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

O.B., *et. al*., individually, and on behalf of a class,	)	
	)	No. 15-CV-10463
Plaintiffs,	)	
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.	)	

DEFENDANT NORWOOD'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

NOW COMES Defendant, FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, by and through her attorney, LISA MADIGAN, Attorney General of Illinois, and submits her Memorandum of Law in Support of her Motion to Dismiss the Complaint, stating as follows:

I. STATEMENT OF FACTS.

Plaintiffs, O.B., C.F., J.M., and S.M., are Medicaid-eligible children who allege they have various disabling medical conditions. Complaint at ¶¶ 5-10; 21-24; 97-150.[1] All of the named Plaintiffs were approved to participate in the Illinois Department of Healthcare and Family Services' ("HFS") Medically Fragile Technology Dependent ("MFTD") Medicaid Waiver. Complaint at ¶ 99; 113; 125, 139. Each Plaintiff has been approved for Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") in-home shift nursing services. Complaint at ¶¶ 21-24; 99; 113; 125; 139. State law requires that children seeking Medicaid-

[1] On or about January 8, 2016, Sheila Scaro, mother of Plaintiffs, Sa.S. and Sh.S., informed the Division of Specialized Care for Children that the family has permanently relocated to Colorado. The case has been cancelled. Defendant has moved to dismiss these Plaintiffs for want of a case or controversy.

funded in-home nursing services request prior authorization for such services from HFS and demonstrate the medical necessity for the services. Complaint at ¶¶ 74-75. When HFS grants prior approval for in-home shift nursing services it issues a written notice to the participant that either grants prior approval of a specific number of nursing hours per week, or grants approval of a specific monthly budget to enable the family to pay for nursing services. Complaint at ¶ 76.

Each named Plaintiff claims that HFS approved for him or her either a monthly budget for in-home shift nursing services in a certain amount, or approved a specific number of nursing hours per week. Complaint at ¶¶ 21-24; 99; 113; 125; 139. Each named Plaintiff alleges that he or she is unable to staff the full nursing hours that HFS approved. Complaint at ¶¶ 102; 115; 127; 141. All Plaintiffs allege that their inability to obtain nursing services is due to Defendant's systemic failure to comply with the Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") component of the federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(43); 1396d(r), the Defendant's alleged failure to provide in-home shift nursing services with reasonable promptness under 42 U.S.C. 1396a(a)(8), and Defendant's purported violation of the ADA and Rehabilitation Act, 42 U.S.C. § 12132; 29 U.S.C. § 794.

All Plaintiffs seek declaratory and injunctive relief. Complaint at p. 45. In particular, Plaintiffs seek preliminary and permanent injunctive relief "requiring Defendant to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment (in-home shift nursing services) to the Plaintiffs and Class." Complaint at p. 45, ¶ 5.

II. ARGUMENT.

A. PLAINTFFS, Sa.S. AND Sh.S., BY AND THROUGH THEIR MOTHER, SHEILA SCARO, MUST BE DISMISSED PURSUANT TO Fed. R. Civ. P. 12(b)(1) BECAUSE THEY NO LONGER HAVE ANY JUSTICIABLE CLAIMS.

Article III of the United States Constitution limits the judicial power of the United States to "Cases" and "Controversies." U.S. Const. art. III, § 2. This is a jurisdictional requirement that prevents the federal court from issuing advisory opinions on hypothetical disputes. *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485, 488 (7th Cir. 2004). As a result of the Constitution's limitation, it is well settled that a federal court may not give opinions on moot questions or abstract propositions, or declare principles or rules of law which cannot affect the matter in issue in the case before it. *Church of Scientology v. U.S.*, 506 U.S. 9, 12 (1992) (citing *Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 133 (1895)).

A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Stotts v. Community Unit Sch. Dist. No. 1*, 230 F.3d 989, 990 (7th Cir. 2000). When a case no longer involves an actual, ongoing controversy, the case is moot and must be dismissed for lack of jurisdiction. *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003). When there is no longer any behavior for a federal court to enjoin, the case is moot because the court cannot affect the asserted rights of the parties. *Worldwide Street Preachers' Fellowship v. Peterson*, 388 F.3d 555, 558 (7th Cir. 2004). The fact that a party at one point was entitled to pursue an action makes no difference because, in order to satisfy Article III's jurisdictional requirements, the requisite personal interest that must exist at the commencement of the litigation must continue throughout its existence. *St. John's United Church of Christ*, 502 F.3d 616, 626 (7th Cir. 2007). Once a party lacks a stake in the outcome of a suit, her claim must be dismissed as moot. *Bertrand v.*

Maram, 495 F.3d 452, 456 (7th Cir. 2007). In analyzing whether a claim is moot, the Court should consider any changes in the relationship of the parties that occurred since the date the litigation commenced, November 20, 2015. *Wisconsin Right to Life*, 366 F.3d at 491.

On or about January 8, 2016, after the filing of this Complaint, Sheila Scaro, mother of Plaintiffs, Sa.S. and Sh.S, informed the Division of Specialized Care for Children that the family, including Sa.S. and Sh.S., has permanently relocated to Colorado and currently resides in Colorado. All public assistance benefits that the family received from the State of Illinois have been cancelled effective February, 2016. Defendant's Exhibit A.[2] The relationship between the parties has changed and the claims of Sa.S and Sh.S., by and through their mother, Sheila Scaro, are moot and must be dismissed.

B. COUNTS I AND II OF THE COMPLAINT MUST BE DISMISSED WITH PREJUDICE BECAUSE NO PROVISION OF THE MEDICAID ACT ACCORDS PLAINTIFFS, AS BENEFICIARIES, A PRIVATE RIGHT OF ACTION TO CHALLENGE DEFENDANT'S MEDICAID REIMBURSEMENT RATES IN FEDERAL COURT.

1. The Statutory Framework.

Title XIX of the Social Security Act, commonly known as the Medicaid Act, establishes a program in which the federal government reimburses states for a portion of the costs incurred by those states in providing certain medical services to needy individuals. 42 U.S.C. § 1396 *et seq*. (Westlaw 2016); *Schweiker v. Gray Panthers*, 453 U.S. 34, 36 (1981); *Harris v. McRae*, 448 U.S. 297, 301 (1980). Medicaid is Spending Clause legislation; Congress provides federal funds to reimburse some of the states' costs in exchange for the states' agreement to spend those funds in accordance with congressionally imposed conditions. *Armstrong v. Exceptional Child Center*, __ U.S. __, 135 S. Ct. 1378, 1382 (2015). Illinois participates in the Medicaid program and the

[2] Defendant redacted certain client-identifying information from the publicly-filed document. An unredacted copy of Defendant's Exhibit A is available for the Court's *in camera* review.

Illinois Department of Healthcare and Family Services ("HFS") is Illinois' single state Medicaid agency pursuant to 42 U.S.C. § 1396a(a)(5). In order to qualify for federal financial participation, HFS was required to adopt and obtain federal approval of a Title XIX State Medicaid plan. 42 U.S.C. § 1396a(a) (Westlaw 2016).

a. EPSDT.

Title XIX requires a state participating in the Medicaid program, as a condition of its participation, to include early and periodic screening, diagnostic, and treatment services ("EPSDT") as part of its State Medicaid plan. 42 U.S.C. § 1396a(a)(43) (Westlaw 2016). EPSDT service is required by 42 U.S.C. § 1396a(a)(10)(A) (Westlaw 2016). EPSDT is Congress' requirement that the state's Medicaid program make certain health services available to children. *Id.*; *Collins v. Hamilton*, 349 F.3d 371, 374 (7th Cir. 2003). At Section 1396a(a)(43)(A), the Medicaid Act requires that the State Medicaid plan provide for "informing all persons in the State who are under the age of 21 . . . of the availability of . . . [EPSDT] services . . ." 42 U.S.C. § 1396a(a)(43)(A) (Westlaw 2016). Section 1396a(a)(43) also states, in pertinent part, that with respect to EPSDT the single state Medicaid agency shall:

> (B) provid[e] or arrang[e] for the provision of such screening services in all cases where they are requested,
>
> (C) arrang[e] for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services . . .

42 U.S.C. § 1396a(a)(43)(B), (C) (Westlaw 2016). 42 U.S.C. § 1396a(a)(43)(D) obligates the Medicaid agency to report to the federal Secretary of the U.S. Department of Health and Human Services ("HHS") certain information respecting the EPSDT services provided during each fiscal year, including the number of children receiving child health screening services, the number of

children referred for corrective treatment and the state's results in meeting the participation results set for it by HHS. 42 U.S.C. § 1396a(a)(43)(D)(i), (ii), (iv) (Westlaw 2016).

The definitions of certain terms used in the Medicaid Act are collected at 42 U.S.C. § 1396d (Westlaw 2016). At Section 1396d(r), the Medicaid Act defines EPSDT services as "the following items and services:" 1) screening services provided according to certain periodicity schedules and which, at a minimum, include certain testing, examinations, immunizations and education; 2) vision services provided according to certain periodicity schedules and which, at a minimum, include diagnoses and treatment for vision defects including eyeglasses; 3) dental services provided according to certain periodicity schedules and which, at a minimum, include relief of pain, restoration of teeth and maintenance of dental health; and 4) hearing services provided according to certain periodicity schedules and which, at a minimum, included diagnoses and treatment for hearing defects, including hearing aids. 42 U.S.C. § 1396d(r)(1)-(4) (Westlaw 2016).

The Medicaid Act also defines the term EPSDT to include:

> (5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State [Medicaid] plan.

42 U.S.C. § 1396d(r)(5) (Westlaw 2016). Under EPSDT, a Medicaid-eligible child shall also receive services and treatment covered through 42 U.S.C. § 1396d(a) to correct or ease the conditions discovered through the periodic screenings. *Id.* The Medicaid Act directs HHS to set annual participation goals for each state in order to measure how many Medicaid-eligible children are participating in EPSDT services. *Id.*

The statutes cited above do not create a program. These Acts of Congress simply require the states to ensure that certain services are made available to Medicaid-eligible children. *Collins v. Hamilton*, 349 F.3d 371, 374 (7th Cir. 2003) (EPSDT is not a program; it is a service). Count I of the Complaint, in the guise of seeking to remediate Defendant's alleged failure to comply with 42 U.S.C. § 1396d(r)(5), is actually seeking higher Medicaid reimbursement rates for in-home nursing service providers and expanded access to Medicaid providers for participants who are alleged to have difficulty staffing the nursing hours Defendant authorizes for them. Complaint at ¶¶ 13-14 and *passim*. The portions of the Medicaid Act cited above do not contain any mention of reimbursement rates to providers of EPSDT services anywhere in those texts. 42 U.S.C. §§ 1396a(a)(43); d(r). Similarly, Count II of the Complaint, in the guise of seeking to remediate Defendant's alleged failure to comply with 42 U.S.C. § 1396a(a)(8), is actually seeking higher Medicaid reimbursement rates for in-home service providers and expanded access to Medicaid providers for participants who are alleged to have difficulty staffing the nursing hours Defendant authorizes for them. Complaint at ¶¶ 13-14 and *passim*. 42 U.S.C. § 1396a(a)(8) states that the State Medicaid plan shall:

> provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.

42 U.S.C. § 1396a(a)(8) (Westlaw 2016). Under the plain language of this statute, the Medicaid agency must afford an opportunity to apply for medical assistance to anyone who wishes to do so, and that medical assistance will be furnished with reasonable promptness to all eligible individuals. Like the EPSDT statutes referenced above, Section 1396a(a)(8) does not contain any mention of reimbursement rates to providers of EPSDT services anywhere in the text. 42 U.S.C. § 1396a(a)(8) (Westlaw 2016). *See Bruggeman v. Blagojevich*, 324 F.3d 906, 910-11 (7th

Cir. 2003); *Bertrand v. Maram*, 495 F.3d 452, 456-58 (7th Cir. 2007) (it is best to proceed as in *Bruggeman*: assume that Section 1396a(a)(8) creates an entitlement and leave its resolution for future litigation). Plaintiffs invoked the wrong Acts of Congress to attempt to remediate the Defendant's alleged failures to pay adequate Medicaid reimbursement rates to attract nurses to fully staff their cases. For that reason alone, Counts I and II of the Complaint fail to state claims for relief.

b. 42 U.S.C. § 1396a(a)(30)(A).

Defendant's obligations respecting reimbursement rates to Medicaid providers, together with its obligations respecting participant access to providers of covered services, are set forth at 42 U.S.C. § 1396a(a)(30)(A) (Westlaw 2016). The statute provides in pertinent part that HFS' State Medicaid plan shall:

> *provide such methods and procedures relating to* the utilization of, and *the payment for, care and services available under the plan* . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area;

42 U.S.C. § 1396a(a)(30)(A) (emphasis added). This statute has been described as a "judgment-laden standard" that is "judicially unadministrable." *Armstrong. v. Exceptional Child Center*, __ U.S. __, 135 S. Ct. 1378, 1385 (2015). *Armstrong* could not imagine a statute with a mandate broader and less specific than Section 1396a(a)(30)(A). *Armstrong*, *Id.* Under the plain language of Section 1396a(a)(30)(A), Defendant's obligations respecting the development of Medicaid provider reimbursement rates apply to all "care and services available under the [Title XIX Medicaid] plan." This obviously includes EPSDT services. Since the Complaint, in its entirety, is predicated on Defendant's purported shortcomings respecting Medicaid

reimbursement rates and participant access to Medicaid providers, the Complaint should be dismissed in its entirety for Plaintiffs' failure to invoke the statute that governs Defendant's alleged obligations respecting these subjects.

C. LEAVE TO AMEND TO PERMIT PLAINTIFFS TO INCLUDE CLAIMS PURSUANT TO 42 U.S.C. § 1396a(a)(30)(A) MUST BE DENIED BECAUSE *ARMSTRONG v. EXCEPTIONAL CHILD CENTER*, __ U.S. __, 135 S. Ct. 1378 (2015) FORECLOSES A SUIT IN THE FEDERAL COURT TO ENFORCE SUCH CLAIMS UNDER ANY THEORY OF RECOVERY.

Leave to amend a Complaint is properly denied where such an amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Brunt v. Service Employees International Union*, 284 F.3d 715, 720-21 (7th Cir. 2002); *Multiut Corp. v. Greenberg Traurig*, 2010 WL 5018538 * 2 (N.D. Ill. December 2, 2010) (leave to amend will be denied where a proposed amendment would not state a claim pursuant to Fed. R. Civ. P. 12(b)(6)). Under these authorities, the Court should not allow Plaintiffs to amend the Complaint to include claims pursuant to 42 U.S.C. § 1396a(a)(30)(A).

The Supreme Court's ruling in *Armstrong v. Exceptional Child Center*, __ U.S. __, 135 S. Ct. 1378 (2015) completely forecloses Plaintiffs from pursuing any claims that arise out of 42 U.S.C. § 1396a(a)(30)(A). In *Armstrong*, providers of residential habilitation services to individuals covered by Idaho's Medicaid plan sued two state officials in federal district court claiming that Idaho violated 42 U.S.C. § 1396a(a)(30)(A) by reimbursing them at rates lower than what the Medicaid Act permits. *Armstrong*, 135 S. Ct. at 1382. The providers sought injunctive relief to increase the Medicaid rates. *Armstrong*, *Id.* The lower court awarded summary judgment to the providers, finding that they had an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement of state legislation citing

Independent Living Center v. Shewry, 543 F.3d 1050, 1065 (9th Cir. 2008). *Armstrong*, *Id*. at 1383. The Supreme Court reversed. *Id*. at 1388.

1. The Supremacy Clause Does Not Confer A Private Right Of Action To Enforce 42 U.S.C. § 1396a(a)(30)(A).

Armstrong held, first, that the Supremacy Clause creates a rule of decision and certainly does not create a cause of action. *Armstrong*, *Id*. at 1383. The Supremacy Clause merely instructs courts what to do when state and federal law clash. *Id*. *Armstrong* found that it would be curious indeed to construe the clause that makes federal law supreme in a manner that *limits* the authority of federal actors to enforce federal law by permitting private actors to enforce Acts of Congress. *Id*. at 1383-84 (emphasis in original).

2. Plaintiffs May Not Invoke *Ex Parte Young* To Challenge Medicaid Reimbursement Rates.

Armstrong held, second, that the federal court's general equity power does not permit private enforcement of a federal statute when Congress itself has excluded private enforcement. *Id*. at 1385-87. After *Armstrong*, the Plaintiffs could not invoke *Ex parte Young*, 209 U.S. 123 (1908) to challenge Defendant's Medicaid reimbursement rates and access to Medicaid providers. Three factors led to this conclusion. One, in rather sweeping terms, the Court cited with approval the canon of statutory construction known as "express mention and implied exclusion." *Id*. at 1385. The remedy for the state's "breach" of the Spending Clause contract is federal HHS' withholding of the Medicaid funds pursuant to 42 U.S.C. § 1396c. *Id*. (quotation marks in original). Under the "express mention and implied exclusion" canon, the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude all others. *Id*. (citing *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

Two, *Armstrong* allowed that the provision for HHS' withholding of federal financial participation might not, *by itself*, preclude the availability of equitable relief. *Armstrong*, *Id*. at 1385. (emphasis in original). It will preclude equitable relief when the relief sought is judicially unadminstrable. *Id*. The concurring opinion states much more bluntly that the history of ratemaking suggests that administrative agencies are better suited to the task than judges. *Armstrong*, *Id*. at 1388 (Breyer, J. concurring). The concurring opinion noted that if the Court were to find Section 1396a(a)(30)(A) privately enforceable, it could set a precedent for rates to be set by federal judges in other actions outside the ordinary channel of federal judicial review of agency decision-making. *Id*. at 1389.

Three, the *Armstrong* plaintiffs have adequate remedies at law. The majority directed the plaintiffs to pursue relief before the federal agency in the first instance. *Armstrong*, *Id*. at 1387. The concurring opinion noted several remedies that the plaintiffs could pursue before HHS. *Id*. at 1389-1390 (Breyer, J. concurring).

3. *Armstrong* Forecloses An Action to Privately Enforce 42 U.S.C. § 1396a(a)(30)(A) Predicated On Section 1983.

The *Armstrong* majority expressly found that Congress excluded private enforcement of 42 U.S.C. § 1396a(a)(30)(A). *Armstrong*, 135 S. Ct. at 1385. The majority stated in a footnote that the providers did not assert their claims pursuant to 42 U.S.C. § 1983 since "our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* [*v. Virginia Hospital Assocation*, 496 U.S. 498 (1990)] exemplified" (citing *Gonzaga University v. Doe*, 536 U.S. 273 (2002)). *Armstrong*, *Id*. at 1396, footnote. The issue is not whether the Seventh Circuit's interpretation of Section 1396a(a)(30)(A) set forth in *Methodist Hospitals Inc. v. Sullivan*, 91 F.3d 1026, 1030 (7th Cir. 1996) is valid. *Armstrong* did not grant *certiorari* to review the merits of the providers' statutory claim. *Armstrong*, 135 S. Ct. at 1383. *Armstrong*

granted *certiorari* to determine whether the Section 1396a(a)(30)(A) could be enforced in federal court. *Armstrong*, *Id.* For all the reasons set forth in Argument C(1) through (2) of this Memorandum, even if Plaintiffs invoked 42 U.S.C. § 1983 to enforce Section 1396a(a)(30)(A), such a claim is no longer cognizable in the federal court after *Armstrong*.

4. The Court Cannot Make A Substantive Ruling Or Craft A Remedy That *Armstrong* Forecloses, Even If The Statutes Plaintiffs Do Invoke Create Privately Enforceable Rights.

Even if the statutes on which Plaintiffs predicate their claims create privately enforceable rights (*see e.g., Bontrager v. Indiana Family and Social Services Administration*, 697 F.3d 604, 606-07 (7th Cir. 2012); *Miller ex rel. Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir. 1993)), the Court, as part of that private enforcement, cannot issue any substantive rulings or craft any remedy otherwise forbidden by *Armstrong*. Given the "sheer complexity" of the issue of access to Medicaid providers (of which rate-setting is one aspect), given the federal judiciary's unsuitability for the task of rate-setting in any context, and given the Supreme Court's hostility to *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), the Court should not do an end-run around *Armstrong* by issuing orders on any of the subjects covered by 42 U.S.C. § 1396a(a)(30)(A) in the guise of nominally enforcing statutes that have been held to create privately enforceable rights. *Armstrong*, *Id.* at 1385, 1388, 1396, footnote.

5. Counts III And IV Of The Complaint Fail To State Claims For Relief Under The ADA Or The Rehabilitation Act.

The Seventh Circuit recognizes three causes of action under the ADA and Rehabilitation Act. Discrimination under both Acts may be established by evidence that: 1) defendant intentionally acted on the basis of disability; 2) refused to provide a reasonable modification; or 3) a defendant's facially neutral policy disproportionately impacts disabled people. *Washington v. Indiana High School Athletic Association*, 181 F.3d 840, 846-48 (1999); *Illinois League of*

Advocates v. Illinois Department of Human Services, 60 F. Supp. 3d 856, 881-883 (N.D. Ill. 2014) *affirmed* 803 F.3d 872 (7th Cir. 2015). The allegations are inadequate to state a claim for disparate treatment because there are no facts setting forth direct or circumstantial evidence that an unknown and unidentified HFS policy or policies have been motivated by Defendant's desire to discriminate against disabled children. Similarly, Plaintiffs do not allege that any facially neutral HFS policy unjustifiably falls more heavily on a protected group than on others. *See Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283 (7th Cir. 1996).

To the extent Plaintiffs predicate their ADA and Rehabilitation Act claims on Defendant's alleged violation of the integration mandates (Complaint at ¶¶ 184-189; 193-196), their Complaint is inadequate under Rule 12(b)(6). The claims asserted by Plaintiffs C.F., J.M. and S.M. are insufficient as a matter of law under *Amundson ex rel. Amundson v. Wisconsin Department of Health Services*, 721 F.3d 871 (7th Cir. 2013). In *Amundson*, Wisconsin reduced rates in its Medicaid program that funded group homes for disabled persons such that the providers of these services were paid less than before. *Amundson*, 721 F.3d at 872-74. No plaintiff alleged that he or she had been required to move from a group home to institutional care because of the rate reduction. *Id*. at 873-84. *Amundson* holds that there is no legal injury for ADA and Rehabilitation Act purposes when the Defendant's provision of fewer services does not force an individual into a less integrated setting. *Id*. at 874. *Amundson* was followed in *Maertz v. Minott*, 2015 WL 3613712 (S.D. Ind. June 9, 2015) and *Beckem v. Minott*, 2015 WL 3613714 (S.D. Ind. June 9, 2015). The court described the Seventh Circuit's *Amundson* ripeness analysis as "categorical." *Maertz*, *Id*. at * 13; *Beckem*, *Id*. at * 12. In both cases, the court stated that the "integration mandate is not implicated by a reduction in services to the disabled unless

the individuals are institutionalized as a result of the reduction." *Maertz*, *Id*. at * 14; *Beckem*, *Id*. at * 13.

Amundson requires dismissal of the ADA and Rehabilitation Act claims advanced by C.F., J.M. and S.M. in Counts III and IV. First, there are no allegations that Defendant made any changes in any policies that affected the services these Plaintiffs were receiving. Complaint a ¶ 14 andt *passim*. Second, and more importantly, there has been no change in the setting in which they receive their in-home private duty services. Complaint, *Id*. Under *Amundson*, since the setting in which they receive their nursing services, their own homes, has not changed, they have no claim under the integration mandates regardless of the purported inconvenience to family members.

Plaintiff O.B. does not state an integration mandate claim under *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003) or *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004). In *Bruggeman*, the Seventh Circuit found that the integration mandate allows disabled persons "care in the least restrictive possible environment" and reasoned that a residential institution might be more integrated than living at home. *Bruggeman*, 324 F.3d at 911-12. The Seventh Circuit did not reach the issue whether defendants violated the integration mandate by failing to offer an alternative to plaintiff's current living arrangement. *Id*. at 912. In *Radaszewski*, plaintiff's claim was allowed to proceed because plaintiff could potentially prove that the services sought were only available to adults in an institutional setting. *Radaszewski*, 383 F.3d at 607-615. Unlike *Bruggeman* and *Radaszewski*, Defendant has neither refused an alternative to the current setting, nor made shift nursing services available only in institutional settings, and the Complaint so admits. Complaint at ¶¶ 5-6. O.B. fails to state a claim for relief.

Lastly, if O.B., C.F., J.M. and S.M. invoked the ADA and Rehabilitation Act in order to obtain relief that is encompassed by 42 U.S.C. § 1396a(a)(30)(A), such relief has been foreclosed by *Armstrong* for all the reasons set forth in Argument (C)(1) through (4) above.

III. CONCLUSION.

WHEREFORE, for the foregoing reason, Defendant respectfully requests that Plaintiffs' Complaint be DISMISSED without leave to amend.

Respectfully submitted,

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