

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 12-60460-CIV-ROSENBAUM

**A.R., by and through her next friend,  
Susan Root, *et al.*,**

**Plaintiffs,**

**v.**

**ELIZABETH DUDEK, in her official  
capacity as Secretary of the Agency for  
Health Care Administration, *et al.*,**

**Defendants.**

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**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**THE STATE OF FLORIDA,**

**Defendant.**

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**THE UNITED STATES' STATEMENT OF INTEREST IN OPPOSITION  
TO THE STATE DEFENDANTS' RENEWED MOTION TO DISMISS  
PRIVATE PLAINTIFFS' COMPLAINT**

The United States submits this Statement of Interest pursuant to 28 U.S.C. § 517,<sup>1</sup> in opposition to the State of Florida's renewed motion to dismiss Private Plaintiffs' Complaint (D.E. 237). The State's motion should be denied for at least two reasons. First, the State

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<sup>1</sup> 28 U.S.C. § 517 permits the Attorney General to send an officer of the Department of Justice to any 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."

incorrectly argues that if it is not currently institutionalizing Plaintiffs but is instead subjecting them to a “mere risk” of institutionalization, then Plaintiffs lack standing to bring an actionable claim under Title II of the ADA. (D.E. 237 at 16-23.) In fact, individuals whom a state places at serious risk of unnecessary institutionalization have standing and a cognizable ADA claim against that state. Second, the State erroneously contends that Plaintiffs’ claims are moot, to the extent that they are based on challenges to certain State policies, because certain of those policies have been amended over the course of this litigation. (*Id.* at 10-11.)<sup>2</sup> To the contrary, the State’s policy changes have not mooted Plaintiffs’ claims; Plaintiffs and putative class members continue to suffer ongoing, present discrimination resulting from the State’s actions.

### **INTRODUCTION**

Plaintiffs T.H., A.G., A.C., A.R., C.V., M.D., C.M., and B.M. (hereinafter “Plaintiffs”) are children with disabilities who are “medically complex”<sup>3</sup> and who qualify for services through the State of Florida’s Medicaid program. (*See* Pls.’ Second Am. Compl., D.E. 62, (“Compl.”) (Filed Aug. 23, 2012) ¶¶ 1, 15-17.) Each receives certain types of Medicaid services, including nursing services for at least a portion of each day, and relies upon these services to maintain his/her health and remain alive. (*See* Compl. ¶¶ 18, 112, 145,162,199, 215, 227, 241.) These

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<sup>2</sup> The State raised this same mootness argument in a previous motion to dismiss that it filed last year, which this Court denied. (D.E. 175.) The State claims that the result should now be different because its attempts to modify some of the policies in question are now more final than they were when the Court first considered the State’s arguments.

<sup>3</sup> A “Medically complex child” is one who “has chronic debilitating diseases or conditions of one (1) or more physiological or organ systems that generally make the person dependent upon twenty-four (24) hour-per-day medical, nursing, or health supervision or intervention.” Fla. Admin. Code Ann. r. 59G-1.010 (164) (2014). A subset of these children are deemed “medically fragile,” which means that the child’s “medical condition is of such a nature that he is technologically dependent, requiring medical apparatus or procedures to sustain life, *e.g.*, requires total parenteral nutrition, is ventilator dependent, or is dependent on a heightened level of medical supervision to sustain life, and without such services is likely to expire without warning.” Fla. Admin. Code. Ann. r. 59G-1.010(165) (2014).

services are—by definition—“medically necessary.”<sup>4</sup> Plaintiffs wish to receive these services in non-institutional settings, and thus have brought this action against certain State officials (collectively, the “State”) and a state contractor, alleging that their policies and practices do not ensure that services are available in such settings, in violation of the ADA and the Medicaid Act. (*See id.* ¶¶ 4-14.)<sup>5</sup>

The State’s arguments in its present motion to dismiss these claims are incorrect. Because the fundamental purpose of the ADA’s integration mandate is to eliminate unnecessary segregation, Plaintiffs need not wait to be institutionalized to challenge policies or practices that place them at serious risk of unnecessary segregation. Accordingly, virtually every federal court to address the issue has agreed that claims that public entities are placing individuals with disabilities at serious risk of institutionalization are cognizable under Title II of the ADA. Consequently, Plaintiffs have standing and a viable claim to challenge such policies. Further, contrary to the State’s assertion, the position of the United States Department of Justice (“Department” or “DOJ”) that Title II of the ADA and its regulation permit an individual with a disability to challenge policies and practices placing him or her at serious risk of

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<sup>4</sup> As Medicaid-eligible children under the age of twenty-one, Plaintiffs are entitled to receive all medically necessary treatment services described in the Medicaid Act at 42 U.S.C. § 1396d(a), which sets forth a number of services that may be made available under a State Medicaid Plan. *See Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1235 (11th Cir. 2011) (holding that under the Medicaid Act’s Early and Periodic Screening, Diagnosis and Treatment (“EPSDT”) requirements, State Medicaid programs must provide “all medical services and treatment ‘necessary . . . to correct or ameliorate’” eligible child’s conditions); *see also* 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a); 42 U.S.C. § 1396d(r)(1)-(5) (setting forth federal EPSDT requirements).

<sup>5</sup> Plaintiffs seek to represent a class of all children who are similarly situated—children who share their entitlement to and reliance upon medically necessary nursing services available through the State’s Medicaid program, but who have not been afforded access to these services in the most integrated setting appropriate to their needs. (*See Compl.* ¶¶ 288-299.) Specifically, they seek to represent a class of: (1) all Medicaid recipients under the age of twenty-one who are receiving services in nursing facilities, and (2) all Medicaid recipients under the age of twenty-one who are medically complex or medically fragile and who reside in the community through receipt of Medicaid services, but who are placed at risk of institutionalization due to the State’s policies and practices with respect to these services. (*See D.E.* 220 at 2.) For the reasons stated in the United States’ Statement of Interest regarding Plaintiffs’ initial motion for class certification, class certification remains appropriate in this case. (*See D.E.* 136 at 13-20.)

institutionalization is entitled to deference.

Nor is this case moot. Even if the State has now finalized its changes to certain administrative rules, the Court should not find that it is entitled to a presumption that its discriminatory actions will not recur. As explained in the United States' Statement of Interest in opposition to the State's prior motion to dismiss, the timing and content of the State's actions do not support the conclusion that allegedly wrongful actions that the State took under preexisting policies will not recur. (*See* D.E. 136 at 5-13.) To the contrary, the State's revised policies appear to have been proposed simply as part of a strategy to deprive this Court of jurisdiction. The Court should therefore deny the State's renewed motion to dismiss.

### **ARGUMENT**

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court must "take the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiffs." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010) (citing *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008)). Plaintiffs have met this burden.

**A. Individuals with Disabilities Have Standing to Challenge Public Entities' Policies or Practices That Place Them at Serious Risk of Unnecessary Institutional Placement.**

The State argues that a risk of institutionalization cannot confer standing and is not actionable under Title II of the ADA. (*See* D.E. 237 at 19-20.) This argument is without merit. Persons who are at serious risk of unnecessary institutional placement because of a public entity's policies or practices have standing and may state a claim for violation of Title II of the

ADA. Plaintiffs need not wait until they are institutionalized to pursue a claim for violation of the ADA, because the purpose of the integration mandate is to eliminate unnecessary institutionalization, and requiring Plaintiffs to enter institutions before they may bring a Title II claim would defeat this fundamental purpose.

**1. Individuals with Disabilities Who Are Placed At Risk of Unnecessary Institutionalization By State Policies or Practices Have Cognizable Claims Under the ADA**

Virtually every federal court to address the issue has found that public entities are subject to suit under the ADA when they place persons with disabilities at serious risk of unnecessary institutionalization in the administration of their services, activities, or programs. *See, e.g., Cruz v. Dudek*, No. 10-23048-CIV, 2010 WL 4284955, at \*3-7 (S.D. Fla. Oct 12, 2010) (Magistrate’s Report and Recommendation Adopted by Court Nov. 24, 2010, attached as Exhibit A) (granting preliminary injunction where state’s denial of community-based services placed plaintiffs at risk of institutionalization); *Haddad v. Dudek*, 784 F. Supp. 2d 1308, 1323-31 (M.D. Fla. 2011) (denying defendants’ motion to dismiss where plaintiff in community sued to prevent unnecessary institutionalization).<sup>6</sup> In *Fisher v. Oklahoma Health Care Authority*, for example,

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<sup>6</sup> *See also, e.g., Pashby v. Delia*, 709 F. 3d 307, 321 (4th Cir. 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1116 (9th Cir. 2011); *Marlo M. ex rel. Parris v. Cansler*, 679 F. Supp. 2d 635, 637 (E.D.N.C. 2010); *Wilborn ex rel. Wilborn v. Martin*, No. 3:13-00574, \_\_\_ F.Supp. 2d \_\_\_, 2013 WL 4401854, at \*12 (M.D. Tenn. Aug. 15, 2013) (“the Defendants’ failure to provide services ‘in the most integrated setting appropriate,’ or placing a qualified individual at ‘high risk for premature entry into a nursing home,’ satisfies the standard for granting injunctive relief under the ADA”), *appeal docketed*, No. 13-6094 (6th Cir. Aug. 22, 2013); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 985 (N.D. Cal. 2010) (granting preliminary injunction where plaintiffs were at risk of institutionalization due to cuts in community-based services); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1164 (N.D. Cal. 2009) (same); and *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1109 (N.D. Cal. 2009)(same); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1309 (D. Utah 2003) (ADA’s integration mandate applies equally to those individuals already institutionalized and to those at risk of institutionalization); *Makin v. Hawaii*, 114 F. Supp. 2d 1017, 1034 (D. Haw. 1999) (individuals in the community on the waiting list for community-based services offered through the State’s Medicaid program could challenge administration of the program as violating title II’s integration mandate because it “could potentially force Plaintiffs into institutions”); *Pitts v. Greenstein*, No. 10-635-JJB-SR, 2011 WL 1897552, at \*3 (M.D. La. May 18, 2011) (A State’s program violates the ADA’s integration mandate if it creates the *risk* of segregation; neither present nor inevitable segregation is required”); *Hiltibran v. Levy*, No. 10-4185-CV-C-NKL, 2010 WL 6825306, at \*4 (W.D. Mo. Dec. 27, 2010) (“Persons at risk of institutionalization may make an integration mandate challenge without having first been placed in institutions.”); *Ball v. Rogers*, No. CV 00-67-TUC-EHC, 2009 WL 1395423, at \*5 (D. Ariz. Apr. 24, 2009) (holding that defendants’ failure to provide adequate services to avoid unnecessary

the Tenth Circuit Court of Appeals rejected defendants' argument that plaintiffs could not make an integration mandate challenge until they were placed in institutions. 335 F.3d 1175, 1178 (10th Cir. 2003). The plaintiffs in *Fisher*, like Plaintiffs in this case, received Medicaid-funded medical care in the community. They argued that Oklahoma's policy of limiting the number of available medically necessary prescriptions covered in community-based settings, while offering unlimited coverage to individuals in institutions, placed them at risk of institutionalization. *Id.* at 1181-82. Because of the policy, they argued, they would remain in their own homes only "until their health ha[d] deteriorated" and "eventually [would] end up in a nursing home." *Id.* at 1181-82, 1185. The Tenth Circuit agreed that the plaintiffs had a cognizable claim under the ADA and noted that "nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements." *Id.* at 1181. The court reasoned that the protections of the integration mandate "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation." *Id.*

As the Tenth Circuit correctly recognized, the purpose of the ADA's integration mandate would be thwarted if individuals could not challenge policies that place them at risk of segregation until they are unnecessarily institutionalized. Congress enacted the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress was particularly concerned that the segregation in institutions of individuals with disabilities constituted a form of discrimination. For example, Congress found

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institutionalization was discriminatory); *Crabtree v. Goetz*, No. 3:08-0939, 2008 WL 5330506, at \*30 (M.D. Tenn. Dec. 19, 2008) ("Plaintiffs have demonstrated a strong likelihood of success on the merits of their [ADA] claims that the Defendants' drastic cuts of their home health care services will force their institutionalization in nursing homes.").

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). Congress also found that “individuals with disabilities continually encounter various forms of discrimination, including . . . segregation.” 42 U.S.C. § 12101(a)(5). Finally, Congress found that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.” 42 U.S.C. § 12101(a)(7) (emphasis added).

Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, thus broadly prohibits discrimination against individuals with disabilities in public services, including the unnecessary provision of such services in a segregated setting. Title II states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. To address Congress’s concern regarding the segregation of individuals with disabilities as a form of discrimination, the Attorney General promulgated an “integration regulation,” which provides that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). Additionally, a public entity must make “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).<sup>7</sup>

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<sup>7</sup> Congress directed that the Attorney General’s regulations under Title II be consistent with preexisting requirements of Section 504 of the Rehabilitation Act, as well as the requirements Congress established under Titles

Neither the statute nor the regulations apply solely to institutionalized persons. Both protect “qualified individuals with disabilities.” 28 C.F.R. § 35.130(d); *accord* 42 U.S.C. § 12132. A “qualified individual with a disability” means a person “who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131. There is no question that plaintiffs, who receive services through Florida’s Medicaid program, are “qualified individuals with disabilities” within the meaning of Title II.

Moreover, although *Olmstead* involved the ongoing institutionalization of persons with mental health disabilities, its holding was broader than the facts of that case. The Court held that “[u]njustified isolation . . . is properly regarded as discrimination based on disability.” *Olmstead*, 527 U.S. at 597. The Court explained that this holding “reflects two evident judgments.” *Id.* at 600. “First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.” *Id.* “Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” *Id.* at 601. *Olmstead* therefore makes clear that the aim of the integration mandate is to eliminate

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I and III of the ADA. *See* 42 U.S.C. § 12134(b); H.R. Rep. No. 101-485, pt. III, at 52 (“The Committee intends that the regulations under Title II incorporate interpretations of the term discrimination set forth in Titles I and III of the ADA to the extent they do not conflict with the Section 504 regulations.”). As directed by Congress, 42 U.S.C. § 12134 (b), the integration requirement contained in the Department’s ADA regulation is substantively identical to that promulgated by the Department of Health, Education, and Welfare pursuant to Section 504 of the Rehabilitation Act in 1978, and the integration requirement contained in Title III of the ADA. *See* 28 C.F.R. § 41.51(d); 42 U.S.C. § 12182(b)(1)(B). The Attorney General’s regulation also included the requirement that public entities must make reasonable modifications to avoid discrimination, which is similarly contained in Title III of the ADA. 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. pt. 35 app. B, at 684 (describing rationale for inclusion of reasonable modification requirement).



unnecessary institutionalization. That purpose can only effectively be served by allowing suit by those who seek to avoid being unnecessarily institutionalized, as well as by those already confined to an institution who are seeking to return to their communities.

The allegations here are virtually identical to those found actionable in two recent cases pending in the U.S. District Court for the Northern District of Georgia. In *Royal ex rel. Royal v. Cook*, No. 1:08-CV-2930-TWT, 2012 WL 2326115 (N.D. Ga. June 19, 2012), a child with a medically complex condition sued the Georgia Medicaid agency, alleging that its reduction of in-home nursing services placed him at risk of institutionalization in violation of the ADA. *See id.* at \*1, \*8-9. After receiving 84 hours of in-home nursing care per week for more than seven years, the child received notice from the agency informing him that his approved hours of in-home nursing had been reduced to 70 hours per week. *See id.* at \*1. After an evidentiary hearing, the court found the reduction of in-home nursing care would “deprive [the child] of essential services necessary to maintain his life and health[,]” and found that the child’s caregiver would have to retire or quit his job to meet the deficit in skilled care caused by the reduction. *Id.* at \*7. The court held that the state agency had violated the ADA, and enjoined the agency from implementing the reduction, finding that the reduction was unreasonable in light of the skill and availability of the caregiver and that it would place the child “at high risk of premature entry into institutional isolation.” *Id.* at \*9.

The Northern District of Georgia recently undertook an identical analysis in another case and reached the same result. *See Hunter ex rel. Lynah v. Cook*, 1:08-CV-2930-TWT, 2013 WL 5429430, (N.D. Ga. Sept. 27, 2013), *appeal docketed* No. 13-14950 (11th Cir. Oct. 25, 2013). Following a bench trial, the Court concluded that “because the [d]efendant was not providing the medically necessary level of care, or was attempting to reduce the level of care below the

medically necessary level, the [p]laintiffs were at a high risk of entering an institution to receive the medical services for which they qualify.” *Id.* The Court awarded permanent injunctive relief to both plaintiffs in the action, finding both “would be irreparably harmed by reductions in skilled nursing hours below the medically necessary level of care” including the possibility that they “could die from inadequate suctioning, seizures, or frequent hospital visits leading to infections.” *Id.* at \* 14.

Here, the facts of Plaintiffs’ claims are virtually identical to those that the courts found actionable in *Royal* and *Hunter*. Plaintiffs’ physicians have prescribed an amount of in-home nursing services determined to be medically necessary, but the State has implemented policies that fail to ensure that they receive a medically necessary level of services. (*See e.g.*, Compl. ¶¶ 171-178; 205-211; 220-224; 232-237; 246-251.) Plaintiffs allege that, through the State’s policies and practices, they have experienced reductions in medically necessary services that place them at serious risk of unnecessary institutionalization. (*See id.*) Accordingly, their claims are cognizable under Title II of the ADA.

## **2. The Department’s Position Is Entitled to Deference**

The Department has made clear since at least 2011 that “the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent. For example, a plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity’s failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual’s eventual placement in an institution.” Statement of the Department of Justice on Enforcement of the Integration Mandate

of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, Question 6, available at: [http://www.ada.gov/olmstead/q&a\\_olmstead.htm](http://www.ada.gov/olmstead/q&a_olmstead.htm) (last updated June 22, 2011) .

The State argues that this position is not entitled to deference. (See D.E. 237 at 20-23.) The State is incorrect. Even though the Plaintiffs do not actually rely upon the Department’s interpretation in their Complaint, the Department’s interpretation of the regulation that it was charged by Congress to promulgate is controlling because the State does not, and cannot, demonstrate that it is “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal citations omitted); see also *M.R. v. Dreyfus*, 663 F.3d 1100, 1117-18 (9th Cir. 2011), *opinion amended and superseded on other grounds*, 697 F.3d 706 (9th Cir. 2012) (citing *Auer* standard while affording “considerable respect” to DOJ’s position that “[t]he integration mandate prohibits public entities from pursuing policies that place individuals at risk of unnecessary institutionalization” and finding that “DOJ’s interpretation [regarding risk of institutionalization] is not only reasonable; it also better effectuates the purpose of the ADA . . .”).

Indeed, when addressing the precise question at issue, courts have repeatedly granted the Department’s interpretation deference. See, e.g., *Olmstead*, 527 U.S. at 597-98 (finding that “[b]ecause the Department is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect”) (internal citation omitted); *Pashby*, 709 F.3d at 322 (“Because Congress instructed the DOJ to issue regulations regarding Title II, we are especially swayed by the DOJ’s determination that ‘the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings’”) (internal citation omitted); *M.R.*, 663 F.3d at 1117-18; cf., e.g., *Bragdon v. Abbott*, 524 U.S. 624, 642, 646 (1998) (granting the Department’s

interpretation of its Title III ADA regulation deference because “the well-reasoned views of the agencies implementing a statute ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance’”) (internal citation omitted; *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 957 F. Supp. 2d 1272, 1280 (D. Colo. 2013) (granting *Auer* deference to the Department’s interpretation of its Title III ADA regulations), *appeal docketed*, No. 13-1377 (10th Cir. Sept. 10, 2013).

The cases cited by the State regarding the level of deference due to the Department’s litigation positions are inapposite. The Department’s position that actions that place an individual at serious risk of institutionalization constitute a violation of the ADA was clearly stated prior to this litigation. The technical assistance challenged by the State was issued on June 22, 2011, and predated this litigation, filed in March 2012. It therefore is not properly characterized as a litigation position.

### **3. Plaintiffs Have Standing to Bring Their Claims.**

The State also argues that Plaintiffs do not have standing because their institutionalization is not “certainly impending.” (D.E. 237 at 19.) This argument incorrectly conflates the requirements of Article III standing with the merits of Plaintiffs’ Title II claims. Plaintiffs have standing because they have alleged actual injuries. To establish standing, a litigant must show (1) that he suffered actual or threatened injury; (2) that the condition complained of caused the injury or threatened injury, and (3) that the requested relief will redress the alleged injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs allege they are subject to policies and practices of the State that have resulted in the reduction of medically necessary, community-based services. Plaintiffs here depend daily, if not hourly, on the medically necessary services that the State is obligated to provide. It is not “speculative” or “conjectural”

that they require these services to maintain their health and safety, or that a policy or procedure that impairs their access to these services causes them injury. They therefore have alleged injury resulting from the State’s conduct sufficient to confer standing.<sup>8</sup>

The State’s reliance on *Bill M. ex rel. William M. v. Nebraska Department of Health & Human Services Finance & Support* is misplaced and ignores relevant portions of the Court’s opinion. When the plaintiffs there asserted that Nebraska state officials violated Title II of the ADA by denying them home and community-based services and withholding funding for those services, the Court found that a number of the named plaintiffs residing in the community had alleged facts sufficient to confer standing to assert a Title II claim, including the “preclu[sion of] necessary residential services” for two plaintiffs, and the underfunding of “required services” which jeopardized the “health and safety” of a number of the named plaintiffs. *See Bill M. ex rel. William M. v. Nebraska Dep’t of Health & Human Servs. Fin. & Support*, 408 F.3d 1096, 1099 (8th Cir. 2005) *cert. granted, judgment vacated sub nom. United States v. Nebraska Dep’t of Health & Human Servs. Fin. & Support*, 547 U.S. 1067 (2006) (citing portions of plaintiffs’

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<sup>8</sup> Although Plaintiffs have alleged injuries sufficient to confer standing, even the threat of future injury is sufficient to sustain standing in analogous situations. Numerous federal courts, including this Court, have held that the risk of future injury qualifies as the type of threatened injury that the Supreme Court in *Lujan* deemed sufficient to satisfy the Constitution’s injury-in-fact requirement and confer standing. *See Bouldry v. C.R. Bard, Inc.*, 909 F. Supp. 2d 1371 (S.D. Fla. 2012) (holding class of individuals implanted with defective medical devices had Article III standing to remain in federal court because they were at risk of future injury by the devices); *see also, e.g., Pisciotta v. Old Nat’l Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007) (“[T]he injury-in-fact requirement can be satisfied by a threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant’s actions.”) (footnote omitted); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002) (holding that “the possibility of future injury may be sufficient to confer standing on plaintiffs” and noting that “threatened injury constitutes ‘injury-in-fact’”); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc) (finding that “[t]hreats or increased risk . . . constitutes cognizable harm.”). “[A] credible threat of harm is sufficient to constitute actual injury for standing purposes.” *Cent. Delta Water Agency*, 306 F.3d at 950; *see also Mental Disability Law Clinic v. Hogan*, No. CV-06-6320, 2008 WL 4104460, at \*8 (E.D.N.Y. Aug. 26, 2008) (finding “the likely harm of another hospitalization and the fact that this harm could be avoided if [Plaintiff were to continue to receive existing services] is not too speculative or conjectural to preclude standing.”) (footnote omitted).

complaint incorporated by reference into plaintiffs' first claim for relief).<sup>9</sup> The only other district court decision to which the State is able to cite comes to a similar conclusion. (*See* Defs.' Br. at 20 (citing *Dykes v. Dudek*, No. 4:11-cv-116/RS-WCS, 2011 WL 4904407, at \*2 (N.D. Fla. Oct. 14, 2011) (finding that plaintiffs' allegations regarding injuries caused by the "waiting lists for enrollment on the DD Waivers where [the community plaintiffs] languish for years without services" were sufficient to confer standing))). Thus, these cases do not support the State's position that Plaintiffs lack standing; in fact, they support the opposite position, that Plaintiffs have standing.

**B. The State's Actions Have Not Mooted Plaintiffs' Claims**

Finally, the State once again argues (as it argued, unsuccessfully, in its previous motion to dismiss one year ago) that Plaintiffs' claims against them are moot due to certain changes that the State has recently made to its Administrative Code and its Home Health Handbook. The State contends that certain rule changes are now more "final" than they were last year, and that therefore, this Court must reach a different conclusion when it rules on the their present motion. The State's argument should be rejected because it only addresses one third of the legal standard applicable to whether a government actor's voluntary cessation of unlawful conduct moots a case, and because it fails even to prove that that one prong of the standard has been satisfied. There is simply no basis for confidence that the State effectuated rule changes out of a genuine intent to refrain from the same conduct going forward. In addition, the State's argument should also be rejected because, even at face value, it only purports to moot the limited subset of

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<sup>9</sup> The scant reasoning provided in *Bill M.* to support its finding that the "mere risk that Plaintiffs may be institutionalized due to the lack of adequate funding" was insufficient by itself to confer standing, 408 F.3d at 1099 n.2, has not been borrowed by any of the other circuit courts that have examined the issue of whether individuals at risk of institutionalization have a cognizable claim under the ADA. *See Pashby*, 709 F. 3d at 321; *M.R.*, 663 F.3d at 1116, *Fisher*, 335 F.3d 1175 at 1178. And at least one district court in the Eighth Circuit appears to have rejected its reasoning entirely. *See, e.g., Hiltibran v. Levy*, 793 F. Supp. 2d 1108, 1116 (W.D. Mo. 2011) ("[p]ersons at risk of institutionalization may make an integration mandate challenge without having first been placed in institutions") (citing *Fisher*, 335 F.3d at 1185).

Plaintiffs' claims about the specific administrative rules the State has sought to change after the litigation was filed. Plaintiffs' clearly have other allegations that do not arise from those administrative rules, thus making dismissal of their claims inappropriate even if the State's argument on mootness had merit.

**1. The State Has Not Shown that the Allegedly Discriminatory Policies and Practices Have Been Unambiguously Terminated.**

When the State filed the same motion last year, it claimed that it had successfully mooted Plaintiffs' claims by changing three regulations: Rule 59G-1.040, relating to PASRR; Rule 59G-4.260, relating to PPECs; and Rule 59G-4.130 (which incorporates the Home Health Handbook), relating to home health care and private duty nursing services. At the time, only the changes to Rule 59G-4.130 had become final. The State's changes to the other two rules remained pending and subject to modification.

In evaluating the State's claims of mootness, the Court first explained that whether its voluntary cessation had successfully mooted Plaintiffs' case depended on three different factors: (1) whether the termination of the offending conduct was "unambiguous"; (2) whether the policy changes were the result of "substantial deliberation" or were simply an attempt to manipulate jurisdiction; and (3) whether the State had "consistently applied" its new policy and adhered to a new course of conduct. (*See* D.E. 175 at 13 (quoting *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 531-32 (11th Cir. 2013))). While the Court did not quote the following, *Rich* also makes clear that "[t]he timing and content of the decision are . . . relevant in assessing" the first prong of the standard: "whether the [State's] 'termination' of the challenged conduct is sufficiently 'unambiguous' . . . ." *Rich*, 716 F.3d at 531-32 (quoting *Harrell v. Fla. Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010)). "Since the [State] is free to return to [its] old ways, [it] bears a heavy

burden of demonstrating that [its] cessation of the challenged conduct renders the controversy moot.” *Id.* at 531.

The Court then concluded that none of the State’s policy changes constituted an “unambiguous termination.” The Court did not proceed to analyze the timing and content of the State’s rule changes. First, the State’s changes to Rules 59G-1.040 and 59G-4.260 were obviously not unambiguous terminations because they were not even final yet. And while the State’s change to the rule governing home health care and private duty nursing services, Rule 59G-4.130, had become final, it had not changed a related provision, Rule 59G-1.010(166), which set forth the Administrative Code’s definition of the term “medically necessary,” and which the State has used, along with Rule 59G-4.130, as a ground for unwarranted denials of private duty nursing services for medically complex children.

These facts were sufficient to support a finding that the State had failed to satisfy the first prong of the three-factor test. The State’s failure to satisfy that first prong, in turn, constituted a sufficient basis for the Court to reject the State’s mootness claims. The Court did not proceed to the test’s second and third prongs (namely, substantial deliberation and consistent application).

The State now argues that the facts on the ground have changed enough over the past year to justify a finding that Plaintiffs’ claims have now truly become moot. Specifically, it contends that changes to Rules 59G-1.040 and 59G-4.260 have become final, and thus, the State is now necessarily entitled to a presumption that the challenged conduct will not recur. (D.E. 237 at 11.) It also argues that it has mooted Plaintiffs’ claims relating to home health care and private duty nursing services by making various new changes to the State’s Home Health Handbook. *Id.*



The State's argument fails. As a preliminary matter, its argument simply stops, without explanation, at the first prong of the three-factor test. (*See* D.E. 175 at 13.) The State does not even mention the other two prongs of the test, let alone attempt to explain why the Court should find either that the State's policy changes were the result of substantial deliberation, or that it has consistently applied these new policies.<sup>10</sup> As the Eleventh Circuit held in *Rich*, it is the State's "heavy burden" to prove its mootness defense. It cannot satisfy that burden while ignoring two thirds of the relevant legal standard.

Moreover, the State has not even satisfied its burden on the first prong alone. The State seems to assume that once its changes to Rules 59G-1.040 and 59G-4.260 became final, those changes necessarily became "unambiguous terminations." But that is not the case. While the non-finality of those rule changes last year constituted a sufficient basis for finding that they were not unambiguous terminations, it does not follow that finality alone creates a sufficient basis to reverse that finding. To the contrary, finality is a necessary condition for demonstrating unambiguous termination, not a sufficient condition. As the Eleventh Circuit has made clear, the question of whether a "termination" is "unambiguous" depends also on the "timing and content" of the government defendant's voluntary cessation of its unlawful conduct. *Rich*, 716 F.3d at 531-32. As previously discussed in the United States' filing on the State's motion from last year, *see* D.E. 136 at 9-11, the timing of the State's rule changes was highly suspect, as they occurred well after Plaintiffs' lawsuit had already begun. *See Harrell*, 608 F.3d at 1266 (11th Cir. 2010) ("cessation that occurs late in the game will make a court more skeptical of voluntary changes

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<sup>10</sup> Indeed, the State does not because it cannot. There is simply no evidence that the State deliberated *at all*, let alone substantially, before setting its policy changes into motion. Rather, the State made these changes abruptly, after Plaintiffs' lawsuit was already underway, without any announced factual findings or stated policy rationales for why it was making the changes. Neither is there any evidence that the State has "consistently applied" the new policies and adhered to a new course of conduct. If the State had done so, then there would have been a noticeable change in the circumstances of the approximately 150 medically complex and medically fragile children in the State who have been relegated to nursing homes. Moreover, the State admits that even after the new rules, its own data show ten reported denials of services under the Convenience Standard that it claims to have eliminated. (D.E. 237 at 8.)

that have been made”) (quotation marks omitted); *see also Jager v. Douglas Cnty. Sch. Dist.*, 862 F.3d 824, 83-34 (11th Cir. 1989) (claim was not mooted where change was made after there was an “imminent threat of a lawsuit”). The “content” of the rule changes was similarly questionable, given that the State did not provide any contemporaneous policy explanation for why it was making those changes. *See Harrell*, 608 F.3d at 1267 (where government defendant “acted in secrecy, meeting behind closed doors and, notably, failing to disclose any basis for its decision” to change its policies, there was no basis for finding that defendant’s “decision was ‘well-reasoned’ and therefore likely to endure”). Rather, the only rationale for the rule changes that can be inferred from the facts currently of record is that the rule changes were intended as a litigation tactic, for the purpose of manipulating this Court’s jurisdiction over Plaintiffs’ claims.<sup>11</sup> *See id.* (“the circumstances here raise a substantial possibility that the ‘defendant has . . . changed course simply to deprive the court of jurisdiction,’ which itself prevents us from finding the controversy moot”).

Finally, on the State’s policies relating to home health care and private duty nursing services, it has not even made any change to the rule at issue, namely, Rule 59G-1.010(166), which sets forth the definition of the term “medically necessary” and provides the basis for the State’s so-called “Convenience Standard.” The State argues that it has made various changes to the state’s Home Health Handbook, which have rendered AHCA “powerless to impose new policies that reapply the Convenience Standard to [private duty nursing] services,” and that these Handbook changes are enough to moot Plaintiffs’ claims even in the absence of any change to

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<sup>11</sup> Additionally, “[i]n determining whether an offending policy is likely to be reinstated, the [Eleventh Circuit] is more likely to find that the challenged behavior is not reasonably likely to recur where it constituted an isolated incident, was unintentional, or was at least engaged in reluctantly . . . . Conversely, [the Court is] more likely to find a reasonable expectation of recurrence when the challenged behavior constituted a continuing practice or was otherwise deliberate.” *Atheists of Fla., Inc. v. City of Lakeland, Fla.*, 713 F.3d 577, 594 (11th Cir. 2013) (internal citations and quotations omitted). Here, of course, the State’s conduct toward the families of the approximately 150 medically fragile and medically complex children in the State was continuous, repeated, and not isolated.

Rule 59G-1.010(166). D.E. 237 at 11. At most, the changes to the Handbook have introduced an inconsistency and an ambiguity into the State's regulations. As the first prong of the applicable legal standard calls for the State to satisfy a heavy burden of proving "unambiguous termination," the mere creation of ambiguity should be deemed definitionally insufficient to satisfy that burden.

**2. Even if the State's Policy Changes Had Mooted Any of Plaintiffs' Allegations, They Do Not Moot Plaintiffs' Claims.**

Moreover, even if the State's actions were to be found to moot certain of Plaintiffs' *allegations* regarding the relevant State policies, that still would not be a basis for dismissal, as the revised policies do not address the subject matter of all of Plaintiffs' *claims*, or those of the putative class. Indeed, nearly 150 children with disabilities remain in nursing facilities, and nearly 2,000 children with disabilities, including each of the Plaintiffs, rely upon the State's services in their family homes or other settings to remain safe in the community. Whether the State's revised policies regarding these services fully redress Plaintiffs' injuries, or those of other putative class members, is not a question appropriate for disposition at this stage of the litigation. For example, the State has admitted that some portion of the putative class members residing in nursing facilities did not receive a screening through the State's Pre-Admission Screening and Resident Review ("PASRR") program from 2008-2012. (*See* D.E. 237 at 3.) The State now asserts that, because it has revised policies related to the state's PASRR program, and has now performed a PASRR screening on each child in a nursing facility (often years after the child was first admitted), Plaintiffs' claims and those of putative class members are now entirely moot. (*Id.* at 3-5.) The State fails to grasp the gravity of the harms inflicted on Plaintiffs and putative class members. A fundamental purpose of the federally-mandated PASRR program is to avoid unnecessary institutionalization in the first place. The State's bald assertion that it has now fixed

the PASRR assessment process provides insufficient relief to those children who remain in nursing facilities and who could have avoided institutional placement in the first place had the State appropriately administered the PASRR program. (*See* Compl. ¶ 282 (“Most of the approximately 250 Plaintiff Class members . . . who are confined in nursing facilities should have been diverted to a more integrated community placement if their PASRR reviews had been properly performed.”)) Rather, putative class members who remain in nursing facilities will be unlikely to benefit from the State’s actions absent injunctive relief that affirmatively remedies the ongoing discrimination—unnecessary institutionalization—through a comprehensive remedy requiring the State to coordinate opportunities for these children to return to the community.

Thus, notwithstanding the passage of time since last year’s motion, none of the State’s policy changes should moot any claims in this litigation.

### CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court deny the State’s Renewed Motion to Dismiss.

Dated: March 31, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 31, 2014, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the a true and correct copy of the foregoing document was served on March 31, 2014 on the individuals identified on the Service List below through Notices of Electronic Filing generated by CM/ECF:

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**EXHIBIT A**

**Nov. 24, 2010 Order Adopting Report and Recommendation  
in *Cruz v. Arnold*, No. 10-23048-CIV (S.D. Fla.)**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 10-23048-CIV-UNGARO

LUIS CRUZ and NIGEL DE LA TORRE,

Plaintiffs,

v.

THOMAS ARNOLD *et al.*,

Defendants.

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**ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATIONS**

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THIS CAUSE came before the Court upon Plaintiffs' Motion for Preliminary Injunction and Expedited Hearing (D.E. 2.)

THE MATTER was referred to the Honorable Andrea Simonton, United States Magistrate Judge (D.E. 14.) Magistrate Judge Simonton issued a Report and Recommendation on October 12, 2010, recommending that Plaintiffs' Motion be granted (D.E. 47.) Defendants filed objections to the Report and Recommendation on October 19, 2010 (D.E. 50.) Plaintiffs filed their response to Defendants' objections on October 26, 2010 (D.E. 52.) The matter is ripe for disposition.

THIS COURT has made a *de novo* review of the entire file and record herein and is otherwise fully advised in the premises.

By way of background, Plaintiffs Luis Cruz and Nigel De La Torre are Medicaid recipients with spinal cord injuries suffering from quadriplegia. Plaintiffs argue that Defendants' refusal to provide them home and community-based services (HCBS) is a violation of both the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*(ADA), and the Rehabilitation Act of

1973, 29 U.S.C. § 794a (“Section 504 ”), and the ADA and Section 504's “integration mandate,” which requires that “a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). Plaintiffs seek declaratory and injunctive relief ordering Defendants to provide home and community-based Medicaid services that will allow Plaintiffs to continue to reside in their community rather than a nursing facility. Plaintiffs argue that they could live in the community with appropriate Medicaid-funded services, however, Defendants have denied them the HCBS services for which they are eligible under the Traumatic Brain Injury/Spinal Cord Injury waiver program (hereinafter “TBI/SCI Waiver Program”).

In her exceedingly thoughtful and well-reasoned Report and Recommendations, Magistrate Judge Simonton recommended that Plaintiffs’ Motion be granted such that Defendants are enjoined from denying them Medicaid HCBS under the Traumatic Brain Injury/Spinal Cord Injury Medicaid Waiver Program; and that no security bond be required pursuant to Rule 65(c).

The Magistrate Judge concluded the following: (1) Plaintiffs’ ADA claims have a strong likelihood of success because Plaintiffs are at risk of institutionalization if they do not receive services available under the TBI/SCI Waiver Program; (2) Plaintiffs have established that they would suffer irreparable injury if institutionalized in a nursing home, such that they would be severed from the communities in which they live and participate, lose their independence, and lose their homes; (3) community-based care rather than institutionalized nursing home care; (4) there is a strong public interest in allowing Plaintiffs to remain in their homes, eliminating the discriminatory effects that arise from segregating persons with disabilities into institutions, and providing care at the least possible cost; (5) Defendants have not demonstrated that the requested

relief would fundamentally alter the Florida Medicaid Program , and the waiver program in particular, or affect the program's ability to provide for others with disabilities; (6) the Court should waive the requirement that Plaintiff post a bond, pursuant to Fed. R. Civ. P. 65(a).

Defendants object to her findings. First, Defendants object to the Magistrate Judge's use of *Olmstead v. Zimring* to support its analysis that Plaintiffs have a strong likelihood of success of their ADA claims. *See* 527 U.S.581 (1999). Defendants argue that the Supreme Court's analysis of the ADA in *Olmstead* was limited to mental disability. Second, Defendants object to the Magistrate Judge's finding that Plaintiffs would suffer irreparable injury, contending that Plaintiffs have not offered any evidence that they would lose their homes. Third, Defendants argue that the Magistrate Judge failed to take into account that it is against the public interest to "jump two recipients" to the top of the waiting list (*See* D.E. 50 at 12.)

Fourth, Defendants contend that the requested relief would fundamentally alter the Florida Medicaid Program because: (a) there are insufficient funds specifically allocated under the TBI/SCI waiver program to pay for Plaintiffs' participation, and Defendants are not permitted to access state Medicaid funds not allocated to the waiver program; and (b) Plaintiffs' participation in the waiver program would prevent individuals higher on the waiting list from accessing the program. Fifth, Defendants argue that the settlement under *Dubois, et al. v. Calamas & Francois* ("Dubois Settlement"), which resolved claims of a class defined as "all individuals with traumatic brain or spinal cord injuries who the state has already determined or will determine to be eligible to receive services from Florida's Medicaid Waiver Program for persons with traumatic brain and spinal injuries and have not yet received such services," precludes Plaintiff Cruz from obtaining injunctive relief. *See* 4:03-cv-001107-SPM-AK, at DE 212 (N.D. Fla. Jan.

4, 2007).

After carefully reviewing the parties' objections, the Court agrees that Plaintiffs' Motion for Preliminary Injunction should be granted. Plaintiffs have shown a clear likelihood of success on the merits. Plaintiffs are qualified persons with disabilities eligible to receive community-based services from the TBI/SCI waiver program. Without these services Plaintiffs are at risk of undue institutionalization prohibited by the ADA. *See Olmstead v. Zimring*, 527 U.S. 581 (1999); *see also Haddad v. Arnold*, Case No. 3:10-cv-414-J-99MMH-TEM, at DE 49 (M.D. Fla. Jul. 9, 2010); *Long v. Benson*, 2008 WL 4571903 (N.D. Fla. Oct. 14, 2008). Moreover, as Magistrate Simonton noted, Defendants have not demonstrated that they have a comprehensive working plan to address unnecessary institutionalization. *Olmstead*, 527 U.S. at 605-606.<sup>1</sup> In fact, it appears that to be eligible currently for the TBI/SCI waiver program, an individual has to first enter a nursing home for sixty days. This means that to receive the protections afforded to him under the ADA and *Olmstead*, an individual would have to be subjected to the very form of institutionalization that the Supreme Court in *Olmstead* held illegal under the ADA. Accordingly, not only have Defendants failed to demonstrate that they have a plan to address unnecessary institutionalization, but also they have brought to light the State's flagrant disregard for Supreme Court precedent and utter failure to comply with the ADA.

Plaintiffs have established that they would suffer irreparable psychological harm if placed

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<sup>1</sup> The Court disagrees with Defendants' contention that the *Olmstead* analysis is limited only to individuals with mental disabilities. *Olmstead* applies broadly to those "qualified individuals with disabilities" under Title II of the ADA. *See Olmstead*, 527 U.S. at 600 (holding that "unjustified institutional isolation of *persons with disabilities*" is a form of discrimination proscribed by the ADA)(emphasis added); *see also Haddad* op at 30.

in a nursing home. *See Olmstead*, 527 U.S. at 600-01; *see also Long*, 2008 WL 4571903 at \* 2.

Plaintiffs have also established that they would suffer irreparable harm because they likely would lose their homes during the sixty-day period they would have to spend institutionalized.

Defendants fixate on the possibility that Plaintiffs could keep their homes, yet present no evidence to support their hypothesis. Regardless of whether or not Plaintiffs could keep their homes, there is no doubt that institutionalization would cause them irreparable psychological harm, and Defendants have not argued to the contrary.

The harms that Plaintiffs would suffer if institutionalized outweighs any hardship the State would incur in providing them with HCBS. In fact, as Magistrate Judge Simonton's factual findings indicate, the State would incur less expense providing Plaintiffs home and community-based care than it would in institutionalizing them. Furthermore, there is a strong public interest in eliminating the discriminatory effects of institutionalization, as well as providing care at the lowest cost possible. *See Olmstead*, 527 U.S. at 599-01; *see also Long* 208 WL 4571903, at \*3 . This public interest outweighs any public interest arguments against "jump[ing] two recipients" to which Defendants allude but fail to support with facts and case law.

Defendants have also failed to satisfy their burden of demonstrating that Plaintiffs' requested relief would constitute a fundamental alteration of the Florida Medicaid Program. First, Defendants' explanation of the TBI/SCI waiver program's budgetary mechanism is woefully inadequate, as are their arguments for how the budget cannot accommodate the inclusion of otherwise eligible Plaintiffs. Defendants' argument that they cannot fund HCBS using money from state Medicaid funds not specifically allocated to the TBI/SCI waiver program is misguided. *See Disability Advocates, Inc.v. Patterson*, 598 F.Supp.2d 350 (E.D.N.Y.

2009)(holding that the relevant budget for funding integration programs pursuant to ADA Title II included the state's Department of Health budget which included the Medicaid program).

Moreover, as Magistrate Judge Simonton points out, arguments about budgetary constraints cannot relieve Defendants from compliance with the ADA. *See Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Public Welfare*, 402 F.3d 374, 381 (3d Cir. 2005); *see also Haddad op.at 32-33*.

Second, Defendants have not established that Plaintiffs' participation in the waiver program would prevent individuals higher on the waiting list from accessing the program. In light of the fact that it costs less to provide Plaintiffs with community-based services than it does to institutionalize them, Plaintiffs' participation would not reduce the availability of services for those individuals currently in the program, nor necessarily prevent those who are ahead on the waiting list from accessing the services. In fact, Defendants have not even filled all the slots available in the TBI/SCI program, and they concede that no one on the waiting list will be moved into the waiver program unless they submit to at least sixty days of institutionalization, a requirement that may be unlawful in light of *Olmstead*. Therefore, the likelihood of moving from the waiting list to the waiver program is actually more dependent on whether he submits to sixty days of institutionalized care and the State's eligibility determination thereafter, rather than on these Plaintiffs' acceptance into the TBI/SCI waiver program. Accordingly, Defendants have not demonstrated that these Plaintiffs' participation in the waiver program would constitute a fundamental alteration Florida Medicaid Program.

The Court also finds that Defendants have failed to provide sufficient proof that the Dubois Settlement applies to Plaintiff Cruz. Defendants did not introduce the settlement into evidence. A mere *reference* to the Dubois Settlement in the *Haddad* case, which appears in

*Plaintiffs'* Notice of Filing Cited Authority is not appropriate evidence that the Court will consider. Even if the Court were to consider the Dubois Settlement, Defendants have not defined the class to which the settlement applies, nor have they sufficiently demonstrated how Plaintiff Cruz is part of the class. They have not provided details on whether the defined class is an opt-in class that Mr. Cruz opted into or whether the defined class is an opt-out class from which Mr. Cruz failed to opt out of. Therefore, Defendants have not demonstrated that the DuBois Settlement precludes Plaintiff Cruz from injunctive relief.

Finally, the Court agrees with Magistrate Judge Simonton that Plaintiffs, due to their indigent status, need not post bond. Defendants do not oppose this relief.

For the foregoing reasons, it is hereby

ORDERED and ADJUDGED that United States Magistrate Judge Simonton's Report and Recommendation of October 12, 2010 (D.E. 47) is RATIFIED, AFFIRMED and ADOPTED and Plaintiffs' Motion for Preliminary Injunction (D.E. 2) is GRANTED. It is further

ORDERED AND ADJUDGED that Defendants are enjoined from denying Plaintiffs the Medicaid home and community-based services that are received by persons who receive such services under the Traumatic Brain Injury/Spinal Cord Injury Medicaid Waiver Program; and that Plaintiff not be required a security bond pursuant to Rule 65 (c).

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of November, 2010.



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URSULA UNGARO



UNITED STATES DISTRICT JUDGE

copies provided:

U.S. Magistrate Judge Simonton

Counsel of Record