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.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATIONS

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.[1] 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 instutionalization 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

[1] 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.

URSULA UNGARO

UNITED STATES DISTRICT JUDGE

copies provided:
U.S. Magistrate Judge Simonton
Counsel of Record