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

ILLINOIS LEAGUE OF ADVOCATES FOR THE DEVELOPMENTALLY DISABLED, *et al.*	)	
Plaintiffs,	)	**No. 13 C 01300**
	)	
v.	)	
	)	**Hon. Judge Aspen**
ILLINOIS DEPARTMENT OF HUMAN SERVICES, *et al.*,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

LISA MADIGAN
Illinois Attorney General

Thomas A. Ioppolo
Marni M. Malowitz
Laura M. Rawski
Assistant Attorneys General
General Law Bureau
100 West Randolph Street, 13th Floor
Chicago, IL 60601
(312) 814-7198/3700/6534
tioppolo@atg.state.il.us
mmalowitz@atg.state.il.us
lrawski@atg.state.il.us

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Defendants Illinois Department of Human Services ("DHS"), Kevin Casey, as Director of the Division of Developmental Disabilities, and Michelle R.B. Saddler, as Secretary (collectively, "Defendants"), by their attorney, Lisa Madigan, Illinois Attorney General, hereby submit their opposition to Plaintiffs' motion for preliminary injunction.

INTRODUCTION

DHS operates facilities across the State of Illinois referred to as State Operated Developmental Centers for the Developmentally Disabled ("SODCs"). One of those facilities, the Murray Developmental Center ("Murray") is slated for closure later this year. Plaintiffs filed a motion asking this Court to enjoin Defendants from closing Murray (or any other SODC facilities), claiming that the Defendants' closure plan (as contained in the "SODC Implementation Outline and Key Features: Plan Outline," and which is wholly misrepresented by Plaintiffs) violates federal and state law. *See* Pl.'s Second Amended Complaint ("Compl.") at Ex. A. Plaintiffs have not demonstrated a likelihood of success on the merits, but this Court need not look past the fact that it lacks subject matter jurisdiction because Plaintiffs' claims are not ripe for adjudication, amongst other jurisdictional defects.

Even if the Court decides to adjudicate Plaintiffs' claims, the motion for preliminary injunction should be denied because the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq*. (the "ADA") and the Rehabilitation Act, 29 U.S.C. §701, *et seq*. (the "Rehabilitation Act") do not prohibit Defendants from offering services to developmentally disabled individuals in more integrated settings. These statutes forbid discrimination in the form of unjustified institutionalization, and favor de-institutionalization for those willing and able to live in the community. Second, Section 1396n(c)(2)(C) of Title XIX of the Social Security Act, 42 U.S.C. §1396, *et seq*. (the "Medicaid Act") and its agency regulations do not confer to Plaintiffs a right

to receive services at a particular institution to the exclusion of all other options. Finally, Plaintiffs' "*Olmstead*" claim fails because it is not an independent cause of action. Thus, Plaintiffs' motion should be denied in its entirety.

FACTUAL BACKGROUND

A. Illinois' Facilities for the Developmentally Disabled

Currently, DHS operates seven SODCs. *See* Declaration of Kevin Casey, Exhibit A hereto, at ¶2. SODCs, along with certain other Medicaid-certified, private, long-term care facilities, are termed intermediate care facilities for the mentally retarded ("ICF-MRs"), which are also known as intermediate care facilities for individuals with intellectual disabilities ("ICF-IIDs) under the Medicaid Act regulations. 59 Ill. Admin. Code §120.10 (*citing* 42 C.F.R. §440.150). ICF-MRs provide an institutional level of care and frequently serve dozens, if not hundreds, of individuals. Murray, for instance, presently houses 261 individuals in five buildings on a 120-acre, sixteen building property. Ex. A, ¶19.

In early 2012, the State announced that due to its budget crisis, it planned to close Murray, along with Jacksonville Developmental Center ("Jacksonville"). Jacksonville closed in late 2012. Murray is slated for closure on October 31, 2013.[1] *See id.* In addition to the budgetary implications, the closure of Jacksonville and Murray furthers a more years-long initiative by the State, consistent with a nationwide trend, to encourage placement of those previously housed in SODCs in community settings custom-designed to suit the individual's specific needs. Historically, society has isolated developmentally disabled individuals by way of institutionalization. In 1999, the Supreme Court held that under Title II of the ADA, a State must transition an individual from an institution to the community if the State's medical professionals

[1] Defendants previously represented to the Court, based on information available at the time, that the closure was slated to occur November 30, 2013. It has since been confirmed that the scheduled closure date is October 31, 2013.

have determined that the person can be served in the community, the person does not oppose such treatment, and the placement can be reasonably accommodated, taking into account the State's resources and the needs of others with mental disabilities. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999). *Olmstead* changed the landscape by refusing to perpetuate discriminatory institutionalization and requiring states to consider the least restrictive setting possible for every developmentally disabled individual in their care. *Id.* at 599. Since *Olmstead*, states have endeavored to minimize institutionalization by transitioning individuals from large institutions to community settings, including Community Integrated Living Arrangements ("CILAs"), consistent with their obligation to pursue the least restrictive setting that meets the needs of the individual.

A CILA is an "arrangement provided by a licensed community developmental disabilities services agency where eight or fewer individuals with a developmental disability reside under the supervision of the agency. Individuals receive a customized array of flexible habilitation or personal care supports and services in the home, in day programs and in other community locations under the supervision of a community support team[.]" 59 Ill. Admin. Code §120.10. CILA placements are arranged only after the individual has been assessed, and medical professionals have collaborated with the individual and the guardian or family regarding his or her needs, resulting in a customized "person-centered plan." Ex. A, ¶4. Any service that is available in an SODC can be implemented as a part of a person-centered plan for placement in a CILA. *Id*. ¶16. Of the 9,581 developmentally disabled individuals placed in community and home-based settings by DHS, over 85% live in CILAs with 24-hour staffing. Another 573 individuals reside with a 24-hour host family or the individual's own family. *Id*. ¶17. Only 8% of those housed in home and community-based settings reside at CILAs with intermittent care, and

these individuals have been assessed as being willing and able to adapt to this more independent setting. *Id*. In some cases, CILAs provide one-to-one care. *Id*. ¶16. Many studies have corroborated how CILAs have proven to be an excellent way to provide quality care tailored to individuals' specific needs while ensuring that individuals have the opportunity to integrate with society. *Id*. ¶15, Ex. 2.

Community placement is undoubtedly the modern approach to care. Indeed, thirteen states no longer have *any* state operated institutions housing sixteen or more individuals. *See* Average Annual Cost of Care, Exhibit B hereto, at 2. Community placement contemplates personal privacy and the basic freedom to make choices, such as when to go to bed and what to eat – options often lacking in an institutionalized setting. In the current economic climate, when many states, including Illinois, are suffering severe difficulties, community placement is often half the cost of SODC placement, without any substantive change in the ability of the State to meet the particular needs of the individual. Ex. A, ¶18. Transitioning Murray's residents to CILAs could reduce the average cost by over $100,000 per individual annually. *See id*.

B. Illinois' Home and Community-Based Medicaid Waiver Program

Illinois participates in the Medicaid program, which is a joint federal-state initiative designed to provide medical assistance to qualified individuals "whose income and resources are insufficient to meet the cost of necessary medical services." 42 U.S.C. §1396-1. The federal government shares the cost of medical assistance for the poor with states that elect to participate in the Medicaid program. In turn, participating states must adopt medical assistance plans that meet the requirements of the federal Medicaid law. *Id.* §§1396, 1396a.

Under the Medicaid Act, states may apply for a waiver of certain Medicaid Act requirements to obtain funding for home and community-based services (including CILAs) for

individuals who would otherwise require a level of care provided in an ICF-MR. 42 U.S.C. §1396n(c)(1). In Illinois, DHS operates a waiver program, the Home and Community-Based Services for Adults with Developmental Disabilities, to enable Medicaid beneficiaries to transition to community settings. *See* Ex. A, ¶24, Ex. 3.

C. Facility Closures and Current Status of Individual Plaintiffs

To date, no SODC has been slated for closure other than Jacksonville, which already closed, and Murray. Ex. A, ¶¶12, 19. Despite Plaintiffs' bald assertions, no Jacksonville resident was coerced into a particular placement – the resident and guardian were able to choose the setting of the individual's new home. *Id*. ¶11. Every transition to the community or otherwise took place with consent of the guardian and/or individual. *Id*. ¶12. Ultimately, about 60% of the Jacksonville residents chose a community placement. *See id*. An additional 10% chose alternative options including private facilities, and 30% chose to transfer to another SODC, in some cases rejecting the recommendations of DHS. *See id*. Three of the individuals alleged by Plaintiffs to have been coerced into the community were actually among the 30% placed in other SODCs. *Id*. ¶22. Just as was the case with Jacksonville, no one at Murray will be coerced into a particular placement – but staying at the facility past the closure date is not an available choice.

With regards to the Murray closure, to date, none of the named individual Plaintiffs have consented to an assessment. Without an assessment, a person-centered plan cannot be generated for discussion with the individual's guardian and/or family. As a result, Plaintiffs are actively obstructing Defendants' abilities to coordinate a smooth transition before Murray shuts down its operations. The transition process takes time – it includes collaboration with the guardian or family, searching for willing and able providers, placement and a pre-transitional visit (with the guardian's consent) to ensure that the placement is a good fit for the individual. If the pre-

transitional visit fails, the process begins all over again. The refusal to *undergo* the assessment halts the process before it even begins and has profound consequences for Defendants. First, it prevents Defendants from fulfilling their duties under *Olmstead* to consider the least restrictive setting available for each individual. Second, it prevents Defendants from being able to develop a person-centered plan, thwarting the entire transition process. Third, it creates a risk that many individuals at Murray will not successfully complete their pre-transitional visits prior to the facility's closure. Finally, it frustrates *Olmstead*'s requirement that the judgment of the State's medical professionals (including contracted professionals) concerning a resident's needs should be afforded considerable deference.

Plaintiffs object to the closing of Murray or any SODC until the State implements a plan *Plaintiffs* believe complies with federal and state law. Their claims are without merit, and this Court is without subject matter jurisdiction. Accordingly, Plaintiffs' motion should be denied.

ARGUMENT

Plaintiffs have twice amended their Complaint since the filing of their motion for preliminary injunction, without amending that motion or supporting brief. To the extent the Second Amended Complaint rests on legal theories or claims not argued in Plaintiffs' motion or seeks relief against the Governor, those issues are not addressed in the instant response because they were not addressed in the motion. Plaintiffs seek a preliminary injunction to stop the closure of any SODC facility, including Murray, until the purported "plan" complies with state and federal law. A preliminary injunction is "[a]n equitable, interlocutory form of relief," that is "an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Girl Scouts of Manitou Council, Inc., v. Girl Scouts of the U.S. of Am., Inc*., 549 F.3d 1079, 1085 (7th Cir. 2008) (quotations omitted). Here, Plaintiffs' request for injunctive relief should be

denied because their claims are not ripe for adjudication, as all they seek is an impermissible advisory opinion on the course of future events. Further, nothing about the state's plan violates federal law, and thus, Plaintiffs have failed to establish a likelihood of success on the merits. Plaintiffs also cannot demonstrate that the balance of hardships tips in their favor, as they seek to saddle the State with enormous, unrealistic burdens and duplicative costs.

A. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Claims Because They Are Not Ripe for Adjudication, and Plaintiffs Lack Standing.

"The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (quotations omitted). Plaintiffs fail to meet two requirements for Article III jurisdiction: ripeness and standing. To have standing, Plaintiffs must allege an injury fairly traceable to the allegedly unlawful conduct that is likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The injury alleged must be distinct and palpable rather than conjectural. *Id*. Ripeness is essentially standing doctrine in a temporal dimension. Even between proper parties, a suit may be premature because there is no showing of actual or imminent harm. *Harris v. Quinn*, 656 F.3d 692, 700 (7th Cir. 2011). Plaintiffs' claims are not ripe for adjudication because: (1) only Murray has been slated for closure, and thus any claims addressing the hypothetical closure of other facilities is improper; and (2) Defendants have not violated any Murray resident's federal rights and have done nothing to indicate that Plaintiffs' federal rights will be violated. Plaintiffs have established no existence of an injury-in-fact, and therefore also lack standing.

i. Plaintiffs' Claims Are Based on Mere Speculation of Hypothetical Events, and Therefore Are Not Ripe for Adjudication.

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998)

(quotations omitted). A case must involve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *N.C. v. Rice*, 404 U.S. 244, 246 (1971) (quotations omitted). This Court's jurisdiction is only invoked if Plaintiffs present a ripe controversy. Ripeness requires consideration of: (1) fitness of the issues for judicial review; and (2) the hardship to the parties of withholding court action. *Texas*, 523 U.S. at 300-01. A "reasonable probability of future harm," is insufficient because for the Court to judge a "hypothetical future violation" would be to render an advisory opinion. *Harris*, 656 F.3d at 700.

If a case contains contingencies, it is not fit for judicial review, and there is no controversy. *Arc of Virginia, Inc., v. Kaine*, No. 09-cv-686, 2009 WL 4884533, at *7 (E.D. Va. Dec. 17, 2009). In *Harris v. Quinn*, the Governor issued an executive order directing the State to recognize a union as an exclusive representative for a group of home-care personal assistants working with State-run Medicaid waiver programs, should they unionize. 656 F.3d at 695. In response, the personal assistants filed suit seeking to challenge the fair share fees to which they would likely be subjected if they ultimately unionized, claiming they were "harmed by the mere threat of an agreement requiring fair share fees" and that the Executive Order made unionization likely. *Id*. at 696. The Seventh Circuit rejected that argument, finding the controversy was not ripe, as the "only violations alleged by the plaintiffs may never occur." *Id*. at 700.

Similar to *Harris*, the only violations alleged by Plaintiffs may never occur, and the fitness requirement cannot be satisfied. First, Plaintiffs allege that Defendants are not only closing Murray, but intend to close all SODCs. Plaintiffs' Complaint concedes that this is mere speculation and that they are "informed and believe[]" that the State intends to eventually

eliminate SODC facilities. *See* Compl. at ¶¶28, 29, 30, 35, 52, 58, 60. These speculative allegations fall far short of showing "actual injury." Only Murray is currently slated for closure.

Second, Plaintiffs speculate that they will be forced to accept a transfer into a community placement, both in the case of Murray's closure, and in the case of the other hypothetical closures. In actuality, Plaintiffs residing in the Murray facility have refused to even be assessed – thus, no community placement has even been suggested let alone forced upon them. As to the other facilities, no closure has been slated, so no plan has been put into place to transition all residents out of their respective SODC facility. *See Arc of Virginia*, 2009 WL 4884533, at *7 (dismissing ADA and Rehabilitation Act claims as unripe where plaintiff challenged potential transfers, though assessments and subsequent placements had not yet been conducted, and any indication of unlawful activity was "uncertain" or "may not occur at all.") (quotations omitted).

Third, Plaintiffs speculate that any community placement would be so inappropriate and substandard that it would violate Plaintiffs' rights. In reality, Plaintiffs refuse to even meet with Defendants' professionals – insisting that any placement outside of an SODC would not only result in failure, but would be unlawful. *See* Compl. at ¶¶7, 58, 59, 60. Plaintiffs also speculate that their wards would be living "independently" without proper staffing. *Id.* at ¶¶6, 59. Plaintiffs further speculate about what actions the Defendants would take *if* a community placement subsequently failed. *See id.* at ¶¶61-62. This Court cannot assess whether a placement is so deficient as to violate an individual's rights or second guess the State professionals' recommendations when an offer of placement does not yet exist, and may never exist. What Plaintiffs are actually requesting (improperly) is that this Court instruct Defendants how to carry out the Murray closure and how to address potential problems that may hypothetically arise.

Although an analysis of the fitness factor sufficiently disposes of Plaintiffs' un-ripe claims, Plaintiffs also cannot satisfy the hardship factor. Hardship turns to the immediacy of the alleged threat. *See Arc of Virginia*, 2009 WL 4884533, at *10. The threat must be direct, mere uneasiness is insufficient. *Id*. Because Plaintiffs have not been recommended for and forced into a proposed community placement (nor will they be forced into any such placement), there simply is no risk of hardship. *See id*. at *10.

Even if Plaintiffs' claims were supported by federal law (which they are not), they are simply not ripe for disposition, and in light of the fact that they have not even been offered a potential community placement, the threat of actual injury is speculative.

ii. Plaintiffs Have Not Established that There Is an Injury-in-Fact, and Thus They Lack Article III Standing before this Court.

Article III standing requires: (1) an injury-in-fact; (2) a causal relation between the injury and the challenged conduct; and (3) redressability. *Harris v. Quinn*, No. 10-cv-02477, 2010 WL 4736500, at *10 (N.D. Ill. Nov. 12, 2010) ("*Harris II*") (citations omitted). When *Harris* was before the District Court, it was dismissed on both ripeness and standing grounds for essentially the same reasons: the plaintiffs could not establish that they had "sustained or [were] immediately in danger of sustaining some direct injury," but rather, were anticipating an injury that may not occur. *Id.* at *10. To be clear, the plaintiffs in *Harris II* lacked standing because their claim involved nothing more than a mere threat. The court in *Harris II* defined "injury-in-fact" as "an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical." *Id*. at *10. Plaintiffs cannot establish standing for essentially the same reasons. There is no injury or immediate danger. As addressed below, being required to leave Murray does not make injury imminent, as Plaintiffs have no legal right to stay at Murray. Such a danger could only exist if Plaintiffs were provided a community

plan and told they were being forced to accept the plan against their will. Accordingly, Plaintiffs lack standing, and this Court does not have subject matter jurisdiction to hear this motion.

B. Plaintiffs' Claims Are Partially Barred by Eleventh Amendment Sovereign Immunity.

i. The Eleventh Amendment Bars any Request that this Court Order Defendants to Comply with State Law.

If the Court were to grant injunctive relief, it could only do so for violations of *federal* law. Plaintiffs' requested relief includes an injunction that Defendants comply with state mental health laws. Although *Ex Parte Young* provides an exception to Eleventh Amendment Immunity for certain prospective injunctive relief, the exception is a narrow one that does not extend to injunctions ordering state officials to comply with *state* law. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 105-106 (1984) (*citing Edelman v. Jordan*, 415 U.S. 651 (1974)). Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106. Thus, any request to enjoin Defendants on the basis of a violation of state law should be denied.

ii. The Eleventh Amendment Bars Certain Claims against DHS.

A state agency such as DHS is not subject to suit in federal court under the Eleventh Amendment, subject to limited exceptions, including where Congress has abrogated the immunity. *In. Prot. & Advocacy Servs. v. In. Family & Soc. Servs. Admin.*, 603 F.3d 365, 370 (7th Cir. 2010). This Court lacks jurisdiction to order injunctive relief against DHS to the extent it is based upon Section 1983 or the Medicaid Act and its supporting regulations. *See id.*

C. Plaintiffs Cannot Satisfy the Requirements for the Extraordinary Relief of a Preliminary Injunction.

i. Plaintiffs Have Not Demonstrated a Likelihood of Success on the Merits.

a. Plaintiffs Cannot Succeed on a Claim to Stop the Closure of a Particular Facility, Namely Murray.

As a preliminary matter, Plaintiffs motion is unclear as to whether they wholly object to the closure of Murray, or only object to the closure of Murray under what Plaintiffs have alleged is the current "Plan." To be clear, Plaintiffs do not have a protected right under any law to remain in or be placed in a *particular* facility.

Courts have indicated that when an individual is being afforded care in a nursing home or similar facility, there is no right to continued residence in that particular facility. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980) (rejecting the notion that the applicable Medicaid provisions or the Due Process Clause confers a right to continued residence in the nursing home of one's choice)*; see also Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003) (holding that Illinois' refusal to adopt plan for expanding the number of ICF/MRs in one region did not violate Medicaid laws, and noting that the aim of the statute was never to "require the creation or authorization of new facilities."); *Rolland v. Patrick*, 562 F.Supp.2d 176, 185 (D. Mass. 2008) ("neither federal nor [Massachusetts] law gives [plaintiffs] the right to reside in a particular facility.").

In *Lelasz v. Kavanagh*, a district court faced with closure of a state-operated school for disabled individuals explained:

> It is certainly true that closing a school may cause some residents deemed inappropriate for community placement to be relocated…The Court recognizes that in some cases hardship will result. The reality is, however, that the State has always possessed the power—and frequently exercises the power—to relocate its residents for its own administrative needs. If it so desired, the State could unilaterally close any of the State schools, for economic reasons or otherwise. The ability of individual residents and parents to fight closure of their own school would likely be limited to political means.

783 F.Supp. 286, 298 (N.D. Tex. 1991). Similarly, individual Plaintiffs here may face hurdles while adjusting to life outside of Murray, but the closure does not confer them with a federal right to keep the facility open. The reality that an individual receiving benefits from the State does not have a federal right to choose a particular institution from which to receive benefits is part and parcel with basic notions of federalism – recognizing that the State has significant autonomy as to its operations. Accordingly, any claim of right to remain at Murray or any other particular facility is without merit.

b. Plaintiffs Fail to Establish a Violation of Title II of the ADA or Section 504 of the Rehabilitation Act

Plaintiffs allege Defendants are violating the ADA and Rehabilitation Act by: (1) closing all SODCs; (2) inadequately assessing Murray residents for community placement; and (3) coercing individuals into community-based settings. The ADA and Rehabilitation Act (together, "Discrimination Statutes") are anti-discrimination laws requiring States to serve individuals with disabilities in the least restrictive setting appropriate. The Discrimination Statutes do not require, as a matter of state policy, that institutional settings be perpetuated – quite the opposite. To be sure, individual placement decisions must be based on professional judgment and respect patient choice, but the broad claim that these laws require an SODC to stay open turns these laws on their head. Plaintiffs have not stated viable claims under the Discrimination Statutes because: (1) Defendants are closing Murray, not all SODCs, but even if all SODCs were closing, the aim of these statutes is *deinstitutionalization* in an effort to stop discrimination[2]; and (2) the assessment process, which individual Plaintiffs refuse to undergo, is intended to ensure that all individuals receive necessary accommodations, which is certainly not discriminatory in nature.

[2] Additionally, even if all SODCs were closing, there are private ICF-MRs available as well to provide an institutional level of care.

In enacting the ADA, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that discrimination "persist[ed] in such critical areas as...institutionalization[.]" 42 U.S.C. §12101(a)(2)-(3). Title II of the ADA, under which Plaintiffs bring their claim, concerns public services and provides:

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

Id. §12132. Consistent with this mandate, the regulations implementing Title II require states to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. §35.130(d). Their preamble defines "most integrated setting" to mean a "setting that enables individuals with disabilities to interact with non-disabled individuals to the fullest extent possible." *Id*. pt. 35, App. A, p. 450 (1998). In other words, the ADA envisioned a future where the disabled would no longer be shunned from society in institutions isolated from the community, and it placed an affirmative duty on the State to ensure that individuals were deinstitutionalized and integrated. *Olmstead*, 527 U.S. at 597, 599 ("[t]he ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living.").

Similar to the ADA, Section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. §794(a). The Rehabilitation Act's anti-discrimination principles direct states to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals[.]" 28 C.F.R. §35.130(d). In view of the similarities between the

relevant provisions of the Discrimination Statutes, courts construe and apply them in a consistent manner. *Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004). Both statutes plainly favor integrated, community-based treatment over institutionalization where appropriate. *See id.*

In *Olmstead*, the Supreme Court made clear the illegality of "unjustified isolation" of persons with disabilities. 527 U.S. at 597. Such isolation constitutes discrimination because: (1) placing individuals who can benefit from community settings in institutions perpetuates unwarranted assumptions that they are incapable or unworthy of participating in community life; and (2) such confinement diminishes everyday quality of life for those residing in institutions. *Id.* at 600-01. Under the ADA, placement of persons with mental disabilities in community settings rather than institutions is required when: (1) the State's treatment professionals have deemed it appropriate; (2) it is not opposed by the individual; and (3) the placement can be reasonably accommodated, taking into account the state's resources. *Id.* at 587. To be sure, *Olmstead* requires Defendants to consider community placement. *Id.*; *see also Rolland*, 562 F.Supp.2d at 185 ("If anything, federal law *requires* Defendants to consider community placement[.]").

Plaintiffs, without citing a single case, seize on *Olmstead's* qualifying language to allege that their potential transfers from Murray to more integrated settings violate the Discrimination Statutes. Plaintiffs misinterpret these laws. Though Defendants are not coercing anyone, the relevant inquiry is not whether their transfers are desired, but whether they are discriminatory. Offering services in a more integrated setting is simply not discrimination. *See Richard S. v. Dept. of Developmental Servs.*, No. SA CV 97-219-GLT, 2000 WL 35944246, at *3 (C.D. Cal. March 27, 2000) ("There is no ADA provision that *providing* community placement is a discrimination."). Plaintiffs provide no authority to support why the converse would also be true. The Discrimination Statutes forbid "unjustified institutionalization," not de-institutionalization,

because de-institutionalization does not implicate the same concerns of social isolation and perpetuation of stereotypes that these laws were implemented to prevent. *See Olmstead*, 527 U.S. at 600.

Additionally, *Olmstead* afforded great deference to the State's medical professionals. 527 U.S. at 602, 605. Here, DHS professionals are of the growing mindset that the inquiry hinges not on "community versus institution" but on what *type and scope* of community services will serve to meet an individual's needs. Plaintiffs refuse to even discuss community placement. By filing this lawsuit, Plaintiffs have summarily determined that any conclusion reached by Defendants' professionals that contradicts their opinion is not only woefully inadequate but unlawful. To be sure, Plaintiffs point to nothing in the assessment process that they purport to be *discriminatory*. Defendants' conduct is hardly unlawful – indeed if anything, it is questionable why a guardian with a fiduciary duty would not also feel required to at least *discuss* what the State's professionals believe to be the most integrated setting available for that individual. *See* 755 ILCS 5/11a-17(a), (e). For these reasons, Plaintiffs' ADA and Rehabilitation Act claims have no likelihood of success on the merits and do not support Plaintiffs' request for injunctive relief.

c. Plaintiffs Fail to Establish a Violation of Section 1396n(c)(2)(C) of the Medicaid Act, either through a Private Right of Action or Section 1983.[3]

Plaintiffs have no individual right to sue under the laws they invoke. Plaintiffs suggest that Section 1396n(c)(2)(C) of the Medicaid Act is actionable under: (1) an implied private right of action; and (2) Section 1983. As to the former, the Seventh Circuit already ruled that this provision confers no private right of action in *Bertrand v. Maram*. 495 F.3d 452, 456, 459 (7th Cir. 2007) (holding that no "arguably relevant provision in the Medicaid Act[,]" including

[3] Plaintiffs' Second Amended Complaint also brings a Section 1983 claim under the Equal Protection Clause. As Plaintiffs do not rely upon this claim in their motion for preliminary injunction, Defendants do not address it herein.

Section 1396n(c)(2)(C), provides a private right of action). In fact, *Bertrand* wholly undermines Plaintiffs' claim that they have a right to prevent Murray's closure, as it acknowledges that Section 1396(c)(2)(C) "does not *make* any particular option 'available' to anyone[,]" particularly if the facility is closing and no longer "available." *See id*. As this Court is bound by *stare decisis* to follow *Bertrand*, Plaintiffs have no likelihood of success on the merits of that claim.

The Seventh Circuit has not yet expressly ruled, however, on whether Section 1396n(c)(2)(C) may serve as a basis for a claim under Section 1983. Although the issue of whether a statutory violation may be enforced through Section 1983 is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute, both inquiries overlap in that a court must determine whether Congress intended to create an individual, federal right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (citations omitted). It is rights created by statute, not mere "benefits" or "interests" implied by a statute, that may be enforced. *Id*. Traditionally, three factors were used to determine whether a federal statute creates enforceable rights: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the asserted right must not be so vague and amorphous that its enforcement would strain judicial competence; and (3) the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (citations omitted). The Supreme Court in *Gonzaga* narrowed the scope of this inquiry, emphasizing that for a statute to create such rights, its text must be "phrased in terms of the persons benefited" and have an "unmistakable focus" on an identifiable class. 536 U.S. at 283. When considering a statute enacted pursuant to the Spending Clause (like the Medicaid Act), no federal basis for private enforcement exists unless Congress speaks with a "clear voice" and manifests an "unambiguous intent" to confer individual rights. *Id.* at 273-74 (citations omitted).

The Seventh Circuit has acknowledged the Supreme Court's "hostility" to interpreting provisions of the Medicaid Act as creating individual rights. *See, e.g.*, *Bruggeman*, 324 F.3d at 911 (declining to interpret other Medicaid Act provisions as creating rights) (*citing Gonzaga*, 536 U.S. 273). Under the *Gonzaga* framework, even "a class of the statute's principal beneficiaries" may have no basis for private enforcement. 536 U.S. at 281. Here, Plaintiffs cannot establish a violation of Section 1983 under Section 1396n(c)(2)(C) of the Medicaid Act because the provision does not confer an individual right of "choice," as they claim.

The Medicaid Act provides that a state may obtain a waiver to provide payment for the cost of certain home or community-based services (including CILAs). *See* 42 U.S.C §1396n(c)(1). For a waiver to be granted, the state must assure the Secretary of the federal Department of Health and Human Services that individuals who are eligible to participate in a State's waiver program are "informed of the feasible alternatives, if available under the waiver, at the *choice of such individuals*, to the provision of inpatient hospital services, nursing facility services, or [ICF/MR] services." *Id.* §1396n(c)(2)(C) (emphasis supplied).

Here, Plaintiffs attempt to latch onto the "choice of such individuals" language and suggest it confers an individual right to choose to receive care at an SODC. This strained interpretation cannot prevail under *Gonzaga*. The provision is not directed at Medicaid recipients or phrased in terms of creating individual rights. *See* 42 U.S.C. §1396n(c)(2)(C). Rather, the provision is phrased in terms of what the State must assure to the Secretary. *See id.*; *see also Gonzaga*, 536 U.S. at 280, 283; *In. Prot. & Advocacy Servs.*, 603 F.3d at 377("[S]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.") (*quoting Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)). Section 1396n(c)(2)(C) certainly does not unambiguously confer an

individualized right on the Plaintiffs. *See Gonzaga*, 536 U.S. at 280, 283; *see also M.A.C. v. Betit*, 284 F.Supp. 2d 1298, 1307 (D. Utah 2003) (holding that Section 1396n(c)(2)(C)'s "choice" provision did not contain unambiguous rights-creating language). Consistent with *Bertrand*'s holding that the provision does not create a private right of action, the provision cannot serve as a basis for a Section 1983 claim.

Plaintiffs cite to the Ninth Circuit case of *Ball v. Rodgers* in support of their position. 492 F.3d 1094, 1103 (9th Cir. 2007). Defendants acknowledge that *Ball* held that Section 1396n(c)(2)(C) could be construed to grant Medicaid recipients with rights enforceable under Section 1983. *Id*. But *Ball* is deeply flawed, and its analysis would almost certainly be rejected by the Seventh Circuit. First, *Ball* mistakenly emphasized the pre-*Gonzaga* analysis of statutory creation of individual rights. *Ball* employed a broad reading of *Blessing v. Freestone*, despite the Supreme Court's admonition that *Blessing*'s language should not be "read to suggest that something less than an unambiguously conferred right is enforceable by § 1983." *Gonzaga*, 536 U.S. at 282-283). Second, the Ninth Circuit haphazardly dodged *Gonzaga*'s requirement that a statute be "phrased in terms of the persons benefited" by merely noting that the provision includes the word "individual" (and completely ignoring that the provision is directed at the regulated State's relationship with the Secretary). *See* 492 F.3d at 1107. Third, the holding in *Ball* is difficult to reconcile with the Seventh Circuit's binding ruling in *Bertrand*. *Compare Ball*, 492 F.3d at 1103 *with Bertrand*, 495 F.3d at 459. The *Bertrand* opinion heeds the Supreme Court's warning that Spending Clause provisions, like Section 1396n(c)(2)(C) of the Medicaid Act, rarely create individual rights and refused to find a private right of action. The Ninth Circuit declined to follow the Supreme Court's directive, and this Court should not adopt its reasoning.

1. Plaintiffs Fail to Establish a Violation of Any Medicaid Act Regulatory Provision.

Plaintiffs' reliance on provisions of the Medicaid Act's implementing agency regulations – 42 C.F.R. §§441.302, 441.303(d), and 483.440 – is also misguided.[4] The "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not .... Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Sandoval*, 532 U.S. at 291 (quotations omitted). The majority of circuits have further held that where a regulation's enforcing statute confers no federal right, the regulation alone cannot create an enforceable right. *See Johnson v. City of Detroit*, 446 F.3d 614, 629 (6th Cir. 2006); *S. Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.*, 274 F.3d 771, 790 (3d Cir. 2001); *Harris v. James*, 127 F.3d 993, 1008 (11th Cir. 1997); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987). Even the Ninth Circuit *Ball* opinion relied upon by Plaintiffs concurs with the majority: "[A]n agency regulation cannot confer an individual right enforceable under § 1983[.]" *Ball*, 492 F.3d at 1114. Although the Seventh Circuit has not expressly ruled on the issue, in *Mungiovi v. Chicago Housing Authority*, the Court doubted whether individuals may "enforce a federal regulation that creates a right independent of any federal statute[.]"). 98 F.3d 982, 984 (7th Cir. 1996). Logically, congressional intent cannot be revealed by an agency regulation that was not drafted by Congress. Because Plaintiffs' invocation of the agency regulations alone cannot create a private right of action nor a right enforceable under Section 1983, their regulatory claims fail.

2. Alternatively, Even if Section 1396n(c)(2)(C) and Implementing Regulations Confer an Enforceable Right, Plaintiffs Fail to State a Claim under that Right.

[4] Plaintiffs also cite to several provisions of the Illinois Administrative Code, suggesting it confers them with some cause of action. As explained above, the Eleventh Amendment bars the Court from ruling on an alleged violation of state law, and so those provisions are not addressed.

Even if this Court were to determine that the Medicaid Act provision or implementing regulations invoked by Plaintiffs confer them with enforceable rights, they cannot be reasonably interpreted to force the State to keep Murray open. Under Section 1396n(c)(2)(C), even if an individual has a right to "choice" as Plaintiffs allege, that choice is limited to "available" options. *See Bertrand*, 495 F.3d at 459. In other words, the facility must be willing and able to serve the individual, not slated for closure. Certainly Plaintiffs could not invoke Section 1396n(c)(2)(C) to force a private ICF/MR they liked to stay open just because the facility accepts Medicaid.

Plaintiffs' claims under the Medicaid Act's implementing regulations are equally flawed. Regulation Section 441.302(d) provides that the State must offer assurances to the Centers for Medicare and Medicaid Services ("CMS") that a Medicaid recipient or his or her legal representative will be—"(1) [i]nformed of any feasible alternatives available under the waiver; and (2) [g]iven the choice of either institutional or home and community-based services." 42 C.F.R. §441.302(d). Section 441.303(d) similarly provides that the State must furnish to CMS a description of the agency's plan "allowing beneficiaries to choose either institutional services or home and community-based services." *Id*. at §441.303(d). At best, these two regulations support a choice between institutional care as opposed to community-based care under a waiver – not a choice between SODCs as opposed to other types of ICF-MRs. Certainly these regulations do not confer an individual with a right to choose a specific SODC like Murray. Even if Plaintiffs had an enforceable right to choose between institutional and community-based care, enjoining the closing of Murray is simply not a remedy that falls within the scope of that alleged right.

Plaintiffs' claims underscore a misunderstanding of the Medicaid Act. "Medicaid is a payment scheme, not a scheme for state-provided medical assistance, as through state-owned hospitals." *Bruggeman*, 324 F.3d at 910. The State is not required by Medicaid to independently

operate any facility at all, much less a particular facility. Indeed, thirteen Medicaid-participating states operate no SODCs and rely on privately owned ICF-MRs to make an institutional level of care available. *See* Ex. B, at 2. The proper solution is not to mandate that partially emptied facilities remain open for the few individuals who wish to remain there. Medicaid is a fund-matching program that supplies no basis to force a State to fund a particular facility. And it certainly does not confer federal courts with the authority to second guess the State's budgetary choices.

Plaintiffs' citation to the transfer provisions contained in 42 C.F.R. §483.440 is perplexing given their refusal to participate in the transfer process. Plaintiffs interpret the cited provision to require that Murray: "(a) provide a reasonable time to prepare…for the transfer or discharge, (b) develop a final summary of the individual's program plan and (c) provide a post-discharge plan of care." Pl.'s Memo. at 17 (*citing* 42 C.F.R. §§483.440 (b)(4)-(5)). Even if Plaintiffs had enforceable rights under these provisions, Plaintiffs are the ones obstructing the process from occurring. Defendants would like to have the individual and guardian's involvement in the assessment process but are not being granted access to the individuals. Plaintiffs are the ones refusing to engage in the process of developing an appropriate person-centered plan. As such, their own actions cannot be seen as Defendants' failure to comply with Sections 483.440(b)(4)-(5).

Plaintiffs have no individual rights under the provisions invoked, and even if they did, Defendants have not violated them. Plaintiffs have no likelihood of success on the merits of their claims under the Medicaid Act and its regulations, and their motion should be denied.

d. Plaintiffs' "*Olmstead*" Claim Fails to Establish any Violation, as It Articulates No Cause of Action.

Plaintiffs put forward no authority to support their claim for a separate cause of action under *Olmstead*. The cases cited do not acknowledge the creation of a new cause of action based upon *Olmstead*, and the language quoted in their brief is only dicta. *See* Pls.' Memo at 20 (*quoting Arc of Virginia*, 2009 WL 4884533, at *8 (dismissing claims as un-ripe); *People First of Tn. v. Clover Bottom Developmental Ctr.*, 753 F.Supp.2d 701, 711 (M.D. Tenn. 2010) (upholding in part a settlement agreement). As *Olmstead* interprets rights under the ADA, Defendants incorporate their analysis under the ADA, *supra* at 13-16.

ii. The Balancing of Harms Favors Defendants.

Plaintiffs request that Defendants be enjoined from closing Murray until a new plan is generated to satisfy Plaintiffs, but this requested relief tips the balancing of harms in favor of Defendants. Defendants are already assessing consenting individuals to begin the process of finalizing person-centered plans, choosing providers and initiating pre-transition visits. Defendants undoubtedly have an obligation under federal law to continue working to integrate those who are willing into the community, and transfers from Murray will ensue. Plaintiffs' requested relief would require DHS to operate Murray at only partial capacity, leaving the State to bear the burden of continuing to operate a large-scale (but partially empty) institution, including its fixed overhead costs. If the closure of Murray was delayed, it could easily double the financial obligation of the State, at the expense of the State and ultimately, the taxpayers.

CONCLUSION

As set forth above, Plaintiffs' request for injunctive relief should be denied.

Respectfully submitted,

/s/Laura M. Rawski
Thomas A. Ioppolo

LISA MADIGAN

Illinois Attorney General

Marni M. Malowitz
Laura M. Rawski
Assistant Attorneys General
General Law Bureau
100 West Randolph Street, 13th Floor
Chicago, IL 60601
(312) 814-7198/3700/6534
tioppolo@atg.state.il.us
mmalowitz@atg.state.il.us
lrawski@atg.state.il.us