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.	)	

REPLY BRIEF OF DEFENDANT-APPELLANT

LISA MADIGAN
Attorney General
State of Illinois

DAVID L. FRANKLIN
Solicitor General

100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Defendant-Appellant

LINDA BOACHIE-ANSAH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2575
LBoachie-Ansah@atg.state.il.us

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ARGUMENT

In her opening brief, the Director of the Illinois Department of Healthcare and Family Services ("Director" and "Department") demonstrated that Plaintiffs failed to show a likelihood of success on the merits of their claims. Contrary to Plaintiffs' assertion in the district court, the Director's inability to ensure that nurses would provide medical care to Plaintiffs in their homes for all of the hours that the Department authorized did not amount to a *per se* violation of the Early and Periodic Screening and Diagnostic Testing ("EPSDT") and reasonable promptness provisions of the Medicaid Act. *See* R. at 1-10, 41-44. Because Plaintiffs failed to make the required "*clear showing*" of entitlement to relief, the district court's entry of the preliminary injunction order was an abuse of its discretion. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (internal quotation marks omitted) (emphasis in original).

On appeal, Plaintiffs respond by claiming that they "presented evidence that the Director systematically failed to provide for adequate levels of in-home shift nursing for the named Plaintiffs and numerous Class Members." AE Br. at 16. Tellingly, Plaintiffs cite nothing in support of that assertion. That is because Plaintiffs offered no evidence to the district court of any systemic failure on the Director's part. Instead, at most their affidavits and other evidence demonstrated that nursing agencies with whom they work have "not been able to find nurses to staff" their cases. R. at 3 ¶ 5(d). But an inability to locate sufficient nurses to care for Plaintiffs in their homes does not constitute a violation of the Medicaid Act.

Plaintiffs also misstate the Director's position with respect to her obligations under the Act. *See* AE Br. at 13. As the Director noted in her opening brief, the EPSDT provisions require her to arrange for necessary corrective treatment for Plaintiffs. AT Br. at 16. By working with the Division of Specialized Care for Children to provide nursing services to Plaintiffs in their homes, seeking to recruit additional nurses, and otherwise making medical treatment available in other settings, the Director *has* arranged for corrective treatment. *Id.* at 17-19.

Additionally, Plaintiffs did not demonstrate a likelihood that the Director failed to furnish medical assistance with reasonable promptness. The word "reasonable" in the statute matters: to be entitled to injunctive relief Plaintiffs had to show that the Director's provision of medical assistance was not reasonably prompt, a showing that necessarily depends on the facts and circumstances behind any delays in their receipt of in-home nursing services. Plaintiffs' bare assertion that the Director failed to arrange for corrective treatment, *see* R. at 42, was not enough to satisfy their burden of proof and obtain the extraordinary relief they seek. Finally, in addition to Plaintiffs' failure to show a likelihood of success on the merits of their claims, they also have not demonstrated that irreparable harm will ensue without the injunction order. And the lack of specificity in the district court's injunction order further illustrates the impropriety of the preliminary injunction entered here.

I. The District Court Abused Its Discretion In Granting Plaintiffs' Motion For A Preliminary Injunction When Plaintiffs Failed To Show That The Director Likely Violated The EPSDT Provisions.

A. Plaintiffs Failed To Establish That The Director Did Not Arrange For Corrective Treatment.

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Plaintiffs did not make that showing here. The EPSDT provisions require the Director, in relevant part, 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). In-home shift nursing services are one way of providing corrective treatment, *see* 42 U.S.C. § 1396d(a)(8), but they are not the only option. Indeed, as Plaintiffs note, in-home shift nursing services are "one of the twenty-nine services listed in § 1396d(a)." AE Br. at 4. Accordingly, if Plaintiffs have not received in-home shift nursing services for all the hours that the Department has approved, that does not automatically mean that the Director violated the EPSDT provisions.

In this case, the Director determined that in-home nursing care would be appropriate, but "it has been extremely difficult to staff [Plaintiffs'] nursing case[s]." R. at 66. Plaintiffs argue that because nurses have not been available to provide in-home care for them for all of the hours that the Department has approved, the Director necessarily failed to arrange corrective treatment for Plaintiffs. AE Br. at 33-35. But that is not so. When construing a statute's terms, the court looks to its plain meaning. *See*

Cler v. Ill. Educ. Assn, 423 F.3d 726, 731 (7th Cir. 2005). Among the definitions of the word "arrange" are "to organize the details of something before it happens: to plan (something)" and "to make preparations for." http://www.merriam-webster.com/dictionary/arrange (last visited Aug. 26, 2016). As explained in the opening brief, after the Director determines that a child needs ongoing medical treatment, the Director refers the child to the Division of Specialized Care for Children. AT Br. at 17. The Division works with eligible nursing agencies to find nurses who can provide medical care to Plaintiffs in their homes. *Id.* Additionally, in view of the fact that the Division "has [had] some difficulty finding nurses or nursing agencies to serve some areas of the State," the Director has conducted "outreach activities" to increase the number of available nurses. R. at 681.

Nursing services differ from, for example, medication, where manufacturers can produce additional tablets in the event of a shortage. With in-home shift nursing services, nurses must be available and willing to work the hours that the family needs. Selecting the right nurse to work with a family involves many considerations beyond the Director's control. The nurse, of course, must be competent to care for children with multiple, complex conditions. The parents may decide that a particular nurse's bedside manner is not an appropriate fit for their child. And even when a proper match between nurse and family has been made, the nurse may need to take time off. In short, the interpersonal nature of in-home nursing services, particularly when it involves children, makes it fundamentally different from other types of medical services.

The record as it stands shows that it has been difficult to find nurses to work in Plaintiffs' homes for all of the hours approved by the Department. *See, e.g.*, SA at 23 ("[T]here 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."). The Director has made efforts to enroll new nursing agencies to broaden the pool of available nurses. R. at 681. And when the nursing agencies are unable to provide sufficient nursing care for Plaintiffs, they may be placed at a care center like Almost Home Kids. R. at 76 ¶ 15. In sum, the available evidence showed that Director has arranged (made preparations) for Plaintiffs to receive corrective treatment as required by the EPSDT provisions.

Plaintiffs contend that the "Director cannot fulfill her obligations by approving in-home shift nursing services as medically necessary, not arranging for those services, and then paying for the Children's inpatient care once their situations deteriorate to the point where they are admitted to the hospital." AE Br. at 29. But as noted, even the limited evidence available at this stage of the proceedings showed that the Director has not simply approved in-home shift nursing hours and then washed her hands of any responsibility to secure the services. The Director was aware that the Division has had difficulty finding enough nurses to work in certain parts of Illinois, and she made efforts to enroll additional agencies to serve in these communities. R. at 681. Moreover, to obtain a preliminary injunction, Plaintiffs bore the burden of persuading the court by a clear showing that the Director violated the EPSDT provisions. *See Mazurek*, 520 U.S. at 972. Simply alleging that the Director failed to arrange in-home shift nursing services

was not enough to carry that burden.

B. The Available Evidence Contradicts Plaintiffs' Claim That The Director Failed To Arrange For Corrective Treatment For Them.

On appeal, Plaintiffs fault the Director for "improperly rais[ing] new facts." AE Br. at 23. Specifically, Plaintiffs complain that the Director has relied upon a report that *Plaintiffs* introduced in the district court. *Id.* at 23-24. On April 18, 2016, Plaintiffs attached to their statement of facts in support of their request for injunctive relief on the other two counts of the complaint a report that the Director issued in January 2016. R. at 656-83. This report—which shows that the Director took steps to increase the pool of available nurses months before this lawsuit was filed, R. at 681—was presented to the district court shortly before the Director filed the memorandum in support of her motion to stay the preliminary injunction pending appeal, R. at 684. As such, this evidence was before the district court at a time that it was considering issues central to this appeal. Further, Plaintiffs have supplemented the record with documents that were filed well after the district court's entry of its preliminary injunction order. *See* R. at 1018-1162. Plaintiffs therefore should not be heard to complain about any reliance on documents there were filed after the district court entered its preliminary injunction order yet are relevant to this Court's consideration of the appeal.

Plaintiffs also are wrong to assert that no evidence of a lack of available nurses to care for them was presented in the district court. AE Br. at 24. As an initial matter, to the extent that Plaintiffs fault the Director for not introducing evidence in the district court, as the party seeking a preliminary injunction, they bore the burden of persuasion.

See AM Gen. Corp. v. DaimlerChrysler Corp., 311 F.3d 796, 803 (7th Cir. 2002). Moreover, their own affidavits demonstrated that finding nurses to work all of the hours that the Department approved has been a challenge. For example, O.B.'s parents stated that the nursing agency that they work with had "not been able to find nurses to staff O.B.'s case" and that they were "unable to find another nursing agency to fully staff the nursing hours approved by the Defendant." R. at 80 ¶ 10. Their private insurer would "not provide coverage for the level of nursing services that O.B. needs." R. at 80-81 ¶ 14. Further, at a hearing that the district court conducted on January 16, 2016, the Director explained that the nursing agencies sought to "recruit nurses and find individuals to work" the approved hours. SA at 23. Accordingly, the district court should have been aware that the unavailability of nurses was the core problem in providing in-home shift nursing services to Plaintiffs.

Plaintiffs observe that the "Director has determined that the right care for the Children is in in-home shift nursing services and the right setting is the home." AE Br. at 28. The Director does not dispute that she approved in-home care for Plaintiffs. In the best-case scenario, nurses would be available to provide in-home medical care for all of the hours that the Department approved. But the question on appeal is not whether it would be ideal for Plaintiffs to receive in-home shift nursing services. The question is whether Plaintiffs met their burden of persuasion, by a clear showing, that the Director violated the EPSDT provisions as to both Plaintiffs and similarly situated individuals before the district court granted their motion for a preliminary injunction.

The record as it stands shows that they did not, and so they should not have received such extraordinary relief.

II. The District Court Also Should Not Have Granted Injunctive Relief Where Plaintiffs Failed To Make A Clear Showing That The Director Did Not Furnish Medical Assistance With Reasonable Promptness.

Section 1396a(a)(8) of the Medicaid Act states that medical assistance "shall be furnished with reasonable promptness" to eligible individuals. 42 U.S.C. § 1396a(a)(8). In its EPSDT Guide for States, the Centers for Medicare & Medicaid Services observe that "[s]ervices under the EPSDT benefit, like all Medicaid services, must be provided with reasonable promptness." https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/EPSDT_Coverage_Guide.pdf at 32 (last visited Aug. 26, 2016). "What is reasonable depends on the *nature of the service* and the needs of the individual child." *Id.* (emphasis added). In this case, as the Director noted, the EPSDT provisions require her to provide corrective treatment, not necessarily in the form of in-home shift nursing services. *See supra* p. 3. But even with respect to in-home shift nursing services, Plaintiffs failed to make a clear showing that the Director's inability to ensure that nurses would provide care to them in their homes meant that she had not furnished medical assistance with reasonable promptness.

The nature of the services here requires nurses to be willing to provide care for Plaintiffs in their homes for the hours approved. In other words, provision of the services that Plaintiffs seek is contingent on nurses' availability to care for them. Both in the district court and on appeal, Plaintiffs ignore the logistical challenges involved

with finding nurses who are able to provide appropriate medical care to children with complex medical conditions, particularly in more remote parts of the State. AE Br. at 33-35. Unlike with, say, medical devices, the Director cannot simply order more nurses to care for Plaintiffs in the event of a shortage. Plaintiffs also continue to imply that increasing "reimbursement rates for in-home services" would resolve the issue. AE Br. at 31. Even if that argument were not undercut by *Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015)—and it is—nurses still must agree to whatever reimbursement they receive from the nursing agencies. Nothing suggests that an additional $10.00 per hour as suggested by Plaintiffs, *see* R. at 10 ¶ 16, would impact staffing where it is unclear that the nurses themselves (and not the nursing agencies) would receive any increase. In sum, the fact that not enough nurses are available to work the hours that the Department has approved for Plaintiffs, *see, e.g.*, R. at 80; SA at 23, cannot establish that the Director "failed" to furnish medical assistance with reasonable promptness. *See* AE Br. at 16, 33.

Medical 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). The word "or" is "used as a function word to indicate an alternative." http://www.merriam-webster.com/dictionary/or (last visited Aug. 26, 2016). Therefore, the plain language of the statute as enacted shows that medical assistance can be provided through one of three alternatives. Plaintiffs note that a "plain reading of the statute reflects the inclusion of services and payment" in the

definition of medical assistance. AE Br. at 20. Yes. But it also plainly includes "payment of part or all of the costs of the following care and services" as one way to provide medical assistance.

Although the statute unambiguously defines medical assistance in the disjunctive, Plaintiffs assert that the statute's legislative history trumps its plain language. AE Br. at 18-22. According to Plaintiffs, based on the legislative history, the statute obligates States to "provide, or ensure the provision, of services, not just pay for them." *Id.* at 19. "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted). The plain-meaning approach both "respects the words of Congress" and helps "avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *Id.* at 536. The plain language of the Medicaid Act does not define "medical assistance" as limited to the provision of care and services. Various district courts have ruled otherwise, *see* AE Br. at 19-20, but those decisions—besides not being binding on this Court, *see Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993)—are incompatible with the language that was enacted, and thus, unpersuasive.

In any event, here, the Director has both paid for medical services and arranged for their provision. *See, e.g.*, 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."); AT Br. at 17-19 (describing

steps the Director has taken to arrange for corrective treatment). Therefore, whether medical assistance can be provided through payment of part or all of the costs of the following care and services—as the language of the statute indicates—or through provision of both payment and care, the Director has in fact complied with the statute. And where Plaintiffs failed to show that the Director's provision of medical assistance was not made with reasonable promptness, the district court abused its discretion by entering a preliminary injunction order as to this count of the Complaint.

III. Plaintiffs Have Not Shown That They Will Suffer Irreparable Harm Without A Preliminary Injunction, And The Injunction Order Is Too Vague To Identify The Activities Enjoined.

A. Plaintiffs Have Not Demonstrated That Irreparable Harm Will Result From The Injunction Order Being Reversed And Vacated.

Among other requirements, a party seeking a preliminary injunction must show "that absent a preliminary injunction, it will suffer irreparable harm in the interim period prior to final resolution of its claims." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). And where a party fails to establish a likelihood of success on the merits, the balance of harm must be greater. *See In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). As the Director noted in the opening brief, with or without the injunction order, Plaintiffs and the Class will be entitled to the in-home nursing hours that the Department has approved, the Division will endeavor to locate nurses to work those hours, and where necessary for their safety, Plaintiffs and the Class may receive health care at a hospital or at a care center like Almost Home Kids. AT Br. at 24.

In response, Plaintiffs wrongly suggest that there was "no evidence that another service, such as inpatient hospital care, is medically necessary or even appropriate." AE Br. at 39. Further, according to Plaintiffs, "[i]t would be improper for the district court to order the Director to provide services for a medically-fragile child that neither a treating physician nor the Director deemed medically necessary." *Id.* But one of Plaintiffs' own doctors "recommend[ed] shift nursing in the home to keep J.M. safe, the alternative being admission to Children's Hospital of Illinois (CHOI) in Peoria." R. at 35 ¶ 130. A physician *has* found that inpatient hospital care would be appropriate, which demonstrates that in-home nursing care is not the only option for Plaintiffs to receive medical treatment.

Plaintiffs also contend that "[t]he Director cannot be harmed by providing services at medically necessary levels, in accordance with the Medicaid Act" and that "it is the Director's legal obligation under the Medicaid Act to promptly arrange for these services." AE Br. at 37. But, again, the Director's obligation under the Medicaid Act is to arrange for "corrective treatment," to ensure that "necessary health care" is available, and to furnish medical assistance with "reasonable promptness." 42 U.S.C. § 1396a(A)(43)(C); 42 U.S.C. § 1396d(r)(5); 42 U.S.C. § 1396a(a)(8). She has fulfilled these statutory obligations. *See supra* pp. 2-10.

And again, the Medicaid Act does not further obligate the Director to ensure that Plaintiffs receive medical care from nurses in their homes, and the Director cannot guarantee that enough nurses will be available to provide such care for Plaintiffs and

the Class of roughly 1,200 children. Moreover, finding nurses who are able to adequately care for Plaintiffs and the 1,200 members of the Class in their homes is much more than an "administrative burden," as Plaintiffs suggest. *See* AE Br. at 37. It may not always be possible, and it is not required under the Medicaid Act. *See Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 387 (7th Cir. 1984) (observing that "the court must not only determine that the plaintiff will suffer irreparable harm if the preliminary injunction is denied—a threshold requirement for granting a preliminary injunction—but also weigh that harm against any irreparable harm that the defendant can show he will suffer if the injunction is granted").

According to Plaintiffs, the public interest supports the district court's entry of the preliminary injunction order. AE Br. at 38. Plaintiffs note that "the cost of O.B.'s hospitalization was approximately $78,000 per month, compared to the Director's finding that in-home shift nursing services totaling $19,178 per month were medically necessary." *Id.* That may be. But as noted, nursing agencies were unable to find nurses who were available to provide the 18 hours per day of care that O.B. required. SA at 23; R. at 4 ¶ 5(k). That it may have been more cost-effective to care for O.B. at home did not affect the availability of nurses, and the nursing agency determined that it was safer, though more expensive, for O.B. to remain in the hospital. R. at 5 ¶ 6. Plaintiffs repeatedly use the phrase "unnecessary institutionalization," *see, e.g.*, AE Br. at 35, but if the child cannot receive enough medical care elsewhere, or if her complex medical conditions have deteriorated, the reality is that hospitalization may become necessary.

In sum, Plaintiffs failed to show that they will suffer irreparable harm without a preliminary injunction. For this reason as well, the district court should not have entered the preliminary injunction order.

B. The Lack Of Specificity In The Injunction Order Puts The Director At Risk Of Contempt And Plaintiffs' Recent Motion To Enforce The Injunction Order Illustrates That Risk.

In granting a preliminary injunction, the district court ordered 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 71). As the Director argued in her opening brief, the district court erred in limiting the Director to one form of corrective treatment, in-home shift nursing services, though that particular corrective treatment is not mandated by the Act. *See* AT Br. at 25; *see also Machlett Labs., v. Techny Indus.*, 665 F.2d 795, 797 (7th Cir. 1981) (observing that when the district court merely "adopts verbatim the findings and conclusions of the prevailing party they may therefore be more critically examined") (internal quotation marks omitted).

Moreover, "[s]ince an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 332 (7th Cir. 1984); *see* Fed. R. Civ. P. 65(d)(1); *Patriot Homes, Inc. v. Forest River Hous.*, 512 F.3d 412, 414-15 (7th Cir. 2008); AT Br. at 24-25. The injunction order in this case does not

provide explicit notice of what conduct is outlawed. Instead, it requires the Director to take unspecified additional steps to arrange for Plaintiffs and the Class to receive in-home shift nursing services. And within just two months of the injunction order being entered, Plaintiffs filed their first motion in the district court, claiming that the Director had "failed to comply with" the order. R. at 1018. Although the Director had identified specific strategies to improve staffing levels, including the use of certified nursing assistants to care for Plaintiffs when their parents are at home, *see* R. at 1160, Plaintiffs unilaterally rejected her response as inadequate, *see* R. at 1018-37. The district court denied, in part, this first motion, *see* R. at 1155-62, but given the lack of specificity in the injunction order, it is not hard to imagine that similar motions will be filed going forward.

The Director should not be under threat of judicial punishment without knowing what steps will be mandated by the district court, particularly where Plaintiffs neither established by a clear showing that the Director likely violated the EPSDT and reasonable promptness provisions of the Medicaid Act, nor showed that they would suffer irreparable harm without the entry of a preliminary injunction order. The balance of factors here weighed in the Director's favor, and thus no preliminary injunction was warranted.

CONCLUSION

For these reasons and those stated in the opening brief, 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.

August 26, 2016

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

DAVID L. FRANKLIN
Solicitor General

100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Defendant-Appellant

/s/ Linda Boachie-Ansah
LINDA BOACHIE-ANSAH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2575
LBoachie-Ansah@atg.state.il.us

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) contains 4,227 words.

/s/ Linda Boachie-Ansah
LINDA BOACHIE-ANSAH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2575
LBoachie-Ansah@atg.state.il.us

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 26, 2016, I electronically filed the foregoing Reply Brief 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.

Robert Hugh Farley, Jr.
Robert H. Farley, Jr., Ltd.
1155 South Washington
Naperville, Illinois 60540
farleylaw@aol.com

Shannon M. Ackenhausen
Thomas D. Yates
Legal Council for Health Justice
180 North Michigan Avenue, Suite 210
Chicago, Illinois 60601
tom@legalcouncil.org

Jane Perkins
Sarah Somers
National Health Law Program
101 East Weaver Street
Suite G-7
Carrboro, North Carolina 27510
perkins@healthlaw.org

/s/ Linda Boachie-Ansah
LINDA BOACHIE-ANSAH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2575
LBoachie-Ansah@atg.state.il.us