IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BENJAMIN ALEXANDER, et al., *Plaintiffs,* v. MARY MAYHEW, in her official capacity as Secretary, Florida Agency for Health Care Administration, and RICHARD PRUDOM, in his official capacity as Secretary, Florida Department of Elder Affairs, *Defendants.*	CIVIL ACTION NO. 4:18-cv-00569-RH-MJR

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Plaintiffs, Benjamin Alexander, et al., allege that Florida's administration of its long-term care system for people with physical or age-related disabilities who qualify for nursing facility care violates Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (ADA). Am. Compl. ¶¶ 1-4, ECF No. 43. They argue that under the ADA, the State must provide long-term care services in the most integrated setting appropriate, but is not currently doing so. Am. Compl. ¶¶

3-4. Plaintiffs seek community-based services to prevent their unnecessary institutionalization in nursing facilities as a reasonable modification of the State's long-term care service system. Plaintiffs have offered a number of ways that the State could modify its long-term care system to bring the State into compliance with the ADA, one of which is increasing the cap on enrollment in a Medicaid waiver program. Pl.'s Opp'n Mot. Summ. J. 3, ECF No. 83. Defendants contend that the ADA does not apply here.

Defendants' motion for partial summary judgment asserts that there is a conflict between the ADA and the Medicaid Act, and that the ADA does not override the earlier Medicaid Act. Def.'s. Mot. Summ. J. 2, 6, ECF No. 72. Defendants' analysis of the relationship between the two statutes is wrong. The United States respectfully submits this Statement of Interest to highlight the well-settled principle that a state's obligations under the ADA are independent of, and distinct from, Medicaid requirements. At the same time, the United States takes no position on the merits of plaintiffs' ADA claim.

I. Interest of the United States

The United States submits this Statement of Interest because this litigation implicates the proper interpretation and application of Title II of the ADA.[1] As the

[1] Pursuant to 28 U.S.C. § 517, the Attorney General is authorized "to attend to the interests of the United States" in any case pending in federal court.

federal agency charged with enforcement and implementation of Title II of the ADA, 42 U.S.C. §§ 12133-12134, the Department of Justice has an interest in supporting the proper and uniform application of the ADA, in furthering Congress' intent to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," *id.* § 12101(b)(2), and in furthering Congress' intent to reserve a "central role" for the federal Government in enforcing the standards established in the ADA. *Id.* § 12101(b)(3).

II. Background

Florida's long-term care program offers services for people with physical and age-related disabilities both in nursing facilities and in the community. Am. Compl. ¶ 34. Currently, home and community-based services are offered through a Medicaid waiver (the "Long-Term Care Waiver"), pursuant to section 1915(c) of the Social Security Act.[2] Def.'s Mot. Summ. J. 3. The Long-Term Care Waiver caps the number of people who can receive services at one time at 62,000 people. *Id.* at 4.

Plaintiffs allege that the State's administration, planning, and funding of its long-term care program favors nursing home care, placing people at risk of unnecessary institutionalization in nursing facilities. Am. Compl. ¶¶ 1-3.

[2] Medicaid 1915(c) waivers are packages of community-based services provided to individuals who would otherwise need institutional care. 42 U.S.C. § 1396n(c).

Plaintiffs further allege the state expressly incentivizes seeking institutional care: most categories of individuals on the waiver program's waitlist have average wait times over 30 months, *id.* ¶ 62, but individuals who spend sixty consecutive days in a nursing facility can bypass the waitlist. *Id.* ¶ 53.

Plaintiffs, eight older adults with disabilities, allege they are at risk of unwanted, unnecessary institutionalization in nursing facilities. *Id.* ¶¶ 8-15, 77-96. They currently live in the community and have each requested home and community-based services to avoid placement in nursing homes, but have been waitlisted for these services. *See id*. ¶ 3. Plaintiffs seek home and community-based services needed to avoid unnecessary nursing facility placement. *Id.* at 41.

III. Discussion

A. The ADA's Anti-Discrimination Provisions Include Integration

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities. 42 U.S.C. § 12132.

The Attorney General's regulations implementing Title II of the ADA require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d); *see also Olmstead v. L.C.*, 527 U.S. 581, 597 (1999) ("[u]njustified isolation, . . [ ] is properly regarded as discrimination based on disability."). The "most integrated setting" is one which "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35 App. B (2019). The regulations require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." *Id.* § 35.130(b)(7).

The Supreme Court interpreted the integration mandate in *Olmstead v. L.C.* *Id.* The Court explained that states must provide community-based services for people with disabilities when "such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id. at* 607.

States must make requested modifications unless they can prove the modifications' unreasonableness by establishing that the modifications would fundamentally alter the services they provide (i.e., the fundamental alteration

defense). *Id.* *See also Brown v. District of Columbia*, 928 F.3d 1070, 1078 (D.C. Cir. 2019) (citing *Steimel v. Wernert*, 823 F.3d 902, 914-16 (7th Cir. 2016); *Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003); *Frederick L. v. Dep't of Public Welfare of Pa.*, 422 F.3d 151, 156-57 (3d Cir. 2005)). The Supreme Court has explained, "Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 604 (1999). For example, a state could show, "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." *Id.* at 605-05.

Every court of appeals to have addressed the issue has held the integration mandate applies not only to people with disabilities who are currently in institutions, but also to people with disabilities who are at serious risk of institutional placement. *Steimel v. Wernert*, 823 F.3d at 911-12; *Davis v. Shah*, 821 F.3d 231, 263-64 (2d Cir. 2016); *Pashby v. Delia*, 709 F.3d 307, 321-22 (4th Cir. 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1116-18 (9th Cir. 2011), *amended by*

697 F.3d 706 (9th Cir. 2012); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003).

B. The State's Obligations under the ADA Are Distinct from and Not Limited by the Medicaid Act

Defendants seek dismissal of the Plaintiffs' ADA claim arguing that the State cannot be required to modify its Medicaid program to comply with the ADA's prohibition on discrimination.[3] Def.'s. Mot. Summ. J. 2. Defendants assert that there is a conflict between the ADA and the Medicaid Act, and that the ADA does not override the earlier Medicaid Act. *Id.* at 8-11, 14. But, in fact, no conflict exists.

A state's obligations under the ADA are not limited by the scope of Medicaid requirements—Title II of the ADA creates an independent and additional legal obligation on states. *See, e.g., Davis v. Shah*, 821 F.3d 231, 264 (2d Cir. 2016) ("[A state's] discretion to decide whether to provide coverage . . . under the Medicaid Act, however, does not affect its duty to provide those services in a non-discriminatory manner under the ADA. A state's duties under the ADA are wholly

[3] Defendants frame their question as "does the ADA's general prohibition against disability-based discrimination in state services and programs prohibit the caps on enrollment in Medicaid waiver programs that section 1915(c) of the Social Security Act has expressly and specifically permitted for more than three decades?" Def.'s. Mot. Summ. J. 2. However, the Plaintiffs have not asked the court to find that all caps on Medicaid waiver services are void under the ADA, or even sought to eliminate the cap on Florida's Long-Term Care Waiver. Am. Compl. at 41.

distinct from its obligations under the Medicaid Act."); *Townsend,* 328 F.3d at 518 n.1 (stating that Medicaid Act conditions are not relevant to whether plaintiffs can demonstrate a *prima facie* violation of the integration regulation); *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1302-03 (M.D. Fla. 2010) (rejecting defendant's argument that plaintiff's ADA challenge requesting waiver services to avoid serious risk of institutionalization failed because it sought to circumvent Medicaid rules). Courts have routinely held that a state may violate the ADA even while carrying out CMS approved state plans, waiver services, and amendments. *See e.g.*, *Radaszewski v. Maram*, 383 F.3d 599, 602, 614-15 (7th Cir. 2004) (Plaintiffs' claims allowed to proceed despite HHS's approval of state's Medicaid plan and waiver programs); *Crabtree v. Goetz*, No. Civ. A. 3:08-0939, 2008 WL 5330506, at *2, *30-31, (M.D. Tenn. Dec.19, 2008) (same); *Haddad*, 784 F. Supp. 2d at 1302-03, 1302 n.14 (same); *Grooms v. Maram*, 563 F. Supp. 2d 840, 844, 863 (N.D. Ill. 2008) (same). Plaintiffs' requested relief would not require the court to "repeal" or "amend" the Medicaid Act, s*ee* Def.'s Mot. Summ. J. 17, because the ADA and Medicaid Act define separate obligations and are not in conflict.[4]

[4] As the case that Defendants rely on notes, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Smith v. Christian*, 763 F.2d 1322, 1325 (11th Cir. 1985). Here, unlike in *Smith*, the agency responsible for implementing the statute at issue has affirmed that the two statues can co-exist. *See* CMS, Olmstead Update No. 4, at 4 (Jan. 10, 2001),

Defendant's assertion that sustaining Plaintiff's claim requires abrogating the Medicaid Act is the same strawman argument courts have rejected for nearly twenty years. *See, e.g., Townsend*, 328 F.3d at 518 n.1; *Haddad*, 784 F. Supp. 2d at 1302-03. Indeed, the State of Florida made this argument almost ten years ago in a similar case and the district court dismissed it as "unavailing." *Haddad*, 784 F. Supp. 2d at 1302.

In *Haddad*, the court granted a preliminary injunction for the plaintiff, a woman with quadriplegia who had been placed on a waitlist for long-term care services. *Id.* at 1289-92, 1306-08. In opposing the plaintiff's motion for a preliminary injunction, the State argued that interpreting the ADA to require serving the plaintiff in a waiver program would abrogate or amend the Medicaid Act provisions that permit states to provide waiver services and cap their programs. *Id.* at 1302. The district court held the State's attempt to characterize the plaintiff's ADA claim "as an invalidation of the Medicaid Act [was] without merit," and granted the plaintiff's motion for preliminary injunction. *Id.* at 1303, 1308. The court explained that the plaintiff's claim "simply addresse[d] the question of whether… Defendants, having opted to provide particular services via the mechanism of a Medicaid Waiver Program, may be required, under the ADA, to

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https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/smd011001a.pdf.

provide those same services to [Plaintiff] if necessary to avoid imminent, unnecessary institutionalization." *Id*. at 1303. It reasoned that "[a] state that chooses to provide optional services, cannot defend against the discriminatory administration of those services simply because the state was not initially required to provide them." *Id.* at 1302; *accord Doe v. Chiles*, 136 F.3d 709, 714 (11th Cir. 1998) (when a state chooses to provide an optional Medicaid service, it must do so in accordance with the requirements of federal law); *Fisher*, 335 F.3d at 1182 (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).

Circuit courts have also rejected the notion that Medicaid Act requirements limit a state's ADA obligations. *See, e.g.*, *Davis*, 821 F.3d at 264; *Townsend*, 328 F.3d at 518 n.1. For example, in *Davis*, the State of New York argued it should not be required to provide orthopedic footwear and compression stockings under the ADA, because they were optional benefits under Medicaid. *Davis*, 821 F.3d at 264. Nonetheless, the court in *Davis* found that the State of New York violated Title II of the ADA by limiting access to that benefit, placing some at risk of institutionalization. *Id.* at 237-38, 263-64. The court rejected the state's argument, because "[a] state's duties under the ADA are wholly distinct from its obligations under the Medicaid Act." *Id.* at 264. While the State has discretion to decide what

optional services it will provide, that "does not affect its duty to provide those services in a non-discriminatory manner under the ADA." *Id.*

C. States Must Make Reasonable Modifications to Their Programs When Necessary to Comply with the ADA

Although a state may provide limitations in its Medicaid Plan, the state must ensure that its provision of long-term care services complies with the ADA. If the state's provision of long-term care services places individuals with disabilities at serious risk of unnecessary institutionalization, the state must make reasonable modifications to its program for providing such services unless the state can demonstrate that making the modifications would fundamentally alter the nature of the program. *Radaszewski*, 383 F.3d at 608-11 ("the integration mandate may well require the State to make reasonable modifications to the form of existing services in order to adapt them to community-integrated settings."); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 994-996 (N.D. Cal. 2010) (new law limiting availability of adult day care services provided through Medicaid likely violated ADA); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1174-75 (N.D. Cal. 2009) (State could reasonably modify its system to avoid discrimination by providing alternative services to prevent institutionalization, but had not effectively done so); *B.N. v. Murphy*, No. 09-cv-199, 2011 WL 5838976, at *7-10 (N.D. Ind. Nov. 16, 2011) (no fundamental alteration where plaintiffs challenged cap on respite care services for 14 individuals who were unable to secure alternative services and were at risk

of institutionalization without additional respite care); *Cruz v. Dudek*, No. 10-cv-23048, 2010 WL 4284955, at *13-15 (S.D. Fla. Oct. 12, 2010) (placing waitlisted plaintiffs on waiver to prevent unnecessary institutionalization was reasonable modification of Florida's spinal cord injury waiver); *see also*, Centers for Medicare and Medicaid Services (CMS), Olmstead Update No. 4, at 4 (Jan. 10, 2001), https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/smd011001a.pdf.

Conclusion

For the foregoing reasons, there is no conflict between the Medicaid Act and the ADA, and Florida's compliance with the Medicaid Act does not relieve it of its obligation to comply with the integration mandate of the ADA.

Dated: December 19, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2019, I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of such filing to all counsel of record.

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