IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

SHELYNDRA BROWN, by her mother and next friend, JESSE O'NEIL, et al., Plaintiffs, v. LAWTON CHILES, in his official capacity as Governor of the State of Florida, et al., Defendants.	Civil Action No.: 98-673-CIV (FERGUSON)

UNITED STATES' MEMORANDUM OF LAW
AS *AMICUS CURIAE* AND INTERVENOR
IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

The United States submits this memorandum in opposition to defendants' motions to dismiss,[1] and moves simultaneously to intervene as of right in this action to address the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and for leave to address as *amicus curiae* the proper construction of Title II of the ADA and regulations promulgated thereunder.[2]

On March 24, 1998, plaintiffs filed this action on behalf of themselves and a class of 1433 other persons who are confined to four Florida State institutions (DSIs) for individuals with developmental disabilities, seeking remedies including improved conditions of confinement for class members who require institutional care, and placement in community settings in the case of each class member for whom such placement would be

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[1] On May 14, 1998, the Attorney General of the State of Florida filed a memorandum of law in support of a motion to dismiss on behalf of all defendants. (This memorandum is cited herein as "Def. Br. __.") In addition, one of the defendants, Tamara Allen, Director of the Division of Vocational Rehabilitation, Florida Department of Labor and Employment Security, filed her own motion to dismiss and motion for a more definite statement on May 18, 1998.

[2] Together with this memorandum of law, the United States submits motion papers seeking intervention as of right, leave to participate as *amicus curiae*, leave to file a memorandum of law exceeding twenty pages, and two proposed orders.

appropriate.[3] The action is brought under Title II of the ADA, 42 U.S.C. §§ 12131-34, and the "integration regulation" promulgated thereunder, 28 C.F.R. § 35.130(d); Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; the Social Security Act, 42 U.S.C. §§ 1396, 1396(a), 1396d(d), and certain regulations promulgated thereunder; the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

Defendants have filed a motion to dismiss the complaint, arguing that plaintiffs fail to allege injury as required to establish standing; fail to state a claim under the ADA because they do not allege that they are discriminated against in the provision of state-sponsored services vis-a-vis non-disabled persons; seek a "fundamental alteration" in the State's programs which would be contrary to the ADA; rely on allegedly unconstitutional provisions of federal statutes (Title II of the ADA and Section 504 of the Rehabilitation Act); fail to state cognizable constitutional claims; and do not have a private right of action under the Social Security Act.

The United States moves to intervene as of right to argue that Title II of the ADA and Section 504 of the Rehabilitation Act are constitutional and a valid abrogation of states' Eleventh Amendment immunity. Given the importance of the ADA questions raised, the role of the Department of Justice in promulgating regulations under the ADA, and the Department's ongoing

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[3] The four institutions are: the Landmark Learning Center, the Sunland Center at Marianna, Tacachale Sunland, and Gulf Coast Center.

investigation of one of the facilities named in the complaint, the United States also moves for leave to address, as *amicus curiae*, the proper interpretation of Title II of the ADA and regulations promulgated thereunder.[4] Contrary to the position defendants take in their briefs, in order to state a claim under the ADA, plaintiffs are not required to allege that non-disabled persons are provided with the same community services the plaintiffs seek, i.e., that the plaintiffs experience discrimination vis-a-vis non-disabled persons. Finally, whether the relief sought by plaintiffs in this class action involves, as defendants maintain it does, a "fundamental alteration" of a State program, such that it would not be required by the ADA, is in this case a fact-bound question, and is inappropriate for resolution at this stage of the litigation.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR PLAINTIFFS' ADA AND REHABILITATION ACT CLAIMS, AS PLAINTIFFS SEEK PROSPECTIVE EQUITABLE RELIEF.

Defendants seek dismissal of plaintiffs' ADA and Rehabilitation Act claims, arguing that these claims are barred by the Eleventh Amendment to the U.S. Constitution. Although the Eleventh Amendment generally bars private citizens from suing

[4] Although the United States has made findings of violations of residents' constitutional and statutory rights in its investigation of the Landmark Learning Center, the United States expresses no view here concerning issues raised in the Brown case other than those specifically addressed herein.

states in federal court,[5] states' Eleventh Amendment immunity is not absolute. As the Supreme Court held 90 years ago in Ex parte Young, 209 U.S. 123 (1908), states have no Eleventh Amendment immunity from suits against state officials seeking prospective equitable relief to prevent continuing violations of federal law.[6] In Counts I, II, and III of their complaint, plaintiffs allege that defendants have violated Title II of the ADA and Section 504 of the Rehabilitation Act and seek prospective equitable -- i.e., declaratory and injunctive -- relief to prevent the State from continuing to violate these federal laws. Thus, plaintiffs' claims fall squarely within the Ex parte Young exception to Eleventh Amendment immunity and are not barred.

II. PLAINTIFFS' ADA CLAIM IS NOT BARRED, BECAUSE THE ADA IS A VALID EXERCISE OF CONGRESS' POWER TO ABROGATE STATES' ELEVENTH AMENDMENT IMMUNITY.

In Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996), the Supreme Court held that Congress can lawfully abrogate states' Eleventh Amendment immunity by statute if the statute passes two tests: (1) Congress must have "unequivocally expressed its intent to abrogate immunity" in the language of the

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[5] See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 53-55, 58-59, 63-65 (1996); Papasan v. Alain, 478 U.S. 265, 276 (1986); Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 100 (1984).

[6] See also Seminole Tribe, 517 U.S. at 71-72 nn.14 & 16 (1996) (reaffirming the Ex parte Young exception to Eleventh Amendment immunity); Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2040 (1997)(same); Does 1-13 v. Chiles, 136 F.3d 709, 718-20 (11th Cir. 1998)(holding that state is not immune from private citizens' lawsuit seeking prospective equitable relief to prevent continuing violation of federal law).

statute, and (2) in enacting the statute, Congress must have "acted pursuant to a valid exercise of power." Defendants argue that the ADA fails to pass at least the second of these tests. Def. Br. at 20-30. But every court of appeals that has addressed this issue to date, including the Eleventh Circuit in Kimel v. State of Florida Board of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998), and Seaborn v. State of Florida, 143 F.3d 1405 (11th Cir. 1998)(applying Kimel as binding law of the Eleventh Circuit), has rejected the same arguments that defendants raise here and has concluded that the ADA passes both tests. See Coolbaugh v. Louisiana, 136 F.3d 430, 430 (5th Cir. 1998); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997); Clark v. California, 123 F.3d 1267, 1269-71 (9th Cir. 1997), cert. denied, 1998 WL 324198 (June 22, 1998). See also Autio v. State, 140 F.3d 802, 803, 806 (8th Cir. 1998), vacated and reh'g granted (July 7, 1998). However, because a petition for rehearing *en banc* of the Eleventh Circuit's Kimel ruling is still pending, the United States will address defendants arguments at some length. As is shown below, the ADA is a valid exercise of Congress' power under the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity from suit in federal court.

A. In the ADA, Congress Has Unequivocally Expressed Its Intent to Abrogate States' Eleventh Amendment Immunity.

Congress cannot abrogate states' Eleventh Amendment immunity for claims under a statute unless it has "unequivocally expressed" its intent to do so in the statute at issue. Seminole Tribe, 517 U.S. at 55-57. As the State apparently concedes,

Congress' abrogation of immunity in Section 502 of the ADA passes this test. Def. Br. at 20, 23. The ADA provides: "[a] State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. Thus, defendants are not entitled to Eleventh Amendment immunity on plaintiffs' ADA claim if Congress' enactment of the ADA was a "valid exercise of power." Seminole Tribe, 517 U.S. at 55, 58-59.

B. The ADA Is a Valid Exercise of Congress' Power to Enforce the Fourteenth Amendment.

Defendants contend that they are entitled to Eleventh Amendment immunity because Congress exceeded its power under the Fourteenth Amendment in enacting the ADA. Def. Br. at 20-30. That contention is meritless.

Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. As the Supreme Court explained over a hundred years ago:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. (10 Otto) 339, 345-346 (1879). A statute is thus "appropriate legislation" to enforce the Equal Protection Clause if "it is 'plainly adapted to that end' and [if] it is not prohibited by but is consistent with 'the letter

and spirit of the constitution.'" Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).[7]

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Supreme Court upheld the abrogation of states' Eleventh Amendment immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as "appropriate" legislation under Section 5. It explained:

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Id. at 456. In Seminole Tribe, the Court reaffirmed the holding of Fitzpatrick. 517 U.S. at 59, 65-66, 71-72 n.15. Thus, even after Seminole Tribe, "§ 5 of the Fourteenth Amendment remains a provision that vests Congress with the power to abrogate Eleventh Amendment immunity." Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 838 (6th Cir. 1997). Accord City of Boerne v. Flores, 117 S.Ct. 2157 (1997).

1. The ADA Was Enacted to Enforce the Equal Protection Clause.

In enacting the ADA, Congress declared that its intent was "to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment . . ., in order to address the major areas of discrimination faced day-to-day by

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[7] See also Corpus v. Estelle, 605 F.2d 175, 180 (5th Cir. 1979), cert. denied, 445 U.S. 919 (1980); Scott v. City of Anniston, Ala., 597 F.2d 897, 899-900 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980).

people with disabilities." 42 U.S.C. § 12101(b)(4). Thus, the ADA was enacted to enforce the Equal Protection Clause.

Even though the ADA, by its own terms, was enacted pursuant to Section 5 of the Fourteenth Amendment, defendants nonetheless argue that because classifications on the basis of disability are not subject to strict scrutiny, the ADA may not be regarded as legislation to enforce the Fourteenth Amendment. Def. Br. at 24-25. But neither the prohibitions of the Equal Protection Clause nor Congress' Section 5 authority is limited to suspect classifications. "[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988). See also Romer v. Evans, 517 U.S. 620, 630 (1996); Mills v. Maine, 118 F.3d 37, 46 (1st Cir. 1997) (collecting cases); Cooper v. Nix, 496 F.2d 1285, 1287 (5th Cir. 1974). In City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985), the Supreme Court made clear that government discrimination on the basis of disability is prohibited by the Equal Protection Clause when it is arbitrary. Although a majority declined to deem classifications on the basis of mental retardation as "quasi-suspect," it nonetheless held that the Fourteenth Amendment did not leave persons with such disabilities "unprotected from invidious discrimination." Id. at 446.

Moreover, the Supreme Court has upheld Congress' authority to abrogate Eleventh Amendment immunity pursuant to Section 5 in

cases involving non-suspect classifications. In Maher v. Gagne, 448 U.S. 122 (1980), the plaintiff brought suit under 42 U.S.C. § 1983 against a state official, alleging that certain state AFDC regulations violated the Fourteenth Amendment's Equal Protection and Due Process Clauses by creating arbitrary, but non-suspect, classifications. Id. at 124-125 & n.5. After the parties entered into a consent decree, the plaintiff sought attorneys' fees pursuant to 42 U.S.C. § 1988. The state official argued that such an award was barred by the Eleventh Amendment. The Supreme Court held to the contrary, explaining that "[u]nder § 5 Congress may pass any legislation that is appropriate to enforce the guarantees of the Fourteenth Amendment. A statute awarding attorneys' fees to a person who prevails on a Fourteenth Amendment claim falls within the category of 'appropriate' legislation." Id. at 132. The Court specifically declined to limit Congress' Section 5 authority to certain types of Fourteenth Amendment claims. Id. at 133 n.16; id. at 134-135 (Powell, J., concurring in part).

Finally, the Eleventh Circuit rejected the same argument that defendants make here. Kimel, 139 F.3d at 1433.[8] Indeed,

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[8] Kimel is consistent with the Eleventh Circuit's ruling in Mitten v. Muscogee County School District, 877 F.2d 932, 937 (11th Cir. 1989), cert. denied, 493 U.S. 1072 (1990), which held that another statute that protects the rights of persons with disabilities, the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., was validly enacted pursuant to Section 5 of the Fourteenth Amendment. See also Seaborn, 143 F.3d at 1405 (applying Kimel as law of the Eleventh Circuit to

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all of the courts of appeals that have addressed the issue have upheld the ADA's abrogation of states' Eleventh Amendment immunity. Coolbaugh, 136 F.3d at 433; Crawford, 115 F.3d at 487; Clark, 123 F.3d at 1270-71.

2. The ADA Is Plainly Adapted to Enforcing the Equal Protection Clause.

Defendants next argue that the ADA is not validly enacted pursuant to the Fourteenth Amendment because it provides protection that is outside the scope of the Fourteenth Amendment. But the Supreme Court's recent decision in City of Boerne, 117 S.Ct. at 2157, addressed the question of the permissible scope of a statute that is "plainly adapted" to enforce the Fourteenth Amendment. In City of Boerne, the Court concluded that even statutes that prohibit more than the Equal Protection Clause itself prohibits can be "appropriate remedial measures" when there is "a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." Id. at 2169.

a. Congress Found that Discrimination Against People with Disabilities Was Severe and Extended to Every Aspect of Society.

In enacting the ADA, Congress made express findings about the status of people with disabilities in our society and determined that they were subject to continuing "serious and pervasive" discrimination that "tended to isolate and segregate

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[8](...continued)
hold that the Eleventh Amendment does not bar ADA claim filed against the State by employees of the State of Florida Department of Corrections).

individuals with disabilities." 42 U.S.C. § 12101(a)(2).[9] Evidence before Congress demonstrated that persons with disabilities were sometimes excluded from public services for no reason other than distaste for or fear of their disabilities. See S. Rep. No. 116, 101st Cong., 1st Sess. 7-8 (1989) (citing instances of discrimination based on negative reactions to sight of disability) (Senate Report); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 (1990) (same) (House Report). Indeed, the United States Commission on Civil Rights, after a thorough survey of the available data, documented that prejudice against persons with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, 23-26 (1983); see also Senate Report, supra, at 21. The negative attitudes, in turn, produced fear and reluctance on the part of people with disabilities to participate in society. See Senate Report, supra, at 16; House Report, supra, at 35, 41-43; Cook, supra, at 411. Congress thus concluded that persons with disabilities were "faced with restrictions and limitations . . . resulting from stereotypic

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[9] See also Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393-394 nn.1-4, 412 n.133 (1991); Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temp. L. Rev. 387, 387-389 (1991) (discussing other laws enacted to redress discrimination against persons with disabilities).

assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7).

The decades of ignorance, fear and misunderstanding created a tangled web of discrimination, resulting in and being reinforced by isolation and segregation. The evidence before Congress demonstrated that these attitudes were linked more generally to the segregation of people with disabilities. See Senate Report, supra, at 11; U.S. Commission on Civil Rights, supra, at 43-45. This segregation was in part the result of government policies in "critical areas [such] as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3) (emphasis added). Evidence before Congress showed that government policies and practices, in tandem with similar private discrimination, produced a situation in which people with disabilities were largely poor, isolated, and segregated. As Justice Marshall explained, "lengthy and continuing isolation of [persons with disabilities] perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." Cleburne, 473 U.S. at 464; see also U.S. Commission on Civil Rights, supra, at 43-45. This evidence provided an ample basis for Congress to conclude that government discrimination was a root cause of "people with disabilities, as a group, occupy[ing] an inferior status in our society, and [being] severely disadvantaged

socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(6).

b. The ADA Is a Proportionate Response by Congress to Remedy and Prevent the Pervasive Discrimination It Found.

Section 5 of the Fourteenth Amendment gives Congress broad power to address what it found to be the "continuing existence of unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity . . . to pursue those opportunities for which our free society is justifiably famous." See 42 U.S.C. § 12101(a)(9). "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (opinion of Burger, C.J.). "Prejudice, once let loose, is not easily cabined." Cleburne, 473 U.S. at 464 (Marshall, J.).

After extensive investigation, Congress found that the exclusion of persons with disabilities from public facilities, programs, and benefits was a result of past and on-going discrimination. See 42 U.S.C. § 12101. In the ADA, Congress sought to remedy the effects of past discrimination and prevent like discrimination in the future by mandating that "qualified handicapped individual[s] must be provided with meaningful access to the benefit that the [entity] offers." Alexander v. Choate,

469 U.S. 287, 301 (1985) (emphasis added).[10] Thus, Title II of the ADA requires 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. And, regulations implementing Title II of the ADA require 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). While this requirement imposes some burden on the States, that burden is not unlimited. Regulations implementing Title II of the ADA do not require public entities to make reasonable modifications to policies, practices, or procedures if "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).

c. In Enacting the ADA, Congress Was Redressing Constitutionally Cognizable Injuries.

In enacting the ADA, Congress was acting within the constitutional framework that has been laid out by the Supreme Court. As discussed above, the Equal Protection Clause prohibits invidious discrimination, that is "a classification whose

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[10] Alexander dealt with Section 504 of the Rehabilitation Act. The Eleventh Circuit, however, has held that the ADA imposes substantive requirements similar to Section 504. See, e.g., Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522, 1526 n.2 (11th Cir. 1997); Gordon v. E.L. Hamm & Assocs., 100 F.3d 907, 913 n.3 (11th Cir. 1996).

relationship to [a legitimate] goal is so attenuated as to render the distinction arbitrary or irrational." Cleburne, 473 U.S. at 446. In Cleburne, the Supreme Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. A majority of the Court recognized that "through ignorance and prejudice [persons with disabilities] 'have been subjected to a history of unfair and often grotesque mistreatment.'" Id. at 454 (Stevens, J., concurring and quoting court of appeals decision in Cleburne, 726 F.2d 191, 197 (5th Cir. 1984)); see id. at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears," id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed against people with disabilities in society at large and sometimes inappropriately infected government decision making.

While a majority of the Court declined to deem classifications based on disability as suspect or "quasi-suspect," id. at 442, the Court elected not to do so, in part, because it would unduly limit legislative solutions to problems faced by persons with disabilities. The Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals." Id. at 442-443. It specifically noted with approval legislation such as

Section 504, which aimed at protecting persons with disabilities, and openly worried that requiring governmental entities to justify their efforts under heightened scrutiny might "lead [governmental entities] to refrain from acting at all." Id. at 444.

Nevertheless, the Court did affirm that "there have been and there will continue to be instances of discrimination against [persons with mental retardation] that are . . . properly subject to judicial correction under constitutional norms," id. at 446, and found the actions at issue in that case unconstitutional. In doing so, the Court articulated several criteria for making such determinations in cases involving disabilities. First, the Court held that the fact that persons with mental retardation were "indeed different from others," id. at 448, did not preclude a claim that they were denied equal protection; instead, it had to be shown that the difference was relevant to the "legitimate interests" furthered by the rules. Id. at 448. Second, in measuring the government's interest, the Court did not examine all conceivable rationales for the differential treatment of persons with mental retardation; instead, it looked to the record and found that "the record [did] not reveal any rational basis" for the decision to deny a special use permit. Ibid.; see also id. at 450 (stating that "this record does not clarify how . . . the characteristics of [people with mental retardation] rationally justify denying" them what would be permitted for others). Third, the Court found that "mere negative attitudes,

or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases" for imposing special restrictions on persons with disabilities. Id. at 448.

The Supreme Court has also recognized that the principle of equality is not an empty formalism divorced from the realities of day-to-day life, and thus the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. The Equal Protection Clause also guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir.), cert. denied, 444 U.S. 937 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). By definition, persons with disabilities have "a physical or mental impairment that substantially limits one or more . . . major life activities." 42 U.S.C. § 12102(2)(A). Thus, as to that life activity, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander, 469 U.S. at 298. The Constitution is not blind to this reality. It is a denial of equality when access to facilities, benefits and services is denied because the State refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne, 473 U.S. at 444.

The State contends that the ADA is not proper remedial legislation because it imposes affirmative duties in addition to simple prohibitions. Def. Br. at 26-28. But, viewed in light of the underlying Equal Protection principles, the ADA is

appropriate preventive and remedial legislation. First, it is preventive because it establishes a statutory scheme that attempts to detect government activities likely tainted by discrimination. By requiring the State to show on the record that distinctions it makes based on disability, or refusals to provide meaningful access to facilities, programs and services, are not the result of prejudice or stereotypes, but rather based on legitimate governmental objectives, the ADA attempts to ensure that inaccurate stereotypes or irrational fear are not the true cause of the decision. Cf. School Bd. of Nassau County v. Arline, 480 U.S. 273, 284-285 (1987). This is similar to the standards articulated by the Court in Cleburne.

Second, the ADA is remedial in that it attempts to ensure that the interests of people with disabilities are given due consideration. Not surprisingly, given their profound segregation from the rest of society, see 42 U.S.C. § 12101(a)(2), the needs of persons with disabilities were not taken into account when buildings were designed, standards were set, and rules were promulgated. See U.S. Commission on Civil Rights, supra, at 21-22, 38. Even when considered, their interests may not have been properly weighed, since "irrational fears or ignorance, traceable to the prolonged social and cultural isolation of [persons with disabilities] continue to stymie recognition of [their] dignity and individuality." Cleburne, 473 U.S. at 467 (Marshall, J.).

Policies and criteria unnecessarily relegating persons to life within the walls of an institution are real barriers. As Congress and the Supreme Court recognized, many of the problems faced today by persons with disabilities are a result of "thoughtlessness or indifference -- or benign neglect" to the interaction between purportedly "neutral" rules and persons with disabilities.[11] As a result, Congress determined that for an entity to treat persons with disabilities as it did those without disabilities was not sufficient to eliminate the effects of years of segregation and to give persons with disabilities equally meaningful access to every aspect of society. See 42 U.S.C. § 12101; see also U.S. Commission on Civil Rights, supra, at 99. When persons with disabilities have been segregated, isolated, and denied effective participation in society, Congress may conclude that affirmative measures are necessary to bring them into the mainstream. Cf. Fullilove, 448 U.S. at 477-478.

The ADA thus falls neatly in line with other statutes that have been upheld as valid Section 5 legislation. For when, as here, there is evidence of a history of extensive discrimination, Congress may prohibit (or require modifications of) rules, policies and practices that tend to have a discriminatory effect on a class or individual, regardless of the intent behind those rules, policies and practices. In South Carolina v. Katzenbach,

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[11] See Senate Report, supra, at 6 (quoting without attribution Alexander, 469 U.S. at 295); House Report, supra, at 29 (same); 136 Cong. Rec. 10,870 (1990) (Rep. Fish); id. at 11,467 (Rep. Dellums).

383 U.S. 301, 325-337 (1966), and again in City of Rome v. United States, 446 U.S. 156, 177 (1980), both cited with approval in City of Boerne, 117 S.Ct. at 2169, the Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect. 117 S.Ct. at 2169.[12]

In exercising its broad power under Section 5 to remedy the ongoing effects of past discrimination and prevent present and future discrimination, Congress is afforded "wide latitude." City of Boerne, 117 S. Ct. at 2164. "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." Id. at 2172 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1996)). This holding is consistent with all the other courts that have considered the issue since Seminole Tribe, which are in agreement that Congress' abrogation of Eleventh Amendment immunity for suits under the ADA is "appropriate legislation" to enforce the Fourteenth Amendment. See Kimel, 139 F.3d at 1433, Seaborn, 143

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[12] Defendants argue that the ADA is inconsistent with the Tenth Amendment because it usurps power reserved to the states. Def. Br. at 20 & n.7. They are simply incorrect. The Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution." Seminole Tribe, 517 U.S. at 59. Thus a long "line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." Fitzpatrick, 427 U.S. at 455.

F.3d at 1405 (applying Kimel); Crawford, 115 F.3d at 487; Coolbaugh, 136 F.3d at 430; Clark, 123 F.3d at 1270-71; Niece v. Fitzner, 941 F. Supp. 1497 (E.D. Mich. 1996); Mayer v. University of Minn., 940 F. Supp. 1474 (D. Minn. 1996). See also Autio, 968 F. Supp. 1366 (D. Minn. 1997), aff'd, 140 F.3d 803, 806 (8th Cir. 1998), vacated and reh'g granted (July 7, 1998). Although some of these decisions pre-date City of Boerne, for the reasons discussed above they remain good law.

III. THE ELEVENTH AMENDMENT DOES NOT IMMUNIZE DEFENDANTS AGAINST PLAINTIFFS' REHABILITATION ACT CLAIMS.

Defendants contend that plaintiffs' Rehabilitation Act claims must be dismissed because the Rehabilitation Act is invalid Spending Clause legislation that does not properly abrogate states' Eleventh Amendment immunity. Def. Br. at 28-30. Defendants' argument fails for two reasons. First, the Rehabilitation Act, like the ADA, is legislation to enforce the Equal Protection guarantees of the Fourteenth Amendment -- not merely a statute enacted pursuant to the Spending Clause. Clark, 123 F.3d at 1270. Second, even if the Rehabilitation Act were enacted pursuant to the Spending Clause, it is nonetheless valid because it provides ample notice to states that abrogation of Eleventh Amendment rights is a condition of receipt of federal funds. Id. at 1271.

A. The Rehabilitation Act, Like the ADA, Is a Valid Abrogation of States' Eleventh Amendment Immunity Under Section 5 of the Fourteenth Amendment.

Congress has lawfully abrogated states' Eleventh Amendment immunity in the Rehabilitation Act if: (1) it has "unequivocally

expressed its intent to abrogate immunity" in the language of the statute, and (2) it "acted pursuant to a valid exercise of power" in enacting the statute. Seminole Tribe, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

Congress amended the Rehabilitation Act in 1973 to make clear that the statute was intended to abrogate states' Eleventh Amendment immunity. Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." Thus, Congress' intent to abrogate states' Eleventh Amendment immunity under the Rehabilitation Act is unambiguous. Lussier v. Dugger, 904 F.2d 661, 668-70 (11th Cir. 1990). See also Lane v. Pena, 518 U.S. 187, 196-99 (1996); Clark, 123 F.3d at 1271; Duffy v. Riveland, 98 F.3d 447, 452 (9th Cir. 1996).

It is equally clear that the Rehabilitation Act, like the ADA, was enacted to enforce the Equal Protection Clause. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 244-245 n.4 (1985);[13] Welch v. Texas Department of Highways & Public Transportation, 483 U.S. 468, 472 n. 2 (1987) ("The Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment. Congress therefore had the power to subject

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[13] Although the Supreme Court held in Atascadero in 1985 that the Eleventh Amendment abrogation was ineffective because of the absence of an express abrogation (an absence that Congress remedied in 1986 by enacting 42 U.S.C. § 2000d-7), it did not question the Ninth Circuit's holding that the Rehabilitation Act was legislation to enforce the Equal Protection Clause.

unconsenting States to suit in federal court" (citations omitted).[14] And, for the reasons stated in Section II supra, the Rehabilitation Act is valid legislation to enforce the Equal Protection Clause, just as the ADA is valid legislation to enforce the Equal Protection Clause. Clark, 123 F.3d at 1270-71; Mayer, 940 F. Supp. at 1479; Niece v. Fitzner, 941 F. Supp. 1497 (E.D. Mich. 1996). Thus, the Eleventh Amendment affords defendants no protection from plaintiffs' Rehabilitation Act claims.[15]

B. The State Waived Its Eleventh Amendment Immunity to Rehabilitation Act Suits by Accepting Federal Funds After the Enactment of Section 2000d-7.

It is a well-settled matter of law, and defendants concede, that a state may waive its Eleventh Amendment immunity by participating in a program that receives federal funds. Edelman v. Jordan, 415 U.S. 651, 672 (1974); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) ("[a] state may effectuate a waiver of its constitutional immunity by . . . waiving its immunity to suit in the context of a particular federal

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[14] See also Department of Educ. v. Katherine D., 531 F. Supp. 517, 530 (D. Haw. 1982), rev'd in part on other grounds, 727 F.2d 809 (9th Cir. 1983), cert. denied, 471 U.S. 1117 (1985).

[15] See Hunter v. Chiles, 944 F. Supp. 914, 917 (S.D. Fla. 1996), appeal dismissed, June 23, 1997; Mayer, 940 F. Supp. at 1478-1480; Niece, 941 F. Supp. at 1501-1504. See also United States v. Yonkers Bd. of Educ., 893 F.2d 498, 503 (2d Cir. 1990); Santiago v. New York State Dep't of Correctional Services, 945 F.2d 25, 31 (2d Cir. 1991) (dictum), cert. denied, 502 U.S. 1094 (1992); Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341, 1363-1364 (D.S.C. 1995), rev'd in part on other grounds, 84 F.3d 707 (4th Cir. 1996); Martin v. Voinovich, 840 F. Supp. 1175, 1187 (S.D. Ohio 1993).

program"). Defendants contend, however, that they are immune from plaintiffs' Rehabilitation Act claim because the Rehabilitation Act does not provide them with notice sufficient to support a waiver of immunity under the Spending Clause. Def. Br. at 28-30. Defendants' argument is meritless.

By enacting 42 U.S.C. § 2000d-7, Congress provided unambiguous notice to states that waiver of Eleventh Amendment immunity was a condition of receipt of funds under the Rehabilitation Act. Clark, 123 F.3d at 1271. See Lane, 518 U.S. at 198; Lussier, 904 F.2d at 669. Thus, defendants' argument that they did not waive their right to immunity because they lacked notice is simply unavailing. Clark, 123 F.3d at 1270-71.

IV. THE AMERICANS WITH DISABILITIES ACT AND THE INTEGRATION REGULATION PROVIDE A CAUSE OF ACTION FOR UNNECESSARY INSTITUTIONALIZATION.

The ADA "integration regulation," promulgated by the Department of Justice under Title II of the ADA, requires covered 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).[16] The regulation, along with Title II of the ADA, 42 U.S.C. § 12131 et seq., provides the basis for a challenge to unnecessary institutional segregation where professional

[16] The ADA integration regulation has "the force of law." L.C. v. Olmstead, 138 F.3d 893, 898 (11th Cir. 1998), petition for reh'g *en banc* denied (July 1, 1998); Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir.), cert. denied sub nom., Pennsylvania Secretary of Pub. Welfare v. Idell S., 516 U.S. 813 (1995).

assessments determine that institutionalized individuals could be served in integrated community settings appropriate to their needs. See L.C. v. Olmstead, 138 F.3d 893, 902-03 (11th Cir. 1998) petition for reh'g *en banc* denied (July 1, 1998); see also id. at 898 ("the denial of community placements to [institutionalized] individuals with disabilities. . . is precisely the kind of segregation that Congress sought to eliminate" through enactment of the ADA); see generally Helen L. v. DiDario, 46 F.3d 325, 332-33 (3d Cir.) (unnecessary institutional segregation of persons with disabilities is prohibited by Title II of the ADA and the integration regulation promulgated thereunder), cert. denied sub. nom., Pennsylvania Secretary of Pub. Welfare v. Idell S., 516 U.S. 813 (1995).

In L.C., the Eleventh Circuit upheld a finding that the State of Georgia had discriminated against two persons with psychiatric disabilities "by confining them in a segregated institution rather than in an integrated community-based program." 138 F.3d at 895. The Eleventh Circuit conclusively repudiated the argument that in order to state a claim under the ADA, plaintiffs were required to make "a comparison of the treatment of individuals with disabilities against that of healthy non-disabled persons." Id. at 896. The State of Florida advances the same failed argument here, and it must be repudiated again, as it was in L.C.

Defendants also argue that the relief requested by the plaintiffs involves a "fundamental alteration" as a matter of

law, and that the complaint should therefore be dismissed. However, as the complaint has been drawn, the question is fact-bound and is inappropriate for resolution at this stage of the litigation. See L.C., 138 F.3d at 905 (Georgia's defense of "fundamental alteration" to community placement is one that is properly decided by the trial court).

A. Plaintiffs Are Not Required to Allege that They Experience Discrimination as Compared to Non-disabled Persons.

Defendants maintain that the failure to provide developmentally disabled individuals with appropriate services in the community cannot, as a matter of law, constitute discrimination prohibited by the ADA, because plaintiffs have not alleged that non-disabled persons receive similar services in community settings. Def. Br. at 10-11; see also id. at 12-13 ("In this action, Plaintiffs seek access to community-based services (as opposed to institutional services) for treatment of their disabilities. As a matter of law, Plaintiffs cannot allege that non-disabled persons would be eligible for the same services. Therefore, under the circumstances of this case, Plaintiffs can state no ADA cause of action").

To the contrary, the Eleventh Circuit has held that institutionalized persons with disabilities can state a claim for discrimination under the ADA and seek community-based services without alleging that non-disabled persons receive community services from which the disabled plaintiffs have been excluded:

> Under [28 C.F.R.] § 35.130(d), the failure to provide the most integrated services appropriate to the needs of disabled persons constitutes unlawful disability-based discrimination -- even though such services may not be needed by non-disabled individuals -- because such segregation perpetuates their status as second-class citizens unfit for community life. As the Third Circuit explained in holding that the unnecessary segregation of disabled persons violates Title II of the ADA, '[t]he ADA is intended to ensure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner that shunts them aside, hides, and ignores them.'

L.C., 138 F.3d at 899 (emphasis added; quoting Helen L., 46 F.3d at 335). One other circuit court as well as district courts examining this question have reached the same conclusion. Helen L., 46 F.3d at 333-35; Williams v. Wasserman, 937 F. Supp. 524, 529-30 (D. Md. 1996); Messier v. Southbury Training School, 916 F. Supp. 133, 140-42 (D. Conn. 1996).

Here, as in L.C.:

> The fact that [plaintiffs] seek community-based treatment services that only disabled persons need does not foreclose their claim that they were unnecessarily segregated. The ADA does not only mandate that individuals with disabilities be treated the same as persons without such disabilities. Underlying the ADA's prohibitions is the notion that individuals with disabilities must be accorded reasonable accommodations not offered to other persons in order to ensure that individuals with disabilities enjoy equality of opportunity, full participation, independent living, and economic self-sufficiency. . . . This principle . . . runs throughout the ADA.

138 F.3d at 899 (citations omitted).

And, as in L.C., "[r]educed to its essence, the State's argument is that Title II of the ADA affords no protection to individuals with disabilities who receive public services designed only for individuals with disabilities." Id. at 896.

The same response received by the defendants in L.C. applies here:

> The State has not pointed to any legal authority that supports such a reading of Title II of the ADA and its integration regulation, § 35.130(d), and we can find none. To the contrary, we find overwhelming authority in the plain language of Title II of the ADA, its legislative history, the Attorney General's Title II regulations, and the Justice Department's consistent interpretation of those regulations, to support [plaintiffs'] position.

Id. In other words, persons with disabilities need not compare the treatment they receive with that received by non-disabled persons, in order to state a claim under the ADA. Defendants' attempt to dismiss the complaint on this ground should be denied.[17]

B. Whether Appropriate Community Placement of the Plaintiff Class Would Require a "Fundamental Alteration" of a State Program is a Fact-bound Question.

The regulations promulgated under the ADA require that:

> A public entity shall 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). Thus, the burden is on the defendants to prove that the relief sought by the plaintiffs would constitute a fundamental alteration of its programs.

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[17] Presumably, the only reason the defendants raised the argument conclusively rejected in L.C. was to preserve it in the event the L.C. decision was reheard *en banc* or the State of Georgia petitioned for certiorari to the United States Supreme Court. On July 1, 1998, the Eleventh Circuit denied rehearing in L.C.

The Eleventh Circuit determined in L.C. that the issue of whether community placement from an institution would entail a "fundamental alteration" in a State program is one that is properly decided by the trial court. 138 F.3d at 905. The Eleventh Circuit remanded the case to the district court for further factual development with a list of factors that the court should consider. Id. These factors included: (1) whether the additional expenditures (if any) required for community-based care would be unreasonable in light of the relevant State budget, (2) whether it would be unreasonable to require the State to use additional available Medicaid waiver slots, as well as any authority it might have to transfer funds from institutionalized care to community-based care, and (3) whether any difference in the cost of providing institutional or community-based care would itself lessen the State's burden. Id. This list was "not exclusive" and the court stated specifically that the "district court may consider any other factors it believes are relevant to the fundamental alteration inquiry." Id.

L.C. left open the "difficult questions of fundamental alteration" that might be present in a class action seeking "deinstitutionalization" of a state hospital, as opposed to an action seeking community placement for a few individual plaintiffs. 138 F.3d at 905 & n.10. Although the Brown plaintiffs do not request closure of any state institution, they seek community placement for each individual class member for whom such placement would be appropriate. Florida maintains that

the relief requested by the plaintiffs would require, as a matter of law, a "fundamental alteration," and that the relief therefore cannot be required under the ADA. Def. Br. at 16-19. However, as the plaintiffs' complaint has been drawn, the question of "fundamental alteration" is fact-bound, and cannot be resolved at this stage of the litigation.

For example, defendants state that placement of hundreds of class members in the community would "impact" state programs. Def. Br. at 18 n.6; see also 15 n.4. But an "impact," particularly one that is merely speculative in nature, is not a per se fundamental alteration, especially where, as here, the State already has a community-based service system for persons with developmental disabilities and its legislature has mandated the continued development of that system. See, e.g., Fla. Stat. Ann. §§ 393.066, 393.13, 419.001; see also Exhibit A (June 14, 1996 letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to Governor Lawton Chiles, reporting findings of investigation of Landmark Learning Center, at 4).

Defendants encapsulate plaintiffs' requested relief as "requiring [the State] to dismantle its provision of institutionalized care to individuals with disabilities." Def. Br. at 18. Defendants mischaracterize the relief that plaintiffs seek in their complaint. The injunction that plaintiffs seek contemplates the continued existence of all or some of the DSIs. For example, the plaintiff class is defined as persons who reside

in the DSIs or in the future may reside there (Complaint ¶¶ 1, 30), and the relief sought by the plaintiffs includes not merely community placement (Complaint at 41-44), but also extensive reform of conditions within the institutions. Complaint at 41-44.

Plaintiffs seek community placement of each class member for whom such placement would be appropriate (see Complaint at 41-44 & ¶ 126), and maintain that the State can offer them, without a fundamental increase in cost, "the opportunity to participate in, and the benefits of, public services and programs that are as effective and meaningful as those delivered to other citizens and that are delivered in less separate, more integrated settings." Complaint ¶¶ 121, 126.

Even assuming the relief requested would result in administrative inconvenience or additional expenditures by the State, that alone would not necessarily constitute a "fundamental alteration." L.C., 138 F.3d at 902 ("the plain language of the ADA's Title II regulations, as well as the ADA's legislative history, make clear that Congress wanted to permit a cost defense in only the most limited of circumstances"; and, according to the legislative history of Title II, "[t]he fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services"). See also Kathleen S. v. Department of Pub. Welfare, No. 97-6610, slip op. at 25 (E.D.Pa. June 26, 1998)("The Court finds that complying

with the ADA's integration mandate does not require a fundamental alteration of the services that the Commonwealth requires DPW to furnish in connection with community placement" of several hundred institutionalized mentally ill class members)(attached as Exhibit B); Charles Q. v. Houston, 1996 WL 447549, *5-6 (M.D. Pa. 1996); Wasserman, 937 F. Supp. at 528, 530.[18] Cf. Civic Assn. of the Deaf of New York City v. Giuliani, 915 F. Supp. 622, 636-37 (S.D.N.Y. 1996) (public entity must demonstrate more than "high" expense in order for court to find that accommodation is unduly onerous under ADA Title II regulations).[19]

As the plaintiffs' complaint has been drawn, the question whether the relief sought by the plaintiffs would constitute a "fundamental alteration" is fact-bound and, as such, is inappropriate for resolution at this stage of the litigation. See, e.g., L.C.,138 F.3d at 905 (remanding to trial court for determination of whether community placement would constitute

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[18] Although the court in Wasserman opined in dicta that the Third Circuit's decision in Helen L. "does not support the imposition of court-ordered relief that would require 'transferring millions of dollars from institutions to the community'," the court held that the administrative and financial implications of the relief requested (including community placement) by the class in Wasserman were fact issues that required further development, and therefore the court denied the defendants' motion for summary judgment on plaintiffs' ADA claims. 937 F. Supp. at 528, 531 (quoting brief submitted by the Wasserman defendants).

[19] In any case, if defendants are suggesting (Def. Br. at 15 & n.4; 18) that persons who do not require institutional care should remain institutionalized in order to preserve the viability of institutions for those who do require that level of care, there is no legal precedent for that view.

"fundamental alteration"); Wasserman, 937 F. Supp. at 528 (whether defendants were correct that the transfer of many plaintiffs--conceivably "hundreds"--from institutional settings to community placements would require a "fundamental alteration" of the State's mental health care delivery system was a disputed issue of material fact precluding summary judgment); Anderson v. Department of Pub. Welfare, 1998 WL 154654, *9-10 (E.D. Pa. 1998) (whether class action seeking changes to managed care program covered by ADA Title II would require a fundamental alteration was a fact issue precluding summary judgment, where the relief requested included architectural modifications, provision of information in different formats, and alternative methods of administration). Cf. Eric L. v. Bird, 848 F. Supp. 303, 313-14 (D.N.H. 1994) (denying motion to dismiss complaint presenting claims under Title II of the ADA and Section 504 of the Rehabilitation Act, where plaintiff class of institutionalized children sought appropriate community placement; observing that plaintiffs' ADA and Section 504 claims presented fact issues); Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d. Cir. 1995) (refusing to dismiss ADA Title III complaint for failure to state a claim, because determination of whether requested accommodation would be reasonable "involves a fact-specific, case-by-case inquiry").

In sum, contrary to defendants' position that the relief sought in plaintiffs' complaint is a per se fundamental alteration, the State must bear the burden of proving that

placing class members into community programs pursuant to individualized determinations by professionals would in fact require a fundamental alteration in the State's programs. L.C., 138 F.3d at 904-05; Kathleen S., No. 97-6610, slip op. at 25-26 (concluding after a bench trial that the State had not carried its burden under 28 C.F.R. § 35.130(b)(7), 28 C.F.R. § 35.130(d) and Title II of the ADA, of producing evidence in support of its claim that providing appropriate community facilities to institutionalized, mentally ill class members would result in a "fundamental alteration," and ordering community placement of class members for whom professionals determine such placement is appropriate).

CONCLUSION

For the reasons stated herein, the Court should deny defendants' motions to dismiss as to plaintiffs' ADA claims, and as to the defendants' argument that Section 504 of the Rehabilitation Act is unconstitutional. Title II of the ADA and Section 504 of the Rehabilitation Act are constitutional and a valid abrogation of the State's Eleventh Amendment immunity. In order to state a claim for discrimination under the ADA, plaintiffs are not required to allege that non-disabled persons are provided the same services the plaintiffs seek. Finally, the question of what constitutes a "fundamental alteration" of a state program for purposes of Title II of the ADA is, in this case, a fact-bound issue, precluding dismissal for failure to state a claim as a matter of law.

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July 17, 1998

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 1998, I sent by Federal Express copies of the United States' Memorandum of Law as *Amicus Curiae* and Intervenor in Opposition to Defendants' Motions to Dismiss; the United States' Motion to Intervene as of Right and for Leave to Participate as *Amicus Curiae*; and the United States' Motion for Leave to File Memorandum of Law Exceeding Twenty Pages, to the following counsel of record:

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