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,** vs. **LLINOIS DEPARTMENT OF HUMAN SERVICES**, *et al.*, **Defendants.**	Case No. 13 C 01300 Hon. Marvin E. Aspen

PLAINTIFFS' POST HEARING BRIEF

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Plaintiffs Illinois League of Advocates for the Developmentally Disabled, *et al.*, by their attorneys, Taft Stettinius & Hollister, submit this Post Hearing Brief as ordered by the Court at the close of the hearing on the Preliminary Injunction (the "Hearing").

There are 1,790 residents in seven State Operated Developmental Centers (SODCs) in Illinois. This case is about those individuals, the future of their treatment and where they will live. It is about their families who care about them and also about how the State of Illinois will treat them. It is about the most vulnerable and fragile citizens whose severe and profound medical and behavioral needs must be provided pursuant to the Medicaid Act, the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, and the Equal Protection Clause of the U.S. Constitution.

This case seeks to enjoin the State plan to deprive and deny Plaintiffs the proper placement, programs and services to which they are entitled. Governor Quinn's Rebalancing Initiative seeks to reduce by 600 the population of the SODCs by the end of fiscal year 2014, through a re-evaluation and re-casting of Plaintiffs so that the State can steer them to community placements of 1-4 bed Community Placements by pretending they are less disabled than they are and depriving them of services which are essential to their life and well-being.

The evidence presented at the Hearing shows that Defendants have violated, and wish to continue to violate, Plaintiffs' rights under Title II of the ADA and Section 504 of the Rehabilitation Act. It also shows Defendants' systematic deprivation of meaningful choice afforded to Plaintiffs under the Medicaid Act, thereby depriving them of the full access to needed services to which they are entitled, and, further, depriving Plaintiffs of the Equal Protection of

the Law under the 14th Amendment to the Constitution of the United States, all in violation of 42 USC 1983.[1]

I. PRELIMINARY INJUNCTION STANDARD.

Plaintiffs[2] have met their burden and a preliminary injunction should be granted. A preliminary injunction requires that the moving party must demonstrate that: (1) there is some likelihood of success on the merits of the claim; and (2) the plaintiff has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied. *Korte v. Sebelius,* 735 F.3d 654, 665 (7th Cir. 2013). A plaintiff "need only demonstrate at the preliminary injunction stage that it has a 'better than negligible' chance of succeeding on the merits so that injunctive relief would be justified." *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 897 (7th Cir. 2001). If the moving party meets this threshold burden, the court weighs the competing harms if an injunction is granted or denied and also considers the public interest. *Id.*, citing *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir.2012).

II. THE EVIDENCE SHOWS THAT DEFENDANTS VIOLATED THE ADA THROUGH (1) INTENTIONAL CONDUCT; (2) BY REFUSING A REASONABLE ACCOMMODATION; AND (3) BY ENACTING A POLICY THAT DISPROPORTIONALLY IMPACTS CERTAIN DISABLED PEOPLE, THEREBY SHOWING A LIKELIHOOD OF SUCCESS ON THE MERITS.

A Title II ADA claim "may be established by evidence that (1) the defendant intentionally acted on the basis of disability, (2) the defendant refused to provide a reasonable

[1] The evidence supports multiple theories advanced by Plaintiffs and therefore there will be cross references to the relevant facts under Plaintiffs' arguments as many facts will support more than one theory of Defendants' violations of federal law.

[2] References throughout this brief will be made to "Plaintiffs" to collectively include the named Individual Plaintiffs and entities, as well as all putative class guardians and their wards who are SODC residents, or were at times relevant to this lawsuit. Additionally, the term "Plaintiff-Guardian(s)" will be used herein to reference, specifically, the individually named and putative class member guardians. Finally, when referencing a loved one who is a ward of one or more Plaintiff' Guardians, the term "Plaintiff Resident" will be used herein.

accommodation, or (3) the defendant's rule disproportionally impacts disabled people. June 20, 2013 Order, Doc. No. 98, p. 10, citing *Wis. Comm. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006).

A. DEFENDANTS INTENTIONALLY VIOLATED TITLE II OF THE ADA.

Section 201 of Title II 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.

[§ 201, as set forth in 42 U.S.C. § 12132].

Under the Title II regulations promulgated by the Attorney General set forth in 28 C.F.R. pt. 35 and beginning with 28 C.F.R. §35.130 titled *General Prohibitions against Discrimination*, the following is prohibited by a "public entity":

> (a) No qualified individual with a disability shall, on the basis of 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 public entity. 28 C.F.R. §35.130 (a).[3]

[3] A public entity is further prohibited from engaging in the following:
(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability-
(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
(iv) Provide different or separate aids, benefits, or services to individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided others;
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(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

Accordingly, to prove a Title II violation, the plaintiff must first establish that: (1) he is a qualified individual with a disability, (2) he was denied the benefits of the services, programs, or activities of a public entity or otherwise subjected to discrimination by such an entity, and (3) the denial or discrimination was by reason of his disability. *Phipps v. Sheriff of Cook County*, 681 F. Supp. 2d 899, 913 (N.D. Ill. 2009). Evidence entered at Hearing demonstrated that Defendants intentionally discriminated against the Plaintiff Residents under Title II by excluding them from the SODC program and freedom of choice under Medicaid. (*See* SOF at Sections I and II).[4]

1. Plaintiffs Are Qualified Individuals with Disabilities.

It is undisputed that the Plaintiff Residents are qualified individuals with disabilities under the ADA. (*See* SOF at Section III.) Each has several profound developmental disabilities, including mental retardation, and behavioral and medical issues. *Id.* *See* 42 U.S.C. 12102 (defining "disability" under ADA). Plaintiff Residents are "qualified" individuals as they currently receive benefits of ICF-MR services at Murray through participation in the Illinois SODC Program, funded by the Illinois Medicaid Plan. (*Id.* at Sections I–II.)

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(b)(8) A public entity shall not impose or apply criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

28 C.F.R. §35.130 (b)(1)(i)-(iv),(vii), (b)(8).

[4] All references herein to Plaintiffs' Statement of Facts and recited as "SOF" with the appropriate Roman numeral section designation.

2. The Rebalancing Initiative and the CRA/ACCT Process Deprived Plaintiffs of the Services Provided of the SODC Program and Denied Them Meaningful Choice under Medicaid.

a. The Hearing Evidence Showed that Defendants' Plan Deprives Plaintiffs of the SODC Program.

Defendant Department of Human Services ("DHS" or Defendant) currently operates seven SODCs in Illinois. The undisputed DHS Division of Development Disabilities FY 2013 Program Manual ("2013 DHS Program Manual"), explains that the Division of Developmental Disabilities ("Division") has oversight for the Illinois system of programs and services specifically designed for individuals with developmental disabilities. One such program is the SODC Program which provides ICF-MR services to which Plaintiffs are entitled. "SODCs provide intensive services that presently cannot be provided in family homes or in community-based residential programs for people with developmental disabilities, primarily mental retardation." (*Id.*) In particular, SODCs are described as:

> specialized Intermediate Care Facilities/Developmental Disabilities (ICF/DD) for persons with developmental disabilities who are unable to be served in a community setting due to intense behavioral and/or medical difficulties. Admission to one of the eight SODCs occurs only after a careful screening by the Pre-Admission Screening (PAS) agency and review team that includes the individual, guardian, family, current and prospective service providers, network staff from the Division and representatives from the SODC.

(*Id.* p. 19). In order to be eligible for a SODC, a person "[m]ust have a developmental disability and require intensive supports/supervision not available in a community setting. *Id.* The "priority" or "target population" for placement in a SODC are "[i]ndividuals with developmental disabilities who are unable to have needs met in the community." *Id.*

Through the Defendants' policies and continued action consistent with the Rebalancing Initiative (a policy discussed in further detail below), the Plaintiffs' have been (will be)

intentionally excluded from the SODC Program. This intentionally exclusion was initially no secret. (*See* SOF at Sections V-VII.)

b. Defendants' Plan Deprives Plaintiffs of Meaningful Choice as Required by the Medicaid Act.

Through the Defendants' policies and continued action consistent with the Rebalancing Initiative (a policy discussed in detail in Sections V-VII of Plaintiffs' Statement of Facts), the Plaintiffs have been (and will be) deprived of the ability to participate in and have the freedom of choice under Medicaid. The record is full of with examples of how Defendants denied choice, gave contradictory statements about choice and failed to provide meaningful alternatives and choice. (See Statement of Facts and transcript references referred to therein.)

Medicaid, and the Illinois SODC Medicaid Program, require "choice" between two valid options: (1) institutional care (ICF-MR); or (2) community care. *See* 42 U.S.C. 1396a(a)(23); 42 C.F.R. 441.302(d); 42 C.F.R. 441.303(d); 42 U.S.C. 1396n; 59 Ill. Admin. Code 120.50; 50 Ill. Admin. Code 120.180. In their application for the Home and Community Based Services Waiver Program ("Waiver"), Defendants have claimed and assured the federal government that the State provides "choice" between institutional or community care. *See* the State of Illinois Waiver Program (Docket. No. ("Doc. No.") 40-5, p. 6) (stating that the Waiver "affords participants the choice between participant direction, including both budget and employer authority and more traditional service delivery, or a combination of the two options."); *see id.*, p. 7 ("Choice of Alternatives" – "The State assures that when an individual is determined to be likely to require the level of care specified for this waiver and is in a target group specified in Appendix B, the individual (or, legal representative, if applicable) is: (1) informed of any feasible alternatives under this waiver; and (2) given the choice of either institutional or home

and community-based waiver services."). The Waiver involves services in the community. By denying, hiding and not providing choice, the CRA/ACCT process is designed to and does exclude Plaintiffs from participation in the SODC Program, and instead forces the Waiver upon Plaintiffs.

Similar to Plaintiffs' exclusion from the SODC Program, and part or as a result the same scheme, Defendants' policies further result in intentional exclusion from choice and services of the Illinois Medicaid SODC Program.

3. Defendants Rebalancing Initiative Constitutes an Intentional Violation of Title II of the ADA By Excluding Participation *By Reason of Disability*.

The State's Rebalancing Initiative implementation through the CRA/ACCT process is a direct and intentional violation of the protections afforded Plaintiffs under Title II of the ADA. In order for the Defendants to achieve their stated objective of reducing the SODC population by assessing, transitioning, and placing Plaintiffs into 2-4 bedroom community home, the Defendants must first "recast" Plaintiffs' disabilities. Only after "recasting" Plaintiffs' disabilities can the Defendants then act to remove and exclude the Plaintiffs from the SODC Program. The evidence shows that the Rebalancing Initiative and the CRA/ACCT Process is itself designed to exclude Plaintiffs from the benefits and services of the Illinois SODC Program. Once "recasted," the DHS Defendants intend to exclude and have excluded Plaintiffs from participating in and receiving the benefits of the Illinois SODC Programs through "forced" 1-to-4 bed community placement.

The denial or discrimination or the exclusion of Plaintiffs in the Illinois SODC Program is intentional. *See Flynn v. Doyle*, 672 F. Supp. 2d 858, 878 (E.D. Wisc. 2009) (identifying or equating the phrases "[i]ntentional discrimination, or discrimination 'by reason of disability.'")

In order to force Plaintiffs into a 1-to-4 bed community placement the Plaintiffs must qualify for the Waiver. In other words, Plaintiffs must be transitioned from receiving Medicaid Institutional Care in an SODC to the Waiver. The CRA/ACCT Process is designed to and in fact accomplishes this result by recasting Plaintiffs' and SODC residents' (including former Jacksonville residents') disabilities in a way to effect the transition to the community and to otherwise qualify Plaintiffs for the Waiver. (*See* SOF, Sections VI, VII).

By "choosing" for the Plaintiffs through "recasting," and forcing community placement, the DHS Defendants have intentionally excluded Plaintiffs on the basis of disability from participating in the SODC Program.

As established during the Hearing, Defendants achieve the stated goal of recasting as follows and primarily through the Rebalancing Initiative and the CRA/ACCT Process:

a. The Rebalancing Initiative

In February 2012, Governor Patrick Quinn introduced his *Rebalancing Initiative*, which slated Jacksonville Developmental Center ("Jacksonville") (181 residents) and Murray (252 residents) for closure. The Rebalancing Initiative declared that DHS "will reduce the number of residents served by [SODCs] by at least 600 by the end of FY14. This will permit DHS to close up to four facilities in the next 2.5 years." Pursuant to the *Rebalancing Initiative*, Jacksonville closed on December 3, 2012. *See* SOF, Setion I(a). *Id.* ¶ 16.

In order to further the Rebalancing Initiative, the State hired Community Resource Associates ("CRA") to implement the CRA/ACCT Process. "ACCT" stands for "Active Community Care Transitions." Under a contract with the State, CRA is paid approximately $180,000 a month to implement the CRA/ACCT Process. *Id.* p. 18.

b. The CRA/ACCT Process: A Mandatory Process with a Stated Purpose of Transition to the Community.

The CRA/ACCT Process is a mandatory process whereby SODC residents are assessed by CRA to live in a group home CILA. Moreover, the "sole goal" of the CRA/ACCT Process is to transition SODC residents to 1-4 bedroom community home placements. (*See* SOF, Sections V-VI.)

Initially, at the September, 2012 Guardian Meeting, Casey gave Murray guardians the "direct answer" that "there's no legal requirement to involve yourself in the CRA process" and that guardians "do not have to go through the CRA process." In response, almost 200 Murray guardians issued "no contact" letters directing DHS to not allow CRA to access records or assess their wards. (*See* SOF, Section VII(a).

After the 2012 Guardian Meeting, however, Defendants reversed course and informed Murray guardians the CRA/ACCT Process was mandatory. On February 20, 2013, Murray guardians received a letter from Saddler informing them DHS, through CRA, "will be assessing the needs of all residents of Murray," and that "[t]he law requires [DHS] to perform these assessments." Saddler also told guardians CRA "will be integrally involved" in these required assessments, "which will include record reviews, in-person meetings, and evaluations." The letter did not inform Murray guardians they could opt out of this process. Trial Exhibit 17 also includes a March 27, 2013 email from Doyle stating "We are fully prepared to move forward with evaluations even without guardian consents if necessary." Saddler's letter was issued one month after Dufresne issued a memo to Casey and Doyle questioning whether guardian SODC choice should stand. At the hearing, Starr testified (after being impeached) the CRA assessments began, over the objection of the residents, in July 2013. Doyle made this decision. (*Id.*)

Mayer testified he is the quality control over the CRA/ACCT assessment process. Mayer assesses Murray residents under the CRA/ACCT Process to determine what supports would be necessary for any individual to live in the community. In order to accomplish this, CRA already has made the assumption the Murray resident can live "in the community." Each assessment begins with this proposition, and CRA and Mayer "reverse-engineer" the assessment to figure out how this is done. This process follows Mayer's philosophy that "all people who have intellectual disabilities, with the appropriate supports, can be successful in the community." Mayer also testified 96-97% of residents CRA assesses are designated for the community. Mayer explained this statistic was "the purpose of the process." Once a SODC resident has been "reverse-engineered" for 1-4 bedroom community home placements, CRA/ACCT Process then continues and a Provider and a particular group home is selected. (*See* SOF, Section VI (b)).

c. CRA/ACCT Selection of "Qualified" Providers.

The CRA/ACCT selection process is governed by DHS document entitled "Eight Principles & Values." Principle #4 states, "Settings are preferred to be 1-2 persons and not more than four persons." Principle #7 states "We will seek providers who subscribe to these principles and values." Starr testified he, along with several group home providers, received a February 5, 2013 email from Doyle telling providers what they must do to be part of the CRA/ACCT Process. Doyle directed providers to embrace DHS' Eight Principles and Values for supporting individualized transitions to the community. Doyle also required providers to sign a pledge whereby they commit to embracing the Eight Principles and Values. (*See* SOF, Section VI(d)).

d. The Pre-Determined CRA/ACCT "Community Option."

The Pre-Admission Screening Agent ("PAS Agent") is part of the CRA/ACCT Process, and among other things, is involved in the provider selection process and presenting "options" to

SODC resident guardians.. The PAS Agent "is statutorily and by contract with DHS, responsible for plan development, case management and monitoring of individuals (including routine in-person visits) receiving community based DD services." The PAS Agent for Murray is Anne Yaunches and Ms. Yaunches's duties or role in the overall scheme included:

> As a PAS agent, I play an integral role in the ACCT process developed by the State. When a Murray resident and/or guardian desires information on community services or elects to go through the ACCT process, I am required to make a determination as to all the services for which the individual is eligible. I make this eligibility determination using the standards provided in the DHS DDD PAS Manual. The PAS Manual requires the PAS agent to reflect eligibility determinations on a DDPAS10 form, which is entitled Determination Summary & Presentation and Selection of Service Options. An example of a completed DDPAS10 form I filled out for a former Murray resident is attached as Exhibit 1.

Dufresne testified "guardians are always provided all of their options through the PAS agency. But, the evidence at hearing showed the PAS Agent refused to certify an SODC option for any Murray resident, and assessed as part of the Rebalancing Initiative through the CRA/ACCT Process.

It is undisputed that Ms. Yaunches makes eligibility determinations after reviewing documents prepared by CRA and by following DHS policies. "Because of this requirement, I have determined that none of the individuals transitioned out of Murray through the CRA/ACCT process to date has been eligible for an SODC." Yaunches Aff. ¶ 5. When confronted with the lack of choice presented by these forms at the hearing, Casey stated the PAS Agent/DHS forms were "bad forms" and "need[] correction." (*See* SOF, Section VII (b)).

e. The "Recasting" Accomplished Through the CRA/ACCT Process, Makes Clear that Defendants Have Excluded Plaintiffs By Reason of Disability.

The DHS Defendants are currently and intentionally excluding Murray residents from the Illinois SODC Program, even though the DHS Defendants continue to provide services to others

who can receive services at their appropriate level. In other words, the DHS Defendants are intentionally excluding Plaintiffs from "participation in … the benefits of the services, programs, or activities of a public entity. And, "but for" the decision to recast Plaintiffs, pursuant to a predetermined agenda, Plaintiffs would not be excluded from the SODC Program and from participation in the full gamut of ICF-MR services and choice under the Medicaid Plan. This is direct evidence of intentional discrimination.

In particular, the Defendants through the CRA/ACCT Process are recasting particular SODC residents as "less disabled" in order to justify placement in the community under the Waiver Plan. The "priority" or "target population" for placement in a SODC are individuals with developmental disabilities who have been previously determined to be an individual whose needs cannot be met in the community.[5] (SOF, Section III).

But now, for the first time, and in some cases years after a particular SODC admission, SODC residents, through the CRA/ACCT Process are simply "reverse engineered" primarily based on a "record review" and a one hour "interview" where residents are determined by CRA to be appropriate for community placement. (SOF, Section VI). Their respective needs are recast and eliminated so that they can be forced into the community.

To the extent that Title II ADA case law requires that the "on the basis of" language requires a "but for" analysis, *Wisconsin Community Services, Inc. v. City of Milwaukee,* 465 F.3d 737 (7th Cir. 2006), any such analysis is satisfied here. The target of the Rebalancing Initiative is SODC residents that are profoundly and severely disabled and the resulting discrimination – exclusion from State Programs – is accomplished on the basis of disability by recasting, or re-

[5] No person other than an SODC resident is required by Secretary Saddler to go through the CRA/ACCT process.

qualifying or re-characterizing the particular disabilities of certain SODC residents as fit for the community by simply identifying "supports" for community placement.

B. THE EVIDENCE SHOWS THAT DEFENDANTS HAVE FAILED TO PROVIDE A REASONABLE MODIFICATION TO AVOID DISCRIMINATION.

Title II's implementing regulations provide that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making modifications would fundamentally alter the nature of the services, program, or activity." *Id.* citing 28 C.F.R. § 35.130(b)(7).

Defendants' current plan of placing Murray residents into only 1-to-4 bed group homes *and nowhere else* violates the ADA because it fails to provide Plaintiffs a reasonable modification. Plaintiffs are entitled to the choice of SODC care or a valid community care option that adequately meets their needs. The DHS Defendants plan to offer only 1-to-4 bed community placements not only grossly fails to meet their needs, but also jeopardizes the health and safety of the residents. Moreover, there has been no proper assessment that the 1-to-4 bed homes can adequately meet the needs of these individuals, including the provision of ICF-MR type services. Lastly, transfer to community placements that are still under construction or otherwise defective cannot serve as a reasonable modification. (SOF, at Sections VI-VIII). As is clear from the evidence submitted at the Hearing, Plaintiffs are recast to modify their needs in the community instead of the community placement providing a reasonable accommodation to them.

C. DEFENDANTS DISCRIMINATED AGAINST PLAINTIFFS UNDER THE ADA AS THEIR CLOSURE PLAN AND CRA PROCESS IMPACTS DISPROPORTIONATELY PERSONS WITH SEVERE AND PROFOUND DEVELOPMENTAL DISABILITIES WHO ARE IN NEED OF ICF-MR SERVICES.

Disparate impact claims are "cognizable under the ADA." *Swan v. Bd. of Ed. of City of Chicago*, 2013 WL 3872799, at *5 (N.D. Ill. July 25, 2013), citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003). Disparate impact "occurs when an entity adopts a policy or practice that is facially neutral in its treatment of different groups but that in fact falls more harshly on one group than another and cannot be justified by a nondiscriminatory necessity." *See Swan*, 2013 WL 3872799, at *5 (holding that plaintiffs pled a viable Title II ADA disparate impact claim by alleging that defendant's school closure plan disparately impacted children in special education programs by not adequately meeting the children's needs).

Plaintiffs have shown that the Rebalancing Initiative and the CRA/ACCT process, which excludes, deprives and sends SODC residents only to 1 to 4 bed group homes through use of the front-loaded pre-determined CRA/ACCT process disparately impacts the Plaintiffs from participation in the Illinois SODC Program (and services provided thereunder), and services that provide for the right to choose between adequate and safe institutional and community services. Only SODC residents like Plaintiffs are subject to CRA/ACCT process and only they are "evaluated" to have their needs redetermined for placement to a less effective and appropriate level of care. (*See* SOF, Sections V-VIII.)

Moreover, in *Amundson v. Wis. Dept. of Health Servs.*, 721 F.3d 871, 874 (7th Cir. 2013), the Seventh Circuit held that, as a matter of law, a plaintiff could allege an ADA Title II/Rehabilitation Act claim by showing discrimination between members of the ADA protected class, or in other words, "intra-class claims of discrimination." The court reached this holding by

citing to *Olmstead* and cases cited therein, such as *O'Connor v. Consolidated Coin Caterers Corp*., 517 U.S. 308, 312 (1996), which "concluded that discrimination against older persons within the class of all persons protected by the [ADEA] ... could violate that statute." *Amundsen*, 721 F. 3d at 874, citing *Olmstead*, 527 U.S. at 598 n. 10; *see Hahn ex rel. Barta v. Linn County*, 130 F. Supp. 2d 1036, 1054-55 (N.D. Iowa 2001) ("The majority [in *Olmstead*] … cited cases establishing the contrary proposition that discrimination is still actionable, even if it is only between members of a protected class. Thus, [plaintiff] can set forth a claim of discrimination even if it is only between members of his protected class, namely, the disabled."); *Cable v. Dept. of Dev. Servs. of State of Cal*., 973 F.Supp. 937, 942 (C.D. Cal. 1997) ("To conclude discrimination between the disabled and non-disabled is prohibited by the ADA, yet discrimination among disabled individuals is not, would conflict with the purposes of the ADA. The effect of either type of discrimination is the same.")

(*See* Section on Equal Protection, *infra*, for further description of comparison group being treated better than Plaintiffs.)

III. THE EVIDENCE ESTABLISHES THAT DEFENDANTS' REBALANCING INITIATIVE AND CRA/ACCT PROCESS DEPRIVED PLAINTIFFS RIGHT OF CHOICE UNDER THE MEDICAID ACT IN VIOLATION OF 42 USC 1983.

Plaintiffs'' Supplemental Brief on the Need to Enjoin Defendants' 42 USC 1983 Violation of the Medicaid Act, filed August 7, 2013 (Doc. No. 160), continues to provide the principles for Plaintiffs' assertions that Defendants' Rebalancing Initiative and the CRA/ACCT process, as written and as undertaken and enforced against the Plaintiffs, has deprived them of entitlements afforded them by several provisions of the Medicaid Act, but principally 42 U.S.C. 1396n(c)(2)(C).

The uncontested affidavits clearly set forth the manner in which Defendants denied, prevaricated and hid any possibility of choice from the affiants. The affidavits of guardians delineated specific encounters with CRA, Mark Doyle and Kevin Casey, including subjects such as the insistence on 2-4 bed placements in the community; the lack of assistance and offer of placement in any other residential facility; the coercion to choose only a 1-4 bed (or smaller placement); and the presentation of forms with pre-marked "choice" for 1-4 bed placement presented by the PAS agency -- all proof of the Defendants' orchestration to prevent and hide from the guardians the ability or knowledge of the choice which they are entitled to under the Medicaid Act.

The documentary evidence also makes clear that choice was not part of the CRA Process. Secretary Saddler's letter of February 20, 2012 indicates that "by law" everyone at Murray had to be evaluated, and that only CRA could complete the evaluation. CRA's Dr. Michael Mayer made it clear on the witness stand that 96-97% of those going through the CRA Process were selected for the community because, "that was the point" of the Process. Certainly, requiring every resident to go through the CRA Process with the admitted “point” being to send everyone to the community underscores the complete lack of the guardian's right to choice under the Medicaid Act.

The testimony from the Hearing further shows that Mark Doyle met with Marsha Holzhauer and on several occasions told her that the only "choice" was 1-4 bed placements, and that "we're going to close all the SODCs eventually anyway." (*See* SOF, Sections V-VIII).

In an attempt to circumvent the conclusion of denied choice, Defendants offered an email from Mark Doyle to Rita Winkler, wherein he tells Ms. Winkler that if she wants another

placement she better get to the social worker and figure it out quickly. Frankly, it is insulting both to Plaintiffs and to this Court that Defendants suggested that such a cavalier and unspecific statement should be deemed legally sufficient as an offering of "choice" required under the Medicaid Act. Defendants' attempts at cross examination of the Plaintiff Guardians, on the topic of choice, undermined, rather than helped their position. Beyond her isolated, pedestrian statements conveniently recalled by Mark Doyle and Kevin Casey at the Hearing, there is no substantive evidence from Defendants that they provided any meaningful choice but 1-4 bed placements. *See Leonard v. Mackereth*, 2014 WL 512456 at * 8 (E.D. PA, Feb. 10, 2014) (requiring meaningful choice under 42 U.S.C. 1396n(c)(2)(C) as discussed *infra*). The testimony of Greg Shaver made clear that alternative placements would be extremely difficult due to: (a) persistent lack of available beds in the general geographic area, (b) a lack of financial resources to create more accommodating places; and (c) the reality of lower rates of reimbursement for care to CILA providers; (d) lower paid staff and fewer professional services. Moreover, and quite telling, there was no evidence presented by Defendants of any specific, quantifiable steps or processes presented to or undertaken by Defendants to assist the Plaintiff guardians with "placement options." Defendants' witnesses hedged on the stand and were unable to provide any specific steps or processes relating to options "offered" in support of "choice."

Regarding meaningful choice, a recent Pennsylvania federal case is instructive to demonstrate the lack of meaningful choice here. In *Leonard v. Mackereth*, 2014 WL 512456, the district court noted that Pennsylvania, like Illinois, participates in the Medicaid Waiver program (called in Pennsylvania the "OBRA Waiver"). *Id.* at *2. The Plaintiffs in that case were all autistic and residing at home with their parents receiving medical assistance under the Waiver.

Id. In late December of 2011, Plaintiffs learned that Pennsylvania was to make cuts in their benefits which resulted in their request to be placed in an ICF/ORC.[6] *Id.* When the State denied their request, the *Leonard* Plaintiffs filed a four count complaint against the Department of Public Welfare (equivalent in this regard to the Illinois Department of Human Service). *Id.* Count IV of the *Leonard* complaint set forth violations of 42 U.S.C. § 1396n(c)(2)(C) for failing to provide a choice between OBRA Waiver services (akin to Illinois' Medicaid Waiver) and ICF/ORC services. *Id.* at *3.

The court granted summary judgment for the Plaintiffs on Count IV of the complaint. In so doing, the court analyzed extensively the meaning of "medical assistance" as defined in the Patient Protection and Affordable Care Act (42 U.S.C. § 1396d(a) since March 23, 2010 as follows: "(t)he term "medical assistance" means payment of part or all of the cost of the following care and services *or the care and services themselves,* or both (emphasis added by the Court). *Id.* at *6. The *Leonard* Court noted that the meaning assigned to "medical assistance" (payment for services only) in *Bruggemann ex rel. Bruggemann v. Blagojevich,* 324 F.3d 906, 910 (7th Cir, 2003) has been overturned by the new and clear congressional amendment, and that the *Leonard* defendant now had to provide payment for care and services themselves, or both. *Id.* at *5-8.

Additionally, the court discussed what it called the "freedom of choice" requirement, 42 USC1396n(c)(2)(C), finding that since the state has an obligation to provide care and services, it

[6] Pennsylvania's residential facilities for developmentally disabled ("DD") individuals, ICF/ORC (Other Related Conditions), are places where they received round the clock, active treatment. 2014 WL 512456 at *1. These placements are equivalent to Illinois' SODCs and ICF/DDs in that each provide the ICF-MR services set forth in the Medicaid Act.

must give recipients a *meaningful choice* to receive ICF/ORC services and that the state had not done so. *Id*. at *8.

The factual parallels between *Leonard* and this case are striking, although not identical. While the *Leonard* plaintiffs sought choice to get into a facility offering ICF-MR services (the ICF/ORCs), the Plaintiffs here are already in an ICF-MR facility but are being reclassified improperly through a specious philosophy, driven by the CRA/ACCT process which recasts them into something they are not -- persons who are able to live in the community because the process says they do not "need" SODC services, effectively removing their ability to choose those services. The *Leonard* court made clear that this is not a legally sufficient discharge of the Defendants' duty to provide meaningful choice. In *Leonard*, similar to here, the State closed facilities under a previous Pennsylvania "rebalancing initiative."

In this case, the record is replete with evidence of what the Defendants have done to deny the required choice of services to Plaintiffs. Defendants have told the Plaintiffs they have only one "choice." To that end, they have put together a process which eliminates any meaningful choice Plaintiffs have for SODC services by recasting Plaintiffs as persons not in need of SODC services and thereby removing their entitled choice from the spectrum which should be available under 42 U.S.C. 1396n(c)(2)(C) and to which they are entitled under the Medicaid Act. (*See* SOF, Sections $-VIII).

Clearly, choice was never part of this plan nor could it be. And just as clearly the failure to give a choice violated 42 U.S.C. 1396n(c)(2)(C) because once the choice is eliminated all other services to which Plaintiffs are entitled are likewise eliminated and given not as an entitlement but as a matter of grace by the State of Illinois at their whim. This is not the mandate

of the Medicaid Act for the provision of services to developmentally disabled adults and therefore this Court should find that the CRA/ACCT process deprives Plaintiffs of their entitlement to choice and services under Medicaid Act and is therefore a violation of 42 USC 1983.

IV. THE PLAINTIFFS HAVE BEEN DEPRIVED OF EQUAL PROTECTION OF THE LAW BECAUSE ONLY THEY HAVE BEEN REQUIRED TO GO THROUGH THE CRA/ACCT PROCESS WHICH RECASTS AND MINIMIZES THEIR DISABILITY WITHOUT ANY COGNIZABLE RATIONAL BASIS.

In its October 8 opinion (Doc. No. 286), this Court found that Plaintiffs stated a valid claim for violation of their rights under the Equal Protection Clause of the Fourteenth Amendment in violation of 42 U.S.C. § 1983.[7] The Amended Complaint alleges, *inter alia*, that Defendants' forced actual transfers of Plaintiffs without ensuring that medically necessary services will be available, deprives them of their right to receive medical benefits in a fair, unbiased and non-discriminatory manner. The Second Amended Complaint also alleges that Defendants have deliberately treated them differently than others who receive medical services from the Medicaid Program.

The evidence in support of these allegations was presented during the Hearing and reflected that defendants deprived Plaintiffs of programs and services afforded to other developmentally disabled adults. Defendants acted to deprive Plaintiffs of their right to choose through the CRA/ACCT process, which was singularly designed to force them into the community. (*See* SOF, Sections V-VIII). It is, further, evident from the testimony of several other witnesses for Defendants that the CRA/ACCT process was only employed against the

[7] Prior to the Hearing, the Plaintiffs filed a supplemental memorandum of law supporting the Motion for Preliminary Injunction on the basis of these Equal Protection Claims. The legal basis therefore is incorporated herein by reference. (Doc. No. 334).

residents of SODCs targeted by the State for population reduction. Importantly, since the CRA/ACCT process was used only with the Plaintiff Class Members, the balance of DD individuals in the DHS system remained free to choose all available services while only the Class Member SODC residents were not. No one except SODC residents are required to go through the CRA/ACCT process. No one except SODC residents are having their disabilities downgraded. No one else is having their choice and their services deliberately taken from them by a front loaded, predetermined process whose only purpose is to send them to the community, with a reduction in services provided.

The evidence shows that there are two groups of developmentally disabled adults in Illinois: The severely and profoundly developmentally disabled SODC residents for whom the CRA/ACCT process is required in order to recast them to become ineligible for SODC care and lose necessary services as a precursor to forced community living and those who do not reside in SODCs and who are not subject to the CRA/ACCT process. The target and purpose of this process is clear from the Hearing evidence. The fact that SODC residents have been singled out from the general adult DD population and denied equal access and equal choice is also evident from the evidence presented at trial.

The fact that SODC residents are being treated differently and denied their necessary services through this CRA/ACCT process is undeniable and, indeed, Defendants do not deny this. Defendants, rather, trumpet this as an accomplishment which they seek to achieve, and they attempt to justify it with two flawed "rational bases," one of which has been summarily rejected several times by the Court - namely a mischaracterized *Olmstead* obligation. The second flawed rational basis advanced is an argument about saving money.

As to the cost-savings rational basis, there is little evidence. Defendants seek to rest on conclusory statements and hand-picked studies from other states on cost reduction that have no application to Illinois or its programs. Moreover, Kevin Casey admitted that there may not be a cost reduction, or it is possible the cost of care could increase. (*See* SOF, Section V). Cost reduction, he testified, is not the prime reason to do this. *Id.*

Also of note is the testimony of Greg Shaver, Plaintiffs expert who is a provider of services to the developmentally disabled along the full spectrum of available service options. His testimony makes clear that cost savings are entirely speculative and probably unrealistic and that with respect to approximately one-third of the Murray residents with whom he is familiar the costs are higher. (SOF, Section V). Indeed, the lack of cost savings is an area in which the States' expert and the Plaintiffs' expert agree, there may be no cost savings.

Finally, Defendants' costs savings rationale is another manufactured construct put into place for the Hearing and contradicts other statement made by Defendants as to their reasons for targeting SODCs. The reason asserted in several of Defendants' briefs in front of this Court, and in its testimony before the Illinois Health Facilities Planning Board on the reasons for closing the Jacksonville Developmental Center and other SODCs, is not to reduce the state budget costs for the treatment of the developmentally disabled, but to take the dollars utilized for the treatment of the most severely and profoundly developmentally disabled residents of SODCs and use those funds on people currently receiving home based services or community services. (SOF, Section V). This last is freely and openly proclaimed by the Defendants in the evidence presented in this proceeding.

The Defendants would turn one group of the developmentally disabled against another group of developmentally disabled and discriminate between them – not to save the State dollars across the board, but rather to deprive one group (the Plaintiff/putative class) of necessary services and confer dollars and services on another group for no other reason than that our Plaintiffs' disabilities are too difficult and costly to deal with in any setting and the others are not. In simple terms they want to deprive SODC residents of their services to give the money formerly utilized by SODC care to someone else whose disability is easier and cheaper for the state to handle. This is not budget reduction. There is no evidence adduced to even pretend that it is. This is not equal protection of the law. This is not equal access to service as required by the Fourteenth Amendment or 42 U.S.C. 1983 and this process should be enjoined.

On the basis of the foregoing Plaintiffs have shown more than a negligible chance of success on the merits of their Equal Protection claim.

V. DEFENDANTS' EXHIBITS 205 AND 206 SHOULD BE STRICKEN ON RELEVANCE, FOUNDATION AND UNFAIR PREJUDICE GROUNDS.

Plaintiffs object to the introduction of Defendants' Exhibits 205 and 206. The first exhibit (Ex. 205), dated October 23, 2013, is a report submitted by "Equip for Equality" documenting their "findings" as to the nature of CRA/ACCT group homes and Murray residents who have been sent there on never-ending pre-transition visits. The second exhibit (Ex. 206) is a December 20, 2013 memorandum documenting and relying on the findings of the Equip for Equality report. These exhibits were also produced to Plaintiffs only a few weeks before the hearing, giving Plaintiffs no opportunity to depose Equip for Equality personnel and address these reports in Plaintiffs' affidavits (submitted well before receipt of these exhibits).

These exhibits should not be allowed in this case or otherwise admitted into evidence. They are not relevant, have no foundation and cause unfair prejudice to Plaintiffs. Equip for Equality is not a party to this case, nor is it a guardian, court-appointed monitor or Murray employee. No Equip for Equality employee was ever listed as a witness, nor was one ever deposed. And, this Court actually excluded Equip for Equality's request to come into this case as an *amicus*. Equip for Equality seeks to undermine this Court's ruling by introducing their report, created merely months before the hearing, in order to relitigate their presence in this case. For these reasons alone, these exhibits should be stricken.

Furthermore, the exhibits themselves reveal their irrelevance. Both exhibits were created well after the events that gave rise to this Court's issuance of a TRO in May, 2013, as well as the written and oral discovery that took place in this case. These exhibits were produced on the eve of trial, and Plaintiffs had no opportunity for cross-examination. And, the Equip for Equality report (205), upon which Casey's report (206) relies, does not list any names of individuals who gathered information for the report, nor does it list dates for which inspections or interviews occurred. While hearsay rules are relaxed at a preliminary injunction hearing, reports (1) created by anonymous persons, (2) with no dates, (3) created on the eve of trial, (4) produced on the eve of trial, (5) created by an entity excluded from this case, and (6) used through a witness with no personal knowledge of the report findings, should not be allowed as evidence.

VI. PLAINTIFFS' INITIAL RESPONSE ON DEFENDANTS' DEFENSES AND STATE INTERESTS, AS APPLICABLE

Plaintiffs reserve the right to respond to the Defendants' defenses and state interests in their reply.

As an initial matter, Defendants reliance on *Olmstead* as argued by its lead counsel in closing continues to be misplaced. This Court has dismissed the *Olmstead* argument several times during the course of these proceedings on the grounds that said defense is based upon a misreading of *Olmstead* and is in opposition to the Supreme Court's clear admonition in *Olmstead* not to use that decision to foreclose residential institutional treatment for persons who need it and continue to desire it.

Additionally, Defendants' affirmative defense of cost savings had little or no credible evidence as their own Director of Developmental Disabilities indicated that the Rebalancing Initiative might not save one dime and that it did not matter if it did. A bald assertion of cost savings with little or no evidence to support the conclusion is not sufficient.

Defendants' legal challenges to the ADA, Rehabilitation Act, and Medicaid claims have been denied by the Court. The facts presented at hearing support Plaintiffs' claims. Defendants' evidence does little if anything to overcome Plaintiff's testimony.

VII. PLAINTIFFS' IRREPARABLE HARM AND THE PLAINTIFFS' INITIAL RESPONSE ON THE PUBLIC AND STATE'S INTERESTS

The irreparable harm to Plaintiffs is set out in the more than 25 affidavits (mostly unrebutted) of parents and guardians and staff who care for the residents of the Murray Developmental Center.

The examples of the results of the predetermined placements which have resulted from going through the CRA/ACCT process demonstrate the injury which is being done to the well-being of the residents who have been removed from MDC and placed into inappropriate and sometimes dangerous residences in the community. Going through the process itself presents an irreparable harm to the residents who have been recast from their current disability issues that

require SODC care to a person with less severe disabilities that suddenly make him/her appropriate for the community. This recasting becomes a part of the permanent treatment record and changes Plaintiffs' status and eligibility for their needed services. The evidence shows that is not as benign a result as claimed by Defendants. (SOF, Sections V-VIII).

The testimony of Stewart Freeman, the Guardian Ad Litem for 24 Murray residents who are wards of the Office of State Guardian adds to the picture of the considerable physical and mental harm which can befall these residents when placed in improper residential conditions. Examples of persons with PICA in homes which have not been swept for dangerous objects, medicine cabinets which are not locked, staff which is unprepared and unable to respond to residents needs in emergency situations, calls to the police resulting from beating and fights occurring in the presence of inadequate staffing are enumerated in Mr. Freeman's testimony and in the testimony of guardians and staff. (*See* SOF, Section VIII).

Finally, and perhaps most important is the loss of what one court has called freedom of choice under the Medicaid Act. The Defendants' actions and CRA/ACCT process has eliminated anything like a meaningful choice which is required by the Medicaid Act. Only injunctive relief can provide a remedy for that situation.

On the other hand, the State neither articulated nor presented evidence which has shown harm, irreparable or otherwise, which will result to it from the entry of the preliminary injunction order.

Public Interest Considerations.

The Court also asked the parties to consider "how the grant, or denial, of the preliminary injunction" will affect the public interest, including public health and safety." Doc. 360 at p. 2.

Plaintiffs have presented compelling evidence as to the threats directly presented to the Plaintiffs' individual health and safety, but those same threats can be easily transferred to the residents of any town or village where Murray residents might be transferred. Evidence was presented at Hearing showing that many former Murray residents currently living in Defendants' community placements have suffered from lack of attention, lack of resources, and lack of adequate care. To allow such ill-planned community placements to persist is a threat not just to the residents forced to live in Defendants' CILAs, but to the neighbors in the surrounding communities. Most troubling, and most threatening to the public's safety, is the demonstrated inability of employees at CILAs promoted by Defendants to adequately attend to residents in their care. For example, the Court heard undisputed evidence of a fight that occurred at the Greenview CILA. Guardians whose wards have far-greater disabilities and disorders, especially residents who are prone to violent outbursts, are terrified about leaving their loved ones in this type of environment. As Dr. Kelly explained, "there is certainly a good deal in the media in recent years about developmentally disabled people being shot in their own family homes, as well as being abused by the police and thrown in jail because they don't understand their behavior and think they are high on drugs." Jan. 7, 2014 p.m. Trans. 228:16-21. Defendants have not yet demonstrated that they are able to adequately care for Murray residents in the community. Therefore they should not be permitted to risk the health and well-being of current Murray residents and their potential neighbors by allowing DHS to proceed with the CRA/ACCT process.

Clearly, under the requirements necessary to enter a preliminary injunction the danger into Plaintiffs is considerable and the equities accrue to them and against the Defendants.

CONCLUSION

For these reasons, Plaintiffs request this Court grant their motion for a preliminary injunction, and enter relief consistent with the requested relief discussed in this Court's prior opinions and Docket Numbers 159 and 313, and for any other relief it deems proper.

DATED: March 5, 2014

Respectfully submitted,

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