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

O.B., by and through his parents GARLAND BURT and JULIE BURT, **C.F.**, by and through his mother, KRISTEN FISHER, **J.M.** and **S.M.**, by and through their parents, DAN MCCULLOUGH and MICHELE MCCULLOUGH, **Sa.S.** and **Sh.S.**, by and through their mother, SHEILA SCARO individually and on behalf of a class, Plaintiffs, vs. **FELICIA F. NORWOOD**, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, Defendant.	No. 15-CV-10463 Hon. Charles P. Kocoras

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTIONS
TO ENFORCE AND MODIFY ITS PRELIMINARY INJUNCTION

Plaintiffs have filed two motions related to the Court's April 4, 2016 preliminary injunction order (Dkt. 42). The first motion (Dkt. 100) asks the Court to enforce the preliminary injunction by requiring HFS to present evidence within 60 days showing its compliance with the preliminary injunction or face the appointment of a receiver.[1] The second motion (Dkt. 102-1) asks the Court to modify the preliminary injunction to require HFS to increase reimbursement rates paid to nursing agencies for in-home shift nursing services to an unspecified level that is sufficient for class members to receive in-home shift nursing services at the level approved by HFS. The Court should deny both motions.

[1] Because defendant Felicia Norwood is sued in her official capacity as the director of the Illinois Department of Healthcare and Family Services ("HFS"), we refer to the defendant as HFS.

The Court should deny plaintiffs' motion to enforce the preliminary injunction (Dkt. 100) because HFS has committed to steps to increase nursing. Contrary to plaintiffs' contention that "Defendant has not committed to [take any] additional non-economic or economic step that may improve access to nursing services" (Dkt. 100 at 6), HFS has undertaken several concrete steps to improve access to nursing services, described below and in Exhibit A. HFS not only has enacted system-wide policy changes in an effort to attract and retain nursing services for the plaintiff class, but HFS also has engaged individual care coordinators to work directly with each class member's family to address each family's particular needs. The parties and the Court should allow sufficient time to determine if HFS's changes are improving the level of nursing before determining if any additional remedies or modifications are necessary or appropriate.

The Court also should deny plaintiffs' request for the Court to modify its preliminary injunction to require HFS to increase reimbursement rates for in-home shift nursing services. (Dkt. 102-1 at 15.) Notably, both this Court and the Seventh Circuit have already ruled in this case that the courts cannot order HFS to increase rates. (Dkt. 94, Seventh Circuit Op. at 9; Dkt. 36, Mem. Op. at 8.) In denying HFS's motion to dismiss, this Court accepted plaintiffs' representation to the Court that "*Plaintiffs are not arguing that Defendants must raise rates for in-home nursing services*." (Dkt. 36 at 8, quoting plaintiffs' opposition to motion to dismiss, Dkt. 32, at 6, emphasis added.) This is consistent with the fact that Medicaid rate-setting is governed by Title XIX of the Social Security Act. 42 U.S.C. § 1396a(a)(30)(A); *Armstrong v. Exceptional Child Center, Inc*., 135 S. Ct. 1378, 1385-86 (and 1388, Breyer, J. concurring) (2015).

Plaintiffs previously argued that their references to reimbursement rates in the Complaint were merely to show that rate discrepancies support their ADA and Rehabilitation Act claims by showing that class members "are treated worse than other persons with disabilities." (Dkt. 32 at

14.) But as the Court has ruled, plaintiffs' ADA and Rehabilitation Act claims must be resolved based on the evidence, not mere allegations, and to sustain these claims the plaintiffs must show that they face "a real threat of institutionalization." (Dkt. 36 at 15.) As discussed below, plaintiffs have not shown that existing reimbursement rates paid to nursing agencies or existing staffing levels received by each family have resulted in any class member, let alone the class as a whole, facing a threat of unjustified institution isolation. Plaintiffs also have not shown that increased reimbursement rates will resolve the particular staffing issues faced by individual families.

Before the Court considers any change to its preliminary injunction, plaintiffs must first meet their burden to show that the present level of nursing poses a "real threat of institutionalization." (Dkt. 36 at 17.) Even if certain class members are not receiving (or utilizing) the full allotment of nursing that HFS has authorized, the key question under *Olmstead* is whether their current level of nursing poses a substantial risk of "unjustified institutional isolation." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597-603 (1999). If the answer is no, then plaintiffs do not have a likelihood of success on their ADA/Rehabilitation Act claim, which is the sole legal basis for their present request for a court-ordered rate increase.[2]

We recognize that the pace of change in this case has challenged the patience of the plaintiffs and the Court, but given (a) the commitments HFS has now made based on observed staffing issues, (b) the lack of evidence that any individual plaintiff faces a substantial risk of institutionalization based on the level of nursing care he or she is currently receiving, and (c) the lack of a valid legal basis to force HFS to increase Medicaid reimbursement rates, plaintiffs' motions should be denied.

[2] HFS reserves all of its defenses against plaintiffs' request for increased reimbursement rates, including that forcing HFS to increase rates to an unspecified level to provide the full allocation of nursing services, regardless of individual need, would impose an impermissible "fundamental alteration" of its programs.

I. Response to Plaintiffs' Motion to Enforce Preliminary Injunction (Dkt. 100).

The premise of plaintiffs' motion to enforce the preliminary injunction is that "Defendant has not committed to [take any] additional non-economic step that may improve access to nursing services." (Dkt. 100 ¶ 15.) That is not true. Before plaintiffs filed their motion, HFS's counsel called plaintiffs' counsel to tell them that HFS was continuing to work on a series of action steps in an effort to comply with the Court's orders. Rather than wait to see HFS's plan, plaintiffs filed this motion.

A. System-Wide Steps to Increase Nursing Care.

As described in Exhibit A, HFS has committed to undertake the following steps to increase nursing care system-wide:

1. *New Nursing Agencies*. HFS has worked with the Division of Specialized Care for Children ("DSCC") to add five new nursing agencies to the nursing agency pool in the last year. Two are located in the Chicago area (one in the city and one in the suburbs). The others are located in Dixon, Alton, and O'Fallon, Illinois. This brings the total number of nursing agencies to 27.

2. *Removed One-Year Experience Requirement*. Previously nurses were not authorized to provide services to class members (MFTD and NPCS participants) unless they had at least one year of clinical experience. By agreement with class counsel, HFS has removed the one-year experience requirement for nurses providing services to the MFTD and NPCS participants. On November 10, 2016, DSCC submitted notices to all nursing agencies stating that "Nurses are no longer required to have one year of clinical experience."

3. *Expanded Services by Nurses with Pending Licenses*. Previously nurses were not authorized to provide services to MFTD and NPCS participants unless they were fully licensed (nurses with pending licenses were not authorized). On November 10, 2016, DSCC submitted notices to all nursing agencies stating that "Nurses with a pending license are now allowed to provide care."

4. *Services by Out-of-State Nurses*. MFTD or NPCS participants who live near bordering states may utilize the services of out-of-state nurses if the nurses seek to become licensed in Illinois. HFS and DSCC are working with nursing agencies who employ nurses in neighboring states who live near the Illinois border to encourage those nurses to become licensed in Illinois.

5. *Adding Nursing Agencies Previously Believed to be Subject to Home Health Moratorium*. Federal CMS imposes a "home health moratorium" that prevents new providers from being enrolled to provide certain home health services. HFS is working with the its Provider Enrollment section to clarify which agencies are subject to the home health moratorium and has developed a process for enrolling additional nursing agencies that were previously believed to be subject to the moratorium. As a result, one additional agency has already been enrolled and will begin providing service.

6. *Added Coordination with Department of Public Health to Facilitate Cross-County Recruitment*. HFS and DSCC have learned that nursing agencies have been reluctant to recruit nurses for cases in new counties until they have been approved to provide services in those counties by the Illinois Department of Public Health (IDPH). It has been the practice of IDPH to approve nursing agencies to provide additional service in new counties only when there is an identified participant and nurse in place. DSCC has explained to IDPH that waiting until nurses are identified prior to submitting the in-home shift nursing request to HFS can create delays in the process. To address this issue, DSCC has identified several liaisons with the IDPH and is working with them to develop a more streamlined process for MFTD and NPCS approved nursing agencies to submit and have approved requests for expanding geographical service areas. The discussions are currently ongoing. HFS will report any results or further action to be taken on this item to class counsel by May 1, 2017.

7. *Re-education and Training*. HFS and DSCC have identified a need for re-education on nurse training service, particularly with respect to training nurses to provide ventilator services needed by many MFTD and NPCS participants. On December 13, 2016, DSCC sent a notice to all approved nursing agencies highlighting the nurse/family training services in the waiver and have asked whether the agencies are having issues finding an entity to provide ventilator training. DSCC is re-educating the nursing agencies and care coordinators about the nurse training service in order to help with the issue of training agency nurses to provide specialty care.

8. *Survey to Nursing Agencies*. As requested by class counsel, HFS has worked with DSCC to develop a survey of nursing agencies with the goal of identifying additional non-economic barriers that may affect the staffing of cases. HFS intends to use the survey results to identify and implement additional non-economic strategies to increase staffing. HFS will submit this survey to class counsel to review and provide comments by February 1, 2017, with the plan to submit the survey to nursing agencies by February 15, 2017. Nursing agencies will be asked to respond to the survey within 28 days of its release. The responses will be shared with class counsel on a confidential basis. HFS and DSCC will review the results of the survey and, by May 1, 2017, will report to class counsel the prospects for additional systemic non-economic strategies or any follow up inquiry that may be necessary to develop additional non-economic strategies.

9. *Tier 1 Reimbursement*. Class counsel has noted that HFS provides a higher "Tier 1" reimbursement rate ($35.03 per hour paid to agencies for registered nurses (RNs) and $31.14 per hour to agencies for licensed practical nurses (LPNs)) for nursing services to

children residing in Cook, DuPage, Kane, and Will counties. (Dkt. 102-1 at 11.) Class counsel also acknowledge that HFS will authorize the higher Tier 1 rates on an individualized basis for children outside of those counties. (*Id.*) Although class counsel is now seeking even higher rates "above Tier 1 rates" (*id.*), there is no dispute that HFS offers the opportunity for all class members to obtain Tier 1 rates based on a showing of need. The Seventh Circuit noted in its opinion that a rate of $35.51 per hour (approximately the Tier 1 rate for an RN) roughly translates to an annual wage of $71,020. (Dkt. 94 at 10.) The court considered this "not a bad wage," and one that should be sufficient to attract nurses. (*Id.*)

10. *Other Economic Issues*. The parties dispute whether reimbursement rates are the key factor affecting individual staffing levels, and whether a rate increase is necessary or legally appropriate within the scope of the litigation. Without waiving any objection to or conceding any issue relating to economic matters, including rates, HFS has requested nursing agencies to provide to HFS confidential and proprietary information about their contracts with nurses. HFS will use this information on a confidential basis to determine whether additional steps may be feasible to increase staffing needs on an individualized basis. Subject to confidentiality protections, HFS will report to class counsel on the status of these inquiries by May 1, 2017.

HFS respectfully submits that the actions outlined above meet the Court's requirement for "HFS to provide information regarding the steps undertaken to arrange for in-home shift nursing services" for class members. (Dkt. 79 at 8.) As requested by the Court, HFS is prepared to join plaintiffs' counsel in signing-off on the steps discussed in Exhibit A to this response.

B. Actions for Individual Class Members.

The Court also has asked the parties to identify steps that can be taken to secure the nursing needed by twelve individual class members identified by class counsel. To address the nursing care needed by all class members, including the twelve identified by class counsel, HFS has arranged for DSCC to employ care coordinators to work with the families of class members to coordinate nursing care and address a variety of needs, including each family's particular needs for in-home shift nursing. The DSCC care coordinators contact each family at least monthly. As summarized in Exhibit A, these discussions have shown that class members often have highly individualized staffing needs that do not depend on reimbursement rates.

The communications with individual class members show that while class members may not be utilizing the full amount of nursing HFS has authorized, it does not follow that all families have problems with their level of nursing, nor does it follow that the current level of nursing poses a substantial risk that any particular class member faces a risk of hospitalization or institutionalization attributable to the existing rate structure or level of in-home nursing. Some families, like that of plaintiff K.W., report being fully staffed and satisfied. (Ex. A.) Other families, like that of D.G., have chosen not to utilize the full level of nursing that HFS has authorized. (*Id*.) Other families face a variety of staffing issues, like nurses taking days off, the need for additional nursing to cover nights and weekends, or personality conflicts. (*Id*.) HFS does not minimize that the hardship families face when they cannot obtain nursing to cover particular shifts, but that is a challenge that HFS and DSCC are working to meet in conjunction with the families and the nursing agencies.

Notably, the action plan proposed by class counsel (Dkt. 100-2), does not account for any individualized nursing issues faced by the twelve individual plaintiffs, nor for any other class members. Rather than suggest any particular steps that address the particular circumstances facing the twelve plaintiffs, class counsel instead demand an across-the-board increase in reimbursement rates for registered nurses state-wide to at least $48.65 an hour. (Dkt. 100-2 ¶ 3.) That represents a $20 increase over existing "Tier 2 rates" that are paid to nursing agencies, and a $13 increase over "Tier 1" rates, discussed below. Plaintiffs would provide that rate increase even where families have not identified problems with their staffing, and without evidence that any particular family's staffing issues are attributable to rates as opposed to other factors.

C. There is No Basis for the Court to Appoint a Receiver.

Plaintiffs ask the Court to require HFS to present evidence within 60 days showing its compliance with the preliminary injunction or face the appointment of a receiver. (Dkt. 100 at 7.) That is unnecessary because HFS has presented its proposed action plan, and has committed to providing continuing reports to plaintiffs' counsel and the Court on an ongoing basis as needed.

Plaintiffs also propose, "as a last resort," that "this Court place the in-home shift nursing services program into receivership" if HFS cannot demonstrate compliance with the Court's preliminary injunction order. (Dkt. 100 at 7.) Plaintiffs cite cases primarily involving desegregation and prison reform where courts appointed receivers after years of other equitable efforts failed. HFS does not deny that receivership is an available remedy, but courts generally have reserved it for "extreme cases" after other efforts to enforce compliance have failed. See, e.g., *Shaw v. Allen*, 771 F. Supp. 760, 762 (W.D. W. Va. 1990). Given that HFS has committed to specific steps to increase nursing available to class members, the "last resort" remedy of a receiver is not necessary or appropriate here.

II. Response to Plaintiffs' Motion to Modify Preliminary Injunction by Requiring HFS to Increase Reimbursement Rates (Dkt. 102-1).

In addition to their motion to enforce the preliminary injunction, plaintiffs also are asking the Court to modify the preliminary injunction to require HFS "to take immediate and affirmative steps to increase the in-home shift nursing rates paid by the Defendant to the Plaintiffs in order that the Plaintiffs and Class are able to receive in-home nursing services at the level approved by the Defendant." (Dkt. 102-1 at 15.) This request lacks a valid legal or factual basis and should be denied.

Notably, plaintiffs are not seeking this relief in connection with their Medicaid claims in Counts I and II, nor could they, as already recognized by this Court and the Seventh Circuit.

(Dkt. 36, Mem. Op. at 8; Dkt. 94 Seventh Circuit Op. at 9.) Instead, plaintiffs contend that a court-ordered rate increase is an appropriate modification that the Court can order under the ADA and Rehabilitation Act. (Dkt. 102 ¶ 8.) This argument is directly contrary to what plaintiffs previously represented to the Court, when they explicitly stated: "*Plaintiffs are not arguing that Defendants must raise rates for in-home nursing services*." (Dkt. 32 at 6, quoted by this Court in Dkt. 36 at 8, emphasis added.) Plaintiffs previously said that their references to reimbursement rates in the Complaint were merely to show that rate discrepancies support their ADA and Rehabilitation Act claims by showing that class members "are treated worse than other persons with disabilities." (Dkt. 32 at 14.) But as this Court has already ruled, for plaintiffs to obtain any relief under the ADA or Rehabilitation Act, they must present evidence showing "a real threat of institutionalization." (Dkt. 36 at 15.) They have not done so. The Court should reject plaintiffs' request to impose an increase in reimbursement rates for this reason alone, but also for the following reasons:

A. Judicial Estoppel Bars Plaintiffs from Seeking a Court-Ordered Rate Increase.

First, plaintiffs are judicially estopped to seek an increase in reimbursement rates. Judicial estoppel serves "to protect the integrity of the litigation process" by preventing litigants from "deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). The doctrine "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdich*, 530 U.S. 211, 227 n. 8 (2000). Although there is no exact test for judicial estoppel, the typical factors are (1) whether a party's position is clearly inconsistent with its earlier position; (2) whether the party used the contrary argument to convince the court to rule in its favor; and (3) whether allowing the party to assert

the inconsistent position would provide the party with an unfair advantage or impose an unfair detriment on the other party. *New Hampshire v. Maine*, 532 U.S. at 750-51.

The Court should apply these factors to bar plaintiffs from seeking a court-ordered increase in reimbursement rates. As noted, plaintiffs previously took the exact opposition position, arguing that they were not seeking a rate increase. (Dkt. 32 at 6.) The Court denied HFS's motion to dismiss and entered a preliminary injunction, relying in part on this representation. (Dkt. 36 at 8, quoting plaintiff's brief, Dkt. 32 at 6.) To allow plaintiffs to make the case about reimbursement rates now would prejudice defendants for the simple reason that if this case has all along been about getting a court-ordered increase in reimbursement rates, it should have been and would have been dismissed at the start.

B. Plaintiffs Have Not Shown That Current Rates Impose A Substantial Threat of Institutionalization.

Second, and more critically, plaintiffs have not shown that the current reimbursement rates result in a substantial threat of institutionalization (or even that increased rates would solve the particular nursing issues faced by individual class members). Under *Olmstead*, plaintiffs cannot prevail on their ADA and Rehabilitation Act claims unless they show that class members face a real threat of "unjustified institutional isolation." 527 U.S. at 597-603. This Court has already ruled that this claim must be resolved based on the evidence, not mere allegations, and that to sustain these claims the plaintiffs must show that they face "a real threat of institutionalization." (Dkt. 36 at 15.) Plaintiffs have not done so. They cite to purported disparities in reimbursement rates (discussed below) but they do not present any evidence that any class member has faced a "real threat of institutionalization" as a result of HFS's current reimbursement rates. Plaintiffs appear to assume that anything less than 100% staffing equates to a substantial risk of institutionalization. That assumption is not factually or legally sound.

1. Plaintiffs Do Not Face a Substantial Threat of Institutionalization.

Plaintiffs submit the declaration of Julie Burt, the mother of plaintiff O.B., who offers the conclusion that "[i]f O.B. does not receive in-home shift nursing services at the level approved by HFS, then there is a serious risk of institutionalization (hospitalized)." (Dkt. 102-1, Ex. A.) The mothers of C.F. and J.M and S.M. offer the identical conclusions. (Dkt. 102-1, Exs. F & G.) But not only are these conclusory assertions insufficient to sustain a preliminary injunction, they fail to show any causal link between reimbursement rates and institutionalization. They do not show that current reimbursement rates (or the family's current level of shift nursing) pose a substantial threat of institutionalization, nor do they show that an increase in rates would remedy these families' particular nursing needs. They also fail to acknowledge the ongoing efforts by HFS and DSCC to work with the families and the nursing agencies to fill those needs.

As shown in Exhibit A,[3] HFS approved O.B. to receive $19,178 per month for in-home shift nursing, which translates to approximately 135 hours per 30 days based on a blended RN/LPN rate. The most recent report from DSCC indicates that during the week of January 8, 2107, O.B. received 134 hours of staffing (99%). DSCC and the nursing agency (Accurate) have been actively working to staff O.B.'s case, and Accurate was able to obtain a new part-time night nurse to cover for another nurse who wanted to reduce hours from full- to part-time. Although the Complaint alleges that O.B. was hospitalized in 2015 and was delayed going home because of a lack of home nursing, O.B. has been home for nearly a year, since February 2016, with no indication that his current level of nursing poses a substantial risk that he will be unnecessarily re-hospitalized.

[3]If necessary, HFS will provide witnesses who will testify about DSCC's communications with plaintiffs and nursing agencies to arrange for needed nursing.

Plaintiffs J.M. and S.M. are a brother and sister. Each is approved to receive 120 hours of nursing in weeks when they attend school, and 112 hours per week when they are not in school. During the week of January 8, 2107, J.M. and S.M. received 112 hours of staffing (93%), in part because staffing is not provided on Sundays at the family's request. (Ex. A.) With one nurse attending to both children, J.M. and S.M. are receiving nearly full staffing. HFS acknowledges that the family has requested an additional nurse to care for each child individually, especially at night. In October 2016, a night nurse for J.M. and S.M. moved to days. A day nurse wanted to switch to nights, but J.M.'s and S.M.'s mother did not want that nurse to switch from days to nights. Also in October, 2016, the nursing agency (Accurate) brought in a possible new nurse to meet the family, but J.M.'s and S.M.'s mother left and did not participate in the meeting. Since then, Accurate found another new nurse who has been oriented in the home. HFS's proposed plan of action is for DSCC to continue to monitor the efforts of the nursing agency to obtain additional nursing for J.M. and S.M. Although HFS has been unable to provide separate nurses to for J.M. and S.M., there is no indication that the lack of individual nurses for J.M. and S.M. poses a substantial threat that either J.M. or S.M. will be institutionalized.

HFS has approved C.F. to receive 84 hours of nursing per week. (*Id*.) The most recent report from DSCC indicates that during the week of January 8, 2107, C.F. received 40 hours of staffing (Monday through Friday from 8 a.m. to 6 p.m.), with an identified request for additional staffing to work the third (evening/night) shift. C.F.'s grandmother is a trained caregiver who assists with C.F.'s care. In September 2016, the nursing agency assigned to C.F.'s case (Preferred) found a night nurse, but that nurse did not want to remain on the assignment. Preferred is continuing to recruit a night nurse. Although a permanent night nurse has not yet

been located, there is no indication that the lack of a night nurse for C.F. poses a substantial threat that C.F. will be institutionalized.

Although plaintiffs may dispute the particulars about the precise level of care each child is receiving (which may change from week-to-week) and the varying reasons for particular shortfalls, this confirms what this Court has already ruled—that whether a child's current level of nursing imposes "a real threat of institutionalization" is a question that must be resolved based on evidence, not mere allegations. (Dkt. 36 at 15.) Plaintiffs have not made this showing individually or on a class-wide basis. To the contrary, reviews by DSCC show that approximately 40% of class member families have expressed no issues with their staffing, and many families use less than their full nursing allotment for a variety of reasons that have nothing to do with a threat of institutionalization. This is reflected both in the supplemental reports previously provided to class counsel, and in the summary of the current staffing for the twelve class members discussed in Exhibit A.

2. Plaintiffs Are Not Subject to Rate Discrimination.

Plaintiffs base their ADA/Rehabilitation Act claim on their assertion that the State provides a higher reimbursement rate through the Illinois Department of Children and Family Services (DCFS) for at least sixteen children who are or were wards of the State. (Dkt. 102-1 at 12, 15.) Based on this, plaintiffs assert it would be a reasonable modification for the Court to require HFS to reimburse all nursing agencies at the rates DCFS has provided for the sixteen children identified. (Id. at 13.) This argument is factually and legally wrong.

As to the facts, plaintiffs are wrong about the number of children who receive DCFS reimbursement rates and the level of those rates. They also disregard why DCFS offered those rates in the first place. For a limited period before 2006, DCFS entered into adoption subsidy

agreements that guaranteed certain reimbursement rates for the nursing services needed by the adopted children. (See Exhibit B, Declaration of Mark Huston ¶ 3.) DCFS offered these rates as an incentive for families to adopt children who were wards of the State. (*Id*. ¶ 4.) Plaintiffs cite a DCFS reimbursement rate as high as $84 (Dkt. 102-1 at 12), but DCFS never provided a rate above $53.51 (which DCFS agreed to provide to six adopted children: S.C., E.F., A.F., A.G., A.P., and T.J [though T.J. no longer receives services]). (*Id*. ¶ 7.) The rates that DCFS agreed to provide to six other adopted children (B.W., J.R., C.F., B.F., C.S., and A.S.) range from $32.11 per hour to $48.65 an hour. Plaintiffs list three children (A.NA., A.Y., and J.N.), but those initials do not match any children who have received the DCFS rates. Plaintiffs also list two children (J.P. and T.P.) who have moved out of the State and no longer receive the DCFS rates (*Id*.) DCFS has not offered different rates to adopting families since 2006. (*Id*. ¶ 8.)

As to the law, the Seventh Circuit confirmed in *Amundson ex. rel. Amundson v. Wisc. Dept. of Health Services*, 721 F.3d 871, 874-75 (7th Cir. 2013), that a state's decision to stop offering one group a higher rate (like DCFS has done here) may signal the end of discrimination *in favor* of one group without showing actionable discrimination against another group. The court rejected the plaintiffs' theory of discrimination based on a claim that a rate reduction threatened to leave plaintiffs with a suboptimal placement in group homes. *Id*. The court labeled such a request as one for an "absolute entitlement," and called it "untenable, unless the state is providing other groups of disabled persons with whatever care, in whatever location, their physicians most favor. . . ." *Id*. at 875. The plaintiffs in *Amundson* did not make that contention, *id*., and neither do the plaintiffs here. In any event, the fact that DCFS previously agreed to provide a different reimbursement rate to a limited number of children as part of their adoption

subsidy agreements does not show that the reimbursement rates provided to all other Medicaid and waiver recipients in Illinois poses a substantial risk of institutionalization.

Plaintiffs also argue that a court-ordered rate increase is a reasonable modification to the preliminary injunction (and would not amount to an impermissible "fundamental alteration") because the rate increase would be below the cost of hospitalization. (Dkt. 102-1 at 13.) But this begs the question. As noted, plaintiffs must first show that class members face a risk of hospitalization based on the level of in-home nursing care HFS is currently providing. Plaintiffs have not made this showing. Nor have plaintiffs shown that an increase in rates is a reasonable accommodation that would solve the nursing issues faced by particular families without causing HFS to fundamentally alter its programs and services. *Olmstead*, 527 U.S. at 604-07; *Radaszewski ex rel. Radaszewksi v. Maram*, 383 F.3d 599, 613-14 (7th Cir. 2004). The Court need not address the fundamental alteration defense because plaintiffs have not shown that current rates and staffing level impose a real threat of unjustified institutional isolation.

Conclusion

For each of these reasons, HFS respectfully requests the Court to deny plaintiffs' motions (Dkt. 100 and Dkt. 102-1) in light of HFS's commitment to the changes discussed in Exhibit A and its commitment to continue to utilize DSCC care coordinators to work with individual families and nursing agencies to address each family's particular nursing needs.

Dated: January 19, 2017

Defendant FELICIA F. NORWOOD, in her official capacity

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