Case No. 16-2049

In the United States Court of Appeals
For the Seventh Circuit

O.B., by and through his parents, GARLAND BURT and JULIE BURT; C.F., by and through his mother, KRISTEN FISHER; J.M. and S.M., by and through their parents, DAN McCULLOUGH and MICHELE McCULLOUGH; individually and on behalf of a class,

Plaintiffs/Appellees,

v.

FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
HONORABLE CHARLES P. KOCORAS

APPELLEES' BRIEF

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-2049

Short Caption: O.B. v. Norwood

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

O.B., by and through his parents, Garland Burt and Julie Burt; C.F., by and through his mother, Kristen Fisher;

J.M. and S.M., by and through their parents, Dan McCullough and Michele McCullough; individually and on Behalf of a class.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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National Health Law Program, 200 North Greensboro Street, Suite D-13, Carrboro, NC 27510

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Robert H. Farley, Jr. Date: May 13, 2016

Attorney's Printed Name: Robert H. Farley, Jr.

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

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N/A

Attorney's Signature: s/Shannon Ackenhausen Date: August 10, 2016

Attorney's Printed Name: Shannon Ackenhausen

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No x

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N/A

Attorney's Signature: s/Thomas Yates Date: August 10, 2016

Attorney's Printed Name: Thomas Yates

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No x

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N/A

Attorney's Signature: s/ Martha Jane Perkins Date: May 26, 2016

Attorney's Printed Name: Martha Jane Perkins

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JURISDICTIONAL STATEMENT

The jurisdictional statement submitted by the Defendant-Appellant (the "Director") is not complete and correct.

On November 20, 2015, Plaintiffs-Appellees, O.B. et al., by and through their parents, (the "Children") filed a complaint alleging violations of

(1) the Medicaid Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT") provisions, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B), 1396a(a)(43)(C) (Count I);
(2) the Medicaid reasonable promptness provision, *id.*§ 1396a(a)(8) (Count II);
(3) Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-32 (Count III); and
(4) Section 504 of the Rehabilitation Act ("Rehabilitation Act"), 29 U.S.C. § 794 (Count IV).

Doc. 1; Dir. SA at 41-44, ¶¶ 174-98. The district court has federal subject matter jurisdiction over these claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Dir. SA at 10, ¶ 19.[1]

Concurrently with the Complaint, the Plaintiffs filed a Verified Motion for a Preliminary Injunction. Doc. 6. On March 21, 2016, the district court issued a memorandum opinion granting a preliminary injunction as to the Medicaid claims (Counts I and II) and reserving judgment on the ADA and Rehabilitation Act claims (Counts III and IV). Dir. SA at 115. The district court also denied the Director's

[1] The district court's docket is cited as "Doc. __." The Director's Brief (Brief of Defendant-Appellant) is cited as "Dir. Br. at __." The Director's short appendix is cited as "Dir. SA at __." This Court's docket is cited as "App. Doc. __."

Motion to Dismiss in part, granting her request to dismiss two named Plaintiffs who relocated out of Illinois. Dir. SA at 115.

On April 6, 2016, the district court entered the Preliminary Injunction Order. On May 4, 2016, the Director filed a timely notice of appeal from the Preliminary Injunction Order, pursuant to Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over the interlocutory appeal under 28 U.S.C. § 1292(a).

ISSUES ON REVIEW

1) Whether the district court acted within its discretion by entering the Preliminary Injunction Order in favor of the Children based on alleged violations of the Medicaid Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT") requirements, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B), 1396a(a)(43)(C), and the Medicaid reasonable promptness requirement, 42 U.S.C. § 1396a(a)(8).
2) Whether the language of the Preliminary Injunction Order, instructing the Director to arrange for "immediate and affirmative steps" to provide in-home shift nursing services to medically complex children, complies with Fed. R. Civ. P. 65(d).

STATEMENT OF THE CASE

Background on the Medicaid Program.

Medicaid is a joint federal-state program, providing medical assistance to certain low-income individuals. 42 U.S.C. §§ 1396-1396w-5. Medicaid is a vendor payment program that makes payments directly to health care providers, not to

eligible individuals. *See* Dir. SA at 18 ¶ 43 (stating Medicaid is a vendor payment program); Dir. Br. at 4 (same).

"A state's participation in the Medicaid program is completely voluntary. However, once a state elects to participate, it must abide by all federal requirements and standards as set forth in the Act." *Collins v. Hamilton*, 349 F.3d 371, 374 (7th Cir. 2003).

Participating states receive matching federal funding for Medicaid services. 42 U.S.C. § 1396b. To receive federal funding, each state must submit a State plan and receive approval of that plan from the Secretary of Health and Human Services. *Id*. § 1396-1. Illinois participates in Medicaid and receives a 51.30 percent federal match. *See* Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2016 Through September 30, 2017, 80 Fed. Reg. 73,779, 73,781 (Nov. 25, 2015).

Each state must designate a "single State agency" to administer the Medicaid program. 42 U.S.C. § 1396a(a)(5). This agency is responsible for compliance with federal requirements and maintenance of the approved Medicaid plan. *Id*. In Illinois, the Director's department (the Department of Healthcare and Family Services) is the designated single state agency. Doc. 22 at 1-2.

The Medicaid Act requires participating states to make certain services available to program beneficiaries. 42 U.S.C. § 1396a(a)(10)(A); 42 C.F.R. § 440.210(a). One mandatory service is Early and Periodic Screening, Diagnostic,

and Treatment ("EPSDT") for Medicaid-enrolled children and youth under age 21. *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B). EPSDT is a "robust" benefit, designed to ensure that children receive care so that more serious health problems are averted. Centers for Medicare & Medicaid Services ("CMS"), *EPSDT-A Guide for States: Coverage in the Medicaid Benefit for Children and Adolescents,* 1 (June 2014) ("CMS, *EPSDT Guide*").[2] "The goal of EPSDT is to assure that individual children get the health care they need when they need it—the right care to the right child at the right time in the right setting." CMS, *EPSDT Guide* at 1.

Accordingly, states must "arrang[e] for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment" that a child needs. 42 U.S.C. § 1396a(a)(43)(C). EPSDT treatment broadly includes any of the twenty-nine services listed in § 1396d(a) when necessary to "correct or ameliorate" a child's illnesses and conditions. *Id*. § 1396d(r)(5). Private duty nursing (referred to as "in-home shift nursing" in Illinois) is among the mandatory EPSDT services. *Id*. § 1396d(a)(8).

The Medicaid Act also requires participating states to furnish medical assistance with "reasonable promptness to all eligible individuals." *Id*. § 1396a(a)(8). Medical assistance must be provided "without any delay caused by the agency's administrative procedures." 42 C.F.R. § 435.930.

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[2] https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/EPSDT_Coverage_Guide.pdf. *See* CMS, *EPSDT Guide* at 2 ("[T]his Guide serves the important purpose of compiling into a single document the various EPSDT policy guidance that CMS has issued over the years.").

States have the option to implement home and community-based waiver programs and can target these programs to specific population groups. *See* 42 U.S.C.§§ 1396n(c)-(e).

Illinois' Administration of In-Home Shift Nursing Services.

State regulations implement the Illinois State Medicaid plan, including the administration of "home health care services," such as in-home shift nursing services. ILL. ADMIN. CODE tit. 89, Part 140, Subpart D ("Payment for Non-Institutional Services"). These regulations include "shift nursing care in the home for purpose of caring for a participant under 21 years of age who has extensive medical needs and requires ongoing skilled nursing care." ILL. ADMIN. CODE tit. 89, § 140.472(b). According to the regulations, "[h]ome health services are services provided for participants in their places of residence . . . 'residence' does not include a hospital, a skilled nursing facility. . . or a supportive living facility." *Id.* §§ 140.471(a),(c).

The Director requires prior authorization for in-home shift nursing services. Dir. SA at 25, ¶¶ 74-76; Doc. 25 at 1-2. The Director's prior authorization signifies her finding that in-home shift nursing is "medically necessary and appropriate to meet the participant's needs." ILL. ADMIN. CODE tit. 89, § 140.473(e). If approved, the Director sends a written notice to each child stating that: (1) the child has been approved for a specific number of home nursing hours per week; or (2) the child has been approved for a specific monthly budget for home nursing services. Dir. SA. at 25, ¶¶ 75-77; Doc. 25 at 2; *see, e.g.*, Doc. 6-3 at 2. Once approved, the

Director delegates care coordination for in-home shift nursing services to her agent, the University of Illinois at Chicago Division of Specialized Care for Children ("DSCC"). Dir. SA at 27, ¶ 82.

Illinois has also opted to provide additional Medicaid services through home and community-based waiver programs. The Director operates the Medically Fragile Technology Dependent ("MFTD") Waiver program for children and youth under age 21. Dir. SA at 21-24 ¶¶ 56-67; *see generally* ILL. ADMIN. CODE tit. 89, § 120.530. The Director approves children for the MFTD Waiver only if the Director determines that, among other requirements:

(1) the family is willing and able to care for the child in the family home;

(2) home services are cost-beneficial or cost-neutral to the Director; and

(3) the child will be at risk of institutionalization in a skilled nursing facility or hospital without in-home services.

ILL. ADMIN. CODE tit. 89, §§ 120.530(b),(e)(4),(f); Dir. SA at 23, ¶¶ 61-62. Children enrolled in the MFTD Waiver are eligible for EPSDT services, such as in-home shift nursing services, as well as additional, non-EPSDT services.[3] ILL. ADMIN. CODE tit. 89, §§ 120.530(d), 140.3(b).

The Children's In-Home Health Care Needs.

Findings made by the district court, supported by uncontradicted evidence

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[3] The additional services offered through the MFTD Waiver program are not at issue in this case. Dir. SA at 23, ¶ 65. And, there is no dispute that in-home shift nursing services are a part of the EPSDT services. Dir. Br. at 15-17.

and unchallenged on appeal, establish the following undisputed facts:

The Children are Medicaid beneficiaries under the age of 21. Dir. SA at 11-13, ¶¶ 21-24; Doc. 25 at 1. Each has been diagnosed with chronic and disabling health conditions and is medically fragile. Dir. SA at 11-13, ¶¶ 21-24; Doc. 25 at 1. The Children depend on complex medical regimens for routine bodily functions, such as eating, drinking, and breathing. Dir. SA at 11-13, ¶¶ 21-24. Due to their complex medical needs, the Director has determined that the Children can be cared for at home with the appropriate medical care. Dir. SA at 30, ¶ 99; Dir. SA at 33, ¶¶ 114-15; Dir. SA at 34-35, ¶ 125; Dir. SA at 36-37, ¶ 139; Doc. 25 at 1-2. Each child's treating physician supports the medical necessity of in-home shift nursing services. Dir. SA at 25, ¶ 75. Additionally, the Director made an independent medical necessity determination for each child, authorizing a specific level of in-home shift nursing services. Dir. SA at 30, ¶ 99; Dir. SA at 33, ¶ 114; Dir. SA at 34, ¶ 125; Dir. SA at 36, ¶ 139; Doc. 25 at 1-2.

Named plaintiff O.B. is two years old. Dir. SA at 11, ¶ 21. O.B. is entitled to EPSDT and is also enrolled in the MFTD Waiver program. *Id*. at 2, ¶ 2; *Id*. at 32, ¶ 108. Among other conditions, O.B. has been diagnosed with Down Syndrome, lung disease, and cardiac abnormalities. *Id*. at 11, ¶ 21. O.B. is ventilator-dependent and cannot accept oral nutrition. *Id*. At nine months old, O.B. was taken by ambulance to Children's Hospital of Illinois due to respiratory failure. Doc. 6-12 at 2, ¶ 7. While O.B. was hospitalized, the Director approved him for a monthly budget of $19,718

(approximately 18 hours per day) of in-home shift nursing services based on medical necessity. Doc. 6-2 at 2.

O.B. was medically ready for discharge in March 2015. *Id.*; Doc. 6-12 at 2-3, ¶ 8. Anticipating his discharge, O.B.'s parents began searching for in-home nursing services in February 2015. Doc. 6-12 at 3, ¶¶ 9-12. The Director was aware of O.B.'s circumstances since at least April 7, 2015, when the Division of Specialized Care for Children notified her that:

> O. was scheduled to be discharged to home on 3/23/2015. Staffing from the nursing agency was not enough that it was felt to be safe for O. to go home. . . . O. remains hospitalized. Dr. Jeffrey Benson . . . continues to recommend in-home skilled nursing care for O. to be safely discharged.

Doc. 6-2 at 2. O.B. remained hospitalized for nearly a year due to the unavailability of in-home shift nursing services. Dir. SA at 68-69. During this time, his mother, Julie, stated,

> My husband and I desperately want to bring O.B. home. I am at the hospital with O.B. so much that I barely see my other children. . . . My husband and I see each other in passing. . . . Our situation has become unbearable. The effects of O.B's institutionalization over the past several months increase every day; they are tearing our family apart.

Doc. 6-12 at 4, ¶¶ 19-20.

Named Plaintiff C.F. is a nine year old who resides with his mother, a working parent, and his 67-year-old grandmother. Doc. 6-4 at 2, ¶ 2. C.F. is diagnosed with congenital anomalies and reduction deformity brain. *Id.* at ¶ 6. C.F. is blind and nonverbal. *Id.* He is tracheostomy-dependent and cannot ambulate without medical equipment. *Id.* C.F. requires a gastronomy tube for feedings and medication. *Id.* He has a bladder dysfunction that requires catheterization multiple

times a day and at night. Doc. 6-4 at 2, ¶ 6. C.F. is entitled to EPSDT and is also enrolled in the MFTD Waiver program. Dir. SA at 2, ¶ 2; Dir. SA at 33, ¶ 121.

The Director approved C.F. for 84 hours per week of in-home shift nursing services based on medical necessity. Doc. 6-3 at 2; Doc. 25 at 1. In the three months prior to filing the Complaint, C.F.'s in-home shift nursing services varied from zero hours to sixty hours per week. Doc. 6-4 at 2-3, ¶¶ 9-12. The Director's agent, DSCC, is aware of C.F.'s inadequate nursing. *Id.* at 2, ¶¶ 9-10. When C.F. does not receive nighttime nursing services, his mother and grandmother sleep in two-hour shifts so that someone is with C.F. at all times. Doc. 6-4 at 3, ¶ 12.

Named Plaintiffs J.M. and S.M. are siblings. Dir. SA at 7, ¶ 9. They are entitled to EPSDT and also enrolled in the MFTD Waiver program. Sixteen-year-old J.M.'s medical conditions include microcephaly, a developmental delay, and a seizure disorder. Doc. 6-6 at 2, ¶ 6. He has a gastronomy tube and is tracheostomy-dependent. *Id.* J.M. is nonverbal and is paralyzed from the nose down. *Id.* at 3, ¶ 6. He communicates through blinking. *Id.* S.M., is 14 years old. S.M. is blind, nonverbal, and only moves her left arm purposefully. Doc. 6-8 at 2, ¶ 6. S.M.'s health conditions include spastic quadriplegia, microcephaly, global developmental delay, and a seizure disorder. *Id.* S.M. experiences autonomic brain storm episodes about once a week. *Id.* at 3, ¶ 7. During these episodes, she can become so agitated that she needs to be restrained and sedated. *Id.*

The Director approved J.M. and S.M. each for 112 hours per week of one-on-one in-home shift nursing based on medical necessity.[4] Doc. 6-5 at 2; Doc. 6-7 at 2. Their in-home shift nursing services are inconsistent and unpredictable. Doc. 6-6 at 3-4, ¶¶ 9-12; Doc. 6-8 at 3-4, ¶¶ 10-13. At the time the Complaint was filed, J.M received only 48 hours per week of one-on-one in-home shift nursing services; S.M. received only 58 hours per week. Doc. 6-6 at 4, ¶ 12; Doc. 6-8 at 4, ¶ 13. J.M. and S.M. received an additional 50 hours of shared nursing services. Doc. 6-6 at 4, ¶ 12; Doc. 6-8 at 4, ¶ 13. The Director's agent, DSCC, was aware of J.M. and S.M.'s inadequate nursing services. Doc. 6-6 at 4, ¶ 15; Doc. 6-8 at 4-5, ¶ 16.

The Children also provided the district court with evidence regarding Class Members. Class Member O.M., age nine months, received 54 of the 126 hours per week that the Director found to be medically necessary. Doc. 6-15 at 2, ¶¶ 2-7. Class Member D.G., age five, received 10 of the 63 hours per week that the Director found to be medically necessary. Doc. 28-1 at 2, ¶¶ 6,8. Class Member K.W., age three, received between 60 and 80 of the 112 hours per week that the Director found to be medically necessary. Doc. 28-2 at 2-3, ¶¶ 6,10. Class Member W.W., age four, received 40 of the 112 hours per week that the Director found to be medically necessary. Doc. 28-3 at 2-3, ¶¶ 6,8. In support of Class Certification, the Children summarized records of seventy-five other Class Members, spanning at least eleven different Illinois counties (including Cook County), who have not received approved,

[4] The Director approved both J.M. and S.M. for eight additional hours per week (a total of 120 hours per week) of in-home shift nursing services while attending school. Doc. 6-5 at 2; Doc. 6-7 at 2.

medically necessary in-home shift nursing services. *See* Doc. 39-2; *see also* Doc. 39-3 (sealed exhibit with unredacted records).

The Proceedings Below.

On November 20, 2015, the Children filed the Complaint, a Verified Motion for a Preliminary Injunction, and a Motion for Class Certification. Doc. 1; Doc. 4; Doc. 6. Count I of the Complaint seeks to enforce the Medicaid Act's EPSDT provisions, which require the Director to arrange for the Children's medically necessary services. Dir. SA at 41, ¶¶ 174-77; 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43)(C), 1396d(a)(4)(B); Count II seeks to enforce the Medicaid Act's requirement that medical assistance be "furnished with reasonable promptness to all eligible individuals." Dir. SA at 41-42, ¶¶ 178-82; 42 U.S.C. § 1396a(a)(8). Counts III and IV assert violations of the ADA and the Rehabilitation Act, respectively. Dir. SA at 42-43, ¶¶ 183-91; 42 U.S.C. §§ 12131-32; Dir. SA at 43-44, ¶¶ 192-98; 29 U.S.C. § 794.

Prior to ruling on the Verified Motion for Preliminary Injunction, the district court questioned the Director's counsel as to whether the Director contested any factual issues. Dir. SA at 82. The district court and the Director's counsel had the following exchange:

> The Court: Are there fact disputes in the preliminary injunction motion? Have you contested anything he asserted in his motion by way of a factual matter?
>
> Mr. Huston: It is more of a legal issue, I believe -- whether the Court has the ability to fashion the relief that they are seeking.
>
> The Court: All right. Well, here is what I hope to do, then . . . a hearing would

> be called for if you have disputed issues of fact, that a hearing is necessary for. But if it is essentially or purely a matter of law, then I can look at your papers and make a decision based on that.

Dir. SA at 82. Counsel did not dispute any facts or request an evidentiary hearing. *Id.*

On March 21, 2016, the district court granted the Verified Motion for Preliminary Injunction as to the Medicaid claims (Counts I and II) but, finding "certain factual issues," the district court did not rule on the ADA and Rehabilitation Act claims (Counts III and IV). Dir. SA at 115. The Preliminary Injunction Order was entered on April 6, 2016. Dir. SA at 116-17.

On April 7, 2016, the Director made an Oral Motion for Stay pending a likely appeal. Doc. 63 (Tr. of Apr. 7, 2016 Hr'g) at 2:15-16. After reviewing position papers submitted by the Director and the Children, the district court denied the Director's Motion for Stay. Doc. 64 (Tr. of Apr. 21, 2016 Hr'g) at 2-3. On May 16, 2016, the Director filed a Motion to Stay Pending Appeal with the district court and this Court. App. Doc. 6. On May 18, 2016, the district court denied the Motion for Stay Pending Appeal. Doc. 58. This Court denied the Motion to Stay on July 15, 2016. App. Doc. 28.

The Motion for Class Certification was fully briefed on April 1, 2016, prior to the district court's entry of the Preliminary Injunction Order. Doc. 39, 40. On May 17, 2016, the district court certified a class in this case:

> All Medicaid-eligible children under the age of 21 in the State of Illinois who have been approved for in-home shift nursing services by the Defendant, but who are not receiving in-home shift nursing services at the level approved by the Defendant, including children who are enrolled in a Medicaid waiver

> program, such as the Medically Fragile Technology Dependent (MFTD) Waiver program, and children enrolled in the nonwaiver Medicaid program, commonly known as the Nursing and Personal Care Services (NPCS) program.

Doc. 55. The Children filed a Motion to Enforce the Preliminary Injunction Order on June 17, 2016. Doc. 66-67. The district court entered an order granting, in part, the Plaintiffs' Motion to Enforce the Preliminary Injunction on August 5, 2016. Doc. 78-79.

SUMMARY OF ARGUMENT

The parties agreed that the issues before the district court were legal in nature. The Director did not dispute the factual evidence submitted in support of Counts I and II of the Verified Motion for Preliminary Injunction. Neither party disputes that: (1) in-home shift nursing services are a part of the Medicaid Act's EPSDT benefit; (2) the Director approved the Children for a specific level of in-home shift nursing services based on medical necessity; or (3) the Children's services, though approved, were consistently not delivered.

The district court's weighing of the evidence and findings of fact were well within its discretion. The district court correctly concluded that the Children are highly likely to succeed on the merits of their Medicaid claims. The Director argues on appeal that her responsibility under the Medicaid Act is to pay claims when and if they are submitted, not to ensure the provision of services. This argument fails, because the Medicaid Act was amended on March 23, 2010 specifically to reject it.

The Medicaid Act's reasonable promptness and Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT") provisions require the Director not only to

pay for necessary services but also to ensure the timely provision of these services. The Director does not comply with these provisions through her willingness to pay for in-home nursing services that are never provided. Nor does the Director comply with the provisions through her willingness to pay for the Children's institutionalization, which is neither medically necessary nor requested by the Children's families or their treating physicians. Rather, the Director must arrange for the Children's in-home shift nursing services and ensure these services are furnished with reasonable promptness. Furthermore, the Director raises new arguments and introduces new facts for the first time on appeal that this Court should reject as waived.

The Preliminary Injunction Order complies with Fed. R. Civ. P. 65(d). As written, the Preliminary Injunction Order provides the Director with adequate notice and appropriate deference.

ARGUMENT

I. Standard of Review.

This Court reviews the "district court's findings of fact for clear error, its legal conclusions *de novo*, and its balancing of the factors for a preliminary injunction for an abuse of discretion." *D.U. v. Rhoades*, No. 15-1243, 2016 WL 3126263, at *2 (7th Cir. June 3, 2016). (citations omitted). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). This Court gives

"substantial deference to the court's weighing of evidence and balancing of the various equitable factors." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). The standard of review "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985).

A preliminary injunction is not "awarded as of right." *D.U.*, 2016 WL 3126263, at *2. The movant must establish that he is "likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This Court has "said repeatedly that the plaintiff's chances of prevailing [on the merits] need only be better than negligible." *D.U.*, 2016 WL 3126263, at *5 (case citations omitted).

II. The Children are Likely to Succeed on Their Claims that the Director is Violating the Medicaid Act's EPSDT and Reasonable Promptness Requirements.

The district court correctly found that the Children are likely to show that the Director's consistent failure to provide for in-home shift nursing services for medically-fragile children is violating the Medicaid Act's EPSDT and reasonable promptness requirements. As noted above, the Medicaid Act provides that "medical assistance . . . shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). This "medical assistance" must include

EPSDT services for Medicaid-eligible children and youth under age 21. 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B). The Director must arrange for the EPSDT treatment services, such as in-home shift nursing, that children need. *Id*. §§ 1396a(a)(43)(C), 1396d(r)(5).[5]

A. *The Director is Failing to Arrange for Adequate In-Home Shift Nursing Services with Reasonable Promptness.*

The district court found that the Children established a high likelihood of success on the merits of their Medicaid claims based upon undisputed facts. The Children presented evidence that the Director systematically failed to provide for adequate levels of in-home shift nursing for the named Plaintiffs and numerous Class Members. The district court found that "it is undisputed that the Director found all named Plaintiffs and class members eligible for Medicaid-covered in-home shift nursing services based on medical necessity" but "failed to provide adequate services for months, if not years, after the services were approved." Dir. SA at 105 (internal quotations omitted); *Id*. at 94, 105 (noting that the Director did not "dispute that Plaintiffs are not receiving all such approved services, much less with the 'reasonable promptness' required" or that "services were both approved and undelivered").

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[5] The Children's ability to enforce 42 U.S.C. § 1396a(a)(8) and § 1396a(a)(43)(C) pursuant to 42 U.S.C. § 1983 is not disputed. Every circuit court of appeals to have addressed the issue has concluded that Medicaid beneficiaries can enforce these provisions. *See* Doc. 32 at 2-4 (collecting cases).

B. *The Director Must Arrange for EPSDT In-Home Services with Reasonable Promptness, Not Simply Make Payment for These Services When and If a Claim is Submitted.*

The Director's primary argument on appeal goes to the heart of what it means for a state to participate in the Medicaid program. The Director argues that she satisfies her obligations to provide "medical assistance" by paying for the Children's services when and if claims are submitted. Dir. Br. at 19-21. The Medicaid Act was amended in 2010, however, to make it clear that this argument is incorrect.

1. *Congress Amended the Definition of "Medical Assistance" to Clarify that It Includes Both Payment and Services.*

The Director relies on *Bruggeman ex rel. Bruggeman v. Blagojevich*, which observed in dicta that "the statutory reference to '[medical] assistance' appears to have reference to financial assistance rather than to actual medical services . . . " 324 F.3d 906, 910 (7th Cir. 2003). At that time, 42 U.S.C. § 1396d(a) defined "medical assistance" to mean "payment of part or all of the costs of the following [enumerated] care and services." 42 U.S.C. § 1396d(a) (2009). Three courts of appeals subsequently relied on the *Bruggeman* dicta to hold that "medical assistance" refers to financial assistance rather than to actual medical services. *See Equal Access for El Paso v. Hawkins*, 562 F.3d 724, 728 (5th Cir. 2009); *Okla. Chapter of the Am. Acad. of Ped. v. Fogarty*, 472 F.3d 1208, 1214 (10th Cir. 2006);

Westside Mothers v. Olszewski, 454 F.3d 532, 540 (6th Cir. 2006). These decisions were at odds with opinions from other federal circuits.[6]

On March 23, 2010, Congress amended the Medicaid Act to define "medical assistance" to mean "payment of part of all of the costs of the following [enumerated] care and services, *or the care and services themselves, or both*." 42 U.S.C. § 1396d(a) (as amended by Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 125 Stat. 119, at § 2304 (March 23, 2010)) (emphasis added). The Director correctly quotes the amended definition, but she fails to acknowledge the significance of the new wording. Dir. Br. at 20.

The legislative history to the amendment (a "technical correction") acknowledges that the term "medical assistance" was expressly defined to refer to payment but noted that it had "generally been understood to refer to both the funds provided to pay for care and services and to the care and services themselves." H.R. REP. NO. 111-299, at 649-50, § 1781, 2009 WL 3321420 (Leg. Hist.) (Oct. 14, 2009). The technical correction was intended squarely to address the "recent court opinions" that questioned this longstanding application. *Id.*; *see also* S. REP. NO. 111-89, at 89 § 1639, 2009 WL 3365933 (Leg. Hist.) (Oct. 19, 2009) ("The Committee Bill would clarify that "medical assistance" encompasses both payment for services

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[6] *See Bryson v. Shumway*, 308 F.3d 79, 81, 88–89 (1st Cir. 2002); *Doe v. Chiles*, 136 F.3d 709, 714, 717 (11th Cir. 1998).

provided and the services themselves.").[7]

Numerous courts have considered the 2010 amendment and concluded that it clarifies that states must provide, or ensure the provision, of services, not just pay for them. *See A. H. R. v. Wash. State Health Care Auth.*, No. C15-5701JLR, 2016 WL 98513, at *12 (W.D. Wash. Jan. 7, 2016) (agreeing that "Congress intended to clarify that where the Medicaid Act refers to the provision of services, a

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[7] The House Committee Report states in full:

> Sec. 1781. Technical corrections . . . Section 1905 of the Social Security Act. Section 1905(a) of the Social Security Act defines the term "medical assistance." The term 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. The Committee, which has legislative jurisdiction over Title XIX of the Social Security Act, has always understood the term to have this combined meaning. Four decades of regulations and guidance from the program's administering agency, the Department of Health and Human Services, have presumed such an understanding and the Congress has never given contrary indications.
>
> 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 be 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.
>
> Other courts have held the term to be payment as well as the actual provision of the care and services, as it has long been understood. The Circuit Courts are split on this issue and the Supreme Court has declined to review the question. To correct any misunderstandings as to the meaning of the term, and to avoid additional litigation, the bill would revise section 1905(a) to read, in relevant part: "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." This technical correction is made to conform this definition to the longstanding administrative use and understanding of the term. It is effective on enactment.

H.R. REP. NO. 111-299, at 649-50, § 1781, 2009 WL 3321420 (Leg. Hist.) (Oct. 14, 2009).

participating State is required to provide (or ensure the provision of) services, not merely to pay for them") (citations and internal quotations omitted); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1321 (W.D. Wash. 2015) (rejecting defendants' "medical assistance" as payment argument, noting the argument was based on an outdated version of 42 U.S.C. § 1396d(a) and that defendants had dropped the argument in their reply brief); *Leonard v. Mackereth*, No. 11-7418, 2014 WL 512456, at *6-8 (E.D. Pa. Feb. 10, 2014); *John B. v. Emkes*, 852 F. Supp. 2d 944, 951 (M.D. Tenn. 2012) (same).

2. A Plain Reading of the Statute Reflects the Inclusion of Services and Payment.

The Director attempts to distinguish *John B. v. Emkes*. Dir. Br. at p. 20, n.4. She cites *Matter of Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995) for the proposition that the statutory text is the best evidence of a statute's purpose and a reviewing court must presume that a legislature says in a statute what it means. Dir. Br. at 15-21. She argues that the "medical assistance" definition contains three exclusive options and that she is allowed to pick one of them—that she need only pay for services—that best suits her purposes. *Id.* at 19-21. However, the Director ignores additional admonitions in *Matter of Lifschultz* that reviewing courts "not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Matter of Lifschultz*, 63 F.3d at 628 (internal citation and quotation marks omitted); *see also*, *e.g.*, *Utility Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) ("[A] statutory term—even one defined in the statute—may take on distinct characters from association with

distinct statutory objects calling for different implementation strategies.") (internal quotations omitted).

Notably, the Director's argument would make some provisions of the Medicaid Act unintelligible—the very thing that the clarification was intended to address. The legislative history points out that the Director's reading would render the reasonable promptness provision "absurd." *See* n.7, *supra*.; *see also*, *e.g.*, 42 U.S.C. § 1396a(a)(23) (provision requiring state to "provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any[one] qualified to perform the service" would mean the Director has the option to provide individuals eligible for payment with payment, including drugs); 42 U.S.C. §1396a(a)(65) (provision requiring state to "issue provider numbers for all suppliers of medical assistance consisting of durable medical equipment" would mean the Director has the option to issue provider numbers to suppliers of payments consisting of medical equipment).

Finally, the Director's reading would render other Medicaid Act provisions superfluous. *See Matter of Lifschultz*, 63 F.3d at 628 (noting that courts "have a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment") (internal quotations omitted). Notably, the Director's argument makes the Medicaid EPSDT provision, 42 U.S.C. § 1396a(a)(43)(C), which requires the state to "arrange for … corrective treatment," superfluous because it cannot reasonably be construed to apply to payment.

In sum, the Director is incorrect when she argues that her obligations under Medicaid provisions can be satisfied by simply "paying for Plaintiffs' in-home shift nursing services and their care at hospitals." Dir. Br. at 21. Rather, she must arrange for the EPSDT in-home nursing services and ensure that they are furnished with reasonable promptness.

C. *The Medicaid Act Requires the Director to Affirmatively Arrange for the Children to Receive the In-Home Nursing Services She has Determined that They Need.*

The Director is not complying with the federal EPSDT provisions if she is not arranging for in-home shift nursing services that the Children need. The Director argues that she can pay for in-home shift nursing in the home or in an institutional (*i.e.*, hospital) setting to satisfy her legal obligations. Dir. Br. at 17-18. As explained below, however, much of the Director's argument is not properly before the Court. And should the Court reach the merits of these arguments, the Court should find that the Director's narrow vision of her EPSDT responsibilities is at odds with the plain language of the Medicaid Act, guidelines from the federal Medicaid agency, as well as opinions from this Court and other courts of appeals.

D. *This Court Should Not Consider the Legal Arguments and Factual Allegations that the Director Introduced for the First Time on Appeal.*

This Court has established clear standards for the legal and factual arguments that may be raised on appeal. Arguments not raised to the district court are waived on appeal. *See Brown v. Auto. Components Holdings, LLC*, 622 F.3d 685, 691 (7th Cir. 2010); *Robyns v. Reliance Standard Life Ins. Co.*, 130 F.3d 1231, 1238 (7th Cir. 1997). Arguments raised in the lower court may still be waived on appeal if

they are "underdeveloped, conclusory, or unsupported by law." *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived. . . . "); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim."); *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) ("We have also recognized that raising an issue in general terms is not sufficient to preserve specific arguments that were not previously presented.")

1. The Director's Brief Improperly Raises New Legal Arguments.

The Director raises two new legal arguments that she forfeited by failing to raise or fully develop them below. First, the Director argues that she can comply with the Medicaid Act if she provides nursing services "either through in-home shift nursing services or through care at hospital." Dir. Br. at 17. Second, the Director argues the Children did not establish a "reasonable likelihood that the Director's inability to find nurses who were able to care for them in their homes [i]s unreasonable." Dir. Br. at 22. These arguments were not raised before the district court, and this Court should not consider them. If this Court chooses to consider them, they should be rejected for the reasons set forth below.

2. The Director's Brief Improperly Introduces New Facts.

Similarly, the Director improperly raises new facts. First, the Director attempts to introduce evidence that she "did take affirmative steps to provide in-home shift nursing services." Dir. Br. at 18. She relies upon a January 2016 report stating that "the Director engaged in 'various outreach activities over the

past 12-18 months' to employ additional nurses." Dir. Br at 18; *see also* Dir. Br. at 6, 22, 25-26 (citing Doc. 45-5 at 8, *Report of Medicaid Services for Persons who are Medically Fragile, Technology Dependent* (Jan. 1, 2016)). This report was not before the district court when the Preliminary Injunction Order was entered on April 6, 2016.[8] Similarly, the Director argues for the first time on appeal that there is a shortage of nurses available to serve the Children. Dir. Br. at 21-22. The Director did not introduce any evidence in the district court (or to this Court, for that matter) of such a shortage.[9] Third, the Director presented no evidence in the district court that pediatric hospitals in Illinois or transitional care facilities (such as Almost Home Kids) have capacity or are even appropriate to care for the "roughly 1,200 children that comprise the Plaintiffs and the class."[10] *See* Dir. Br. at 24; *see also* Dir. Br. at 17, 21.

The Court should refuse to consider these facts. These facts were not before the district court on April 6, 2016, when the Preliminary Injunction Order was

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[8] The Children introduced this report on April 18, 2016, as an exhibit to their proposed statement of facts in support of a preliminary injunction as to Counts III and IV, the ADA and Rehabilitation Act claims. *See* Doc. 45.

[9] The Director's limited citations to the record are to the Complaint and evidence introduced by the Plaintiffs after the Preliminary Injunction Order was entered on April 6, 2016. *See* Dir. Br. at 22 (citing Dir. SA at 4, ¶ 5(k); Doc. 45-5.)

[10] The Director supports her argument with statements from two declarations made by Michele McCullough, the mother of named plaintiffs J.M. and S.M. Def. Br. at 7, 17. The declarations merely relay the suggestion made by DSCC (the Director's agent, the Division of Specialized Care for Children) that these two siblings could be institutionalized at Almost Home Kids due to their lack of in-home shift nursing services. *See* Doc. 6-6 at ¶ 15; Doc. 6-8 at 4-5, ¶ 16; Dir. Br. at 7, 17. Additionally, the Director misconstrues paragraph 130 of the Complaint, concerning the "alternative" of J.M.'s hospitalization. *See* Dir. Br. at 17, citing Dir. SA at 35, ¶130.

entered. Arriving before this Court in general, conclusory terms, these factual allegations should not be considered. And if they are, the Court should find that these facts do not provide the grounds for reversing the Preliminary Injunction Order.

E. *Even if the Court Does Consider These Arguments, the Director Cannot Meet Her Obligations through Reimbursement or Delegation if In-Home Shift Nursing Services are Not Promptly Arranged.*

The Director argues that she satisfied her responsibility to implement the federal EPSDT provisions when she "alerted Plaintiffs to the EPSDT provisions, screened them, and made necessary health care available to Plaintiffs, either through in-home shift nursing services or through care at hospital[s]." Dir. Br. at 17. According to the Director, after determining that a child has a medical need services, she meets her legal obligation by delegating the responsibility for ongoing care to the Division of Specialized Care for Children ("DSCC"). Dir. Br. at 8, 17. The Court should reject these arguments.

As an initial matter, the Director's delegation to DSCC does not absolve the Director of her responsibility to ensure that the Illinois Medicaid program is operated in compliance with federal law. *See* 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10(e)(3) (single state agency may not delegate the authority to supervise the plan); see *Katie A. ex rel. Ludin v. L.A. City*, 481 F.3d 1150, 1159 (9th Cir. 2007) ("Even if a state delegates the responsibility to provide treatment to other entities . . . the ultimate responsibility to ensure treatment remains with the

state."); *accord K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107, 119 (4th Cir. 2013) ("One head chef in the Medicaid kitchen is enough.").

In addition, the Director's argument ignores the way in which Congress requires each state to implement EPSDT. The Director must arrange for a broad range of treatment services—those listed in 42 U.S.C. § 1396d(a), including in-home nursing services. The Director must provide these services when necessary to "correct or ameliorate" the child's illnesses and conditions. *Id.* §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r)(5). The Director must "arrang[e] for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment" that the child needs. *Id.* § 1396a(a)(43)(C). To this end, "[t]he agency must make available a variety of individual and group providers qualified and willing to provide EPSDT services." 42 C.F.R. § 441.61(b); *see*, *e.g.*, *Parents' League for Effective Autism Services v. Jones-Kelley*, 339 F. App'x 542, 547 (6th Cir. 2009) (quoting 42 U.S.C. §§ 1396a(a)(43)(C), 1396d(r)(5) and stating that "[t]aken together, these provisions require Ohio to provide EPSDT-eligible children *all of the services* in subsection § 1396d(a) that are determined to be medically necessary") (emphasis added); *Katie A.*, 481 F.3d at 1154 (finding that (a)(43)(C) obligates states to cover every type of service when needed for corrective or ameliorative purposes that is allowable under § 1396d(a) and that "states also have an obligation to see that the services are provided when screening reveals that they are medically necessary for a child."); *id.* at 1162 ("Requiring the State actually to provide EPSDT services that have been found to be medically necessary is consistent with the

language of the Medicaid Act, which requires that each state plan '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 . . .'").[11] *See also*, *e.g.*, *Chisholm v. Hood*, 110 F. Supp. 2d 499, 505 (E.D. La. 2000) ("[S]tates are further obligated to actively arrange for corrective treatment" under § 1396a(43)(C)); *Salazar v. Dist. of Columbia*, 954 F. Supp. 278, 330 (D.D.C. 1996) (finding District of Columbia's failure to ensure that EPSDT-eligible children receive diagnosis and treatment for health problems detected during screening violated § 1396a(a)(43)(C)).

The Director also disregards clear guidance from CMS. In June 2014, CMS issued extensive policy guidance on states' obligations to arrange services under 42 U.S.C. § 1396a(a)(43). *See* CMS, *EPSDT Guide*. CMS notes that the "affirmative obligation to connect children with necessary treatment makes EPSDT different from Medicaid for adults" and is "a crucial component of a quality child health benefit." *Id.* at 5.[12]

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[11] The Director relies on *Katie A* for her argument that she has discretion to provide nursing services in hospitals rather than in the home. Dir. Br. at 18. But that reliance is misplaced. In *Katie A.*, the parties did not dispute that the EPSDT provisions required the state to provide children with mental health services in the home setting. *See Katie A.,* 481 F.3d at 1151-56. Rather, the dispute involved whether the state had to fund these services in a bundle, using the "wraparound" and "therapeutic foster care" approaches advanced by the plaintiffs, or whether the state could fund the mental health services under the various, separate home care categories listed in 42 U.S.C. § 1396d(a). *Id.* at 1160.

[12] As a statement of long-standing agency policies, the CMS *EPSDT Guide* is "entitled to respect" from this Court. *Skidmore v. Swift & Co.*, 323 U.S 134, 140 (1944). The Director also cites the *EPSDT Guide*. Dir. Br. at 4, 5, 22.

According to the CMS, "The role of states is to *make sure the full range of EPSDT services is available* as well as to assure that families of enrolled children are aware of and have access to those services so as to meet the individual child's needs." CMS, *EPSDT Guide* at 9 (emphasis added); *id.* at 28 (requiring states to take advantage of "all available resources" to provide a "broad base" of providers and noting states may need to recruit new providers). "The goal of EPSDT is to assure that individual children get the health care they need when they need it – the right care to the right child at the right time in the right setting." *Id.* at 2.

In this case, the Director has determined that the right care for the Children is in-home shift nursing services and the right setting is the home. Dir. SA. at 25, ¶¶ 75-77; Doc. 25 at 2; *see, e.g.*, Doc. 6-3 at 2; *see also* ILL. ADMIN. CODE tit. 89, §§ 140.471(a),(c) (requiring in-home shift nursing to be provided in the Children's "places of residence … [and] … residence does not include a hospital"); *see generally Steimel v. Wernert*, 823 F.3d 902, 907 (7th Cir. 2016) ("Home-health services include '[s]killed nursing,' …. Home-health services, as the name suggests, 'must be performed in the home,'" quoting 405 IND. ADMIN. CODE 5-3-13 et seq.).

Nevertheless, the Director argues that, if the Children do not receive in-home nursing services, she can comply with federal law by merely paying for the Children to get care in the hospital. Dir. Br. at 17. To the extent that this Court is willing to consider this argument, the Director's approach must be rejected because it is at odds with the Medicaid Act, federal guidance, the case law discussed above, and her own regulations (not to mention the integration mandates of the ADA and

Rehabilitation Act). *See Bond v. Stanton*, 655 F.2d 766, 768 (7th Cir. 1981) ("Congress intended to require States to take aggressive steps to screen, diagnose, and treat children with health problems."); *id.* at 771 ("The state must assure that arrangements are made for treating detected health problems. . . . Monitoring of this aspect of the problem is mandatory in order to prevent future health problems as Congress intended."); *see also Stanton v. Bond*, 504 F.2d 1246, 1251 (7th Cir. 1974) (criticizing Indiana's "somewhat casual approach" to EPSDT implementation and noting that implementation is meant to be "aggressive").

The Director cannot fulfill her obligations by approving in-home shift nursing services as medically necessary, not arranging for those services, and then paying for the Children's inpatient care once their situations deteriorate to the point where they are admitted to the hospital. Under this logic, the Director could approve physical therapy to enable children to walk, fail to arrange for the therapy, and then pay for wheelchairs when their conditions deteriorated to the point where they could not ambulate; the Director could approve children for community-based psychology services, fail to arrange for the services, and then pay for inpatient psychiatric care when they decompensate.

Under the Medicaid Act, the Director has the obligation to ensure that medically necessary, in-home shift nursing services are actually available to the Children. *See S.D. v. Hood*, 391 F.3d 581, 592 (5th Cir. 2004) (rejecting state's argument for discretion because the "plain words of the statute and the legislative history make evident that Congress intended that the health care . . . that must be

provided under the EPSDT program be determined by reference to federal law, not state preferences").

F. *The Director Misconstrues the Reasonable Promptness Requirement of 42 U.S.C. § 1396a(a)(8).*

The Director argues that the district court should be reversed because the Children did not establish a "reasonable likelihood that the Director's inability to find nurses who were able to care for them in their homes [i]s unreasonable." Dir. Br. at 22. This argument mischaracterizes the Medicaid provision at issue here. Section 1396a(a)(8) requires a court to focus not on whether or not the Director's actions were reasonable but on whether the State is "furnish[ing] medical assistance with reasonable promptness to all eligible individuals." 42 U.S.C. §1396a(a)(8).

The Director's miscue is tied, in large part, to the mistaken position that her obligation is simply to fund medical services. *See* Dir. Br. at 19-21. The Director cites *Okla. Chapter of the Am. Acad. of Ped. v. Fogarty*, 472 F.3d at 1209, and *Brown v. Tenn. Dep't of Fin. & Admin.*, 561 F.3d 542, 545 (6th Cir. 2009), to argue that delays in treatment and waiting lists for services do not violate federal law. Dir. Br. at 22. Both of these cases pre-date the 2010 statutory amendment that, as explained above, clarifies that participating states are required to provide or ensure the provision of services, not merely pay for them.[13] In addition, *Brown* concerns a

[13] In *Oklahoma Chapter*, the Tenth Circuit refused to recall its prior 2007 mandate, noting that Congress did not make the amendment retroactive or call into question the finality of judgments. *See Okla. Chapter of the Am. Acad. of Ped. v. Fogarty*, Nos. 05-5100, 05-5107,

distinct section of the Medicaid Act (42 U.S.C. § 1396n(c)), which authorizes states to limit the number of enrollees in special waivers for home and community-based services programs. That provision of the Medicaid Act is not at issue here. By contrast, reasonable promptness provisions were included within various sections of the Social Security Act to prohibit waiting lists. *See*, *e.g.*, *Jefferson v. Hackney*, 406 U.S. 535, 544-45 (1972).

The Director also argues that the reasonable promptness claim must fail because the Children have suggested that reimbursement rates for in-home services need to be increased. Dir. Br. at 23. The Director says CMS approved the rates, thus indicating they are legally permissible. This argument is beside the point.[14] The Children are suing to require the Director to comply with her obligations under the Medicaid reasonable promptness and EPSDT provisions, not to enforce 42 U.S.C. § 1396a(a)(30)(A), the adequate payment provision. As plaintiffs, the Children get to choose which provisions they will seek to enforce. The Director may not transform the Plaintiffs' claims.

The Director also cites *Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015). Dir. Br. at 23. The Director's primary argument before the district

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2010 WL 3341881, at *2 (10th Cir. July 20, 2010). *Compare Disability Rights N.J., Inc. v. Velez*, Civ. No. 05-4723, 2010 WL 5055820, at *3 (D.N.J. Dec. 2, 2010) (reversing order granting summary judgment to defendant in ongoing case and reinstating plaintiffs' claim because subsequently amended definition of "medical assistance" includes "not only financial assistance but also actual care and services").

[14] A similar argument was made and properly rejected in *A. H. R. A. H. R.* 2016 WL 98513, *14 (W.D. Wash. Jan. 7, 2016) (noting that defendant "has submitted no evidence that CMS is aware of the issues in this lawsuit or has made any determination with respect to [defendant's] compliance with the Medicaid statute here").

court was that this *Armstrong* foreclosed the Children's Medicaid claims. *See generally* Doc. 22; Doc. 25; *see also* Dir. SA at 96-99. To the extent the Director may be hinting that here, this Court should affirm the district court's reasoning below: "*Armstrong* was a plurality opinion, with only a minority of Justices joining in the portion on which Norwood relies (Part IV).… But as important, this discussion in *Armstrong* is also inapposite here, because it addresses a different statutory provision, asserted by different plaintiffs, under a different theory." Dir. SA at 96. (case citations omitted).

The Complaint does allege that the Director is paying for the Children's in-home nursing services at much lower rates than those paid by the Director and a sister agency for other pediatric home nursing services. Dir. SA at 9-10, ¶¶ 13-15. The Complaint also alleges that the Director's conduct violates the ADA and the Rehabilitation Act. Dir. SA at 42-43, ¶¶ 183-91; Dir. SA at 43-44, ¶¶ 192-98. Citing these allegations, the district court recognized the viability of these disability claims. *See* Dir. SA at 98-103 (quoting *Amundson ex rel. Amundson v. Wis. Dep't of Health Servs.*, 721 F.3d 871, 874-75 (7th Cir. 2013) (acknowledging discrimination claim where a state "buys the best available care" for one disability, "but pays only for mediocre care" for another)).

The Director has found that specific amounts of in-home shift nursing services are medically necessary for the Children, but, indisputably, she fails to provide for adequate services for months, if not years, after the services were approved. *See* Dir. SA at 2-9, ¶¶ 5-12; Dir. SA at 11-14, ¶¶ 21-26; Dir. SA at 30-

40, ¶¶ 97-173. This Court should affirm the district court's finding that the Children are likely to succeed on the merits of the reasonable promptness claim.

G. *The Children Presented Undisputed Evidence of the Director's Systemic Failure to Arrange for Medically Necessary EPSDT Services with Reasonable Promptness.*

The undisputed declarations of the Children's parents and the Director's records demonstrate the systemic nature of the Director's legal violations. The declarations demonstrate a failure to arrange adequate services for months, if not years. These violations affect Children across the state of Illinois.[15]

The Children presented evidence that O.B., and others like him, have been unnecessarily institutionalized due to the Director's violations. *See* Doc. 6-2 at 2 regarding O.B.; Doc. 6-12 at 4, ¶ 16 (regarding O.B. and four similarly situated children at Children's Hospital of Illinois). The evidence further demonstrated that children residing at home often receive inadequate nursing services; these inadequate service levels have gone on for months, and in some cases, years. *See* Doc. 6-4 at 2, ¶ 9 (regarding three years of staffing issues for C.F.); Doc. 6-6 at 4, ¶ 12 (regarding five months of inadequate service levels for J.M. and S.M.); Doc. 6-9 at 2, ¶ 10 (regarding a year and a half of inadequate staffing for Sa. S); Doc. 6-14 at 2-3, ¶ 9 (regarding at least nine months of inadequate service levels for G.A.); Doc. 28-1 at 3, ¶¶ 14-15 (regarding one year of inadequate service levels for D.G.); Doc.

[15] The declarations that the Children submitted reflect residents of six counties in Illinois, including Cook County. Of the seventy-five Class Members summarized in Doc. 39-2, geographic information was available for sixteen Class Members, residing in eleven counties, including Cook County. *See* Doc. 39-3. In total, at least sixteen distinct counties were reflected.

28-2 at 2-3, ¶ 10 (regarding approximately six months of inadequate service levels for K.W.); Doc. 28-3 at 3, ¶ 8 (regarding approximately six months of inadequate staffing for W.W.).

The declarations that the Children submitted demonstrate that their parents have tried to work within the Director's system to no avail. For example, parents have contacted multiple nursing agencies to find adequate nursing services. *See* Doc. 6-6 at 5, ¶ 16; Doc. 6-10 at 3, ¶ 14; Doc. 6-12 at ¶ 10; Doc. 28-1 at 2-3, ¶ 13. Parents have also attempted to recruit nurses on their own. *See* Doc. 6-10 at 3, ¶ 16; Doc. 28-3 at 3, ¶ 9; Doc. 6-12 at 3, ¶ 11 (O.B.'s mother contacted at least three local nursing colleges and created a Facebook page with over 42,000 views).

The Director's agent, DSCC, is aware of the Children's inadequate service levels. *See* Doc. 6-2 at 2; Doc. 6-6 at 4, ¶ 15; Doc. 6-10 at 3, ¶ 15; Doc. 6-14 at 2, ¶ 9; Doc. 6-15 at 2, ¶ 9; Doc. 28-1 at 3, ¶ 14; Doc. 28-2 at 3, ¶ 12; Doc. 28-3 at 3, ¶ 13 (W.W.'s mother reports that "DSCC has continued to inform us that our staffing issues are not unique but are normal for children enrolled in the Medicaid program."). Parents also report that either they or DSCC have alerted the Director's employees to inadequate service levels. *See* Doc. 6-10 at 2, ¶ 12; Doc. 6-14 at 2-3, ¶ 9. Similarly, the Director receives periodic letters from her agent, DSCC, requesting prior authorization to renew the Children's in-home shift nursing services; those letters often indicate whether the Children are receiving adequate service levels. *See*, *e.g.*, Doc. 6-2 at 2 (letter regarding O.B.'s hospitalization); Doc. 28-5 at 2 (letter discussing inadequate services for class member G.A.); *see also*

Doc. 28 at 3 (discussing the Director's receipt of renewal letters that often indicate service levels); Dir. SA at 87-88.

III. The District Court Correctly Found that the Plaintiffs' Risk of Irreparable Harm Outweighs Any Possible Harm to the Director.

The Director argues that the "roughly 1,200 children that comprise the Plaintiffs and class" will not suffer irreparable harm because they "still will have the option of obtaining care at a hospital." Dir. Br. at 24. This argument should not be considered on appeal because it was not advanced or supported with evidence in the district court.

The Children have met the test for issuance of the injunction. Without injunctive relief, the Children will continue to face on-going risks of serious medical complications at home and unnecessary institutionalization. Those risks are described in the declarations of the Children's parents. *See*, *e.g.,* Doc. 6-6 at ¶ 15; Doc. 28-3 at 3, ¶¶ 14-17. As the district court correctly stated:

> Plaintiffs' lack of an adequate remedy at law and irreparable injury in the event an injunction is denied on Courts I and II are similarly evident, given Norwood's concession that each Plaintiff has been "approved for [EPSDT] in-home shift nursing services," and that such approval required Plaintiffs to "demonstrate the medical necessity for the services." *See* Dkt. 22 at 1-2; *see also A.H.R. v. Wash. State Health Care Auth.,* No. C15-5701JLR, 2016 WL 98513, at *14-17 (W.D. Wash. Jan. 7, 2016) (no administrative remedy required, and irreparable injury demonstrated, where State "already determined the services that are needed"; "the abundance of case authority that has found irreparable harm when medical services are eliminated or reduced in similar situations").

Dir. SA at 105-06;[16] *see also*, *e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600-01 (1999) (noting that "confinement in an institution severely diminishes the everyday activities of individuals including family relations, social contacts . . . [and] educational advancement"); *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 611 (7th Cir. 2012) (affirming preliminary injunction requiring state Medicaid agency to cover all medically necessary dental services, in part because beneficiaries "will likely suffer irreparable harm if the injunction is not granted, as they would be denied medically necessary care"); *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."). Furthermore, the Children cannot seek damages or restitution. *See*, *e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

The risk of physical and emotional harm to the Children if they receive inadequate home care or are unnecessarily institutionalized far outweighs any purported risk to the Director. The district court ordered the Director to provide

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[16] In *A. H. R.*, the State of Washington's Medicaid agency, 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. The plaintiffs filed suit to enforce the EPSDT and reasonable promptness provisions. 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).

previously approved services. Dir. SA at 110. In reaching this decision, the district court did not "perceive an unjust harm perpetrated by HFS [the Director's department] providing care and treatment that is medically (and statutorily) required." *Id.*; *see also* Dir. SA at 114 ("the balance of harms tips in [the Children's] favor, not [the Director's].").

The Director cannot be harmed by providing services at medically necessary levels, in accordance with the Medicaid Act. Nevertheless, the Director says that, "if the preliminary injunction order remains in effect, the Director will be faced with the arduous (if not impossible) task of ensuring that nurses [are] willing and available to care for each of the roughly 1,200 children that comprise the Plaintiffs and the class in their homes for all of the hours that each child needs." Dir. Br. at 24. But it is the Director's legal obligation under the Medicaid Act to promptly arrange for these services, which she determined to be medically necessary. Compliance with these federal requirements cannot harm the Director.

Moreover, any administrative burden or cost associated with arranging medically necessary in-home shift nursing services for the Children does not outweigh the Children's need for adequate home care. As this Court noted in *Bontrager*:

> [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. This Court should reject the Director's claims of irreparable harm, as it has previously rejected similar arguments.

IV. The Public Interest Supports the District Court's Grant of a Preliminary Injunction.

Judicial intervention to protect the health of this extremely vulnerable group benefits the public interest. The district court appropriately found that it is in the interest of the public, the Children, and even in the interest of the Director for the Director to provide medically necessary home nursing services.

> [T]he public has an interest in seeing care and treatment that HFS [the Defendant] has already determined to be medically necessary fully provided to the disabled children who seek it here. … Also of note is Plaintiffs' assertion (which Norwood does not dispute) that, as to institutionalized plaintiffs, 'Defendant would expend considerably fewer resources to provide care at home than in an institutional setting.' ECF No. 7 at p. 13. . . . the avoidance of such institutionalization is certainly desirable by the public, as well.

Dir. SA at 115. For example, the cost of O.B.'s hospitalization was approximately $78,000 per month, compared to the Director's finding that in-home shift nursing services totaling $19,178 per month were medically necessary. Dir. SA at 4, ¶¶ 5(h)-(j); *see* ILL. ADMIN. CODE tit. 89, § 120.530(e)(4) (cost-effectiveness and cost-neutrality requirements for the home services of children enrolled in the MFTD Waiver program); *See generally Williams v. Zbaraz,* 442 U.S. 1309, 1313 (1979) ("Far from suffering any irreparable financial losses without a stay, the State will benefit financially if one is not granted.")

V. The Preliminary Injunction Order Properly Instructs the Director to Provide or Arrange for In-Home Shift Nursing Services.

To prevent further violations of Medicaid EPSDT and reasonable promptness requirements, the district court properly ordered the Director to arrange for in-home shift nursing services. Dir. SA at 116-17. The Director incorrectly faults the district court's order for citing in-home shift nursing specifically, as opposed to another corrective treatment. Dir. Br. at 25. Each child's treating physician found in-home shift nursing to be medically necessary. Dir. SA at 25, ¶ 75. The Director herself found in-home shift nursing services to be necessary for each named Plaintiff and Class Member. Dir. SA at 30, ¶ 99; Dir. SA at 33, ¶ 114; Dir. SA at 35, ¶ 125; Dir. SA at 37, ¶ 139; Doc. 25 at 1-2. The Director provided no evidence that another service, such as inpatient hospital care, is medically necessary or even appropriate. It would be improper for the district court to order the Director to provide services for a medically-fragile child that neither a treating physician nor the Director deemed medically necessary.

A. The District Court's Order Complies with Fed. R. Civ. P. 65(d).

Rule 65(d) provides, in relevant part, that a preliminary injunction order must "state its terms specifically; and describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)-(C). When applying Rule 65(d), this Court has explained that "[a]ll that is required under Fed. R. Civ. P. 65(d) is for the language of the injunction to be as specific as possible under the totality of the circumstances.

. . ." *Medtronic, Inc. v. Benda*, 689 F.2d 645, 649 (7th Cir. 1982) (citing *City of Mishawaka v. Am. Elec. Power Co., Inc.*, 616 F.2d 976, 991 (7th Cir. 1980)).

When drafting the Preliminary Injunction Order, the district court weighed the totality of the circumstances. Taking into consideration the complexity of the Medicaid program and federalism principles, the district court struck an appropriate balance that "provid[ed] plaintiffs with the appropriate level of protection while still placing defendants on notice of the prohibited conduct." *3M v. Pribyl*, 259 F.3d 587, 597 (7th Cir. 2001); *see* Dir. SA at 110 ("[I]t is Norwood who stresses the 'sheer complexity' of the issue of access to Medicaid providers.").

Indeed, the district court was appropriately deferential to the Director, allowing her the discretion to "fashion the most effective but least burdensome method of providing the EPSDT services." Dir. SA at 110-11, citing *Katie A.*, 481 F.3d at 1157 (9th Cir. 2007) (injunction required "only that defendants supply the services that the court found to be required under federal law" and "appropriately allowed defendants an opportunity jointly to develop the remedial plan needed to implement the injunction") and *A. H. R.*, 2016 WL 98513, at *19 (noting "the federalism principles that require federal courts to grant each state the widest latitude in the dispatch of its own internal affairs") (citation omitted).

Rule 65(d) does not require the district court to dictate step-by-step how the Director should correct systemic deficiencies. *See*, *e.g.*, *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1431 (7th Cir. 1985) (stating that "the Rule does not require the impossible"); *3M*, 259 F.3d at 598 ("We agree with the district court's

decision that more specificity in the injunction is not mandated."). As the district court noted, "Norwood knows what those services are and for whom they were approved because her agency approved them." Dir. SA at 110.

B. The Director is Not at Risk of an Unfair Finding of Contempt.

The Director is not at risk of "facing contempt despite her best efforts to follow the law." Dir. Br. at 26. In the four months after the Preliminary Injunction Order was entered, neither the Children nor the district court have sought to hold the Director in contempt. On June 17, 2016, the Children did file a Motion to Enforce the Preliminary Injunction Order; however, they did not seek a finding of contempt. Doc. 66, 67. In its ruling granting the motion in part, the district court remained deferential to the Director, adopting a methodical approach.[17] *See* Doc. 79 at 5 ("[W]hen issuing [the Preliminary Injunction Order], the Court also committed to preserve 'Norwood's discretion to fashion the most effective but least burdensome method of providing the EPSDT services.…'"). The Court deferred to the Director's assertion that a comprehensive review is "necessary 'to determine the affirmative steps that can be enacted to achieve greater alignment' between the services approved and the services actually provided." *Id*. at 5-6. Furthermore, the district court ordered the Director to produce periodic reports with "information regarding 'what steps have been undertaken … to arrange for in-home shift nursing services'" and "information regarding the cases reviewed and the measures implemented

[17] The district court also noted that "though [the Director's] counsel generally opposed the [Motion to Enforce the Preliminary Injunction Order] in open court, [the Director] filed no response in opposition at all." Doc. 79 at 3.

pursuant to such review." Doc. 79 at 7. There is no apparent risk of the Director being held in contempt unfairly.

C. *The Preliminary Injunction Order Properly Instructs the Director to Take "Immediate and Affirmative Steps" to Arrange for In-Home Shift Nursing Services.*

The Director incorrectly argues that the Preliminary Injunction Order is problematic, as "the record shows that the Director *has* taken steps to increase the number of nurses that are available to care for Plaintiffs in their homes." *See* Dir. Br. at p. 25-26 (emphasis in original). The Director introduced no such evidence before the district court entered the Preliminary Injunction Order on April 6, 2016. The evidence the Director refers to on appeal is a report filed by the Plaintiffs after the Preliminary Injunction Order was entered. *See* Doc. 45-5 (*Report of Medicaid Services for Persons who are Medically Fragile, Technology Dependent* (January 1, 2016), filed as an exhibit to Plaintiffs' Proposed Statement of Facts in Support of a Preliminary Injunction as to Counts III and IV).

Moreover, even if the Director had introduced this report in a timely manner, it would have undercut her argument. The report demonstrates that the Director was aware of the Children's inadequate nursing services and took affirmative steps (enrolling four nursing agencies with DSCC) in an attempt to address this "difficulty finding nurse or nursing agencies." *See* Doc. 45-5 at 8. This report demonstrates that the Director has the ability to take steps to arrange for the delivery of in-home shift nursing services. *Id*.

Finally, the Director's argument that the "it is unclear what other steps would satisfy the district court" rings hollow in light of on-going proceedings in that court. Dir. Br. at 26. As required by the Preliminary Injunction Order, the Director filed a report with the Children on May 6, 2016. *See* Dir SA. at 117; *see also* Doc. 67. The Director expressed no confusion regarding compliance. *See generally* Doc. 67. On the contrary, the Director's May 6, 2016 report outlined several "potential strategies for addressing the delta between what has been approved and what is being staffed." *See* Doc. 67 at 5; Doc. 79 at 6.

If the Director is grappling with any genuine uncertainty regarding compliance, she "can always seek clarification or modification of the decree from the district court, and is protected because if the decree remains ambiguous after efforts at clarification, or after being modified, the defendant cannot be held in contempt for violating it." *U.S. v. Apex Oil Co., Inc.*, 579 F.3d 734, 740 (7th Cir. 2009); *see also Medtronic, Inc. v. Benda*, 689 F.2d 645, 649 (7th Cir. 1982) ("The appellants are placed on adequate notice regarding permissible and impermissible conduct. They are, of course, always free to seek a more detailed statement if they so choose."). The Director was provided with ample opportunity to propose alternative language for the Preliminary Injunction Order and did not do so, nor has the Director sought modification or clarification of the Preliminary Injunction Order from the district court.

CONCLUSION

For the foregoing reasons, the District Court's Memorandum Opinion and Preliminary Injunction Order should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-face requirements of Fed. R. App. P. 32 (a)(5) and type-style requirements of Fed. R. App. P. 32 (a)(6) because it was prepared using a proportionally spaced typeface, Microsoft Word, in 12-point Century Schoolbook font (11-point font in footnotes).

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,030 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/Jane Perkins
Jane Perkins

CERTIFICATE OF SERVICE

I hereby certify that on August 12th, 2016, I electronically filed the foregoing Brief of Appellees with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate *CM/ECF* system on August 12, 2016. I certify that all of the listed participants in the case are registered *CM/ECF* users and that service will be accomplished by the appellate *CM/ECF* system.

/s/Jane Perkins
Jane Perkins