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; and Sa.S. and Sh.S., by and through their mother, SHEILA SCARO; individually and on behalf of a class,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Plaintiffs-Appellees,	)	No. 15 C 10463
v.	)	
FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	The Honorable CHARLES P. KOCORAS, Judge Presiding.
Defendant-Appellant.	)	

BRIEF AND SHORT APPENDIX OF DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellees, 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, and Sa.S. and Sh.S., by and through their mother, Sheila Scaro, filed a complaint in the district court under 42 U.S.C. § 1983, claiming that Defendant-Appellant Felicia F. Norwood, Director of the Illinois Department of Healthcare and Family Services ("Director"), violated: (1) the Early and Periodic Screening Diagnostic and Testing ("EPSDT") provisions of the Medicaid Act, *see* 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43)(C), 1396d(r)(5); (2) the reasonable promptness provision of the Medicaid Act, *see* 42 U.S.C. § 1396a(a)(8); (3) Title II of the Americans with Disabilities Act ("ADA"), *see* 42 U.S.C. §§ 12131-32; and (4) section 504 of the Rehabilitation Act, *see* 29 U.S.C. § 794. R. at 1-46 (SA at 1-46).[1] According to Plaintiffs, these provisions require the Director to ensure that nurses were available to provide medical care to Plaintiffs in their homes. R. at 2 ¶¶ 2-3. The district court had federal question jurisdiction over the claims under 28 U.S.C. § 1331.

On April 6, 2016, the district court entered a preliminary injunction order, requiring the Director 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 Plaintiffs and such similarly situated

[1] The consecutively paginated record on appeal is cited "R. at __." The district court's docket is cited "Doc. __ at __." This brief's short appendix is cited "SA at __."

Medicaid-eligible children under the age of 21 in the State of Illinois who also have been approved for in-home shift nursing services, but who are not receiving in-home shift nursing services at the level approved by Defendant, as required by the Medicaid Act." R. at 642. On May 4, 2016, the Director filed a notice of appeal from the district court's preliminary injunction order, Doc. 48, which was timely under Federal Rule of Appellate Procedure 4(a)(1)(A) because it was filed within 30 days of that order. This Court has jurisdiction over the interlocutory appeal under 28 U.S.C. § 1292(a).

ISSUES PRESENTED FOR REVIEW

(1) Whether the district court abused its discretion by entering a preliminary injunction order based on a clearly erroneous view of the law and facts when the court accepted Plaintiffs' unsupported contention that the Medicaid Act obligates the Director to ensure that nurses are willing and available to provide medical care to Plaintiffs in their homes.

(2) Whether the district court abused its discretion when it entered a preliminary injunction order in the absence of a showing of irreparable harm to Plaintiffs and requiring only that the Director take unspecified "affirmative steps."

STATEMENT OF THE CASE

Medicaid And The Parties

Medicaid "is a vendor payment program, wherein Medicaid-participating providers . . . are reimbursed by the program for the services they provide to recipients." R. at 18 ¶ 43 (SA at 18). Medicaid "does not directly provide health care services to eligible individuals, nor does it provide beneficiaries with money to purchase health care directly." *Id.* The EPSDT provisions of the Medicaid Act were enacted to "assure that children receive early detection and care, so that health problems are averted or diagnosed and treated as early as possible." EPSDT Guide at 1 https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/EPSDT_Coverage_Guide.pdf (last visited July 13, 2016). States must ensure that children and their families "are aware of EPSDT and have access to required screenings and necessary treatment services." *Id.* Further, Medicaid-eligible children are "entitled to receive Medicaid services from any provider qualified to provide the service and willing to furnish it." *Id.* at 28.

Plaintiffs are Medicaid-eligible children under age 21 who live in Illinois and have very serious medical conditions. R. at 1 (SA at 1). Plaintiffs' conditions require ongoing medical treatment; therefore, the Department has authorized them to receive care from nurses in their homes (known as "in-home shift nursing services") at the State's expense. R. at 2 (SA at 2). For example, Plaintiff O.B. "has a complex medical history of Down syndrome, pulmonary hypertension, chronic lung disease," and

various other conditions. R. at 3 (SA at 3). At the time Plaintiffs filed the complaint in this case, he "require[d] an institutional level of care." R. at 2 (SA at 2). That is, O.B. required 18 hours per day of medical care. R. at 4 ¶ 5(k) (SA at 4).

The defendant in this case, Norwood, is the Director of the administrative agency that provides healthcare coverage for adults and children in Illinois who qualify for Medicaid. *See* http://www.illinois.gov/hfs/About/Pages/default.aspx (last visited July 13, 2016). Because Medicaid is funded by both the State and the federal government, the State had to adopt a plan for medical assistance that complied with the Medicaid Act. R. at 18 (SA at 18); *see* 42 U.S.C. § 1396a. The federal government, through the Centers for Medicare & Medicaid Services ("CMS") had to approve Illinois's plan. R. at 18-19. Additionally, the State had to obtain approval from CMS to establish the reimbursement rate for nurses: in February 2014, CMS approved of Illinois's "request to modify non-institutional payment rates." R. at 368.[2]

In a report to the Governor and members of the Illinois General Assembly dated January 1, 2016, the Director explained that "only a specialized group of 54 nursing agencies serve the technology-dependent pediatric population with shift nursing care." R. at 680. The Director added that the University of Illinois at Chicago's Division of

[2] CMS has noted that an "appropriate level of reimbursement can be critical to ensuring adequate access to providers." EPSDT - A Guide for States at 28 https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/EPSDT_Coverage_Guide.pdf (last visited July 13, 2016). But CMS also has observed that the "statute provides states with broad authority to set provider payment rates." *Id.*

Specialized Care for Children, whom she partnered with to provide ongoing care for children with special healthcare needs, has "ha[d] some difficulty finding nurses or nursing agencies to serve some areas of the State." R. at 681. But "through various outreach activities over the past 12-18 months, four new nursing agencies have enrolled with [the Division of Specialized Care for Children] and have begun providing shift-nursing services to this population." *Id.*

Plaintiffs' Complaint And Motion For Preliminary Injunction

On November 20, 2015, Plaintiffs filed a complaint under 42 U.S.C. § 1983 in the district court seeking declaratory and injunctive relief against the Director. R. at 1-46 (SA at 1-46). According to Plaintiffs, by not ensuring that nurses were available to provide care to them in their homes for all of the hours that the Department had authorized, the Director violated the EPSDT and reasonable promptness provisions of the Medicaid Act, as well as sections of the ADA and Rehabilitation Act. R. at 1, 41-44 (SA at 1, 41-44). Plaintiffs alleged that the Director, "through her systems, policies, and practices, has failed to arrange for adequate in-home shift nursing services for Plaintiffs and Class." R. at 1 ¶ 1 (SA at 1). The particular "system-wide policies, practices, and procedures" that Plaintiffs challenged "include[d] a low reimbursement rate for the Plaintiffs' and the Class members' in-home shift nursing services." R. at 9 ¶ 13 (SA at 9). Plaintiffs suggested that the Director should "increase[ ] nursing rates by $10.00." R. at 10 ¶ 16 (SA at 10).

According to Plaintiffs, they have had trouble finding nurses who were willing

and available to work all of the hours that the Department authorized. R. at 5 ¶ 7 (SA at 5). For example, O.B. remained hospitalized past his projected discharge date because neither his parents nor the "nursing agency that O.B.'s parents work with [were] able to find nurses to staff O.B.'s case." R. at 3 ¶ 5(c), (d) (SA at 3). The Director responded that "the problem" in O.B.'s case was that the nursing agencies in his area had "enough staffing for either the day or the night, but not both." SA at 69; *see* R. at 4 ¶ 5(k) (SA at 4) (noting that O.B. required 18 hours per day of care).

The Division of Specialized Care for Children advised that Plaintiffs may be placed at Almost Home Kids, or another care center, if nurses were unavailable to care for them in their homes. R. at 76 ¶ 15. One of Plaintiffs' doctors "recommend[ed] shift nursing in the home to keep J.M. safe, the alternative being admission to Children's Hospital of Illinois." R. at 35 ¶ 130 (SA at 35).

Also on November 20, 2015, Plaintiffs moved the district court to grant them a preliminary injunction. R. at 220-37. Plaintiffs argued that because the Department authorized in-home nursing services hours but nurses were unwilling to staff all of the hours, the Director "clearly violated the Medicaid Act." R. at 225. According to Plaintiffs, "[p]reliminary injunctive relief would . . . prevent further legal violations by the Defendant." R. at 233. Plaintiffs asked the district court to enter an 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." R. at 121. The same day, Plaintiffs also moved under Federal Rule of Civil Procedure 23(b)(2) to certify a class of roughly 1,200 children "who are not receiving in-home shift nursing services at the level approved by the Defendant." R. at 49; *see id.* at 49-115.

At a hearing on Plaintiffs' motions for a preliminary injunction and class certification, the Director explained that once the Department has determined that a child is eligible for in-home shift nursing services, the Division of Specialized Care for Children would "provide a list of all providers in that geographic area that meet the needs of the individual." SA at 51. Only Medicaid providers were allowed to care for the children, but of those, their families were free to "choose[ ] the nursing agency and they have a right to change providers at any time." SA at 51-52. In short, because she had arranged for corrective treatment by referral to appropriate agencies, the Director asserted that she "was in compliance with the Act of Congress regarding EPSDT." SA at 49.

The Director's Motion To Dismiss And Opposition To Injunctive Relief

On January 26, 2016, the Director moved to: (1) dismiss Plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6); and (2) dismiss Sa.S. and Sh.S. from the action because they no longer resided in Illinois, and thus, no longer had justiciable claims against the Director. R. at 315-16.

The Director argued that Counts I and II of the complaint were "actually seeking higher Medicaid reimbursement rates for in-home nursing services providers." R. at

323; *see, e.g.*, R. at 9 ¶ 13 (SA at 9) ("Defendant's system-wide policies, practices, and procedures include a low reimbursement rate for the Plaintiffs' and the Class members' in-home shift nursing services."); SA at 54 ("The problem is that the reimbursement rate is so low, the agencies can't recruit nurses."). Because the provisions of the Medicaid Act that Plaintiffs cited did not entitle them to challenge her reimbursement rates to providers, the Director argued that Plaintiffs had failed to state a claim for relief. R. at 323-24. The Director also argued that *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378 (2015), foreclosed Plaintiffs' pursuit of their claims because it, among other things, prevented them from seeking to enjoin the State to raise its provider reimbursement rates. R. at 325-28. Finally, because Sa.S. and Sh.S. had permanently relocated from Illinois to Colorado, the Director argued that their claims against her were moot. R. at 319-20.

In addition, the Director opposed Plaintiffs' motion for a preliminary injunction. R. at 352-85. The Director argued that Plaintiffs' claims failed on the merits for the reasons set forth in her motion to dismiss. R. at 357-59. The Director further observed that CMS had approved the reimbursement rates that Plaintiffs challenged, thereby demonstrating that the Director had not violated federal law. R. at 359-60. Additionally, the Director challenged the proposed injunction for failing to comply with Federal Rule of Civil Procedure 65(d). R. at 354-56. The Director argued that "by simply parroting an Act of Congress, the proposed injunction builds in conclusions as to what Defendant's ultimate legal duties are respecting the provision of EPSDT

services are to Medicaid-eligible children." R. at 356. Finally, the Director opposed Plaintiffs' motion for class certification, arguing, among other things, that "[c]laims for individualized relief do not satisfy Rule 23(b)(2)." R. at 349.

At the hearing on the motion to dismiss, the Director stated that her request to dismiss the complaint and her opposition to Plaintiffs' motion for a preliminary injunction were largely based on "a legal issue." SA at 82. The Director already had explained that, in her view, she was in full compliance with the EPSDT provisions of the Medicaid Act. SA at 49-50. The Director also observed that although Plaintiffs asserted that their nursing hours had not been staffed, the pleadings did not answer the individualized factual questions as to why nurses declined to care for Plaintiffs in their homes. SA at 87-88.

The District Court's Rulings

On March 21, 2016, the district court issued its memorandum opinion on the motions for a preliminary injunction and to dismiss the complaint. R. at 484-507 (SA at 92-115). The court dismissed Sa.S. and Sh.S. from the lawsuit, but otherwise denied the Director's motion to dismiss. R. at 485 & n.1, 486-95 (SA at 93-103).

The district court asserted that the "factual and statutory background underlying both [the Director's] motion to dismiss and Plaintiffs' motion for preliminary injunction [was] undisputed." R. at 485 (SA at 93). Additionally, the court found that an "evidentiary hearing [was] required only to the extent genuine issues of material fact are created by the response to a motion for a preliminary injunction." R. at 496 (SA at

104) (internal quotation marks omitted). The Director did "not dispute that [in-home shift nursing] services were both approved and undelivered"; therefore, the district court concluded that "Plaintiffs' likelihood of success on Counts I and II [wa]s firmly established." R. at 497 (SA at 105). On the other hand, the court found that "Plaintiffs' ADA and Rehabilitation Act claims (Counts III and IV) raise[d] certain factual issues," and it granted injunctive relief only on Plaintiffs' claims under the Medicaid Act. R. at 498, 507 (SA at 106, 115).

The district court ruled that Plaintiffs "met the threshold requirements for injunctive relief on Counts I and II of their Complaint." R. at 500 (SA at 108). The court also rejected the Director's arguments about the form of the injunction, and it determined that no harm would result from requiring the Director to ensure that nurses would be available to care for each Plaintiff in her home. R. at 500-07 (SA at 108-115).

Over the Director's objection, on April 6, 2016, the district court entered its preliminary injunction order. R. at 641-42 (SA at 116-17); *see* R. at 622-40. The injunction order obligated the Director 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 Plaintiffs and such similarly situated Medicaid-eligible children under the age of 21 in the State of Illinois who also have been approved for in-home shift nursing services, but who are not receiving in-home shift nursing services at the level approved by Defendant, as required by the Medicaid Act." R. at 642 (SA at 117). At the time it issued the order, the

district court had not ruled on the Plaintiffs' motion for class certification. R. at 641-42 (SA at 116-17); Doc. 55. It nonetheless granted injunctive relief with respect to the entire putative class. R. at 641-42 (SA at 116-17). Subsequently, the district court certified the class Plaintiffs sought. Doc. 55. That ruling is not at issue here.

On May 4, 2016, the Director appealed from the district court's entry of the preliminary injunction order. Doc. 48.

SUMMARY OF THE ARGUMENT

The district court abused its discretion in entering the preliminary injunction order. The threshold factor when assessing a request for a preliminary injunction is whether Plaintiffs demonstrated a likelihood of success on the merits of their claims. In this case, Plaintiffs alleged, but did not and cannot show that the EPSDT and reasonable promptness provisions of the Medicaid Act required the Director to ensure that Plaintiffs would receive medical care from nurses in their homes. Indeed, the discretion afforded to States in determining how to provide medical assistance under the Medicaid Act precludes their claims.

A balance of the remaining factors also weighs in the Director's favor. Although Plaintiffs would prefer to receive medical care in their homes—and the Department has authorized such care—if nurses are not able to fully staff their hours, Plaintiffs can receive care elsewhere at the State's expense. On the other hand, the Director simply cannot guarantee that enough nurses will be available to care for Plaintiffs in their homes, and the Medicaid Act does not obligate her to. Finally, the injunction order both improperly asserts that the Director should take affirmative steps to provide in-home nursing care, without identifying those steps or acknowledging the many steps already taken, and includes erroneous assumptions about what the Medicaid Act requires.

ARGUMENT

I. Standard of Review

This Court reviews "the district court's grant of a preliminary injunction by considering its legal rulings *de novo,* its factual determinations for clear error, and its balancing of the factors for an abuse of discretion." *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 607 (7th Cir. 2012). "Because preliminary injunctions are an unusual remedy requiring the application of a definite set of standards," this Court "subject[s] them to effective, and not merely perfunctory, appellate review." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015) (internal quotation marks omitted).

II. Plaintiffs Failed To Establish That It Was Likely That The Director Violated The Medicaid Act; Therefore, The District Court Abused Its Discretion In Granting Their Motion For A Preliminary Injunction.

A. A Preliminary Injunction Should Be Granted Only When Plaintiffs Establish That They Are Likely To Succeed On The Merits Of Their Claims.

Plaintiffs did not and cannot demonstrate that they were likely to succeed on the merits of their claims under the Medicaid Act; therefore, the district court abused its discretion in granting their request for injunctive relief.

"A plaintiff seeking a preliminary injunction 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*, 555 U.S. 7, 20 (2008). A preliminary injunction is "an extraordinary remedy that may only be awarded upon a

clear showing that the plaintiff is entitled to such relief." *Id.* at 22; *see Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 823 (7th Cir. 1998) (noting that motion for a preliminary injunction should be denied "unless the movant, *by a clear showing,* carries the burden of persuasion") (internal quotation marks omitted) (emphasis in original). "[L]ikelihood of success on the merits" is the "threshold factor" for granting a preliminary injunction. *Rust Env't & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1213 (7th Cir. 1997). And when assessing claims under the Medicaid Act, courts have remarked "[t]hat plaintiffs merit sympathy does not escape our notice, but neither does it govern our reasoning." *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 183 (3d Cir. 2004).

In this case, although Plaintiffs fault the Director for not ensuring that nurses were available to care for them in their homes, they did not and cannot establish that the Medicaid Act likely required her to do so. Because they failed to establish a likelihood of success on the merits of their claim, the district court abused its discretion in granting Plaintiffs' motion for a preliminary injunction on Counts I and II of their complaint.

B. The Plain Language Of The EPSDT Provisions Contradicts Plaintiffs' Claim That The Director Violated Them.

"All statutory interpretation begins with the language of the statute itself." *Kovacs v. United States*, 614 F.3d 666, 673 (7th Cir. 2010) (internal quotation marks omitted). When interpreting a statute, courts also "look to the provisions of the whole law, and to its object and policy." *Matter of Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628

(7th Cir. 1995) (internal quotation marks omitted). Here, the EPSDT provisions of the Medicaid Act require the Director to screen Medicaid-eligible children, to identify whether they need corrective treatment, and to make sure that they had access to that treatment. *See* 42 U.S.C. §§ 1396a(a)(43)(A)-(C), 1396d(r)(5). According to the record as it stands, the Director complied with these provisions.

The EPSDT provisions first require the Director to inform Medicaid-eligible children "of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r)." 42 U.S.C. § 1396a(a)(43)(A). The Director also must provide for or arrange for the provision of screening services upon request. *See* 42 U.S.C. § 1396a(a)(43)(B). Additionally, the Director is required to "arrang[e] for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services." 42 U.S.C. § 1396a(A)(43)(C). Certain services, such as vision and dental, are specifically required under the EPSDT provisions. *See* 42 U.S.C. §§ 1396d(r)(2), (3). And the Director must make available "[s]uch other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." 42 U.S.C. § 1396d(r)(5).

Plaintiffs have not argued that the Director failed to alert them of the EPSDT provisions or that she declined to provide them with screening services. And although

Plaintiffs alleged that the Director failed to arrange for corrective treatment, other factual allegations themselves, along with other evidence in the record, demonstrated otherwise. After the Director determines that a child needs additional treatment, she "delegates ongoing care coordinat[ion]" to the Division of Specialized Care for Children. R. at 27 ¶ 82 (SA at 27). The Division then works with nursing agencies that are Medicaid providers to arrange for nurses to care for Plaintiffs in their homes. R. at 27 ¶¶ 83-84 (SA at 27). And to the extent that the nursing agencies are unable to find nurses to staff all of the hours, Plaintiffs can receive necessary healthcare at places like Almost Home Kids. R. at 76 ¶ 15; *see* R. at 35 ¶ 130 (SA at 35) (observing that an "alternative" to in-home shift nursing services was "admission to Children's Hospital of Illinois."). Thus, the Director 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. Accordingly, the record reveals that the Director complied with the Medicaid Act, despite Plaintiffs' allegations.

Plaintiffs however, seek to impose an additional requirement on the Director: that is, they want the Director to ensure that nurses provide care to them in their homes. *See, e.g.*, R. at 41 ¶ 175 (SA at 41) ("In violation of the EPSDT provisions of the Medicaid Act, the Defendant, while acting under the color of law, has failed to provide the Plaintiffs and Class with in-home shift nursing services[.]") (internal citations omitted). But the EPSDT provisions state that "necessary healthcare" must be provided. Under the law, that care does not have to take place in Plaintiffs' homes. And this is not a case

where the Director declined to approve in-home shift nursing services for Plaintiffs. *Cf. D.U. v. Rhoades*, No. 15-1243, 2016 WL 3126263, at *2 (7th Cir. June 3, 2016) (plaintiff challenged the State's conclusion that she "no longer qualified for private duty nursing services"). Instead, the Department authorized the hours for Plaintiffs, but not enough nurses were available to staff all of them. That did not mean that the Director failed to comply with the EPSDT provisions of the Act.

Further, contrary to Plaintiffs' claim (and the corresponding terms of the preliminary injunction order), *see* R. at 642, the Director *did* take affirmative steps to provide in-home shift nursing services. Recognizing that the Division of Specialized Care for Children has had "difficulty" finding enough nurses to care for Medicaid-eligible children, the Director engaged in "various outreach activities over the past 12-18 months" to employ additional nurses. R. at 681. What the Director has not done is to guarantee that nurses will be available and willing to care for Plaintiffs in their home for all the hours the Department has authorized. And the EPSDT provisions do not require her to do so. Therefore, Plaintiffs did not, and cannot, show a reasonable likelihood of success on the merits of these claims.

Although "states must meet the substantive obligations of the Medicaid Act, they nonetheless retain the discretion to design and administer their Medicaid systems as they wish." *Katie A., ex rel. Ludin v. L.A. Cty.*, 481 F.3d 1150, 1161 (9th Cir. 2007). To rule, as the district court did here, that the Director could comply with the EPSDT provisions only by ensuring that nurses provided medical care to Plaintiffs in their

homes, would be to deprive the Director of the flexibility that states always have enjoyed under the Medicaid Act in determining how to provide medical assistance. *See, e.g.*, *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 665 (2003) ("Medicaid Act gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in the best interest of the recipients") (Stevens, J.) (internal quotation marks omitted).

In sum, the EPSDT provisions require the Director to provide Plaintiffs with necessary healthcare and the record indicates that she has made such care available to them. The district court abused its discretion by further requiring, through the grant of a preliminary injunction—which is extraordinary relief—the Director to ensure that Plaintiffs receive medical care in their homes.

C. A State's Primary Obligation Under Medicaid Is To Fund, Not Directly Provide, Medical Services.

The Director's responsibility under the Medicaid Act is to pay for medical services. The Director is not further obligated under the law to ensure that Plaintiffs receive medical services in their homes. Medicaid "allows states to provide federally subsidized medical assistance to low-income individuals and families." *Bontrager*, 697 F.3d at 605 (internal citation omitted). "The cornerstone of Medicaid is financial contribution by both the Federal Government and the participating State." *Harris v. McRae*, 448 U.S. 297, 308 (1980); *see Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 910 (7th Cir. 2003) ("Medicaid is a payment scheme, not a scheme for state-

provided medical assistance, as through state-owned hospitals.").[3] Section 1396a(a)(10)(A) of the Medicaid Act requires the Director to "mak[e] medical assistance available" to Plaintiffs. 42 U.S.C. § 1396a(a)(10)(A). "[M]edical assistance" is defined as "*payment* of part or all of the cost of the following care and services" *or* "the care and services themselves" *or* "both." 42 U.S.C. § 1396d(a) (emphasis added).[4]

As noted, Plaintiffs have not suggested that the Director refused to approve in-home shift nursing services, or that she refused to pay for their medical care. *See* R. at 80 n.1 ("Defendant is paying all of these costs as one of O.B.'s parents is an employee of the State of Illinois."). Nonetheless, they claim that the Director violated the EPSDT and reasonable promptness provisions because the nursing agencies in their areas have not

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[3] For this reason, Medicaid-Act litigation often centers on whether the State properly funded (or refused to fund) a medical service or device. *See, e.g.*, *Bontrager*, 697 F.3d at 606 (plaintiffs challenge was to State's "$1,000 annual cap on dental services, even when such services are covered and medically necessary"); *Collins v. Hamilton*, 349 F.3d 371, 376 (7th Cir. 2003) (requiring the State "to fund the cost" of services that are deemed "medically necessary by an EPSDT screening") (internal quotation marks omitted); *see also S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 590 (5th Cir. 2004) ("[E]very Circuit which has examined the scope of the EPSDT program has recognized that states must *cover* every type of health care or service necessary for EPSDT corrective or ameliorative purposes that is allowable under § 1396d(a).") (emphasis added).

[4] Despite this clear statutory definition of "medical assistance" as payment of part or all of the cost of care and services, or the care and services themselves, or both, at least one district court has concluded that "Congress intended 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. Emkes*, 852 F. Supp. 2d 944, 951 (M.D. Tenn. 2012). This conclusion is unwarranted. "The statutory text is the best evidence of a statute's purpose, and courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Matter of Lifschultz*, 63 F.3d at 628 (7th Cir. 1995) (internal citation and quotation marks omitted).

been able to find enough nurses to fully staff Plaintiffs' cases. R. at 5 ¶ 6 (SA at 5). But as noted above, the medical assistance that the Director must provide can be satisfied by payment of the cost of medical services. By paying for Plaintiffs' in-home shift nursing services and their care at hospitals, the Director has complied with the Medicaid Act. There was, therefore, no need for a preliminary injunction in this case.

Plaintiffs failed to establish that the Director violated the EPSDT provisions of the Medicaid Act. And without that showing, Plaintiffs were not entitled to the extraordinary relief that the district court granted.

D. Given The Limited Pool Of Nurses Who Are Capable Of Caring For Plaintiffs In Their Homes And The Director's Outreach Activities, Plaintiffs Failed To Establish That She Violated The Reasonableness Promptness Provision.

Furthermore, the district court erred in concluding that because in-home shift nursing services "were both approved and undelivered," Plaintiffs established a likelihood of success on the merits of their claim under the reasonable promptness provision. R. at 497 (SA at 105). Section 1396a(a)(8) provides that a State's Medicaid plan must "provide that all individuals wishing to make application for medical assistance [payment of the cost of care and services, or the care and services themselves, or both] under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8); *see* 42 U.S.C. § 1396d(a). Additionally, the federal regulations provide that an agency must "[f]urnish Medicaid promptly to beneficiaries without any delay caused by the agency's administrative procedures." 42 C.F.R. § 435.930(a); *see also*

https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/EPSDT_Coverage_Guide.pdf at 32 (observing that "[w]hat is reasonable depends on the nature of the service and the needs of the individual child.").

In this case, Plaintiffs did not establish a reasonable likelihood that the Director's inability to find nurses who were able to care for them in their homes s unreasonable. First, as noted, the Director's primary obligation under the Medicaid Act is to fund medical services. Accordingly, courts have held that "delays in treatment of Medicaid beneficiaries" do not mean that the reasonable promptness provision has been violated. *Okl. Chapter of Am. Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208, 1209 (10th Cir. 2007); *see Brown v. Tennessee Dep't of Fin. & Admin.*, 561 F.3d 542, 545 (6th Cir. 2009) ("[A]bsent more, a waiting list for waiver services does not violate federal law because the state's duty is to pay for services, not ensure they are provided.").

Further, as a factual matter, Plaintiffs have not shown that the steps the Director has taken to provide them with corrective treatment are unreasonable. Only a certain group of nurses are capable of caring for Plaintiffs, and because of the severity of their conditions, Plaintiffs require many hours of care. *See* R. at 4 ¶ 5(k) (SA at 4), 680. The Director has recognized the difficulty that agencies have had staffing the in-home nursing services hours and she has conducted "various outreach activities" to increase the eligible number of nurses. R. at 681. The fact that not all of Plaintiffs' hours have been staffed does not mean that the Director has not provided medical assistance with reasonable promptness.

Plaintiffs have suggested, without any evidentiary support, that "the state of Illinois increase [ ] nursing rates by $10.00 per hour." R. at 10 ¶ 16 (SA at 10); *see* SA at 54 (arguing that "the reimbursement rate is so low, the agencies can't recruit nurses"). But CMS approved of the Director's reimbursement rates, which indicates that the rates are legally permissible. R. at 368; *see Armstrong*, 135 S. Ct. at 1388 (Breyer, J., concurring in part and concurring in judgment) (observing that the "history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges"). Moreover, the Supreme Court's recent rejection of a similar attempt to enjoin a state to raise its reimbursement rates undermines the argument that Plaintiffs can sue to compel the Director to raise her rates. *See Armstrong*, 135 S. Ct. at 1382, 1385.

In sum, Plaintiffs failed to establish that the Director likely violated the reasonable promptness provision of the Medicaid Act and the district court abused its discretion in granting injunctive relief on Count II.

III. Along With Plaintiffs' Failure To Establish Their Likelihood Of Success On The Merits, Other Factors Weigh Against The District Court's Grant Of A Preliminary Injunction.

As noted, when evaluating a motion for a preliminary injunction, the "threshold factor is likelihood of success on the merits." *Rust*, 131 F.3d at 1213. Plaintiffs did not establish that they were likely to succeed on the merits of their claims under the Medicaid Act; therefore, "the less heavily the balance of harms must weigh in [the Director's] favor." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014); *see Rust*, 131 F.3d at 1219 (noting that when Plaintiffs have not "demonstrate[d] likelihood of

success on the merits, it is not necessary to analyze the other elements required for preliminary injunctive relief").

Here, Plaintiffs also have not established that they will suffer irreparable harm without injunctive relief. If the preliminary injunction order is vacated and reversed, Plaintiffs still will be entitled to the nursing services hours that the Director approved, the Division of Specialized Care for Children still will attempt to locate nurses who are willing to work those hours, and Plaintiffs still will have the option of obtaining care at a hospital. On the other hand, if the preliminary injunction order remains in effect, the Director will be faced with the arduous (if not impossible) task of ensuring that nurses 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, notwithstanding the fact that only certain nurses are even able to provide the type of care that Plaintiffs need. Additionally, though the public has an interest in the State's continued compliance with the Medicaid Act, it does not have an interest in compelling the State to spend scarce resources on expenditures that—however desirable—are not mandated by law.

Finally, the injunction that the district court entered did not comply with Federal Rule of Civil Procedure 65(d)(1). "Rule 65(d) of the Federal Rules of Civil Procedure requires that the injunction set forth the reasons for its issuance; be specific in terms; and describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." *Patriot Homes, Inc. v. Forest River*

Hous., 512 F.3d 412, 414 (7th Cir. 2008) (internal quotation marks omitted). This Court has explained that the "requirement of specificity spares courts and litigants from struggling over an injunction's scope and meaning by informing those who are enjoined of the specific conduct regulated by the injunction and subject to contempt." *Id.* at 415 (internal quotation marks omitted). This Court also has long ruled that "a district court abuses its discretion in issuing a preliminary injunction when it applies an incorrect legal standard in determining the likelihood of success on the merits." *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 326 (7th Cir. 1984). When "the district court's error is the very predicate of its order, the order must be reversed as an improvident exercise of the court's discretion." *Id.*

Here, the district court's order required the Director 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 Plaintiffs [and the class] at the level approved by Defendant, *as required by the Medicaid Act*." R. at 642 (SA at 117) (emphasis added). At least two problems are evident from the face of the injunction order. First, the district court incorrectly assumed that in-home shift nursing services were the only form of corrective treatment that the Director could provide to comply with the Act. And for the reasons explained above, that is wrong. Second, the district court ordered the Director to take immediate and affirmative steps to arrange for in-home shift nursing services. But 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* R. at 681, and it is unclear what other steps would satisfy the district court. There is a risk, then, that the lack of specificity in the preliminary injunction order could lead to the Director facing contempt despite her best efforts to follow the law.

In sum, the balance of factors weighed in the Director's favor, and thus, the preliminary injunction order should be reversed and vacated.

CONCLUSION

For these reasons, the Director asks this Court to reverse and vacate the preliminary injunction order entered by the district court on April 6, 2016, which granted injunctive relief to Plaintiffs on Counts I and II of their Complaint.

July 13, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32 and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface WordPerfect X4, in 12-point Book Antiqua font, and complies with Federal Rule of Appellate Procedure 32(a)(7)(A) in that the brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) is 27 pages in length.

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CERTIFICATE OF COMPLIANCE WITH SEVENTH CIRCUIT RULE 30

I hereby certify that all materials required by Seventh Circuit Rule 30(a) and (b) are included in the short appendix to the Brief and Short Appendix of Defendant-Appellant.

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SHORT APPENDIX

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

O.B. by and through his parents GARLAND BURT and JULIE BURT, **C.F.** by and through his mother, KRISTEN FISHER, **J.M.** and **S.M.** by and through their parents, DAN MCCULLOUGH and MICHELE MCCULLOUGH, **Sa.S.** and **Sh.S.**, by and through their mother, SHEILA SCARO individually and on behalf of a class,	)	
Plaintiffs,	)	No. 15-CV-10463
vs.	)	Judge:
FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	Magistrate:
Defendant.	)	

COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

Now comes the Plaintiffs, by and through their attorneys, Robert H. Farley, Jr., Ltd., the Legal Council for Health Justice, and the National Health Law Program, and file the following complaint against the Defendant as follows:

I. INTRODUCTION

1. Medicaid-eligible children residing in Illinois with disabling and chronic health conditions bring this suit to challenge the Defendant's systemic failure to arrange for in-home shift nursing services. The Defendant acknowledges that in-home shift nursing services are medically necessary for all named Plaintiffs and Class members. Yet, the Defendant, through her systems, policies, and practices, has failed to arrange for adequate in-home shift nursing services for the Plaintiffs and Class.

2. The Defendant found each of the Plaintiffs and Class eligible for Medicaid-funded in-home shift nursing services, which allow either a nurse (RN), licensed practical nurse (LPN), or a certified nursing assistant (CNA) to provide nursing services in the child's home. However, the Plaintiffs and Class are unable to obtain adequate nursing services due to the Defendant's systemic failure to "arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment [nursing services]", as mandated by the federal Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provisions of the Medicaid Act. 42 U.S.C. Sec. 1396a(a)(43)(C); 42 U.S.C. Sec. 1396d(r).

3. The Medicaid Act requires the Defendant to proactively arrange for EPSDT services. The Medicaid Act also requires that medically necessary in-home shift nursing services be provided with reasonable promptness. 42 U.S.C. Sec. 1396a(a)(8). However, due to systemic deficiencies in the Defendant's policies, practices, and procedures, the Defendant fails to fulfill these legal obligations and, as result, the Plaintiffs and Class members are going without medically necessary services.

4. The Defendant's deficient systems, policies, practices, and procedures also violate the Americans with Disabilities Act (ADA), the federal Rehabilitation Act and other provisions of the Medicaid Act by failing to arrange for the delivery of in-home shift nursing services, which results in the Plaintiffs and Class members being either institutionalized or facing the serious risk of institutionalization.

5. The Plaintiff O.B. is currently improperly institutionalized (hospitalized) at the Children's Hospital of Illinois (CHOI) in Peoria due to the failure of the Defendant to arrange for adequate in-home shift nursing services. O.B. is enrolled in the Medically Fragile, Technology-Dependent (MFTD) Waiver program, meaning that O.B. requires an institutional level of care.

Upon information and belief from the mother of O.B., there are four other children like O.B. who are currently unable to be discharged from the Children's Hospital of Illinois due to the unavailability of in-home shift nursing services.

(a) Plaintiff O.B. is 23 months old; he was born prematurely at 34 weeks and has a complex medical history of Down syndrome, pulmonary hypertension, chronic lung disease, patent foramen ovale (PFO), patent ductus arteriosus (PDA), Factor V Leiden-Mutation, and Transient Myeloproliferative disorder. He is tracheostomy- and ventilator-dependent, with a gastrostomy-jejunostomy tube (g-j tube) for nutrition and medication administration.

(b) O.B. was scheduled to be discharged to his home on March 23, 2015 from the Children's Hospital of Illinois (CHOI) in Peoria, but O.B. has been unable to be discharged from the hospital due to the failure of the Defendant to arrange for the delivery of in-home shift nursing services.

(c) O.B.'s parents have spent the last nine months searching for adequate in-home nursing services so that O.B. may be safely discharged from CHOI.

(d) The nursing agency that O.B.'s parents work with has not been able to find nurses to staff O.B.'s case. O.B.'s parents have been unable to find another nursing agency to fully staff the nursing hours that the Defendant approved for O.B.

(e) In an attempt to find adequate nursing services, O.B.'s mother has also contacted local colleges that have nursing programs. At least three of these colleges sent emails with information about O.B.'s nursing needs to past graduates.

(f) O.B.'s parents created a Facebook page for O.B. On that Facebook page, O.B.'s parents posted information about O.B.'s need for nursing services, which has been shared widely. That Facebook post has been viewed approximately 42,000 times.

(g) O.B.'s mother spoke with one nurse who expressed interest in working full-time on O.B.'s case. However, when that nurse found out the pay for O.B.'s care was $11 less per hour than the hourly pay the nurse received working in a nursing home, the nurse backed out of the position.

(h) O.B. remains institutionalized (hospitalized) at a cost to the Defendant of approximately $57,000 per month for just the hospital charges, in contrast to the Defendant's approval for in-home shift nursing services to O.B. at a monthly budget of $19,718.

(i) The doctor's charges at the hospital for just the month of May 2015 add an additional $21,000 to the monthly medical costs for O.B., which means that the approximate hospital and doctor charges during the month of May 2015 was $78,000 ($57,000 + $21,000).

(j) O.B.'s hospital charges are being paid, at least in part, by a private insurer, as O.B.'s father is an employee of the state of Illinois. However, this private insurer has told O.B's parents that they do not cover the long-term private duty nursing services that O.B. requires.

(k) No nursing agency has been able to provide the approximately 18 hours per day of medically necessary in-home shift nursing services required for the Plaintiff O.B.

6. For months, the Defendant has been aware of O.B.'s inadequate services. The Defendant found in-home shift nursing services to be medically necessary for O.B. in 2014. In the system designed by the Defendant, the University of Illinois Chicago Division of Specialized Care for

Children (DSCC) provides care coordination for O.B's in-home skilled nursing services. O.B.'s parents have spoken frequently with their DSCC care coordinator about this issue. On April 7, 2015, DSCC sent a letter to the Defendant regarding O.B. The April 7, 2015 letter stated that no in-home shift nursing services have been provided to O.B. as O.B. remains hospitalized. The April 7, 2015 letter further stated that, "The nursing agency has not been able to fully staff the case, so O.[B.] is still residing at Children's Hospital of Illinois (CHOI) in Peoria. O.[B.] was scheduled to be discharged to home on 3/23/2015. Staffing from the nursing agency was not enough that it was felt to be safe for O.[B.] to go home."

7. The Plaintiff C.F. has been approved for 84 hours per week on in-home shift nursing services and has only been able to obtain approximately 60 hours per week of nursing services. C.F. is at a serious risk of institutionalization because he is not receiving the approved level of in-home shift nursing services. C.F. is enrolled in the Medically Fragile, Technology-Dependent (MFTD) Waiver program, meaning that C.F. requires an institutional level of care.

(a) During the past three years, it has been extremely difficult for C.F. to receive adequate nursing services. As a result, C.F. has rarely received 84 hours a week of in-home nursing services.

(b) DSCC care coordinators are aware of C.F's inadequate nursing services. However, it remains extremely difficult to staff C.F.'s nursing case.

(c) The amount of nursing services that C.F. receives changes from week to week or sometimes month to month. At the moment, C.F. receives 60 hours per week of nursing services (40 day shift hours and 20 night shift hours). However, from mid-September 2015 until late October 2015 (approximately September 13 to October 23, 2015), C.F. had 0 hours of nursing services.

(d) When C.F. does not have nursing services, C.F's mother and grandmother must provide all of C.F.'s medically necessary care. For example, when he does not have night nursing coverage, C.F.'s mother and grandmother often sleep in two hour shifts to cover all of his night time care.

8. The Plaintiff J.M. has been approved for 120 hours per week of in-home shift nursing services when in school and 112 hours per week when not in school. The Plaintiff J.M. is approved for an additional 8 hours per week when in school. J.M. is enrolled in the Medically Fragile, Technology-Dependent (MFTD) Waiver program, meaning that J.M. requires an institutional level of care.

(a) J.M.'s mother has spoken with at least four nursing agencies that serve the geographical area where J.M. resides. Each has informed J.M.'s mother that they are unable to serve J.M. due to the low nursing rates paid by the Defendant.

(b) Due to the Defendant's failure to arrange for in-home shift nursing, J.M. currently receives only 48 hours per week of in-home shift nursing on a 1:1 basis.

(c) Though approved for individualized nursing services, J.M. received an additional 50 hours per week of nursing which must be shared with his sister, Plaintiff S.M.

(d) The Defendant has found it medically necessary for both J.M. to have individualized nursing services on a 1:1 basis. This need is also supported by J.M.'s treating physician(s).

(e) The Defendant's failure to arrange for medically necessary, individualized nursing services puts J.M. at an unjustifiable risk of experiencing medical complications at home.

(f) The Defendant's failure to arrange for medically necessary, individualized nursing services also puts J.M. at a serious risk of institutionalization.

9. The Plaintiff S.M. is the sister of J.M. Both S.M. and J.M. were adopted by Dan McCullough and Michele McCullough. S.M. has also been approved for 120 hours per week of in-home shift nursing services when in school and 112 hours per week when not in school. The Plaintiff S.M. is approved for an additional 8 hours per week when in school. S.M. is enrolled in the Medically Fragile, Technology-Dependent (MFTD) Waiver program, meaning that S.M. requires an institutional level of care.

(a) S.M.'s mother has spoken with at least four nursing agencies that serve the geographical area where S.M. resides. Each has informed S.M.'s mother that they are unable to serve S.M. due to the low nursing rates paid by the Defendant.

(b) Due to the Defendant's failure to arrange for in-home shift nursing, S.M. currently receives only 50 hours per week of in-home shift nursing on a 1:1 basis.

(c) Though approved for individualized nursing services, S.M. received an additional 50 hours per week of nursing which must be shared with her brother, Plaintiff J.M.

(d) The Defendant has found it medically necessary for S.M. to have individualized nursing services on a 1:1 basis. This need is also supported by S.M.'s treating physician(s).

(e) The Defendant's failure to arrange for medically necessary, individualized nursing services puts S.M. at an unjustifiable risk of experiencing medical complications at home.

(f) The Defendant's failure to arrange for medically necessary, individualized nursing services also puts S.M. at a serious risk of institutionalization.

10. The mother of the Plaintiffs J.M. and S.M. was told by nursing agencies in her geographical area that they are unable to serve J.M. and S.M. due to inability to recruit nurses as a result of the low nursing rates paid by the Defendant.

11. The Plaintiff Sa.S. has been approved for 112 hours per week on in-home shift nursing services and only receives approximately 82 hours per week of nursing services. Sa.S. is enrolled in the Medically Fragile, Technology-Dependent (MFTD) Waiver program, meaning that Sa.S. requires an institutional level of care.

(a) Sa.S.'s mother has spoken with at least three nursing agencies that serve the geographical area where Sa.S. resides. Each has informed Sa.S.'s mother that they are unable to fully staff Sa.S.'s case.

(b) Due to the Defendant's failure to arrange for in-home shift nursing, Sa.S. currently receives only 82 hours per week of in-home shift nursing.

(c) Sa.S.'s mother cannot remember the last time that Sa.S's nursing case was fully staffed; she believes it has been about a year and a half since Sa.S's nursing case was fully staffed.

(d) The Defendant's failure to arrange for medically necessary, individualized nursing services puts Sa.S. at an unjustifiable risk of experiencing medical complications at home.

12. The Plaintiff Sh.S. is approved by the Defendant, the Illinois Department of Healthcare and Family Services to receive in-home shift nursing services of 84 hours per week. Sh.S. only receives approximately 65 hours per week of in-home shift nursing services. Sh.S. is enrolled in the Illinois Medicaid program, but is not enrolled in the Medically Fragile, Technology-Dependent (MFTD) Waiver program.

(a) Sh.S.'s mother has spoken with at least three nursing agencies that serve the geographical area where Sh.S. resides. Each has informed Sh.S.'s mother that they are unable to fully staff Sh.S.'s case.

(b) Due to the Defendant's failure to arrange for in-home shift nursing, Sh.S. currently receives only 65 hours per week of in-home shift nursing.

(c) Sh.S.'s mother cannot remember the last time that Sh.S's nursing case was fully staffed; she believes it has been at about a year and a half since Sh.S's nursing case was fully staffed.

(d) The Defendant's failure to arrange for medically necessary, individualized nursing services puts Sh.S. at an unjustifiable risk of experiencing medical complications at home.

13. The Defendant failed to provide adequate in-home shift nursing services for the Plaintiffs and Class. Accordingly, the Plaintiff O.B. remains hospitalized (institutionalized); the Plaintiffs C.F., J.M., S.M., Sa.S, and Sh.S. receive inadequate in-home shift nursing services.
The Defendant's system-wide policies, practices, and procedures include a low reimbursement rate for the Plaintiffs' and the Class members' in-home shift nursing services. The Defendant will not pay a nursing agency more than $35.03 per hour for a RN and $31.14 per hour for a LPN for in-home shift nursing services for the Plaintiffs and Class members. In contrast, the Defendant will pay $72.00 per hour for shift nursing services under certain circumstances not applicable to the Plaintiffs, if care is initiated within 14 days from the day of discharge. (*See*: http://www2.illinois.gov/hfs/SiteCollectionDocuments/2015_hhfeeschedule.pdf)

14. The Defendant compounded the nursing staffing problem in May 2015, when the Defendant imposed a system-wide 16.75% rate cute for the Plaintiffs' and Class members' in-home shift nursing services. As a result, for the months of May 2015 and June 2015, the Defendant reduced RN rates to $29.16 per hour and LPN rates to $25.92 per hour, which resulted in a large number of nurses declining to serve the Plaintiffs and Class.

15. Upon information and belief, the Defendant's sister agency, the Illinois Department of Children and Family Services (DCFS) will pay a shift nursing rate of approximately $45.00 per hour for in-home shift nursing.

16. The Medicaid program is jointly funded by the federal government and the states. In Illinois, the federal government pays approximately 50% of the Illinois's Medicaid costs. Accordingly, if the state of Illinois increased nursing rates by $10.00 per hour, the net increase in cost to Illinois would be less than $10.00 per hour.

17. This class action lawsuit asks this Court to order the Defendant to take all immediate and affirmative steps necessary to correct her system-wide policies, practices, and procedures in order to arrange for adequate levels of previously-approved, medically necessary in-home shift nursing services to the Plaintiffs and Class. It will be up to the Defendant to determine the manner in which to implement the Order.

II. JURISDICTION & VENUE

18. This is an action for declaratory and injunctive relief to enforce the rights of the Plaintiffs and the Class under the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) and reasonable promptness mandate of Title XIX of the Social Security Act (Medicaid Act); the Americans with Disabilities Act (ADA), 42 U.S.C. Sec. 12132; and Section 504 of the Rehabilitation Act (Rehabilitation Act), 29 U.S.C. Sec. 794(a).

19. This Court has jurisdiction over Plaintiffs' federal law claims pursuant to 28 U.S.C. Sections 1331 and 1343, which grant this Court original jurisdiction in all actions authorized by 42 U.S.C. Sec. 1983 to redress the deprivation under color of state law any rights, privileges, or immunities guaranteed by the United States Constitution and Acts of Congress. The Plaintiffs

and Class' claims for declaratory and injunctive relief are authorized under 28 U.S.C. Secs. 2201-2202, 42 U.S.C. Sec. 1983, and Fed. R. Civ. P. 65.

20. Venue is proper in the Northern District of Illinois under 28 U.S.C. Sec. 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred here and because Defendant Norwood may be found here.

III. PARTIES

A. The Named Plaintiffs

21. **Plaintiff O.B.** is 23 months old. O.B. was born prematurely at 34 weeks. He has several complex medical diagnoses, including Down syndrome, pulmonary hypertension, chronic lung disease, PFO, PDA, Factor V Leiden-Mutation, and Transient Myeloproliferative disorder. He is tracheostomy-dependent and ventilator-dependent; he receives nutrition and medication through a g-j tube. As a result of these conditions, O.B. cannot breathe, eat, or take medication without assistance and/or medical equipment. The Defendant has approved a monthly budget of $19,718 for in-home shift nursing services, equivalent to approximately 126 hours per week (18 hours per day) of in-home shift nursing services. However, O.B. remains institutionalized (hospitalized) due to the Defendant's failure to arrange for the delivery of in-home shift nursing services. Pursuant to Fed. R .Civ. P. 17(c), O.B. brings this action through his parents and next friends, Garland Burt and Julie Burt.

22. **Plaintiff C.F.** is almost 9 years old. C.F. is diagnosed with specified congenital anomalies, reduction deformity brain, laryngotracheal anomaly, and great vein anomaly. C.F. also has cortical visual impairment, congenital bilateral leg contractures (non-ambulatory without medical equipment), tracheostomy dependence, gastrostomy tube for feelings and medications, neurogenic ladder that requires catheterization multiple times a day and indwelling

catheter at night, and dysautonomia. This means that C.F. is blind, non-verbal, and is primarily fed through a g-tube. Additionally, C.F. cannot clearly communicate his needs nor can he control his bladder. The Defendant has approved C.F. for 84 hours per week of in-home shift nursing services, based on medical necessity. However, C.F. has been only able to obtain approximately 60 hours per week of nursing services. Pursuant to Fed. R. Civ. P. 17(c), C.F. brings this action through his mother and next friend, Kristen Fisher.

23. **Plaintiff J.M.** is 16 years old. J.M. is diagnosed with congenital cytomegalovirus (CMV), microcephaly, developmental delay, and a seizure disorder. He is g-tube dependent and is tracheostomy dependent due to dependence on nightly ventilation due to central alveolar hypoventilation. Bolus feeds are given three times a day, with continuous feeding at night. J.M. receives oral suctioning an average of four times per nursing shift, with oxygen saturations normally between 93-100% on room air. J.M. requires total assistance for all activities of daily living. He is wheelchair bound and dependent for mobility and transfers. J.M. is nonverbal, but he is able to communicate through blinking. The Defendant has approved J.M. to receive 120 hours per week of in-home shift nursing services when in school; 112 hours per week when not in school. Due to the unavailability of in-home shift nursing, J.M. is receiving only 48 hours per week of in-home shift nursing on a 1:1 basis. J.M. receives an additional 50 hours per week of nursing, however he shares the same nurse with his sister, S.M., due to the lack of nurse staffing. Pursuant to Fed. R. Civ. P. 17(c), J.M. brings this action through his parents and next friends, Dan McCullough and Michele McCullough.

24. **Plaintiff S.M.** is 14 years old. S.M. was born at 26 weeks premature with sub-glottic stenosis. At five months she sustained a non-accidental traumatic brain injury (Shaken Baby Syndrome). S.M. was later adopted by her current parents, Dan and Michelle McCullough.

S.M. has spastic quadriplegia, microcephaly, a global developmental delay, a seizure disorder, g-tube dependence, tracheostomy dependence due to obstructive breathing problems, and a right-sided cerebrovascular accident (CVA). S.M. has autonomic storms which cause tachycardia, increased temperature, clonus, and agitation. S.M. requires total assistance for all activities of daily living. She is unable to sit up independently. She is nonverbal, has cortical blindness, and moves only the left arm purposefully. The Defendant has approved S.M. to receive 120 hours per week of in-home shift nursing services when in school; 112 hours per week when not in school. Due to the unavailability of in-home shift nursing, S.M. is receiving only 50 hours per week of in-home shift nursing on a 1:1 basis. S.M. receives an additional 50 hours per week of nursing, however she shares the same nurse with her brother, J.M., due to the lack of nurse staffing. Pursuant to Fed. R. Civ. P. 17(c), S.M. brings this action through her parents and next friends, Dan McCullough and Michele McCullough.

25. **Plaintiff Sa.S.** is 3 years old. Plaintiff Sa.S. is the twin brother of Plaintiff Sa.S. Sa.S. was born prematurely, at approximately 27 weeks. Sa.S. remained hospitalized for about nine months after his birth. Sa.S. was discharged in June 2013 for about thee days, until he experienced respiratory failure at home. Sa.S. was re-admitted to the hospital where he received a tracheostomy. Sa.S. was discharged again in late December 2013. He was approved for the Medically Fragile and Technology Dependent (MFTD) waiver program around that same time. Sa.S. has been diagnosed with chronic respiratory failure. He had a tracheostomy, and he is ventilator-dependent. He requires a gastrostomy tube (g-tube) for all of his feedings and medications. He receives nebulizer treatments as needed to assist his breathing. Pursuant to Fed. R .Civ. P. 17(c), Sa.S. brings this action through his mother and next friend, Sheila Scaro.

26. **Plaintiff Sh.S.** is 3 years old. Plaintiff Sh.S. is the twin sister of Plaintiff Sh.S. Sh.S. was born prematurely, at approximately 27 weeks. Sh.S. remained hospitalized for about seven months after her birth. Sh.S. has complex medical conditions including dysphagia and esophageal reflux. She requires a gastrostomy tube (g-tube) for all of her feedings and her medications; she cannot take more than 5 mL of any liquid orally. She receives nebulizer treatments twice per day to help with her breathing. Sh.S.'s g-tube feedings are very complex. She receives bolus feeds four times a day. Because of her dysphagia and reflux, she often throws up and gags during feedings. About two to three times a week, Sh.S. aspirates during feedings, requiring use of a Smartvest to help prevent pneumonia. Pursuant to Fed. R .Civ. P. 17(c), Sh.S. brings this action through his mother and next friend, Sheila Scaro.

B. The Defendant

27. The Defendant, Felicia F. Norwood, is the Director of the Illinois Department of Healthcare and Family Services (HFS). As such she is responsible for the supervision and oversight of HFS medical programs and contractual arrangements. Her responsibilities in this role include the responsibility to ensure compliance with federal law. She is being sued in her official capacity.

IV. CLASS ACTION ALLEGATIONS

28. The Plaintiffs bring this action as a statewide class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2) on behalf of:

> 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 non-waiver Medicaid program, commonly known as the Nursing and Personal Care Services (NPCS) program.

29. The Class is so numerous that joinder of all persons is impracticable. There are approximately 1,200 children eligible to receive in-home shift nursing services through the Defendant's Medicaid programs. The Defendant administers EPSDT-mandated in-home shift nursing services for eligible children under the age of 21.

30. As of January 1, 2015, approximately 535 children under the age of 21 with extensive medical needs were eligible for in-home shift nursing services. The approximately 535 children referenced in this paragraph are not enrolled in a Medicaid waiver program.

31. As of March 13, 2015, approximately 686 additional children were enrolled in a Medicaid waiver program, the Medically Fragile Technology Dependent (MFTD) waiver program. The approximately 686 children referenced here are also eligible to receive the full range of standard Medicaid services, including in-home shift nursing services.

32. The Plaintiffs and Class have severe disabilities and limited financial resources, as Medicaid recipients. They are unlikely to institute individual actions.

33. The claims of the Class members raise common questions of law and fact. The factual questions common to the entire Class include what system-wide policies, practices, and procedures were instituted or permitted by the Defendant and resulted in her failure to arrange for Medicaid-covered, medically necessary in-home nursing services. These legal questions are common to both non-waiver and waiver enrollees in the Medicaid program. The legal questions common to the Plaintiffs and all Class members include:

(a) Whether the defendant has failed to "arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment [in-home shift nursing services]" to the Plaintiffs and Class as mandated by the

federal Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provisions of the Medicaid Act pursuant to 42 U.S.C. Sec. 1396a(a)(43)(C) and 42 U.S.C. Sec. 1396d(r)(5);

(b) Whether the Defendant has failed to furnish medical assistance with reasonable promptness to the Plaintiffs and Class, who are eligible children with disabilities, pursuant to 42 U.S.C. Sec. 1396a(a)(8);

(c) Whether the Defendant violated the ADA and/or Rehabilitation Act when the Defendant failed to arrange for Medicaid-covered, medically necessary in-home nursing services;

(d) Whether the Defendant violated the ADA and/or the Rehabilitation Act by failing to assure that in-home shift nursing services are administered to the Plaintiffs and Class in the most integrated setting appropriate to their needs; and

(e) Whether the Defendant violated the ADA and/or the Rehabilitation Act when the Defendant failed to make reasonable modifications to the existing Medicaid benefit which would result in the availability of in-home shift nursing services.

34. The Plaintiffs' claims are typical of the Class members' claims. None of the Plaintiffs and Class members are receiving in-home shift nursing services at the level that the Defendant found to be necessary to correct or ameliorate their conditions.

35. The Plaintiffs are adequate representatives of the class because they suffer from the same deprivations of the other Class members and have been denied the same federal rights that they seek to enforce on behalf of the other Class members.

36. The Plaintiffs will fairly and adequately represent the interests of the absent Class members, many of whom are unable to pursue claims on their own behalf as the result of their disabilities.

37. The Plaintiffs' interest in obtaining injunctive relief for the violations of their rights and privileges are consistent with and not antagonistic to those of any person within the Class.

38. The Plaintiffs' counsel are qualified, experienced and able to conduct the proposed litigation.

39. Prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudication with respect to individual Class members, which would establish incompatible standards of conduct for the party opposing the Class or could be dispositive of the interests of the other members or substantially impair or impede the ability to protect their interests.

40. A class action is superior to other available methods for the fair and efficient adjudication of the controversy in that:

(a) A multiplicity of suits with consequent burden on the courts and defendants should be avoided.

(b) It would be virtually impossible for all class members to intervene as parties-plaintiffs in this action.

41. The Defendant has, with knowledge of the requirements of the EPSDT mandate, the Medicaid Act, the ADA, the Rehabilitation Act and implementing regulations, acted or refused to act, and continues to act or refuse to act, on grounds applicable to the Class, thereby making appropriate final injunctive and declaratory relief with respect to the Class as a whole.

V. STATUTORY AND REGULATORY FRAMEWORK

A. The Medicaid Act and Implementing Regulations

42. The Medicaid Act, Title XIX of the Social Security Act, 42 U.S.C. Secs. 1396-1396w-5, establishes a medical assistance program cooperatively funded by the federal and state governments. Medicaid is designed to "enabl[e] each State, as far as practicable . . . to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence and self-care . . . " 42 U.S.C. Sec. 1396-1.

43. The Medicaid program typically does not directly provide health care services to eligible individuals, nor does it provide beneficiaries with money to purchase health care directly. Rather, Medicaid is a vendor payment program, wherein Medicaid-participating providers—including in-home shift nursing providers — are reimbursed by the program for the services they provide to recipients.

44. The Centers for Medicare & Medicaid Services (CMS) of the United States Department of Health and Human Services is the agency that administers Medicaid at the federal level, including publishing rules and guidelines. These rules and regulations are set forth in 42 C.F.R. Secs 430.0-483.480, and in the CMS *State Medicaid Manual*. These rules and regulations are binding on all states that participate in Medicaid.

45. The state must adopt a plan that meets the requirements of the Medicaid Act. 42 U.S.C. Sec. 1396; 42 C.F.R. Sec. 430.12. States can make changes to their Medicaid programs by

submitting state plan amendments for CMS's approval. 42 U.S.C. Sec. 1396; 42 C.F.R. Sec. 430.12.

46. Certain services, such as hospital services, are mandatory under Medicaid and must be covered for all beneficiaries. 42 U.S.C. Secs. 1396a(a)(10)(A), 1396d(a)(7). 42 C.F.R. Secs. 440.210, 440.220. Other services are optional for adults, including in-home shift nursing services. 42 U.S.C. Secs. 1396a(a)(10)(A), 1396d(a)(8).

47. One mandatory category of Medicaid services is the Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) benefit. The federal EPSDT benefit requires that any of the mandatory or optional services that are coverable under 42 U.S.C. Sec. 1396d(a) must be provided if they are "necessary … to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening process, regardless of whether or not such services are covered" for adults. 42 U.S.C. Sec. 1396d(r)(5). Included in the list of services under Section 1396d(a) are home health services and private duty nursing services. *See* 42 U.S.C. Secs. 1396d(a)(7), 1396d(a)(8). Accordingly, the EPSDT benefit includes in-home shift nursing services that are necessary to ameliorate, correct, or maintain a child's condition(s).

48. The federal EPSDT mandate requires the Defendant to provide or arrange for the provision of covered services. 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 . . . child health screening services." 42 U.S.C. Sec. 1396a(a)(43)(C). The Defendant must ensure that medically necessary services are available, accessible and provided, either by providing them directly or by arranging for them through "appropriate agencies, organizations, or individuals." 42 U.S.C. Sec. 1396a(a)(43).

Accordingly, the Defendant must either provide in-home shift nursing directly or coordinate with others to do so. Furthermore, the Defendant must implement and maintain system-wide policies, practices, and procedures that proactively arrange for the delivery of medically necessary, EPSDT-mandated services.

49. The state Medicaid agency must furnish services with "reasonable promptness to all eligibility individuals." 42 U.S.C. Sec. 1396a(a)(8). This must happen "without any delay caused by the agency's administrative procedures." 42 C.F.R. Sec. 435.930.

B. The Americans with Disabilities Act (ADA) and Implementing Regulations

50. In enacting the Americans With Disabilities Act, Congress found that "[individuals with disabilities continually encounter various forms of discrimination, including…segregation…." 42 U.S.C. Sec. 12101(a)(5).

51. Title II of the Americans with Disabilities Act provides that "no qualified individual with a disability shall, by reason of disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity or be subjected to discrimination by such entity." 42 U.S.C. Sec. 12132.

52. Regulations implementing Title II of the ADA make clear that the ADA requires that: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. Sec. 35.130(d).

53. Regulations implementing Title II of the ADA provide: "A public entity may not, directly or through contractual or other arrangements, utilize criteria or other methods of administration: (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of defeating or

substantially impairing accomplishment of the objectives of the entity's program with respect to individuals with disabilities. . . ." 28 C.F.R. Sec. 35.130(b)(3).

54. The United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), held that the unnecessary institutionalization of individuals with disabilities is a form of discrimination under Title II of the ADA. In doing so, the Supreme Court interpreted the ADA's "integration mandate" to require that persons with disabilities be served in the community when: (1) the state determines that community-based treatment is appropriate; (2) the individual does not oppose community placement; and (3) community placement can be reasonably accommodated. *Id.* at 607.

C. The Section 504 of the Rehabilitation Act and Implementing Regulations

55. Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), on which the ADA is modeled, sets forth similar protections against discrimination by recipients of federal funds, such as the Defendant. 29 U.S.C. Secs. 794-794a. These protections include the prohibition against unnecessary segregation of people with disabilities. Regulations implementing the Rehabilitation Act require that a public entity administer its services, programs and activities in "the most integrated setting appropriate" to the needs of qualified individuals with disabilities. 28 C.F.R. Sec. 41.51(d).

VI. STATEMENT OF FACTS

A. The Federal Medicaid Act's Mandate to Provide In-Home Shift Nursing Services to Children Enrolled in the Medicaid Program

56. The federal EPSDT benefit requires the Defendant to provide the services listed in 42 U.S.C. Sec. 1396d(a) to Medicaid-enrolled children under the age of 21 that are "necessary … to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the

screening process, regardless of whether or not such services are covered". 42 U.S.C. Sec. 1396d(r)(5).

57. The services listed in 42 U.S.C. Sec. 1396d(a) include home health services and private duty nursing services. *See* 42 U.S.C. Secs. 1396d(a)(7), 1396d(a)(8). Accordingly, the EPSDT benefit of the federal Medicaid Act requires the Defendant to provide and arrange for in-home shift nursing services (i.e., private duty nursing) to Medicaid-enrolled children under 21 in Illinois. The Defendant refers to private duty nursing as in-home shift nursing services.

58. States may also include home and community-based "waivers" as part of their Medicaid programs. These programs provide Medicaid services to individuals in their homes who would otherwise need the level of care provided in an institution, including nursing homes and hospitals. 42 U.S.C. Sec. 1396n(c)(1). Thus, waiver enrollees have very high medical needs and, in most cases, serious disabilities.

59. These programs are called waivers because they allow states to waive certain Medicaid requirements that may otherwise apply. This includes certain financial eligibility requirements. Thus, in contrast to regular Medicaid rules, income and resources of a child's family are not taken into account when determining eligibility for a waiver.

60. In Illinois, children be found eligible for Medicaid in one of two ways:

(a) First, they can found eligible because of their parent(s)'/guardian(s)' limited financial resources. (In this lawsuit, individuals eligible for Medicaid based on financial resources are referred to as "non-waiver enrollees".); or

(b) Alternatively, children can qualify for a Medicaid waiver program based on their extensive medical needs, regardless of their family's financial resources. (In this lawsuit, individuals eligible for Medicaid waiver program are referred to as "waiver enrollees.")

61. Children are eligible for the MFTD Waiver program if the Defendant makes a determination that "except for the provision of in-home care, these individuals would require the level of care provided in a hospital or a skilled nursing facility." 89 Ill. Admin. Code 120.530(b).

62. The estimated cost of in-home services provided to a waiver enrollee cannot exceed the cost of institutional level of care appropriate to the individual's medical needs (hospital or skilled nursing facility), as determined by the Defendant. 89 Ill. Admin. Code 120.530(e)(4).

63. Non-waiver enrollees in the Illinois Medicaid program are entitled to receive any Medicaid-covered service when medically necessary. 89 Ill. Admin. Code 140.3(a). Under the Medicaid Act, non-waiver enrollees in Illinois Medicaid are entitled to receive the federal EPSDT benefit, which includes in-home shift nursing services when medically necessary. This federal requirement is also codified in 89 Ill. Admin. Code Sec. 140.3(b)(13).

64. Waiver enrollees, meaning children enrolled in the Medically Fragile and Technology-Dependent waiver program, are also entitled to receive the EPSDT benefit, which includes in-home shift nursing services. This requirement is codified in 89 Ill. Admin. Code Secs. 140.3(a)(5), 120.530.

65. A child enrolled in the Medically Fragile and Technology-Dependent waiver program may also be eligible for additional, non-EPSDT services, including:

i. Respite care;
ii. Environmental modifications (e.g., home renovation to accommodate a disability);
iii. Special medical supplies and equipment;
iv. Medically supervised day care;
v. Family and nurse training; and
vi. Maintenance counseling.

Those additional services available to waiver enrollees are not at issue in this case.

66. Non-waiver enrollees in the Illinois Medicaid program can apply for the MFTD waiver program. If a non-waiver enrollee meets the medical requirements of the MFTD waiver program, they can participate in the MFTD waiver program. As participants in the MFTD program, they are still entitled to the full range of EPSDT services, including in-home shift nursing services. Additionally, they may receive the additional waiver services listed in the preceding paragraph.

67. In-home shift services are non-waiver services. Accordingly when medically necessary, in-home shift services must be provided to bother waiver enrollees and non-waiver enrollees because of the federal Medicaid Act's EPSDT mandate.

D. The Defendant's Administration of Federally Mandated In-Home Shift Nursing Services

68. The Defendant's systems, policies and procedures must comply with the Medicaid Act and associated regulations, including the systems, policies and procedures for administering in-home shift nursing services to both waiver enrollees and non-waiver enrollees.

69. The Defendant sometimes refers to the administration of in-home shift nursing services to non-waiver enrollees as the Nursing and Personal Care Services (NCPS) program.

70. Children approved for in-home services have extensive and complex medical needs. However, waiver enrollees must also be technology-dependent. Though non-waiver enrollees have extensive and complex medical needs, they do not meet the technology-dependent requirements of the waiver program.

71. The Defendant's administration of in-home shift nursing to non-waiver enrollees must comply with federal requirements of the EPSDT mandate, the Medicaid Act, the ADA, the Rehabilitation Act, and implementing regulations.

72. Similarly, the Defendant's administration of in-home shift nursing services to waiver enrollees must also comply with federal requirements of the EPSDT mandate, the Medicaid Act, the ADA, the Rehabilitation Act, and implementing regulations.

73. The Defendant has approved all Plaintiffs and Class members for in-home shift nursing services based on medical necessity. All Plaintiffs and Class members have extensive medical needs. The Plaintiffs and Class members consist of both non-waiver enrollees and waiver enrollees.

E. Defendant's Prior Approval For In-Home Shift Nursing Services

74. Pursuant to the Illinois Administrative Code, the Defendant requires prior approval for all in-home shift nursing services for children under 21 years of age. 89 Ill. Adm. Code Sec. 140.473(d)-(e). This prior authorization is required for both non-waiver enrollees and waiver enrollees.

75. A prior authorization request for in-home shift nursing services requires the support of a treating physician who supports the medical necessity of such services.

76. When the Defendant grants prior approval for in-home shift nursing services for a non-waiver or waiver enrollee, the Defendant sends a written notice to the child stating that either: (1) the child has been approved for a specific number of nursing hours per week; or (2) that the child has been approved for a specific monthly budget for nursing services.

77. The Defendant's written notice for prior approval for in-home shift nursing services sets forth the reimbursement rates that the Defendant will pay to registered nurses (RNs), licensed practical nurses (LPNs) and certified nurse aides (CNAs) to perform in-home shift nursing

services. The Defendant reimburses RNs, LPNs, and CNAs at the same rate for in-home nursing services delivered to both non-waiver enrollees and waiver enrollees.

78. Through her business records, the Defendant has actual or constructive knowledge of her failure to arrange adequate in-home shift nursing services for the Plaintiffs and Class members. The Defendant has knowledge of the amount (i.e., weekly hours or monthly budget) of in-home shift nursing services that she found to be medically necessary for each Plaintiff and Class member. Additionally, the Defendant has knowledge of the monthly billing for each Plaintiff's and Class member's in-home shift nursing services. Therefore, the Defendant is or should be aware of her failure to arrange medically necessary services when the Defendant is not billed for the full of amount in-home shift nursing services.

79. Once the Defendant determines that a certain number of in-home skilled nursing services are medically necessary, the Defendant uses to same systems, procedures, and practices to arrange in-home skilled nursing services for the waiver and non-waiver enrollees. This system involves the delegation of care coordination to University of Illinois at Chicago Division of Specialized Care for Children and the delegation of service delivery to licensed nursing agencies in Illinois. The Defendant's system has failed the Plaintiffs and Class.

F. The Role of the Division of Specialized Care for Children (DSCC) in the Defendant's Administration of In-Home Shift Nursing Services

80. The University of Illinois at Chicago Division of Specialized Care for Children (DSCC) provides care coordination for children who receive in-home shift nursing care. DSCC provides care coordination to both waiver and non-waiver enrollees.

81. Additionally, DSCC acts as the single point of entry for both waiver and non-waiver enrollees applying for in-home nursing services. However, the Defendant approves all eligibility determinations for in-home shift nursing services.

82. Once the Defendant finds a child eligible for in-home shift nursing services, the Defendant delegates ongoing care coordinate to DSCC's staff members or contractors (registered nurses, social workers, respiratory therapists and speech therapists).

83. The primary care coordination responsibilities that the Defendant delegates to DSCC include, but may not be limited to:

(a) conducting assessments to determine a child's eligibility for the waiver program;

(b) developing a service plan for each eligible child;

(c) overseeing the health and safety of waiver participants; and

(d) monitoring of care coordination, nursing agencies and home medical providers.

84. Approximately once every sixty days, DSCC receives periodic reports from nursing agency servicing each waiver and non-waiver enrollee. These periodic reports require the nursing agency to provide the following information about each child to DSCC:

(a) amount of nursing hours/week prescribed for that time period;

(b) average amount of nursing hours provided per week for that time period;

(c) usual days and times of service; and

(d) any reasons for unfilled shifts.

85. DSCC, acting as the agent of the Defendant, is aware that all Plaintiffs and putative Class members are unable to arrange for in-home shift nursing services at the level approved by the Defendant.

86. DSCC does not have the authority to modify the Defendant's policies, practices, or procedures regarding the arrangement of in-home shift nursing services for the Plaintiffs and Class members.

87. DSCC has informed the Defendant that some Plaintiffs and Class members are unable to arrange for in-home shift nursing services at the level approved by the Defendant.

88. In the case of the Plaintiff O.B., an April 7, 2015 letter from DSCC to the Defendant stated that no in-home shift nursing services have been provided to O.B. as O.B. remains hospitalized. The April 7, 2015 letter further stated that, "The nursing agency has not been able to fully staff the case, so O.[B.] is still residing at Children's Hospital of Illinois (CHOI) in Peoria. O.[B.] was scheduled to be discharged to home on 3/23/2015. Staffing from the nursing agency was not enough that it was felt to be safe for O.[B.] to go home."

89. In the case of the Plaintiff Sh.S., Sh.S.'s mother has contacted one of the Defendant's employees, Ms. Shari Bangert, approximately five or six times by phone regarding the inadequate quantity and quality of Sh.S.'s nursing services. Each time, Sh.S.'s mother left a voicemail message for Ms. Bangert. On only one occasion did Ms. Bangert return the call of Sh.S.'s mother. During that return call, Ms. Bangert informed Sh.S.'s mother that she could not assist her; additionally, Ms. Bangert did not refer Sh.S.'s mother to anyone else for assistance. On all other occasions, Ms. Bangert did not respond to the messages left by Sh.S.'s mother. Sh.S.'s mother was told by the nursing agency staffing Sh.S.'s case that Shari Bangert followed up with them, instructing the nursing agency that Sh.S.'s mother was not supposed to contact Ms. Bangert.

90. In the case of Class member G.A., DSCC wrote to the Defendant on January 21, 2015 stating, "The current plan is approved for 105 hours of nursing care per week…The

family…remains frustrated due to the agency being unable to staff all of the allotted hours…the family is using a total of 48-60/hr of nursing per week."

91. Despite DSCC's notifications to the Defendant of inadequate nursing services, the Defendant has not arranged for adequate levels of in-home shift nursing services for the Plaintiffs and Class.

92. The Defendant is aware of both the number of monthly hours and the approved monthly budget that the Defendant found to be medically necessary for all Plaintiffs and Class members. The Defendant is also aware of the monthly bills being submitted for all Plaintiffs' and Class members' in-home shift nursing services.

93. Through the Defendant's own knowledge, and the information that DSSC provided to the Defendant, the Defendant is aware or should be aware that all Plaintiffs and Class members are unable to receive in-home shift nursing services at the level approved by the Defendant. However, the Defendant has neither implemented nor maintained system-wide policies, practices, and procedures that proactively ensure that the Plaintiffs and Class receive medically necessary in-home shift nursing services.

G. The Defendant's Use of Nursing Agencies and Home Health Agencies to Arrange for In-Home Shift nursing Services

94. Illinois has an enrollment of 355 licensed home health agencies, but only a specialized group of 34 home health agencies or private duty nursing agencies serves the technology-dependent pediatric population with shift nursing care.

95. DSCC has specific guidelines for approving providers of private duty nursing under the MFTD waiver. Once approved, and annually thereafter, agencies sign an agreement with DSCC

to comply with the requirements of the program. These include qualifications, experience and training for administrative and nursing staff.

96. In-home shift nursing must be provided by appropriately qualified staff – registered nurses (RNs), licensed practical nurses (LPNs) and certified nurse aides (CNAs), who are licensed or certified in Illinois, provide services for both non-waiver and waiver enrollees. Nurses and CNAs must be employed by a DSCC-approved nursing agency or community-based health center.

H. Plaintiff O.B.

97. O.B. was born prematurely at 34 weeks. He has several complex medical diagnoses, including Down syndrome, pulmonary hypertension, chronic lung disease, PFO, PDA, Factor V Leiden-Mutation, and Transient Myeloproliferative disorder. He is tracheostomy-dependent and ventilator-dependent; he receives nutrition and medication through a g-tube. As a result of these conditions, O.B. cannot breathe, eat, or take medication without assistance and/or medical equipment.

98. O.B. was schedule to be discharged to his home on March 23, 2015 from the Children's Hospital of Illinois (CHOI) in Peoria, but O.B. has been unable to be discharged from the hospital due to the failure of the Defendant to arrange for the delivery of in-home shift nursing services. O.B. remains institutionalized (hospitalized) at a cost to the Defendant of approximately $57,000 per month in the hospital charges alone.

99. In contrast, the Defendant has approved an in-home shift nursing services monthly budget of $19,718 for O.B., equivalent to approximately 126 hours per week (18 hours per day) of in-home shift nursing services. O.B. is a waiver enrollee; he meets the medical and technology-dependent requirements of the MFTD Waiver program.

100. In a letter dated, April 7, 2015, DSCC told the Defendant the following regarding Plaintiff O.B.:

> The nursing agency has not been able to fully staff the case, so O[.B.] is still residing at Children's Hospital of Illinois (CHOI) in Peoria. O[.B.] was scheduled to be discharged to home on 3/23/2015. Staffing from the nursing agency was not enough that it was felt to be safe for O[.B.] to go home.

101. There are qualified in-home nursing care providers in O.B.'s geographic area.

102. The parents of O.B. have been unable to find any nursing agency to fully staff the in-home shift nursing services at the level approved by the Defendant.

103. It is medically necessary that O.B. receives in-home shift nursing services of approximately 18 hours per day which has been approved by the Defendant.

104. Dr. Jeffrey Benson, a pulmonologist with the Pediatric Ventilation Clinic at OSF Healthcare, will be managing O.B.'s medical plan for home care. Dr. Benson continues to recommend in-home shift nursing care for O.B. In lieu of in-home nursing care, O.B. would remain in the Pediatric Intensive Care Unit (PICU) at Children's Hospital of Illinois (CHOI) in Peoria, Illinois.

105. O.B. is currently institutionalized (hospitalized) for the sole reason that in-home shift nursing services are unavailable at the level approved by the Defendant. Discharging O.B. without in-home shift nursing services at the level approved by the Defendant creates an unjustifiable level of medical risk that O.B.'s parents are unwilling to accept.

106. If O.B. is discharged from the hospital and receives in-home shift nursing at a level which is substantially less than the approved level by the Defendant, then O.B. faces a serious risk of institutionalization (re-hospitalization). If he remains at home with reduced in-home shift nursing, then he faces a strong possibility of a life threatening episode.

107. O.B. is requesting injunctive relief to require the Defendant to arrange for the delivery of in-home shift nursing services at the level approved by the Defendant in order that he not remain institutionalized or hospitalized.

108. O.B. is enrolled in the MFTD Waiver program.

109. O.B. is a qualified individual with a disability under the ADA and the Rehabilitation Act.

110. The Defendant has regarded Plaintiff O.B. as having a disability within the meaning of the ADA and the Rehabilitation Act.

111. O.B. is a recipient of Medical Assistance, commonly known as Medicaid.

112. O.B. is a resident of Illinois.

I. Plaintiff C.F.

113. The Plaintiff C.F. is almost 9 years old. C.F. is diagnosed with specified congenital anomalies, reduction deformity brain, laryngotracheal anomaly, and great vein anomaly. C.F. also has cortical visual impairment, congenital bilateral leg contractures (non-ambulatory without medical equipment), tracheostomy dependence, gastrostomy tube for feelings and medications, neurogenic ladder that requires catheterization multiple times a day and indwelling catheter at night, and dysautonomia. This means that C.F. is blind, non-verbal, and is primarily fed through a g-tube. Additionally, C.F. cannot clearly communicate his needs nor can he control his bladder. The Defendant has approved C.F. for 84 hours per week of in-home shift nursing services, based on medical necessity. C.F.'s care is managed by Dr. Jason Becker, a board certified pediatrician. Dr. Becker recommends 84 hours per week of in-home shift nursing to safely and stably maintain C.F. at home.

114. It is medically necessary that C.F. receives in-home shift nursing services of 84 hours per week which has been approved by the Defendant.

115. C.F. has been only able to receive approximately 60 hours per week of in-home shift nursing services. Kristen Fisher, the mother of C.F. has been unable to find any other nursing agencies to fully staff the nursing hours approved by the Defendant. C.F. is a waiver enrollee; he meets the medical and technology-dependent requirements of the MFTD Waiver program.

116. There are qualified in-home nursing care providers in C.F.'s geographic area.

117. If C.F. cannot obtain in-home shift nursing services at the level approved by the Defendant, then C.F. will 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 the approved level by the Defendant, then he faces a strong possibility of a life threatening episode.

118. C.F. is requesting injunctive relief to require the Defendant to arrange for the delivery of in-home shift nursing services in order that he may remain in the community and not be institutionalized or hospitalized.

119. C.F. is a qualified individual with a disability under the ADA and the Rehabilitation Act.

120. The Defendant has regarded Plaintiff C.F. as having a disability within the meaning of the ADA and the Rehabilitation Act.

121. As an enrollee in the MFTD Waiver program, C.F. is by definition at serious risk of institutionalization if he does not receive the Medicaid services he needs.

122. C.F. is a recipient of Medical Assistance, commonly known as Medicaid.

123. C.F. is a resident of Illinois.

J. Plaintiff J.M.

124. The Plaintiff J.M. is 16 years old. J.M. is diagnosed with congenital CMV, microcephally, developmental delay, and a seizure disorder. He is g-tube dependent and is tracheostomy dependent due to dependence on nightly ventilation due to central alveolar hypoventilation. Bolus feeds are given 3 times a day, with continuous feeding at night. J.M. gets suctioned an average of 4 times per nursing shift, with oxygen saturations normally between 93-100% on room air. J.M. requires total assistance for all activities of daily living. He is wheelchair bound and dependent for mobility and transfers. J.M. is nonverbal but he is able to communicate through blinking.

125. The Defendant has approved J.M. to receive in-home shift nursing services of 120 hours per week when in school and 112 hours per week when not in school, based on medical necessity. J.M. is a waiver enrollee; he meets the medical and technology-dependent requirements of the MFTD Waiver program.

126. It is medically necessary that J.M. receives in-home shift nursing services of 120 hours per week when in school and 112 hours per week when not in school, which has been approved by the Defendant.

127. Since approximately June 2015, J.M. has been only able to receive approximately 90 hours per week of in-home shift nursing services, including shared night nursing services received by J.M. and S.M. due to the Defendant's failure to arrange for individualized in-home shift nursing at medically necessary, approved levels. As of October 22, 2015, J.M. receives 48 hours per week of in-home shift nursing services on a 1:1 basis and will receive an additional 50 hours per week of nursing. However he shares the same nurse with his sister, S.M., due the Defendant's failure to arrange for individualized in-home shift nursing.

128. There are qualified in-home nursing care providers in J.M.'s geographic area.

129. Nursing agencies in the geographic area of J.M., have informed J.M.'s mother that they are unable to serve J.M. due to their lack of ability to recruit nurses as a result of the low nursing rates paid by the Defendant.

130. J.M.'s care is managed by his primary care physician, Dr. Terry Ho. Dr. Ho recommends shift nursing in the home to keep J.M. safe, the alternative being admission to Children's Hospital of Illinois (CHOI) in Peoria.

131. If J.M. cannot obtain in-home shift nursing services at the level approved by the Defendant, then J.M. will 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 the approved level by the Defendant, then he faces a strong possibility of a life threatening episode.

132. J.M. is requesting injunctive relief to require the Defendant to arrange for the delivery of in-home shift nursing services in order that he may remain in the community and not be institutionalized or hospitalized.

133. J.M. is a qualified individual with a disability under the ADA and the Rehabilitation Act.

134. The Defendant has regarded Plaintiff J.M. as having a disability within the meaning of the ADA and the Rehabilitation Act.

135. As an enrollee in the MFTD Waiver program, J.M. is by definition at serious risk of institutionalization if he does not receive the Medicaid services he needs.

136. J.M. is a recipient of Medical Assistance, commonly known as Medicaid.

137. J.M. is a resident of Illinois.

K. Plaintiff S.M.

138. The Plaintiff S.M. is 14 years old. S.M. is diagnosed with spastic quadriplegia, microcephaly, a global developmental delay, a seizure disorder, g-tube dependence, tracheostomy dependent due to obstructive breathing problems, and a right-sided CVA. S.M. has autonomic storms which cause tachycardia, increased temperature, clonus, and agitation. S.M. requires total assistance for all activities of daily living. She is unable to sit up independently. She is nonverbal, has cortical blindness, and moves only the left arm purposefully.

139. The Defendant has approved S.M. to receive in-home shift nursing services of 120 hours per week when in school and 112 hours per week when not in school, based on medical necessity. S.M. is a waiver enrollee; she meets the medical and technology-dependent requirements of the MFTD Waiver program.

140. It is medically necessary that S.M. receives in-home shift nursing services of 120 hours per week when in school and 112 hours per week when not in school, which has been approved by the Defendant.

141. Since approximately June 2015, S.M. has been only able to receive approximately 56 hours per week of in-home shift nursing services, including shared night nursing services received by J.M. and S.M. due to the Defendant's failure to arrange for individualized in-home shift nursing at medically necessary, approved levels. As of October 22, 2015, S.M. receives 50 hours per week of in-home shift nursing services on a 1:1 basis and will receive an additional 50 hours per week of shared nursing services. However, she shares the same nurse with her brother, J.M., due the Defendant's failure to arrange for individualized in-home shift nursing.

142. There are qualified in-home nursing care providers in S.M.'s geographic area.

143. Nursing agencies in the geographic area of S.M., have informed S.M.'s mother that they are unable to serve S.M. due to their lack of ability to recruit nurses as a result of the low nursing rates paid by the Defendant.

144. If S.M. cannot arrange for in-home shift nursing services at the level approved by the Defendant, then S.M. will be forced to be either institutionalized in a hospital or if she remains at home and receives in-home shift nursing at a level which is substantially less than the approved level by the Defendant, then she faces a strong possibility of a life threatening episode.

145. S.M. is requesting injunctive relief to require the Defendant to arrange for the delivery of in-home shift nursing services in order that she may remain in the community and not be institutionalized or hospitalized.

146. S.M. is a qualified individual with a disability under the ADA and the Rehabilitation Act.

147. The Defendant has regarded Plaintiff S.M. as having a disability within the meaning of the ADA and the Rehabilitation Act.

148. As an enrollee in the MFTD Waiver program, S.M. is by definition at serious risk of institutionalization if he does not receive the Medicaid services she needs.

149. S.M. is a recipient of Medical Assistance, commonly known as Medicaid.

150. S.M. is a resident of Illinois.

L. Plaintiff Sa.S.

151. **Plaintiff Sa.S.** is 3 years old. Plaintiff Sa.S. is the twin brother of Plaintiff Sh.S. Sa.S. was born prematurely, at approximately 27 weeks. Sa.S. remained hospitalized for about nine months after his birth. Sa.S. was discharged in June 2013 for about 3 days, until he experienced respiratory failure at home. Sa.S. was re-admitted to the hospital where he received

a tracheostomy. Sa.S. was discharged again in late December 2013. He was approved for the MFTD waiver program around that same time. Sa.S. has been diagnosed with chronic respiratory failure. He had a tracheostomy, and he is ventilator-dependent. He requires a gastrostomy tube (g-tube) for all of his feedings and medications. He receives nebulizer treatments to help with his breathing at least [ ] times per day.

152. The Defendant has approved Sa.S. to receive in-home shift nursing services of 112 hours per week. Sa.S. is a waiver enrollee; she meets the medical and technology-dependent requirements of the MFTD Waiver program.

153. It is medically necessary that Sa.S. receives in-home shift nursing services of 112 hours per week, which has been approved by the Defendant.

154. Since approximately January 2015, Sa.S. has been only able to receive approximately 82 hours per week of in-home shift nursing services.

155. There are qualified in-home nursing care providers in Sa.S.'s geographic area.

156. Sa.S.'s mother has attempted recruit nurses to staff Sa. S's case, but she has not been successful.

157. Sa.S. is requesting injunctive relief to require the Defendant to arrange for the delivery of in-home shift nursing services in order that he may remain safely in the community.

158. Sa.S. is a qualified individual with a disability under the ADA and the Rehabilitation Act.

159. The Defendant has regarded Plaintiff S. as having a disability within the meaning of the Rehabilitation Act.

160. As an enrollee in the MFTD Waiver program, Sa.S. is by definition at serious risk of institutionalization if he does not receive the Medicaid services he needs.

161. Sa.S. is a recipient of Medical Assistance, commonly known as Medicaid.

162. Sa.S. is a resident of Illinois.

M. Plaintiff Sh.S.

163. Plaintiff Sh.S. is 3 years old. Plaintiff Sh.S. is the twin sister of Plaintiff Sh.S. Sh.S. was born prematurely, at approximately 27 weeks. Sh.S. remained hospitalized for about seven months after her birth. Sh.S. has complex medical conditions including dysphagia and esophageal reflux. She requires a gastrostomy tube (g-tube) for all of her feedings and her medications; she cannot take more than 5 mL of any liquid orally. She receives nebulizer treatments twice per day to help with her breathing. Sh.S.'s g-tube feedings are very complex. She receives bolus feeds four times a day. Because of her dysphagia and reflux complicate her feedings, she often throws up and gags during feedings. About two to three times a week, Sh.S. aspirates during feedings, requiring use of a Smartvest to help prevent pneumonia.

164. The Defendant has approved Sh.S. to receive in-home shift nursing services of 84 hours per week. Sh.S. is a non-waiver enrollee; she does not meet the medical and technology-dependent requirements of the MFTD Waiver program.

165. It is medically necessary that Sh.S. receives in-home shift nursing services of 84 hours per week, which has been approved by the Defendant.

166. Since approximately January 2015, Sh.S. has been only able to receive approximately 65 hours per week of in-home shift nursing services.

167. There are qualified in-home nursing care providers in Sh.S.'s geographic area.

168. Sh.S.'s mother has attempted recruit nurses to staff Sh.S.'s case, but she has not been successful.

169. Sh.S. is requesting injunctive relief to require the Defendant to arrange for the delivery of in-home shift nursing services in order that she may remain safely in the community.

170. Sh.S. is a qualified individual with a disability under the ADA and the Rehabilitation Act.

171. The Defendant has regarded Plaintiff Sh.S. as having a disability within the meaning of the Rehabilitation Act.

172. Sa.S. is a recipient of Medical Assistance, commonly known as Medicaid.

173. Sa.S. is a resident of Illinois.

VI. CAUSES OF ACTION

COUNT I

VIOLATION OF THE FEDERAL MEDICAID ACT'S EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT (EPSDT) MANDATE

174. The Plaintiffs incorporate and re-allege paragraphs 1 through 173 as if fully set forth herein.

175. In violation of the EPSDT provisions of the Medicaid Act, 42 U.S.C. Secs. 1396a(a)(10)(A), 1396d(a)(4)(B), and 1396a(a)(43)(C), the Defendant, while acting under the color of law, has failed to provide the Plaintiffs and Class with in-home shift nursing services necessary to correct or ameliorate their conditions.

176. In violation of the EPSDT provisions of the Medicaid Act, the Defendant, while acting under the color of law, has failed to "arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment [in-home shift nursing services]" to the Plaintiffs and Class pursuant to 42 U.S.C. Sec. 1396a(a)(43)(C).

177. The Defendant's violations, which have been repeated and knowing, entitle the Plaintiffs and Class to relief under 42 U.S.C. Sec. 1983.

COUNT II

VIOLATION OF THE FEDERAL MEDICAID ACT'S REASONABLE PROMPTNESS REQUIREMENT

178. The Plaintiffs incorporate and re-allege paragraphs 1 through 177 as if fully set forth herein.

179. The named Plaintiffs and the Class they seek to represent are all Medicaid-eligible children with disabilities residing in Illinois.

180. The Defendant is engaged in the repeated, ongoing failure to arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment, despite the Defendant's acknowledgment that in-home shift nursing services are medically necessary for all named Plaintiffs and Class members.

181. In violation of 42 U.S.C. Sec. 1396a(a)(8) of the Federal Medicaid Act, the Defendant, while acting under the color of law, failed to provide services to the Plaintiffs and Class with ". . . reasonable promptness . . .".

182. The Defendant's violations, which have been repeated and knowing, entitle the Plaintiffs and Class to relief under 42 U.S.C. Sec. 1983.

COUNT III

VIOLATION OF AMERICAN WITH DISABILITIES ACT (ADA)

183. The Plaintiffs incorporates and re-alleges paragraphs 1 through 182 as if fully set forth herein.

184. Title II of the American with Disabilities Act (ADA) provides that no qualified person with a disability shall be subjected to discrimination by a public entity. 42 U.S.C. Secs. 12131-32. It requires public entities 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).

185. The Plaintiffs and Class are qualified individuals with disabilities within the meaning of Title II of the ADA.

186. The Illinois Department of Healthcare and Family Services (HFS) of which Defendant Norwood is Director is a "public entity" within the meaning of Title II of the ADA.

187. The Defendant's policies, practices, and procedures have the effects of: (1) impermissibly segregating the some Plaintiffs and Class members in institutions or hospitals; and (2) placing other Plaintiffs and Class members at a serious risk of institutionalization or hospitalization.

188. The actions by HFS constitute unlawful discrimination under the ADA and violate the integration mandate of the implementing regulations

189. The Plaintiffs and Class members require in-home shift nursing services to avoid institutionalization. The Defendant's failure to arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment (in-home shift nursing services), violates the ADA and its implementing regulations.

190. The Plaintiffs and Class members have no adequate remedy at law.

191. The Plaintiffs are indigent and unable to post bond.

COUNT IV
VIOLATION OF REHABILITATION ACT

192. The Plaintiffs incorporates and re-alleges paragraphs 1 through 191 as if fully set forth herein.

193. Section 504 of the Rehabilitation Act, 29 U.S.C. Sec. 794, prohibits public entities and recipients of federal funds from discriminating against any individual by reason of disability. Public and federally-funded entities must provide programs and activities "in the most integrated setting appropriate to the needs of the qualified individual with a disability." See 28 C.F.R. Sec. 41.51(d). Policies, practices, and procedures that have the effects of unjustifiably

segregating persons with disabilities in institutions constitute prohibited discrimination under the Rehabilitation Act.

194. The Illinois Department of Healthcare and Family Services is a recipient of federal funds under the Rehabilitation Act. The Plaintiffs and Class members are qualified individuals with a disability under Section 504 of the Rehabilitation Act.

195. The actions by HFS constitute unlawful discrimination under 29 U.S.C. Sec. 794(a) and violate the integration mandate of the regulations implementing this statutory prohibition. 28 C.F.R. Sec. 41.51(d).

196. The Plaintiffs and Class members require in-home shift nursing services to avoid institutionalization. The Defendant's failure to arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment (in-home shift nursing services), violates Section 504 of the Rehabilitation Act of 1973 and its implementing regulations.

197. The Plaintiffs and putative class have no adequate remedy at law.

198. The Plaintiffs are indigent and unable to post bond.

VII. REQUEST FOR RELIEF

WHEREFORE, the Plaintiffs respectfully request that this Court:

1. Certify this case to proceed as a class action under Fed. R. Civ. P. 23(b)(2);

2. Issue a Declaratory Judgment in favor of the Plaintiffs and the Class, requiring Defendant to adhere to the requirements of the Medicaid Act, the Americans with Disabilities Act, and the Rehabilitation Act;

3. Declare unlawful the Defendant's failure to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment (in-home shift nursing services) to the Plaintiffs and Class;

4. Issue Preliminary and Permanent Injunctive relief enjoining the Defendant from subjecting the Plaintiffs and the Class to practices that violate their rights under the Medicaid Act, the Americans with Disabilities Act and the Rehabilitation Act;

5. Issue Preliminary and Permanent Injunctive relief requiring the Defendant to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment (in-home shift nursing services) to the Plaintiffs and Class;

6. Award Plaintiffs and the Class the costs of this action, including reasonable attorneys' fees, pursuant to 42 U.S.C. Sec. 12205; Sec. 504 of the Rehabilitation Act, and 42 U.S.C. Sec. 1988; and

7. 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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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

O.B., et al., individually and on behalf of a class,	)	Docket No. 15 C 10463
Plaintiffs,	)	
vs.	)	
FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	
	)	Chicago, Illinois
	)	December 3, 2015
Defendant.	)	9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - MOTIONS
BEFORE THE HONORABLE CHARLES P. KOCORAS

APPEARANCES:

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PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

THE CLERK: 15 C 10463, O.B., et al., vs. Norwood. Motion to certify a class and temporary restraining order.

MR. FARLEY: Good morning, your Honor, Robert Farley on behalf of the plaintiffs.

THE COURT: Good morning.

MS. ACKENHAUSEN: Good morning, your Honor, Shannon Ackenhausen on behalf of the plaintiffs.

THE COURT: Good morning.

MR. HUSTON: Good morning, your Honor, John Huston, Sr., Assistant Illinois Attorney General, on behalf of the defendant Norwood.

THE COURT: Good morning.

Well, what do we have here this morning?

Are you really seeking a temporary restraining order or -- you are asking for affirmative action; are you not?

MR. FARLEY: Yes.

THE COURT: You do not want to keep the status quo in place, do you?

MR. FARLEY: No.

THE COURT: So, you really do not want a restraining order. All a restraining order does is keep the status quo in place.

MR. FARLEY: Yes. We are asking for an order that the --

THE COURT: That the State starts doing what it is

supposed to do?

MR. FARLEY: Take steps to -- right -- follow their obligations.

THE COURT: All right.

What is your response to the motion and all of the assertions in the memorandum?

MR. HUSTON: Well, first of all, your Honor, we agree that in this case a temporary restraining order is not appropriate.

THE COURT: Yes. You have already won that point.

MR. HUSTON: Okay.

And --

THE COURT: But the rest of it is the heavy stuff.

MR. HUSTON: Right. And it is a very quick thumbnail sketch.

We believe that we are in compliance with the Act of Congress regarding the EPSDT.

The Act of Congress says that we must provide for or arranging for, directly or through referral, to appropriate agencies or organizations or individuals, corrective treatment and the need for which is disclosed by such Child Health Screening Services.

We have --

THE COURT: What does that mean, the State refers to outside vendors or --

MR. HUSTON: It can --

THE COURT: -- or service providers?

MR. HUSTON: It can either provide the service directly or provide, arranging for -- directly or through a referral for -- appropriate agencies and corrective treatment.

And that is what we have in place here. So, we are in full compliance with the Act of Congress.

THE COURT: Is there some other Act or procedural requirement, state-mandated, that you are not in compliance with?

MR. HUSTON: I don't believe so, Judge, because what we -- what -- the mechanism of what happens here is an individual is determined to need, in this case, private duty nursing services in home.

THE COURT: Are these all children?

MR. HUSTON: Yes.

So, private duty nursing services in home are not -- is not -- a covered service under the State Medicaid Plan for individuals over the age of 21; but, under the EPSDT provisions, it is required to be provided whether it is in the State plan or not.

So, we have made a determination that these individuals who are under the age of 21 are -- have a need for this service. We refer them to the DSCC. Okay?

THE COURT: Would you use titles? Acronyms sometimes

leave me in the clouds.

MR. HUSTON: Division of Services for -- it used to be Crippled Children, but now it's --

THE COURT: I yield. Maybe you will have to go to acronyms.

(Laughter.)

MR. HUSTON: Division of Services.

THE COURT: Okay.

MR. HUSTON: Division of Services.

THE COURT: Some statewide --

MR. HUSTON: And, at that point, the DS will provide a list of all providers in the geographic area that meet the needs of the individual.

So, in this case, in various geographic areas, you will have lists of nursing agencies who are enrolled in the Medicaid Program.

Now, those nursing services have to be provided through an enrolled Medicaid provider.

So, if -- counsel in his pleadings, I think, referenced the fact that there are a number of nursing agencies in a geographic area, but only a certain number are Medicaid providers.

Only the Medicaid providers can provide service to these individuals. You have to be enrolled in the Program.

THE COURT: Yes.

MR. HUSTON: The family chooses the nursing agency and they have a right to change providers at any time.

So, they have to make the initial determination of nursing services -- what agency is going to be providing the services.

They enter into a contract, with an agreement with the provider.

And they also have the right, if they are dissatisfied, to go back to the DS and seek other referrals.

Now, DS does not provide the services, but it provides the list of individuals or agencies that are enrolled in the Medicaid Program.

THE COURT: So, who pays, the State, the federal government or a combination of both?

MR. HUSTON: Well, it is a combinations of both.

In practical terms, the nursing agency sends a bill to the DS. HFS might review that bill, but it is paid by the DS. And, ultimately, we seek Medicaid match.

THE COURT: Okay.

Let me stop you there. I know you have a lot more, but I get the general idea of what I think your defense is.

Why do you say he is wrong or something is missing in his presentation?

MR. FARLEY: Well, what is -- his overall presentation would be if, for example, your Honor was on Medicaid and you

got approval from the State of Illinois that you needed a medically-necessary heart bypass; and, then, the State says, "Oh, one caveat. We will approve payment, but you have got to find a doctor who will only do it for a hundred dollars."

Well, that is what EPSDT -- which we cite Memisovski, which was Judge Lefkow -- and she said, "These EPSDT requirements differ from merely providing access to services. Medicaid statute places affirmative obligations on states to assure that these services are actually provided to the children on Medicaid in a timely and effective manner."

And, then, she quotes the Seventh Circuit in Stanton vs. Bond: "The mandatory obligation upon each participating state to aggressively notify, seek out and screen persons under 21, in order to detect health problems, to pursue those problems with the needed treatment, is made unambiguously clear."

THE COURT: Okay.

Can I ask you a question without you --

MR. FARLEY: Fine.

THE COURT: I mean, at some point I am going to have to read for myself what you are telling me another judge said, but let me ask you this. I want to see if I get the nub of the problem.

So, they say that do what they are mandated to do and provide a service provider.

MR. FARLEY: No. They are --

THE COURT: Just --

MR. FARLEY: Okay. Sorry.

THE COURT: -- let me explain my understanding and, then, you tell me where I am wrong.

But you say, among other things, I assume -- you did not say it yet, but I assume it is part of your argument -- that, "That is not realistic. The provider who can do the surgery, if you will, or whatever the medical treatment is, cannot do it for the money the State is willing to pay. And there is the rub."

Is that it?

MR. FARLEY: Correct.

And --

THE COURT: So, I understand the problem.

MR. FARLEY: The problem is that the reimbursement rate is so low, the nursing agencies can't recruit nurses.

And to compound -- just to demonstrate the utter failure by the defendant, is we have O.B., one of the named plaintiffs, in a hospital, who was told that he could be discharged in March of 2015. But he couldn't be discharged from the hospital because there was no nursing agency that could staff his situation.

And the Division of Specialized Care For Children -- which is DSCC, which is contracted with the State -- notified

the defendant, HFS, in April that he is still at the hospital and he can't be discharged.

So, Illinois is paying roughly $78,000 a month for O.B. to remain in a hospital for doctors and hospital charges, where they have already approved a budget of around 19,000 for in-home skilled nursing.

So, the State is spending over $50,000 a month. O.B. is being unnecessarily institutionalized. And we allege, with a declaration, that the mother says there are four other children in Peoria --

THE COURT: So, your complaint is --

MR. FARLEY: -- Children's Hospital.

THE COURT: -- two prong. One, he could not -- he or she could not -- get the service by the service provider because they are asking for more money than the State is willing to pay, No. 1; and, No. 2, they are spending money foolishly by not providing the ultimate service and, then, institutionalizing somebody in a different facility and paying more money than they should, while somebody wastes away getting no treatment.

Is that the gist of it?

MR. FARLEY: We have people in institutions, we have other family member children at home, who are getting not all of the hours --

THE COURT: All right.

MR. FARLEY: -- which the State has determined to be medically necessary.

And they have the risk of institutionalization. And we point out in our complaint and declarations that sometimes the State will pay up to $79 an hour.

THE COURT: Yes.

MR. FARLEY: Their sister agency, the Department of Children and Family Services, will be paid $45 an hour. Their top rate is 35.

We are not telling the Court to order them to pay X number of dollars. We are asking the Court to issue an order that the defendant take immediate and affirmative steps to arrange directly, if they want to provide the services, or for referral to appropriate agencies.

But you just can't refer it to an appropriate agency and, then, they cannot carry out the job --

THE COURT: Yes.

MR. FARLEY: -- and they wash their hands of the situation.

THE COURT: So, you are telling me that the State is both cheap and inefficient? Is that it, in lay terms?

MR. FARLEY: Well, and --

THE COURT: Is there another --

MR. FARLEY: -- I will add the word "irrational."

THE COURT: Is there another sin there?

(Laughter.)

MR. FARLEY: There is also "irrational" --

THE COURT: Do not smile.

(Laughter.)

MR. FARLEY: -- because they have no problem if you are going knocking on the door at the Department of Children and Family Services to pay 45; but, if you are dealing with HFS and EPSDT, "We are only going to pay 35."

So, why does one nurse in a different agency get more?

We want them to carry out their legal obligations under the EPSDT mandate. The law is clear.

We have -- I think we have -- set forth our reasons in the memo why we are entitled to injunctive relief.

THE COURT: All right.

Let me interrupt the discussion of the merits of the case with how we should proceed at this point.

What did you want to say?

MR. HUSTON: I just wanted to address the "irrational" payment aspect of it.

Right now, as the Court may be aware, Illinois does not have a budget.

THE COURT: Oh, I heard that on the radio this morning.

(Laughter.)

MR. HUSTON: And --

THE COURT: One side is talking and one side is not listening. Is that it?

MR. HUSTON: Well, that is --

THE COURT: Okay. I know this --

MR. HUSTON: That is the preface -- that is the preface -- to the --

THE COURT: And I also know how the election came out. Okay?

MR. HUSTON: That is the preface to the fact that there is an order entered in a case that is in the District Court -- the Beeks case by Judge Lefkow -- which orders the State to pay for the Medicaid -- the Medicaid -- claims pursuant to federal -- the federal -- court order.

So, we are not free -- we are under a federal court order in the Beeks case in front of Judge Lefkow now to pay at the rate that is set by that order. And that is what we are doing.

So, we don't have -- we really don't have -- the freedom to say, "Okay. Now, we are going to pay more money for this service and less money for this service because we are under federal court order."

THE COURT: Well, I assume that is one of your defenses?

MR. HUSTON: Yes.

And I wanted the Court to be aware of that -- that

right now we are --

THE COURT: Well, I am, obviously, going to have to become aware of what Judge Lefkow has ordered and how it constrains you or how it might not constrain you. I do not have any idea about that.

MR. HUSTON: There is not --

THE COURT: So, is there some discovery necessary here?

Well, first, there is a motion for class certification.

I assume there is a class involved?

MR. HUSTON: Well, we would -- we are going to object to class.

THE COURT: Are you going to resist that?

MR. HUSTON: Yes. I think we are going to -- at this point we are going to -- resist class. I don't think it is a given that this class is appropriate -- would be appropriately certified.

THE COURT: All right.

MR. HUSTON: We have a complaint. The answer is due December 11th.

THE COURT: Are you going to answer, as opposed to move to dismiss?

MR. HUSTON: Well, we are probably going to file another pleading and move to dismiss.

But I would ask the Court, given the -- given my -- schedule, I have got another injunction motion that is going to be set -- that is set -- for trial with Mr. Farley. I have got a number of other cases. So -- and with the holidays coming up, I would ask that we be allowed to answer or otherwise plead by January 12th, which is the date that the Court set for the initial status in the case.

THE COURT: Do you have any objection to that?

MR. FARLEY: Not to when they file an answer --

THE COURT: All right.

MR. FARLEY: -- or --

THE COURT: Well, I think he is going to file a motion.

MR. FARLEY: -- or a pleading.

THE COURT: All right.

I will give you until January 12th to answer or otherwise plead.

I do not know if it is premature to have you respond to the motion to certify a class, but it might be efficient to do it at the same time.

MR. HUSTON: The 12th of January? That is fine.

THE COURT: Yes, the same.

So, a responsive pleading to the complaint, as well as an answer to the motion to certify the class.

So, in the meanwhile, is there anything that can be

done to move the case along, other than to wait for these pleadings and have you take care of your other matters here?

There is some urgency, I take it.

They wanted a restraining order, which we discussed at the very beginning is not apt at this stage of the case.

MR. FARLEY: Judge, we would be asking that you set it down for a hearing for a preliminary injunction. We would be ready to proceed on that.

THE COURT: Well, before we do that, I have to see what he is going to file and what facts -- material facts -- might be in dispute, or whether I need to deal with the law and whether the case is presently viable, in the face of any motion to dismiss he might supply.

So, setting a -- and, then, the question becomes is whether there is any discovery necessary.

Any hearing that I hold is going to have to be informative. And I do not know whether either side needs any more information than it already has.

So, maybe you do not, but that is what discovery would be geared to do. So --

MR. FARLEY: Judge, were we are ready to go ahead without -- we don't need any discovery from them.

You know, our clients are facing irreparable harm or injury. The State has determined that it is medically necessary that they receive these hours -- for those at home --

and they are not getting it. And it places them at risk.

And, then, we have got somebody who has been unnecessarily institutionalized since April. So, you know, he can --

THE COURT: How long has that -- how long has this -- regimen been in place, that your complaining about? Since the election?

MR. FARLEY: No, no. The --

THE COURT: Since January of this year?

MR. FARLEY: No.

The tipping point has probably occurred, you know, earlier this year, to the extent that you have children that cannot be -- are not being -- discharged from hospitals.

And, you know, I have been --

THE COURT: I want to know how long that has lasted, that --

MR. FARLEY: Well, he was ready to be discharged in March. The State was notified in April that he couldn't be discharged.

THE COURT: So, it is a single plaintiff in this case, B?

MR. FARLEY: O.B.

And we have reason to believe there are four other children in the same situation.

THE COURT: All right.

MR. FARLEY: And, then, we have people going back -- a couple years they have been struggling to fill those hours and they have been unable to do it. And the situation has gotten worse.

THE COURT: All right.

Here is --

MR. FARLEY: So, our clients are facing irreparable harm.

THE COURT: Okay.

MR. FARLEY: And we believe we just have to show some likelihood of prevailing on the merits and, you know, they can have --

THE COURT: But you have asked for a class determination. So, the issues you are suggesting exist here are going to go beyond the named plaintiffs in the case.

MR. FARLEY: We cited in our memo that the Court has the authority to give relief to the proposed class. We cite three cases in this district -- Judge Anderson, Judge Lefkow and Judge Coleman -- who said that they have the inherent equity power to enter preliminary relief on behalf of a proposed class.

So, we are asking for a preliminary injunction on behalf of the named plaintiffs and the proposed class.

THE COURT: Here is what I would like -- here is what I am going to do. I think it is premature for me to give you a

hearing date for, I think, obvious procedural reasons.

But I am going to ask you, Counsel -- since O.B. is the named plaintiff in the case and there may be four others similarly situated, I am going to ask you -- even in advance of the January 12th date I am affording you to respond, to look into each of those cases.

There are four?

How many plaintiffs do you have named here?

MR. FARLEY: We have six named plaintiffs. One is in an institution.

THE COURT: I want you to look into each of those cases and see if you cannot do something to advance their welfare, consistent with what counsel is claiming in his complaint here, without any concession that they are legally entitled to it.

But if they are waiting for things that the whole rub is they have not had them and nobody is paying any attention to their circumstances, even in advance of deciding the legal and factual issues in the case, I would like you to see what you can do as regards those six.

MR. HUSTON: I will do that, your Honor.

THE COURT: All right.

And, then, I want to see you shortly after January 12th. I want to see what you are going to file and what that is going to dictate by way of further proceedings.

And, then, I want an update on whether or not some -- and the plaintiff can let me know, whatever may be done with the named plaintiffs, at least provides some temporary satisfaction to the plaintiffs' side of the case. Okay?

I would like to see that happen well before January 12th. All right?

Any questions?

MR. HUSTON: No, your Honor.

MR. FARLEY: So, the defendant's attorney is to communicate to us prior to January 12th as to what type of possible remedy?

THE COURT: Yes, I would like to see that happen.

I know you are busy, but at least you do not have -- you have a distinct group of people to concern yourself with. And I would like to see something happen, so that whatever condition or posture they are in -- which counsel claims is not helpful -- be amended in whatever way the State can do it.

MR. HUSTON: I understand.

We will do that, Judge.

THE COURT: And that will not be viewed as a concession, that whatever the State has done is improper or illegal or not consistent with your obligations that the State has. But I would like to see it done. Okay?

So, when can we see the parties, again?

THE CLERK: January 12th.

THE COURT: All right.

THE CLERK: At 9:30.

THE COURT: We will see you on the 12th. Okay?

All right. Thank you very much.

MR. HUSTON: Thank you, Judge.

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joene Hanhardt May 17, 2016
Official Court Reporter

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

O.B., et al., individually and on behalf of a class,	)	Docket No. 15 C 10463
Plaintiffs,	)	
vs.	)	
FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	
	)	Chicago, Illinois
	)	January 12, 2016
Defendant.	)	9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - STATUS
BEFORE THE HONORABLE CHARLES P. KOCORAS

APPEARANCES:

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PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

THE CLERK: 15 C 10463, O.B., et al., vs. Norwood. First status.

MR. FARLEY: Good morning, your Honor, Robert Farley on behalf of the plaintiffs.

THE COURT: Good morning.

MS. ACKENHAUSEN: Good morning, your Honor, Shannon Ackenhausen on behalf of the plaintiffs.

THE COURT: Good morning.

MR. HUSTON: Good morning, your Honor, John Huston, Sr., Assistant Illinois Attorney General, on behalf of the defendant Norwood.

THE COURT: Good morning.

MR. FARLEY: Judge, when we were last before you about five weeks ago, you entered and continued our motion for preliminary injunction.

You suggested to the State, to advance the welfare of the named plaintiffs, to try to work out staffing these nursing hours which aren't being staffed.

There has been no contact by the defendant with the families of the named plaintiffs to resolve this matter.

We have the plaintiff O.B. He has been hospitalized, it is almost 10 months and he can't be discharged from the hospital because nursing can't staff it.

One of the named plaintiffs is now down to 36 hours a week, as opposed to an approved 84.

So, one of the things we would be requesting is that this Court schedule a hearing for a preliminary injunction.

THE COURT: What is your response?

MR. HUSTON: Judge, as regards to the named plaintiff O.B., my client, in conjunction with the DSEC, has been trying to arrange for nursing services.

O.B. is hospitalized. Throughout this period, from last summer through currently, they have been trying to locate nursing. They thought they had nursing back last year; but, because of O.B.'s hospitalization and his condition, the nurses that they had -- that they thought they had -- lined up, withdrew.

So, the problem is, right now, there are two agencies that are in play down in this area where O.B. resides. They have enough staffing for either the day or the night, but not both.

And there was an attempt between -- to work out a deal between -- the two nursing agencies, one to provide a day nurse and one to provide nursing at night. And apparently that has fallen through.

So, my understanding is that O.B. is supposed to be discharged from the hospital in about four weeks. So, they are looking to -- they are still looking to -- see if they can recruit nurses and find individuals to work.

THE COURT: Is that discharge being held up because of

this --

MR. FARLEY: Yes, Judge.

We --

THE COURT: -- unavailability?

That is what he says.

MR. FARLEY: We have attached documents in the motion for a preliminary injunction. The State acknowledged he was ready to be discharged from the hospital in March of 2015 -- last year -- and he wasn't able to be discharged because of the inability to provide the nursing.

Since we last talked, your Honor, on January 7th, 2016, a case was decided in the State of Washington, the federal court, 2016 West Law 98513, A.H.R. vs. Washington State Healthcare Authority, which mirrors this case exactly in that those plaintiffs were approved for in-home nursing -- private duty nursing.

So, there was no dispute by the State that they need it, but they weren't able to access the nurses. Some were hospitalized. Some were at home getting reduced services.

And the District Judge, James Robart, last Thursday granted the plaintiffs' preliminary injunction. And, basically, he ordered the defendant to take all actions within their power necessary for the plaintiffs to receive 16 hours per day of private duty nursing, as previously authorized by the defendants, and arranged and agreed to by plaintiffs and

their medical providers.

And, then, in order to effectuate --

THE COURT: I do not think you need to read the opinion to me.

MR. FARLEY: All right.

So, we have named plaintiffs. We have putative class members who have been -- the State has said that they need these hours. They are not getting these hours. Some are getting 50 percent of the hours. These children are medically fragile. They are at risk. They are facing irreparable harm and injury.

We have a group that is in the hospital. They can't be discharged in the community.

We have a group that is in the community that aren't getting the necessary hours.

You know, it would be no different if your Honor was prescribed a medication for, say, a heart condition; the State approved that you should get this medication of eight pills a day; and, then, the State says, "Well, we are only going to give you four pills a day."

You know, it puts people at risk. So, we are asking that this matter be set down for a hearing for the preliminary injunction.

THE COURT: Have you answered the motion for preliminary injunction?

MR. HUSTON: We have not, your Honor.

THE COURT: All right. You are going to have to answer that.

I do not know what the fact disputes may be, based on the pleadings, but we will have to take a look at it.

When can you answer the motion by?

MR. HUSTON: I am going to need 28 days, Judge.

THE COURT: Well, I cannot give you that long. He says -- one of the problems is apparently there has been -- you have indicated there are some problems in finding agencies to do the round-the-clock thing.

I had hoped you might reach out either to counsel or to some of the parties here to see what can be done. And, at least, it seems that that correspondence has not taken place, which leaves them in a non-informed situation, which is part of the problem.

That is not the real problem, but that is part of the procedural problem.

MR. HUSTON: Part of the problem, Judge, is that I asked my client to do this. They did it.

They -- I have got -- they have been working me on this for this period of time. I didn't get anything back. So, I couldn't call counsel.

So, I mean, I just got this late yesterday afternoon.

THE COURT: Well, you can bring him up to date on the

fact that you have made these attempts with your client and these are the problems. And I do not know whether they are in a position to help solve those problems with their own knowledge of what may be available.

But I am just saying that the lack of communication is just a little bit of an annoyance, it seems to me.

MR. HUSTON: Well, I apologize to the Court and I apologize to counsel. But, you know, I didn't have anything to report.

And the fact of the matter, Judge, is I am in an office that has only another lawyer in the case. And we are currently swamped with matters.

THE COURT: Well, that is the hard question.

Beyond -- the remedy here necessarily is going to entail money.

You are representing -- your client represents an expenditure of funds. And, you know, we all read the papers about the plight of the State of Illinois and the financial problems they have. But, at least, at present, that may be some factor in trying to voluntarily come up with a solution.

But, in the meanwhile, they have a right to press their claims based on statutes and other legal obligations, and for me to resolve those. So, that is where we are.

I would rather it did not come to that. And I do not know if there are any -- I am going to give you a hearing after

the pleadings are up to par, but I am going to have decide where the fact questions are, if there are any; resolve those -- or, at least, make a judgment on what the likely outcome would be at a trial -- and either grant or not grant a motion for preliminary injunction.

That is what we are going to have to do, which puts more money into the system in litigating the case, as opposed to finding some therapy and needed remedial measures for these plaintiffs.

That is the way I see it.

And money only goes so far, but I think there is a choice in how it is expended.

And I am not condemning you for anything. I know you are in a tough situation here, but the law and the requirements are what they are. And we have obligations to see that whatever rights they have are adhered to. And, then, we will take up the fallout about ability or inability. But that is the way we have to do it.

So, I will give you two weeks to answer the motion for preliminary injunction.

I will give you a week to reply.

And I am going to set it for in-court ruling two weeks thereafter and give you a date for a hearing if an evidentiary hearing is called for under the circumstances.

That will depend on your answer.

So, give me all of those dates, Vettina.

THE CLERK: The 26th, the response is due; February 2nd, the reply is due; and, February 16th is the in-court ruling at 9:30.

MR. HUSTON: Judge, I am going to be in Kane County that -- I mean, Will County that -- day --

THE COURT: All right.

MR. HUSTON: -- on the 16th.

THE COURT: Give him another date.

THE CLERK: The 18th?

THE COURT: Is that convenient for you?

MR. HUSTON: Yeah.

I have got a matter in Probate Court at 10:00 o'clock, but I should be able to make it.

THE COURT: We will get you out of here. Okay?

MR. HUSTON: Thank you, Judge.

THE COURT: Thank you.

MS. ACKENHAUSEN: Thank you, your Honor.

(Brief pause.)

MR. HUSTON: We have an answer that was -- another pleading that was -- supposed to be due today.

Due to the press of work, I am not able to get that done. So, with regard to that, I am going to be tied up on the preliminary injunction response. So, I was just wondering --

THE COURT: Well, you are going to have to answer. I

mean, I think that procedurally is the first obligation. And, then, the preliminary injunction should follow.

I mean, you can do them both at the same time, but I assume you are going to file an answer as opposed to some motion to dismiss? Because the consideration of their request for emergency relief is predicated on the proposition that the complaint sets forth a legal cause of action or causes of action.

So --

MR. HUSTON: Well, I don't know that I am going to be able to get an answer to the complaint and an answer to the preliminary injunction in the next two weeks.

THE COURT: Well, all right. File what you can and we will take it up.

I mean, even if you do not have an answer on file, we still have to take up -- in the absence of an answer, we will just assume there is a validity to the complaint, in terms of its legal completeness and accuracy. Okay?

MR. HUSTON: Thank you, Judge.

MR. FARLEY: In addition, their response to our motion for class certification is due today, as well.

MR. HUSTON: And we are --

THE COURT: That is another one not done.

So, sequentially, all of that will fall into place at some point.

MR. FARLEY: Right.

THE COURT: All right?

MR. FARLEY: All right.

Thank you, your Honor.

MR. HUSTON: Thank you, Judge.

THE COURT: I am just thinking, this is a very inapt thing, but -- I will not even say it -- the State needs a lot of money. Do any of the State employees buy lottery tickets?

(Laughter.)

THE COURT: I think it is up to 1.3 billion or something.

(Laughter.)

THE COURT: I know, lightening does not strike often, but it is just a thought.

(Laughter.)

MR. FARLEY: Well, O.B.'s annual hospital care is about a million dollars a year, which would be a lot less if he was discharged in the community.

THE COURT: Well, it makes all kinds of sense to me, that to hold somebody hostage and incur greater expense than what otherwise may be called for with his release, it does not make any sense at all to me.

It did not make any sense, I think, when the case was first up. It makes less sense today. But I can only do what I can do.

MR. FARLEY: All right.
THE COURT: So, anyway, you are all free to buy lottery tickets, you know.
(Laughter.)
THE COURT: Even your side is.
(Laughter.)
MR. FARLEY: Okay.
THE COURT: All right.
MR. FARLEY: Thank you, your Honor.
THE COURT: I know that is light and an inapt observation, but it just came to me. All right?
Because I know the problem behind this case is money, right?
MR. HUSTON: Well --
THE COURT: The shortage of money.
MR. HUSTON: -- I am not sure that that is the entire problem, Judge.
THE COURT: No, but maybe 98 percent of it.
(Laughter.)
MR. HUSTON: Well --
MR. FARLEY: I think you have it right, Judge.
THE COURT: All right.
Have a good morning. There is nothing more to be said.
MR. HUSTON: Thank you.

THE COURT: All right.

MR. FARLEY: Thank you.

MS. ACKENHAUSEN: Thank you.

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joene Hanhardt May 17, 2016
Official Court Reporter

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

O.B., et al., individually and on behalf of a class,	)	Docket No. 15 C 10463
Plaintiffs,	)	
vs.	)	
FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	Chicago, Illinois February 2, 2016 9:30 o'clock a.m.
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS - MOTIONS
BEFORE THE HONORABLE CHARLES P. KOCORAS

APPEARANCES:

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PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

THE CLERK: 15 C 10463, O.B., et al., vs. Norwood. Motion to dismiss and motion for extension of time.

MR. FARLEY: Good morning, your Honor, Robert Farley on behalf of the plaintiffs.

MS. ACKENHAUSEN: Good morning, your Honor, Shannon Ackenhausen on behalf of plaintiffs.

MR. HUSTON: Good morning, your Honor, John Huston, Sr., Assistant Illinois Attorney General, on behalf of the defendant.

THE COURT: Good morning.

Well, one of the things we have is a motion to dismiss. Is that for the entirety of the complaint?

MR. HUSTON: Yes, it is, your Honor.

THE COURT: What is your response?

MR. FARLEY: Judge, we would like to -- we will respond in one week.

THE COURT: One week? All right. We will give you a week to respond.

And a week to reply.

And, then, I am going to set it for an in-court ruling three weeks thereafter.

What else can we do in the meanwhile? I know you have a motion pending for interlocutory relief?

MR. FARLEY: Yes.

THE COURT: And that is still pending.

Now, I am getting anxious, that if the complaint passes legal muster, that there are consequences to services not being provided. So, it is troubling me, is what I am telling you.

MR. HUSTON: Well, we responded to the preliminary injunction motion, as well.

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: Give you -- I mean, 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.

So, here is what I am going to do. I am going to first deal with the motion to dismiss. And if the complaint should survive that motion, I am going to then look at the motion for preliminary injunction at the same -- after the first decision; and, then, hopefully, give you a decision on both matters at the same time.

So, I am going to make it 30 days thereafter. I will set it short.

MR. FARLEY: Can we file a reply to their response in the preliminary injunction?

THE COURT: Yes, you can.

Can you do that in --

MR. FARLEY: Seven days?

THE COURT: Yes, seven days. You have a right to reply to their answer to the motion. Okay?

So, after the last pleading comes in, Vettina, I need 30 days after that.

THE CLERK: For the in-court ruling?

THE COURT: Yes.

And I hope to rule in court. I have some trials I am going to be in the middle of, but I will see what we can do.

MR. FARLEY: They --

THE CLERK: March 15th for an in-court ruling.

MR. FARLEY: They had filed a response to our motion for class certification. We motioned it up for Thursday, because we filed it late yesterday, that we asked for limited class discovery on -- just on -- the issue of numerosity, which they opposed.

THE COURT: What is the -- what are you seeking on the class question? Are you just asking for documents?

MR. FARLEY: We are asking for documents from the

State; and, then, that we can also take depositions of three nursing agencies within the 28 days.

THE COURT: All right.

I think we are going to have to continue that. If it is documents, it is thing. And if it is more extensive than that, I think --

MR. FARLEY: Well, if we just do the documents, that would probably be sufficient.

THE COURT: Can you give him the documents?

MR. HUSTON: Well, Judge, if they want documents from a -- from our -- contracting agency, we believe that --

THE COURT: Do you have them?

MR. HUSTON: I don't have them now. I am sure that --

THE COURT: All right. I will let you finish. I thought you had them.

MR. HUSTON: No, no, I don't have those documents.

THE COURT: Go ahead.

MR. HUSTON: They are only seeking -- we have already responded to the class motion, as well. We filed three sets of pleadings. We responded to the class motion.

We believe that they don't meet the criteria for Rule 23 on any account. And they are only seeking documentation on numerosity for a class.

So, if they haven't -- if they haven't -- met the other factors of Rule 23, this discovery is not -- it just adds

to the burden of the case.

But, more importantly, even if there were a hundred people or two hundred people under our theory of the motion to dismiss, the Court -- they are seeking an increase in the rates for nursing, is, basically, what they are seeking; and, based upon the Armstrong case, that case held that the courts -- the district courts -- lack the ability to set rates.

So, whether there is ten people, a hundred people, two hundred people, it is really irrelevant to the main issue in the case. And I would ask that the Court decide the motion to dismiss first before we start engaging in all kinds of discovery.

THE COURT: Well, here is why I asked you how intrusive or cumbersome it would be to respond, at least in a less than complete way, as to what he is asking for.

So, you have got -- I think there are five plaintiffs in the case lined up?

MR. FARLEY: We have --

THE COURT: Presumably common --

MR. HUSTON: Two left.

THE COURT: What?

MR. FARLEY: Two moved to Denver because they couldn't get the services.

But we have four plaintiffs. We also have attached five declarations of putative class members who can't get the

services. That is nine.

Then one of the plaintiffs is aware that there is -- believes that there is -- four other children at Childrens Hospital in Peoria who cannot be discharged. So, that goes up to thirteen.

And we are asking for just documents that -- it is their agent, the Division of Specialized Care for Children. They have documents which will reflect that the hours aren't being served.

And there is, basically, two sets of documents. And we have attached those -- referenced them in our motion -- where DSCC informs the State that people weren't able to staff.

So, we have asked for limited -- if they claim that it is irrelevant, then let them concede numerosity. We don't need the discovery.

If they are going to win on their motion -- which we disagree with --

THE COURT: Yes.

MR. FARLEY: -- but if they raise the issue of numerosity, we should be entitled to limit the discovery to show numerosity.

THE COURT: Well, here. They are claiming more than the deficiency in numerosity. They are claiming none of the other criteria for class certification are present. That is the assertion.

What I am trying to do -- and I cannot -- I am not about to force them in on a motion or -- or -- give it up.

What occurs to me is if it is not burdensome, he can -- I will not order the depositions to go forward because those tend to be cumbersome and long -- or sometimes long -- and sometimes costly and a little complicated.

But if you have documents in your third-party agency, whoever is servicing these patients or these claimants, and they are relatively easily accessible and not so voluminous as to be overwhelming, the simple way to do it is to give those documents to counsel now.

I am going address the class pleadings as it is, but at least we can get started. The case has been before me a while and we are still jousting over pleading matters and sufficient pleading and all of that.

So, it does not seem to me to be a real stretch or onus on your side if you have got some documents. No depositions. Then give them some because he has got to -- assuming the other criteria are not deficient, then we are going to have to address the numerosity question. And doing it prematurely is really no skin off anybody's nose.

So, that is what I think.

MR. HUSTON: Okay.

Well, just from the pleading -- from the documentation -- that they provided in the motion, there is only -- there is

a letter that said -- that is usually sent to HFS. So, HFS may have some of these documents. But they mainly say that they have staffing for -- approval for -- so many hours. And, in some of the letters, they will say they have only staffed X amount of hours.

But that does not go into why the individuals can't get staffing. So, I mean --

THE COURT: Are you telling me that the request is not broad enough or, what?

MR. HUSTON: Well, no.

I mean, it is going to only tell you that there are a certain number of people that --

THE COURT: I do not care what it is going to tell you. If he is willing -- he is not willing, he wants depositions. I am willing to give him the documents now or ask you to supply them.

MR. HUSTON: I will do that.

THE COURT: And if they do not give us the full answer, then he will tell me that, and he needs more than documents. He wants the depositions. And maybe by that point we will have been able to address the class motion. So --

MR. HUSTON: No, that is -- I just want to --

THE COURT: So, you are a little ahead of the game.

MR. HUSTON: Yes, I understand, Judge. I just wanted you to know what we are looking at.

THE COURT: I know, but that is a deeper -- deeper -- objection than -- you are saying what he is asking for is not good enough; it just raises more questions than it is going to satisfy. So, I think that is what I take from your --

MR. HUSTON: Well, it may go into some of the other factors: The typicality and commonality. So --

THE COURT: Let us do it a step at a time.

MR. HUSTON: That is fine, Judge.

THE COURT: Okay?

MR. HUSTON: That is fine.

Your Honor gave a ruling date of March 15th?

THE COURT: Right.

MR. HUSTON: That is Election Day and I am going to be on election duty, monitoring the polls.

THE COURT: Are you running for some office?

MR. HUSTON: No.

THE COURT: Should we wish you well?

(Laughter.)

MR. HUSTON: Only to survive the day, Judge.

(Laughter.)

MR. HUSTON: We, traditionally -- our office goes out on that day and we --

THE COURT: I used to do the same kind of duties.

MR. HUSTON: So, if we could have -- if I could ask for a different date?

THE COURT: Push it back a week.
THE CLERK: March 22nd.
THE COURT: Is that okay?
MR. HUSTON: That fine, Judge.
THE COURT: How is that for you guys?
MR. FARLEY: That is find, Judge.
Can we have that they produce those documents in 21 days?
THE COURT: Could you do that?
MR. HUSTON: I will see if I can do it, Judge.
THE COURT: All right.
MR. HUSTON: I will try to get it done as quickly as possible.
THE COURT: I will ask you to do it in 21 days.
MR. HUSTON: I will attempt to do that.
We also had a status -- a ruling -- date on -- for -- originally set on February 18th.
THE COURT: Everything else is stricken --
MR. HUSTON: That is, fine.
THE COURT: -- in terms of the present schedule. Okay?
Anything else?
MR. FARLEY: That is all.
MR. HUSTON: I think that does it, Judge.
THE COURT: All right. Very good.

MR. HUSTON: Thank you.

MR. FARLEY: Thank you.

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joene Hanhardt March 7, 2016
Official Court Reporter

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

O.B., et al., individually and on behalf of a class,	)	
Plaintiffs,	)	
v.	)	15 C 10463
FELICIA F. NORWOOD, in her official capacity as Director of Healthcare and Family Services,	)	
Defendant.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

Plaintiffs O.B., C.F., J.M., S.M., Sa.S., and Sh.S. (collectively, "Plaintiffs") bring this four-count action pursuant to 42 U.S.C. § 1983 and various provisions of Title XIX of the Social Security Act (the "Medicaid Act"), 42 U.S.C. §§ 1396 *et seq*. (Counts I and II); the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq*. (Count III); and the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq*. (Count IV). Plaintiffs allege that they are Medicaid-eligible children with disabling and chronic health conditions who are "eligible for Medicaid-funded in-home shift nursing services." Compl., Dkt. 1, ¶¶ 1-2. According to Plaintiffs' Complaint, Defendant Felicia F. Norwood ("Norwood"), the Director of the Illinois Department of Healthcare and Family Services ("HFS"), "has failed to arrange for adequate in-home shift nursing services" for Plaintiffs and the class they seek to represent. *Id*.

Now before the Court are two motions: Norwood's motion to dismiss Plaintiffs' Complaint (Dkt. 21), and Plaintiffs' motion for a preliminary injunction (Dkt. 6). For the following reasons, Norwood's motion to dismiss is granted as to plaintiffs Sa.S. and Sh.S.,[1] and otherwise denied; and Plaintiffs' motion for preliminary injunction is granted in part, and otherwise continued for status and to allow Norwood to identify any disputed issues of fact requiring a hearing.

DISCUSSION

The factual and statutory background underlying both Norwood's motion to dismiss and Plaintiffs' motion for preliminary injunction is undisputed. As Norwood's Memorandum explains, "to qualify for federal financial participation, HFS was required to adopt and obtain federal approval of a Title XIX State Medicaid plan." Dkt. 22, at 5. "Title XIX requires a state participating in the Medicaid program, as a condition of its participation, to include early and periodic screening, diagnostic, and treatment services ('EPSDT') as part of its State Medicaid plan." *Id*. "State law requires that children seeking Medicaid-funded in-home nursing services request prior authorization for such services from HFS and demonstrate the medical necessity for the services." *Id*. at 1-2. "Each Plaintiff has been approved for [EPSDT] in-home shift nursing services." *Id*. at 1; Dkt. 7, at 9.

[1] Norwood moves to dismiss the claims brought by Sa.S. and Sh.s. for mootness, because those children have now relocated out of state, and all Illinois public assistance benefits for those children have thus been canceled. *See* Dkt. 22, at 3-4. Since "Plaintiffs agree that Sa.S.'s and Sh.S.'s claims are moot," Dkt. 32, at 1 n.1, Norwood's motion to dismiss their claims is granted.

"When HFS grants prior approval for in-home shift nursing services it issues a written notice to the participant that either grants prior approval of a specific number of nursing hours per week, or grants approval of a specific monthly budget to enable the family to pay for nursing services." Dkt. 22, at 2. While Norwood disputes whether Plaintiffs will be irreparably injured as a result of not receiving the full component of in-home shift nursing services that HFS approved for them (*see* Dkt. 25, at 11-12), at no point does she dispute that Plaintiffs are not receiving all such approved services, much less with the "reasonable promptness" required by 42 U.S.C. §1396a(a)(8).

I. Norwood's Motion to Dismiss

Norwood's motion to dismiss has two prongs. She argues first that the Supreme Court's recent decision in *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378 (2015), "forecloses" any private right of action seeking to enforce the Medicaid Act provisions Plaintiffs assert (Counts I and II), and similarly precludes relief under the ADA and Rehabilitation Act (Counts III and IV). *See* Dkt. 22, at 4-12, 15. Second, Norwood argues that Plaintiffs' ADA and Rehabilitation Act claims further fail under Seventh Circuit precedent. *Id*. at 12-14. Both arguments are unavailing.

A. The Medicaid Act Claims

Plaintiffs' Medicaid Act claims fall into two categories. "Count I alleges that the Defendant violated EPSDT provisions of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B), and 1396a(a)(43)(C)," and Count II seeks "to

enforce the reasonable promptness provision, 42 U.S.C. § 1396a(a)(8)." Dkt. 32, at 2-4. Plaintiffs correctly assert that the Seventh Circuit and Illinois district courts "have specifically held these provisions create federal rights under § 1983 that Medicaid beneficiaries can enforce." *Id.* (citing, *inter alia*, *Bontrager v. Ind. Fam. & Soc. Servs. Admin.*, 697 F.3d 604, 607 (7th Cir. 2012) (regarding § 1396a(a)(10)(A)); *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 457-58 (7th Cir. 2007) (regarding § 1396a(a)(8)); *Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir. 1993) (regarding § 1396a(a)(10(A) and § 1396d(a)(4)(B)); *N.B. v. Hamos*, No. 11 C 06866, 2013 WL 6354152, at *3-6 (N.D. Ill. Dec. 5, 2013) (regarding § 1396a(a)(43))).[2]

In *Bontrager*, the Seventh Circuit reaffirmed this holding in light of more recent Supreme Court decisions stating "a new analytical approach" for determining whether a federal statute affords a private right of action—*Blessing v. Freestone*, 520 U.S. 329, 340 (1997), and *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). In so doing, the court observed that "post-*Blessing* and *Gonzaga*, several circuit courts have held that the Medicaid provision at issue creates an enforceable federal right." *Bontrager*, 697 F.3d at 606-07. Plaintiffs make the same point: "every circuit court to have decided the question has concluded that Medicaid beneficiaries can enforce the EPSDT provisions" and "the reasonable promptness provision." Dkt. 32, at 3.

[2] As *Hamos* explains, while the Seventh Circuit has not expressly addressed the availability of a private action under § 1396a(a)(43), it did recognize in *Bertrand* a private right to enforce § 1396a(a)(8), which "is part of the same statutory subsection as § 1396a(a)(43), the primary EPSDT provision; both are enumerations of what a 'State plan for medical assistance *must provide*.'" *Hamos*, 2013 WL 635152, at *3 (emphasis in original)).

Norwood admits to being "well aware" of these holdings (Dkt. 34, at 5), but insists they are not controlling here. According to Norwood, Plaintiffs' Medicaid-related claims do not arise under the foregoing sections of the Medicaid Act, but instead arise under § 1396a(a)(30)(A), which governs "Medicaid reimbursement rates and access to Medicaid providers." *Id*. So, the argument goes, Plaintiffs' Medicaid claims must be dismissed both "for Plaintiffs' failure to invoke the statue that governs Defendant's alleged obligations respecting these subjects," and because the Supreme Court's recent ruling in *Armstrong* "completely forecloses Plaintiffs from pursuing any claims that arise out of 42 U.S.C. § 1396a(a)(30)(A)." Dkt. 22, at 9. There are several problems with this argument.

For one thing, *Armstrong* was a plurality opinion, with only a minority of Justices joining in the portion on which Norwood relies (Part IV). Thus, as several district courts have now recognized, its analysis "is not part of the majority decision and is therefore not binding." *Unan v. Lyon*, NO. 2:14-cv-13470, 2016 WL 107193, at *11 (E.D. Mich. Jan. 11, 2016).[3] 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. The *Wong* court summarized these distinctions in language equally applicable to this case:

[3] *See also, e.g.*, *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, -- F. Supp. 3d --, 2015 WL 6551836, at *24 (M.D. La. Oct. 29, 2015) (the "plurality's construal" in *Armstrong* was "dicta," and does not disturb precedent holding a private right of action exists to enforce other subparagraphs of §1396a(a)); *J.E. v. Wong*, -- F. Supp. 3d.--, 2015 WL 5116774, at *7 (D. Haw. Aug. 27, 2015) ("Part IV was not joined by a majority of the Court and is a plurality opinion. It is also *dicta*.").

> First, Plaintiffs are Medicaid beneficiaries entitled to EPSDT services, not Medicaid providers. Second, Plaintiffs' suit relies on 42 U.S.C. § 1983. Plaintiff does not rely on the Supremacy Clause or an equity theory. Third, Plaintiffs sue for EPSDT services pursuant to individual rights conferred by 42 U.S.C. §§ 1396a(a)(10) and (43), not for higher provider reimbursement rates based on the federal agency directive in 42 U.S.C. § 1396a(a)(30).

Wong, 2015 WL 5116774, at *7.

Armstrong emphasizes the first of these differences in the very passage on which Norwood relies: "We doubt, to begin with, that providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement, which was concluded for the benefit of the infirm whom the providers were to serve, rather than for the benefit of the providers themselves." *Armstrong*, 135 S. Ct. at 1387. Given this clarification in *Armstrong* itself that Medicaid-eligible participants (such as Plaintiffs here) are intended beneficiaries of the Act, and the different statutory provisions at issue in this case (EPSTD and reasonable promptness provisions), this Court concurs with those holding "that the *Armstrong* decision is distinguishable from the present case and does not dictate that Plaintiffs are deprived of a private right of action to enforce their rights to EPSDT services." *Wong*, 2015 WL 5116774, at *7; *Unan*, 2016 WL 107193, at *11 ("The discussion in *Armstrong* regarding the private enforcement of Medicaid provisions is therefore not binding and is inapposite to the present action.").

Arguing against this result, Norwood contends that the statutes "nominally" asserted by Plaintiffs are not dispositive, Dkt. 22, at 12, because their claims really

seek "to raise Medicaid reimbursement rates to in-home shift nursing agencies in order that they may secure Medicaid services." Dkt. 34, at 4. According to Norwood, "the subjects of Medicaid reimbursement rates and access to Medicaid providers are expressly included in Section 1396a(a)(30(A)," and "*Armstrong* bars any attempt to privately enforce any provision of the Medicaid Act when it would require the Court to undertake the activities included in Section 1396a(a)(30)(A)." *Id*. at 5. Plaintiffs may not circumvent this prohibition, Norwood argues, "by invoking other general statutes that have been held to confer rights to Medicaid 'services.'" *Id*. But Norwood's support for this premise—a handful of references to provider reimbursement rates in Plaintiffs' 200-paragraph Complaint—cannot bear its weight.

For instance, Norwood relies heavily on Plaintiffs' allegations that the in-home nursing services they receive rate only $35.03 for a registered nurse and $31.14 for a licensed practical nurse (later reduced to $29.16 and $25.92, respectively), whereas "Defendant will pay $72.00 per hour for other Medicaid enrollees, and its sister agency, the Department of Children and Family Services, will pay nursing agencies $45.00 per hour for in-home nursing." *See* Dkt. 32, at 14; Dkt. 34, at 2 (quoting Compl., ¶¶ 13- 15). Similarly, Norwood points to Plaintiffs' companion allegation that a $10-rate increase (which might place them in closer stead with other Medicaid participants) would be born partially by the federal government, easing the burden on the State. Dkt. 34, at 2. But Norwood overlooks the fact that Plaintiffs point to these rate discrepancies to support their ADA and Rehabilitation Act claims that "they are

being treated worse than other persons with disabilities," for whom the State pays higher rates for services. Dkt. 32, at 14. As to their Medicaid claims, however, "Plaintiffs are not arguing that the Defendants must raise reimbursement rates for in-home nursing services. Rather, they argue that the Defendant must, in one way or the other, arrange for these services when they are medically necessary." *Id*. at 6.

The Court agrees with Plaintiffs that the inclusion of these allegations (largely in support of different claims under different statutes) "does not convert Plaintiffs' claims into a request for higher Medicaid reimbursement rates to be paid to in-home nursing service providers." Dkt. 32, at 6. To hold otherwise would improperly convert a claim for services under the EPSDT and reasonable promptness provisions of the Medicaid Act—long recognized by a multitude of courts, including the Seventh Circuit—into one for an increase in rates under § 1396a(a)(30)(A), just to strike it down under *Armstrong*. Nor does *Armstrong* require any such departure from existing precedent. As other courts have recognized, it was well established long before *Armstrong* that § 1396a(a)(30(A) could not be privately enforced by Medicaid providers, whereas the EPSDT and reasonable promptness provisions of the Medicaid Act could be privately enforced by Medicaid participants.[4] *Armstrong's* uncontroversial affirmation of the former does nothing to abrogate the latter.

[4] *See, e.g.*, *Planned Parenthood*, 2015 WL 6551836, at *27 ("Neither revolutionary nor anomalous, *Armstrong* actually aligned with a majority of federal courts in its construction of Section 1396a(a)(30) as to Medicaid providers" (citing cases)); *Wong*, 2015 WL 5116774, at *7 ("The *Armstrong* Court's discussion

B. The ADA and Rehabilitation Act Claims

Norwood's challenge to Plaintiff's ADA and Rehabilitation Act claims similarly relies upon inapposite case law. To the extent Norwood again asserts that "such relief has been foreclosed by *Armstrong*" (Dkt. 22, at 15), that argument fails for the reasons explained above. And to the extent Norwood argues that these claims are foreclosed by the Seventh Circuit's decision in *Amundson ex rel. Amundson v. Wisc. Dep't of Health Servs.*, 721 F.3d 871 (7th Cir. 2013), the Court disagrees.

As Norwood acknowledges, Plaintiffs' predicate their ADA and Rehabilitation Act claims, at least in part, "on Defendant's alleged violation of the integration mandates." *See* Dkt. 22, at 13.[5] Such mandates require that a public entity "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." *See* Compl., Dkt. 1, ¶ 52 (quoting ADA integration mandate, 28 C.F.R. § 35.130(d)); ¶ 55 (quoting Rehabilitation Act integration mandate, 28 C.F.R. 41.51(d)). Plaintiffs contend that "Defendant is failing to arrange for the necessary in-home nursing services" for "children who have multiple disabling conditions" (such as C.F., J.M., and S.M.),

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regarding the lack of a private cause of action to enforce Section 1396a(a)(30) was not a departure from existing precedent." (citing cases)).

[5] As noted above, Plaintiffs also allege that "they are being treated worse than other persons with disabilities," for whom the State pays higher hourly rates for services. *See* Dkt. 32, at 14; Compl., Dkt. 1, ¶¶ 13-15. Norwood does not challenge this aspect of Plaintiffs' ADA and Rehabilitation Act claims; nor does she respond to Plaintiffs' argument that *Amundson* acknowledges their viability. *See* 721 F.3d at 874-75 (acknowledging discrimination claim where a state "buys the best available care" for one disability, "but pays only for mediocre care" for another); Dkt. 32, at 14.

"and, as a result, the children are facing institutionalization/hospitalization." Dkt. 32, at 11. Supreme Court and Seventh Circuit precedent hold that such "'unjustified institutional isolation' of a disabled individual receiving medical care from a State amounts to an actionable form of discrimination" under the ADA and Rehabilitation Act and their implementing regulations (*i.e.*, the foregoing integration mandates). *See Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 607-08 (7th Cir. 2004) (quoting *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597-603 (1999)).

Norwood argues that the claims of C.F., J.M., and S.M. are nevertheless barred by the Seventh Circuit's recent decision in *Amundson*. According to Norwood, *Amundson* "holds that there is no legal injury for ADA and Rehabilitation Act purposes when the Defendant's provision of fewer services does not force an individual into a less integrated setting." *See* Dkt. 22, at 13 (citing *Amundson*, 721 F.3d at 874). Thus, Norwood argues, "since the setting in which they receive their nursing services, their own homes, has not changed, they have no claim under the integration mandates regardless of the purported inconvenience to family members." *Id.* at 14. To support this argument, Norwood cites two Indiana district court decisions that describe *Amundson's* "ripeness" analysis as "categorical"—in other words, "absent actual institutionalization, the plaintiffs' integration-mandate claims were unripe." *See Maertz v. Minott*, No. 1:13-cv-00957-JMS-MJD, 2015 WL 3613712, at *13 (S.D. Ind. June 9, 2015); *Beckem v. Minott*, No. 1:14-cv-00668-JMS-MJD, 2015 WL 3613714, at *12 (S.D. Ind. June 9, 2015).

Plaintiffs counter with a contrary Illinois decision brought against the same defendant sued here, *M.A. v. Norwood*, -- F Supp. 3d --, 2015 WL 5612597 (N.D. Ill. Sept. 23, 2015). The *M.A.* court did not read *Amundson* "so narrowly," and therefore disagreed with *Maertz* and *Beckem*, instead holding that plaintiffs need not allege actual institutionalization to state ADA and Rehabilitation Act claims where "the threat of their institutionalization is real." *Id*. at *10-11 and n.12. Such a "real" threat existed in *MA*, the court reasoned, because (unlike *Amundson*) the Director "made no representation indicating that . . . plaintiffs (and putative class members) would not face imminent institutionalization." *Id*. at *11; *see also Amundson*, 721 F.3d at 874 ("Wisconsin maintains that it has safeguards in place that will prevent any plaintiff from being transferred to an institution.").

Norwood has similarly declined to give such assurances here. On the contrary, Norwood's reply brief not only fails to respond to Plaintiffs' argument regarding the lack of such a representation (*see* Dkt. 32, at 13), it fails to support her motion to dismiss Plaintiffs' ADA and Rehabilitation Act claims in any respect, which is reason enough to deny the motion.[6] But all waivers aside, given that Norwood's motion is indeed a Rule 12(b)(6) motion to dismiss (not one for summary judgment as in *Maertz* and *Beckem*), the Court agrees that C.F., J.M., and S.M. "should have the opportunity to complete discovery and flesh out their claims." *See* Dkt. 32, at 13 and n.6.

[6] *See In re LaMont*, 740 F.3d 397, 410 (7th Cir. 2014) (failure to reply to argument in response brief conceded issue) (citing *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver.").

The same is true of Plaintiffs' claim that O.B. and similarly situated children are "segregated in an institutional or hospital setting in order to get necessary nursing services although they *can* and *should* be receiving those services in more integrated, home settings." Dkt. 32, at 10. As Plaintiffs correctly argue, the Supreme Court and Seventh Circuit have both recognized a discrimination claim for "community-based treatment for individuals with disabilities" whose "placement into such programs had been delayed." *See Radaszewski*, 383 F.3d at 608 (sustaining claim for continued in-home private-duty nursing, citing *Olmstead*, 521 U.S. at 607); Dkt. 32, at 10-11.[7]

Radaszewski recites three requirements for such a claim under the ADA and Rehabilitation Act: (1) "the State's treatment professionals find that such treatment is appropriate," (2) "the affected individuals do not oppose community-based treatment," and (3) "placement in the community can be reasonably accommodated, taking into account the State's resources and the needs of others with similar disabilities." *Id.*, 383 F.3d at 608 (construing *Olmstead*, 521 U.S. at 607). As discussed further below, Norwood disputes that at least the first of these requirements—*i.e.*, that O.B. "could be safely cared for in his parents' home with any amount of nursing"—is met here. Dkt. 25, at 11. *Radaszewski* teaches, however, that this determination "cannot be resolved on the pleadings." *Id.*, 383 F.3d at 609-10. Norwood's motion to dismiss this claim is therefore denied, as well.

[7] Contrary to Norwood's argument (Dkt. 25, at 8), *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003), held no differently. It merely remanded the ADA and Rehabilitation Act claims for consideration under *Olmstead* and the implementing regulations. *See* 324 F.3d at 912-13.

II. Plaintiffs' Motion for Preliminary Injunction

Having resolved Norwood's motion to dismiss, the Court turns to Plaintiffs' motion for a preliminary injunction, the requirements for which are well settled and undisputed. "To obtain a preliminary injunction, the moving party must demonstrate a reasonable likelihood of success on the merits, no adequate remedy at law, and irreparable harm absent the injunction." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 972 (7th Cir. 2012); Dkt. 7, at 2-3; Dkt. 25, at 3. "If it makes this threshold showing, the district court weighs the balance of harm to the parties if the injunction is granted or denied and also evaluates the effect of an injunction on the public interest." *Planned Parenthood*, 699 F.3d at 972; Dkt. 25, at 3; Dkt. 7, at 3. Both sides also agree that these factors are weighed on a "sliding scale"—"the more likely the party's chance of success on the merits, the less the balance of harms need weigh in favor and vice-versa." Dkt. 25, at 3; Dkt. 7, at 3; *Planned Parenthood*, 699 F.3d at 972 (same).

An evidentiary hearing is required only to the extent "genuine issues of material fact are created by the response to a motion for a preliminary injunction." *In re Aimster Copyright Litig.*, 334 F.3d 643, 654 (7th Cir. 2003) (quoting *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997)); *Dexia Credit Local v. Rogan*, 602 F.3d 879, 884 (7th Cir. 2010) (same). "But as in any case in which a party seeks an evidentiary hearing, he must be able to persuade the court that the issue is indeed genuine and material and so a hearing would be productive—he must show in other words that he has and intends to introduce evidence that if believed will so

weaken the moving party's case as to affect the judge's decision on whether to issue an injunction." *Aimster*, 334 F.3d at 654 (quoting *GMA*, 132 F.3d at 1171). The Court considers Plaintiffs' preliminary injunction request with these standards in mind.

A. Threshold Injunction Factors: Likelihood of Success, Inadequate Remedy at Law, and Irreparable Harm

Plaintiffs assert that they are likely to show that Norwood violated the EPSDT and "reasonable promptness" provisions of the Medicaid Act (Counts I and II), since it is undisputed "that Defendant found all named Plaintiffs and Class members eligible for Medicaid-covered in-home shift nursing services based on medical[] necessity," but "she has failed to provide adequate services for months, if not years, after the services were approved." Dkt. 7, at 9. Indeed, Norwood does not dispute that such services were both approved and undelivered. Instead, her opposition regarding Plaintiffs' likelihood of success on their Medicaid Act claims merely repeats the arguments Norwood made in support of her motion to dismiss. *See* Dkt. 25, at 6-9. Since those arguments fail for the reasons explained above, Plaintiffs' likelihood of success on Counts I and II is firmly established.

Plaintiffs' lack of an adequate remedy at law and irreparable injury in the event an injunction is denied on Counts 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") (collecting cases). Although Norwood now attempts to question whether the services that Plaintiffs demand are "medically necessary" (Dkt. 25, at 11), she offers no evidence calling into question her own HFS determinations. Thus, as in *A.H.R.*, "that issue has been resolved." 2016 WL 98513, at *17.

By contrast, Plaintiffs' ADA and Rehabilitation Act claims (Counts III and IV) raise certain factual issues. As explained above, although the Plaintiffs who remain in their homes (C.F., J.M., and S.M.) need not demonstrate actual institutionalization resulting from their non-receipt of all EPSDT services allotted to them, they nevertheless must demonstrate a real threat that institutionalization will follow from that deprivation. *See supra* Part I-B. As to these claims, therefore, the likelihood of success and irreparable injury factors substantially overlap. And while the medical necessity of the services that Plaintiffs demand "has been resolved" as noted above, the question of whether the denial of such services would lead to Plaintiffs' institutionalization has not. Norwood complains, for example, that several of Plaintiffs' supporting declarations "consist of the opinions of parents/caregivers who are complaining about inconvenience to them," as opposed to medical opinions demonstrating why or how the denials of EPSDT services that Plaintiffs are experiencing will cause their institutionalization. *See* Dkt. 25, at 11.

Similar factual issues are raised by O.B.'s ADA and Rehabilitation Act claims. As also discussed above, to support his claim for shift-nursing services in the more integrated setting of his home (as opposed to the hospital where he is now treated), O.B. must demonstrate that "the State's treatment professionals find that such treatment is appropriate," and that "placement in the community can be reasonably accommodated, taking into account the State's resources and the needs of others with similar disabilities." *Radaszewski*, 383 F.3d at 608. Plaintiffs similarly concede that a state "may defend by showing that a community setting cannot be accommodated without fundamental alteration to the entity's programs and services." Dkt. 7, at 12; *see also Radaszewski*, 383 F.3d at 607 (agency is "relieved" of obligation to "make such modifications as are 'reasonable' in order to avoid unduly segregating the disabled," if it can show that "'making the modifications would fundamentally alter the nature of the service, program, or activity.'" (quoting 28 C.F.R. § 35.130(b)(7)).

Norwood does not address whether in-home treatment of O.B. could be reasonably accommodated without "fundamental alteration" of HFS's programs and services, but does dispute that O.B. "could be safely cared for in his parents' home with any amount of nursing," given "his medical history and his medical complexity." Dkt. 25, at 11. Plaintiffs respond that "Defendant has already determined that 18 hours per day of nursing services would meet his medical needs at home and approved him to receive those services," and further note that O.B.'s "monthly hospital charges far exceed the cost of in-home services." Dk.t 31, at 7 n.2; Dkt. 7, at 13.

While Plaintiffs' account is compelling, the Court is mindful of *Radaszewski's* instruction that "the State always has the opportunity to show that adapting existing institution-based services to a community-based setting would impose unreasonable burdens or fundamentally alter the nature of its programs and services, and for that reason it should not be required to accommodate the plaintiff." *Radaszewski*, 383 F.3d at 611. Accordingly, the Court will allow Norwood the opportunity to request an evidentiary hearing regarding the following factual issues raised by Plaintiffs' ADA and Rehabilitation Act claims: (1) the feasibility of treating O.B. at home, (2) whether such in-home treatment would require fundamental alteration of HFS's program or services, and (3) the likelihood that reduced services to Plaintiffs who remain at home (C.F., J.M., and S.M.) would cause their institutionalization. As explained above, however, Norwood "must be able to persuade the court" that "a hearing would be productive," meaning that she "intends to introduce evidence that if believed will so weaken the moving party's case as to affect the judge's decision on whether to issue an injunction." *Aimster*, 334 F.3d at 654. The Court will hear from the parties regarding the need for any such hearing at the next scheduled status.

B. The Form of Injunction

Having determined that Plaintiffs have already met the threshold requirements for injunctive relief on Counts I and II of their Complaint, the Court next addresses the form of injunction they propose. Plaintiffs request an injunction on Counts I and II (seeking EPSDT services with reasonable promptness) ordering the following:

> A) that the Defendant, Felicia F. Norwood, 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 Medicaid Act . . . pending final judgment in this action or until further order of Court; and
>
> B) that the Defendant 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.

Norwood lodges several objections to this language. First is her opposition to the requirement of "immediate and affirmative steps." Norwood argues that this locution fails to comport with Fed. R. Civ. P. 65(d)(1)'s mandate that the injunction "describe in reasonable detail . . . the act or acts restrained or required." Dkt. 25, at 4. In a similar vein, Norwood complains that the injunction's reference to "the Medicaid Act" amounts to no more than a requirement "to follow the law without any description of what immediate and affirmative steps should be taken to follow the law." *Id*. at 5. According to Norwood, the injunction Plaintiffs propose "merely instructs the enjoined party not to violate a statute," and thus "increases the likelihood of unwarranted contempt proceedings for acts that are unrelated to what was originally contemplated as unlawful." *Id*. at 4. The Court disagrees.

While the Court is mindful of Seventh Circuit case law warning against an "obey-the-law injunction," *see E.E.O.C. v. Autozone, Inc.*, 707 F.3d 824, 841 (7th Cir.

2013), the injunction Plaintiffs have proposed is not that. It requires Norwood to take immediate and affirmative steps to provide the very in-home shift nursing services that HFS approved. Norwood knows what those services are and for whom they were approved because her agency approved them. *See* Dkt. 22, at 1 ("Each Plaintiff has been approved for Early and Periodic Screening, Diagnostic and Treatment ('EPSDT') in-home shift nursing services."). Nor is the injunction's reference to the Medicaid Act an "obey-the-law" infraction. For one thing, it distinguishes the relief from that Plaintiffs seek under the ADA and Rehabilitation Act (*e.g.*, treatment on par with persons with other disabilities). But also, it provides context for the nature of the required services—EPSDT services—which even Norwood acknowledges are defined in the Medicaid Act in considerable detail. *See* Dkt. 22, at 5-6 (quoting and discussing 42 U.S.C. §§ 1396a, 1396d. And, again, as Plaintiffs correctly assert, the injunction requires Norwood to provide only "the number of hours that she has determined are medically necessary through her own agency's process." Dkt. 31, at 2.

Norwood next complains that the injunction Plaintiffs propose would give her too much freedom, or in her words, improperly "shift all responsibility to determine how to comply to Defendant." Dkt. 25, at 5. Here again, the Court disagrees. After all, it is Norwood who stresses the "'sheer complexity' of the issue of access to Medicaid providers." Dkt. 22, at 12. Retaining Norwood's discretion to fashion the most effective but least burdensome method of providing the EPSDT services approved for each Plaintiff is thus prudent, and accords appropriate deference to HFS's "internal affairs." *See Katie A., ex rel. Ludin v. L.A. Cnty.*, 481 F.3d 1150,

1157 (9th Cir. 2007) (injunction requiring "only that defendants supply the services that the court found to be required under federal law" "appropriately allowed defendants an opportunity jointly to develop the remedial plan needed to implement the injunction"); *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," and following *Ludin* in allowing defendants "to develop the remedial plan needed to implement the injunction" (quoting *Ludin*, 481 F.3d at 1157). It is also consistent with the discretion conferred by the Medicaid Act itself. "While the states must live up to their obligations to provide all EPSDT services, the statute and regulations afford them discretion as to how to do so." *Ludin*, 481 F.3d at 1159; *see also Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1238 (11th Cir.2011) ("While the EPSDT mandate requires [a state Medicaid agency] to provide children, who meet the eligibility requirements, with medically necessary 'private duty nursing services' to 'correct or ameliorate' their conditions . . . the Medicaid Act does not set forth a uniform manner in which states must implement that EPSDT mandate.").

Norwood also opposes the proposed injunction's inclusion of class relief. She claims to lack "criteria that define membership in the class" and "reasonable assurances that the class would consist of individuals whose alleged in ability [sic] to staff their authorized nursing hours was a result of Defendant's purported violation of federal law." Dkt. 25, at 9. But the class criteria are clearly defined: "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 enrolled in a waiver program or a non-waiver program. Dkt. 1, ¶ 28. As Plaintiffs note, "Defendant need only review her own records to determine who these children are." Dkt. 31, at 9. Indeed, Norwood's memorandum describes the records HFS keeps regarding the children for whom such services have been approved and the services provided to them, if only to meet federal reporting requirements, Dkt. 22, at 5-6; and Plaintiffs' have identified other records available to HFS from its servicing agent, including summaries of the services provided (and not provided) from the nursing agencies to whom cases are assigned. *See* Dkt. 28. Such records would also satisfy Norwood's demand for assurances that the class consist solely of individuals whose inability "to staff their authorized nursing hours was a result of Defendant's purported violation of federal law," insofar as they reveal "any reasons for unfilled shifts," despite the federal requirement to provide the services allotted. *See id.*[8]

[8] Contrary to Norwood's contention that the Medicaid statutes at issue here "simply require the states to ensure that certain services are made available to Medicaid-eligible children," Dkt. 22, at 7, "numerous courts" have held that the statutes "render it mandatory for the state to provide as part of its EPSDT program every category of 'medical assistance'" enumerated in § 1396d(a). *See N.B. Hamos*, 26 F. Supp. 3d 756, 765 n.5 (N.D. Ill. 2014) (construing 42 U.S.C. §§ 1396d(a), 1396d(r)(5) and collecting cases); *accord Reese*, 637 F.3d at 1234 (construing 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a): "The 1989 Amendment [of the Medicaid Act] made it incumbent upon states to provide all 29 categories of care [enumerated in § 1396d(a)], including 'private duty nursing services,' to Medicaid-eligible children who qualify under the EPSDT provision."); *Ludin*, 481 F.3d at 1154 (states "must provide all of the services listed in § 1396d(a) to eligible children when such services are found to be medically necessary"). Even Norwood concedes that § 1396a(a)(8) provides "that medical assistance *will be furnished* with reasonable promptness to all eligible individuals." Dkt. 22, at 7 (emphasis added). And § 1396a(a)(43)(C) similarly requires "arranging for (directly or through referral to appropriate agencies,

Norwood contends that class-wide relief is inappropriate also because Plaintiffs purportedly fail to meet the criteria of Fed. R. Civ. P. 23(a), particularly commonality. But the class includes only plaintiffs who have been approved for EPSDT services and are not receiving them in full, and who seek to enforce their rights under the Medicaid Act to the services not provided. Proper common questions thus appear to include, at a minimum, whether "treatment found to be 'medically necessary,' and therefore mandatory for the state to provide, is nevertheless unavailable in Illinois," and "whether there is system-wide failure to provide services that already have been prescribed and that, therefore, the EPSDT program requires the State to provide." *See Hamos*, 26 F. Supp. 3d at 772 (certifying class of "children eligible for home and community-based services"). Contrary to Norwood's contention, these are issues of "systemic failure," not "individual violations of the same law" prohibited under *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481 (7th Cir. 2012). *See Hamos*, 26 F. Supp. 3d at 772.

But in any event, it is unnecessary to certify, or even conditionally certify, Plaintiffs' proposed class at this time. "The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons." *See Lee v. Orr*, No. 13-cv-8719, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013) (quoting *Ill. League of Advocates for the Developmentally Disabled v. Ill. Dep't of Human Servs.*, No. 13 C

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organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services."

1300, 2013 WL 3287145, at *3 (N.D. Ill. June 28, 2013)). As in *Lee*, "this Court will forgo a conditional class ruling at this time, but use its general equity powers to order preliminary injunctive relief for the proposed []class of plaintiffs," as to Counts I and II of Plaintiffs' Complaint.

C. The Balance of Harms and Public Interest

Finally, with Plaintiffs' proposed injunction in mind, the Court considers the balance of harms to the parties if such an injunction were granted or denied, and its potential impact on the public interest, which Norwood correctly asserts are very much "related." *See* Dkt. 25, at 12. But Norwood is incorrect in asserting that any negative impact the injunction might have on HFS should "weigh much more heavily in Defendant's favor." *See id*. Because the Court concludes that Plaintiffs have established a high likelihood of success on Counts I and II, the balance of harms tips in their favor, not Norwood's. *See Planned Parenthood*, 699 F.3d at 972 ("The more likely it is that the moving party will win its case on the merits, the less the balance of harms need weigh in its favor." (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008) (brackets omitted)). In either case, however, the substantial benefit that the requested injunction could provide to Plaintiffs and the public easily outweighs the potential harm that Norwood identifies.

Norwood complains that HFS "would certainly not be able to recover from Plaintiffs any of the funds it would have to expend under the injunction, if Defendant were to prevail after a trial on the merits," and correspondingly, "that the injunction asked would adversely affect a public interest for whose impairment an injunction

bond cannot compensate." Dkt. 25, at 12. Quite the opposite. If anything, the public has an interest in seeing care and treatment that HFS has already determined to be medically necessary fully provided to the disabled children who seek it here. Nor does the Court perceive an unjust harm perpetrated by HFS providing care and treatment that is medically (and statutorily) required. Also of note is Plaintiffs' assertion (which Norwood does not dispute) that, as to institutionalized plaintiffs, "Defendant would expend considerable fewer resources to provide care at home than in an institutional setting." Dkt. 7, at 13. And as to plaintiffs who seek services to avoid such institutionalization, further cost savings may be possible, and the avoidance of such institutionalization is certainly desirable by the public, as well.

CONCLUSION

Accordingly, for the foregoing reasons, Defendant's Motion to Dismiss (Dkt. 21) is granted as to Plaintiffs Sa.S. and Sh.S., and otherwise denied; and Plaintiffs' Motion for Preliminary Injunction (Dkt. 6) is granted as to Counts I and II of their Complaint. Plaintiffs shall submit a proposed injunction order to Defendant's counsel for comment, and submit a final version to the Court's proposed order email address by March 28, 2016. The case remains set for status on March 22, 2016, at which time the Court will hear from the parties regarding any need for a hearing on Plaintiffs' request for a preliminary injunction for Counts III and IV of their Complaint.

Charles P. Kocoras

Dated: March 21, 2016

Charles P. Kocoras
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

O.B. by and through his parents **GARLAND BURT** and **JULIE BURT**, et al., individually and on behalf of a class, Plaintiffs, v.	)	15-CV-10463
FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, Defendant.	)	Judge Charles P. Kocoras

PRELIMINARY INJUNCTION ORDER

This matter is now before the Court on the Motion for Preliminary Injunction [6] of Plaintiffs O.B., C.F., J.M., and S.M. ("Plaintiffs"), pursuant to Fed. R. Civ. P. 65. In furtherance of the Court's Memorandum Opinion dated March 21, 2016 [36], the Court finds and orders as follows:

1. Plaintiffs have demonstrated a likelihood of success on the merits of Counts I and II of their Complaint [1], which allege that Defendant violated the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provisions, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B), and 1396a(a)(43)(C), and "reasonable promptness" provision, 42 U.S.C. § 1396a(a)(8), of the Medicaid Act.

2. It is undisputed that Defendant approved each named Plaintiff for EPSDT in-home shift nursing services based on medical necessity, and that such Plaintiffs are not receiving all such approved services.

3. Without injunctive relief, Plaintiffs and similarly situated Medicaid-eligible children (as defined in paragraph 28 of Plaintiffs' Complaint and in paragraph A below) lack an adequate remedy at law and face irreparable injury by not receiving medically necessary in-home shift nursing services. The balance of equities and public interest favor Plaintiffs and such similarly situated Medicaid-eligible children, as the public has an interest in seeing care and treatment that Defendant has determined to be medically necessary provided.

IT IS HEREBY ORDERED THAT:

A. Defendant Felicia F. Norwood shall 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 Plaintiffs and such similarly situated Medicaid-eligible children under the age of 21 in the State of Illinois who also have been approved for in-home shift nursing services, but who are not receiving in-home shift nursing services at the level approved by Defendant, as required by the Medicaid Act.

B. Defendant Felicia F. Norwood shall provide the following information to Plaintiffs within 30 days of the entry of this Order:

(1) what steps have been undertaken by Defendant to arrange for in-home shift nursing services to Plaintiffs and such similarly situated Medicaid-eligible children; and

(2) an identifying list of such similarly situated Medicaid-eligible children which contains (a) their currently approved level of in-home shift nursing care and (b) how much of their in-home shift nursing care was used or delivered during the preceding 90 days.

C. This Court waives or excuses the filing of any security or bond by Plaintiffs and such similarly situated Medicaid-eligible children.

D. This Order shall remain in effect pending final judgment in this action or until further order of Court.

Charles P. Kocoras

Dated: April 6, 2016

Charles P. Kocoras
United States District Judge

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 13, 2016, I electronically filed the foregoing Brief and Short Appendix of Defendant-Appellant with the Clerk of the Court using the CM/ECF system. The other participants in this appeal, named below, are CM/ECF users, and thus will be served via the CM/ECF system.

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