

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

JONATHAN PAUL BOYD,)	
)	
Plaintiff,)	Civil Action Number:
)	
vs.)	2:10-cv-00688-MEF-TFM
)	
CAROL A. HERRMANN-STECKEL,)	
in her official capacity as Commissioner,)	
Alabama Medicaid Agency,)	
)	
Defendant.)	

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 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). 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 and urges the Court to grant the plaintiff’s motion for preliminary injunction.

INTRODUCTION

Plaintiff Jonathan Paul Boyd, a young man with quadriplegia who receives services in the State of Alabama’s Medicaid program, is enrolled with a scholarship as a graduate student at 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.”

University of Montevallo, where he is pursuing a Master's degree in community counseling. Because of the defendant's discriminatory administration of Alabama's Medicaid program, however, Mr. Boyd has been relegated to a nursing home unnecessarily and indefinitely – significantly interfering with his ability to participate in his graduate program, school activities and community life generally. The defendant refuses to make reasonable modifications to the State's Medicaid program to enable Mr. Boyd to live in the community, despite the substantial evidence that Mr. Boyd wants to live in the community, is capable of doing so, and that providing him services in the community instead of a nursing home would actually save the State money. As a result, Mr. Boyd remains needlessly institutionalized in violation of Title II of the ADA, 42 U.S.C. § 12131, *et. seq.* (“ADA”), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) and the Supreme Court decision *Olmstead v. L.C.*, 527 U.S. 581 (1999). Moreover, Mr. Boyd is suffering irreparable harm each day he remains segregated in a nursing home, where he loses valuable time and educational and other opportunities that no court order in the future can adequately remedy. For these reasons and the reasons set forth below, the Court should grant the plaintiff's motion for preliminary injunction.

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.” 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 others who are receiving disability services from the entity. *Id.* at 607.

FACTUAL BACKGROUND

In 1995, while a sophomore at Troy State University, Jonathan Paul Boyd was injured in an accident that resulted in paralysis below the collar bone. (Am. Compl. at ¶ 2.) For the following eleven years, he lived at home with his family in Montevallo, Alabama, where his mother served as his primary caregiver, and he received some services under the State of

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), 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, p. 571 (2009).

Alabama Independent Living (“SAIL”) Medicaid waiver program. (Id. at ¶¶ 17-19). He eventually returned to college in Montevallo and graduated in 2007 with a Bachelor of Arts degree.

When his mother could no longer serve as his primary caregiver, Mr. Boyd entered a nursing home in December 2006, and the waiver services he received prior to that time were terminated. (Id. at ¶ 20.) He remains in the nursing home today, and the services he receives there are provided through the State’s Medicaid program.

Early this year, Mr. Boyd was accepted to a graduate program at the University of Montevallo, where he seeks to earn a Master’s degree so that he can pursue a career in community counseling. (Am. Decl. of Jonathan Paul Boyd 11-12.) Unlike most students at the University of Montevallo, however, Mr. Boyd cannot participate fully in activities, events and opportunities offered by the school because he is confined to a nursing home, thirteen miles away. (Id.) In the nursing home, Mr. Boyd is subject to curfews, restrictions and regimented activities. (Id. ¶¶ 20-22.) He has no privacy, and is surrounded by constant noise. All of the other nursing home residents are individuals with disabilities and most are much older than Mr. Boyd. (Id.) As a result, he is deprived of the simple pleasure of being around people his own age and choosing what to do with his day. He is also deprived of the opportunity to take full advantage of all the University has to offer, such as athletic events, lectures, author readings, theatrical and musical performances and other school functions. (Id. ¶ 15.)

The State of Alabama has opted to take advantage of Medicaid’s waiver programs in order to provide home and community-based services to persons with disabilities who would otherwise be cared for in hospitals and other institutions.⁴ The “waiver” authority permits the

⁴ States can submit requests for approval to the Centers for Medicare and Medicaid Services

Secretary of Health and Human Services to waive certain Medicaid requirements in order for states to offer these services. *See* 42 U.S.C. § 1396m(b)-(h); 42 C.F.R. §430.25(d). Pursuant to this authority, Alabama administers six waiver programs, including the Elderly and Disabled Waiver and the State of Alabama Independent Living (“SAIL”) waiver. The purpose of the Elderly and Disabled waiver is to “provide home and community-based services to elderly and disabled individuals in the community who would otherwise require nursing facility care.” *See* Application for a § 1915(c) Home and Community-Based Services Waiver, at 4 (attached as Exhibit 6 to Pl.’s Mem. of Law in Support of Mot. for Prelim. Inj., dated Aug. 17, 2010, ECF No. 4-6) (hereinafter (E/D Waiver Application”) The SAIL waiver “provides services to individuals with physical disabilities not associated with the process of aging and with onset prior to age 60, [including] quadriplegia. . . .” Section 1915(c) Waiver Request, November 2008 (hereinafter “SAIL Waiver Application”), attached hereto as Exhibit A.

By providing services to individuals in the Elderly and Disabled waiver instead of a nursing facility, the State saved annually, on average, more than \$10,000 per person during the last three years. *See* E/D Waiver Application at Appendix J-1:1.⁵ Similarly, in a cost neutrality demonstration set forth in the SAIL Waiver Application, the State represented that it saved on average more than \$15,000 per person to serve individuals through the SAIL waiver instead of a nursing facility. *See* SAIL Waiver Application at 92. Even though it would be less costly to provide services to Mr. Boyd in the community, where he is able to and very much wants to live, defendant has refused to make reasonable modifications to its service program to enable him to do so.

(“CMS”) to alter the terms of a waiver application at any time. *See* 42 C.F.R. § 441.355.

⁵ *See also* 42 C.F.R. § 441.303(f)(1) (providing instructions on terminology used in 1915(c) Waiver Applications).

ARGUMENT

The plaintiff satisfies the requirements for a preliminary injunction. To obtain a preliminary injunction, the moving party must show (1) a substantial likelihood of success on the merits, (2) that he will be irreparably harmed in the absence of an injunction, (3) that the balance of the equities favors granting the injunction, and (4) that the public interest would not be harmed by the injunction. *Mesa Air Group, Inc. v. Delta Air Lines, Inc.*, 573 F.3d 1124, 1128 (11th Cir. 2009). The decision whether or not to issue a preliminary injunction lies within the sound discretion of the trial court. *Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005). The “primary justification” for the issuance of a preliminary injunction is to preserve the court’s ability to render a meaningful decision on the merits. *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567, 573, 576 (5th Cir. 1974).⁶ Here, preliminary injunctive relief is necessary to prevent the irreparable harm of unnecessary institutionalization. *See Long v. Benson*, No. 08cv26, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008) (granting preliminary injunction requiring Florida to provide Medicaid-funded community-based services because irreparable injury would result if plaintiff were forced to enter a nursing home), *aff’d*, No. 08-16261, 2010 WL 2500349 (11th Cir. June 22, 2010).

⁶ *See also Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349, 1351 (11th Cir. 2005) (affirming preliminary injunction in a voting rights acts case requiring defendants to process voter registration applications); *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1425 (11th Cir. 1984) (issuing preliminary injunction requiring defendants to display notices and instruct employees and agents of nondiscrimination policies and finding that “when housing discrimination is shown it is reasonable to presume that irreparable injury flows from the discrimination”); *Haddad v. Arnold*, No. 3:10-cv-00414-MMH-TEM (M.D. Fla. July 9, 2010) (hereinafter “*Haddad Op.*”) at 39 (attached as Exhibit B) (issuing preliminary injunction requiring defendants to provide community-based services to plaintiff); *Rogers v. Windmill Point Vill. Club Assoc., Inc.*, 967 F.2d 525, 528 (11th Cir. 1992); *Community Services, Inc. v. Heidelberg*, 439 F. Supp. 2d 380, 400-401 (M.D. Pa. 2006) (entering preliminary injunction ordering defendants to issue permits for plaintiff to utilize property as long term structured residence for individuals with mental illness).

I. Plaintiff is Likely to Prevail on the Merits of His Claims

To establish a violation of Title II of the ADA, a plaintiff must prove that (1) he has a disability; (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability. *Morisky v. Broward County*, 80 F.3d 445, 447 (11th Cir. 1996).⁷ Defendants do not dispute that Mr. Boyd is an individual with a disability within the meaning of the ADA and the Rehabilitation Act. Nor do they dispute that he is eligible to receive Medicaid-funded services from the State; indeed, the State pays for the services Mr. Boyd currently receives in the nursing home. Instead, defendant contends that the plaintiff’s ADA and Rehabilitation Act claims are “trump[ed]” by the Medicaid Act; that an ADA regulation exempts the State from providing personal services; that Mr. Boyd is not able to live in the community; and that the relief he seeks works an “overhaul” of the State’s Medicaid program and requires the creation of an “entirely new State-funded program.” These arguments have no merit.

A. Defendant’s Interpretation of Federal Law is Unfounded

Defendant argues that Mr. Boyd’s ADA and Rehabilitation Act claims “force[] the statutes into conflict” with the Medicaid Act and that the Medicaid Act “trumps” these anti-discrimination statutes. Def.’s Resp. at 45. Specifically, defendant argues that a finding under the ADA and Rehabilitation Act that services must be provided to Mr. Boyd in a community-based setting would conflict with the Medicaid Act because waiver programs are optional, can be limited to target populations, and are approved by the U.S. Department of Health and Human Services Center for Medicaid and Medicare Services (“CMS”). *Id.* at 44. Contrary to

⁷ Claims under the ADA and the Rehabilitation Act are treated identically unless, unlike here, one of the differences in the two statutes is pertinent to a claim. *Allmond v. Akal Sec., Inc.*, 558 F.3d 1312, 1316 n.3 (11th Cir. 2009); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

defendant's assertion, Mr. Boyd's claim does not raise any question requiring the Court to reconcile the ADA or Rehabilitation Act with the Medicaid Act.

1. ADA Compliance Does Not Conflict With the Medicaid Act

A determination that Mr. Boyd should be provided services in the most integrated setting appropriate to his 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 limited to a particular target population.⁸ 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. 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. *Haddad Op.* at 28-29 (“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.”); *see also 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. Oklahoma Health Care Authority*, 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).

⁸ Indeed, given that he is a person with a physical disability, Mr. Boyd is within the target populations served by the Elderly and Disabled Persons waiver and the SAIL waiver.

Equally unavailing is the defendant's suggestion that approval of the State's Medicaid program by CMS exempts it from making modifications to comply with the ADA or Rehabilitation Act. Def.'s Resp. at 44. 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. *See 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.") (Attached hereto as Exhibit C).

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

Defendant also asserts 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." Def.'s Resp. at 48-51. Defendant's 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.”⁹ See U.S. Dept. of Justice, ADA Title II Technical Assistance Manual § II-3.6200 (emphasis added).¹⁰

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 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); *Blatch ex rel. Clay 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).¹¹ Thus, where, as here, the services sought by the plaintiff are

⁹ For example, a State’s Department of Motor Vehicles need not provide wheelchairs to those who wait in line for a driver’s license.

¹⁰ 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. 574 (2009) (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 (2009). 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).

¹¹ 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

customarily provided in the program in which he is receiving services, the limitation expressed by 28 C.F.R. § 35.135 has no bearing.

3. Defendant's Legal Arguments Were Recently Rejected by Courts in the Eleventh Circuit

The same legal arguments asserted by defendant were recently rejected in two separate *Olmstead* cases pending in federal courts in Florida. In *Haddad*, *supra* n. 6, 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. *Id.* at 2. The defendants opposed the motion, arguing *inter alia* that (1) 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, and (2) 28 C.F.R. § 35.135 exempted them from providing personal care services to the plaintiff. *Id.* at 26-29. The district court rejected these arguments and granted the plaintiff's motion for preliminary injunction. It found that defendants' attempt to characterize the plaintiff's ADA claim "as an invalidation of the Medicaid Act is without merit," explaining that it "simply address[ed] 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. With respect to the defendants Section 35.135 argument, the district court found it also "misses the mark," reasoning that when a state chooses to provide certain services, it must do so in a nondiscriminatory fashion. *Id.*

ADA to provide a plastic chair for support in shower to accommodate plaintiff's joint disease.

Similarly, in *Long v. Benson*, a man who was relegated to a nursing home after experiencing a stroke that resulted in paralysis on the left side of his body sought a preliminary injunction requiring the State to provide Medicaid coverage for certified nursing assistance in his home. *Long* 2008 WL 4571903. The district court found that the plaintiff satisfied the requirements for entry of a preliminary injunction, including that he was likely to prevail on the merits of his *Olmstead* claim. *Id.* at 2. On appeal to the Eleventh Circuit Court of Appeals, the state defendants argued, as defendant does here, that 28 C.F.R. § 35.135 does not require them to provide personal care services and 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, 2010 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).

B. Mr. Boyd is a Qualified Individual with a Disability

Under the ADA, a “qualified individual with a disability” is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices ... meets the essential eligibility requirements for receipt of services or the participation in programs or activities provided by the public entity.” 42 U.S.C. § 12131(2). The defendant argues that Mr. Boyd is not a “qualified individual” because Alabama does not “currently [have] a Medicaid waiver program which, as designed, meets his needs.” Def.’s Resp. at 54. Defendant’s argument conflates the question of eligibility with the question of whether the relief sought is a reasonable modification of the program provided by defendant. There is no dispute that Mr. Boyd is qualified to receive long-term medical care and living assistance through Alabama’s

Medicaid program. Moreover, given that he lived in the community for eleven years with adequate support services, it is clear that community-based services are appropriate for his needs. *See Townsend*, 328 F.3d at 516 (individual satisfied eligibility requirement where he was qualified to receive long-term care through state's Medicaid program and showed he benefitted from receiving those services in a community-based setting); *Long*, 2008 WL 4571903, at *2 (“[C]ommon sense and experience suggest there is nothing that can be done for [the plaintiff] in the nursing home that cannot also be done in his apartment complex. Indeed, this is true of most if not all services provided in nursing homes for most if not all patients.”). Thus, Mr. Boyd has established that he is a qualified individual with a disability.

Defendant appears to argue that Mr. Boyd is not eligible for community-based services because he has not been assessed by a state treatment professional. As many courts have held, however, a plaintiff need not show that a state's treatment professional has concluded that he can be served in the community. *See Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 310 (E.D.N.Y. 2008) (no eligibility determination from the state's professional is required); *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 258 (E.D.N.Y. 2009) (same); *Long*, 2008 WL 4571904, *2 (state “cannot deny the right [to an integrated setting] simply by refusing to acknowledge that the individual could receive appropriate care in the community. Otherwise, the right would, or at least could, become wholly illusory.”); *Frederick L. v. Dep't of Public Welfare*, 157 F. Supp. 2d 509 (E.D. Pa. 2001) (“*Frederick L. F*”) (“*Olmstead* does not allow States to avoid the integration mandate by failing to require professionals to make recommendations regarding the services needs of institutionalized individuals with mental disabilities.”).¹²

¹² To the extent defendant suggests that Mr. Boyd is ineligible for services in the Elderly and Disabled waiver because he is not “on the referral list of persons who wish to be enrolled in the E&D waiver,” Def.’s Resp. at 54, that argument is also without merit. As Mr. Boyd attested, he

C. With Reasonable Modifications to its Program, the State Can Provide the Services Mr. Boyd Needs to Live in the Community

Defendant mischaracterizes the relief Mr. Boyd seeks as a “new waiver program” and one that would require an “overhaul of the system.” Def.’s Resp. at 63. The relief Mr. Boyd seeks is nothing of the sort. Defendant’s characterizations are flawed for two reasons. First, they fail to account for the fact that the State is already providing Mr. Boyd with the services he is seeking in this litigation. He simply requests that the State provide those services in a community-based setting rather than an institution. *See Townsend*, 328 F.3d at 517 (“If services were determined to constitute distinct programs based solely on the location in which they were provided, *Olmstead* and the integration regulation would be effectively gutted. States could avoid compliance with the ADA simply by characterizing services offered in one isolated location as a program distinct from the provision of the same services in an integrated location.”); *Helen L. v. Didario*, 46 F.3d 325, 337-39 (3d Cir. 1995) (state violated ADA by not providing state-funded attendant care services for which plaintiff was eligible in her own home, rather than a nursing home); *Fisher*, 335 F.3d at 1183 (questioning whether defendants had a valid fundamental alteration defense where plaintiffs were simply requesting that a service for which they are eligible be provided in a community-based setting rather than a nursing home).

Second, Mr. Boyd can be served successfully in the community with services that the State already provides to other individuals with disabilities in the State’s community-based

applied for Alabama’s community-based waiver program in October 2008. (Boyd Am. Decl. ¶ 24.) In her answer to the complaint, the defendant admits that Mr. Boyd applied for waiver services, but states that he applied for services in December 2008, not October 2008. (Answer ¶ 26.) Moreover, even if Mr. Boyd failed to follow application procedures or filed an application for one particular waiver and not another, failure to follow administrative formalities does not bear on whether an individual with a disability is qualified to receive services in an integrated setting. *See Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d at 333 n.44 (expressing doubt that failure to file a formal application “bears on whether individuals are qualified to receive services in a ‘more integrated setting.’”).

programs.¹³ Defendant has produced evidence that the Elderly and Disabled waiver provides personal care services without any hourly limit. (Affidavit of Marilyn Chappelle ¶ 14.) Thus, that program can readily meet Mr. Boyd’s needs for personal care services. Additionally, with respect to skilled nursing services, Alabama law contains a regulatory exception that permits a nurse or doctor to delegate such services to unlicensed personnel. Def.’s Resp. at 15-16 (citing regulation of Alabama Board of Nursing allowing a registered nurse to delegate tasks to a designated caregiver under certain circumstances); *see also* Ala. Code 1975 § 34-21-6 (providing that Chapter regarding practice of professional nursing “does not prohibit ... persons, including nursing aides, orderlies, and attendants, carrying out duties necessary for the support of nursing services, ... or under the supervision of professional nurses licensed hereunder, nor gratuitous nursing of the sick by friends or members of the family....”) Thus, Mr. Boyd’s need for limited skilled nursing services in connection with his catheter and bowel program could be delegated to another person, such as a home health attendant, a service provided in the State’s Medicaid plan. *See* 42 U.S.C. § 1396a(a)(10)(D) (“A state plan for medical assistance must ... provide ... for the inclusion of home health services for any individual who, under the State plan, is entitled to nursing facility services”); *see also Alabama Medicaid Covered Services and Co-payments* (attached as Exhibit D) (describing home health services offered in the State plan for recipients who have “an illness, disability or injury that keeps him or her from leaving home without special equipment or the help of another person.”). Moreover, under 42 C.F.R. § 440.70, a state’s home care program must include “medical supplies, equipment and appliances.” *Townsend*, 328 F.3d at 522 (citing 42 C.F.R. § 440.70). Defendant fails to explain why the

¹³ Defendant cites no authority that expressly precludes serving an individual in more than one waiver so long as there is no duplication of payment and the services are coordinated.

medical supplies, equipment and appliances provided for in the State's home care program would not be sufficient to meet Mr. Boyd's needs.

Defendant's argument that the requested relief is not a reasonable modification rests primarily on the fact that she cannot "unilaterally amend any Medicaid waiver program." Def.'s Resp. at 65. But states routinely apply to CMS to amend their waiver programs in order to comply with the integration mandate. *See Knowles v. Horn*, 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.")).¹⁴ Several courts have recognized that modifying a Medicaid waiver program to comply with the integration mandate is reasonable. In a similar case challenging the State of Illinois' limits on the amount of services under a waiver program, the Seventh Circuit determined that requiring the state to modify the services provided via its waiver program would not by itself be a fundamental alteration. *See Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 611 (7th Cir. 2004). In another similar case, a district court held that requiring the state to amend its waiver application in order to continue to provide the level of services plaintiff required to remain living in the community would not be a fundamental alteration. *Grooms v. Maram*, 563 F. Supp. 2d 840, 857 (N.D. Ill. 2008). Moreover, as

¹⁴ The only recent exception to this trend was a rejection by CMS of a request by the State of Missouri that would have resulted in the state serving more people in segregated settings. Missouri had submitted a request to increase the population served in its mental retardation/developmental disabilities waiver program by funding placements into residential units clustered on the grounds of a large State-operated institution. *See Ohio Legal Rights Service, CMS Rejects Application to Use Waiver to Fund Group Homes In Missouri*, Aug. 11, 2010, available: <http://www.olrs.ohio.gov/news/missouri-cms-waiver-denial>. CMS rejected the request because "[u]nder the proposed amendment, Missouri would not provide services that permit individuals to avoid institutionalization, but would [instead] serve individuals in an institutional setting." *Id.*

discussed, *supra* pp. 8-9, CMS itself has recognized that a state may need to amend its waiver programs to comply with the ADA.

It is the defendant's burden to establish that the requested relief would fundamentally alter its service program. *See Olmstead*, 527 U.S. at 604; *Frederick L. v. Dept. of Public Welfare*, 364 F.3d 487, 492 n. 4 (3d Cir. 2004) ("*Frederick L. II*"); *Disability Advocates, Inc.*, 653 F. Supp. 2d at 267; *Haddad Op.* at 33-36. Defendant fails to meet this burden. The defendant has put forward no evidence that providing services to Mr. Boyd in the community would compel cutbacks in services to others with disabilities or otherwise alter the nature of the State's program. In fact, the only evidence of estimated costs in the record – defendant's application to the federal Centers for Medicare and Medicaid Services for approval of its Elderly and Disabled Waiver Program – indicates that the cost of care in the community is much less than the cost of care in a nursing facility. In that application, the State represented that the average yearly cost of care for a Medicaid recipient in a nursing facility over a five-year period is approximately \$36,455.00, whereas the average yearly cost of care in the community for that same time period amounted to approximately \$22,876.00. *See E/D Waiver Application*, referenced *supra* p.5., Appendix J-1:1

Even if, assuming *arguendo*, providing services to Mr. Boyd in the community increases the state's administrative burden or cost, that alone does not constitute a fundamental alteration of the State's Medicaid program. *See Pa. Prot. & Advocacy, Inc. v. Dep't of Pub. Welfare*, 402 F.3d 374, 380-81 (3d Cir. 2005) (explaining that "it would have been legal error for the District Court to find a fundamental alteration solely on the basis of budgetary constraints"); *Frederick L. II*, 364 F.3d at 501 (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 with regard to community placement in a manner for which the state can be held accountable by the courts). *Townsend* 328 F.3d at 520 (Remanding for further factual development but explaining that budgetary considerations are insufficient to establish a fundamental alteration defense and focusing instead on “whether [the asserted] extra costs would, in fact, compel cutbacks in services to other Medicaid recipients”); *Fisher* , 335 F.3d at 1182-83 (“the fact that [a state] has a fiscal problem, by itself, does not lead to an automatic conclusion that [the provision of community-based services] will result in a fundamental alteration If 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.”)

Moreover, to invoke the fundamental alteration defense, a public entity must demonstrate that it has a “comprehensive, effectively working plan to address unnecessary institutionalization.” *Olmstead*, 527 U.S. at 605-06; *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381-82 (the Court’s *Olmstead* opinion allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA and [the Rehabilitation Act]”); *Disability Advocates, Inc.*, 598 F. Supp. 2d at 339 (“If a state does not make a genuine attempt to comply with the integration mandate in the first instance, it cannot establish that compliance would be a fundamental alteration of its programs and services....”); *see also Haddad* Op. 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).

Here, defendant has provided no facts suggesting there is an effective plan in place to address unnecessary institutionalization. To the contrary, she references the existence of many other people who, like Mr. Boyd, desire to move out of the nursing home and receive services in the community. *See* Def.'s Resp. at 4 (“[I]t may be assumed that Mr. Boyd’s desire to move out of the nursing home is shared by almost everyone else who lives there.”). Defendant asserts, without any support, that Mr. Boyd would be “jumping line” if he were to gain entry to the Elderly and Disabled Waiver, but she provides no facts concerning the length of any waiting list, the rate that individuals on the list are placed in community-based programs, or Mr. Boyd’s placement on any wait list. Nor does the defendant provide any information with respect to the decline in the number of persons, like Mr. Boyd, who are unnecessarily confined in nursing homes. Courts have found such factors necessary to establish a finding that a defendant has an effectively working plan in place. *See Arc of Washington v. Braddock*, 427 F.3d 615, 621 (9th Cir. 2005) (citing waiting list with turnover, increased slots, increases in community-based services expenditures and declining institutionalized populations); *Frederick L. v. Dept. of Pub. Welfare of Pa.*, 422 F.3d 151, 157-160 (3d Cir. 2005) (deinstitutionalization plan must be specific and measurable and include time-frames and rates of community transition); *Haddad Op.* at 34 (granting preliminary injunction where defendants failed to provide “the most basic factual information in regard to the waiver program and its waiting list.”). Given the lack of any facts suggesting that defendant has any plan in place to address unnecessary institutionalization, she cannot establish that granting preliminary injunctive relief to Mr. Boyd would be a fundamental alteration. Accordingly, Mr. Boyd is likely to prevail on the merits of his claims.

II. Plaintiff Will Suffer Irreparable Harm Without A Preliminary Injunction

Defendant discounts the harm that Mr. Boyd's institutionalization has caused and will continue to cause him. Def.'s Resp. at 11, 65-67. As a 34-year-old man confined indefinitely to a nursing home, Mr. Boyd is isolated from his peers and cut off from his community. All of the activities of the nursing home are targeted to people much older than him, and he is "deprived of the simple pleasure of being around people [his] own age with similar interests and activities." (Boyd Am. Decl. ¶ 21.) Given the regimented nature of the nursing home, Mr. Boyd's opportunities for social contact are extremely limited. He must be present at the institution at specific hours, and he is limited by the schedule of activities in the home. (Id. ¶ 20.) Furthermore, he has virtually no privacy, and he is surrounded by constant noise and commotion. (Id. ¶ 22.) As a result of these and other institutional characteristics of the nursing home, Mr. Boyd has suffered and continues to suffer irreparable harm.

Many courts have recognized that the harms associated with institutionalization are irreparable. For instance, in *Haddad*, the court granted the plaintiffs's motion for preliminary injunction, finding that she had "clearly established that she is at risk of irreparable injury if required to enter a nursing home." *Haddad Op.* at 37. See also *Washington v. DeBeaugrine*, 658 F. Supp. 2d 1332, 1339 (N.D. Fla. 2009) ("Withholding benefits essential to a disabled person's ability to remain in the community rather than in an institution rather obviously would constitute irreparable harm."); *Long*, 2008 WL 4571903, at *2 (forcing individual to leave his community placement and enter a nursing home "will inflict an enormous psychological blow"); *Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010) (if plaintiffs lost community services they would "suffer regressive consequences if moved [to a nursing home], even temporarily"); *Crabtree v. Goetz*, No. 08-0939, 2008 WL 5330506, at *25 (M.D. Tenn. Dec. 19, 2008)

(institutionalization would be detrimental to [plaintiffs'] care, causing, *inter alia*, mental depression, and for some plaintiffs, a shorter life expectancy or death”).

Furthermore, Mr. Boyd’s unnecessary institutionalization has caused him to suffer the very harms recognized by the Supreme Court in *Olmstead*. As a result of his confinement in a nursing home, Mr. Boyd’s opportunities for “social contact, work options, economic independence, educational advancement, and cultural enrichment” are severely limited. *See Olmstead*, 527 U.S. at 600-01. Mr. Boyd’s progress in his graduate degree program has been and will be inordinately delayed because his current placement in a nursing facility requires him to limit enrollment to two classes per semester. (*Id.* ¶¶ 13-16.) Further, he is unable to enjoy University activities that are the bedrock of participation in an enriching academic environment – athletic events, author readings, or theatrical and musical performance. (*Id.* ¶ 15).

The harms that Mr. Boyd has suffered and will continue to suffer cannot be adequately remedied by a future order of this Court.

III. The Balance of Hardships Weighs in Plaintiff’s Favor

The balance of harms clearly lies in plaintiff’s favor. The hardships that plaintiff currently endures as a result of his institutionalization far outweigh any potential hardship to the State. The defendant has not identified any in costs that would be incurred by serving Mr. Boyd in a community-based setting rather than a nursing home. In fact, the evidence in the record demonstrates that the State would experience cost savings. Even if there were some costs associated with the relief, any financial burden that defendant might incur will likely be offset by the cost savings that accrue from avoiding long-term institutional care and enabling Mr. Boyd to pursue his career and gain economic independence. *See V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1122 (N.D. Cal. 2009) (granting preliminary injunction where the risk of unnecessary

institutionalization outweighed the financial burden of the state during a fiscal crisis); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1177 (N.D. Cal. 2010) (state’s fiscal crisis did not outweigh harm to persons with disabilities facing a reduction in services); *Haddad Op.* at 37 (granting mandatory, preliminary injunction and finding that balance of harms weighed in favor of plaintiff). Thus, the balance of hardships clearly tips in plaintiff’s favor.

IV. Granting This Preliminary Injunction is in The Public Interest

The public interest in community integration weighs heavily in favor of granting a preliminary injunction. *Haddad 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”). There is a strong 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.”¹⁵ 527 U.S. at 600. 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 [plaintiff] 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, at *3.

¹⁵ 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 breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression.”).

CONCLUSION

For the reasons stated above, the Court should grant Plaintiff's Motion for Preliminary Injunction. With the Court's permission, counsel for the United States will be present at the preliminary injunction hearing on October 13, 2010.

DATED: October 12, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on October 12, 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: James Tucker (jtucker@adap.us.edu), Lonnie J. Williams (lwilliams@adap.us.edu), Steve Gold (stevegolda@cs.com), Margaret L. Fleming (mfleming@ago.state.al.us), James W. Davis (jimdavis@ago.state.al.us) and Misty S. Fairbanks (mfairbanks@ago.state.al.us).

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