

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

MARKETRIC HUNTER, a minor child,)
by and through his mother and legal)
guardian THELMA LYNNAH,)
ZACHARY ROYAL, S.R., a minor)
child, by and through her father and)
natural guardian CHARLES REGNA,)
J.M., a minor child, by and through his)
grandmother and next friend MINNIE)
MANUAL, R.E., a minor child, by and)
through her mother and natural guardian)
MICHELLE EAVES,)

Plaintiffs,

v.

DAVID A. COOK, in his Official)
Capacity as Commissioner of the)
DEPARTMENT OF COMMUNITY)
HEALTH,)

Defendant.

CIVIL ACTION
1:08-CV-2930-TWT

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 an officer of the Department of Justice to any district in the United States “to attend to the interests

application of the integration mandate of Title II of the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12101, *et. seq.* See *Olmstead v. L.C.*, 527 U.S. 581 (1999). The Attorney General has authority to enforce Title II of the ADA, and pursuant to Congressional mandate, to issue regulations setting forth the forms of discrimination prohibited by Title II. See 42 U.S.C. § 12134. Accordingly, the United States has a strong interest in the resolution of this matter. The United States files this memorandum to assist the Court in addressing Defendant’s pending Motion for Partial Summary Judgment (“Def.’s Mot.”) and in support of Plaintiffs’ claim under Title II of the ADA.

INTRODUCTION

Plaintiffs Marketric Hunter, S.R, J.M, and R.E.,² by and through their parents and guardians (collectively, “Plaintiffs”), bring this proposed class action for declaratory and injunctive relief under Title II of the ADA, the Medicaid Act, 42 U.S.C. § 1396a *et seq.*, and the United States Constitution. See Second

of the United States in a suit pending in a court of the United States.”

² Plaintiff Zachary Royal was 18 years old and a named plaintiff at the time of the filing of the second amended class action complaint. Compl., ECF No. 81, ¶ 6. On June 19, 2012, this Court ruled that the Defendant had discriminated against Mr. Royal in violation of the ADA and that Royal was entitled to permanent injunctive relief and declaratory judgment. Order, ECF No. 113, at 22. For the purposes of this Statement of Interest, “Plaintiffs” refers to Marketric, S.R., J.M., and R.E.

Amended Class Action Complaint (“Compl.”), ECF No. 81, ¶¶ 114-146. Plaintiffs are Medicaid-eligible children with significant medical needs who live at home with their families and receive home and community-based services, including nursing services, through the State of Georgia’s Medicaid program. Compl., ¶¶ 5-9. The Defendant is David Cook, in his official capacity as Commissioner of the Georgia Department of Community Health (“DCH”). Compl. ¶ 11. Plaintiffs allege that the Defendant’s administration of DCH and the Medicaid program denies, limits, and reduces their nursing services in a manner that puts Plaintiffs at imminent risk of unnecessary confinement or out of home care in violation of the ADA. Compl., ¶¶ 5-9, 13, 139.

STATUTORY AND REGULATORY BACKGROUND

A. The Integration Mandate and Olmstead

Congress enacted the ADA in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). Congress 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.” *Id.* § 12101(a)(2). For

these 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.

Id. § 12132.

One form of discrimination prohibited by Title II of the ADA is violation of the “integration mandate.” The integration mandate arises out of Congress’s explicit findings in the ADA, the Attorney General’s regulations implementing Title II,³ and the Supreme Court’s decision in *Olmstead*, 527 U.S. at 587. In *Olmstead*, the Supreme Court held that public entities are required to provide community-based services to persons with 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 other persons with disabilities. *Id.* at 607.

³ The regulations provide 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). The preamble discussion of the “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. Part 35, App. B at 673 (2010).

B. The Early and Periodic Screening, Diagnosis and Treatment Requirements of the Medicaid Act⁴

Under the Early and Periodic Screening, Diagnosis and Treatment (“EPSDT”) requirements of the Medicaid Act, states must provide coverage to categorically Medicaid-eligible individuals under the age of twenty-one for all medically necessary treatment services described in the Medicaid Act at 42 U.S.C. § 1396d(a), which sets forth a number of services that may be made available under a State Medicaid Plan. 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a)(4); 42 U.S.C. § 1396d(r)(1)-(5). The treatment to be provided for is defined by 42 U.S.C. § 1396d(r) and includes dental, hearing and vision services and “[s]uch other necessary health care, diagnostic services, treatment, and other measures described in [42 U.S.C. § 1396d(a)]. . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are [otherwise] covered under the State plan.” 42

⁴ Although this Statement of Interest does not address the Parties’ disputed issues of fact regarding the Defendant’s administration of Georgia’s EPSDT program, a brief description of the EPSDT requirements of the Medicaid Act is provided here, as it is relevant to the Defendant’s argument that provision of community-based nursing services would fundamentally alter the Defendant’s services. *See* Def.’s Mot., n. 6, at 13. To the contrary, federal law requires Defendant’s program to make available medically necessary private duty nursing services to all EPSDT-eligible children, *see* 42 U.S.C. § 1396d(a)(8), and, under the ADA, these services must be provided in the most integrated setting appropriate to their needs, 42 U.S.C. § 12132, 28 C.F.R. § 35.130(d).

U.S.C. § 1396d(r)(5); 42 C.F.R. § 440.40. Under § 1396d(r)(5), states must “cover every type of health care or service necessary for EPSDT corrective or ameliorative purposes that is allowable under § 1396d(a),” *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 590 (5th Cir. 2004), including private duty nursing services. *See* 42 U.S.C. § 1396d(a)(8).

A state has discretion to develop a reasonable definition of “medical necessity,” but the services provided must be sufficient in amount, duration, and scope to reasonably achieve their desired purpose, including providing treatment “to correct or ameliorate defects and chronic conditions” of EPSDT-eligible children. 42 C.F.R. § 441.50 (describing purpose of EPSDT services); *see Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1255, 1261 (11th Cir. 2011). Imposing restrictions on the number of hours of skilled nursing care available to a child that are not based on the needs of that child is inconsistent with the EPSDT provisions of the Medicaid Act. *See Moore ex rel. Moore v. Cook*, No. 1:07-CV-631-TWT, 2012 WL 1380220, at *10 (N.D. Ga. Apr. 20, 2012) (finding that reduction in nursing care hours provided to a child violated the EPSDT provisions of the Medicaid Act where his condition was not improving, and the reduction was based on a policy and practice to wean care and shift the burden of skilled care to the

child's parent). States must ensure that each child receives all the covered services he is identified as needing, consistent with the EPSDT definition of medical necessity in §1396d(r)(5). *See Katie A. v. Los Angeles County*, 481 F.3d 1150, 1154 (9th Cir. 2007; *Rosie D. v. Swift*, 310 F.3d 230, 232 (1st Cir. 2002).

FACTUAL BACKGROUND

Plaintiffs are four Medicaid eligible children who have significant medical needs. Compl., ¶¶ 5-9. All four plaintiffs receive nursing services through the Georgia Pediatric Program ("GAPP"), a Medicaid program administered by the Defendant that provides nursing care to children who require nursing services in order to remain in their homes. Order, ECF No. 113, at 2; Compl., ¶¶ 5-9. Private duty nursing services are defined as "nursing services for recipients who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility." 42 C.F.R. § 440.80. These services are provided by a registered nurse or nurse practitioner under the direction of the recipient's physician at the Plaintiffs' homes. Order, ECF No. 113, at n. 2; Compl., ¶¶ 5-9. The Plaintiffs have all obtained some nursing services under the GAPP program and allege that they have been subjected to the application of GAPP policies that have the effect of limiting, denying, or

reducing the amount of Medicaid-funded nursing services that Plaintiffs will receive. Compl., ¶¶ 5-9.

Plaintiff Marketric Hunter (Marketric) is an eleven year old resident of Savannah, Georgia who receives in-home private duty nursing services. Compl., ¶ 5, 57. Marketric sustained long-term, neurologic injuries as a toddler. *Id.*, ¶ 50. Marketric's physicians have determined that he can and should live at home and should receive nursing services at home. *Id.*, ¶ 56. Despite physician recommendations for increased nursing services and repeated hospitalizations, Marketric's nursing services have been consistently reduced in accordance with GAPP policies. *Id.*, ¶¶ 47, 61-64, 68-71, 75-78. This Court has on two occasions ordered the Defendant to provide Marketric with the private duty nursing hours he requires, ECF Nos. 9, 47, and also enjoined Defendant from using criteria for determining nursing services not based on medical necessity. Order, ECF No. 77, at 3-4.

Plaintiff S.R. is currently five years old and lives at home with her mother. Compl., ¶¶ 7, 86. S.R.'s medical diagnoses include Reactive Airway Disease, chronic rhinitis, dysphagia, gastroesophageal reflux, cerebral palsy and seizure disorder. *Id.*, ¶ 83. Contrary to the recommendation of S.R.'s treating physician

and despite multiple hospitalizations, S.R.'s nursing services have been repeatedly reduced. *Id.*, ¶¶ 85, 87, 88, 90-94.

Plaintiff J.M. is a sixteen year old child who lives with his grandmother in Atlanta, Georgia. Compl., ¶ 8. His grandmother is aging and experiences health problems. *Id.*, ¶ 95. As a result of a brain tumor diagnosed in 2003 and complications from treatment, he requires continuous ventilator support, has intractable seizures, and his gastrointestinal system and endocrine systems are nonfunctional. *Id.* Although he requires 24-hour nursing support to meet his medical needs, his nursing services have been repeatedly reduced. *Id.*, ¶¶ 96-97.

Plaintiff R.E. is a fifteen year old residing with her parents and younger siblings in Atlanta, Georgia. Compl., ¶ 9. In addition to cerebral palsy, R.E. has a seizure disorder, chronic aspiration, asthma, dysphagia, obstructive sleep apnea, hypothyroidism and brittle bones. *Id.* As a result of Defendant's policies, R.E.'s nursing hours were reduced from 60 to 52 hours per week. *Id.* R.E.'s doctors have requested that she receive 84 hours of nursing care, but Defendant's policies severely curtail R.E.'s ability to obtain an increase in nursing hours when determined to be necessary for her. *Id.*

The Defendant's denial and/or reduction of medically necessary nursing services places the Plaintiffs at serious risk of unnecessary confinement in institutions, including nursing facilities, or other out of home placements, that are not the most integrated setting appropriate to their needs, in violation of the ADA's integration mandate. Compl., ¶ 139. *See Olmstead*, 527 U.S. at 596-97.

ARGUMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant is entitled to summary judgment only if, after construing the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in favor of the nonmoving party, no genuine issues of material fact remain to be tried. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Defendant's Motion for Partial Summary Judgment fails to demonstrate that he is entitled to judgment as a matter of law because the Plaintiffs have a viable claim under title II of the ADA and genuine issues of material fact remain to be tried.

A. Policies and Practices That Place Individuals With Disabilities At Serious Risk of Institutionalization Violate Title II of the ADA

Defendant's sole ADA argument — that “the threat of institutionalization is not a cognizable injury under the ADA” — is overwhelmed by the tide of ADA case law stating the very opposite. Def.'s Mot., ECF No. 158-1, at 19. As noted in Plaintiffs' Response to Defendant's Motion for Partial Summary Judgment (“Pls.' Resp.”), ECF No. 169, at 14, the Defendant also ignores this Court's previous rulings that a reduction in services creating a risk of institutionalization can be a violation of the ADA. Order, ECF No. 77, at 10-12; Order ECF No. 113, at 20.

The integration mandate of the ADA, as described above, prohibits public entities from implementing policies or practices that place individuals at serious risk of unnecessary institutionalization. *See Pashby v. Delia*, No. 11-2363, 2013 WL 7911829, at *10 (4th Cir. March 5, 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1116 (9th Cir. 2011); *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (noting that “nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements”); *Haddad v. Dudek*, 784 F. Supp. 2d 1308, 1326 (M.D. Fla. 2011) (denying defendants' motion to dismiss where plaintiff in community sued to prevent unnecessary institutionalization).

Thus, the ADA's protections are not limited to those individuals who are currently institutionalized. *See also* Order, ECF No. 77; Order ECF No. 113. As the Tenth Circuit Court of Appeals reasoned in *Fisher v. Oklahoma Health Care Auth.*, the protections of the ADA would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an alleged discriminatory policy that threatens to force them into segregated isolation. 335 F.3d at 1181.

Instead it is sufficient for a plaintiff to show that the challenged state action creates a serious risk of institutionalization. *M.R.*, 663 F.3d at 1116; *Pashby v.* 2013 WL 7911829, at *10 (“individuals who must enter institutions to obtain Medicaid services for which they qualify may be able to raise successful Title II and Rehabilitation Act claims because they face a risk of institutionalization.”)⁵

Indeed, since the goal of the integration mandate is to avoid unjustified segregation, almost every court to issue an opinion deciding whether recipients of community-based services — individuals not living in institutions — may bring an integration claim when faced with the threat of unnecessary institutionalization,

⁵ In reaching this conclusion the Fourth Circuit cited U.S. Dept. of Justice, *Statement of the Department of Justice on the Integration Mandate of Title II of the ADA and Olmstead v. L.C.*, http://www.ada.gov/olmstead/q&a_olmstead.htm (last visited March 13, 2013).

has agreed that they may do so. *See Fisher*, 335 F.3d at 1181; *Pitts v. Greenstein*, No. 10-635-CIV, 2011 WL 1897552, at *4 (M.D. La. May 18, 2011) (finding that the state's plan for providing services violates the ADA by creating a greater risk for institutionalization); *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1308 (M.D. Fla. 2011) (issuing preliminary injunction requiring defendants to provide community-based services to plaintiff to prevent unnecessary placement in a nursing home); *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008), *aff'd*, 383 Fed. Appx. 930 (11th Cir. 2010) (granting preliminary injunction requiring Medicaid coverage to prevent plaintiff from entering a nursing home); *Cruz v. Dudek*, No. 10-23048-CIV, 2010 WL 4284955, at *13 (S.D. Fla. Oct. 12, 2010) (granting preliminary injunction that required the state agency to provide Medicaid recipients home-based services to prevent their institutionalization); *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); *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), *dismissed as moot*, *Oster v. Wagner*, No. 09-17581, Dkt. No. 106-1 (9th Cir. Jan. 7, 2013); *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”). Defendant fails to cite any cases regarding the risk of institutionalization in which a court has denied the viability of a Title II claim under the ADA and, as a result, Defendant’s motion be denied.⁶

Federal courts have acknowledged and recognized that Congress instructed the Department of Justice to promulgate the regulations for Title II of the ADA and, as a result, the Department has a special role in interpreting those regulations. *Olmstead*, 527 U.S. at 597–98 (“Because the Department is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect.”)(citation omitted); *Pashby*, 2013 WL 7911829, at *10 (“Because Congress instructed the DOJ to issue regulations regarding Title II, we are especially swayed by the DOJ’s determination that ‘the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings’”) (citation omitted); *M.R.*, 663 F.3d at 1117 (“An agency’s interpretation of its own regulation

⁶ Defendant’s citation to *Buchanan v. Maine* is inapposite. 469 F.3d 158, 173 (1st Cir. 2006). In *Buchanan*, the brother of a man with a mental illness who was shot and killed by the police brought several claims, including an ADA claim, against the state. *Id.* at 161. The individual in question was not in an institution, nor at risk of entering an institution. *Id.* at 162-66, 173. Instead, as specifically noted by the First Circuit, the case was about the adequacy of mental health treatment and thus is not relevant to the Plaintiffs’ ADA claims regarding a risk of institutionalization. *Id.* at 173-75.

is ‘controlling unless plainly erroneous or inconsistent with the regulation.’”) (citations omitted). *See also Zhou Hua Zhu v. U.S. Atty. Gen.*, 703 F.3d 1303, 1307 (11th Cir. 2013) (noting that an agency’s interpretation of its own regulations warrants deference).

B. This Court Has Already Ruled That the Serious Risk of Institutionalization is a Viable Claim Under the Title II ADA

As Plaintiffs correctly note, this Court has previously ruled in this case that the Defendant’s actions that create a serious risk of institutionalization can and do violate Title II of the ADA. Pls.’ Resp., at 14. On September 27, 2011 the Court, citing the Tenth Circuit holding in *Fisher*, ruled that Plaintiff’s ADA claim under Title II “is not futile.” Order, ECF No. 77, at 10-12; *see Fisher*, 335 F.3d at 1181. Similarly, in ruling on the matter of Zachary Royal, this Court found that “the Plaintiff may succeed on his ADA claim if the Defendant’s action places him at ‘high risk’ of premature entry into institutional isolation.” Order, ECF No. 113, at 20; *see Fisher*, 335 F.3d at 1185.⁷ There is no compelling reason, and there is no argument presented in Defendant’s motion, that the Court should reach a different conclusion at this stage of the case. As a result, the Court should deny Defendant’s

⁷ The Court concluded that Defendant’s actions violated the ADA. Order, ECF No. 113, at 21-22.

Motion for Partial Summary Judgment as it relates to Plaintiffs' claims under Title II of the ADA.

CONCLUSION

For all the foregoing reasons, the Court should deny Defendant's Motion for Partial Summary Judgment.

Dated: March 14, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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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:

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