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. Marvin E. Aspen**
ILLINOIS DEPARTMENT OF HUMAN SERVICES, *et al*.,	)	
Defendants.	)	

DEFENDANTS' POST-HEARING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Regulations

Other Authorities

Defendants Illinois Department of Human Services ("DHS"), Kevin Casey, in his official capacity as Director of the Division of Developmental Disabilities, and Michelle R.B. Saddler, in her official capacity as Secretary (collectively, "Defendants"), by their attorney, Lisa Madigan, Attorney General of Illinois, submit the following post-hearing brief concerning Plaintiffs' Motion for Preliminary Injunction which was heard on January 7-9, 2014.

INTRODUCTION

To obtain a preliminary injunction, Plaintiffs must establish: (1) likelihood of success on the merits; (2) traditional legal remedies are inadequate; and (3) they will suffer irreparable harm if the injunction is denied. If Plaintiffs fail to establish any one of these requirements, the injunction must be denied. *Girl Scouts of Manitou Council v. Girl Scouts of the United States of America,* 549 F.3d 1079, 1086 (7th Cir. 2008). If these elements are met, the Court must then balance the respective harms imposed by a potential injunction both with respect to the parties and the public interest. *Id.* Plaintiffs have not met this standard, legally or factually.

The State of Illinois plans to close the Murray Developmental Center ("Murray"), a state operated facility for the developmentally disabled ("SODC"). This decision is consistent with federal law, particularly the Americans with Disabilities Act ("ADA"), which not only favors, but requires that Defendants evaluate the disabled for placement in the most integrated setting possible. The current statewide Rebalancing Initiative sets out to increase opportunities for community living and diminish reliance on institutions. It is not unique to the developmentally disabled population, as the State is also addressing community placements for the mentally ill. In attempting to stop Murray's closure, Plaintiffs are swimming against the tide of history, public policy, scholarly studies, and federal law. Plaintiffs have shown no likelihood of success in demonstrating that Murray's closure or the closure process violates the ADA, Rehabilitation Act, or Equal Protection Clause, all of which require a showing of *discrimination*. The closure of

Murray and assessment of residents for community placements using clinical judgment is simply not discriminatory. Plaintiffs have also alleged that the closure violates Medicaid because DHS is denying guardian choice in the selection of their next placement. The evidence shows otherwise. First, the record is clear that Plaintiffs *were never told* that they must only accept a placement in a community integrated living arrangement ("CILA"). Second, of those residents who have moved from the Jacksonville Developmental Center and Murray, CILA placements have ***not*** been the only option chosen by guardians. Guardians have at all times retained the choice afforded to them under the law. In fact, Plaintiffs have thwarted Defendants' efforts to provide them with informed choice by refusing to engage in dialogue about placement options. Finally, the only assertions of irreparable harm are speculative at best. Even if Plaintiffs could meet the aforementioned elements, the balance of harms tips in favor of Defendants. Plaintiffs fail to meet their burden as to any element of a preliminary injunction, and the motion should be denied.

ARGUMENT

I. THE ADA AND REHABILITATION ACT CLAIMS LACK ANY LIKELIHOOD OF SUCCESS ON THE MERITS.

Congress passed the ADA to end a long established custom of isolating the disabled from mainstream American life. Title II prohibits discrimination by public entities. 42 U.S.C. §12132.[1] The associated regulations provide that public entities must "administer services, programs, and activities in the most integrated setting appropriate[.]" 28 C.F.R. §35.103(d). "The most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]" 28 C.F.R. Pt. 35, App. B at 673; *see also,* Doc. 42 at 2-3. The State's rebalancing efforts are consistent with the holding of *Olmstead v. L.C. ex rel Zimring*, which held that unjustified isolation of individuals in institutional settings is prohibited

[1] As this Court has noted in an earlier opinion, the legal standards under the ADA and Rehabilitation Act are identical. Doc. 98 at 8, n.3.

discrimination under the ADA, and which requires States to "provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such treatment is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." 527 U.S. 581, 587 (1999). This Court has already ruled that Plaintiffs have no claim under *Olmstead*. Doc. 98 at 9; *see also Sciarrillo v. Christie,* No. 13–03478, 2013 WL 6586569, at *4 (D.N.J. Dec. 13, 2013).

Thus, three evidentiary approaches remain for Plaintiffs' ADA claim: (1) "the defendant intentionally discriminated on the basis of disability; (2) the defendant refused to provide a reasonable accommodation; or (3) the defendant's rule disproportionately impacts disabled people." Doc. 286 at 14 (citing *Wis. Cmty. Servs. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006); *Wash. v. Ind High Sch. Athletic Ass'n*, 181 F.3d 840, 847 (7th Cir. 1999)). As an initial matter, there is no question that the closure of Murray does not violate the ADA: closure of an institution cannot simultaneously be in furtherance of and in violation of the ADA. Plaintiffs concede there is no entitlement to a particular facility, and the case law agrees. Doc. 48 at 1-4; *Bruggeman ex rel. Bruggeman v. Blagojevich,* 324 F.3d 906, 910-11 (7th Cir. 2003); *Rolland v. Patrick,* 562 F.Supp.2d 176, 185 (D. Mass. 2008); *Lelsz v. Kavanaugh,* 783 F.Supp. 286, 298 (N.D. TX 1991), *aff'd* 983 F.2d 1061 (5th Cir. 1993). Medicaid affords choice as discussed below, but neither the ADA nor Medicaid confers a right to stay in a facility slated for closure. *See O'Bannon v. Town Court Nursing Ctr,* 447 U.S. 773, 785-86 (1980). Even though challenging the closure itself and Plaintiffs' wish to remain in the facility indefinitely are both foreclosed under the ADA, this Court held that Plaintiffs stated a claim under the ADA under Rule 8 and 12 standards. However, the record shows there was (and is) no factual support to

back up the Complaint's allegations. As detailed below, Plaintiffs have failed to demonstrate even a negligible likelihood of success on the merits under any avenue of proof.

A. The Record Is Devoid Of Any Evidence Of Intentional Discrimination.

The ADA set out to integrate the disabled and tear down stereotypes that they were "unfit" for community participation. Historically, society has underestimated the developmentally disabled, holding misconceptions about their limits based on a conventional understanding of function and communication. These misconceptions are no longer accepted – they are in fact, illegal discrimination. Unfortunately, these archaic views persist. At the hearing, Plaintiffs argued that some nonverbal Murray residents are so disabled that they can *never* be served in the community and that any effort to discern their preferences about living options is *futile*. Defendants not only disagree with this assumption, but also recognize that acceptance of such a view would directly contradict *Olmstead*.

Plaintiffs have not established any likelihood of success on their claim that Defendants intentionally discriminated against Murray residents "on the basis of disability." Murray is slated to close. From there, Defendants must prepare to transition residents in a safe and healthy manner in light of the closure. In exercising professional judgment, Defendants must be mindful of the integration mandate as interpreted in *Olmstead*. To be sure, *Olmstead requires* Defendants to consider community placement. 527 U.S. at 587; *see also Rolland*, 562 F.Supp.2d at 185 ("If anything, federal law *requires* Defendants to consider community placement[.]"). It was within this context that Defendants hired CRA to assess Murray residents for potential community placement. The basis of the decision to assess Plaintiffs was not an act of discrimination. Rather, Murray is going to close as a matter of the State's prerogative, and the ACCT process was utilized to comply with Defendants' *Olmstead* obligations. To be sure, all of these actions have been in furtherance of compliance with well-established federal law.

i. Plaintiffs Are Not Entitled To Reside In An SODC Outside Murray, But The Option Exists.

Plaintiffs repeatedly refer to their entitlement to an "SODC Program." Doc. 383 at 5-6. There is no right to reside in any SODC, much less a specific one. *Bruggeman,* 324 F.3d at 910-11; *Lelsz,* 783 F. Supp. at 298. Even still, the overwhelming weight of the evidence shows that if Plaintiffs' guardians request that their loved ones be transitioned to another SODC, DHS has indicated they will honor those wishes (above and beyond their legal requirements). (PF ¶¶40-44, 46)[2]. Thus, Plaintiffs are not being denied the benefits of the "SODC Program" and Defendants need not address the remaining merits (or lack thereof) of this claim.

ii. CRA Is Not "Reverse-Engineering" The Assessment Process

Plaintiffs argue that CRA "reverse-engineers" the assessment process to force a conclusion that community placement is appropriate. Doc. 383 at 9-10. Undoubtedly, CRA's work with the State is limited to assessing Plaintiffs for community living – that is what they were contracted to do. (PF ¶15). That does not mean that community placement will be *forced* upon Plaintiffs. Rather, the presumption after *Olmstead* is that community placement is preferred. The weight of professional research and activities of other states are both in accord with this principle, as is federal policy providing states with incentive to increase community placements by offering an enhanced Medicaid match through the MFP program. (PF ¶¶5, 9, 10, 56). Thus, DHS contracted with CRA to assess the level of supports necessary to care for SODC residents in the community setting. This is not "reverse-engineering." Placements other than CILAs are determined outside of the ACCT process. (PF ¶¶38, 45). However, if a guardian chooses to go through the ACCT process to explore community options, CRA will conduct the assessment and determine what services and placements meet the individual's needs. Guardian

[2] "PF" refers to Defendants' Proposed Findings of Fact, found at Doc. 392.

choice as to final placement always exists – a guardian is never forced to accept a CILA, even after going through the ACCT process. (PF ¶¶38-47). Plaintiffs make much about the ACCT process having a focus on community placement: yes, it does, because so does *Olmstead*. But the ACCT process is but one avenue (albeit, preferred) that Murray guardians may utilize in choosing a placement.

Indeed, not starting with the presumption that every disabled individual can succeed in the community, given the proper supports, could be discrimination. Contrary to the view espoused by Plaintiffs, the developmentally disabled should be afforded the same presumptions enjoyed by non-disabled individuals. No one should be presumed incapable of community living. *See Olmstead*, 527 U.S. at 600. By starting with the presumption that all individuals *can* succeed in the community with appropriate supports, in effect putting the disabled on equal footing with the non-disabled, Defendants are in compliance with the ADA.

Finally, Plaintiffs make much about the DDPAS 10 form (a form indicating eligibility for various placements) used in the ACCT process, arguing that because the form indicates an SODC option was not offered, the process is "rigged" to deny choice. (Doc. 383 at 10-11). First, the form shows that the guardian must *consent* to a placement. Second, the form unequivocally establishes that, in addition to community care and other options, institutional care *is an option*, for the resident is eligible for placement in a private ICF-DD. The right that exists is one of institutional care or community care, and the DDPAS 10 form establishes that Defendants honor this choice. *See Bruggeman,* 324 F.3d at 910-11; *Lelsz,* 783 F.Supp. at 298. Furthermore, the evidence demonstrates that while Murray residents may not be entitled to another SODC, Defendants are offering that choice to Murray guardians. However, an SODC transfer does not have to go through a PAS agent, thus the DDPAS 10 form is irrelevant. (PF ¶¶39-40, 42-44, 46).

iii. Plaintiffs Have No Federal Right Entitling Them To Refuse Assessment

Plaintiffs have failed to point to any federal right protecting them from being assessed for community placement. Indeed, they cannot refuse assessment, for if they could, they could prevent a closure indefinitely by refusing to be assessed for transition out of the facility. DHS must assess Plaintiffs (and all SODC residents) for community placement. *See Rolland*, 562 F.Supp.2d at 185. Whether or not a guardian ultimately accepts a CILA placement, there is certainly a benefit to receiving a full assessment of an individual's needs. (PF ¶49). Furthermore, there has been no evidence that anyone, including Defendants or CRA, has forced any resident into a CILA. Only the guardian has the final say in placement decisions. (PF ¶38).

iv. Plaintiffs' Disagreement With Defendants' Professional Judgment Cannot Form The Basis Of An ADA Discrimination Claim

Plaintiffs introduced no evidence undermining the clinical process used by CRA. The federal courts give great deference to the treatment decisions made by the state's professionals, and will only intervene "where a decision made by a qualified professional was such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such judgment." *Youngberg v. Romeo,* 457 U.S. 307, 323 (1982). To be sure, "interference by the federal judiciary with the internal operations of these institutions should be minimized." *Id.* at 322; *see also Messier v. Southbury Training Sch.,* 562 F.Supp.2d 294, 301 (D. Conn. 2008). This was the standard used by the Illinois Supreme Court in a case brought prior to the ADA's passage in rejecting a challenge to the closure of the Dixon Developmental Center. *Dixon Ass'n of Retarded Citizens v. Thompson,* 91 Ill.2d 518, 534 (1982) ("Those who devised the relocation plan and those who will

administer it are qualified professionals whom the law vested with the authority to make such decisions. We must accept their decisions as presumptively valid.").

Murray's closure and the associated assessment process, is presumptively valid. As Director Casey testified, the overwhelming weight of professional opinion is that the developmentally disabled generally do better in community settings. (PF ¶¶5, 9). Additionally, Dr. Mayer credibly testified as to the thoroughness of the ACCT process. The process begins with a clinical assessment comprised of a record review in consultation with a nurse practitioner as well as several other specialized professionals who weigh in regarding the individual's needs across 15 Functional Life Assessment Domains. (PF ¶18). Additionally, a person-centered plan is developed in collaboration with (ideally) the Murray staff, the PAS agent, the resident, guardian, and family members. (PF ¶19). The meeting is memorialized in part, with a graphic depiction to assist in engaging the individual resident in the process. *Id.* Plaintiffs' implication that this graphic (or as they refer to it, "cartoon") is the primary CRA document on which Defendants rely (disregarding all other CRA clinical reports) in transitioning someone to the community is frankly, disingenuous in light of the record in this case.

After the clinical work is completed, and if the guardian chooses to follow CRA's recommendation, an individual support and budget report is prepared compiling this information and projecting the budget for the necessary supports identified by CRA for the resident. (PF ¶20). CRA professionals meet with the resident, guardian, family, and PAS agent to identify community providers and placements willing and able to meet all of the individual's needs. (PF ¶23). The guardian has the ultimate choice as to which provider will implement the plan, and pre-transition visits are available to see how the resident adapts. (PF ¶21, 24). Ultimately, CRA's

determinations are recommendations, and CRA "will not continue to advocate for transition into a CILA where a guardian chooses an alternative option." Doc. 275-1, ¶10.

Plaintiffs have raised no serious attack on any part of this process. At best, Plaintiffs have submitted affidavits from Murray staff (with questionable credibility) objecting to the process, or disagreeing with specific placements while admitting they have not even engaged in the process or in some cases, even reviewed the CRA planning documents. (PF ¶51). The affidavits, relating to discrete events nearly a year ago, are not credible and do not provide an evidentiary foundation for granting an injunction. Plaintiffs' purported expert, Ms. Kelly, provided no scientific basis as to why the ACCT process in theory or practice is insufficient or "such a substantial departure from accepted professional judgment" as to show no professional judgment was exercised. Indeed, Ms. Kelly is not a credible expert– she has no relevant qualifications: she is a registered nurse with a doctorate in education. (PF ¶10). She is not a certified psychiatric nurse and does not concentrate on the field of developmental disabilities. *Id.* Ms. Kelly did not cite to research at the hearing, let alone any that supports her position. (PF ¶9). Defendants' expert is also not aware of research supporting her position. *Id.*

But more fundamentally, even if there were no credibility issues – and there are many – it would not affect the outcome. A placement decision made with the consent of a guardian is not discrimination. "Simply put, 'there is no basis [in *Olmstead*] for saying that a premature discharge into the community is an ADA *discrimination* based on disability[.] Indeed, [t]here is no ADA provision that *providing* community placement is a discrimination. It may be a bad medical decision, or poor policy, but it is not discrimination based on disability." *Sciarrillo,* 2013 WL 6586569, at *4 (quoting *Richard S. v. Dept. of Dev. Serv. of the State of Cal.,* 2000 WL

35944246, at *3 (C.D. Cal. 2000) (emphasis in original)); *see also Bryant v. Madigan,* 84 F.3d 246, 249 (7th Cir. 1996) ("The ADA does not create a remedy for medical malpractice").

iv. Defendants Are Not "Recasting" Plaintiffs' Disabilities

Presumably recognizing Murray will close, Plaintiffs make a last-ditch effort to stop the closure by raising a new argument—that Defendants are "recasting" Plaintiffs' disabilities for the purpose of moving them into the community. Their claim is that to be eligible for SODC placement in the first place, one must have a developmental disability that cannot be treated in the community. Doc. 383 at 5, 11-12. Thus, if the assessments now show that the SODC resident can live in the community, their disability must have been "recast" into something milder than a disability requiring SODC services.

As Director Casey testified, "Illinois has for a number of years been behind the rest of the country." (PF ¶5). The Rebalancing Initiative seeks to correct this historical wrong. Many Murray residents can thrive in the community. There is no recasting – Illinois has merely taken a cue from federal law and constructed (along with CRA) a process by which to ensure that all individuals are considered for community placement. Moreover, Plaintiffs' argument incorrectly assumes that once an individual is placed in an SODC, he or she can never leave, for doing so would require a "recasting" of the disability. Indeed, at least ten states, plus the District of Colombia, have closed all of their SODCs. (PF ¶5). These states have not "recast" disabilities of those previously residing in SODCs. Notably, this assertion that once in an SODC, always in an SODC directly contradicts Plaintiffs' assertion that community transitions should be conducted by Murray staff pursuant to SOPP 181 instead of by CRA under the ACCT process. (PF ¶50).

The nature of an SODC as a temporary placement also belies Plaintiffs' argument. (PF ¶¶43-44). Individuals should be placed in an SODC only until "maladaptive behaviors" are stable, at which point the PAS agent is supposed to "link the individual to appropriate

community services." (PF ¶43). It does not take a "recasting" of one's disability, nor has any "recasting" occurred here. Plaintiffs' position does not acknowledge that an individual's condition and needs often change, or that continually improving technology and changing systems of care can create supports that were once unavailable (or difficult to obtain), accessible. Plaintiffs' argument boils down to an accusation that DHS would intentionally direct CRA to conduct sham assessments so that harmful placements could be recommended. This is unfounded, especially when taking into consideration that DHS (though encouraging the ACCT process) has willingly offered SODCs as an option for Murray guardians, despite their nature as a temporary placement and despite having no legal requirement to do so. It is one thing for Plaintiffs to disagree on the opinions or recommendations of the assessment (albeit an unpersuasive one under the standard in *Youngberg,* 457 U.S. at 323), and another to baldly assert that DHS would intentionally harm Plaintiffs. Plaintiffs' unsupported "recasting of the disability" argument should be rejected.

B. Defendants Have Provided More Than Reasonable Accommodations

The Seventh Circuit has held that a reasonable modification claim under Title II of the ADA requires a causal connection between the disability and the plaintiff's deprivation of public services. *Wis. Cmty. Servs.*, 465 F.3d at 748, 751-52; *see Ind. High Sch. Athletic Assoc.*, 181 F.3d at 848; *see also Forest City Daly Hous. v. Town of N. Hempstead*, 175 F.3d 144, 152 (2d Cir. 1999) (holding that, under ADA and Rehabilitation Act, proposed accommodation must be "'necessary' in light of the disabilities[.]'"). Thus, a plaintiff seeking modification from a public entity to gain its benefits and services must demonstrate that, "but for" his disability, he could have gained access to the services or benefits. *See Wis. Cmty. Servs.*, 465 F.3d at 752. In other words, a plaintiff must prove "that his disability is what causes his deprivation of the services or benefits desired." *Id.*

Plaintiffs fall woefully short of this burden. They present no evidence that in the absence of their disabilities, they would continue to receive services at Murray. Instead, when Murray closes, Plaintiffs will not be denied services at Murray because of their disabilities; rather, Murray will be unavailable *to anyone*. The closure, not Plaintiffs' disabilities, is the source of the alleged loss of benefits. Plaintiffs therefore cannot satisfy the "but for" causation element to prove a denial of reasonable modification claim. Plaintiffs next contend that by offering "only" 1-4 bed CILAs, Defendants are failing to provide a reasonable modification. Doc. 383 at 13. The record, however, confirms that CILAs have never been the only option. Notably, Plaintiffs omit the wide array of services available to address individual needs through the ACCT process as well as the non-community based options such as ICFs and other SODCs available outside of the ACCT process. (PF ¶¶15-16, 26). To claim that Defendants have not provided a reasonable modification when the fact is that all placement options are available to Plaintiffs except Murray, is incorrect. Finally, Plaintiffs argue that transfer to community placements "under construction or otherwise defective" is not a reasonable modification. Doc. 383 at 13. This argument is devoid of factual support. Moreover, DHS policy implements safeguards to ensure CILAs are properly functioning prior to any transition. (PF ¶30). Keeping Murray open is not a reasonable modification. Plaintiffs have shown no likelihood of success under this theory.

C. Plaintiffs Have Not Been Disparately Impacted by the Rebalancing Initiative.

Finally, Plaintiffs raise an intra-class discrimination theory, asserting Defendants' use of the ACCT process as to SODC residents results in a disparate impact because those who reside in SODCs are being forced into a less effective and appropriate level of care in the community. Plaintiffs' disparate impact claim is based on the fact that only SODC residents undergo the ACCT process. Doc. 383 at 14. The ACCT process is utilized to fulfill DHS Defendants'

obligations under *Olmstead*. If a developmentally disabled individual already lives successfully in the community, there is no point in conducting the assessment pursuant to the ACCT process.

Indeed, if Plaintiffs' disparate impact theory is accepted, the State could never tailor an assessment program to determine how SODC residents can be safely moved to the community, making it impossible to comply with *Olmstead*. According to Plaintiffs' claim, compliance with *Olmstead* would actually constitute discrimination on the basis of disparate impact. This turns *Olmstead* on its head. Plaintiffs' argument is nothing more than another creative attempt, and a red herring, to stop the assessment process and eventual transition of residents out of Murray because that is Plaintiffs' goal — to stop the closure of Murray.

To the extent that Plaintiffs' claim is based on the theory that DHS is forcing SODC residents into CILAs, it is factually unsupported and a gross mischaracterization. As discussed more fully below, DHS has at all times respected Plaintiffs' choice as to institutional care versus community care, going so far as to allow Plaintiffs to choose another SODC if their guardians prefer. (PF ¶43). And to the extent Plaintiffs continue to argue that the ACCT process is flawed and creates an adverse, disparate impact on SODC residents, that argument must be rejected as a disagreement over professional judgment which cannot support a discrimination claim. *See Youngberg*, 457 U.S. at 323. The ACCT process was and is not deficient, SODC residents are not adversely impacted, and Plaintiffs' claim has no likelihood of success.

II. THE MEDICAID CLAIM IS BASELESS, FAILING TO DEMONSTRATE EVEN A NEGLIGIBLE LIKELIHOOD OF SUCCESS

As a preliminary matter, Plaintiffs' brief incorporates an August 7, 2013 memorandum addressing Medicaid law. *See* Doc. 159-160. The Court rejected Plaintiffs' motion for leave to file that memorandum because it raised new Medicaid claims which were not pled in Plaintiffs' Complaint. *See* Doc. 167. Defendants request that Plaintiffs' references to a brief that is not a

part of the record, as well as references to the medical assistance provisions in §1396a(a) or §1396d(a) be disregarded by this Court.[3]

Plaintiffs' §1983 Medicaid claim relies on §1396n(c)(2)(C) of the Medicaid Act – a provision listing conditions a state must fulfill in order to be granted a "waiver" by the U.S. Department of Health and Human Services. The waiver permits reimbursement for home or community-based care of Medicaid recipients, so long as it is cost-neutral compared to institutional care. In order to be granted a waiver, a State must make assurances that:

> such individuals who are determined likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the developmentally disabled 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 services in an intermediate care facility for the developmentally disabled.

42 U.S.C. §1396n(c)(2)(C). Two distinct rights stem from this provision: (1) a right to information; and (2) a right to choice. *Ball v. Rodgers*, 492 F.3d 1094, 1107 (9th Cir. 2007).

As this Court stated, §1396n(c)(2)(C) "does not mandate that Defendants offer a particular option or operate a particular facility but 'just requires the provision of information about options that *are* available.'" Doc. 286 at 18, (quoting *Bertrand ex rel. Bertrand v. Maram,* 495 F.3d 452, 459 (7th Cir. 2007)). The plain language creating this right focuses on the options available *under the waiver*, not institutional options. Indeed, the court in *Ball* describes the informational right conferred as "the right to be informed of alternatives to traditional, long-term institutional care." 492 F.3d at 1107; *see also Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 388 (5th Cir. 2003) ("[A]t most, the plain language of §1396n(c)(2)(C) affords a right of information only for waiver applicants."). Plaintiffs claim they have been given inadequate information about ICF-DD choices, but no such right exists under §1396n(c)(2)(C).

[3] §1396a(a) was one of the "new claims" rejected by this Court in its August 12 Order. Doc. 167. Similarly, §1396d(a) is raised for the first time here, and not invoked in Plaintiffs' Complaint.

The "choice" provision of §1396n(c)(2)(C) is also far narrower than Plaintiffs claim. The regulations[4] and case law demonstrate that the "choice" available is between: (1) institutional services; or (2) community-based services. 42 C.F.R. §441.302(d), §441.303(d); *Doe v. Kidd*, 501 F.3d 348, 359 (4th Cir. 2007) ("The only choice referred to in the Medicaid regulations…is a choice between institutional or home-based and community-based services as a part of the waiver program[.]") (citing 42 C.F.R. § 441.302(d)(2)); *Leonard v. Mackareth*, No. 11–7418, 2014 WL 512456, at *8 (E.D. Pa. Feb. 10, 2014) (§1396n(c)(2)(c) requires the ability to switch between community and institutional care); *Boulet v. Cellucci*, 107 F.Supp.2d 61, 79 (D. Mass. 2000) (describing choice conferred by §1396n(c)(2)(c) as institutional versus home or community-based services); *Cramer v. Chiles*, 33 F.Supp.2d 1342, 1353 (S.D. Fla. 1999) (bill violated §1396n(c)(2)(C) because it removed choice between institutional and community services). There is no authority to support Plaintiffs' claim that the provision confers a right to choose *among* institutional placements. It would indeed be nonsensical for waiver-related provisions such as §1396n(c)(2)(C) to create institutionalization-related rights bearing no relation to the waiver. Plaintiffs also fail to demonstrate that Defendants *denied* them a choice between institutional and community care. The record is devoid of a single instance in which an individual was refused an ICF-DD placement and forced into the community. To the contrary, every transition to a CILA has occurred with guardian consent. (PF ¶¶39-40). This alone is sufficient to show that Defendants have not violated the choice provision. The state's medical professionals may *recommend* community placement, but there is no evidence they *forced* it upon anyone.

[4] The language 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. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (quotations omitted). Agency regulations are relevant, however, in determining the scope of the right conferred by Congress. *Ball*, 492 F.3d at 1106.

Plaintiffs cite *Leonard v. Mackereth* for the proposition that they are entitled to "meaningful choice." 2014 WL 512456, at *8. This term does not appear in the case. In *Leonard*, autistic Medicaid recipients receiving waiver services in their parents' homes were denied choice under §1396n(c)(2)(C) when the state refused to fund ICF placements. *Id.* at *3, 6, 8. Because of this denial, plaintiffs could not choose to switch from waiver services to institutional services. *Id.* at *8. Here, the state is willing and able to fund both, and *Leonard* is not on point. (PF ¶¶42-47). Further, *Leonard* lends no support to Plaintiffs' claim that Illinois' community choices effectively deny them "meaningful" choice because Plaintiffs find them inadequate. The simple fact is that Plaintiffs do not want community services. Many have testified that they believe their ward can only be served in an institution. (PF ¶9). Even if Plaintiffs were interested in community options, they have no idea what community choices are available because they boycotted the ACCT process. (PF ¶44). Choice has not been denied, it has been declined.

Plaintiffs next suggest Defendants "hide" the choices available, citing to conversations with DHS officials in which ICF placements were not discussed. Under Plaintiffs' strained interpretation of the statute, Defendants would be required to provide a laundry list of every conceivable institutional and community placement from which the guardian may freely choose in *every* communication regarding Murray's closure. This is not the law, nor is it practical. However, a full view of the record reinforces that choice between ICF/DD and community services is afforded and has been communicated to Murray guardians. First, the standard forms used by the PAS agent make it effectively impossible for a Murray resident to be placed in a CILA without written consent, and there was no evidence of "preselected guardian choice" on consent forms. (PF ¶39). Second, approximately 71 residents from Jacksonville were placed in other SODCs or private ICF/DDs in lieu of community placements. (PF ¶41). Murray guardians

have also successfully elected inter-SODC and private ICF/DD transfers following the closure announcement. (PF ¶42). No one was forced into community placements. Third, choice *has* been explained to Murray guardians. The evidence cites to at least three meetings occurring in May 2012, September 2012, and January 2013 in which the Plaintiffs do not dispute that choice was discussed with Murray guardians, including options outside of community placements, and Defendants expressly stated that *no one* would be forced into a CILA. (PF ¶¶46-47).

Plaintiffs' claims that Defendants will not help them find ICF-DD placements does not support a violation of the informational right in §1396n(c)(2)(C), and they are also untrue. *See Ball*, 492 F.3d at 1107. Plaintiffs were told they could work with Murray social workers to locate institutional options. (PF ¶¶38, 45-47). PAS agents also assist in finding private ICF-DD placements. (PF ¶¶38, 45). Plaintiffs have refused to engage in dialogue about their placement options or any dialogue that acknowledges Murray is closing. In fact, Defendants are providing an *enhanced* choice beyond that afforded by any law. As Director Casey testified, DHS will even make an exception to its normal rules for new SODC admissions to admit Murray residents in other SODCs if the guardian so chooses. (PF ¶¶43-44).[5] Mark Doyle also testified that the State is attempting to free up capacity at other SODCs in the event some Murray guardians make that choice. (PF ¶43). Plaintiffs' final assertion is the claim that the ACCT process violates guardian choice. This assertion is not only baseless, but bears no relationship to the choice between institutional and community care afforded by §1396n(c)(2)(C). Even if residents were assessed without guardian consent, this does not violate the provision invoked.

Finally, Plaintiffs do not provide any meaningful analysis of "but for" causation under Medicaid, let alone meet their burden of proof on the issue. In any event, the facts of this case

[5] "[T]he Medicaid statute does not require states to be service-providers of last resort." *Mandy R. ex rel. Mr. and Mrs. R. v. Owens*, 464 F.3d 1139, 1146 (10th Cir. 2006).

turn the "but for" analysis on its head. Plaintiffs refuse to engage in dialogue regarding any choice other than Murray. The record is clear that but for Plaintiffs' boycott of any transition process, they would be provided all choices (and more) afforded to them under §1396n(c)(2)(C).

III. PLAINTIFFS' HAVE ALSO FAILED TO ESTABLISH A LIKELIHOOD OF SUCCESS AS TO THE EQUAL PROTECTION CLAIM

Plaintiffs' equal protection claim misapplies the rational-basis review standard. Individuals with disabilities do *not* comprise a suspect class for purposes of equal protection. *United States v. Harris*, 197 F.3d 870, 876 (7th Cir. 1999); *Doe v. Bd. of Trs. of Univ. of Ill.*, 429 F. Supp. 2d 930, 943 (N.D. Ill. 2006). Thus, as Plaintiffs concede, claims of disparate treatment based on disability are subject to rational basis review. Doc. 383, at 20-23; *Cherry v. Univ. of Wisc. Sys. Bd. of Regents*, 265 F.3d 541, 552 (7th Cir. 2001). Governmental conduct survives rational basis review as long as there is a rational relationship between the alleged disparate treatment and a legitimate governmental purpose. *Srail v. Vill. of Lisle*, 588 F.3d 940, 946 (7th Cir. 2009). This is a heavy burden for Plaintiffs, for even a rational basis not articulated at the time of the alleged disparate treatment will suffice. *Id.* The equal protection claim fails as long as this Court can conceive of any rational basis that *could have* motivated Murray's closure and the implementation of the ACCT process. *See D.B. ex rel. Curtis B. v. Kopp*, 725 F.3d 681, 686-87 (7th Cir. 2013).

At least two conceivable rational bases exist. First, the ADA furthers a congressional mandate to take reasonable steps toward the transition of residents out of segregated, institutional settings and into the community. *Olmstead*, 527 U.S. at 587; *Rolland*, 562 F.Supp.2d at 185. That is not to say Defendants will transition Murray residents to CILAs even where a resident's health or safety would be jeopardized. This is a point that Plaintiffs continue to misunderstand. On the contrary, each Murray resident is individually evaluated with the recognition that, while

the vast majority will succeed in CILAs, ICF/DD placements will be available to the few who may not and to whose guardians prefer institutional care. Doc. 246-1, Casey Aff. ¶13. The fact remains, however, that Defendants cannot comply with their obligations under the ADA unless they assess individuals for a potential community placement. *Olmstead*, 527 U.S. at 587. Again, this does not mean Plaintiffs are *required* to transition to a CILA, but it does mean that the assessment process does not violate the Equal Protection Clause, for it is at least conceivable that the assessments of Plaintiffs would be rationally related to Defendants' *Olmstead* obligations.

Second, cost is undeniably a factor rationally related to Defendants' conduct. In most cases, it is less expensive and more effective to serve the developmentally disabled in the community than in an SODC. Doc. 246-1, Casey Aff., ¶14; PF ¶¶8, 54-55. Moreover, part of cost-savings is maximizing the taxpayer's dollar – it would be irresponsible (if possible) to pay both to operate institutions well below capacity while also funding increased community services. Balance is required, both legally and economically. Given the reality of the State's fiscal situation, cost-savings is a conceivable reason for assessing Plaintiffs for transition into CILAs and closing Murray. The fact that Director Casey testified cost-savings is not the prime reason is of no moment: the State's motivation in taking governmental action is irrelevant to the equal-protection analysis. *See D.B. ex rel. Curtis B*, 725 F.3d at 686-87. Nor is it relevant whether the State will *actually* save money because on rational basis review, governmental action is not subject to courtroom fact-finding. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (stating governmental action "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). All that matters is anticipated cost-savings is rationally related to Defendants' conduct, and it is.

In any event, the State stands to save significant costs by closing Murray and transitioning residents into the community. The evidence indicates that Defendants will save on average, an estimated $100,000 per resident for Murray residents transitioned to a CILA. (PF ¶¶54-55). On the whole, cost of care for the developmental disabled in the community is undoubtedly less expensive than in an SODC. *Id.*

In the end, the assessments of Plaintiffs as well as the closure of Murray do not violate the Equal Protection Clause, nor are particular placement recommendations made by the State's treatment professionals. The State has closed state operated facilities for the mentally ill as well as SODCs in the past. Facility closures are a necessary part of rebalancing the system. Seeking to increase options for community placement is a valid goal for the State to pursue, and easily survives rational basis review. Indeed, if closing an institution, or assessing someone for a potential community placement, is not "discrimination" under the ADA, then it cannot be an act of intentional discrimination under the Equal Protection Clause.

IV. PLAINTIFFS HAVE NOT ESTABLISHED IRREPARABLE HARM

Plaintiffs have been artfully ambiguous as to the relief they seek. They concede there is no legal right to keep Murray open in perpetuity, but at times, have claimed that preliminarily enjoining the closure is proper, while at other times claiming they seek only "to enjoin the State plan to deprive and deny Plaintiffs the proper placement, programs and services[.]" Doc. 383 at 1. A plaintiff seeking a preliminary injunction must establish that they are likely to suffer irreparable harm in the absence of the preliminary relief sought. *Univ. of Notre Dame v. Sebelius*, 2014 WL 687134, at *6; _ F.3d _ (7th Cir. Feb. 21, 2014) *citing Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008); s*ee also*, Wright, Miller, and Kane Fed. Practice & Procedure: Civil 2d § 2948.1 at 153-56 ("Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant. Thus, a preliminary injunction will not be

issued simply to prevent the possibility of some remote future injury. A presently existing actual threat must be shown."); *Adams v. Freedom Forge Found.*, 204 F.3d 475, 487-88 (3rd Cir. 2000) (finding harm speculative; "the dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat."); *EnVerve Inc. v. Unger Meat Co.,* 779 F.Supp.2d 840, 845 (N.D. Ill. 2011).

Plaintiffs refuse to articulate exactly what relief they seek. To the extent they seek an injunction preliminarily enjoining the closure, such an injunction is not necessary to prevent the irreparable harm they allege. To the extent they seek to enjoin the processes currently implemented by DHS Defendants in connection with the closure, Plaintiffs have failed to make a showing that irreparable harm is likely, as required under federal law. Plaintiffs cite to three main sources of irreparable harm in their brief: (1) the loss of choice; (2) the "recasting" of Murray residents; and (3) the purported "predetermined placements" resulting from the ACCT process which results in supposedly inappropriate placements.

First, there has been no loss of choice. Defendants have thoroughly addressed this above. Plaintiffs next turn to their claim that Murray residents are being "recasted" as less disabled by way of the ACCT process, and that this results in changes in treatment as well as eligibility for necessary services. Plaintiffs argue that merely going through the ACCT process creates irreparable harm. This is untrue. The process itself is thorough and if nothing else, would provide a guardian more information as to potential options. (PF ¶¶14-27). Notably, this Court previously refused to enjoin the assessment process. Doc. 90, ¶C. Plaintiffs fail to cite a single fact in the record to support their assertion that by simply engaging in the ACCT process, irreparable harm is imminent, nor have they pointed to a specific instance where the severity of an individual's disability has been recast as a result of the ACCT process. There is simply no evidence that the

ACCT process, undertaken with professional judgment, has or will cause the Plaintiffs irreparable harm. Plaintiffs fail to even establish the possibility of this, let alone that it's *likely*.

Plaintiffs' final claim is that the ACCT process results in dangerous "predetermined" placements, but the evidence is clear that no harm results from this process. First, guardians retain the ultimate choice. Nonetheless, the placement recommendations generated by the ACCT process are not dangerous, and guardian approved transitions to such placements simply do not warrant a finding of irreparable harm. The vast majority of Murray residents now living in the community have done well in their new homes. Stewart Freeman has not concluded that any of the OSG wards he visited need to be immediately removed from their homes and as GAL, has not asked the state court to do so. (PF ¶34). Even if Freeman had made such a request, he is not a qualified professional, and no expert has corroborated his conclusion. *Id.* Moreover, Freeman readily admitted at the hearing that former Murray residents are doing well in the community even where their transitions originally presented challenges, and acknowledged that the homes he has visited are "nice." (PF ¶35).

There are nearly 10,000 developmentally disabled individuals living in Illinois CILAs. (PF ¶7). All community providers are licensed; staff must meet the training requirements; registered nurses supervise medication administration; homes are inspected; and significant follow up by both DHS and the independent PAS agent are implemented following a transition. (PF ¶29). These undisputed system-wide safeguards contradict any claim that a transition to the community following a proper assessment will likely result in irreparable harm.[3] Nor did

[4] Mr. Shaver has a strong economic interest in keeping Murray open because half of the Murray residents attend his day program. Shaver has also testified he does not oppose closure of other SODCs because they provide services unable to be delivered in the community– he just opposes the closure of Murray. Tr. 1/8/14 a.m. at 60.

Plaintiffs produce evidence that the risks of a community placement would be greater than risks residents already face at Murray. Plaintiffs made no effort to compare institutional and community environments. Indeed, the record indicates that community placements provide *more* supervision. (PF ¶33). Moreover, many Murray residents leave the SODC daily to attend a day program, undercutting any claim that they must be served in an institutional setting out of medical necessity. (PF ¶26). Errors and injuries occur in both settings. Focus on one injury or error in a vacuum reveals nothing about the overall system implemented by DHS, especially when appropriate corrective actions are taken. The remedy should be to correct the problem, not to re-institutionalize the resident. Otherwise, the mandate of *Olmstead* would never be achieved. Plaintiffs fail to meet their burden – the claims of irreparable harm are speculative at best.

V. THE BALANCING OF HARMS ALSO DISFAVORS PLAINTIFFS

A preliminary injunction against a state agency is an extraordinary remedy. *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004). Even if Plaintiffs could meet the threshold requirements, the balance of harms weights in favor of the interests of the Defendants and the public. An injunction preventing the closure would impermissibly interfere with the State's right to administer its budget and make policy decisions. It would create a financial burden on the taxpayers, requiring the State pay to maintain facilities where the census is continually decreasing, even though institutionalized residents can be served more effectively and economically in alternate settings. An injunction would greatly impede efforts to expand community options for the disabled because money that would be spent on community placements would instead be spent maintaining archaic institutions with a dwindling census. Finally, expanded community services, which are more economical in nature, will enable the State to serve *more* developmentally disabled individuals who must do without services while on a waiting list. (PF ¶7). Illinois has traditionally been too reliant on congregate care, and efforts to

reverse that trend (which is of great interest to the public) would be severely damaged by a preliminary injunction.

An injunction preventing the operation of the ACCT process and restricting DHS from retaining private contractors like CRA to do assessments and assist with community placements would also disserve Defendants' (and the public) interest. If CRA cannot lead the ACCT process, then the Murray staff would have to assume primary responsibility, but some Murray staff may have a significant conflict of interest because they vehemently oppose the closure under any circumstances, regardless of the interests of Murray residents. (PF ¶52). Eliminating CRA from the assessment process removes any neutrality in assisting residents to make decisions regarding community placement. Indeed, Bill Henson *changed* Mark Winkeler's Individual Support Plan ("ISP") in 2012 to *recast him* as unsuitable for the community while a Murray social worker in 2011, prior to the closure announcement, stated her opinion that Mark would do well in the community, an opinion Bill Henson adopted but removed from the 2012 ISP after a request was made by Ms. Winkeler. (PF ¶53). While a guardian makes the final decision for their ward, the evidence in this record indicates some staff are not capable of or are refusing to exercise independent judgment at this juncture, to the detriment of the Murray residents. CRA provides resources and independent judgment which is currently lacking at Murray. Moreover, the ACCT process ensures *Olmstead* compliance by making certain that no individual is presumed unworthy of a less restrictive environment than an institution. It is certainly within the best interest of everyone to ensure ADA compliance, and retaining CRA only furthers this cause.

Further, Plaintiffs' current refusal to cooperate in seeking appropriate placements, particularly in light of an announced facility closure, is clearly contrary to the guardian's obligations under Illinois law and does not further the ward's best interests, meaning that it also

runs afoul of public interest. An assessment does not interfere with the guardian's ultimate choice about placement after the closure of Murray, it merely *informs* the guardian. *See Messier,* 562 F.Supp.2d at 337 ("a guardian should not be allowed simply to ignore the advice of medical professionals."). Similarly, Illinois law provides that "[t]he guardian shall have a duty to investigate the availability of reasonable residential alternatives[,] monitor the placement of the ward on an on-going basis to ensure its continued appropriateness, and shall pursue appropriate alternatives as needed." 755 ILCS 5/11a-14.1. Plaintiffs' request for an injunction which would impede the free flow of useful information is at odds with their duties as guardians, the best interest of the Murray residents and the public interest. As addressed in Section IV, there is also no public safety concern with permitting the assessment process to continue as this Court has done to date. The balance of harms disfavors any temporary prevention of Murray's closure or enjoining of the ACCT process.

VI. DHS DEFENDANTS PROCEDURE FOR VARIOUS TRANSITIONS IN CONNECTION WITH THE CLOSURE OF MURRAY

The Court requested detail regarding the process by which Murray guardians will be permitted to choose from available options in light of the impending closure. Even though federal law only affords Plaintiffs a choice between community and institutional placement, Defendants have also offered the choice of an SODC in addition to a private ICF or CILA. Plaintiffs may also choose home-based services, which DHS would help fund and facilitate.

The processes are as follows. First, both waiver-based community options (CILAs and home-based services) would involve participation in the ACCT process so that proper supports may be developed and put into place. This process is detailed throughout the record in this case. Second, for those seeking placement in a private ICF, three different avenues can be pursued. Guardians may utilize the assistance of Murray's two full-time social workers to locate available

facilities. (PF ¶45). Guardians may also work with Ann Yaunches from the local PAS agency, who will provide information about available options and arrange visits to various private ICFs. *Id.* Guardians may also directly contact DHS's Bureau of Transition Services for assistance in locating available facilities. Third, for those guardians seeking an inter-SODC transfer, such a transfer request must be made directly to DHS Staff. If the guardian submits a list of SODCs ranked by preference, DHS will work diligently to match the individual with a preferred facility subject to availability and any extenuating circumstances. The resident's current Interdisciplinary ("ID") Team would then coordinate with the selected SODC and meet with the resident's future ID Team to discuss the resident's Individual Support Plan and how it may be implemented at the new SODC prior to the transition.

The Court has also asked how long Defendants estimate it would take to transition residents and close Murray. This question is difficult – each process has its own timeframe, and these timeframes may be lengthened or shortened based on factors outside of DHS' control: the ACCT process takes approximately 45 days from assessment to transition (longer if the CILA is being newly developed); transition to a private ICF takes approximately 30 days; and an inter-SODC transfer takes approximately 14 to 28 days. Without knowing which option will be chosen by the remaining Murray residents, it is difficult to speculate further as to an overall timeframe.

VII. DEFENDANTS' EXHIBITS 205 AND 206 SHOULD BE CONSIDERED

Equip for Equality ("EFE") is the State of Illinois' Protection and Advocacy System agency, vested by federal law with authority to investigate and duties to report as described in 42 U.S.C. §15041 *et seq*. *See also* 405 ILCS 45/1 *et seq*. Plaintiffs object to the admission of Defendants' Exhibit 205, a report by EFE, and Exhibit 206, Director Casey's response to that report. As this Court has acknowledged, evidence may not be excluded *per se* unless it is clearly inadmissible. Doc. 321 at 8 (citing *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436,

440 (7th Cir. 1997)). Indeed, at the start of the January hearing, the Court created a *presumption* of admissibility for the purposes of the preliminary injunction hearing. Perhaps in light of this Court's statements and the fact that the Rules of Evidence do not apply with full vigor to preliminary injunction proceedings, Plaintiffs have not argued that the reports are inadmissible pursuant to the Rules of Evidence. *See*, *e.g.*, *Jackson v. N'Genuity Enter., Co*., 2011 WL 4628683, at *23 (N.D. Ill. Oct. 3, 2011). Citing to no authority, Plaintiffs merely argue that the exhibits are irrelevant, lack foundation, and cause unfair prejudice.

Plaintiffs admit that Defendants produced the exhibits "a few weeks" before the hearing. Doc. 383 at 23. Exhibit 206 is dated December 20, 2013, and as such could not have been produced earlier. Moreover, Plaintiffs demanded that documents continue to be produced in December 2013 for potential use at the hearing and cannot now claim prejudice simply because they are dissatisfied with the substance of these particular documents. At the January 2014 hearing, Plaintiffs had the opportunity to cross-examine Director Casey, the author of Exhibit 206. Director Casey laid a proper foundation for Exhibit 205 by testifying to his request for an EFE investigation and his receipt of the report from EFE. *See* Tr. 1/8/14, p.m. at 33-38. Prior to Plaintiffs' objection, Defendants' counsel began laying a foundation for Exhibit 206, representing that the document, which appears on DHS letterhead, was authored by Kevin Casey. *Id.* This easily satisfies the foundational requirements of Federal Rule of Evidence 901(b)(1).

Had Plaintiffs requested an opportunity to amend their affidavits or depose the report's identified author, they could have sought leave to do so. They did not. But even if Plaintiffs were precluded from further depositions, this Court has viewed the evidence through a paradigm of weight rather than admissibility. For example, over the objection of Defendants, this Court admitted hundreds of letters asking the Court to keep Murray open with the condition that the

letters will not be afforded the same weight as sworn testimony, and irrelevant information, generalities, and information evincing the author's lack of personal knowledge will be ignored. Doc. 321 at 708. Notably, Plaintiffs never disclosed the vast majority of these individuals on their witness list. Equally applicable here, the Court may consider Defendants' exhibits and assign the appropriate weight.[6] Both exhibits directly refute testimony by Plaintiffs' witnesses about the conditions of CILAs developed through the ACCT process and are equally relevant as testimony of those witnesses. Moreover, in contrast to Plaintiffs' presented testimony from self-interested witnesses, Exhibit 205 is a report generated by an independent third party, and as such, it can aid this Court in its fact-finding. Plaintiffs have not demonstrated that the reports are inadmissible *per se*, and they should be entered into evidence. *See Jonasson*, 115 F.3d at 440.

VIII. CONCLUSION

Following the hearing, this Court asked the parties to include in closing "the specific elements of any counts ***remaining viable*** based on the evidence provided at the hearing." Doc. 360 at 1 (emphasis added). Plaintiffs' claims are not legally viable, and any allegations asserted in support of their legal claims are unsupported by the evidence. None of Plaintiffs claims, to the extent they were *ever* viable, remain viable following the close of evidence in these proceedings. Defendants are well within their rights to close a state operated facility, well within the requirements of the ADA in considering all residents for community placement, and well within the requirements of the invoked Medicaid provision by offering guardians a choice between institutional and community based care. Plaintiffs have failed to meet their burden of even a negligible likelihood of success on the merits, and their motion must be denied.

[6] Plaintiffs appear to have abandoned their claim that the exhibits should not be considered because they are hearsay. As this Court has ruled, "hearsay can be considered in entering a preliminary injunction." Doc. 321 at 6 citing *SEC v. Cherif*, 993 F.2d 403, 412 n.8 (7th Cir. 1991). The exhibits' admission would be permitted nevertheless under Federal Rule of Evidence 803(8).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the aforementioned document was filed on March 27, 2014 through the Court's CM/ECF system. Parties of record may obtain a copy of the paper through the Court's CM/ECF system.

/s/ Thomas Ioppolo