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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:15-cv-21017 COOKE/TORRES

MAURA MENA,

Plaintiff,

v.

PLANNED PARENTHOOD OF SOUTH FLORIDA AND THE TREASURE COAST, INC. and PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.,

Defendants.
_____/

DEFENDANT PPSF' PARTIAL MOTION FOR SUMMARY JUDGMENT ON *STANDING* AND INCORPORATED MEMORANDUM OF LAW

Defendant PLANNED PARENTHOOD OF SOUTH FLORIDA AND THE TREASURE COAST, INC. ("PPSF"), by and through its undersigned attorneys, under Federal Rule of Civil Procedure 56, hereby files this Partial Motion for Summary Judgment on *Standing*, and in support thereof states as follows:

INTRODUCTION

Plaintiff MAURA MENA (Mena), a deaf individual, brings discrimination claims under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, ("ADA") and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Rehab Act") against PPSF.[1] Mena alleges that PPSF discriminated against her by failing to provide auxiliary aids and services necessary for effective communication during her August 2, 2013 visit to their Miami Clinic. She seeks permanent

[1] Mena also brings similar claims against Co-Defendant PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. ("Planned Parenthood Federation"). Planned Parenthood Federation's Motion to Dismiss Mena's Amended Complaint [DE 57] is pending before this Court.

injunctive relief as well as compensatory damages for PPSF' alleged discriminatory actions. Mena claims that she has standing to bring her injunctive claims, under both the ADA and the Rehab Act, because she plans to return in the near future to the Miami Clinic to receive health services, including yearly wellness checkups, information for her daughter and to participate in PPSF' education programs. Mena also claims that, upon her return, she will likely be harmed by PPSF's discriminatory actions.

PPSF is entitled to summary judgment as a matter of law because Mena has failed to establish that she meets the constitutionally mandated standing requirements. Standing presents a threshold jurisdiction question independent of the merits of the parties' claims. For ADA and Rehab Act plaintiffs seeking injunctive relief, these threshold requirements demand that Mena establish a sufficient concrete, particularized actual injury-in-fact as well as a sufficient likelihood that she will be affected by the allegedly unlawful conduct in the future. Mena's general "someday" plans to return to the Miami Clinic in the near future fail to demonstrate the requisite "concrete and realistic plan" that is "reasonably fixed and specific in time and not too far off."

Moreover, it is clear that even if she were able to do so, there is no likelihood that she would experience discrimination upon any return visit. PPSF is committed to providing deaf and hearing impaired individuals with effective communication. It has policies and procedures in place to provide, at no charge, sign language interpretation services, including a live ASL interpreter, upon an individual's request. PPSF has also implemented training for all of its employees and volunteers with respect to providing auxiliary aids and services to deaf or hearing impaired patients. Accordingly, Mena has failed to demonstrate the requisite sufficient likelihood that she will experience discriminatory actions upon any return to the Miami Clinic. PPSF is

entitled to summary judgment as a matter of law as there is no genuine issue of material fact that Mena has not demonstrated the requisite real and immediate threat of future injury necessary to establish standing to bring her injunctive relief claims.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Mena's Claims[2]

1. PPSF operates several health centers in South Eastern Florida from Miami-Dade County to Indian River County, including a health center located at 3119-A Coral Way in Miami, Florida ("Miami Clinic"). (Fowler Aff. ¶3).[3] PPSF does not own or operate health centers in Ft. Myers or Orlando. (Fowler Aff. ¶4).

2. Mena, a deaf individual, alleges that PPSF discriminated against her during her August 2, 2013 visit to PPSF' Miami Clinic by failing to provide her with auxiliary aids and services necessary for effective communication, including not offering ASL interpreters to deaf persons; not offering heightened Interpersonal Violence (IPV) programming for deaf persons; and failing to translate written education materials into pictorial ASL or ASL videos. (Am. Comp. ¶¶ 90-101; 112-113). [4]

3. In support of standing, Mena alleges that she has used PPSF in the past and will return in the future for yearly wellness services and information for her daughter, and that she would like to participate in PPSF' education programs. (Am. Comp. ¶¶ 76, 77, 80, 111).

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[2] As PPSF is only challenging standing requirements in this partial motion for summary judgment, it will only be setting forth those facts relevant to its standing argument.

[3] Michelle Fowler is the Chief Operating Officer of PPSF and has been at all times relevant to this action. Her affidavit has been separately filed in support of PPSF's partial motion for summary judgment and it will be referred to as "Fowler Aff."

[4] The symbol "Am. Comp." refers to Mena's Amended Complaint, filed on July 23, 2015 at docket entry 49.

4. She also alleges that she will likely return to the PPSF premises in the near future to receive health services and she will be harmed by their discriminatory policies and procedures. (Am. Comp. ¶ 111).

Facts Relevant to Standing Re:
Likely Near Future Return Component

5. Since September 2013, Mena has lived in Lehigh Acres, which is located in Southwestern Florida near Ft. Meyers. (Mena at 13).[5]

6. Lehigh Acres is approximately 140 miles from Miami.[6]

7. Mena explained that while she has moved around, and you never know what happens in the future, she does not have any plans to move right now and she may stay in Lehigh Acres for a while. (Mena at 42).

8. She likes the people there and is happy living there. (Mena at 43).

9. Her children are also in school there and doing well. (Mena at 43).

10. Mena is also currently in a good relationship with a man who lives and works in Lehigh Acres. (Mena at 118).

11. This man is her baby's father; he is responsible and he wants to have a family relationship with Mena, her children and his children. (Mena at 118-122).

12. Within the next six months, they plan to move in together to live as a family. (Mena at 119-122).

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[5] The symbol (Mena at page #) refers to the deposition of Mena taken on August 28, 2015. Certified ASL Interpreters translated from English to Sign Language and from Sign Language to English. A copy of this deposition will be filed in support of PPSF' partial motion for summary judgment.

[6] This approximate distance was calculated by Google Maps on Sept. 30, 2015. <https://www.google.com/maps/dir/Miami,+FL/Lehigh+Acres,+FL/@26.2579403,82.090509,8z/data=!3m1!4b1!4m13!4m12!1m5!1m1!1s0x88d9b0a20ec8c111:0xff96f271ddad4f65!2m2!1d0.1917902!2d25.7616798!1m5!1m1!1s0x88db103da8607e39:0x6649d476dcbd3453!2m2!1d81.6248026!2d26.6253497>>.

13. Mena currently receives all of her medical care in the Ft. Meyers' area. (Mena at 34-35).

14. For the last two years, Mena has treated with a family physician at theWomen's Health Center in Ft. Myers for regular check-ups and other medical problems. (Mena at 34-35).

15. She receives gynecological care at the Ft. Myers Women's Health Center. (Mena at 37).

16. And she gave birth to her son at the Gulf Coast Medical Center in Ft. Myers. (Mena at 77).

17. Mena has not been to any Planned Parenthood clinic in Florida since 2013. (Mena at 41).

18. As Mena explained, Planned Parenthood doesn't take her insurance. (Mena at 41).

19. Mena stated though that she does plan to go back to a Planned Parenthood in Florida. (Mena at 41).

20. When asked about these plans, Mena explained that she would like to take her daughter there and explain to her about safe sex and other things that are important for her to know. (Mena at 42).

21. Mena's daughter is 7 years old. (Mena at 42).

22. Mena also related that there is a Planned Parenthood clinic in Ft. Myers; she is sure they're all over and she'll plan to go. (Mena at 42).

23. She affirmed that she would plan to go to the Planned Parenthood clinic in Ft. Myers for her daughter.

24. In her Amended Complaint, Mena alleged that she planned to return to the Miami Clinic for yearly wellness services and to receive information about safe and reproductive health for her daughter. (Am. Comp. ¶ 76, 80).

25. Since her abortion in August 2013 though, Mena has not returned to the Miami Clinic or any other PPSF clinic. (Mena at 41).

26. Before her 2013 abortion, Mena had not been to the Miami Clinic or any other PPSF clinic. (Am. Comp. ¶ 37, 38, 40, 43).

27. On cross-examination in her deposition, when asked if she wanted to go back to the Miami Clinic, Mena responded that she does. (Mena at 216-217).

28. She explained that she wants to get her daughter educated. (Mena at 217).

29. She also explained that she wants to make sure that the Miami Clinic is going to improve their services, do the right thing and make it accessible if other deaf patrons happen to go there; that they are going to provide interpreters; and that they are ready and equipped to have interpreting services for deaf people for herself, her daughter and other deaf people. (Mena at 217).

Facts Relevant to Standing Re:
Likely Experiencing of Discrimination Component

30. PPSF operates several health centers in South Eastern Florida from Miami-Dade County to Indian River County, including the Miami Clinic. (Fowler Aff. ¶ 3). It does not own or operate health centers in Ft. Myers or Orlando.

31. PPSF is committed to providing all individuals with disabilities, complete, comprehensive and equal access to its services. (Fowler Aff. ¶ 4).

32. PPSF is also committed to providing deaf and hearing impaired individuals with effective communication under the American with Disabilities Act (ADA). (Fowler Aff. ¶ 4).

33. PPSF has written policies concerning the ADA in general as well as communication with deaf or hearing impaired patients and patients with limited English proficiency (LEP) in particular. (Fowler Aff. ¶ 5).

34. PPSF also has a Client's Bill of Rights outlining the client's Rights and Responsibilities posted in each of its clinics; the Bill of Rights at the Miami Clinic has been hanging on the wall in the lobby, in a framed display box, since 2012. (Fowler Aff. ¶ 6).

35. The December 2012 Bill of rights, expressly states, among other things:

> It is the policy of Planned Parenthood of South Florida and the Treasure Coast to accord all clients the right:
>
> - To receive reasonable and impartial access to care regardless of race, creed, gender, national origin, religion, physical handicap, rank or sources of payment for care.
>
> - To receive free language interpreter services by request if needed to understand information given during healthcare visits – (advance notice may be needed).

(Fowler Aff. ¶ 7; Ex. B).

36. From 2009 through the present, PPSF has had agreements with several sign language interpreting services to provide live American Sign Language (ASL) interpreting services for deaf or hearing impaired patients. These agreements were with Signs of Excellence, Inc. and Coda Link, Inc. (Fowler Aff. ¶ 8).

37. In August 2013 when Ms. Mena came to PPSF, and currently, PPSF's policy was and continues to be that, if requested, a live sign language interpreter will be provided at no charge to a deaf or hearing impaired patient. (Fowler Aff. ¶ 9).

38. Therefore, if Ms. Mena or anyone on her behalf would have requested a live sign language interpreter when her appointment was made and/or at the time she came to PPSF, one would have been provided to her at no cost. (Fowler Aff. ¶ 10).

39. In January 2014, PPSF amended its Client's Bill of Rights, and added, among other things the following:

> You have the right to:
>
> - Have access to means of assisted communication, such as interpreters, auxiliary aids, or other materials.

(Fowler Aff. ¶ 11; Ex. C).

40. In March 2014, PPSF amended its demographic form, which is completed upon intake for each patient, so that a patient can specify that her primary language is American Sign Language. (Demographic From, attached as Exhibit D.) (Fowler Aff. ¶ 12; Ex. D).

41. In 2015, PPSF began using a VRI service from Language Line Solutions, Inc. which allows access to an ASL interpreter on an IPad, a cellular/mobile telephone or a desk top computer. This service and IPad's are available in all of PPSF clinics. (Fowler Aff. ¶ 13).

42. In June 2015, PPSF began conducting a Power Point presentation that explains specifically the services PPSF provides to the hearing impaired. (Fowler Aff. ¶ 14; Ex. E).

43. PPSF has and/or is providing training to all of its full and part time employees and volunteers with respect to providing these auxiliary aids and services to deaf or hearing impaired patients. (Fowler Aff. ¶ 14).

44. During the Power Point presentation, discussed in paragraph 42, PPSF did a demonstration of how to access the VRI sign language interpreter. In addition, an explanation of how to access the VRI sign language interpreter is available for staff to view when or if needed. (Fowler Aff. ¶ 15; Ex. F).

MEMORANDUM OF LAW

I. APPLICABLE STANDARDS

A. Summary Judgment

Summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The basic issue on summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). Summary judgment should be entered against a party who fails to make a showing sufficient to establish the existence of each essential element of its case that it must prove. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). The Eleventh Circuit "urge(s) district courts to take a firm hand and whittle down cases down to the few triable claims, casting aside the many non-triable ones . . . through summary judgment where there is no genuine issue of material fact." *Chapman v. AI Transport*, 229 F.3d 1012, 1027 (11t Cir. 2000).

The Eleventh Circuit has not hesitated to enter summary judgment when appropriate in ADA Title III cases alleging discrimination based on the failure to provide auxiliary aids. *McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1145 (11th Cir. 2014) (no showing of discriminatory intent necessary to establish deliberate indifference for entitlement to compensatory damages under Rehab Act and no showing of future injury requirement).

B. Challenges to the Court's Subject Matter Jurisdiction

A court's subject matter jurisdiction is challenged under Rule 12(b)(1), Federal Rules of Civil Procedure, under either a "facial attack" or a "factual attack." *See Garcia v. Copenhaver, Bell & Assocs., M.D.s, P.A.*, 104 F.3d 1256, 1260-61 (11th Cir. 1997). Challenging the existence

of subject matter jurisdiction as a factual attack allows the Court to review the question of jurisdiction in fact, regardless of the allegations which the court need not assume are true, and matters outside the pleadings, such as testimony and affidavits, are considered. *Garcia*, 104 F.3d at 1261; *Lamb v. Charlotte County*, 429 F.Supp.2d 1302, 1305 (M.D. Fla. 2006). It is the plaintiff's burden to allege and prove that the court has subject matter jurisdiction by a preponderance of the evidence. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Citizens Concerned About Our School Children v. School Bd. of Broward Cty.*, 193 F.3d 1285, 1289 n.2 (11th Cir. 1999) ("Showing standing is the plaintiffs' burden"). When subject matter jurisdiction is challenged on summary judgment, the plaintiff must set forth evidence showing that the minimum requirements of Article III standing have been satisfied. *McCullum*, 768 F.3d at 1145.

II. MENA'S CLAIMS FOR INJUNCTIVE RELIEF FAIL AS A MATTER OF LAW BECAUSE MENA HAS NOT ESTABLISHED SUFFICIENT EVIDENCE OF A REAL AND IMMEDIATE THREAT OF FUTURE INJURY.

Title III of the ADA prohibits discrimination against disabled individuals in places of public accommodation, including the professional office of a health care provider. 42 USC § 12182(a) and § 12181(7)(F). In order to state a claim under Title III, a plaintiff must allege that (1) she is a qualified disabled individual; (2) that the defendant owns and/or operates a place of public accommodation; and (3) that the defendant denied her full and equal enjoyment of the goods, services, facilities or privileges offered by defendant on the basis of her disability. *See e.g. Shotz v. Catz*, 256 F.3d 1077, 1079 (11th Cir. 2001). The Rehab Act similarly prohibits discrimination against individuals with disabilities. 29 U.S.C. § 701 *et. seq.*. With the exception of this federal funding requirement, the ADA and Rehab Act use the same standards. *Martin Halifax Healthcare Systems, Inc.*, No. 14-12771, --- Fed.Appx. --- 2015 WL 4591796 * 6 (July 31, 2015) (citing *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000).

The ADA and Rehab Act afford disabled individuals an equal **opportunity** to participate in and benefit from services. *See* 42 USC § 12182(a); 29 U.S.C. § 794(a); 28 CFR 36.202(b). *See also Martin*, 2015 WL at 4591796 at *6. Discrimination under Title III of the ADA and the Rehab Act includes the failure to ensure that no person is discriminated against because of the absence of auxiliary aids and services, unless the taking of such steps would fundamentally alter the nature of the service or would result in an undue burden. *See* 42 U.S.C. 12182(b)(2)(A)(iii); 45 C.F.R. § 84.4(a); 45 C.F.R. § 84.52(d). Available auxiliary aids and services for deaf or hearing impaired individuals include qualified interpreters or other effective methods of making aurally[7] delivered materials available to individuals with hearing impairments. 42 U.S.C. § 12103(A); 28 C.F.R. § 36.303(b)(1); 45 C.F.R. § 84.52(d). While Title III enforcement provisions authorize private lawsuits by "any person who is being subjected to discrimination on the basis of disability[,]" 42 U.S.C. § 12188(a)(1), individuals must still satisfy constitutional standing requirements. *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001).

Standing presents a threshold jurisdiction question independent of the merits of the parties' claims and it must be determined at the time the complaint is filed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569-570 (1992); *Focus on the Family v. Pinella Suncoast Transit Authority*, 344 F.3d 1263, 1275 (11th Cir. 2003). In the context of a Title III ADA claim, the plaintiff must establish the following "irreducible minimum" requirements to have standing under Article III of the Constitution: (1) an injury in fact; (2) a causal connection between the challenged conduct and the injury; and (3) a likelihood that the injury will be redressed by the relief sought. *McCullum*, 768 F.3d at 1145 (*citing Lujan*, 504 U.S. at 560-561); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013) (citing *Shotz*, 256 F.3d at 1081)

[7] The term "aural" includes oral or spoken materials, as well as nonverbal sounds, alarms and computer-generated speech. *See* 28 C.F.R. § Pt. 36, App. C.

(internal citations omitted). An injury-in-fact is an invasion of a legally protected interest, which is concrete and particularized and actual or imminent, not conjectural or hypothetical. *Lujan*, 504 US at 560. It requires more than an injury to a cognizable interest; "[i]t requires that the party seeking review be himself among the injured." *Seco v. NCL (Bahamas), LTD*, 588 Fed. Appx. 863 (11th Cir. 2014) (citation omitted).

Standing also requires more than an injury to a cognizable interest. Instead, it requires that the party herself be injured by the violation. *Seco*, 588 Fed.Appx. 862 (11th Cir. 2014) (citation omitted); *Norkunas v. Seahorse N.B., LLC*, 444 Fed. Appx. 412, 416 (11th Cir. 2011) (rejecting plaintiff's argument that an individual has standing to bring an entire facility into compliance with the ADA upon the discovery of a single barrier or violation); *Access Now, Inc. v. S. Florida Stadium Corp.*, 161 F. Supp. 2d 1357, 1365 (S.D. Fla. 2001). When injunctive relief is sought, Article III's injury-in-fact demand additionally requires the plaintiff to "show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future." *Houston*, 733 F.3d at 1329 (quoting *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1283 (11th Cir.2001)). This requires **a real and immediate threat of *future* injury**, not merely a conjectural or hypothetical threat of harm. *McCullum*, 768 F.3d at 1145 (citing *Shotz*, 256 F.3d at 1081) (additional citations omitted); *Houston*, 733 F.3d at 1329 (citations omitted).

This real and immediate threat of future injury requirement encompasses a showing of both a likely near future return to the facility as well as the likely experiencing of discrimination upon any return. *See e.g. McCullum*, 768 F.3d at 1146. The likely near future return to the facility component is not satisfied by general allegations of a "someday" return. *See Lujan*, 504 U.S. at 564 (profession of intent to return to place visited before "without any description of concrete plans, or indeed any specification of when the some day will be" insufficient to

establish requisite constitutional injury). Instead, it requires the establishment of a "concrete and realistic plan" that is "reasonably fixed and specific in time and not too far off." *Houston*, 733 F.3d at 1340.

Factors considered in the general context of a near future intention to return to a defendant's business include: (1) the proximity of the place of public accommodation to plaintiff's residence, (2) past patronage of the defendant's business, (3) the definitiveness of plaintiff's plan to return, and (4) the plaintiff's frequency of travel near the defendant. *Houston*, 733 F.3d at 1337 (analyzing plaintiff's near future intent to return to a defendant's business). Additional factors considered in the more specific context of a plaintiff's near future return to a healthcare provider's facility include whether the plaintiff will likely need to receive medical treatment in the near future and whether the plaintiff will likely need to obtain that medical treatment at the defendant healthcare provider's facility. *See e.g. Connors v. West Orange Healthcare Dist.*, No. 6:05-cv-647, 2005 WL 1500899 * 4 (M.D. Fla. 2005) (granting summary judgment on injunctive relief claims under the ADA and Rehab Act where plaintiff did not establish a likelihood of returning to receive treatment from the defendant healthcare provider). Claims of a potential future medical emergency are too speculative to demonstrate a near future intent to return. *Id.* Absent the requisite showing of a near future intent to return, a plaintiff cannot establish that they will likely suffer from discrimination at the defendant's hands in the future; as such, they lack standing to pursue injunctive relief. *Id.* (citations omitted).

A plaintiff that demonstrates a near future intent to return must still satisfy the second component—that she will likely experience a denial of benefits or discrimination at the facility. *See McCullum*, 768 F.3d at 1146. In *McCullum*, a deaf and mute child, who suffered with ulcerative colitis, was hospitalized for extended periods at two different hospitals. The hospitals

respective staffs communicated with the child by using written notes and visual aids and by relying on a family member to interpret for him in sign language. The staffs did not provide him with a professionally trained sign language interpreter and they never asked the child or his parents if he wanted one. However, the child and his parents never requested that a sign language interpreter be provided. The child and his parents filed suit against the hospitals alleging that the child obviously needed a sign language interpreter because he was deaf and that the hospitals' failure to obtain a sign language interpreter violated the ADA and Rehab Act.

In support of his standing to claim injunctive relief, the child claimed a real and immediate threat of future injury based on his chronic medical condition. The trial court granted the hospitals' summary judgment on the injunctive relief claims finding that there was no real and immediate threat of future injury. The Eleventh Circuit affirmed the trial court's summary judgment. In so doing, it noted that the child hadn't been hospitalized for his condition in several years and that he was able to control his symptoms with over the counter medication. It then found, that even assuming that he would be hospitalized again, there was no evidence establishing that he would likely experience a denial of benefits or discrimination upon any return to either hospital.

In support of this finding, the court highlighted the fact that both hospitals have written policies that state they will provide appropriate accommodations for hearing-impaired patients, which may include the use of a hospital provided interpreter. The court also pointed out that since both hospitals now know that the child wants an interpreter to help him communicate and his parent's know that all they have to do is request an interpreter "there is little or no chance that either hospital will refuse to provide [him] with an interpreter if he is readmitted." *McCullum*, 768 F.3d at 1146.

Mena states that she has used PPSF in the past and will return in the future for yearly wellness services and information for her daughter, and that she would like to participate in PPSF' education programs. These statements are wholly insufficient to establish the requisite real and immediate threat of future injury requirement. Mena's own testimony clearly fails to establish her intention to return in the near future. Mena now lives in Lehigh Acres Florida, more than 140 miles from the Miami Clinic. Mena has no plans to move out of Lehigh Acres. Her children are in school and doing well there. She and her boyfriend are planning to move-in together, in Lehigh Acres, within the next six months. She receives gynecological treatment and reproductive health services from the Women's Health Center in Lehigh Acres. While she states a general intention to return to the Miami Clinic for both herself and for her daughter, she hasn't been back since August 2013.

Mena's generic plans that she plans to return or would like to return to the Miami Clinic constitute nothing more than vague "someday" intentions which are insufficient to allege a genuine threat of a future, imminent injury. *See Lujan*, 504 U.S. at 563; *Houston*, 733 F.3d at 1329. Mena's desire to seek reproductive health education for her daughter does not show a plan to return in the near future because her daughter is only 7 years old. Mena also stated that she would go to the Planned Parenthood in Ft. Myers for this education. The availability of a Planned Parenthood clinic in Ft. Myers further demonstrates the unlikelihood that Mena would return to the Miami Clinic. *See Gomez v. Dade County Federal Credit Union*, No. 123882-CIV, 2014 WL 121796 (S.D. Fla. 2014) (in the non-medical context, court found plaintiff lacked standing where his contract with the property was infrequent and there were other available facilities closer to his home).

Mena also indicated that she wanted to return to the Miami Clinic to make sure that they are doing the right thing and providing accessible services if other deaf patrons happen to go there. (Mena at 217). It may be that Mena is trying to establish standing based on a "tester motive." While it is true that a "tester motive" does not defeat standing, neither does a "tester motive" excuse a plaintiff from establishing standing. *Houston*, 733 F.3d at 1340. "Each plaintiff must establish standing on the facts of the case before the court. That is equally as true about a regular customer of a public accommodation as it is for a tester." *Id.* This means that, even an ADA tester, must plausibly allege an injury-in-fact and. "a concrete and realistic plan of when he would visit" the public accommodation again. *Houston*, 733 F.3d at 1340. As discussed above, Mena has wholly failed to establish any concrete and realistic plan of visiting the Miami Clinic in the near future.

Moreover, it is clear that even if she were able to do so, there is no likelihood that she or any other deaf person for that matter would experience discrimination upon any return visit. PPSF is committed to providing deaf and hearing impaired individuals with effective communication. It has policies and procedures in place to provide, at no charge, sign language interpretation services, including a live ASL interpreter, upon an individual's request. PPSF has also implemented training for all of its employees and volunteers with respect to providing auxiliary aids and services to deaf or hearing impaired patients. Additionally, since the Miami Clinic knows that Mena desires an interpreter to help her communicate and that all she has to do is request one, as in *McCullum*, "there is little or no chance that either hospital will refuse to provide [him] with an interpreter if he is readmitted." *McCullum*, 768 F.3d at 1146.

Based on the foregoing, there are no genuine issues of material fact that Mena has failed to demonstrate a real and immediate threat of future injury. As such, PPSF is entitled to summary judgment as a matter of law.

CONCLUSION

WHEREFORE, Defendant PLANNED PARENTHOOD OF SOUTH FLORIDA AND THE TREASURE COAST, INC. ("PPSF"), respectfully requests that this Court enter partial summary judgment against the Plaintiff Mena on her injunctive relief claims under the ADA and the Rehab Act, and for all other relief this court deems just and proper.

Respectfully submitted,

s/ Dale L. Friedman
Dale L. Friedman
Florida Bar No.: 854646
dfriedman@conroysimberg.com
Conroy Simberg
3440 Hollywood Boulevard, Second Floor
Hollywood, FL 33021
(954) 961-1400 Broward
(954) 518-8683
Attorneys for Planned Parenthood of South Florida and The Treasure Coast, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic filing on October 1, 2015 on all counsel or parties of record on the Service List below.

s/Dale L. Friedman
Dale L. Friedman
Florida Bar No.: 854646

SERVICE LIST

MENA, MAURA V. PLANNED PARENTHOOD OF SOUTH FLORIDA AND THE TREASURE COAST, ET AL
Case No. 1:15-cv-21017 COOKE/TORRES
United States District Court, Southern District of Florida

Matthew W. Dietz, Esq.
Disability Independence Group, Inc.
2990 S.W. 35th Avenue
Miami, FL 33133
Attorney for Plaintiff
Phone: 305-669-2822/Erika
Fax: 305-442-4181
Email: mdietz@justdigit.org
Served via ELECTRONIC FILING

James K. Green, Esquire
James K. Green, P.A.
222 Lakeview Avenue
Suite 1650, Esperante
West Palm Beach, FL 33401-6100
Attorney for Planned Parenthood Federation of America, Inc.
Phone: 561-659-2029
Fax: (561) 655-1357
Email: jkg@jameskgreenlaw.com; lad444@bellsouth.net
Served via ELECTRONIC FILING

Mary O'Connor, Esq.
Patrick G. O'Brien, Esq.
Akin Gump Strauss Hauer & Feld, LLP
1700 Pacific Avenue
Suite 4100
Dallas, TX 75201
Attorneys for Planned Parenthood Federation of America, Inc.
Phone: 214-969-2800
Email: moconnor@akingump.com
pobrien@akingump.com
Served via ELECTRONIC FILING