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.	)	

PLAINTIFFS' MEMORANDUM OPPOSING DEFENDANT NORWOOD'S MOTION TO DISMISS THE COMPLAINT

The Plaintiffs are medically fragile children who depend on Medicaid for their health care. The children's treating providers and the Defendant have determined that they need in-home nursing services to treat their conditions. The Plaintiffs filed the Complaint because they are not receiving the in-home nursing services they need. The impact on the children and their families is severe and deep, with one plaintiff stuck in a hospital and the remaining plaintiffs obtaining nursing care from parents who are physically, emotionally, and financially exhausted to the point where the children risk being forced into institutions to get the care they need.

The Defendant has filed a Motion to Dismiss the Complaint arguing, in the main, that the Plaintiffs' legal claims fail. *See* ECF No. 22, Defendant Norwood's Memorandum of Law In Support of Motion to Dismiss the Compl., (Def. Mem.).[1] As discussed below, the Court should deny the Motion.

[1] The Defendant seeks dismissal of Plaintiffs Sa.S. and Sh.S. on the ground that their claims have become moot because they left Illinois. ECF No. 22, Def.Mem. at 3-4. Plaintiffs agree that Sa.S's.and Sh.S.'s claims are moot.

I. The Plaintiffs have a Private Right of Action to Enforce the Medicaid provisions set forth in Counts I and II.

Plaintiffs' Complaint rests upon provisions of the Medicaid Act that are enforceable by them pursuant to 42 U.S.C. § 1983. The Supreme Court has "traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). First, Congress must intend the provision in question to benefit the plaintiff; second, the right contained in the provision must not be so "vague and amorphous" that its enforcement would strain judicial competence; third, the statute must unambiguously impose a binding obligation on the state. *Id.* at 340-41 (citations omitted); *see also Gonzaga Univ. v. Doe*, 536 U.S. 2743, 284 (2002) (clarifying that, under first prong, Congress must use unambiguous "rights-creating" language). Courts must ascertain whether "each separate claim" satisfies the test. *Blessing*, 520 U.S. at 342.

In the case before this Court, Count I alleges that the Defendant has violated EPSDT provisions of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B), and 1396a(a)(43)(C). The Seventh Circuit and Illinois federal district courts have specifically held these provisions create federal rights under § 1983 that Medicaid beneficiaries can enforce. *See Bontrager v. Ind. Fam. & Soc. Serv. Admin*., 697 F.3d 604, 607 (7th Cir.2012) (concerning § 1396a(a)(10)(A)); *Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir. 1993) (concerning §§ 1396a(a)(10)(A), 1396d(a)(4)(B));[2] *N.B. v. Hamos*, No 11 C 06866, 2013 WL 6354152, at *3-6 (N.D. Ill. Dec. 5, 2013) (regarding §§ 1396a(a)(43) and(r)); *Memisovski v. Maram*, No. 92 C 1982, 2004 WL 1878332, at *10-11 (N.D. Ill. 2004) (concerning § 1396a(a)(10)(A),

[2] Judge Ripple dissented, citing *Suter v. Artist M*., 503 U.S. 347 (1992). A year after *Hunter* was decided, Congress amended the Social Security Act (of which Medicaid is a part) to reestablish the private right of action as it existed prior to *Suter*. *See* 42 U.S.C. §§ 1320a-2 and 1320a-10.

1396a(a)(43), d(r)), *earlier ruling sub nom. Memisovski v. Patla*, 2001 WL 1249615 (N.D. Ill., Oct. 17, 2001). Indeed, every circuit court to have decided the question has concluded that Medicaid beneficiaries can enforce the EPSDT provisions in federal court. *See*, *e.g.*, *John B. v. Goetz*, 626 F.3d 356 (6th Cir. 2010) (regarding § 1396a(a)(43)(A)); *Watson v. Weeks*, 436 F.3d 1152, 1159-62 (9th Cir. 2006) (same); *S.D. v. Hood*, 391 F.3d 585 (5th Cir. 2004) (concerning §§ 1396a(a)(10)(A),1396a(a)(43)(B)); *Sabree v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004) (concerning § 1396a(a)(10)(A)); *Ped. Specialty Care, Inc. v. Ark. Dept. of Human Servs*., 293 F.3d 472 (8th Cir. 2002) (concerning §§ 1396a(a)(10)(A),1396a(a)(43)). *See also, e.g.*, *Salazar v. District of Columbia*, 729 F. Supp. 2d 268-71 (D.D.C. 2010) (concerning § 1396a(a)(43)); *Parents' League for Effective Autism Servs. v. Jones-Kelly*, 565 F. Supp. 2d 895, 903-04 (S. D. Ohio 2008 (concerning §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r)); *John B. v. Emkes*, 852 F. Supp. 2d 944, 947-49 (M.D. Tenn. 2012), *aff'd without discussion*, 710 F.3d 394 (6th Cir. 2103) (concerning § 1396a(a)(43)(B) and (C)); *Kenny A. v. Perdue*, 218 F.R.D. 277, 293-94 (N.D. Ga. 2003) (concerning §§ 1396a(a)(10)(A),1396a(a)(43),1396d(a)(4)(B),1396d(r)).

All the federal circuit courts of appeals to have addressed the issue have also concluded that Medicaid beneficiaries have a federal right under § 1983 to enforce the reasonable promptness provision, 42 U.S.C. § 1396a(a)(8), which is the subject of Count II of the Complaint. *See Romano v. Greenstein*, 721 F.3d 373 (5th Cir. 2013); *Doe v. Kidd*, 419 F. App'x 411 (4th Cir. Mar. 24, 2011), *reaff'g,* 501 F.3d 348 (4th Cir. 2007); *Westside Mothers v. Olszewski,* 454 F.3d 532 (6th Cir. 2006); *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004); *Bryson v. Shumway*, 308 F.3d 79 (1st Cir. 2002); *Lewis v. N.M. Dep't of Health*, 261 F.3d 970 (10th Cir. 2001); D*oe v. Chiles*, 136 F.3d 709 (11th Cir. 1998)*; see also Bertrand v. Maram*, 495 F.3d 452, 457-58 (7th Cir. 2007) (assuming § 1983 supplies a private right of action to enforce

claims under § 1396a(a)(8)). *See*, *e.g. Lewis v. Rendell*, 501 F. Supp. 2d 671, 686 (E.D. Pa. 2007); *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 428-29 (S.D. N.Y. 2006).

Notably, when holding that the EPSDT and reasonable promptness provisions create enforceable rights, all of these courts apply the Supreme Court's "traditional" three-part test for deciding when a federal law creates a federal right.

A. <u>The Medicaid Act provisions at issue in this case require the Defendant to do more than simply ensure certain services are available.</u>

The Defendant does not discuss the enforcement test for determining whether the Plaintiffs have a private right of action under § 1983, nor does she acknowledge the consistent appellate court track record applying that test to uphold private enforcement of the EPSDT provisions of Count I and the reasonable promptness provision of Count II. Instead, the Defendant argues that the statutes are not privately enforceable because they "simply require the states to ensure that certain services are made available to Medicaid-eligible children," ECF No. 22, Def. Mem. at p. 7. There are at least four reasons why this argument fails. [3]

First, the Medicaid Act requires the Defendant do more than simply make services "available to Medicaid-eligible children" and pay for them when and if a claim for payment is submitted by a provider. In § 2304 of the Affordable Care Act, Congress amended the Medicaid Act to clarify that the term "medical assistance … means payment of part or all of the cost of the following care and services *or the care and services themselves, or both*." 42 U.S.C. § 1396d(a)

[3] The Defendant prefaces her argument by saying the statutory sections relied upon by the plaintiffs "do not create a program." ECF No. 22, Def. Mem.at p. 7. It is unclear how this statement aids the Defendant's argument. Also, *Collins v. Hamilton*, 349 F.3d 371, 374 (7th Cir. 2013), cited by the Defendant to make the point that EPSDT is a service and not a program, refers to EPSDT as a program. *Id*. at 372.

(italics indicating added language).[4] The clarification responded to a handful of federal court decisions that found "medical assistance" to refer only to financial assistance rather than actual medical services.[5] As noted by the district court in *John B.*, 852 F. Supp.2d at 951, Congress intended § 2304 "to clarify that where the Medicaid Act refers to the provision of services, a participating State is required to provide (or ensure the provision of) services, not merely to pay for them."

Second, under the EPSDT provisions, the State must do more than simply make certain services available. 42 U.S.C. § 1396a(a)(43)(C) requires the State Medicaid agency to "arrange for (directly or through referral)" the services that a Medicaid enrolled child is determined to need--in this case, in-home nursing services. The U.S. Department of Health and Human Services Centers for Medicare & Medicaid Services (CMS) has issued guidance discussing the EPSDT requirement to arrange for necessary services, instructing states as follows:

> States must arrange (directly or through delegations or contracts) for children to receive the physical, mental, vision, hearing, and dental services they need to treat health problems and conditions… The affirmative obligation to connect children with necessary treatment makes EPSDT different from Medicaid for adults. It is a critical component of a quality child health benefit…. States must … take advantage of all resources available to provide a broad base of providers who treat children. Some states may find it necessary to recruit new providers to meet children's needs.

CMS, *EPSDT—A Guide for States: Coverage in the Medicaid Benefit for Children and Adolescents* 1, 5, 28 (June 2014) (internal quotations omitted), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/EPSDT_Coverage_Guide.pdf. Issued by the federal agency

[4] *See* H.R. Rep. No. 111-299, 1st Sess. At 649-50, 2009 WL 3321420 (Leg. Hist.) (Oct. 14, 2009); 156 Cong. Rec. H1854, 1856 , 2010 WL 1006359 (Mar. 21, 2010) (statement of Rep. Waxman); *Id*. at H1891, 1967, 2010 WL 1027566 (Mar. 21, 2010).

[5] *E.g., Bruggeman v. Blagojevich*, 324 F.3d 906, 910 (7th Cir. 2003) ("[T]he statutory reference to 'assistance' appears to have reference to *financial* assistance rather than to actual medical *services*.") (emphasis in original).

responsible for implementing the Medicaid Act, this guidance document is entitled to some deference from this Court. *See U.S. v. Mead Corp*. 533 U.S. 218, 234 (2001) (finding that federal agency sub-regulatory interpretations merit some deference from the court, based on the specialized expertise of and information available to the agency).

Third, the Defendant's argument would render the reasonable promptness provision meaningless. This provision requires the state Medicaid agency to ensure that medical assistance "shall be furnished with reasonable promptness." 42 U.S.C. § 1396a(a)(8). Simply ensuring that certain services are "made available" is not the same thing as ensuring that services are "furnished with reasonable promptness."

Finally, contrary to the Defendant's argument, reliance on these statutory sections for the proposition that states must "assure that necessary services are actually provided to children on Medicaid in a timely and effective manner," *Memisovski*, 2004 WL 1878332, at *50, does not convert Plaintiffs' claims into a request for higher Medicaid reimbursement rates to be paid to in-home nursing service providers. Plaintiffs are not arguing that the Defendant must raise reimbursement rates for in-home nursing services. Rather, they argue that the Defendant must, in one way or the other, arrange for these services when they are medically necessary. *Accord Stanton v. Bond*, 504 F.2d 1245, 1250 (7th Cir. 2074) ("The mandatory obligation upon each participating state to aggressively notify, seek out and screen persons under 21 in order to detect health problems and to pursue those problems with the needed treatment is made unambiguously clear by the 1967 act and by the interpretative regulations and guidelines."). The Court should deny Defendant Norwood's motion to dismiss Count I and Count II.

B. The Plaintiffs do not seek to enforce 42 U.S.C. § 1396a(a)(30)(A), and the Defendant cannot force them to seek to enforce § 1396a(a)(30)(A).

The Defendant also argues that the Plaintiffs should have brought a case to enforce a Medicaid Act payment provision, 42 U.S.C. § 1396a(a)(30)(A) (cited herein as § (30)(A)), and, if they had, their case would be foreclosed by *Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015). ECF No. 22, Def. Mem. at pp. 8-12. In this case, the Plaintiffs are enforcing the EPSDT and reasonable promptness provisions. They have *not* included a § (30)(A) count in the Complaint because they do not seek to enforce § (30)(A). The Plaintiffs get to choose which provisions they will seek to enforce.

Moreover, *Armstrong* does not alter the § 1983 enforcement test or the conclusion that the EPSDT and reasonable promptness provisions create federal rights that the Plaintiffs can enforce. *Armstrong* was filed by health care providers, not Medicaid beneficiaries. *Armstrong*, 135 S. Ct. at 1382. The health care providers in *Armstrong* sought to bring their claim under the Supremacy Clause, not § 1983. *Id.* at 1382-83. Their case focused not on the EPSDT and reasonable promptness provisions that extend protection to "all individuals" eligible for medical assistance, but instead on § (30)(A) , which requires states to use "methods and procedures" regarding payment to assure that services are available. *Id. Armstrong* rejected the notion that the Supremacy Clause confers a private right of action on health care providers and thereafter concluded that Congress did not intend to allow the providers to enforce § (30)(A) in an action for equitable relief. *Id*. at 1385; cf. *id*. at 1383 (Breyer, J., concurring) (stating there is no "simple, fixed legal formula separating federal statutes that may underlie this kind of injunctive action from those that may not . . . . Rather . . . several characteristics of the federal statute before us, when taken together, make clear that Congress intended to foreclose respondents from bringing *this particular action* for injunctive relief.") (emphasis added).

Armstrong does not concern, and certainly does not overrule, private enforcement of laws that create "federal rights" under § 1983, and it neither addresses nor undermines the consistent judicial track record holding that Medicaid beneficiaries have federal rights under § 1983 to enforce the EPSDT and reasonable promptness provisions. *See*, *e.g.*, *Fishman v. Paolucci*, _ F. App'x _, 2015 WL 5999318, at * 3 n.1 (2d Cir. Oct. 15, 2015) (rejecting argument that *Armstrong* precludes Medicaid beneficiaries from enforcing Medicaid Act provisions pursuant to § 1983); *J.E. v. Wong*, No. 14-00399, 2015 WL 5116774 (D. Haw. Aug. 27, 2015) (distinguishing *Armstrong* and holding child plaintiffs can enforce EPSDT provisions); *Cruz v. Zucker*, No. 14-cv-4456, 2015 WL 4548162 (S.D.N.Y. Jul. 29, 2015) (same).

Instead of *Armstrong*, the instant case mirrors *A.H.R. v. Washington State Health Care Authority*, No. C15-570, 2016 WL 98513 (W.D. Wash. Jan.7, 2016). In *A.H.R.*, the Health Care Authority (HCA) determined that each of the child plaintiffs was eligible for 16 hours of in-home private duty nursing care, but the children were not receiving it. *A.H.R.*, 2016 WL 98513 at *13. One plaintiff was forced to live in an institution while others were being cared for at home by exhausted and sleepless parents. *Id*. at *3-4. Evidence attributed the lack of in-home nursing care to low Medicaid payment rates. *Id.* at *3, *5. The plaintiffs filed suit, bringing claims to enforce the EPSDT and reasonable promptness provisions pursuant to § 1983. The district court recently held that the "[p]laintiffs are entitled to enforce their rights to private duty nursing through a claim under § 1983." *Id*. at *13 (citing *Sabree*, 367 F.3d at 194). The court issued a preliminary injunction ordering the defendants to "take all actions within their power necessary for Plaintiffs to receive 16 hours of private duty nursing, as previously authorized by Defendants and arranged and agreed to by Plaintiffs and their medical providers." *Id.* at *20; *id.* (ordering parties to meet and confer to develop a plan for implementing the preliminary injunction). As

with the plaintiffs in *A.H.R.*, the children and families in the instant case should be allowed to proceed with their EPSDT and reasonable standards claims.

II. Counts III and VI of the Complaint State Claims under ADA/§ 504.

Plaintiffs' Third and Fourth Claims for Relief allege that the Defendant is violating the Plaintiffs' rights under the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act (§ 504), first, by segregating some plaintiffs and class members in institutional, hospital settings rather than in the most integrated setting appropriate for their conditions—which, for them, is at home with their families; second, by placing some plaintiffs and class members at serious risk of institutionalization; and third, by failing to arrange for the in-home shift nursing services that the plaintiffs and class members need, directly or through appropriate referral. *See* ECF No. 1, Compl. ¶¶ 87, 89 (regarding ADA); *Id*. ¶¶ 195, 196 (regarding § 504). The Defendant does not dispute the Plaintiffs' standing to bring the claims (that is, she does not argue that the claims are not ripe); however, she does argue that the Plaintiffs have failed to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. Rule 12(b)(6).

When ruling on a Rule 12(b)(6) motion to dismiss, the "analysis rests on the complaint," and the court "must construe it in the light most favorable to the plaintiffs, accepting as true all well-pleaded facts alleged and drawing all permissible inferences in their favor." *Active Disposal, Inc. v. City of Darien*, 635 F.3d 883, 886 (7th Cir. 2011). "[T]he Federal Rules of Civil Procedure generally require[] only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011) (citation omitted); *Tolle v. Carroll Touch, Inc*., 977 F.2d 1129, 1134 (7th Cir. 1992) ("[A] complaint sufficiently raises a claim even if it points to no legal theory or even if it points to the

wrong legal theory as a basis for that claim, as long as 'relief is possible under any set of facts that could be established consistent with the allegations.'") (citation omitted). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Skinner*, 131 S. Ct. at 1296 (quoting *Scheuer v. Rhodes*, 416 U.S. 232,236 (1974)).

The Defendant argues that Plaintiff O.B. does not state a claim for relief under the ADA/§ 504 because the Defendant has "neither refused an alternative to the current setting, nor made shift nursing services available only in institutional setting." ECF No. 22, Def. Mem. at 14. This argument does not read the Complaint fairly. As alleged in the Complaint, 23-month-old O.B. is a qualified individual with disabilities, ECF No. 1, Compl. ¶ 5(a) (listing disabling conditions), ¶¶ 109, 185 (stating O.B. is a qualified individual with disabilities). His treating providers have determined that he needs in-home nursing services. *Id.* ¶¶ 5(b), 21, 98. O.B.'s family wants him at home with them. *Id*. ¶¶ 5, 102 (describing parent's lengthy search for nursing services). The Defendant has determined that O.B. qualifies for in-home nursing services because of medical need. *Id*. ¶¶ 5(b) and (h), 6, 21, 73, 98. Rather than arrange for the Medicaid EPSDT services the Plaintiff needs to live at home, Defendant Norwood has relied on a hospital to provide the necessary care to O.B. *id*. ¶¶ 5(b), 21, 98, and O.B. is forced to stay there because that is the only place where he is able to get the necessary nursing services. As alleged by the Complaint, the Defendant's actions are causing O.B. and other children similarly situated to be segregated in an institutional or hospital setting in order to get necessary nursing services although they *can* and *should* be receiving those services in more integrated, home settings. O.B. and other class members are, thus, in the same position as L.C. and E.W. when they filed the *Olmstead* case, and in *Olmstead*, the Court allowed recognized their claim under the ADA.

See Olmstead v. L.C. ex rel. Zimring, 521 U.S. 581,607 (1999); *see Radazewski ex rel. Radezewski v. Maram*, 383 F.3d 599, 608-10 (7th Cir. 2004) (applying *Olmstead* and recognizing ADA/§ 504 claims where plaintiff faced the prospect of having to enter a hospital to receive the in-home nursing services that he continued to need). Plaintiff O.B. has stated a claim for relief pursuant to Title II of the ADA and § 504 of the Rehabilitation Act.

Turning to the remaining plaintiffs, C.F., J.M. and S.M. are children who have multiple disabling conditions. ECF No. 1, Compl. ¶¶ 22, 113, 119 (listing C.F.'s multiple conditions and alleging he is a qualified individual with disabilities). *Id*. ¶¶ 23, 124, 133 (same, with respect to J.M.); *Id*. ¶¶ 24, 138, 146 (same, with respect to S.M.). The children's treating providers have determined them to need in-home nursing services, ECF No. 1, Compl. ¶¶ 113 (regarding C.F.); *Id*. ¶¶ 8(d), 130 (regarding J.M.); *Id*. ¶¶ 9(d) (regarding S.M.). The Defendant has determined each child to need the in-home nursing services. ECF No. 1, Compl. ¶¶ 7, 22, 73, 114 (regarding C.F.); *Id*. ¶¶ 8, 23, 73, 125-26 (regarding J.M.); *Id*. ¶¶ 9, 24, 73, 139-140 (regarding S.M.). As alleged in the Complaint, however, the Defendant is failing to arrange for the necessary in-home nursing services and, as a result, the children are facing institutionalization/hospitalization. ECF No. 1, Compl. ¶ 117 (regarding C.F.); *Id*. ¶ 131 (regarding J.M.); ¶ 144 (regarding S.M.).

Defendant Norwood argues that, because these children are still at home, their integration mandate claims are foreclosed by *Amundson v. Wis. Dep't of Health Servs.*, 721 F.3d 871 (7th Cir. 2013). In *Amundson,* plaintiffs challenged Wisconsin's reduction of group home care subsidies for adults with developmental disabilities. Wisconsin justified the subsidy changes on the grounds that they would reduce the overall cost of care, without necessarily risking institutionalization of developmentally disabled adults. *Id.* at 872-874. In the instant case, however, there is no cost justification for the Defendant's actions. As illustrated by O.B., the

costs to care for these children in the hospital can exceed $75,000 per month, ECF No. 1, Compl. ¶ 5(h),(i), compared to in-home nursing that is much less costly. *Id*. ¶¶ 5(h), 13.

Amundson is distinguishable in other ways. The *Amundson* plaintiffs filed their complaint as the subsidy reductions first took effect because they "fear[ed] the worst," *Amundson*, 721 F.3d at 874. However, they would only be institutionalized if the reductions in payments at some point triggered a domino effect in which: (1) group homes determined that they could no longer house individual plaintiffs due to subsidy reductions; (2) the plaintiffs would be forced to leave their group homes and would be unable to find any other group home; and (3) the plaintiffs would be forced to move into institutions. *Id.* at 873-75. Here, unlike in *Amundson*, the dominos have already fallen. The Plaintiffs' treating providers have determined that they need in-home nursing services, and the Defendant has found that the services are medically necessary and appropriate for these children and approved Medicaid coverage. Despite repeated requests to their departmental workers, the Plaintiffs are not receiving the in-home services they need and institutionalization and/or hospitalization is now a serious risk. ECF No. 1, Compl. ¶¶ 7, 114-115 (regarding C.F.); *Id.* ¶¶ 8, 125-127 (regarding J.M.); *Id.* ¶¶ 9,139-141 (regarding S.M.).

The Defendant cites *Beckem v. Minott*, 1:14-CV-00668-JMS, 2015 WL 3613714 (S.D. Ind. June 9, 2015), and *Maertz v. Minott*, 1:13-CV-00957-JMS, 2015 WL 3613712 (S.D. Ind. June 9, 2015), in which an Indiana district court dismissed the integration mandate claims at the summary judgment phase on jurisdictional grounds. By contrast, the Northern District of Illinois has allowed children to proceed with their ADA/§ 504 claims and has not taken so restrictive a reading of *Amundson*. *See M.A. v. Norwood*, No. 15C3116, 2015 WL 5612597 (N.D. Ill. Sept. 23, 2015). In *M.A.*, the children allege that Director Norwood is using standards that are severely reducing eligibility for in-home nursing and that the reductions or eliminations of coverage either

force plaintiffs into institutions or leave them facing life-threatening situations at home. *Id.*, at *9. As she does here, the Defendant cited *Amundson*, *Beckem*, and *Maertz*. The court rejected the Defendant's arguments, however, finding the potential for the children's institutionalization not "merely threatened," but "real." *Id*. at *10. The court also noted that in *Amundson*, the Medicaid director represented that plaintiffs would not face institutionalization (that is, that costs could be saved without necessarily institutionalizing anyone), while the Illinois Director had made no such representation. *Id*. at *11. And, that is the situation in the case now before this Court. Refusing to read *Amundsen* "so narrowly" as the Indiana judge, *Id.* at *10 n.12, the *M.A.* court cited *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013), which found that *Pashby* plaintiffs who "must enter institutions to obtain Medicaid services for which they qualify may be able to raise successful . . . claims because they face a risk of institutionalization." *Pashby,* 709 F.3d at 322. As in *Pashby*, the Plaintiffs here face a severe risk of institutionalization, as they require medically-prescribed in-home nursing services to remain safely and stably at home. Furthermore, Plaintiffs' needs are more significant than the *Pashby* plaintiffs; they require extensive medical care at home, not just assistance with activities of daily living. Plaintiffs C.F., J.M., and S.M. have stated ADA/§ 504 claims under Rule 12(b)(6) and should have the opportunity to complete discovery and flesh out their claims.[6]

[6] Both *Beckem v. Minott*, No. 1:14-cv-00668 (S.D. Ind. June 9, 2015) at *1; and *Maertz v. Minott*, No. 1:13-cv-00957 (S.D. Ind. June 9, 2015),at *1, were decided after the parties did discovery and had an opportunity to develop evidence as to whether any of the plaintiffs had been institutionalized as a result of state action. In *Beckem*, the parties did discovery from June to November 2014. Docket Proceedings, entry 18 at 11, *Beckem v. Minott et. al*, No. 1:14-cv-00668 (S.D. Ind. June 9, 2015). In *Maertz*, discovery was due on August 8, 2014 and later amended as due on November 7, 2014. Docket Proceedings, entry 29 at 34, *Steimel v. Minott et al.*, No. 1:13-CV-00957 (7th Cir. Oct. 25, 2013); Docket Proceedings, entry 140 at 11, *Steimel v. Minott et al.*, No. 1:13-CV-00957 (7th Cir. Nov. 11, 2014).

Finally, the Plaintiffs have a claim for relief under the ADA/§ 504 because they allege that, as a result of Defendant's policies, they are being treated worse than other persons with disabilities. As *Amundson* recognized, "[i]f Wisconsin buys the best available care for persons with visual impairments, but pays only for mediocre care for the developmentally disabled, then plaintiffs have a theory of discrimination even though all of them remain in group homes." *Amundson*, 721 F.3d at 874-85. The Plaintiffs in this case are making just such a contention. As alleged in the Complaint, the Defendant will pay nursing agencies to provide in-home nursing services for Plaintiffs and class members amounts that cannot exceed $35.03 per hour for a registered nurse and $31.14 per hour for a licensed practical nurse; however, the Defendant will pay $72.00 per hour for other Medicaid enrollees, and its sister agency, the Department of Children and Family Services, will pay nursing agencies $45.00 per hour for in-home nursing. Compl. ¶¶ 13-15. Under the standards governing Rule 12(b)(6) motions to dismiss, this Court should deny the Defendant's motion and allow the Plaintiffs to proceed with discovery in this case.

Conclusion

For the reasons stated, the Defendant's motion to dismiss plaintiffs' complaint should be denied.

Dated: February 9, 2016

Respectfully submitted,

/s/ Jane Perkins
One of the Attorneys for
the Plaintiffs

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CERTIFICATE OF SERVICE

I, Thomas Yates, certify that on February 9, 2016, I served Defendant Norwood with the foregoing Plaintiffs' Memorandum Opposing Defendant Norwood's Motion to Dismiss the Complaint by filing said document with the Clerk of the Court using the CM/ECF system.

/s/ Thomas Yates