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, individually and on behalf of a class,	
Plaintiffs,	No. 15-CV-10463
vs.	Judge: Charles P. Kocoras
FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	Magistrate: Michael T. Mason
Defendant.	

PLAINTIFFS' AND CLASS' REPLY TO
DEFENDANT'S RESPONSE TO
PLAINTIFFS' SECOND MOTION TO ENFORCE
AND/OR MOTION TO MODIFY
PRELIMINARY INJUNCTION ORDER

Plaintiffs and Class, by and through their attorneys, file this Reply to the Defendant's Response to Plaintiffs' Second Motion to Enforce and/or Modify the Preliminary Injunction Order.

This Court entered a preliminary injunction order (the "Order") on April 6, 2016, requiring Defendant take "immediate and affirmative steps…to arrange…nursing services…at the level approved." ECF No. 42 at 2. The Defendant's failure to achieve substantial compliance with the Order has forced this Court, Plaintiffs, and Class Members to wait far too long for relief. But by her Response, Defendant seeks this Court's indulgence for even more "time to determine if HFS's changes are improving the level of nursing before determining if any additional

remedies or modification are necessary or appropriate." *See* ECF No. 109 at 2. Defendant proposes that this Court and Plaintiffs wait until May 1, 2017 (more than a full year after the Order was entered) to find if HFS has achieved "any results." *See* ECF No. 109 at 4-6, Points 6, 8, 10 (no reporting deadline for results for remaining points.) Defendant's inability to demonstrate substantial compliance to date is particularly egregious in this case, as Defendant herself found these nursing services to be medically necessary for severely disabled children. Therefore, this Court should grant Plaintiffs' Second Motion to Enforce or Modify the Order.

I. Defendant Has Failed Repeatedly to Take Court-Ordered Actions.

The Defendant's January 19 filing does not fulfill her responsibility under the Order. Exhibit A to her Response does, finally, offer some "potential strategies" (as originally promised on May 6, 2016), but there is no evidence that any strategy has been implemented so as to achieve any results. See ECF No. 109-1 (Exhibit A to January 19 filing); *see also*, ECF No. 67 at 5 (May 6, 2016 report where Defendant references "potential strategies" that had not yet been undertaken.) Defendant acknowledges that any results from her latest round of potential strategies are left to the future. *See* ECF No. 109 at 4-6, Points 6, 8, 10. This filing is too little too late.

Consistently and repeatedly, Defendant has failed to comply with court-ordered actions. The Order required "*immediate* and affirmative steps" to improve nursing staffing and called for Defendant to report on her progress after one month. ECF No. 42 at 2 (emphasis added.) However, on May 6, 2016, the Defendant did not report a single affirmative step towards compliance or relief. *See* ECF No. 67 at 2-6. The Defendant's May 6, 2016 report stated that HFS "will be undertaking a comprehensive review of each case," referencing "potential strategies for addressing the delta between what has been approved and what is being staffed"

while committing to employ *none* of those strategies. *See* ECF No. 67 at 5. Furthermore, the May 6, 2016 report inaccurately reported staffing data for named Plaintiffs and Class Members. *See* ECF No. 67 at 6. When Defendant largely ignored Plaintiffs' inquiries regarding compliance, Plaintiffs filed the First Motion to Enforce the Order. *See* ECF No. 66.

On August 5, 2016, this Court granted in part the first Motion to Enforce, ordering four monthly reports that would include accurate staffing data and *steps undertaken* to arrange for nursing services. *See* ECF No. 79 at 8. Defendant provided two reports, each three weeks after their deadlines, and failed altogether to provide the remaining two Court-ordered reports. It was unclear from Defendant's reports what, if any, affirmative steps had been taken and whether any Plaintiff or Class Member benefited from such steps as the Order required. *See* Exhibit "A" (September 23, 2016 report); *See* Exhibit "B" (October 28, 2016 report.)

The Defendant's second and most recently filed a report, dated October 28, 2016, incorrectly and paradoxically asserted that the parents of O.B., J.M., and S.M. stated "they had no issues with current staffing." *See* Exhibit "B" at 5-6 (Defendant's October 28, 2016 report included an Exhibit B1 – Case by Case Review with details about individual children, including O.B., J.M., and J.M.; that exhibit is incorporated by reference, but not attached here.) As the parents deny making these statements, Class Counsel can only assume that Defendant intended to say that the parents did not want to remove any currently-assigned nurses from their cases.

In light of the lack of progress towards compliance with the Order, this Court asked the parties to develop and execute an action plan to address the on-going plight of Plaintiff and Class Members by December 13, 2016. Defendant did not provide any meaningful response to Plaintiffs' December 1, 2016 proposed action plan by that deadline. *See* ECF 100-2. Plaintiffs agreed to move the December 13, 2016 status hearing to January 5, 2017 to give Defendant more

time to respond. *See* ECF No. 99. Having received no meaningful response by January 4, 2017, Plaintiffs brought the instant motion. Defendant's repeated failure to undertake court-ordered actions demands further intervention from the Court.

II. Modification to Address Compliance is Consistent with the Seventh Circuit's Approach.

As the Seventh Circuit has noted in this case, "[t]he preliminary injunction should be understood simply as a first cut: as insisting that the state do something rather than nothing to provide in-home nursing care for these children. The adequacy of what it does can then be evaluated, perhaps leading to modification or even abrogation of the preliminary injunction." *O.B. v. Norwood*, 838 F.3d 837, 841–42 (7th Cir. 2016). Thus far, Defendant has only provided this Court and the Class with promises of future action and assertions of a precious few actions taken, without providing supporting documentation or any measurable results. It is clear that without the Court's intervention, Plaintiffs will continue to wait for any relief.

III. *Armstrong* Does Not Preclude a Reasonable, Financial Modification to the Defendant's Nursing Program.

This Court and Plaintiffs' counsel have given the Defendant time and deference to take affirmative steps that lead to increased staffing and after nine months, she has not made meaningful progress towards compliance. This Court has the authority under the Medicaid Act, the ADA, and Section 504 to order the Defendant to remedy the problem, including both non-economic and economic modifications.

Armstrong does not affect the Court's ability to afford relief in this case. This Court has already distinguished *Armstrong* from the instant case, noting that *Armstrong* concerned "different statutory provision, asserted by different plaintiffs, under a different theory. …. *Armstrong* was a plurality opinion, with only a minority of Justices joining in the portion on

which Norwood relies (Part IV)." *O.B. v. Norwood*, 170 F. Supp. 3d 1186, 1191, aff'd, 838 F.3d 837 (7th Cir. 2016). Thus, this Court held that *Armstrong* does not address or constrain its authority to order appropriate relief in the Medicaid claim that is at issue here, 42 U.S.C § 1396a(a)(43)(C). Moreover, under the ADA and Section 504, this Court's authority to order reasonable modifications (including modifications affecting payment rates) is unclouded by *Armstrong*.[1] *See* ECF No. 105 at 9-14 (further discussion of this Court's authority under the ADA and Section 504.) This Court does not need to determine the exact reimbursement rate. Rather, this Court can order Defendant to make reasonable, financial modifications to her home nursing program.

IV. Defendant Has Not Achieved Substantial Compliance for a Subset of Twelve Individual Class Members.

Defendant has not shown that any step taken or potential strategy considered to date has or will result in increased service levels. Instead, Defendant's January 19 filing reflects her inability to achieve approved staffing levels for a group of twelve children that Class Counsel has continually and repeatedly identified.

C.F.

HFS reports lower staffing levels for Named Plaintiff C.F. now than when this case was filed. *See* ECF No. 109 at 12 (HFS reported 40 hours per week of staffing as of January 19, 2017); ECF No. 6-4 at 3 ¶ 11 (Kristen Fisher reported 60 hours per week of staffing Nov. 6, 2015.) Defendant offers no plan to arrange for C.F.'s approved level of nursing services. Defendant also protests that C.F.'s lack of a night time nurse does not pose a risk of

[1]Although the Seventh Circuit commented on a Court's ability to set reimbursement rates, that opinion was reviewing the Plaintiffs' claims and Defendant's inaction only within the context of the Medicaid Act.

institutionalization, disregarding the risk that C.F.'s caregivers (his single mother who works fulltime and his now 68 year old grandmother) "often sleep in two hour shifts to cover all of his night time care. While one of us sleeps, the other one cares for C.F. We relieve each other every two hours or so that one of us can briefly rest." *See* ECF No. 6-4 at 3 ¶ 12. The caregiving responsibilities that current fall on the C.F.'s family are unsustainable, resulting in a serious risk of institutionalization due to caregiver fatigue or medical decline. *See* ECF No. 6-4 at 3 ¶ 14.

G.A.

Like C.F., Class Member G.A.'s nursing services have decreased, not increased, over the past two years. Class Member G.A. is approved for 105 hours per week of in-home nursing services. ECF No. 28-5 at 2. G.A.'s staffing issues were brought to the Defendant's attention on:

- January 21, 2015 in a letter from G.A.'s DSCC Care Coordinator to Defendant, ECF No. 28-5 at 2-3 (noting 48-60 hours per week of staffing);
- November 20, 2015 through the Complaint and Motion for Preliminary Injunction, ECF No. 1 at ¶ 90; ECF No. 6 at 4; ECF No. 6-14 (noting 65 hours per week of staffing);
- May 31, 2016 letter from Plaintiffs' Counsel to Defendant, ECF No. 65-3 at 3 (noting 36 hours per week of staffing); and
- August 23, 2016 letter from Plaintiffs' Counsel to Defendant, Exhibit "C" (noting 12 hours per week of staffing)

Defendant now reports that G.A. is staffed at 12 hours per week – over 24 hours per week *less* than her staffing levels when the Order was entered. Defendant's records show that G.A.'s "Mom has been actively seeking nurses. Able to locate some RNs, but shared that they cited the low rate of pay as the reason for not taking on case." Exhibit "D" at 2 (HFSD000061.)

J.M. and S.M.

Defendant appears to be counting hours when one nurse serves both siblings J.M. and S.M. as an hour that is "fully staffed," while also admitting that "HFS has been unable to provide separate nurses [to] for J.M. and S.M." *See* ECF No. 109 at 12. Michele McCullough explains how HFS's failure to provide full staffing affects her two children. Exhibit "E" at 2-3, ¶¶ 3-9.

When only day nurse is available to serve both children, only one child is able to attend school because one-on-one staffing is required for attendance. Exhibit "E" at 2, ¶¶ 3-6, 8. Each day that only one child can go to school, she and her husband must decide which child to send. *Id*. The other child stays home with her and/or her husband. *Id*. Although Defendant cites to 93% staffing the week of January 8, 2017, Michele McCullough reports that S.M. missed three school days the week of January 8, 2017, as the one available nurse accompanied J.M. to school. *Id*. at 2, ¶ 6. Michele McCullough stated that one child missed school for lacking of nursing at least one day a week for the past two months.

It is not clear that J.M. and S.M. have received any increase in staffing since this case was filed. Under the Defendant's current plan of action, it is unclear that they will. "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." ECF No. 109 at 12. This "plan of action" is little more than a wait and see approach, far short of immediate and affirmative steps.

Contrary to Defendant's assertion that "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", Michele McCullough has stated in November 2015 that, "[m]y husband and I are wearing out . . . . . [w]ithout adequate nursing services, I do not know how long we can maintain S.M. [and J.M.] at home and ensure she has the care she needs . . . . I want to do everything I can to keep S.M. and J.M. at home." *See* ECF No. 7-15 at 4, ¶ 15; *see also*, *See* ECF No. 7-16 at 4-5, ¶ 16. That strain has only increased, not decreased during the ensuing months of Defendant's noncompliance. "We are 60 and 69 years old. It's an incredible strain on us. … I worry that if we are too worn down anything happens to my health or my husband's health, the children would need to be hospitalized." Exhibit "E" at 3, ¶ 11.

O.B.

While Plaintiffs' Motion indicates significant staffing shortages over a three-month period of time, Defendant points the Court to one week of near-complete staffing in January 2017. ECF No. 109 at 11. Defendant overlooks O.B.'s eleven month delay in discharge and Julie Burt's repeated attestations that O.B.'s staffing is not receiving adequate staffing. *See* ECF No.7-12 at 3-4; ECF No. 45-2 at 2; ECF No. 105-2 at 2. As Defendant is well aware, O.B. requires hospitalization if he cannot receive adequate nursing services at home. ECF No. 7-8 at 2. Consistent with the Defendant's own finding that O.B. requires an institutional level of care, Julie Burt has repeatedly stated that inadequate home care places O.B. at a serious risk of institutionalization. *See* ECF No. 1 at ¶ 5; *see also* ECF No.7-12 at 3-4; ECF No. 45-2 at 2.

C.M., W.W., O.M., and I.Z.

According the Defendant's January 19 filing, these four Class Members are staffed at a mere 47%, 41%, 28%, and 27%, respectively. ECF No. 109-1 at 4-5. The Defendant's "plan of action" for each is to "continue to monitor" the recruiting efforts of nursing agencies. *Id*. As with Defendant's plan for J.M. and S.M., Class Counsel contends that these plans of action (or inaction) do not comply with the Court's Order.

V. Defendant's Action Plan is Insufficiently Detailed, Leaves Important Options for Staffing Unexplored, and Unreasonably Extends the Timeline for Potential Relief to a Full Year after the Entry of the Motion to Enforce

As discussed throughout this Reply, Defendant has not shown that the Plaintiffs or Class have seen meaningful benefits of any duration from affirmative steps she has taken under the Preliminary Injunction Order. Instead, Defendant directs the Court and Class Counsel to a proposed Action Plan that, while lengthy, is lacking in substance, specificity, and scope, failing to provide the immediate, affirmative relief required by the Order.

For many of the listed steps, Defendant asks this Court, Plaintiffs, and Class Members to wait until May 1, 2017 to learn whether HFS has achieved "any results." *See* ECF No. 109 at 5-6, Nos. 6, 8, 10. Because the Class has already waited eight months for relief, an additional four month wait to determine if any action item achieves a result is unreasonable. Notably, the remaining steps have no deadlines to determine whether HFS has achieved any results and are therefore even more concerning. *See* ECF No. 109 at 4-6, Nos. 1, 2, 3, 4, 5, 7, 9.

1. As to Points 1-3, while we are pleased to hear for the first time confirmation of this decision by the Department's, we are still unsure as to the critical specifics of compliance with the order.
    a. For example, as to Point 1, Defendant fails to indicate:
        i. when these five nursing agencies were added to the agency pool (in response to the Order or before April 6, 2016);
        ii. whether these new agencies have staff available to provide services to the Plaintiffs and Class; or
        iii. whether these agencies actually staffed any cases for the Plaintiffs or Class over and above staffing levels before the Order.

    Of additional concern is Defendant's accounting for number of agencies. In Defendant's January 2016 report, she stated that there are "54 nursing agencies" serving the Plaintiffs and Class. *See* ECF No. 45-5 at 7. If there are now only 27 nursing agencies to serve the Plaintiffs and Class in Illinois, then there has been a net loss of 27 nursing agencies. While adding agencies to the pool appears to be an inherent good, the issue before the Court is Defendant's compliance with the Order, which depends on steps that arrange for approved levels of nursing services. Answers to the questions above and resolution to the

Defendant's accounting discrepancies are necessary to evaluate past and on-going compliance with the Order.

2. As to Point Two, Class Counsel has requested, but not received, written confirmation of this policy change, including the text of the new policy and the communication sent to nursing agencies. To confirm whether the terms and timing of this purported step are mutually agreeable, Defendant should provide such information to Class Counsel. Similar to Point One, Defendant represents to Class Counsel and this Court that this step took place over two months ago. Yet, Defendant fails to identify how many (if any) nurses have joined the nursing pool as a result of this policy, and how Plaintiffs or Class Members have benefited from this step.
3. As to Point Three, Defendant did not notify Class Counsel of this purported step until she filed her Response brief. Likewise, Defendant has not shared any written confirmation of the policy change or the communications sent to nursing agencies. Additionally, Defendant has not provided information about how many nurses would be covered by the change or whether these nurses have been engaged by one of the 27 approved agencies. More importantly, Defendant has not reported what (if any) amount of staffing these nurses provided to the Plaintiffs or Class in the past two months.
4. As to Points Four through Six, Defendant offers the Plaintiffs and Court no definite or measurable information, which could be used to determine when Defendant initiated these potential strategies, what progress has been made, or what net benefit can be expected, if successfully implemented.
    a. Regarding Point Four, Defendant provides no detail as to what she means by her statement that she is "working with nursing agencies" to "encourage" out-of-state

nurses in neighboring states to become licensed in Illinois. Defendant does not explain how many agencies she is working with, what that "work" entails, whether any nurses have agreed to become licensed in Illinois, or how long that licensing process takes. An assessment whether or not this is a meaningful, affirmative step depends on these details. Moreover, compliance hinges on the steps that can attract and retain nurses to serve Plaintiffs and Class. If Defendant has identified some form of "encouragement" that attracts nurses from neighboring states, the same encouragement could perhaps be used to attract nurses licensed in Illinois to serve Class Members.

5. As to Point Five, Defendant does not reveal:
    a. which agency was enrolled;
    b. whether more than one agency may potentially benefit from this clarification; or
    c. whether the one new agency enrolled is providing or could provide staffing to Plaintiffs or Class Members; and
    d. when this new agency can begin providing services (if it is not currently doing so.)
6. As to Point Six, Defendant provides no information on the timing of their efforts with the Illinois Department of Public Health (IDPH) to address delays in their approval process, how many agencies have expressed interest in or capacity to expand geographical services, how many nursing agencies' requests have been approved, nor anything about the process or timeframe for her discussions with IDPH. As with many points listed, Defendant offers no indication or supporting evidence that demonstrates Plaintiffs or Class Members have benefitted or will benefit.

7. As to Point Seven, Defendant's offer to educate agencies about trainings is well within their routine course of business and she offers no indication that this is a new, affirmative step designed to benefit Plaintiffs and Class Members. Re-educating agencies about the need for training appears to lack substance, in comparison with actions the Defendant might have undertaken, such as providing funds for nurses to attend trainings or funding the provision of trainings if insufficient existing trainings are available in any geographic area. Otherwise, the cost of training is an additional expense the nursing agencies serving Plaintiffs and Class must absorb.
8. As to Point Eight, while Class Counsel are grateful to see the survey now, despite Defendant's assertions on October 28, 2016 that the survey was being created then, waiting until May 2017 to obtain another set of unimplemented, potential strategies is deeply concerning. We also note that the survey document addresses only non-economic options and does not allow nursing agencies to opine on economic options (including, but certainly not limited to, reimbursement rates) that would lead to increased staffing.
9. As to Point Nine, Defendant has not disclosed the process or criteria for Plaintiffs or Class Members to pursue the rate exceptions. Class Counsel are aware that this process exists from discussions with Class Members and review of discovery documents that reference this process. Without either revealing or developing a standardized process to obtain a higher rate in rule, written notices, or on her website, Point Nine can hardly be considered an affirmative step responsive to the Order.
10. As to Point Ten, this point is crucial to our current posture, as the issue of reimbursement rates has been hotly contested throughout the case. Defendant alludes to an unacceptable level of secrecy when discussing her confidential plan to explore the rate issue with

nursing agencies; Plaintiffs have no understanding of how Defendant will approach this issue. Certainly, Plaintiffs have concerns if this investigation is to be conducted by Defendant alone and without adequate transparency to Plaintiffs and Class Counsel.

Finally, Class Counsel continues to be troubled by Defendant's presentation of DSCC care coordination as an affirmative step, designed to comply with this Court's Order. Defendant states that she has "arranged for DSCC to employee care coordinators to work with the families of class members to coordinate nursing care" ECF No. 109 at 6. However, this is not an "affirmative step" to increase staffing with the context of the Order. As noted in the Complaint, it was the Defendant's policy and practice to employ DSCC care coordinators to work with families prior to the instant litigation. However, families repeatedly noted that "DSCC care coordinators do not seem to be able to do much to help staff … ." *See* ECF No. 6-4 at 2, ¶ 10; *see also*, ECF No. 1 at ¶¶ 80-93 (Complaint); *see also*, ECF No. 6-2 at 2-3; ECF No. 28-5 at 2-3 (letters from DSCC care coordinators to HFS regarding inadequate staffing.)

The inability of DSCC care coordinators to arrange for approved levels of staffing is one of the systemic issues alleged in the Complaint; it is not an affirmative step towards compliance. *See e.g.*, ECF No. 1 at ¶ 5 ("O.B.'s parents have spoken frequently with their DSCC care coordinator about this issue. On April 7, 2015, DSCC sent a letter to the Defendant regarding O.B. The April 7, 2015 letter stated that no in-home shift nursing services have been provided to O.B. as O.B. remains hospitalized. The April 7, 2015 letter further stated that, 'The nursing agency has not been able to fully staff the case, so O.[B.] is still residing at Children's Hospital of Illinois (CHOI) in Peoria. O.[B.] was scheduled to be discharged to home on 3/23/2015. Staffing from the nursing agency was not enough that it was felt to be safe for O.[B.] to go

home.' "); *see also*, ECF No. 1 at ¶¶ 7(b), 80-93. While DSCC care coordinators may have the best of intentions to work with families and improve staffing levels, DSCC is the Defendant's agent; DSCC can only execute the Defendant's policies and practice. Defendant's failure to comply with this Court's Order further limits DSCC's ability to assist Plaintiff and Class Members.

VI. Conclusion.

For the foregoing reasons, Plaintiffs respectfully request that this Court enter the following relief:

A. Order Defendant Felicia F. Norwood to appear before this Court to present evidence of compliance with the Preliminary Injunction Order within sixty (60) days or Defendant's In-Home Nursing Services Program will be placed into receivership.

B. Award such other relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ Robert H. Farley, Jr.
One of the Attorneys for
the Plaintiffs

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CERTIFICATE OF SERVICE

I, Robert H. Farley, Jr., one of the Attorneys for the Plaintiffs, deposes and states that he caused the foregoing Plaintiffs' Second Motion to Enforce and/or Modify Preliminary Injunction Order to be served by electronically filing said document with the Clerk of the Court using the CM/ECF system, this 4th day of January, 2017.

/s/ Robert H. Farley, Jr.
One of the Attorneys for
the Plaintiffs