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

O.B. et. al,	)	
	)	No. 15-CV-10463
Plaintiffs,	)	
vs.	)	Judge: Charles P. Korocas
	)	
FELICIA F. NORWOOD	)	Magistrate: Michael T. Mason
	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' AND CLASS MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Now comes the Plaintiffs, by and through their attorneys, file this Memorandum of Law in support of their Motion for Temporary Restraining Order and Preliminary Injunction.

I. INTRODUCTION

The Plaintiffs and all proposed Class members are Medicaid-eligible children under 21 with severe disabilities and limited financial resources who need in-home shift nursing services to live safely in their homes. The Defendant has found these services to be medically necessary and authorized Medicaid coverage of those services. However, for months, the Defendant has failed to arrange for these medically necessary, in-home shift nursing services. As a result, the Plaintiffs and Class members are either forced to live in an institutional setting or suffer at home without services they need to remain safe and stable.

The Defendant fails to "arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment [in-home shift nursing services]". 42 U.S.C. Sec. 1396a(a)(43)(C). Furthermore, the Defendant fails to comply with the Medicaid Act's reasonable promptness requirement. 42 U.S.C. Sec. 1396a(a)(8). Moreover, Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (the

Rehabilitation Act) require the Defendant to provide services in the most integrated setting appropriate for people with disabilities and to minimize the risk that they will be forced into institutions to receive services. 42 U.S.C. Sec. 12131-32; 29 U.S.C. Sec. 794. The Defendant is also violating the ADA and the Rehabilitation Act.

The mounting emotional and physical strain caused by the Defendant's violations has become untenable. Plaintiff O.B.'s parents have spent nine months searching for adequate nursing services. *See* Exhibit K, para. 9. Yet, O.B. continues to live in a hospital, separated from his family. *Id.* at paras. 9, 13. Plaintiff C.F. receives roughly 60 weekly hours per week of in-home shift nursing services, even though the Defendant has found 84 hours per week to be medically necessary. *See* Exhibit L, paras. 4, 11. Similarly, Plaintiffs J.M.'s and S.M.'s parents are wearing thin, attempting to manage the demanding needs of both children without adequate nursing services. *See* Exhibit N, para. 15; *See* Exhibit O, para. 16. Due the inadequacy of in-home nursing services for both children, the parents of twin Plaintiffs Sa.S. and Sh.S. are seriously considering leaving the state of Illinois. *See* Exhibit P, para. 20; Exhibit Q, para. 24. Accordingly, Plaintiffs are seeking a Temporary Restraining Order and Preliminary Injunction requiring the Defendant to take immediate action to ensure that Plaintiffs receive the in-home nursing services, which would prevent further legal violations and irreparable harm during the pendency of this class action suit.

II. ARGUMENT

A. The Legal Standard for a Preliminary Injunction.

The Plaintiffs and Class are entitled to injunctive relief under the standard set forth by the Seventh Circuit Court of Appeals. As a threshold matter, the Plaintiffs and Class must demonstrate: (1) "some likelihood of succeeding on the merits"; and (2) that the Plaintiffs and Class have " ' no adequate remedy at law' and will suffer 'irreparable harm' if preliminary relief

is denied." *Abbott Labs. v. Mead Johnson & Co*., 971 F.2d 6, 11-12 (7th Cir. 1992). If the Plaintiffs and Class can meet those prerequisites, this Court is then to consider: (3) "the irreparable harm . . . [to the Defendant] . . . if the relief is granted, balancing it against the irreparable harm . . . [to the Plaintiffs and Class] if the relief is denied"; and finally (4) the public interest, meaning "the consequences of granting or denying the injunction to non-parties." *Abbott Labs*, 971 F.2d at 6, 11-12; *see also Promatek Indus., LTD v. Equitrac Corp.,* 300 F.3d 808, 811 (7th Cir. 2002). A sliding scale approach is used to balance all four factors. *Abbott Labs.*, 971 F.2d at 12. The weighing process "takes into consideration the consequences to the public interest of granting or denying preliminary relief." *Id.*; *see also Bhalero v. Ill. Dep't of Financial and Prof. Regs.,* 834 F. Supp. 2d 775, 781 (N.D. Ill. 2011). In the Seventh Circuit, the legal standards for a temporary restraining order and a preliminary injunction are "functionally identical." *Illusions Too Reality, LLC v. City of Harvey*, 02 C 7272, 2003 WL 260335, at *4 (N.D. Ill. Feb. 4, 2003). Under this legal standard, the Plaintiffs and proposed Class are entitled to a Temporary Restraining Order and Preliminary Injunction.

B. This Court Can Extend Injunctive Relief To The Proposed Class.

This Court has the authority to issue class-wide injunctive relief to both the Plaintiffs and the proposed Class prior to class certification. Under similar circumstances, courts in this district have granted class-wide injunctive relief. For example, in *Lee v. Orr*, the court granted a temporary restraining order to the plaintiffs and proposed class, citing the following authority:

> 'District courts have the power to order injunctive relief covering potential class members prior to class certification.' *Ill. League of Advocates for the Developmentally Disabled v. Ill. Dep't of Human Services*. No. 13 C 1300, 2013 U.S. Dist. LEXIS 90977 (N.D. Ill. June 28, 2013). 'The court may conditionally certify the class or otherwise order a broad preliminary injunction, without a formal class ruling, under its equity powers . . . .'

Lee v. Orr, 2013 WL 6490577, at *2 (N.D. Ill. Dec., 2013). The *Lee* court declined to issue a conditional class ruling, but instead used its general equity powers to order preliminary

injunctive relief for a proposed Class of plaintiffs. *Id.* In *M.A. v. Norwood*, a case involving children's access to in-home nursing services, Judge Lefkow granted a class-wide temporary restraining order prior to any ruling on class certification. *M.A. v. Norwood*, No. 15-3116, (N.D. Ill. April 22, 2015). *See* Exhibit "A". Therefore, through a conditional class ruling or through its general equity powers, this Court can issue class-wide injunctive relief at this time.

C. The Plaintiffs and Class Have No Adequate Remedy At Law And Will Suffer Irreparable Harm Without A Preliminary Injunction.

As set forth in the attached Exhibits and the Complaint, the Plaintiffs are suffering and will continue to suffer profound harm without necessary in-home nursing services. O.B. will remain in a hospital, separated from his family and home. C.F., J.M., S.M., Sa.S, and Sh.S. face serious risks of illness, injury, harmful medical complications, and institutionalization as their families try to make do without the nursing services that they need. In *Olmstead,* the Supreme Court summarized the harm which a plaintiff would likely suffer if unjustifiably institutionalized:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday activities of individuals including family relations, social contacts, . . . [and] educational advancement . . . . Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with . . . disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without [such] disabilities can receive the medical services they need without similar sacrifice.

Olmstead, 527 U.S. at 600-01. In similar cases, federal district courts in Illinois have issued injunctive relief to prevent irreparable harm.[1] In *Hampe v. Hamos*, Judge Castillo granted

[1] In *Harris v. Hamos,* Judge Zagel issued a Temporary Restraining Order to prevent the reduction of nursing care when the plaintiff turned age 21. *Harris v. Hamos,* No. 12-7105 (N.D. Ill. Sept.18, 2012), *see* Exhibit "F"; *see also, e.g., Fisher v. Maram,* No. 06 C 4405, 2006 WL 2505833 (N.D. Ill. Aug. 28, 2006) (Exhibit "B"); *Sidell v. Maram,*

injunctive relief pending the outcome of the case to approximately 33 plaintiffs and class members, which prevented the reduction of nursing services when class members turned age 21. *Hampe v. Hamos,* No. 10 C 3121; *see also* Pls. Mot. for T.R.O./Prelim. Inj. at n. 11.

Finally, the Plaintiffs and Class have no adequate remedy at law, because an award of damages at the end of trial will be "seriously deficient as a remedy for the harm suffered." *Roland Mach. v. Dresser Indus.,* 749 F.2d 380, 386 (7th Cir. 1984). The requirement of irreparable harm is met when the moving party will suffer harm during the pendency of the case "that cannot be prevented or fully rectified by the final judgment after trial." *Id.*, 794 F.2d at 386. *See also McMillan v. McCrimon,* 807 F. Supp. 475, 479 (C.D. Ill. 1992) ("The nature of [the] claim – a claim against the state for medical services – makes it impossible to say that any remedy at law could compensate them."). In this case, the Plaintiffs and Class members are not seeking monetary damages, which would be inadequate to compensate them for the emotional, psychological, and physical harm that they would suffer.

D. Plaintiffs and Class Are Likely To Prevail On Their Claims That Defendant Violated the Medicaid Act, the ADA, and the Rehabilitation Act.

The Plaintiffs and Class are likely to prevail on all claims. The Complaint sets forth two claims under the Medicaid Act, one claim under the ADA, and one under the federal Rehabilitation Act. Though likely to succeed on all four claims, the Plaintiffs and Class only need to demonstrate likelihood of success on the merits for one claim. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America*, 549 F.3d 1079, 1096 (7th Cir. 2008).

No. 05-1001 (N.D. Ill. Jan. 13, 2005) (Exhibit "C"); *Crabtree v. Goetz,* No. Civ.A. 3:08-0939, 2008 WL 5330506, at *30 (M.D. Tenn. Dec. 19, 2008) (home care service cuts will cause irreparable injury because "institutionalization will cause Plaintiffs to suffer injury to their mental and physical health, including a shortened life, and even death for some Plaintiffs). *See also,* Exhibit "A", *M.A. v. Norwood*, No. 15-3116. A permanent injunction was later issued against the Defendant in *Fisher* and *Sidell*. *See* Exhibits D and E.

1. Plaintiffs and Class Are Likely to Prevail on Their Claims under the Medicaid Act.

The Plaintiffs and Class are likely to show that the Defendant violated the Medicaid Act. Count I of the Complaint alleges that the Defendant failed to arrange for federally-mandated, medically necessary in-home shift nursing services for severely disabled children. Pls. Compl. at paras. 174-77. Count II of the Complaint alleges that the Defendant's failure to arrange for those services with "reasonable promptness" also violates the Medicaid Act. Pls. Compl. at paras. 178-82. The Complaint clearly details how the Defendant found specific amounts of nursing hours to be medically necessary for all Plaintiffs and proposed Class members. Pls. Complaint at paras. 5-12. Additionally, the Complaint clearly states that the Defendant failed to provide adequate services for months, if not years, after the services were approved. Pls. Complaint at paras. 5-12, 21-26, 29-31, 97-173. The Defendant clearly violated the Medicaid Act.

a. Plaintiffs and Class are Likely to Show that the Defendant Violated the Medicaid Act's EPSDT Mandate.

Children under age 21 who are covered by Medicaid are entitled to the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) benefit. EPSDT requires Medicaid agencies to provide any service described in section 1396d(a) of the Medicaid Act if "necessary . . . to correct or ameliorate" illnesses or conditions regardless of whether they are covered under the State Plan for adults. 42 U.S.C. Sec. 1396d(r)(5). In-home shift nursing services are covered under EPSDT. The Defendant's must arrange for medically necessary, EPSDT-mandated services including in-home nursing. 42 U.S.C. Sec. 1396a(a)(43)(C) (requiring that "[A State plan for medical assistance must]…provide for…arranging 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.")

Accordingly, the Medicaid Act requires the Defendant to proactively arrange for EPSDT services and ensure that those services are provided. Each state must "[d]esign and employ methods to assure that children receive . . . treatment for all conditions identified as a result of examination or diagnosis . . . ." Centers for Medicare & Medicaid Services, *State Medicaid Manual*, CMS Pub. 45, Ch. 5, Sec. 5310, *available at* https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html. Additionally, courts have reiterated each state's requirement to actively comply with the EPSDT mandate: "[a state's] obligations with respect to EPSDT services require more proactive steps, such as actual provision of services . . . ." *Clark v. Richman*, 339 F. Supp. 2d 631, 646-47 (M.D. Pa. 2004); "[S]tates are further obligated to actively arrange for [EPDST] corrective treatment" under 42 U.S.C. Sec. 1396a(a)(43)(C) of the Medicaid Act. *Chisholm v. Hood*, 110 F. Supp. 2d 499, 507 (E.D.La. 2000). *See Salazar v. Dist. of Columbia,* 954 F. Supp. 278, 330 (D.D.C.1996) (finding that the District of Columbia's failure to ensure that EPSDT-eligible children receive diagnosis and treatment for health problems detected during screening violated 42 U.S.C. Sec.1396a(a)(43)(C).) In *Memisovski v. Maram*, the court stated the following about compliance with 42 U.S.C. Sec. 1396a(a)(43)(C):

> These EPSDT requirements differ from merely providing "access" to services; the Medicaid statute places affirmative obligations on states to assure that these services are actually provided to children on Medicaid in a timely and effective manner. *See, e.g., Stanton v. Bond*, 504 F.2d 1246, 1250 (7th Cir. 1974) ("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.")

Memisovski v. Maram, No. 92 C 1982, 2004 WL 1878332, at *50 (N.D. Ill. Aug. 23, 2004).

Although state Medicaid agencies may delegate the provision of services, the ultimate responsibility to ensure treatment remains with the Defendant. *See John B. v. Menke,* 176 F.

Supp. 2d 786, 801 (M.D. Tenn. 2001) (declaring that a state cannot "disclaim responsibility for the ultimate provision of EPSDT-compliant services by a once-removed provider").

The Defendant's obligation to arrange for in-home shift nursing services does not end with her prior authorization to reimburse providers.[2] Moreover, merely authorizing coverage of EPSDT-mandated services for the Plaintiffs and Class without arranging for receipt of those mandatory services is insufficient to meet Defendant's obligations under the EPSDT mandate. The Defendant authorized approximately 126 hours per week (18 hours per day) of in-home shift nursing services hours per week for O.B.; however, O.B. is still hospitalized because the Defendant failed to actually arrange for or provide 126 hours per weeks of in-home shift nursing services. Pls. Compl. at paras. 5-6, 97-112. Similarly, the Defendant approved reimbursement for a specific number of hours of in-home nursing services for C.F., J.M., S.M., Sa.S. and Sh.S. based on medical necessity. Pls. Compl. at paras. 7-12, 21-26, 30-31. Yet, the Defendant fails to arrange for the necessary hours. Pls. Compl. at paras. 7-12, 97-173. Accordingly, the Plaintiffs and Class are likely to show that Defendant violated the Medicaid Act by failing to arrange for medically necessary, EPSDT-mandated services in-home shift nursing services.

b. The Plaintiffs and Class are Likely to Show that the Defendant Violated the Medicaid Act's Reasonable Promptness Requirement.

The Plaintiffs and Class are likely to show that Defendant failed to provide in-home shift nursing services in a reasonably prompt manner as required the Medicaid Act. The Act requires that Medicaid services be "furnished with reasonable promptness to all eligible individuals." 42 U.S.C. Sec. 1396a(a)(8). Moreover, state agencies must "[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." 42 C.F.R. Sec. 435.930.

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[2] *See John B. v. Emkes*, 852 F.Supp.2d 944, 951 (M.D. Tenn. 2012), quoting H.R. Rep. No. 299, 111th Cong., 1st Sess. 2009, at 645-50 (Oct. 14, 2009), *available at* 2009 WL 3321420, at *694-*95.

There is no dispute that Defendant found all named Plaintiffs and Class members eligible for Medicaid-covered in-home shift nursing services based on medically necessity. *See* Exhibits G –J. However, though the Defendant found specific amounts of nursing hours to be medically necessary for all Plaintiffs and proposed Class members, she has failed to provide adequate services for months, if not years, after the services were approved. Pls. Compl. at paras. 7-12, 21-26, 30-31, 97-173. "It is axiomatic that delays of several years are far outside the realm of reasonableness." *Doe v. Chiles,* 136 F.3d 709, 717 (11th Cir. 2003).

In-home skilled nursing services are critical, medically necessary services that allow severely disabled children to be treated safely and stably in the home setting. Failing to provide such services when necessary, as in this case, violates 42 U.S.C. Sec. 1396a(a)(8). *See Rosie D. v. Romney*, 410 F. Supp. 2d 18 (D. Mass. 2006) (finding failure to provide necessary behavioral health services to children with disabilities violated the EPSDT and reasonable promptness provisions). Moreover, merely authorizing services by failing to provide adequate compensation to providers runs afoul of the provision as well:

> A state may not circumvent a statutory duty . . . by underfunding a mandatory Medicaid service to the degree that no health care practitioners can afford to provide the service. Setting reimbursement levels so low that private dentists cannot afford to treat Medicaid enrollees effectively frustrates the reasonable promptness provision by foreclosing the opportunity for enrollees to receive medical assistance at all, much less in a timely manner. To that end, . . . sec. 1396a(a)(8) may be reasonably understood to constrain actions and protocols by a state and its Medicaid administrative and rate-setting agencies that otherwise subvert the statute's intent.

Health Care for All v. Romney, No. Civ.A 00-10833RWZ, 2005 WL 166-677, *10 (D. Mass. July 14, 2005). Similarly, here, Defendant may not avoid her obligations to provide services

with reasonable promptness by merely authorizing services that are not actually provided for months, if ever.[3] Accordingly, Plaintiffs have a strong likelihood of success on this claim.

2. The Plaintiffs and Class Are Likely to Prevail on Their Claims under the Americans with Disabilities Act and the federal Rehabilitation Act.

The Plaintiffs and Class are likely to prevail on their claims that the Defendant violated the ADA and the Rehabilitation Act. Title II of the ADA prohibits public entities from discriminating against persons with disabilities:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

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[3] In *Bruggeman ex rel. Bruggeman v. Blagojevich,* 324 F.3d 906, 910 (7th Cir. 2003), the Seventh Circuit observed that. Sec. 1396a(a)(8) "appears to have reference to *financial* assistance rather than to actual medical *services*" [being provided directly] and disagreed with the interpretation of two other circuit courts which held otherwise. In *Sabree ex rel. Sabree v. Richman,* 367 F.3d 180, 181 fn. 1 (3d Cir. 2004), the Circuit Court stated in addressing the reasonable promptness provision,"[t]here appears to be a disagreement among our sister court of appeals as to whether, pursuant to Medicaid, a state must merely provide financial assistance to obtain covered services, or provide the services themselves. . ."

After *Bruggeman,* Congress amended the definition of "medical assistance" to address the circuit split and to clarify what is required under "medical assistance" by a State. In *Leonard v. Mackereth,* 2014 WL 512456, *6-7 (E.D. PA, February 10, 2014), the District Court stated:

> As part of its enactment Patient Protection and Affordable Care Act, Congress amended the definition of "medical assistance" under 42 U.S.C. Sec. 1396d(a). As of March 23, 2010, "[t]he 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. Sec. 1396d(a)(2013)(emphasis added). As one court has already noted, it appears that Congress intended to squarely address the circuit split and "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[.]" *John B. v. Enkes,* 852 F.Supp.2d 944, 951 (M.D. Tenn. 2012). Particularly edifying is the House Committee Report on the amendment which states in relevant part:
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> > ["Medical assistance"] is expressly defined to refer to payment but has generally been understood to refer to both the funds provided to pay for care and services and to the care and services themselves . . . Some recent court opinions have, however, questioned the longstanding practice of using the term "medical assistance" to refer to both the payment for services and the provision of the services themselves. These opinions have read the term to refer only to payment; this reading makes some aspects of the rest of Title XIX difficult and, in at least one case, absurd. If the term meant only payments, the statutory requirement that medical assistance by furnished with reasonable promptness "to all eligible individuals" in a system in which virtually no beneficiaries receive direct payments from the state or federal governments would be nearly incomprehensible. . . To correct any misunderstands as to the meaning of the term, and to avoid additional litigation, the bill would . . . conform this definition to the longstanding administrative use and understanding of the term.

H.R.Rep. No. 111-299, pt.1 at 649-50. *See also Disability Rights New Jersey, Inc., v. Velez,* 2010 WL 5055820, *3-4 (D.N.J. Dec. 2, 2010), where the Court examined both the new statutory definition of "medical assistance" under 42 U.S.C. Sec. 1396d(a) and the legislative history surrounding the amendment and concluded that " 'medical assistance' includes not only financial assistance but also actual care or services."

42 U.S.C. Sec. 12132. Under the ADA, a "qualified individual with a disability" is a person who "with or without reasonable modifications to rules, policies or practices" meets the "essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. Sec. 12131(2). Similarly, the Rehabilitation Act prohibits recipients of federal funds from discriminating based on disability. 29 U.S.C. Sec. 794(a).

Regulations clarify that Title II and the Rehabilitation Act require a public entity to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. *See* 28 C.F.R. Sec. 35.130(d) (Title II); 28 C.F.R. Sec. 41.51(d) Rehabilitation Act). This "integration mandate," requires that recipients of federal funds administer their programs and activities in the "most integrated setting appropriate to the needs of qualified handicapped persons." *Radaszewski v. Maram,* 383 F.3d 599, 607 (7th Cir. 2004). The above-described provisions of the ADA and the Rehabilitation Act, and their implementing regulations are construed and applied in the same manner. *See Radaszewski,* 383 F.3d at 607.

In 1999, the United States Supreme Court addressed and interpreted the integration mandate in its landmark *Olmstead* decision. *Olmstead v. L.C.,* 527 U.S. 581 (1999). The Court affirmed that integration into community life was a central aspect of the legislation prohibiting discrimination against persons with disabilities.[4] The Supreme Court held that policies or practices imposing unjustified isolation of persons of disabilities in institutions are "…properly regarded as discrimination based on disability." *Olmstead*, 527 U.S. at 597. The Court in

[4] The *Olmstead* plaintiffs had developmental disabilities and mental illness. They wished to live in the community; treatment professionals agreed that community care was appropriate. Nevertheless, they were confined in psychiatric hospitals due to limited funding for community care in the state budget. They claimed that Georgia's funding of institutional care, but not of community based care, violated the ADA's integration mandate.

Olmstead set out the elements of a discrimination claim based on the integration mandate. A plaintiff must allege and ultimately show that: (1) treating professionals have found that the person can handle and benefit from a community setting; (2) that the person wants to be in the community setting; and (3) that community-based services can be reasonably accommodated taking into account the resources of the state and the needs of others with comparable disabilities. *Id.* at 601-03. The public entity may defend by showing that a community setting cannot be accommodated without fundamental alteration to the entity's programs and services.[5] *Id.* at 603.

In this case, the *Olmstead* elements are met; therefore, the Plaintiffs and Class are likely to prevail on their claims under the ADA and the Rehabilitation Act. The Plaintiffs and Class want to remain at home or be discharged to their homes. The Plaintiff O.B.'s mother has stated that "My husband and I desperately want to bring O.B. home." *See* Exhibit K, para. 19. Additionally, the adoptive mother of the Plaintiffs J.M. and S.M. states that, "I have been told by DSCC [the Division of Specialized Care for Children] that we can take the S.M. and J.M. to Almost Home [an institutional setting] in Chicago. However, I want to do everything I can to keep S.M. and J.M. at home." *See* Exhibit N para. 15; Exhibit O para. 16. Their treating physicians have found that the Plaintiffs and Class members can be treated with adequate levels of in-home shift nursing care. *See* Exhibit N para. 8; Exhibit O para. 9. Regarding Plaintiff C.F., Dr. Jason Becker, the Plaintiff C.F.'s treating pediatrician stated that,

> It is medically necessary that C. [F.] receives in-home shift nursing services of 84 hours per week. If C. [F.] receives in-home shift nursing services at a level which is substantially less than the approved level of 84 hours per week, then C. [F.] will

[5] Similarly, in *Radaszewski v. Maram,* on remand from the Seventh Circuit, the district court found that Illinois inadequately funded necessary in-home shift nursing care. The court concluded that requiring the state to fund in-home shift nursing care would not fundamentally alter of the state's programs**,** stating, "Allowing Eric [Plaintiff] to remain in the community can be readily accommodated… Illinois has not demonstrated that providing the requested accommodation to Eric would impose an unreasonable burden on the state or fundamentally alter the nature of its programs and services." *Radaszewski ex rel. Radaszewski*, 2008 WL 2097382 at *15.

> be forced to be either institutionalized in a hospital or if he remains at home and receives in-home shift nursing at a level which is substantially less than 84 hours per week, then he faces a strong possibility of a life threatening episode.

See Exhibit M para. 7. Furthermore, the Defendant can reasonably accommodate the Plaintiffs' and Class members' in-home care. For all Plaintiffs and Class members, the Defendant would expend considerable fewer resources to provide care at home than in an institutional setting. This is clearly evident in the case of O.B., whose monthly hospital charges far exceed the cost of in-home services. Pls. Compl. at para. 5. Accordingly, the Plaintiffs and Class have a high likelihood of success on the merits of their claims that the Defendant violated the Medicaid Act, the ADA, and the Rehabilitation Act.

E. The Balance Of Equities Supports Entry Of A Preliminary Injunction In This Case.

Without preliminary injunctive relief, the Plaintiffs and Class will continue to receive inadequate home care or be forced into institutionalized care, despite their eligibility for adequate home care. The Defendant, however, will only be required to arrange for the in-home shift nursing services that she previously authorized. When balancing these factors, this Court considers "…whether 'the harm to the defendant would substantially outweigh the benefit to the plaintiff.' " *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 789 (7th Cir.2011). Preliminary injunctive relief to the Plaintiffs and Class will have no serious fiscal impact on the Defendant. Any inconvenience to the Defendant is far outweighed by the harm to the Plaintiffs and Class if forced to: (1) remain in an institution; (2) face the serious risk of institutionalization; or (3) face the risk of medical complications by remaining at home with insufficient nursing services. As the Seventh Circuit stated in *Bontrager v. Indiana Fam. and Soc. Servs. Admin.*, "[t]he State's potential budgetary concerns are entitled to our consideration, but do not outweigh

the potential harm to… indigent individuals, especially when the State's position is likely in violation of state and federal law." 697 F.3d 604, 611 (7th Cir. 2012).

Preliminary injunctive relief would merely prevent further legal violations by the Defendant and further injury to the Plaintiffs and the Class. In *Haskins v. Stanton*, the Seventh Circuit affirmed the district court's grant of a preliminary injunction, which enjoined the defendants from further violations of the federal Food Stamp Act. *Haskins v. Stanton,* 794 F.2d 1273 (7th Cir. 1986). In *Haskins,* the court emphasized the minimal burden imposed when a defendant is required to comply with its legal responsibilities, particularly when those legal responsibilities promote the public welfare, stating:

* * *

> Because the defendants are required to comply with the Food Stamp Act under the terms of the Act, *we do not see how enforcing compliance imposes any burden on them*. The Act itself imposes the burden; this injunction merely seeks to prevent the defendants from shirking their responsibilities under it. We also fail to see how enforcing a statute designed to promote the public welfare disserves the public. *Id.*

Haskins, 794 F.2d at 1277. Therefore, the balance of equities supports the issuance of a preliminary injunction in this case.

F. The Public Interest Favors The Issuance Of Interim Injunctive Relief.

The granting of a Preliminary Injunction for the Defendant to arrange for in-home shift nursing services at the level approved by the Defendant would have no detrimental effect on the public. No widespread change to non-parties would result from the Defendant arranging to deliver the level of services which she has previously approved. In fact, the public interest would be well served if the Defendant provided less costly in-home services to the Plaintiffs and Class members who are currently institutionalized. In *Bontrager*, the Court stated:

> [T]he Medicaid statute was designed to pay for the healthcare costs of 'the most needy in the country.' *Schweiker v. Hogan*, 457 U.S. 569, 590 (1982). Although we are mindful of potential budgetary concerns, these interests do not outweigh Medicaid recipients' interests in access to medically necessary health care.

Bontrager, 697 F.3d at 611-12. The Defendant's legal responsibilities under the Medicaid Act, the ADA, and the Rehabilitation Act protect the rights of an extremely vulnerable group. The Plaintiffs and all proposed Class members are severely disabled children under 21. Additionally, the families of the Plaintiffs and all proposed Class members, as Medicaid beneficiaries, by definition have very limited financial resources. Judicial intervention to protect the welfare of such a vulnerable class benefits the public.

In particular, the Defendant's actions have taken an immeasurable toll on the friends and family of the Plaintiffs and Class members, who would benefit greatly from preliminary injunctive relief. Plaintiff O.B. has been institutionalized unjustifiably for months. His parents have been searching for nursing services for the past nine months. *See* Exhibit K para. 9. In the attached declaration, O.B.'s mother stated that, "My husband and I desperately want to bring O.B. home….Our situation has become unbearable. The effects of O.B.'s institutionalization over the past several months have torn our family apart." *See* Exhibit K paras. 19-20. Additionally, the adoptive mother of Plaintiffs J.M. and S.M. stated, "My husband and I are wearing out . . . . . Without adequate nursing services, I do not know how long we can maintain S.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* Exhibit N para. 15; Exhibit O para. 16. Sa.S. and Sh.S's mother stated, "We were both let go by our former employers . . . . we have had to spend much of our time at the hospital or caring for them at home. Some days are unbelievably tough for us." *See* Exhibit P, paras. 15-16; Exhibit Q, para. 19-20. Finally, based upon the showing the Plaintiff has made regarding the merits of this case, this Court should conclude that the public interest favors interim enforcement of the Medicaid Act and the integration mandate of both the ADA and the Rehabilitation Act.

III. CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that this Court enter the following relief:

A) Enter a Temporary Restraining Order and Preliminary Injunction ordering the Defendant, Felicia F. Norwood, to take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to the Plaintiffs and Class at the level approved by the Defendant, as required by the the Medicaid Act, the ADA, and the federal Rehabilitation Act pending final judgment in this action or until further order of Court.

B) That the Defendant shall provide to the Plaintiffs within 30 days the following: (1) what steps have been undertaken by the Defendant to arrange for in-home shift nursing services to the Plaintiffs and Class; and (2) an identifying list of the Class members which contains (a) their currently approved level of in-home shift nursing care and (b) how much of their in-home shift nursing care is actually being used or delivered to the Class during the preceding 90 days.

C) That this Court waive or excuse the filing of any security or bond by the Plaintiffs and Class.

D) 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, Shannon Ackenhausen, one of the Attorneys for the Plaintiffs, deposes and states that she caused the foregoing Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction to be served by electronically filing said document with the Clerk of the Court using the CM/ECF system, this 20th day of November, 2015, and will cause the foregoing Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, to be served on the named Defendant, by hand delivering a copy to the office of the Defendant, Felicia F. Norwood at 401 S. Clinton, Chicago, Illinois on November 20, 2015

/s/ Shannon Ackenhuasen