IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS LEAGUE OF ADVOCATES FOR THE DEVELOPMENTALLY DISABLED, *et al*.

Plaintiffs,

vs.

LLINOIS DEPARTMENT OF HUMAN SERVICES, **MICHELLE R.B. SADDLER,** *in her official capacity as Secretary of the Illinois Department of Human Services,* **KEVIN CASEY**, *in his official capacity as Director of Developmental Disabilities of the Illinois Department of Human Resources,* and **COMMUNITY RESOURCE ALLIANCE,**

Defendants.

Case No. 13 C 01300

Hon. Marvin E. Aspen

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

This lawsuit seeks the Court's assistance to protect the federal rights of an extremely fragile and vulnerable group of profoundly developmentally disabled adults who reside in State Operated Developmental Centers for the Developmentally Disabled ("SODCs"). At a minimum, material issues of fact exist sufficient to warrant a hearing to determine Plaintiffs' Motion for a Preliminary Injunction ("Motion"). Notwithstanding Defendant's blanket denials in response to the Motion, the attached affidavits and anticipated testimony from concerned guardians and family members reveal that statements were made directly to them by State officials that the ongoing "transition plan" includes closing all SODCs and moving all residents into 2-4 bed community homes, including the profoundly disabled Plaintiff-Class members.

The State's transition plan may appear to the Court at first blush to yield only the minimal inconvenience occasioned by relocation generally. However, the injuries underway are both grievous and dire. The majority of MDC residents (84% of them) have profound developmental disabilities manifesting in cognitive and skill levels of an infant or young child.

As the attached affidavits reveal, a majority of the Plaintiff Class members have resided in the highly structured, 24-hour care SODCs dating to their pre-teen years due to the high level of services required. The SODC placements were far from just a convenient choice; the placements have been and continue to be necessitated and guided by required medical and care services.

As the Court will further glean from the attached affidavits and anticipated testimony, the 2-4 bedroom group homes simply are not designed, structured or staffed to provide the services that the Plaintiff-Class members require and are entitled to receive under federal law. These individuals have longstanding medical and safety issues ranging from an inability to perform even the simplest daily living tasks to violent outbursts and an overall inability to appreciate right from wrong. Critically, these deficits have existed for years in the Plaintiff-Class members and will continue at or near present levels for the balance of their lives. Indeed, many of them have a history of rejection from community placements due to the care requirements and behaviors attendant to their profound deficits. This is best reflected in the long history of individualized care assessments that are in Defendants' possession, coupled with first-hand accounts of the Plaintiff guardians.

Additionally, the represented Plaintiff-Class members' injuries are ripe for adjudication and are neither speculative nor hypothetical. State officials responsible for violating Plaintiffs' rights are named as individual defendants sued in their official capacities.[1] The attached affidavits and anticipated testimony reveal that the Defendants continue to violate the Plaintiff-Class members' rights having set in motion a reckless transition plan that cannot reasonably be

[1] Plaintiffs have a pending, unopposed motion for leave to file a Second Amended Complaint, which seeks to add Governor Patrick Quinn in his official capacity to this action. Because Plaintiffs have not yet been granted leave to file the Second Amended Complaint, their Motion for Preliminary Injunction does not include Governor Quinn.

Additionally, the naming of individuals as Defendants in their official state capacities suffices as a suit brought against the relevant state agency itself. Thus, while Defendants attempt to make much of the fact that the Illinois Department of Human Services ("DHS") is not a properly named defendant, the practical effect of also naming individual DHS officials as defendants essentially nullifies that argument. To that end, Plaintiffs concede that DHS need not be a named defendant and voluntarily withdraw the agency as a defendant in this lawsuit.

funded to adequately provide required care that is currently in place at SODCs. As a practical matter, a preliminary injunction is the last recourse for the profoundly disabled Plaintiff-Class members to preserve a means of redress for the significant legal wrongs in progress. To be sure, once the State's transition plan is completed there will be legal arguments raised of mootness, despite belated recognition of injuries. It is for that very reason the Seventh Circuit holds that the aggrieved need not wait to file suit until the course of imminent harms underway is completed (and potentially moot). Thus, it is respectfully requested that the Court probe beyond the written pleadings herein to rule on the requested preliminary injunction, particularly given the serious health, safety and welfare concerns at issue.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION

A. Plaintiffs Have Suffered An Injury In Fact Sufficient To Confer Standing.

Defendants argue that Plaintiffs cannot establish standing because they cannot show an injury-in-fact. To satisfy standing, one must have first suffered an injury in fact that is both (a) concrete and particularized; and (b) actual and imminent, not conjectural or hypothetical. *Sierra Club v. Franklin County Power of Illinois*, 546 F. 3d 918, 925 (7th Cir. 2008). Plaintiffs have suffered an injury in fact. Murray residents with profound developmental disabilities are being forced to move out of Murray into facilities such as 2 to 4 bed homes and CILAs without the consent of guardians and without any regard to whether such homes can handle the residents.

Defendants nevertheless argue that Plaintiffs do not have standing because they cannot show that any facility other than Murray is being closed, and that Plaintiffs "have no legal right to stay at Murray." (Docket No. 40, pp. 5, 9-10.) This argument is erroneous. In *Sierra Club*, the defendant made a version of this argument by stating that the plaintiff environmental association did not have standing to argue against the opening of a power plant, because the plant would take years to build and construction had not yet commenced. *Id.* at 926. The court

rejected this position and held that the plaintiffs had standing. *Id.* at 926 ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."); citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). As part of the evidence, the court looked to public statements by the defendant company of its "commitment to completing the plant." *Id*.

Here, Defendants' assertion that no other facility other than Murray is being closed is simply not true. Governor Quinn himself, on April 10, 2013, after discussing SODC facilities like Murray at a rally, stated that "we are going to be closing down the institutions and moving to a patient-centered community care approach…."[2] He also talked about moving patients from Murray, Howe and Jacksonville, and stated that he would do this "elsewhere in Illinois." Furthermore, the State, through high-ranking officials such as Michael Gelder (Senior Health Care Policy Advisor to Governor Quinn), Mark Doyle (Transition of Care Project Manager) and Jamie Veach (Director of Murray) have represented to Murray guardians and employees that all SODC facilities will be closed. *See* Affidavit of Jeff Wehking, Exhibit A; Affidavit of Perry Stanfa, Exhibit B; Affidavit of Marsha Holzhauer, Exhibit C; Affidavit of Rita Winkeler, Exhibit D. And, Defendants' own position in their brief- that "only Murray is slated for closure" (Docket No. 40, p. 9) is undermined by their public posting of "Governor Quinn's Rebalancing Initiative – November 2011," where the State has declared that the "Department of Human Services will reduce the number of residents served by State-Operated Developmental Centers (SODCs) by at least 600 by the end of FY 14. This will permit DHS to close up to four facilities in the next 2.5 years." Attached hereto as Exhibit E (emphasis added). These public statements are no different from the type of statements considered by the court in *Sierra Club*.

Even if the State didn't have a plan to close all SODCs, which it does, Defendants admit that a "danger" sufficient to establish standing "could only exist if Plaintiffs were provided a

[2] http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=11078 The Governor's statements can be heard on two audio links attached to this email address (bottom of the page).

community plan and told they were being forced to accept the plan against their will." (Docket No. 40, pp. 10-11.) That is the case here. There is no State plan in effect that satisfies federal law. Murray residents are instead being force-fit into 2-4 bed group homes. In fact, Susan Barnhart, the administrator of Community Resource Alliance, the group in charge of resident assessments prior to home placement, told a Murray guardian that CRA is only "offering Murray residents 2-4 bed group homes." (Exhibit C.) This statement was echoed by Kevin Casey, the Director of Developmental Disabilities for the Illinois Department of Human Services and Mark Doyle (Transition of Care Manager). (Affidavit of Karen Kelly, Exhibit F.) The State has also used the stick/carrot approach to persuading Murray guardians to move residents to 2 to 4 bed homes, regardless of the necessary care for such residents. *See* Exhibit C; Affidavit of Denise Schoppet, Exhibit G (discussing large financial incentives offered to Murray guardians to place residents in 2 to 4 bed homes); Affidavit of Rita Burke, Exhibit H ("Mr. Gelder also stated that if Illinois could no longer provide the ICF/DD level of care to which SODC residents were entitled, they would be sent out of state…Both Mr. Gelder and Mr. Doyle informed me that if I did not go through a [CRA] assessment, I would go to the "end of the line." Mr. Gelder told me that he wondered why they should provide any services to people who would not cooperate with them"). These statements were made despite the history of many Murray residents (with violent tendencies) who have failed at or been turned down from similar types of group homes. *See* Exhibit F; Exhibit H; Exhibit D; Exhibit G. Most shockingly, State officials have even offered Murray employees to take residents home. *See* Exhibit A ("At one point in the meeting, Mr. Gelder also told me, "If you care about the residents so much, why don't you take a person home yourself?"). Plaintiffs have established an injury in fact sufficient to establish standing.

B. Plaintiffs' Claim is Ripe for Consideration by This Court.

Defendants also argue that Plaintiffs' action is not yet ripe, again based on their position (undermined above) that only Murray is closing. In addition to being factually incorrect, this position ironically illustrates Defendants' strategy, when viewed in the context of another case,

ILADD et al. v. Illinois Health Facilities & Servs. Review Bd. d/b/a/ Jacksonville Developmental Center, 2012 MR 103 ("*Jacksonville*"). In *Jacksonville*, Defendants argued that with the closure of the Jacksonville SODC, the action by the Jacksonville guardians to enjoin the closure was moot. Defendants prevailed on this argument. *Jacksonville* Opinion, Exhibit I. Now, Defendants argue that because there is no plan to close all SODCs (again factually wrong), the claim is not yet ripe. If this argument were applied to its logical conclusion, then Plaintiffs would never have standing, and the State would be entitled to close each SODC *one by one* until the very last, arguing lack of ripeness while the SODC is being closed and then mootness when it is closed, depriving Plaintiffs of any ability to challenge the State's practices and deprivation of necessary care.

This catch-22 is not the Seventh Circuit's standard for ripeness. *See Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1274-75 (1992) ("When present harms will flow from the threat of future actions, those present harms may mean a controversy is ripe for review."); *see id.* (holding that plaintiffs challenging the statutory requirement of a surety bond had a ripe claim even though bond enforcement regulations had not yet been passed); *McCotter v. Longo,* No. 95 C 5985, 1997 WL 158325 at *3 (N.D. Ill. Mar. 31, 1997) (Noting that, for purposes of ripeness, "[f]ar from being unfounded, the facts here indicate that plaintiffs' fears regarding defendants' future conduct are soundly based on defendants' past and continuing conduct"); *Sierra Club v. Franklin County Power of Illinois,* 546 F. 3d 918, 925 (7th Cir. 2008) (rejecting defendants' ripeness challenge based on the EPA agency permit review not yet being complete); *Sierra Club v. Marita,* 46 F.3d 606, 611(7th Cir. 1995) (holding that the plaintiffs' claims seeking to enjoin timber harvesting were ripe, and rejecting defendants' arguments that the timber plans did not yet implement anything and were merely "thought without action").

In support of their ripeness assertion, Defendants cite to *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011). *Harris* is distinguishable. In *Harris*, the Seventh Circuit held that a group of

home-care personal assistants did not have standing to challenge any mandatory fees to a union, because such group had opted to not have union representation and therefore was not required to pay any fair share payments under any agreement. *Id.* at 699-700. The Seventh Circuit recognized that "the State ha[d] no representative to recognize and cannot agree to compel the plaintiffs to pay fair share fees at all." *Id.* at 700. Thus, in *Harris*, the disability plaintiffs were not subject to any imminent harm.

Unlike *Harris*, Plaintiffs' claim is ripe because the probability of future harm occurring is real, here the closure of all SODC facilities, and also the deprivation of the Murray Center residents' required care. As mentioned above, the State has represented that it intends to close all SODC facilities, thus depriving the Plaintiffs of an entire category of care. Defendants argue that Plaintiffs "speculate that they will be forced to accept a transfer into a community placement," that would be "so inappropriate and substandard that it would violate Plaintiffs' rights." (Docket No. 40, p. 9.) There is no "speculation" here. The State has represented to Murray guardians that only 2 to 4 bed homes are available through the assessment process. *See supra.* And, as evidenced by the tragic story of Jeanine Williams' brother, the CRA's removal of a resident into an inappropriate home can have disastrous consequences. *See* Jeanine Williams Affidavit, Exhibit J (describing how her brother was transferred by CRA from an SODC to a CILA home and lasted four days before having a violent outburst and being subsequently sent to a hospital and drugged, only to be rejected by the CILA and sent back to an SODC); testimonials from Murray Guardians, Exhibit K.[3] Plaintiffs should not have to wait until each resident injures himself or someone else in an inappropriate home placement before obtaining ripeness. Plaintiffs' claim is ripe for review.

[3] These testimonials are typical of the stories of Murray guardians and their loved ones.

II. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs Do Not Claim an Entitlement to Any Particular Facility.

Plaintiffs have never claimed entitlement to services at any particular developmental center. Defendants argue that because the State intends to close Murray, it is no longer an "available option" to residents under Medicaid provision 1396n(c)(2)(C), and that even if Plaintiffs have an enforceable right to choose between institutional and community-based care, they are still unable to enjoin the closure of Murray. (Docket No. 40, p. 21). Again, Defendants misstate Plaintiffs' claim. Many Murray residents require a level of service that is only available in SODCs. These residents are not being given the choice to continue receive these services in an institution, or ultimately, to continue receiving these services at all.

Defendants claim that even if they close all SODCs, there are still private ICF/MR[4] facilities that could care for Plaintiffs. (Docket No. 40, p. 13). This is simply not the case. Countless residents of SODCs have tried, and failed, to reside in an ICF/MR. (Ex. F, ¶ 7; Ex. H, ¶ 3; Ex. G, ¶ 3). Many individuals have been outright rejected by ICFs/MR, while others were returned to SODCs after the facility could not properly provide for them. (Ex. J, ¶ 6; Ex. F, ¶ 7; Ex. H, ¶ 3; Ex. G, ¶ 3). If SODCs are completely eliminated, and ICFs/MR are unable or unwilling to care for such patients, these patients will have no place to go.

Plaintiffs have not alleged that they are entitled to receive services in a particular location, but the Medicaid Act and ADA require Defendants to provide Plaintiffs with services in the most integrated setting appropriate to the needs of Plaintiffs, which often is a state-operated ICF/MR. *See Olmstead v. Zimring, et al.*, 527 U.S. 581, 605 (1999). Defendants' current plan will cause Plaintiffs to be discharged from Murray to settings that are not appropriate to their needs, forcing the most medically-fragile and vulnerable individuals into settings that are not appropriate and often dangerous.

[4] Intermediate Care Facilities for individuals with Mental Retardation ("ICF/MR") is the term currently used in federal law and regulations. Illinois, however, prefers to use the accepted term individuals with "developmental disabilities" or "ICF/DD." These two terms are used interchangeably

B. Plaintiffs Establish a Likelihood of Success Under Title II of the ADA and Section 504 of the Rehabilitation Act.

In arguing that the ADA and Rehabilitation Act claims are not likely to succeed, Defendants deliberately misrepresent Plaintiffs' claims to craft an argument that has no basis in fact or law. Although Defendants take great pains not to admit their plan to close all SODCs, the Response states that "even if all SODCs were closing, the aim of [the ADA and the Rehabilitation Act] is to deinstitutionalize in an effort to stop discrimination." (Docket No. 40, p. 13). Defendants argue that the ADA and Rehabilitation Act "do not require that institutional settings be perpetuated—quite the opposite." *Id.* This statement illustrates the *gravamen* of Plaintiffs' ADA and Rehabilitation Act claims: namely that Defendants' plan to close all SODCs eliminates an entire category of services to which Plaintiffs are entitled.

The residents of SODCs are in need of continuous care by multidisciplinary teams of professionals as are currently serving them at MDC. In fact, 84% of the residents at MDC fall within the severe or profound M.R. range, meaning they require total assistance and care provided by direct service staff that is specially trained on individualized programs. *See* http://www.dhs.state.il.us/page.aspx?item=58719. The services provided to Murray residents cannot be reasonably replicated in alternative residential settings. The elimination of institutional settings that provide ICF/MR services to residents with profound M.R. is discriminatory under the ADA and Rehabilitation Act in that, among other things: (1) Defendants are targeting developmental disabilities for greater reductions in funding than other disabilities; (2) Defendants' plan prevents Plaintiffs from receiving services that are as effective as those provided to individuals with other disabilities; and (3) Defendants' reduced funding creates a substantial risk that Plaintiffs will not be able to live safely in the "most integrated setting" as required under the ADA.

Olmstead expressly states that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from

community settings." *Id.* at 601-02. As the *Olmstead* Court explained, states must "maintain a range of facilities for the care and treatment of persons with diverse mental disabilities…" *Id.* at 2185. Interpreting the ADA and the Department of Justice's regulations issued under it, *Olmstead* emphasized that there is no "federal requirement that community-based treatment be imposed on patients who do not desire it." *Id*. at 602.

Defendants' plan is diametrically opposed to this proposition. In fact, the vast majority of SODC residents oppose community placement. (*See* SODC Census and Tier Report, http://www.dhs.state.il.us/page.aspx?item=58786). Out of the 1,819 current SODC residents, only 9.5% consent to community placement (and these individuals are likely wards of the state who have no choice in the matter), 31% are individuals with medical and/or behavioral needs that DHS concedes prevent a transition to the community and 58% are opposed to community placement. *Id.* The *Olmstead* decision cannot be misconstrued to require deinstitutionalization of individuals who need the services at Murray. *See Olmstead* at 605. *See also, Conner v. Branstad*, 839 F. Supp. 1346, 1357 (S.D. Iowa, 1993) (if Congress had actually intended to require states to provide community-based programs for the mentally disabled individuals currently residing in institutional settings, it surely would have found a less oblique was of doing so).

C. Plaintiffs Establish a Likelihood of Success Under Section 1396n(c)(2)(C) of the Medicaid Act

1. §1983 Supplies a Private Right of Action to Enforce Claims Under 1369n(c)(2)(C).[5]

Defendants devote over three pages of the Response disputing the well-established federal case law determining Section 1983 supplies a private right of action to enforce claims under Medicaid provision 1369n(c)(2)(C). (Docket No. 40, pp. 16-19). First, Defendants rely on *Bertrand v. Maram*, claiming *Bertrand's* holding to be that "no arguably relevant provision in

[5] Importantly, Defendants' only mention of 42 U.S.C. §1983 is in the context of whether Plaintiffs can enforce their Medicaid claim under that statute. (Docket No. 40, pp. 16-17). Defendants' Response is silent regarding Plaintiffs' claim of deprivation of equal protection in violation of 42 U.S.C. §1983.

the Medicaid Act, including §1396n(c)(2)(C), provides a private right of action." (Docket No. 40, pp. 16-17). Defendants are mistaken. Defendants took a sentence from *Bertrand* stating the Medicaid statute itself does not have a specific provision providing a private right of action (which Plaintiffs do not dispute) (*Bertrand*, 495 F.3d at 456), and represented the holding to be that there is no private right of action under §1396n(c)(2)(C). *Bertrand* actually is inapposite to Defendants' position.

In *Bertrand*, developmentally disabled applicants brought an action against various Illinois officials alleging the state failed to provide funding for Medicaid waiver services in violation of Medicaid provision 1396(a)(8). The actual holding in *Bertrand* was that the State of Illinois did not violate Medicaid section 1396(a)(8). In fact, contrary to Defendants' argument, *Bertrand* assumes that §1983 supplies a private right of action to enforce claims under Medicaid. *Bertrand*, 495 F.3d 457-58. Importantly, Bertrand does not hold anything with respect to Section 1396n(c)(2)(C), the relevant provision in this case, thus Defendants' statement that this Court is bound by *stare decisis* to follow *Bertand* with respect to 1396n(c)(2)(C) is incorrect. (*See* Docket No. 40, p. 17).

Next, Defendants urge the Court to disregard the seminal Ninth Circuit case *Ball v. Rodgers*, by downplaying its holding. Specifically, Defendants state that *Ball* "could be construed to grant Medicaid recipients with rights enforceable under Section 1983," but that *Ball's* reasoning is flawed. (Docket No. 40, p. 19). Defendants are incorrect. *Ball* held that "Medicaid beneficiaries enjoy 'unambiguously conferred' individual rights under 1396n(c)(2)(C) … and those right can properly be enforced through a § 1983 cause of action." *Ball v. Rodgers*, 492 F.3d 1094, 1117 (9th Cir. 2007). In fact, the entire case is devoted to an in-depth analysis of the "rights-creating" language of this specific Medicaid provision. *Id*. at 1103-1120.

Contrary to Defendants' claims, *Ball* properly applied the *Blessing* test as modified by *Gonzaga*, considered the legislative history of 1396n(c)(2)(C) to determine Congress' intent, and

looked at other relevant statutes and implementing regulations to conclude that "Medicaid beneficiaries enjoy 'unambiguously conferred' individual rights under 1369n(c)(2)(C) and that those rights can be properly enforced through a §1983 cause of action." *Id.* at 1115-17.

Similarly, in *Michelle P. ex rel. Deisenroth v. Holsinger*, the district court held §1396n(c)(2)(C) conferred a right to private action under §1983, explaining:

> Interpreting the statute according to the *Blessing* test as modified by *Gonzaga*, the Court finds that the language in this section speaks in terms that are "rights creating." First, the assurances set forth in the statute are clearly intended to protect the health and welfare of individuals such as Plaintiffs. The individually focused terminology confers the sort of individual entitlement enforceable under § 1983. Further, the section imposes a mandatory duty on the participating state-a state must provide the enumerated assurance in order to obtain a home care waiver. Finally, the Court finds that the concept of a state providing assurances that it has informed eligible individuals of their options, and provided them with ICF/MR services (if the individuals so choose), is not so vague or ambiguous as to be unenforceable by the judiciary. Accordingly, the Court finds that the freedom of choice provision, 42 U.S.C. § 1396n(c)(2)(C), meets all of the criteria for individual enforcement under Section 1983.

Michelle P. ex rel. Deisenroth v. Holsinger, 356 F. Supp. 2d 763, 769 (E.D. Ky. 2005); *see also Masterman, et al v. Goodno*, 2004 WL 51271 at ** 6-10 (D. Minn. Jan. 8, 2004) (holding section 1369n(c)(2)(C) contains sufficient "rights creating" language to allow a cause of action under §1983); *Cramer v. Chilies*, 33 F. Supp. 2d 1342, 1351 (S.D. Fla. 1999) (same); *Wood v. Tompkins*, 33 F.3d 600, 608-11 (6th Cir. 1994) (same).

2. Plaintiffs Have Properly Stated a Claim Under Medicaid Provision 1396n(c)(2)(C).

Defendants argue that "even if Plaintiffs have an enforceable right to choose between institutional and community-based care, enjoining the closing of Murray is not a remedy that falls within the scope of that alleged right," and that Plaintiffs do not get a choice between SODCs as opposed to other types of ICFs/MR. (Docket No. 40, p. 21). Defendants mistake Plaintiffs' position.

Plaintiffs are entitled to ICF/MR services, which they are currently receiving from SODCs (including Murray). By closing Murray, and the other SODCs, Defendants are

eliminating Plaintiffs' guaranteed access to ICF/MR services. While there are private facilities that do offer this level of service, private ICF/MR facilities have the discretion to refuse, and do refuse, eligible candidates. (Ex. F, ¶ 7; Ex. H, ¶ 3; Exc. G, ¶ 3). SODC residents are the most severe and profoundly disabled individuals in Illinois.[6] These individuals are the least attractive candidates for private ICFs/MR. In fact, Michael Gelder, Senior Health Care Policy Advisor for the Governor, and Mark Doyle, Transition of Care Project Manager, confirmed that private ICFs/MR may not be available or willing to take SODC residents, and if Illinois could no longer provide the ICF/MR level of care to which SODC residents are entitled, they could be sent out of state. (Ex. H, ¶ 5). Accordingly, if all SODCs close, the residents who are unable to secure a placement in a private ICF/MR facility, or are initially accepted but then later rejected from a facility, will have no place to return to and no place to receive ICF/MR services within Illinois.

Other federal courts have issued injunctions enjoining closure of certain facilities where a budgetary plan violates Medicaid. For example, in *Harris et al. v. Bd. of Supervisors, Los Angeles County et al.*, 366 F.3d 754 (9th Cir. 2003), the Ninth Circuit affirmed the trial court's decision to grant an injunction enjoining the closure of a county hospital, Rancho Los Amigos National Rehabilitation Center ("Rancho"). In *Harris*, chronically ill patients who relied on county health services brought suit against county board of supervisors seeking injunctive relief against proposed cutbacks that would close Rancho. The court determined the evidence suggested that serious harm would follow closely on the heels of the proposed closure, and plaintiffs established a likelihood of success on the merits that the cutbacks would violate Medicaid and affirmed the preliminary injunction enjoining the closure. *Id.* at 765-66; *see also, Wheeler v. Wexford Health Services, Inc.*, 689 F.3d 680, 682 (7th Cir. 2012 (citing to *Harris* with approval).

As discussed in Plaintiffs' memorandum at law in support of their motion for preliminary

[6] According to the State DHS website, 84% of the Murray residents have "severe or profound M.R. range," and 68% "have a behavior intervention program, often requiring higher levels of staff supervision. www.dhs.state.il.us/page.aspx?item=58719

injunction, Medicaid provision §1396n(c)(2)(C) entitles Plaintiffs to a choice between institutional or home and community-based services. (Docket No. 9, pp. 15-18). Defendants plan to close all SODCs without regard to the individual's support requirements eliminates both Plaintiffs' right to choose, as well as Plaintiffs' access to ICF/MR services. This is in direct violation of the Medicaid Act.

III. NONE OF PLAINTIFFS' CLAIM'S ARE BARRED BY THE ELEVENTH AMENDMENT

Although Defendants make much over state officials having Eleventh Amendment Immunity for violations of state law (Docket No. 40, p. 11), none of Plaintiffs claims are for violations of state law. (*See* Docket No. 14). Notwithstanding whether a state official can be compelled to comply with state law, the issues in this case concern Defendants' violations of *federal law*—the ADA, the Rehabilitation Act, the Medicaid Act and the Civil Rights Act. *Id.* Defendants concede this Court has the ability to grant injunctive relief for violations of federal law. (Docket No. 40, p. 11).

Additionally, Defendants' Response argues that DHS has Eleventh Amendment Immunity for certain claims. (Docket No. 40, p. 11). However, the federal claims in Plaintiffs' Original Complaint (Docket No. 1); First Amended Complaint (Docket No. 14); and pending Second Amended Complaint (Docket No. 33, Ex. 1) are all properly brought against the named state officials in their official capacities. *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (a plaintiff may file "suit against state officials seeking prospective equitable relief for on-going violations of federal law…."); *see also Indiana Protection and Advocacy Services v. Indiana Family and Social Services, et al.*, 603 F.3d 365, 367 (7th Cir. 2010) (holding the Eleventh Amendment does not par plaintiff from seeking injunctive and declaratory relief against named state officials). Simply put, the Eleventh Amendment does not provide immunity for the Defendant state officials for violations of federal law.

IV. THE BALANCING OF HARMS FAVORS PLAINTIFFS

Defendants claim that because they have an obligation under federal law to continue to integrate those who are willing into the community, transfers will continue to ensue and thus Murray will only be operating at partial capacity. (Docket No. 40, p. 23). However, as the *Olmstead* Court cautioned "if the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition." *Olmstead*, 527 U.S. at 610 (Kennedy concurrence). Importantly, almost no one is asking to be transferred out of Murray. As previously stated, of the 1,819 individuals currently residing in SODCs, only 9.5% of them are consenting to transfer into the community. http://www.dhs.state.il.us/page.aspx?item=58786.

Defendants claim that if the closure of Murray is delayed, it could double the financial obligations of the State at the expense of the taxpayers. (Docket No. 40, p. 23). This financial hardship of potentially having to operate a partially-full facility, however, does not trump Plaintiffs' irreparable harm if the State's plan is not enjoined. *Harris*, 366 F.3d at 766 ("faced with [] a conflict between financial concerns and preventable human suffering, [the court has] little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor."). This harm includes pain, medical complications and possibly death, if the transitioning of profoundly disabled residents occurs without adequate safeguards and supervision, as the evidence here indicates.

CONCLUSION

As set forth above, Plaintiffs' request for injunctive relief should be granted.

Dated: April 15, 2013

Respectfully submitted,

ILLINOIS LEAGUE OF ADVOCATES FOR THE DEVELOPMENTALLY DISABLED, *et al.*, Plaintiffs

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