

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

CHARLES TODD LEE, et al.,

Plaintiffs,

Case No. 4:08cv26-RH/WCS

vs.

ELIZABETH DUDEK, et al.

Defendants.

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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

This lawsuit alleges that the State of Florida fails to provide Medicaid services to eligible individuals with disabilities in the most integrated setting appropriate to their needs. Instead, the State administers its program of services for persons with disabilities

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

in a manner that confines them unnecessarily and indefinitely in nursing homes. The State continues to fund costly, unnecessary institutional placements in violation of the integration mandate of title II of the ADA, as interpreted in *Olmstead*, when it could instead provide more appropriate, community-based services at a lower cost.

The undisputed facts set forth in the parties' cross motions for summary judgment demonstrate that the defendants do not have a comprehensive, effectively working plan to address unnecessary institutionalization. As a result, they are not entitled to avail themselves of the affirmative defense that the relief sought would constitute a fundamental alteration of their service system. Additionally, the arguments asserted in support of the defendants' motion for summary judgment are based on disputed facts and have no merit. Thus, the United States urges the Court to find that the defendants may not avail themselves of the fundamental alteration defense and to deny the defendants' motion for summary judgment.

Statutory and Regulatory Background

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:

[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. § 12132.²

One form of discrimination prohibited by the ADA is a violation of the “integration mandate,” which requires public entities to provide services in the most integrated setting appropriate to the needs of persons with disabilities. 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 587. 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 others who are receiving disability services from the entity. *Id.* at 607.

Olmstead’s integration requirement may be excused only where a state demonstrates that it would result in a “fundamental alteration” of the state’s services and programs. *Id.* at 603. This affirmative defense, commonly referred to as the

² Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”).

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). 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, p. 571 (2010).

“fundamental alteration defense,” is not available, however, to states that have not developed a plan to comply with the *Olmstead* mandate. *Frederick L. v. Dep’t of Pub. Welfare of Pa.*, 422 F.3d 151, 158-59 (3d Cir. 2005). The Supreme Court in *Olmstead* described such a plan as a “comprehensive, effectively working plan for placing qualified persons with . . . disabilities in less restrictive settings, and a wait list that move[s] at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated.” 527 U.S. at 605-06.

Summary of Facts

The plaintiff class consists of all Florida Medicaid-eligible adults who, at any time during this litigation, have resided in a nursing home that receives Medicaid funding, and who could and would reside in the community with appropriate community-based services. *Long v. Benson*, No. 4:08cv26, 2008 WL 4571904, *3 (N.D. Fla. Oct. 14, 2008).

Named plaintiff Charles Todd Lee is a 68-year-old man with partial paralysis who lives in a Florida nursing home and receives assistance with activities of daily living through services paid for by Medicaid. (Am. Compl. ¶¶ 39-41, ECF No. 13; Defs.’ Answer ¶ 39, ECF No. 83.) Defendants do not dispute that Mr. Lee could live in a more integrated setting with appropriate support services, but he remains in the nursing home against his wishes. (Defs.’ Mot. for Summ. J. 11-12, ECF No. 313; Kidder Aff. ¶ 1, Nov. 15, 2010, ECF No. 313-1.)

Class member Ruth Fiedler is a 48-year-old woman with cerebral palsy who resides in a nursing home. (Decl. Ruth Fiedler ¶¶ 1-2, 7-8, Nov. 10, 2010, ECF No. 315-

24.) The services she receives at the nursing facility are the same services she would need in the community: assistance with transferring, showering, toileting, and dressing. (*Id.* ¶¶ 19-23, ECF No. 315-24.) Ms. Fiedler’s treating physician has determined that her needs can be met in the community with appropriate supports (*Id.* App. B, ECF No. 315-24), but she remains in an institutional setting.

Class member Monica Stallworth is a 39-year-old woman with multiple sclerosis who is similarly confined to a nursing home. (Decl. Monica Stallworth ¶¶ 1, 2, 6, Nov. 12, 2010, ECF No. 315-25.) The nursing home assists her with transferring from bed, bathing, feeding, toileting, dressing, and other activities of daily living. (*Id.* ¶ 8, ECF No. 315-25.) Ms. Stallworth has previously lived successfully in the community with appropriate supports and currently desires to return to the community (Schrenker Aff. ¶¶ 7-10, ECF No. 317-4), yet she remains institutionalized. (Stallworth Decl. ¶ 6.)

Class member Christopher Clabeaux will turn 21 years old next month. (Decl. Christopher Clabeaux ¶ 1, Nov. 10, 2010, ECF No. 315-23.) He has quadriplegia (*Id.* ¶ 6, ECF No. 315-23) and resides in a nursing home. (*Id.* ¶¶ 11, 14, ECF No. 315-23.) Defendants do not dispute that Mr. Clabeaux’s needs could be met in the community with appropriate supports (Russell Aff. ¶¶ 1-6, Dec. 10, 2010, ECF No. 317-3); indeed, defendants approved him for community placement in April 2010 (*Id.* ¶ 4, ECF No. 317-3). Mr. Clabeaux, however, remains in a nursing home. (*Id.* ¶ 5, ECF No. 317-3.)

Class member Junior Pellot is 26-years-old and has quadriplegia. (Decl. Junior Pellot ¶¶ 1, 5, Nov. 11, 2010, ECF No. 315-26.) The nursing home where he resides assists him with bathing, dressing, toileting, and other activities of daily living. (*Id.* ¶¶ 10-

11.) Mr. Pellot wants to live in the community and has frequently told nursing home staff that he wants to leave the nursing home and return to the community. (*Id.* ¶ 14.) To his knowledge, however, no one from the defendants' programs has ever met or discussed with him the possibility of moving to the community. (*Id.* ¶ 15.)

Over the last decade, the number of persons institutionalized under Florida's Medicaid Program has remained relatively static. (Kidder Aff. ¶ 2, Dec. 10, 2010, ECF No. 317-1.) For instance, Florida served 81,116 people in institutions during fiscal year 2000-2001, and it served 79,109 people in institutions during fiscal year 2009-2010. (*Id.*) Similarly, Florida has consistently spent the vast majority of its long-term care dollars on institutional settings, and that spending has far exceeded the national average. (Stone Supp'l Rep. 2, Nov. 4, 2010, ECF No. 315-22.) In 2006 and 2008, the State spent 87.3% and 82.9% of its long-term care dollars, respectively, on nursing home care, while the national averages were 71.4% and 68.4%, respectively. (*Id.*) Additionally, data produced by the State show that the number of individuals transitioned from nursing homes to waiver programs dropped significantly between 2006 and 2008, and the current number is no higher than it was in 2002. (Pls.' Exhibit 45, ECF No. 315-45.)

Defendants did not initiate their current nursing home transition efforts until 2009. (Kidder Aff. ¶ 18, ECF No. 313-1; *cf.* Kidder Dep. 10:13-12:1, Dec. 2, 2008, ECF No. 318-8 (AHCA had not requested funding for nursing home transition efforts in 2008); Tallent Dep., 17:25-18:11, Nov. 17, 2008, ECF No. 318-9 (same); Kidd Dep. 10:10-22, Nov. 17, 2008, ECF No. 318-11 (stating that prior to 2009, defendants did not request appropriations to fund a nursing home transition program).) Defendants state that they

have been able to undertake these efforts because the State Legislature has given them access to funds that had been earmarked for nursing home expenditures. (Kidder Aff. ¶ 18, ECF No. 313-1.) This funding has been made available only through fiscal year 2010, however, and there is no indication that defendants' efforts will continue beyond then. (*Id.*; Kidder Dep. 146:12-23, Sept. 27, 2010, ECF No. 318-1; *cf.* Mendie Dep. 189:13-20, Oct. 29, 2010, ECF No. 318-7.)

Defendants' nursing home transition plan, which defendants are still in the process of "develop[ing], refin[ing], and improv[ing]" (Kidder Aff. ¶ 29, ECF No. 313-1), lacks specific goals evidencing a genuine commitment to deinstitutionalization. The plan does not outline goals for the transition of unjustifiably isolated persons. (Florida Nursing Home Transition Plan, Aug. 19, 2010, ECF No. 315-46.) It lacks a time-frame or target date for transition (*Id.*), lacks quantifiable goals related to the approximate number of persons to be transitioned (Kidder Dep. 20:4-18, 32:2-18, ECF No. 315-5; Mendie Dep. 9:18-23, Oct. 4, 2010, ECF No. 315-8), and fails to adequately specify the eligibility criteria for discharge under the plan. (Smith Dep. 109:18-20, Oct. 4, 2010, ECF No. 315-12; Florida Nursing Home Transition Plan, ECF No. 315-46.) Moreover, defendants are unaware of the approximate number of people who have requested transition. (Kidder Dep. 31:23-32:1, ECF No. 315-5; Smith Dep. 49:4-9, ECF No. 315-12), or who remain to be assessed for transition. (Kidder Dep. 50:17-21, ECF No. 315-5; Russell Dep. 57:18-59:5, Oct. 13, 2010, ECF No. 315-10.)

Given the lack of a comprehensive, effectively working deinstitutionalization plan, many people with disabilities remain confined unjustifiably in institutional settings.

Argument

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The undisputed facts show that defendants do not have a comprehensive, effectively working plan to address unnecessary institutionalization and therefore cannot establish a fundamental alteration defense as a matter of law. Additionally, defendants’ motion for summary judgment should be denied because it is based on legal arguments that are fundamentally flawed and material facts that are disputed.

I. Without An Effective Plan to Address Unnecessary Institutionalization, Defendants Cannot Establish a Fundamental Alteration Defense

A state’s failure to satisfy the integration mandate may be excused only where a state establishes that compliance would result in a fundamental alteration of its services and programs. *Olmstead*, 527 U.S. at 603-04; *Pa. Prot. & Advocacy, Inc. v. Dep’t of Pub. Welfare*, 402 F.3d 374, 381 (3d Cir. 2005). It is the defendants’ burden to establish that the requested relief would fundamentally alter its system of services. See *Olmstead*, 527 U.S. at 604; *Frederick L. v. Dep’t of Pub. Welfare*, 364 F.3d 487, 492 n. 4 (3d Cir. 2004) (“*Frederick L. I*”). Moreover, to invoke the fundamental alteration defense, a public entity must demonstrate that it has a “comprehensive, effectively working plan” to address unnecessary institutionalization. *Frederick L. v. Dep’t of Pub. Welfare*, 422 F.3d 151, 157 (3d Cir. 2005) (“*Frederick L. II*”) (“[defendant] may not avail itself of the ‘fundamental alteration’ defense to relieve its obligation to deinstitutionalize eligible

patients without establishing a plan that adequately demonstrates a reasonably specific and measurable commitment to deinstitutionalization for which [defendant] may be held accountable.”); *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381-82 (“[a]ny interpretation of the fundamental alteration defense that would shield a state from liability in a particular case without requiring a commitment generally to comply with the integration mandate would lead to [a] bizarre result.”); *see also Haddad v. Arnold*, No. 3:10-cv-00414-MMH-TEM (M.D. Fla. July 9, 2010) (attached to Pls.’ Resp. to Defs.’ Mot. for Summ. J., ECF No. 318-15) at 35-36 (granting preliminary injunction to plaintiff seeking waiver services and finding that defendants’ fundamental alteration defense was not sufficiently supported where they failed to show they have a comprehensive, effectively working plan in place to address unnecessary institutionalization).⁴

While the Eleventh Circuit has not had occasion to enunciate what constitutes a comprehensive, effectively working plan, the Third Circuit has properly required such a plan to include a specific and measurable commitment to action by the state, with measurable goals, benchmarks, and timeframes for which the state can be held accountable. *Frederick L. II*, 422 F.3d at 157. The Third Circuit has correctly rejected as inadequate a state’s vague assurances of future community placement and has properly found that past progress in deinstitutionalization is insufficient to establish a valid *Olmstead* plan. *Id.* at 156-158.

⁴ *See also Cruz v. Dudek*, No. 10-23048, 2010 WL 4285955, *14 (S.D. Fla. Oct. 12, 2010) (U.S. Magistrate Judge report recommending issuance of preliminary injunction requiring state to provide community-based services to plaintiffs at risk of institutionalization based, in part, on finding that defendants had not met their burden of establishing a comprehensive, effectively working plan to address unnecessary institutionalization) (report and recommendation adopted November 24, 2010).

The Third Circuit has repeatedly vacated district court rulings that found a state's deinstitutionalization plan to be valid based solely on past progress and vague assurances of future deinstitutionalization. *See Frederick L. I*, 364 F.3d at 500-01 (vacating district court ruling in favor of state defendants where fundamental alteration defense was premised on the state's limited economic resources and did not demonstrate a commitment to action in a manner for which the state can be held accountable by the courts); *Frederick L. II*, 422 F.3d at 157-160 (vacating district court ruling in favor of state defendants where fundamental alteration defense was premised on vague assurances of future deinstitutionalization rather than a meaningful commitment with measurable goals for community integration); *Pa. Prot. & Advocacy, Inc. v. Dep't of Pub. Welfare*, 364 F.3d at 385-86 (vacating district court ruling in favor of state defendants where fundamental alteration defense was premised solely on budgetary constraints and failed to require state defendants to establish a reviewable commitment to action).

In *Frederick L.*, a class action involving approximately 300 persons with mental illness in psychiatric institutions, the Pennsylvania defendants presented evidence to the district court that they had (1) closed thirteen psychiatric institutions over the previous two decades, (2) funded more than 200 community placements in the prior two years at issue, (3) began the discharge planning process as soon as each patient was admitted to the institution, and (4) implemented a plan to shift the focus of their service system from institutional settings to community-based settings, providing for transitioning up to 250 institutionalized persons per year. *Frederick L. I*, 364 F.3d at 499; *Frederick L. II*, 422 F.3d at 158-59. The defendants further provided assurances in their submissions to the

court that they would not reverse their “proven commitment to deinstitutionalization.” 422 F.3d at 158.

The Third Circuit found Pennsylvania’s fundamental alteration defense deficient, explaining that its “strong commitment in the past to deinstitutionalization,” its vague assurances of future efforts, and its “amorphous . . . goal” of closing up to 250 institutional beds per year, were insufficient to establish the existence of an effective deinstitutionalization plan. *Frederick L. I*, 364 F.3d at 499; *Frederick L. II*, 422 F.3d at 158-59. The court reasoned that the district court was “unrealistic (or unduly optimistic) in assuming past progress is a reliable prediction of future programs.” 364 F.3d at 500. Instead, there must be a “plan for the future.” *Id.* Additionally, in requiring specific benchmarks and goals, the Third Circuit correctly concluded that “[g]eneral assurances and good faith intentions neither meet the federal laws nor a patient’s expectations.” *Frederick L. II*, 422 F.3d at 158-59. It reasoned that mere assurances do not ensure effective implementation, given that “implementation may change with each administration or Secretary of Welfare, regardless of how genuine; they are simply insufficient guarantors in light of the hardship daily inflicted upon patients through unnecessary and indefinite institutionalization.” *Id.* at 158.

Thus, in remanding the case to the district court for the second time, the Court of Appeals specified that:

a viable integration plan at a bare minimum should specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.

Frederick L. II, 422 F.3d at 160.

The undisputed facts establish that defendants fail to meet the well-reasoned standard established by the Third Circuit.⁵ The record makes clear that defendants have not completed the most basic step required to develop an effective deinstitutionalization plan—namely, to identify all individuals confined in nursing homes who could receive services in more integrated settings. Only a fraction of the nursing home residents have received some kind of assessment (*Cf.* Pls.’ Mot for Summ. J. 5-6, ECF No. 314 (based on Minimum Data Set information) *with* Kidder Dep. 15:22-25, ECF No. 315-5), and defendants are unable to identify the approximate number of people who have requested

⁵ Defendants’ “plan” also lacks the elements of the plans found to be valid by the Ninth Circuit Court of Appeals. In *Sanchez v. Johnson*, 416 F.3d 1051, 1064-68 (9th Cir. 2005), the Ninth Circuit found in place a comprehensive, effectively working plan where a state “ha[d] a successful record of personalized evaluations leading to a reasonable rate of deinstitutionalization and . . . ha[d] undertaken to continue and increase its efforts” to accommodate disabled persons in the community. *Id.* at 1068. There, the court highlighted numerous indications of previous successes as well as evidence of an ongoing commitment to deinstitutionalization. Similarly, in *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615 (9th Cir. 2005), the Ninth Circuit found valid a plan that had made significant strides over the course of an extended period of time, such that any changes could fundamentally alter it. *Id.* at 621-22. Whereas the defendants in *Sanchez* and *Arc of Wash.* had significantly reduced their respective institutionalized populations during the relevant time periods, it is undisputed that the institutionalized population under Florida’s Medicaid Program has decreased only 2.5% since fiscal year 2000-2001. (Kidder Aff. ¶ 2, ECF No. 317-1.) Similarly, Florida has consistently spent the vast majority of its long-term care dollars on institutional settings, and that spending has far exceeded the national average. (Stone Supp’l Rep. 2, ECF No. 315-22.) It was not until 2009 that defendants initiated their most recent nursing home transition efforts (Kidder Aff. ¶ 18, ECF No. 313-1), and given that the funding is authorized through fiscal year 2010 only (*Id.*; *see* Kidder Dep. 146:12-23, ECF No. 318-1; Mendie Dep. 189:13-20, ECF No. 318-7), there is no assurance that the current effort is anything more than temporary. Defendants thus have not demonstrated the past commitment to deinstitutionalization that was found sufficient in *Sanchez* and *Arc of Wash.*

transition (Kidder Dep. 31:23-32:1, ECF No. 315-5; Smith Dep. 49:4-9, ECF No. 315-12) or the number of people who have not received assessments (Kidder Dep. 50:17-21, ECF No. 315-5; Russell Dep. 57:18-59:5, ECF No. 315-10).

Moreover, defendants' "transition plan" lacks any time-frames or target date for the transition of unjustifiably isolated persons, including quantifiable goals related to the approximate number of persons to be transitioned under the draft plan. (Kidder Dep. 20:4-18, 32:2-18, ECF No. 315-5; Mendie Dep. 9:18-23, ECF No. 315-8.) Indeed, in addressing the outcomes of Florida's purported plan, they identify only non-specific, amorphous goals, such as "increas[ing] [their] nursing facility transition efforts" (Kidder Aff. ¶ 18, ECF No. 313-1) and plans "resulting in more transition opportunities" (*Id.* ¶ 29). These are the same type of vague assurances found insufficient by the Third Circuit. 422 F.3d at 157-59.

Defendants' draft plan also fails to describe the collaboration between local authorities and state agencies that is necessary to ensure successful integration. (Florida Nursing Home Transition Plan, ECF No. 315-46.) Defendants implement the purported transition plan without coordination, but rather "under . . . [each agencies'] own guidelines" (Kidder Dep. 97:10-16, ECF No. 318-1), and ACHA, the agency responsible for administering Florida's Medicaid program, does not review eligibility determinations to ensure that people are not unjustifiably isolated in nursing facilities, nor is it aware of whether other defendants conduct reviews. (*Id.* 95:13-17.) Moreover, it has not provided any guidance to its operating partners concerning the consistency of their assessment instruments (*Id.* 221:19-24), and it fails to monitor the independent providers that provide

services under defendants' purported transition plan (*Id.* 234:21-24; Smith Dep. 13:1-6, ECF No. 315-12). Indeed, the Director of Adult Protective Services for DCF testified that his organization is ill-equipped to carry out transition efforts since its resources are low and it lacks experience. (Anderson Dep. 97:12-99:12, ECF No. 315-2.)

The myriad deficiencies described above are fatal to any assertion by Florida that it has a working deinstitutionalization plan that would justify invocation of the fundamental alteration defense. Defendants' failure to put forth any specific goals, timeframes or benchmarks to achieve deinstitutionalization of eligible persons, along with a lack of past progress in deinstitutionalization and a failure to extend even their current efforts to more than a portion of the class places the fundamental alteration defense beyond their reach.

II. Defendants' Motion for Summary Judgment Should Be Denied

Defendants' motion for summary judgment is based on disputed facts and deficient legal arguments. They assert, for example, that the lawsuit is moot, when the facts show that thousands of people who desire to live in the community remain confined to nursing homes. They assert that they do not require people to be unnecessarily relegated to nursing homes, when the facts show that it is the State's policies and practices that cause the unnecessary institutionalization in this case. Moreover, the defendants argue that the claims asserted and the relief requested under the ADA and the Rehabilitation Act conflict with the Medicaid Act and are barred by an ADA regulation, but a finding in favor of plaintiffs in no way requires the Court to amend or modify the

Medicaid Act and is entirely consistent with ADA regulations. As explained more fully below, defendants' arguments have no merit and their motion should be denied.

A. The Lawsuit Is Not Moot

Defendants argue that this class action is moot because four of the seven named plaintiffs are now deceased, one is receiving services in a waiver program, one has declined transition, and one has been scheduled for reassessment. (Defs.' Mot. for Summ. J. 26, ECF No. 313.) Their mootness argument is also based on the availability of funding to implement the transition of institutionalized persons. (*Id.* 26-27.)

Defendants' mootness argument is based on erroneous facts. As defendants themselves concede, named plaintiff Charles Todd Lee remains confined in a nursing home. (Kidder Aff. ¶ 1, ECF No. 313-1.) He is therefore currently subject to an ongoing injury. Similarly, named plaintiff Seymour also remains in a nursing home (*Id.*), and named plaintiff Clayton Griffin received waiver services (*Id.*) only after prevailing on a motion for preliminary injunction.⁶ Additionally, plaintiffs' motion for summary judgment sets forth facts relating to several other specific class members who remain in

⁶ Even if the named plaintiffs' claims were moot, that would not moot the claims of the class. Once a class is certified, mooting a named plaintiff's individual claim does not moot the entire action, because the class "acquire[s] a legal status separate from the interest asserted by [the named plaintiff]." *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). Thus, even if a defendant remedies a named plaintiff's claims, the class claims may remain appropriate. *See Sosna*, 419 U.S. at 399; *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030 (5th Cir. 1981) (class action exception to mootness doctrine applies where defendants tendered named plaintiffs their personal claims after named plaintiffs filed a timely motion for class certification); *Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234, 1268, n.30 (11th Cir. 2001) (events subsequent to class certification that may moot a named plaintiff's claims do not necessarily defeat her ability to continue to represent a class whose members still have live claims).

nursing homes against their wishes (Pls.’ Mot. for Summ. J. 10-14, ECF No. 314; *see* Clabeaux Decl., ECF No. 315-23; Fiedler Decl., ECF No. 315-24; Stallworth Decl., ECF No. 315-25; Pellot Decl., ECF No. 315-26), despite the availability of funding (Kidder Aff. ¶ 18, ECF No. 313-1). And plaintiffs have offered facts showing that thousands of people remain in nursing homes who have not even been identified for assessments. (Pls.’ Mot. for Summ. J. 5-6, ECF No. 314 (citing Minimum Data Set information). Thus, there can be no serious dispute that this case presents a live controversy.

Even if, contrary to the record, the defendants had voluntarily ceased their conduct as to the plaintiffs, they would not satisfy the high standard for mootness. While “[a] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief,” *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1183 (11th Cir. 2007) (citation omitted), “[i]t is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The standard for mootness is “stringent”: “[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *U.S. v. Concentrated Phosphate Export Assoc., Inc.*, 393 U.S. 199, 203 (1968); *accord Friends of the Earth, Inc.*, 528 U.S. at 189. The defendants point to no facts making it clear that unjustified institutionalization could not reasonably be expected to recur. Indeed, the record contains facts undermining a genuine commitment to deinstitutionalization (Russell Dep. 57:18-59:5, ECF No. 315-

10; Kidder Dep. 31:23-32:18, 50:17-21, ECF No. 315-5; Mendie Dep. 9:18-23, ECF No. 315-8; Smith Dep. 49:4-9, 109:18-20, ECF No. 315-12), and the State's long term care system remains heavily tilted in favor of institutional care (Stone Suppl'l Rep. 2, Nov. 4, 2010, ECF No. 315-22). The funding defendants point to as evidence of mootness has yet to be renewed beyond this fiscal year (*Id.*; Kidder Dep. 146:12-23, ECF No. 318-1; *cf.* Mendie Dep. 189:13-20, ECF No. 318-7 (stating that the funding proviso expires annually, and defendants must re-request funds annually), and even with the current availability of funding, people remain confined in nursing homes unnecessarily).

B. Compliance with Medicaid Law Does Not Relieve Defendants of Their Obligations to Comply with the ADA and Rehabilitation Act

Defendants argue that their Medicaid waiver programs have been operated in compliance with the Medicaid Act and with assurances upon which the U.S. Centers for Medicare and Medicaid Services ("CMS") approved their programs. (Defs.' Mot. for Summ. J. 27-28.) Plaintiffs do not, however, assert claims in this litigation that defendants have violated the Medicaid Act. Thus, defendants' argument is irrelevant, and a finding by this Court that the defendants have complied with the Medicaid Act or with assurances provided to CMS does not dispose of the discrimination claims at issue in this case.

Indeed, compliance with Medicaid laws and approval of the State's Medicaid program by CMS does not exempt a public entity from making modifications to comply with the ADA or Rehabilitation Act. *Haddad*, No. 3:10-cv-00414, at 29. The Medicaid Act sets conditions for the availability of federal funds, but the obligation of states to ensure that individuals with disabilities are not needlessly institutionalized is independent

of the Medicaid statutes. *Townsend v. Quasim*, 328 F.3d 511, 518 n.1 (9th Cir. 2003). Thus, although a particular aspect of a state's Medicaid program has been approved, the state may have to request a modification from CMS in order to comply with other laws. CMS has explicitly recognized that the ADA may require states to modify their Medicaid programs under certain circumstances. For example, CMS has issued guidance that the mere fact that a state is permitted to "cap" the number of individuals it serves in a particular waiver program under the Medicaid Act does not exempt the state from seeking a modification of its program to comply with the ADA or other laws. *See* CMS, Olmstead Update No. 4, at 4 (Jan. 10, 2001), available at <http://www.cms.hhs.gov/smdl/downloads/smd011001a.pdf> ("If other laws (e.g., ADA) require the State to serve more people, the State may . . . request an increase in the number of people permitted under the HCBS Waiver.").

Defendants further argue that they cannot transition anyone where transition would violate assurances provided to CMS that (a) the State will not transition individuals if it would jeopardize the individuals' health and welfare and (b) the costs associated with the waiver programs will "not exceed the costs for the waiver's recipients if they were in a nursing facility." Defendants have failed to identify any evidence in the record, or even argue, that providing plaintiffs with community-based services or developing an effective deinstitutionalization plan would abrogate these assurances. Accordingly, their argument should be rejected.

C. ADA Compliance Does Not Conflict With the Medicaid Act

Defendants further argue that plaintiffs' ADA and Rehabilitation Act claims require the Court to invalidate provisions of the Medicaid Act providing that waiver programs are optional and can be limited to target populations. (Defs.' Mot. for Summ. J. 28-31.) Contrary to their assertion, the plaintiffs' claims do not raise any question requiring the Court to invalidate or amend provisions of the Medicaid Act.

A determination that plaintiffs should be provided services in the most integrated setting appropriate to their needs does not require a finding that the State must provide waiver services as a mandatory (as opposed to optional) Medicaid service, or that such services cannot be capped. Rather, once a state has elected to provide services (whether mandatory or optional under the Medicaid Act), the state must administer those services in accordance with the ADA and Rehabilitation Act. *Haddad*, No. 3:10-cv-00414, at 28.

Defendants' argument was recently rejected by another Florida district court. In *Haddad*, a woman with quadriplegia, who was on a wait list for services in Florida's home and community-based services waiver, filed a motion for preliminary injunction seeking to enjoin the defendants from refusing to offer her services in the waiver. *Haddad*, No. 3:10-cv-00414, at 2. The defendants opposed the motion, arguing, *inter alia*, that a finding under the ADA that plaintiff must be served in a waiver program would abrogate or amend the Medicaid Act provisions that allow states to cap their programs and to have the option to provide waiver services. The district court rejected the argument and granted the plaintiff's motion for preliminary injunction. *Id.* at 38-39. It found that defendants' attempt to characterize the plaintiff's ADA claim "as an

invalidation of the Medicaid Act [was] without merit,” explaining that it “simply addresse[d] the question of whether [the] 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.” *Id.* at 29. It reasoned that “[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.” *Id.* at 28; *accord Doe v. Chiles*, 136 F.3d 709, 714 (11th Cir. 1998) (when a state chooses to provide an optional Medicaid service, it must do so in accordance with the requirements of federal law); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003) (even though a waiver program is optional, a state may not, under title II of the ADA, amend optional programs in such a way as to violate the integration mandate).

Similarly, after this Court entered a preliminary injunction in favor of named plaintiff Clayton Griffin, the defendants argued to the Eleventh Circuit Court of Appeals that the relief ordered under the ADA impermissibly invalidated the provisions of the Medicaid Act that make waiver programs optional and allow them to be limited. *See Benson v. Long*, Amended Initial Brief of the Secretaries of the Florida Agency for Health Care Administration and the Department of Elder Affairs, 2009 WL 2493235, at *10-16 (Jan. 14, 2009). Finding that the district court did not abuse its discretion, the Eleventh Circuit affirmed the preliminary injunction on June 22, 2010. *Long v. Benson*, No. 08-16261, 2010 WL 2500349, at *1 (11th Cir. 2010).

D. Defendants Cause Plaintiffs to be Confined Unnecessarily in Institutions

Defendants argue that they do not require plaintiffs to be confined unnecessarily in institutions because the State has an assessment process, to which the Court should defer, for nursing home residents who wish to move to community-based settings. (Defs.' Mot. for Summ. J. 31-33, ECF No. 313.) Defendants' argument has no merit. Their purported assessment process has not been applied to all nursing home residents who wish to move to the community, and to the extent some process exists, it is flawed in many ways.

Evidence put forward by the plaintiffs shows that thousands of residents who wish to move to the community have not received assessments for transition. (Pls.' Mot. for Summ. J. 5-7, ECF No. 314 (citing Minimum Data Set information).) Defendants do not know the approximate number of people who have requested transition (Kidder Dep. 31:23-32:1, ECF No. 315-5; Smith Dep. 49:4-9, ECF No. 315-12), and they do not know who remains to be assessed. (Kidder Dep. 50:17-21, ECF No. 315-5; Russell Dep. 57:18-59:5, Oct. 13, 2010, ECF No. 315-10). Thus, it is simply not the case that defendants have an assessment process for all nursing home residents who wish to transition from an institution to the community. Given that the assessment process is the sole way for a person to access community-based services under the current system, the State's failure to make that process available to all persons who wish to transition *requires* thousands of persons to remain unnecessarily institutionalized.

Additionally, assessments must be reasonable. As the Supreme Court stated in *Olmstead*, "a state generally may rely on the *reasonable* assessments of its own

professionals in determining whether an individual ‘meets the essential eligibility requirements’ for habilitation in a community-based program.” 527 U.S. at 602 (emphasis added). As this Court has previously held, “[s]tate officials cannot avoid the obligations of the ADA as interpreted by *Olmstead* by denying the provisions of proper assessments.” (Order Denying Motion to Dismiss, ECF No. 68 at 4.)

Recognizing that states are not permitted to avoid the integration mandate by failing to require assessments, many courts have similarly held that a plaintiff need not present evidence that he has been assessed by a state treatment provider and found eligible to be served in a more integrated setting. *See Frederick L.*, 157 F. Supp. 2d 509 (E.D. Pa. 2001) (stating that “*Olmstead* does not allow States to avoid the integration mandate by failing to require professionals to make recommendations regarding the service needs of institutionalized individuals”); *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 258-59 (E.D.N.Y. 2009) (same); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 291 (E.D.N.Y. 2008) (“ . . . [I]t is not clear whether *Olmstead* even requires a specific determination by *any* medical professional that an individual with mental illness may receive services in a less restrictive setting . . .”).

The plaintiffs have put forth evidence showing that the State’s current assessment process is flawed. (Stone Supp’l Rep. 16-17, ECF No. 315-22 (noting, *inter alia*, a lack of eligibility criteria, oversight and review); Kidder Dep. 95:13-17 (failure to review eligibility determinations); Creel Dep. 51:17-52:16, ECF No. 315-3 (failure to follow-up on representations made by nursing home staff). Plaintiffs’ expert concluded that the State’s assessment process lacks eligibility criteria, determines eligibility based on

inappropriate criteria, and is without oversight and review. (Stone Supp'l Rep. 16-17, ECF No. 315-22.) Given the evidence put forward by the plaintiffs concerning the deficiencies in the current assessment process, it is not entitled to deference.

E. ADA Regulation on Personal Services Does Not Exempt Defendant from Providing the Relief Sought

Finally, defendants assert that the ADA's Personal Devices and Services Regulation, 28 C.F.R. § 35.135, exempts the State from having to provide "services of a personal nature." (Defs.' Mot. for Summ. J. 36-37, ECF No. 313.) Defendants' interpretation of this regulation is incorrect. The Personal Devices and Services Regulation simply makes clear that title II does not require a State to provide personal services where such services are *not* "customarily provided."⁷ See U.S. Dep't of Justice, ADA Title II Technical Assistance Manual § II-3.6200 (emphasis added).⁸

Indeed, courts that have held that § 35.135 imposes any limits on a state's duty to provide reasonable accommodations have only done so, as the Department of Justice

⁷ This argument was similarly rejected in *Haddad*, where the court found that it "misse[d] the mark," and reasoned that when a state chooses to provide certain services, it must do so in a nondiscriminatory fashion. *Haddad*, No. 3:10-cv-00414, at 26-27.

⁸ 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, 646-47 (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. 574 (2010) (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. 732 (2010). 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).

interpretation contemplates, where such devices or services are not “customarily provided.” *See, e.g., McCauley v. Winegarden*, 60 F.3d 766, 767 (11th Cir. 1995) (“environmental filtering” device in a courtroom); *Kerry M. v. Manhattan School Dist. #114*, 2006 WL 2862118, at *10 (N.D. Ill. 2006) (collapsible wheelchair in school district’s bus service); *Blotch v. Hernandez*, 360 F. Supp. 2d 595, 630 (S.D.N.Y. 2005) (expert representatives in tenancy termination proceedings); *Rivera v. Delta Air Lines, Inc.*, 1997 WL 634500, at *1-2 (E.D. Pa. 1997) (wheelchair to board airplane); *Adelman v. Dunmire*, 1996 WL 107853, at *3 (E.D. Pa. 1996) (wheelchair in courtroom).⁹ Thus, where, as here, the services sought by the plaintiffs are customarily provided in the program in which they are receiving services, the limitation expressed by 28 C.F.R. § 35.135 has no bearing.

⁹ Other courts have interpreted the limits imposed by § 35.135 narrowly. For example, in *A.P. ex rel. Peterson v. Anoka-Hennepin Indep. School Dist. No. 11*, 538 F. Supp. 2d 1125, 1152-53 (D. Minn. 2008), the court held that § 35.135 does not bar a diabetic child’s parents from requesting that school district staff be trained and authorized to provide glucagon injections to the child. Similarly, in *Purcell v. Pennsylvania Department of Corrections*, 1998 WL 10236, at *9 (E.D. Pa. 1998), the court rejected the state’s argument that it was not required under the ADA to provide a plastic chair for support in shower to accommodate plaintiff’s joint disease.

CONCLUSION

For the reasons stated above, the Court should find that the defendants cannot avail themselves of the fundamental alteration defense and should deny the defendants' motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on December 20, 2010, a copy of foregoing was filed electronically with the Clerk of the Court using the CM/ECF system, which will electronically send a copy of the same to the following: Steve Gold (stevegoldada@cs.com), Jodi Siegel (jodi.siegel@southernlegal.org), Bruce Vignery (bvignery@aarp.org), Sarah Somers (somers@healthlaw.org), Andrew Sheeran (Andrew.Sheeran@acha.myflorida.com), and Dean Kowalchyk (Kowalchykd@elderaffairs.org).

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