restriction for the ACS program closes off the personal care option as a funding source for individuals like Ms. Haddad, who currently reside in the community.

the state offers to institutionalize individuals in costly, segregated nursing homes for sixty days in order to later provide them with community-based services. In effect, the state makes community-based services unavailable to individuals who are currently in the community, but are at risk of institutionalization. Instead, it requires them to be institutionalized in order to receive services.[9]

Plaintiff Michele Haddad is a 49 year-old woman with a spinal cord injury that resulted from a motorcycle accident; she has quadriplegia and uses a wheelchair. (Haddad Dec. ¶ ¶ 4, 5, 11.) She first applied for the TBI/SCI Waiver program in November 2007 and remains on the waiting list. (Id. ¶ 6). Ms. Haddad requires assistance with activities of daily living, including transferring in and out of bed, bathing and basic hygiene needs, dressing, preparing meals, eating and assistance with her catheter and bowel program. (Id. ¶¶ 14, 15.) Following her accident, Ms. Haddad's husband served as her primary caregiver. The couple divorced in November 2009. Despite their divorce, her ex-husband continued to live in her home and acted as her primary caregiver until March 2010, because there was no one else who could help her. (Id. ¶¶ 12-13.)

Ms. Haddad notified Defendants in March 2010 of the significant change in her caregiving arrangement, a change that put her at risk of institutionalization if she did not receive waiver services. (Id. ¶¶ 12, 16.) Since her husband left, Ms. Haddad's 24-year-old son Anthony temporarily moved back home from Miami to assist her until she is

[9] Indeed, the state has submitted an amendment to the waiver program to CMS that would "carve out" more slots from the waiver to limit them exclusively to persons currently in nursing homes rather than in the community, so that there would be even fewer spaces on the waiver program for persons like Ms. Haddad who seek to avoid going to the nursing home. (Attached at Exh. B)

taken off the waiting list. (Id. at ¶ ¶ 13-14.) This solution is only short-term, as Anthony must return to his life in Miami soon. (Id. at ¶ 18.)

Recently, Defendants informed her that, although there were no funds for community-based services, if Ms. Haddad would move into a nursing home for 60 days, she could receive 10 hours a day of services in the community. (Id. at ¶¶ 8, 17.) Ms. Haddad does not wish to enter a nursing home in order to receive the assistance she requires. (Id. at ¶ 9.) The services Ms. Haddad would receive if she were forced to enter a nursing home would be the same types of services that she needs to remain in her community placement and are already available in her community and provided to other individuals who receive services under the TBI/SCI Waiver. (Compl. ¶ ¶¶ 36-37.) Further, the cost of providing these services to Ms. Haddad in the community is less expensive than the cost of receiving these services in an unnecessarily segregated setting, such as a nursing home. Ms. Haddad would require approximately seven hours per day of assistance with her activities of daily living (at an estimated cost of $109.34/day or $3,280.20/month).[10] (Id. ¶ 35.) This cost is roughly half the cost of Ms. Haddad's care in a nursing home (Florida reimburses nursing homes for Medicaid residents at $6,182.70/month). (Id. ¶ 34.) Ms. Haddad desires to remain living in the community, where she has an active life attending church and social events with friends, exercising, and shopping. (Haddad Dec. ¶¶ 19, 20.)

[10] A declaration submitted by Dr. Johns suggests Ms. Haddad may need additional hours (10-12 hours per day). (Johns Dec. ¶ 20.) Even with this higher hour requirement, the estimated cost for Ms. Haddad's community-based services would still be less than the reimbursement rate paid to nursing homes (using plaintiff's rate of $15.62/hr, 12 hours of service per day would come to $187.44/day or $5623.30/month).

Argument

To obtain a preliminary injunction, the moving party must show (1) substantial likelihood of success on the merits, (2) substantial likelihood of irreparable harm, (3) that the balance of equities favors granting the injunction and (4) that the public interest would not be harmed by the injunction. *ACLU v. Miami Dade County School Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009); *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion'" as to each of the four prerequisites. *See McDonald's*, 147 F.3d at 1306 (internal citations omitted). Defendants' failure to provide community services under the TBI/SCI waiver to individuals living in the community without first requiring an individual to enter a nursing home puts Ms. Haddad at risk of institutionalization and satisfies the requirements of a preliminary injunction by showing (1) likelihood of success on the merits of her ADA Title II claim; (2) likelihood that placement in a nursing home will cause irreparable harm; (3) balance of hardships weighs in favor of plaintiff; and (4) granting an injunction is in the public interest.

A. Plaintiff Is Likely to Succeed on the Merits of Her Title II Claim

1. The ADA Integration Mandate

Congress enacted the ADA in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA prohibits discrimination in access to public services by requiring 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." 42 U.S.C. § 12132. In *Olmstead*, the Supreme Court construed the ADA's integration mandate and concluded that the discrimination forbidden under Title II of the ADA includes "unnecessary segregation" and "[u]njustified isolation" of the disabled. *Olmstead*, 527 U.S. at 582, 600-601 (1999). "Unjustified isolation of the disabled" amounts to discrimination because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id*. at 560-61.

The ADA's integration mandate specifies that persons with disabilities receive services in the "most integrated setting appropriate to their needs." 28 C.F.R. § 35.130(d) ("[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."). The "most integrated setting" is "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35 app. A (2009); *Olmstead*, 527 U.S. at 592. This mandate advances one of the principal purposes of Title II of the ADA – ending the isolation and segregation of people with disabilities. *See Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005).

The *Olmstead* decision represents an authoritative construction of the ADA statute and implementing regulation and therefore under *Alexander v. Sandoval*, 532 U.S. 275 (2001), may be enforced through a private right of action. In *Sandoval*, a case addressing whether private individuals may sue to enforce disparate-impact regulations

promulgated under Title VI of the Civil Rights Act of 1964, the Court held that private individuals cannot bring suit to enforce rights that are provided only by implementing regulations, where the statute does not explicitly provide both a private right of action and the statute itself has been construed to prohibit only intentional discrimination. However, *Sandoval* explicitly states that a private right of action lies to enforce a regulation that authoritatively construes a statute:

> We do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.

532 U.S. at 284 (internal citations omitted). The Supreme Court's decision in *Olmstead* constitutes just such an authoritative construction of the statute and provides the basis for a private right of action to enforce the integration mandate. *Frederick L. v. Dept. of Public Welfare*, 157 F. Supp. 2d 509, 539 (E.D. Pa. 2001).

Courts reviewing *Olmstead* claims have consistently analyzed these cases within the framework of the typical requirements for an ADA Title II claim. The general foundational requirements of a Title II claim require a plaintiff to allege that he or she (1) is a "qualified individual with a disability"; (2) was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. *See Townsend v. Quasim*, 328 F.3d 511, 517 n.3 (9th Cir. 2003).

Crucially, the risk of institutionalization itself is sufficient to demonstrate a violation of Title II. *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175 (10th Cir. 2003). 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 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.* at 1181.[11] *See also Marlo M. v. Cansler*, 679 F. Supp. 2d 635 (E.D.N.C. 2010) (granting preliminary injunction in case where plaintiffs were at risk of institutionalization); *Ball v. Rogers*, No. 00-67 (D. Ariz. April 24, 2009) (holding that failure to provide plaintiffs with needed services "threatened Plaintiffs with institutionalization …[and] forced them into institutions in order to receive their necessary care" in violation of the ADA and Rehabilitation Act).

A state's obligation to provide services in the most integrated setting may be excused only where a state can prove that the relief sought would result in a "fundamental alteration" of the state's service system. *Olmstead*, 527 U.S. at 601-03. In *Townsend*, an individual brought an *Olmstead* claim challenging the state of Washington's decision to provide assistance with his activities of daily living only in nursing home settings, and not in the community. In rejecting the state's fundamental alteration defense, the court explained that "policy choices that isolate the disabled cannot be upheld solely because offering integrated services would change the segregated way in which existing services are provided," for "precisely that alteration was at issue in

[11] The Court went on to conclude that "*Olmstead* does not imply that disabled persons, who, by reason of a change in state policy, stand imperiled with segregation, may not bring a challenge to the state policy under the ADA's integration regulation without first submitting to institutionalization." *Id*. at 1182.

Olmstead, and *Olmstead* did not regard the transfer of services to a community setting, without more, as a fundamental alteration." *Townsend*, 328 F.3d at 519.

Further, "[i]f every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed." *Fisher*, 335 F.3d at 1183. Nor do a state's budgetary shortages alleviate its responsibilities under *Olmstead*: "that [a state] has a fiscal problem, by itself, does not lead to an automatic conclusion" that providing the community services that plaintiffs seek would be a fundamental alteration. *Fisher*, 335 F.3d at 1181. *See also Pennsylvania Protection and Advocacy, Inc. v. Pennsylvania Dept. Of Public Welfare*, 402 F.3d 374, 380 (3d Cir. 2005). Congress was aware that integration "will sometimes involve substantial short-term burdens, both financial and administrative," but the long-term effects of integration "will benefit society as a whole." *Fisher*, 335 F.3d at 1183.

Here, defendants limit community-based services under the TBI/SCI waiver to those already in nursing homes. This practice prevents individuals, who are at risk of entry into nursing homes from receiving the necessary services in the community that would allow them to stay out of congregate, institutional settings. Defendants instead choose to fund more expensive services in segregated settings. Plaintiff could be appropriately served in the community and desires a community placement. Providing such a placement in a manner that complies with *Olmstead* and the integration regulation would not fundamentally alter the state's operation of its programs. The allegations in plaintiff's petition thus state a claim for a Title II violation under the ADA in a straightforward application of the *Olmstead* principle.[12]

[12] As stated by CMS in the following guidance provided to state Medicaid directors, the mere fact that a state is permitted to "cap" the number of individuals it serves on a particular waiver under the Medicaid

2. Defendants' Provision of Personal Care Services Must Comply with the Integration Regulation

In an earlier case, Florida argued that 28 C.F.R. § 35.135, entitled "Personal Devices and Services," exempts States from having to provide any personal services (such as the types of services Ms. Haddad requires) to a qualified individual with a disability as part of a program modification.[13] That regulation affords no defense here. The personal devices regulation simply makes clear that Title II does not require a State to provide personal services *in a program that does not include such services*. (For example, the Department of Motor Vehicles need not provide wheelchairs to those who wait in line for a driver's license.) But the State already provides personal services both to individuals in need of such services who are living in the community and are enrolled in the State's TBI/SCI Waiver program. Both the relevant regulations and the Department of Justice's authoritative interpretation of those regulations make clear that where the State operates a program or provides a service that includes the provision of personal services – such as a program providing nursing home services – it cannot discriminate against individuals with disabilities in the provision of those services. 28 C.F.R. § 35.130. *See also* U.S. Dept. of Justice; ADA Title II Technical Assistance

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Act does not by itself determine whether the requested modification would result in a fundamental alteration under the ADA:

> **May a State establish a limit on the total number of people who may receive services under an HCBS waiver?**
> Yes. Under 42 U.S.C. § 441.303(f)(6), States are required to specify the number of unduplicated recipients to be served under the HCBS waivers. ... The State does not have an obligation under Medicaid law to serve more people in the HCBS 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 HCBS waiver*. ... 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).

CMS, Olmstead Update No. 4, at 4 (Jan. 10, 2001) (emphasis in original and added), available at http://www.cms.hhs.gov/smdl/downloads/smd011001a.pdf.

[13] See the State of Florida's Response in Opposition filed in *Jones v. Arnold*, No. 09-cv-1170 (M.D. Fla., Dkt. 59) at 2D (Attached at Exh. A)

Manual, § II-3.6200 ("Of course, if personal services or devices are customarily provided to the individuals served by a public entity, such as a hospital or nursing home, then these personal services should also be provided to individuals with disabilities.").[14]

The issue in this case is whether the ADA's integration mandate requires the State to provide services (including personal care services) in the community to plaintiff when it would otherwise provide such services in nursing homes. As we have argued above, the integration mandate requires exactly that.

3. Plaintiff Is Likely to Prevail on Her Title II Claim

Plaintiff can be served in the community. (Johns Dec. ¶ 20.) Plaintiff has lived in a community placement — her family home — since leaving the Brooks Rehabilitation Hospital following the accident that left her a person with quadriplegia. She could be served appropriately at home with the necessary supports for her activities of daily living. (Compl. ¶¶ 36-37.) In November 2007, Plaintiff requested community-based services that would enable her to remain in the community. (Haddad Dec. ¶ 6.) She did not receive these services and instead was placed on the waiver's waiting list. (Id. ¶ 7.) Ms. Haddad was able to remain in the community only because her husband assisted her with all of her activities of daily living. (Id. ¶ 12.) However, in March, 2010, Ms. Haddad's caregiver situation changed dramatically as her husband, whom she has

[14] The Technical Assistance Manual provides the Department's interpretation of its ADA regulations, and has been relied upon by the Supreme Court. *See Bragdon v. Abbott*, 524 U.S. 624, 646-647 (1998). The appendix to the Title II regulations also explains that the regulation "parallels an analogous provision" in the regulations implementing Title III. 28 C.F.R. Pt. 35, App.A, p. 546 (2004) (referring to 28 C.F.R. § 36.306). The Appendix accompanying the Title III regulations, in turn, explains: "Of course, if personal services are customarily provided to the customers or clients of a public accommodation, e.g., in a hospital or senior citizen center, then these personal services should also be provided to persons with disabilities using the public accommodation." 28 C.F.R. Pt. 36; App. B, p. 704 (2004). Because the Department of Justice's interpretation of its own regulation merits substantial deference, *see Auer v. Robbins*, 519 U.S. 452, 461 (1997), this Court should reject contrary interpretations of the personal services regulation. *See also Coeur Alaska Inc. v. Se. Alaska Conservation Council*, __ U.S. __, 129 S.Ct. 2458, 2469 (2009).

recently divorced, left the home, leaving her without a primary caregiver. (Id. ¶ 12.) Ms. Haddad notified defendants of this change and her elevated need for community-based services under the waiver. (Id. ¶ 16.) Despite the heightened risk of Ms. Haddad being institutionalized due to her lack of support services, the state offered her community services only if she first entered a nursing home. (Id. ¶ 17.) The receipt of community-based services was thus conditioned on plaintiff's willingness to relinquish her life in the community, despite clear evidence that the state could provide her with necessary services in the community at less cost than it would pay if she would enter the nursing home. (Id. ¶ 26.)

The Court in *Olmstead* interpreted Title II of the ADA to require public entities to make reasonable modifications to their service systems to enable individuals with disabilities to receive services in integrated, community-based settings, unless doing so would constitute a fundamental alteration. *Disability Advocates, Inc.*, 653 F. Supp. 2d 184, 191-92 (E.D.N.Y. 2009) After plaintiff has presented a "reasonable accommodation," a state can rebut the reasonableness of such a proposal by either showing compliance with the integration mandate or showing that the relief requested would require a fundamental alteration. *Disability Advocates, Inc.*, 653 F. Supp. 2d at 301, n.890.

Here, plaintiff alleges that defendants are willing to provide plaintiff with services in costly institutional settings, yet refuse to allow plaintiff to remain in the community and receive similar services. (Haddad Dec. ¶¶ 23, 24, 26, 27.) Importantly, in a brief filed in a related matter, defendants have not contested Ms. Haddad's risk of institutionalization; instead, they argued that the harm of institutionalization is not

substantial enough to justify the requested relief. ("Response in Opposition," *Jones v. Arnold*, No. 09-cv-1170 (M.D. Fla., Dkt. 58, at 14, 15.) There is no doubt from the facts alleged that Ms. Haddad is at risk of institutionalization: the temporary assistance she currently receives from her son will terminate shortly, as he intends to leave and return to his home in Miami. (Haddad Dec. ¶ 18.) Ms. Haddad has no other supports to provide her with assistance with tasks such as transferring her in and out of bed to a wheelchair, bathing her, helping her with her hygiene needs, helping her with her catheter and bowel program, preparing meals and assisting her with eating. (Id. ¶¶ 14, 15.) Without assistance in these essential tasks, Ms. Haddad will be forced to enter a nursing home where she will no longer be able to actively participate in her community. (Id. ¶¶ 18, 19, 20)

Plaintiff's proposed modification, on the other hand, would allow her to be served in the community, rather than force her to enter a nursing home to be eligible to receive services. This modification is consistent with *Olmstead* and the requirement that states serve individuals in the most integrated setting. There are no facts demonstrating that Florida has an "effectively working plan" (*Olmstead*, 527 U.S. at 605) for individuals with spinal cord injuries who are at risk of institutionalization. Instead, the defendants' position, as evident in filings in the *Jones* matter, appears to be that the only individuals who will be able to access community services are those who will first submit to institutionalization. ("Response in Opposition," *Jones v. Arnold*, No. 09-cv-1170 (M.D. Fla., Dkt. 58, at 15.) To argue that the requested relief will result in a fundamental alteration is unpersuasive in light of the services defendants say they will provide if at-risk individuals will first enter nursing homes.

Courts have been clear that the burden of establishing the fundamental alteration defense is on the defendant. *Benjamin v. Dept. of Public Welfare, Commonwealth of Penn., et al.*, No. 09-1182 (M.D. Pa. Jan. 25, 2010 Order Denying Motion to Dismiss) (Attached at Exh. E), citing *Frederick L. v. Dept. of Public Welfare*, 364 F.3d 487, 492 n.4 (3d Cir. 2004). The facts alleged here support a strong likelihood that plaintiff could be served with a reasonable modification. By merely speculating on possible scenarios that might work a fundamental alteration,[15] defendants cannot carry the burden of establishing this defense.[16]

B. Plaintiff Will Suffer Irreparable Harm if Defendant Is Not Enjoined

Ms. Haddad's placement in the unnecessarily segregated nursing home will undoubtedly harm her health and well-being. Ms. Haddad's physician has submitted a declaration stating that if she "were placed in a nursing home she would quickly become depressed and her health would most likely quickly deteriorate." (Johns Dec. ¶ 21.) These facts are consistent with those that have led other courts to find irreparable harm. In *Long v. Benson*, No. 08cv26, 2008 WL 4571903 *2 (N.D. Fla. Oct. 14, 2008), a Florida court granted a preliminary injunction in an *Olmstead* case and explained that forcing the individual to leave his community placement and enter a nursing home "will inflict an enormous psychological blow. Also, because of the very substantial difference in

[15] See the State of Florida's Response in Opposition filed in *Jones v. Arnold*, No. 09-cv-1170 (M.D. Fla., Dkt. 59) at 2D (Attached at Exh. A)

[16] The plurality in *Olmstead* recognized the concern of displacing "persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions." *Olmstead*, 527 U.S. at 606. Here, however, plaintiff is not asking to jump to the head of the line; instead, she is requesting that, until the court can complete a full evaluation of the state's fundamental alteration defense, the state provide her with less costly community-based services rather than requiring her to first enter a nursing home for 60 days. Furthermore, any suggestion by defendants that Ms. Haddad seeks to skip ahead of more needy individuals is at odds with the fact that they appear willing to provide her with services (in advance of others on the waiting list), as long as she is first willing to subject herself to discrimination by entering a nursing home. ("Russell Affidavit," *Jones v. Arnold*, No. 09-cv-1170 (M.D. Fla., Dkt. 59) at 2D (Attached at Exh. A).)

[plaintiff's] perceived quality of life in the apartment as compared to the nursing home, each day he is required to live in the nursing home will be an irreparable harm." In *Marlo M.*, 679 F.Supp. 2d at 638, the court granted a preliminary injunction in an *Olmstead* case because the plaintiffs had "lived successfully in their community based apartments," and, if they lost community services they would "suffer regressive consequences if moved [to a nursing home], ***even temporarily***." (emphasis added). And in *Crabtree v. Goetz*, No. 08-0939, 2008 WL 5330506 *25 (M.D. Tenn. Dec. 19, 2008), the court granted a preliminary injunction enjoining state defendants from cutting home health care services that would force plaintiffs with disabilities into institutional placements; the court explained that institutionalization "would be detrimental to [plaintiffs'] care, causing, inter alia, mental depression, and for some Plaintiffs, a shorter life expectancy or death."

The Court in *Olmstead*, too, recognized these very concerns, describing the adverse effects that occur with unnecessary institutional placements:

> First, institutional placement … 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.... In order to receive needed [] services, persons … must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the [] services they need without similar sacrifice.

Olmstead, 527 U.S. at 600-01. Should Ms. Haddad be required to enter a nursing home, as the state has offered as a condition to her receipt of services in the community, she will sacrifice these exact benefits of community integration: no longer attending church, visiting with friends, and many other activities. (Haddad Dec. ¶¶ 19, 20.)

C. The Balance of Hardship Tips in Plaintiff's Favor

The hardship to defendant of funding services for plaintiff in a community setting under the waiver program is negligible and is clearly outweighed by the benefit of allowing plaintiff to remain in the community setting where she has thrived for the past three years. The proposed reasonable modification to allow Ms. Haddad to receive community-based services without entering a nursing home for 60 days will *save* defendants and its Medicaid program money because it will cost less than her placement in a nursing home, which defendants have already offered to fund for a 60-day period. (Haddad Decl. ¶¶ 8, 17; "Russell Affidavit," Jones v. Arnold, No. 09-cv-1170 (M.D. Fla., Dkt. 59) at 2D (Attached at Exh. A).) The lack of hardship to defendant is in stark contrast with the significant hardship Ms. Haddad faces if no injunction is granted: if forced to enter a nursing home, she must relinquish the freedom and independence of her life in the community in order to receive waiver services. The balance of hardships therefore tips in favor of granting a preliminary injunction to permit Ms. Haddad to remain in the community pending final judgment.

D. Granting a Preliminary Injunction is in the Public Interest

There is a strong public interest in granting a preliminary injunction to allow plaintiff to remain in a community setting. There is a public interest in eliminating the discriminatory effects that arise from segregating persons with disabilities into institutions when they can be appropriately placed in community settings. As *Olmstead* explained, the unjustified segregation of persons with disabilities can stigmatize them as incapable or unworthy of participating in community life.[17] *Olmstead,* 527 U.S. at 600.

[17] See also U.S. Amicus Brief in *Olmstead* at 16-17, citing to 136 Cong. Rec. H2603 (daily ed. May 22, 1990) (statement of Rep. Collins) ("To be segregated is to be misunderstood, even feared," and "only by

In *Long*, the court relied on this reasoning to hold that the public interest favored allowing the plaintiff to "remain in the community rather than be isolated in the nursing home":

> If, as it ultimately turns out, treating individuals like Mr. Griffin in the community would require a fundamental alteration of the Medicaid program, so that 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.

Long, 2008 WL 4571903 *3.

In addition to the public interest in eliminating the discriminatory effects of unnecessary segregation of individuals with disabilities, the public has an interest "in protecting its pocketbook." *Florida Wildlife Fed'n v. Goldschmidt*, 506 F.Supp. 350, 373 (C.D. Fla. 1981). As noted above, Ms. Haddad's services are less expensive if provided in the community than in a nursing home. The public interest favors a preliminary injunction where such a fiscal loss would otherwise result.

Conclusion

The Court should grant Ms. Haddad's Motion for Preliminary Injunction. Plaintiff has demonstrated that the Complaint satisfies all the requirements for this court to grant a preliminary injunction, and as such, the Court has authority to grant plaintiff the relief that she seeks in this matter. With the Court's permission, counsel for the United States will be present at any upcoming hearings.

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breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression.") (Attached at Exh. F)

Respectfully submitted this the 24th day of May, 2010.

Dated: _ May 24, 2010____

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 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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