

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

LARS KNIPP by his next friend,)
Deborah Stone; JAMES KIM, by)
his next friend, Grace Kim; SUSANNAH)
TROGDON, by her next friend, Samuel)
Trogon; AMBI HEARD; SHAUN)
MITCHELL; and ROBERT CHAFFIN)
by his next friends, Tom Chaffin and)
Lena Margareta Larsson Chaffin,)

Plaintiffs,)

CIVIL ACTION
1:10-CV-2850-TCB

v.)

GEORGE ERVIN “SONNY” PERDUE)
III, in his official capacity as Governor,)
State of Georgia, CLYDE L. REESE, III)
in his official capacity as Commissioner,)
Georgia Department of Community)
Health; DR. FRANK E. SHELP, in his)
official capacity as Commissioner,)
Georgia Department of Behavioral Health)
and Developmental Disabilities.)

Defendants.)

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517,¹ because this litigation implicates the proper interpretation and

¹ 28 U.S.C. § 517 permits the Attorney General to send any officer of the Department of Justice “to any State or district in the United States to attend to the

application of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et. seq.* (“ADA”), and in particular, its integration mandate. *See Olmstead v. L.C.*, 527 U.S. 581 (1999). The Department of Justice has authority to enforce Title II, 42 U.S.C. § 12133, and to issue regulations implementing the statute, 42 U.S.C. § 12134. The United States thus has a strong interest in the resolution of this matter and urges the Court to grant the plaintiffs’ motion for preliminary injunction.

Additionally, the United States advises the Court of its right to intervene in this action pursuant to 28 U.S.C. § 2403 to address a question of constitutionality of an Act of Congress affecting the public interest.² In their response filed on October 4, 2010, defendants assert that they are immune under the Eleventh Amendment from private suits under Title II of the Americans with Disabilities Act (“ADA”), claiming that “some courts have held that Congress failed to abrogate Eleventh Amendment immunity for states under Title II of the [ADA] and further that immunity may still exist for states in suits brought under Title II where there is no underlying constitutional violation alleged.” *See Defendants’ Response to Motion for Preliminary Injunction (“Defs.’ Resp.”)*, ECF No. 23 at 8-9.

interests of the United States in a suit pending in a court of the United States.”
² 28 U.S.C. 2403 provides: “In any action, suit or proceeding in a court of the United States to which the United States ... is not a party, wherein the constitutionality of an Act of Congress affecting the public interest is drawn in question, the court shall ... permit the United States to intervene for ... argument on the question of constitutionality.”

The United States typically defends the constitutionality of Title II of the ADA in all contexts and anticipates that it will file a notice of intervention to address the constitutionality question raised by the defendants. In accordance with Department of Justice procedures, however, authorization from the Office of the Solicitor General is required in advance of filing a notice of intervention under 28 U.S.C. § 2403. Given that defendants' constitutionality challenge was raised only two days ago, the United States respectfully requests the Court's permission to submit a brief addressing defendants' constitutional challenge on or before October 28, 2010.³

INTRODUCTION

This lawsuit alleges that defendants, the Governor of the State of Georgia and the Commissioners of the Department of Community Health and the Department of Behavioral Health and Developmental Disabilities (collectively, "Georgia" or "the State"), are placing the plaintiffs at serious risk of hospitalization by terminating the Medicaid-funded services plaintiffs need to remain in their current settings without offering any alternative support services.

³ We also advise this Court that a two-week hearing has been scheduled to begin on November 8, 2010 with respect to the United States' motion for immediate relief in the case captioned *United States v. Georgia*, No. 1:09-CV-119, pending before the Honorable Charles A. Pannell, Jr. That action involves factual and legal issues that overlap with the issues before the Court in the instant action.

The plaintiffs are adults with mental disabilities who have been receiving services under a Georgia Medicaid program called “Service Options Using Resources in a Community Environment (“SOURCE”). (Compl. ¶ 1). Services provided through the SOURCE program include nursing and health-related support services, medically-related personal care and case management. *See* Georgia Department of Community Health, Division of Medical Assistance, *Policies and Procedures for Alternative Living Services*, at XII-29 (attached as Exhibit 4 to Pls.’ Mot. for Prelim. Inj., dated Sept. 10, 2010, ECF. No 11-5). In support of their motion, the plaintiffs have put forth substantial evidence that these services have enabled them to remain in their current residential settings and to avoid the recurrent and long term hospitalizations they have experienced in the past. (*See, e.g.,* Pltfs.’ Mot. for Prelim. Inj. at 8, 12, 15, 18, 20, 23.) Plaintiffs have also put forth evidence that, without the SOURCE services provided by the State, or sufficient alternative support services, their health will deteriorate and they will be placed in settings, such as hospitals, shelters and jails, that are far more restrictive than their current settings. (*See* Declaration of Dr. Richard Elliott, ECF No. 11-11 (“Elliott Decl.”) ¶¶ 34, 42, 60, 69, 75, 77, 96.)

All but one of the plaintiffs have been receiving SOURCE benefits in personal care homes licensed by the State. Personal care homes are one source of

housing for individuals discharged from the State's psychiatric hospitals, but they are not the most integrated setting for most individuals with serious mental illness. Supported housing—another type of service setting that exists (albeit in limited supply) in the State's mental health service system—is an integrated setting in which persons with serious mental illness live in the community and receive flexible support services as needed.⁴ *See* Declaration of Michael J. Franczak at ¶ 35, Exhibit 20 to United States' Motion for Preliminary Injunction, *United States v. Georgia*, 09-119 (N.D. Ga. Jan. 28, 2010), ECF No. 55-23 (attached hereto as Exhibit A). Most, if not all, persons with serious and persistent mental illness can be served successfully in supported housing or with similar supports. *Id.* at ¶¶ 9-13.

Plaintiffs' motion is limited to maintaining the status quo to avoid the irreparable harm of unnecessary hospitalizations and deterioration of the plaintiffs' health. For that reason, the United States does not address here whether the defendants are currently serving the plaintiffs in the most integrated settings appropriate to their needs, as required by Title II of the ADA, the Rehabilitation Act and *Olmstead*. Instead, the United States addresses the limited question

⁴ The State has already begun to implement Pathways to Housing, a supported housing program modeled after a similar program in New York State. *See* Declaration of Dr. Frank E. Shelp, M.D., Ph.D., ¶ 43, attached as Exhibit 13 to Pls.' Mot. for Prelim. Inj., dated Sept. 10, 2010, ECF No. 11-14.

whether the actions by the defendants that are causing plaintiffs to be at serious risk of unnecessary placement in settings that are more restrictive than their current settings, such as hospitals, shelters, and jails, violates the integration mandate.

Actions that place individuals with disabilities who receive services from the state at serious risk of unjustified institutionalization violate Title II of the ADA and the Rehabilitation Act. *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003). As the facts put forth by the plaintiffs show, defendants' elimination of services, without any alternatives, places the plaintiffs at serious risk of placement in more restrictive settings. Accordingly, the defendants' actions violate the ADA and the Rehabilitation Act, and the Court should grant the plaintiffs' motion for preliminary injunction.

ARGUMENT

I. Olmstead and the Integration Mandate

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

reasons, Congress prohibited discrimination against individuals with disabilities by public entities:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.⁵

One form of discrimination prohibited by the ADA is a violation of the “integration mandate.” The integration mandate arises out of Congress’s explicit findings in the ADA, the regulations of the Attorney General implementing title II,⁶ and the Supreme Court’s *Olmstead* decision. In *Olmstead*, the Supreme Court held that unjustified isolation of persons with disabilities is a form of discrimination prohibited by the ADA. *Olmstead*, 527 U.S. at 597. Accordingly, public entities are required to provide community-based services to persons with

⁵ Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

⁶ The regulations provide that “a public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities.” 28 C.F.R. §§ 35.130(d), 41.51(d). The preamble discussion of the ADA “integration regulation” explains that “the most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.” 28 C.F.R. § 35.130(d), App. A. at 571 (2009).

disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. *Id.* at 607.

A. Institutionalization Is Not A Prerequisite To Establishing A Violation of Title II's Integration Mandate

Defendants assert that plaintiffs do not have standing to bring a Title II claim because they are not currently institutionalized and therefore have not suffered an injury. (Defs.' Resp. at 5.) Defendants' argument is without merit. First, they incorrectly conflate the requirements of Article III standing with the merits of integration claims. The issue here is not whether plaintiffs have "standing." Indeed, defendants do not dispute that the plaintiffs will lose their SOURCE benefits as a result of their change in policy with respect to that program. Plaintiffs therefore have standing because they have alleged injury – *i.e.*, the loss of services – resulting from defendants' conduct. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).⁷ At issue in this case whether defendants' conduct violates

⁷ *31 Foster Children v. Bush*, 329 F.3d 1255 (2003)—the only case cited by defendants for their proposition that plaintiffs do not have standing—is materially different. There, the Court recognized that “a plaintiff need not demonstrate that the injury will occur within days or even weeks to have standing,” but held that

Title II of the ADA, which is a question about the merits of plaintiffs' claims, not justiciability.

Second, Plaintiffs need not wait until they are institutionalized to pursue a claim for violation of the ADA. Neither the statute nor its integration regulation applies solely to institutionalized persons. On the contrary, both protect "qualified individuals with disabilities." 28 C.F.R. 35.130(d); *accord* 42 U.S.C. 12132. Unquestionably, plaintiffs are "qualified individuals," because they are eligible to receive services through the State's program of services for persons with mental disabilities. *See Townsend v. Quasim*, 328 F.3d 511, 516 (9th Cir. 2003) (concluding that plaintiff was a "qualified individual with a disability" for purposes of Title II because he was eligible to receive services through State's Medicaid program, he preferred to receive such services in a community-based setting, and community-based services were appropriate for his needs).

Further, the Supreme Court in *Olmstead* recognized Title II's broad prohibition of discrimination goes beyond protecting those who are currently institutionalized. The Court explained that Congress' identification of unjustified

plaintiffs who were not then in custody of the state could not allege injury for inadequate foster care services. *Id.* at 1266-67. Where, as here, the plaintiffs are currently eligible for and have received support services from the State, the termination of such services that places them at serious risk of institutionalization demonstrates clear injury.

segregation as discrimination “reflects two evident judgments.” 527 U.S. at 600.

First, that “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.* And second, that “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.

Thus, the goal of the integration mandate is to eliminate unnecessary institutionalization, and requiring a plaintiff to enter an institution before she may bring a Title II claim would defeat this fundamental purpose. *See Fisher*, 335 F.3d at 1181 (reasoning 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.”).

Indeed, every court to issue an opinion deciding whether recipients of community-based services may bring an integration claim in such circumstances has agreed that they may do so. *See Fisher*, 335 F.3d at 1181; *Haddad v. Arnold*, No. 3:10-cv-00414-MMH-TEM (M.D. Fla. July 9, 2010) (hereinafter “*Haddad Op.*” and attached hereto as Exhibit B) (issuing preliminary injunction requiring

defendants to provide community-based services to plaintiff to prevent unnecessary placement in a nursing home); *Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 637 (E.D.N.C. 2010) (granting preliminary injunction in case where plaintiffs were at risk of institutionalization); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 985 (N.D. Cal. 2010) (granting preliminary injunction where cuts to community-based services placed plaintiffs at risk of institutionalization), *appeal docketed* No. 10-15635 (9th Cir. Mar. 24, 2010).⁸

⁸ *See also Ball v. Rogers*, No. 00-67, 2009 WL 1395423, at *6 (D. Ariz. April 24, 2009) (holding that defendants' failure to provide adequate services to avoid unnecessary institutionalization was discriminatory); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1164 (N.D. Cal. 2009) (granting preliminary injunction where plaintiffs were at risk of institutionalization due to cuts in community-based services); *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1109 (N.D. Cal. 2009) (preliminarily enjoining cuts to community-based services where plaintiffs demonstrated risk of institutionalization), *appeal docketed*, No. 09-17581 (9th Cir. Nov. 11, 2009); *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.") *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) (holding that 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").

B. The Risk of Institutionalization Need Not Be “Imminent”

Defendants’ assertion that plaintiffs must show that their institutionalization is “imminent” is similarly without merit. Defs.’ Resp. at 5-6. The elimination of services that have enabled plaintiffs to remain out of settings that are more restrictive than their current settings violates the ADA, regardless of whether it causes them to be immediately hospitalized, or whether it causes them to decline in health over time and eventually enter a hospital to seek necessary care. Indeed, in *Fisher*, the first United States Circuit Court case to explicitly recognize risk-of-institutionalization claims, there was no allegation that the defendants’ actions threatened any of the plaintiffs with immediate institutionalization. 335 F.3d at 1185. Rather, the evidence showed that many of the plaintiffs would remain in their homes “until their health ha[d] deteriorated” and would “*eventually* end up in a nursing home.” *Id.* (emphasis added); *see also V.L.*, 669 F. Supp. 2d at 1120 (concluding that plaintiffs may establish a violation of the integration mandate by showing that the denial of services could lead to an eventual “decline in health” that puts them at “risk [of] being placed in a nursing home.”)

As plaintiffs have demonstrated here, their continued stability is highly dependent upon the services that they currently receive through the SOURCE program. (Elliott Decl. ¶¶ 31-33, 41-43, 60, 69, 77, 93-95). The elimination of

those services without any services to replace them puts them at serious risk of placement in more restrictive settings. (Id. ¶¶ 34, 42, 60, 69, 75, 77, 96.)

II. Plaintiffs Satisfy the Requirements for a Preliminary Injunction

To obtain a preliminary injunction, the moving party must show (1) a substantial likelihood of success on the merits, (2) that he will be irreparably harmed in the absence of an injunction, (3) that the balance of the equities favors granting the injunction, and (4) that the public interest would not be harmed by the injunction. *Mesa Air Group, Inc. v. Delta Air Lines, Inc.*, 573 F.3d 1124, 1128 (11th Cir. 2009). The decision whether or not to issue a preliminary injunction lies within the sound discretion of the trial court. *Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005). The “primary justification” for the issuance of a preliminary injunction is to preserve the court’s ability to render a meaningful decision on the merits. *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567, 573, 576 (5th Cir. 1974).⁹ Here, preliminary injunctive relief is necessary to prevent the irreparable harm of unnecessary and

⁹ See also *Cox*, 408 F.3d at 1351 (affirming preliminary injunction in a voting rights acts case requiring defendants to process voter registration applications); *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1425 (11th Cir. 1984) (issuing preliminary injunction requiring defendants to display notices and instruct employees and agents of nondiscrimination policies and finding that “when housing discrimination is shown it is reasonable to presume that irreparable injury flows from the discrimination”); *Haddad Op.*, at 39 (issuing preliminary injunction requiring defendants to provide community-based services to plaintiff);

repeated institutionalization in a psychiatric hospital caused by defendants' termination of services. *See Long v. Benson*, No. 08cv26, 2008 WL 4571903 *2 (N.D. Fla. Oct. 14, 2008) (granting preliminary injunction requiring Florida to provide Medicaid-funded community-based services because irreparable injury would result if plaintiff were forced to enter a nursing home), *aff'd*, No. 08-16261, 2010 WL 2500349 (11th Cir. June 22, 2010).

A. Plaintiffs Are Likely to Succeed on the Merits

To establish a violation of Title II of the ADA, a “plaintiff must prove that (1) she has a disability; (2) she is a qualified individual; and (3) she was subjected to unlawful discrimination because of her disability.” *Morisky v. Broward County*, 80 F.3d 445, 447 (11th Cir. 1996).¹⁰ Defendants do not dispute that plaintiffs are persons with disabilities within the meaning of the ADA and the Rehabilitation Act. Nor do they dispute that plaintiffs are eligible to receive services in the State’s mental health service system. Instead, defendants contend that plaintiffs fail to meet the eligibility criteria of the SOURCE program because “they do not meet the program requirements which have been set forth legitimately by [the defendants].” Defs’ Resp. at 10. Defendants also assert that continuing to provide

¹⁰ Claims under the ADA and the Rehabilitation Act are treated identically unless, unlike here, one of the differences in the two statutes is pertinent to a claim. *Allmond v. Akal Sec., Inc.*, 558 F.3d 1312, 1316 n.3 (11th Cir. 2009); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

SOURCE services to the plaintiffs would be a fundamental alteration of that program. *Id.* at 11. These arguments are without merit.¹¹

1. Plaintiffs Are Qualified Individuals with Disabilities

Under the ADA, a “qualified individual with a disability” is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices ... meets the essential eligibility requirements for receipt of services or the participation in programs or activities provided by the public entity.” 42 U.S.C. § 12131(2). The defendants argue that plaintiffs are not eligible for the SOURCE program because the defendants have implemented practices that exclude plaintiffs from that program. The relevant program for purposes of this analysis, however, is not the SOURCE program, which the State is now

¹¹ Defendants raise an additional argument that “[t]o the extent that Plaintiffs are utilizing the regulation relied upon as the vehicle for this suit, no private right of action exists in such a regulation promulgated to implement the ADA.” Defs.’ Resp. at 9. This argument misconstrues plaintiffs’ claims. Plaintiffs are not relying solely upon the ADA regulations as the basis for their action. Rather, they are alleging a violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132. Accordingly, *American Association of People with Disabilities v. Harris* (“AAPD”), 605 F.3d 1124 (11th Cir. 2010) is inapplicable here. In *AAPD*, the court found that there was no legal basis for an injunction because the district court’s ruling did not hold that the defendants had violated the ADA, instead it ordered the defendant to comply with the regulation alone. 605 F.3d at 1131. The *AAPD* court’s entire analysis considers whether the regulation provides “a freestanding cause of action.” However, no freestanding cause of action is being alleged in this case. *See also Haddad* Op. at 25-26 (holding that *AAPD* presents no bar to the plaintiff’s integration claims where she is asserting a violation of the ADA).

administering in a way that excludes plaintiffs. The relevant program is the State's program of services for persons with mental disabilities, which includes community-based services funded by SOURCE and other means, as well as services provided in institutions. Defendants do not dispute that plaintiffs are eligible for and do receive services in the State's mental health service system. The State is required to provide those services in the most integrated setting appropriate to the needs of the plaintiffs. Given that plaintiffs have been successfully served with support services in their current settings, there can be no dispute that they are qualified to remain in those settings with adequate services.

2. Plaintiffs' Current Level of Services Can Be Maintained With Reasonable Modifications to the State's Service System

With reasonable modifications to its service system, the State could maintain the services necessary to enable plaintiffs to avoid unnecessary hospitalizations. Given that the plaintiffs have been receiving services in their current settings for almost two years, it is clear that a service delivery system is already in place and that plaintiffs are connected to a network of caregivers. Indeed, defendants have failed to muster any support for their assertion that the relief sought would "effect an entire reworking of the SOURCE program and would represent a significant alteration to that program." Defs' Resp. at 11.

Moreover, as defendants do not dispute, it is far less costly to serve individuals with disabilities outside the setting of a psychiatric hospital or other similar settings. *See Georgia Department of Community Health, Division of Medical Assistance, Policies and Procedures for Service Options Using Resources in Community Environments* at VI-1-2 (attached as Exhibit 5 to Pls.' Mot. for Prelim. Inj., dated Sept. 10, 2010, ECF. No 11-6) (stating that the SOURCE program was created "to reduc[e] the need for long-term institutional placement and increas[e] the cost-efficiency and value of Medicaid [Long-term Care] funds by reducing inappropriate emergency room use, multiple hospitalizations, and nursing home placement caused by preventable medical complications.").

Defendants could also pursue other options for obtaining federal funding for services they provide to persons with mental disabilities. Partial federal funding could be available through the Medicaid program, either through rehabilitative or personal care benefits available under the State Medicaid plan, through a home and community-based services program established in the State plan under Section 1915 (i) of the Social Security Act,¹² or, when Medicaid would

¹² Under Section 1915(i), States can provide home and community-based services through a state plan service package that does not require that recipients meet the nursing home level of care. Under the Affordable Care Act, P.L. 111-148 & P.L. 111-152, States are now permitted to target specific 1915(i) services to State-specified populations. *See State Medicaid Director Letter, Re: Improving Access*

otherwise cover institutional care, through a program to furnish home and community-based services operating under a waiver of Medicaid requirements pursuant to section 1915(c) of the Social Security Act.¹³

The plaintiffs thus have a substantial likelihood of success on the merits of their claims.

B. Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief

Without a preliminary injunction preserving the status quo, the plaintiffs will suffer irreparable harm. The plaintiffs' medical expert has determined, based on his assessments of the plaintiffs, that the loss of their current services would result in the deterioration of their health and will require them to endure frequent hospitalizations, long-term institutionalization, or incarceration. (Elliott Decl. ¶¶ 31-33, 41-43, 60, 69, 77, 93-95). Thus, the harm the plaintiffs will endure is not speculative and cannot be adequately remedied by a later decision from this Court.

to Home and Community-Based Services, August 6, 2010, available at <http://www.cms.gov/smdl/downloads/SMD10015.pdf>.

¹³ Although the State argues that it terminated SOURCE services to plaintiffs because of federal limitations of its existing Medicaid waiver programs, that argument is flawed. Defendants' obligations under *Olmstead* are not defined by, or limited to, the scope of the Medicaid program. The Medicaid program provides an opportunity for the State to obtain partial federal funding to provide services, but the obligation of the State to ensure that individuals with disabilities are not needlessly institutionalized is independent of the Medicaid program. Even if the plaintiffs were not properly served in a particular Medicaid waiver program, the defendants could construct their program in a way that complies with both Medicaid and the ADA.

As many courts have held, requiring an individual to submit to unnecessary institutionalization in order to receive needed services results in irreparable harm. *See Marlo M.*, 679 F. Supp. 2d at 638 (finding that unnecessary institutionalization constitutes irreparable harm and recognizing the “regressive consequences” that such placements would have on the individuals); *Crabtree*, 2008 WL 5330506, at *25 (finding that unnecessary institutionalization “would be detrimental to [plaintiffs’] care, causing, inter alia, mental depression, and for some Plaintiffs, a shorter life expectancy or death”); *Long*, 2008 WL 4571903, at *2 (finding irreparable harm where individual would be forced to leave his community placement and enter a nursing home and specifically recognizing the “enormous psychological blow” that such placements would cause). The disruptive and destabilizing effects of repeated hospitalizations or long-term entry into an institution cannot be understated.¹⁴

C. The Balancing of Hardships Tips in Plaintiffs’ Favor

The hardship to defendants of continuing to provide services to the six plaintiffs in this action is negligible, and is unquestionably outweighed by the benefit of allowing plaintiffs to avoid placement in more restrictive settings.

¹⁴ The plaintiffs also face the substantial possibility of losing their current housing. For example, Mr. Knipp has received an eviction notice from his personal care home because he did not prevail on his administrative appeal to retain his SOURCE benefits. (Second Declaration of Ray Johnson ¶ 2).

Long, 2008 WL 4571903 at *3 (N.D. Fla. Oct. 14, 2008) (“If, as it ultimately turns out, treating individuals like [the plaintiff] in the community would require a fundamental alteration of the Medicaid program, so that the Secretary prevails in this litigation, little harm will have been done. To the contrary, [plaintiff’s] life will have been better, at least for a time.”). Providing services to the plaintiffs in manner that prevents their institutionalization in a psychiatric hospital will also *save* defendants money. *See* p. 17 *supra*. The lack of hardship to defendants stands in stark contrast to the significant hardship the plaintiffs face if no injunction is granted.

D. Granting a Preliminary Injunction is in the Public Interest

The public interest weighs heavily in favor of granting preliminary injunctive relief. There is a strong public interest in eliminating the discriminatory effects that arise from segregating persons with disabilities into institutions. As the *Olmstead* Court explained, the unjustified segregation of persons with disabilities stigmatizes them as incapable or unworthy of participating in community life. *Olmstead*, 527 U.S. at 600. Many courts have held that issuing injunctive relief to avoid unnecessary institutionalization furthers the public interest. *See Long*, 2008 WL 4571903, at *3; *Haddad Op.* at 38 (“[T]he public interest favors preventing the discrimination that faces Plaintiff so that she may avoid unnecessary

institutionalization ... [and] upholding the law and having the mandates of the ADA and Rehabilitation Act enforced....”); *Wagner*, 669 F. Supp. at 1122 (preliminary injunction enjoining the state from withdrawing community-based supports furthers the public interest); *Cota*, 688 F. Supp. 2d at 999 (preliminary injunction enjoining the state from implementing restrictive eligibility requirements for community-based services was in the public interest); *Kathleen S. v. Dep’t of Pub. Welfare*, 10 F. Supp. 2d 476, 481 (E.D. Pa. 1998) (“[I]t is clearly in the interest of the public to enforce the mandate of Congress under the Americans with Disabilities Act.”) Thus, granting a preliminary injunction in this matter to prevent the withdrawal of support services is in the public interest.

CONCLUSION

For all the foregoing reasons, the Court should grant Plaintiffs' Motion for Preliminary Injunction. The United States respectfully requests to be present, through its counsel, at the hearing on plaintiffs' motion for preliminary injunction.

Dated: October 6, 2010

Respectfully submitted,

SALLY QUILLIAN YATES
United States Attorney
Northern District of Georgia

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant Attorney General
Civil Rights Division

/s/ Mina Rhee

MINA RHEE
GA Bar No. 602047
AILEEN BELL-HUGHES
GA Bar. No. 375505
Assistant United States Attorneys
Northern District of Georgia
600 United States Courthouse
75 Spring Street, SW
Atlanta, Georgia 30303
Tel: (404) 581-6302
Fax: (404) 581-6163
Mina.Rhee@usdoj.gov

JOHN L. WODATCH, Chief
PHILIP L. BREEN, Special Legal Counsel
RENEE M. WOHLNHAUS, Deputy Chief

/s/ Anne S. Raish

ANNE S. RAISH
Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. – NYA
Washington, DC 20530
Tel: (202) 305-1321
Fax: (202) 307-1197
Anne.Raish@usdoj.gov

/s/ Mary R. Bohan

MARY R. BOHAN
(GA Bar. No. 420628)
Deputy Chief
Special Litigation Section
U.S. Department of Justice

Civil Rights Division
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
Tel: (202) 616-2325
Fax: (202) 307-1197
Mary.Bohan@usdoj.gov

Counsel for the United States

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing document was prepared in Times New Roman 14 point font, in compliance with L.R. 5.1.B.

/s/ Mina Rhee

MINA RHEE

Assistant United States Attorney

Georgia Bar No. 602047

CERTIFICATE OF SERVICE

This is to certify that I have on this day electronically filed the foregoing
STATEMENT OF INTEREST OF THE UNITED STATES with the Clerk of
Court using the CM/ECF system, which will send notification of such filing to
all parties in this matter via electronic notification or otherwise:

Shalen S. Nelson
Michelle Townes
Penny L. Hannah
Assistant Attorneys General
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

C. Talley Wells
Charles R. Bliss
Atlanta Legal Aid Society, Inc.
151 Spring Street NW
Atlanta, GA 30303

This 6th day of October, 2010.

Assistant
Georgia

/s/ Mina Rhee
MINA RHEE
United States Attorney
Bar No. 602047