IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ERIC STEWARD, *et al.*, *Plaintiffs,* v. COURTNEY N. PHILLIPS, in her official capacity as the Executive Commissioner of Texas's Health and Human Services Commission, *et al.*, *Defendants.*	§ § § § § § § § § §	Case No. 5:10-CV-1025-OLG
THE UNITED STATES OF AMERICA, *Plaintiff-Intervenor,* v. THE STATE OF TEXAS *Defendant.*	§ § § § § §	

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Pursuant to the Court's January 10, 2019 text Order granting Unopposed Motion to Vary General Order, ECF No. 648, Plaintiffs submit their joint post-trial conclusions of law regarding their claims under the Medicaid Act and Class Certification, and Plaintiffs and the United States submit their joint post-trial conclusions of law regarding their claims under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504) .

PLAINTIFFS' CLAIMS UNDER THE MEDICAID ACT AND CLASS CERTIFICATION

I. Texas Violates the Nursing Home Reform Amendments to the Medicaid Act.

1. Responding to House and Senate Committee hearings on the care of individuals with intellectual and/or developmental disabilities and related conditions ("IDD"; collectively "people with IDD" or "individuals with IDD") in nursing facilities, the General Accounting Office (GAO) issued a report that was designed to "ascertain whether mentally retarded [persons][] in nursing homes have the same access to needed services as their counterparts in facilities for the mentally retarded" (ICF/MRs).[1] *See* Report to the Secretary of Health & Human Servs. (HHS), Medicaid: Addressing the Needs of Mentally Retarded Residents Nursing Home Residents (1987) (hereafter GAO Report), *cited in Rolland v. Romney*, 318 F.3d 42, 45 (1st Cir. 2003). The GAO Report found that states had routinely transferred individuals with IDD from state institutions, like ICF/MRs, to nursing facilities, where they were provided inadequate care. GAO Report at 11; *Rolland*, 318 F.3d at 45-46. The GAO Report recommended, among other things, that Congress require states to provide active treatment to all individuals with IDD in nursing facilities, and to include IDD professionals as members of all treatment teams. *Id*.

[1] The GAO Report, like other federal statutes and programs at that time, used the term "mentally retarded" instead of the current, statutorily-required reference "intellectual and developmental disabilities."

2. In response to the GAO Report, the House Energy and Commerce Committee proposed the initial version of the Nursing Home Reform Amendments (NHRA) to the Medicaid Act, requiring states: (1) to implement a pre-admission screening program so as to avoid unnecessary admissions to nursing facilities, where services in an alternative setting could meet the needs of individuals with IDD, and (2) to provide and pay for active treatment for individuals with IDD who are admitted to nursing facilities. *See* H. Rept. 100-391II, H.R. 3545, Omnibus Budget Reconciliation Act of 1987, 1987 U.S.C.C.A.N. 231-1, 2313-279 to 2313-282; Conf. Rept. 133 Cong. Rec. H12103-02. Congress incorporated these requirements into the final version of the Pre-Admission Screening and Resident Review (PASRR, formerly PASARR) provisions of the NHRA, which were designed to prevent and remedy the unnecessary admission and confinement of people with IDD (and psychiatric disabilities) in nursing facilities. 42 U.S.C. § 1396r(e); Pub. L. No. 100-203, § 4211(C), 101 Stat. 1330-198 (1987); *see also Rolland*, 318 F.3d at 46 (describing legislative history and purpose of the NHRA); *Grammar v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 530-31 (3rd Cir. 2009) (citing with approval the legislative history from *Rolland*).

3. The NHRA are part of a comprehensive remedial statute designed to address the warehousing of people in nursing facilities. *See Rolland*, 318 F.3d at 45-46 (explaining that Congress enacted the NHRA to address the pattern of States transferring individuals with IDD from Intermediate Care Facilities for Persons with Mental Retardation (ICF/MRs) to nursing facilities in order to save money and then not providing adequate care).

4. Federal regulations make clear that a State cannot delegate its statutory obligations and its ultimate responsibility to comply with the NHRA. 42 C.F.R. § 483.106(e).

5. Congress' intent in creating PASRR was two-fold: (1) to ensure that only persons with mental disabilities who actually needed twenty-four hour nursing care and who could not be adequately cared for in other programs would be admitted to and retained in nursing facilities; and (2) to mandate that all persons with IDD who remained in nursing facilities would be provided the same special disability services which they otherwise would receive in state institutions or community programs. Cognizant of the well-established federal requirement to provide persons with IDD with a program of active treatment in institutions and community settings, Congress adopted this same mandate for nursing facilities. *See* 135 Cong. Rec. S13057-03, *S13238, 1989 WL 195142 ("If a resident is found to be mentally ill or mentally retarded and requires nursing facility care, the individual may reside in a facility, but the State is required to provide active treatment if the individual is found to need it."). Congress directed the Secretary to define the terms and implement the requirements of the PASRR program in order to effectuate its intent, including the term "active treatment."

6. The Court has already determined that the NHRA claims presented in this case are privately enforceable under 42 U.S.C. § 1983. *Steward v. Abbott*, 189 F. Supp. 3d 620, 634-39 (W.D. Tex. 2016); *see also Rolland*, 318 F.3d at 56; *Grammar*, 570 F.3d at 532; *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1314-18 (W.D. Wash. 2015); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 298-304 (E.D.N.Y. 2008); *Martin v. Voinovich*, 840 F. Supp. 1175, 1195-96, 1200-02 (S.D. Ohio 1993) (PASARR provisions of NHRA creates unambiguous enforceable obligations); *Ottis v. Shalala*, 862 F. Supp. 182, 185-87 (W.D. Mich. 1994) (same).

7. Congress also instructed the Secretary of HHS to issue regulations that describe the details of the PASRR process as well as the mandate for active treatment, subsequently renamed "specialized services." Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-

508, § 4801(b)(8) (1990), codified as 42 U.S.C. § 1396r(f)(1). These regulations are both consistent with Congress' purpose in enacting the NHRA and enforceable as an expression of Congress' directive to ensure the orderly implementation of the PASRR program. *Rolland*, 318 F.3d at 56-58 (discussing the Secretary's definition of specialized services as incorporating the federal active treatment standard).

8. The PASRR provisions of the NHRA require that all individuals who are considered for admission to a nursing facility be screened to determine if they may have an IDD. This is referred to as the Level I PASRR screen. 42 C.F.R. § 483.112; *see also Rolland*, 318 F.3d at 46; *Dunakin*, 99 F. Supp. 3d at 1305; *Joseph S.*, 561 F. Supp. 2d at 287.

9. All persons whose Level I PASRR screen indicates that they may have an IDD must then be assessed and evaluated to determine if they do in fact have an IDD, whether they satisfy the nursing facility level of care criteria, whether their needs could be met in the community through the provision of appropriate services and supports, and whether they could benefit from the provision of specialized services designed to maximize their ability for self-determination and independence. This part of the PASRR process is referred to as the Level II PASRR evaluation. 42 C.F.R. §§ 483.128, 483.132(a); *see also Rolland*, 318 F.3d at 46.

10. The Level II PASRR evaluation must include a psychosocial assessment, which analyzes current living arrangements and medical and social supports. The evaluation also must include a functional assessment of the individual's ability to engage in activities of daily living as well as nine other functional areas. It then must document the level of support and services that would be needed to assist the individual to perform these activities and function with the maximum level of independence. 42 C.F.R. § 483.136.

11. PASRR prohibits the unnecessary nursing facility admission of people with IDD. The Level II PASRR evaluation must determine whether it would be possible to meet the individual's needs through the provision of services and supports in the community as an alternative to nursing facility placement. 42 C.F.R. § 483.132(a)(1)-(2); *see McNiece v. Jindal*, No. CIV.A 97-2421, 1998 WL 175899, at *4 (E.D. La. Apr. 14, 1998) (holding that the regulation was intended to assure that "the (nursing home) placement would be selected only after less restrictive settings had been rejected because the individual's care needs are so extensive that the individual requires institutional care") (citing 57 Fed. Reg. 56450-01 at *56496).

12. The PASRR reviewer, as part of the Level II PASRR evaluation, also must determine if the nursing facility to which the individual is being admitted is an appropriate placement for that person. 42 C.F.R. § 483.132(a)(3). An appropriate placement, as defined in 42 C.F.R. § 483.126, is a nursing facility that can meet all of the individual's needs. Thus, the PASRR reviewer must make the determination that "the individual's needs for treatment do not exceed the level of services which can be delivered in the NF to which the individual is admitted either through NF services alone, or, where necessary, through NF services supplemented by specialized services provided by or arranged for by the State." 42 C.F.R. § 483.126; *see McNiece*, 1998 WL 175899, at *4 ("Congress has clearly given the final authority to the PASARR evaluators to decide whether nursing home treatment is required for the applicant's mental condition.").

13. If the PASRR reviewer concludes that the facility cannot meet the individual's needs and cannot provide all appropriate specialized services, the individual cannot be admitted to, or remain in, that nursing facility. 42 C.F.R. § 483.130(n) (any determination to admit an

individual with IDD to a nursing facility must be supported "by assurances that the specialized services that are needed can and will be provided or arranged by the State while the individual resides in the NF").

14. If the Level II PASRR evaluation determines that a nursing facility resident who has been in the facility for more than thirty months prior to a PASRR evaluation does not require nursing facility services, but instead requires specialized services, the state has duty to offer to provide these services to the resident in an appropriate community setting. 42 U.S.C. § 1396r(e)(7)(C)(i)-(ii); 42 C.F.R. §§ 483.118(c), 483.120(b); *see also Rolland*, 318 F.3d at 46. Thus, the NHRA requires States to provide community services and alternative placement to long-term residents of nursing facilities who need specialized services but who no longer need nursing services.

15. Finally, the Level II PASRR evaluation must determine whether the individual would benefit from specialized services in order to function more independently or to avoid a loss of skills. If so, the individual must be provided those specialized services either in the nursing facility or in an alternative appropriate setting. 42 U.S.C. § 1396r(e)(7)(B)(ii)(II) & (e)(7)(C); 42 C.F.R. §§ 483.112(b), 483.114(b)(2), 483.116(b)(2), 483.118, 483.120(b), 483.128(i)(5); *see also Rolland*, 318 F.3d at 57 (affirming decision requiring state to provide all needed specialized services and active treatment); *Rolland v. Cellucci*, 198 F. Supp. 2d 25 (D. Mass. 2002) (requiring specialized services that constitute a program of active treatment); *Rolland v. Cellucci*, 52 F. Supp. 2d 231, 235 (D. Mass. 1999) (holding that the NHRA obligates states to provide specialized services and active treatment).

16. The PASRR reviewer must explain to the individual and, where applicable, to his or her legal representative, the results of the Level II PASRR evaluation, including information

regarding the services that are needed and the placement options that are appropriate. 42 C.F.R. § 483.130(l)(3)(k)-(l).

17. The PASRR regulations create a mandatory duty on the states to provide specialized services to all persons with IDD who need them, regardless of whether they require nursing facility services. 42 C.F.R. § 483.116(b) (for residents needing both a nursing facility level of services and specialized services, then "[t]he State must provide or arrange for the provision of the specialized services needed by the individual while he or she resides in the NF").

18. Specialized services for individuals with IDD must include all services which are needed to implement "a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services . . . that is directed toward—(i) The acquisition of the behaviors necessary for the client to function with as much self-determination and independence as possible; and (ii) The prevention or deceleration of regression or loss of current optimal functional status." 42 C.F.R. § 483.120(a)(2) (quoting 42 C.F.R. § 483.440(a)(1)); *see also Rolland*, 318 F.3d at 56-57 (rejecting state's argument that active treatment is not required and is not attainable); *Rolland v. Patrick*, 483 F. Supp. 2d 107, 113 (D. Mass. 2007) (finding that First Circuit "determined that, although Defendants were not required to comply with every regulation applicable to ICF/MRs, they were required to implement the 'active treatment' aspects of the regulations as that term concerned mentally retarded residents of nursing facilities"); *Steward*, 189 F. Supp. 3d at 639; *Idaho Health Care Ass'n v. Sullivan*, 716 F. Supp. 464, 472 (D. Idaho 1989) (Congress acted to benefit "many individuals who . . . were not receiving active treatment for their individual needs"); *Rolland*, 198 F. Supp. 2d at 29 ("Congress mandated that States

provide active treatment to nursing facility residents deemed in need."); *Rolland v. Cellucci*, 138 F. Supp. 2d 110, 117 (D. Mass. 2001) (individuals with IDD in nursing facilities have a right to active treatment).

19. Active treatment means the same thing for residents of nursing facilities as it does for residents of institutional or community programs for individuals with IDD. 57 Fed. Reg. 56450-01 at *56474 (Nov. 30, 1992) (active treatment, as defined for nursing facilities, is identical to active treatment in ICF/MRs); 57 Fed. Reg. 56450-01 at *56476 ("Congress did not see fit to alter in any way the States' responsibility to provide these services, however they are called."). States must guarantee individuals with IDD a program of active treatment that is "continuous" and includes an "aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services" and not merely something analogous to it. 57 Fed. Reg. 56450-01 at *56475; *see also Rolland*, 138 F. Supp. 2d at 115-17 (rejecting argument that active treatment for individuals with IDD in nursing facilities means something different than for individuals with IDD in other settings); *Rolland*, 198 F. Supp. 2d at 32 (also rejecting argument that services only need to be "analogous to active treatment").

20. In response to comments from states questioning their duty to provide active treatment in nursing facilities, the Secretary confirmed this obligation in unconditional terms:

> In § 483.120(c), we proposed that the State must provide or arrange for the provision of specialized services (previously known as active treatment) to all NF residents with MI or MR whose needs are such that 24-hour supervision, treatment and training by qualified mental health or mental retardation personnel is necessary, as identified by the screening.
>
> Comment: In response to the requirement that the State must provide specialized services to all residents who are determined to need them, a number of States protested that there is no way to do this short of bringing qualified mental retardation and mental health professionals into NFs. They strongly objected to having to make NFs into ICFs/MR or psychiatric treatment facilities. Terming this impossible, they noted that a statutory change is needed to absolve them of this onerous responsibility.

> Response: We have discussed the substitution of the term "specialized services" for "active treatment" elsewhere in this preamble. There is little we can add to that discussion. Congress did not see fit to alter in any way the States' responsibility to provide these services, however they are called. When the need for specialized services is great, a State may need to examine whether, in fact, an ICF/MR, psychiatric hospital, or other setting may be a more appropriate placement. As we have noted elsewhere in this preamble, determinations as to the need for NF services and the need for specialized services in a PASARR program should be related to one another and sensitive, where appropriate, to the range of available services.

57 Fed. Reg. 56450-01 at *56476.

21. The Secretary considered and rejected several arguments by the states as to the meaning and application of the federal active treatment standard. When states protested that a continuous program of active treatment might require them to fund qualified IDD staff at nursing facilities twenty-four hours a day, the Secretary agreed that this is the intent and clear effect of the regulation. 57 Fed. Reg. 56450-01 at *56476. When the states argued they should be able to compel nursing facilities to provide some portion of the specialized services mandated by the statute and regulations, the Secretary disagreed:

> Response: Commenters who believed that NFs were prohibited by the proposed rule from providing specialized services misunderstood our intent in stating that specialized services is not a NF responsibility. We meant to prevent NFs from being required by States to provide specialized services, not to bar them from providing it if they choose to do so and are staffed and equipped to provide these services.

57 Fed. Reg. 56450-01 at *56480.

22. This authoritative construction of the statute by the agency directed by Congress to interpret and implement the statute is entitled to considerable deference. *See Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984). Deference to the Secretary is particularly compelling when the regulations specifically construe Congressional intent. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 23 (1981) (administrative understanding of Congress' intent is critical factor).

23. The intensity, duration and frequency of specialized services must be sufficient to provide active treatment, using trained and qualified staff, to each individual who needs such services. 42 C.F.R. §§ 483.120(a)(2), 483.120(b), 483.440(c)-(f); *Rolland*, 483 F. Supp. 2d at 113-14 (holding that active treatment is not confined to the definition set forth in § 483.440(a)(1) but extends to all subsections of the regulation, including §§ 483.440(a)-(f)).

24. The scope and breadth of specialized services cannot be arbitrarily curtailed or limited by the state in a manner that results in a level of care which is less than active treatment. 42 C.F.R. § 483.440(a), (c). In addition, the process for planning, providing and monitoring those services must comply with 42 C.F.R. §§ 483.120(a)(2), 483.120(b), and 483.440(c)-(f). *See Rolland*, 318 F.3d at 57; *Rolland*, 483 F. Supp. 2d at 114; *Steward*, 189 F. Supp. 3d at 638-39.

25. Each individual with IDD who is admitted to a nursing facility must be provided with a comprehensive functional assessment, which is the foundation for all service planning and which is necessary to meet the federal active treatment standard. 42 C.F.R. §§ 483.120(a)(2), 483.120(b), 483.440(c)(3); *see also Rolland*, 483 F. Supp. at 114. The comprehensive functional assessment must be developed within thirty days, must evaluate the individual's strengths and needs in ten specific habilitative areas, and must identify needed services without regard to the actual availability of those needed services. 42 C.F.R. § 483.440(c)(3)(i)-(v); *see Rolland v. Patrick*, No. 98-30208-KPN, 2007 WL 7607256 (D. Mass. Aug. 2, 2007) (holding that compliance with the active treatment requirements set forth in the order "accompanying" the decision, Order Approving Revised Active Treatment Standards at 2-3, ECF Nos. 456 and 456-2, (hereafter, *Rolland* Active Treatment Order), shall constitute compliance with federal law, including CMS standards); ECF No. 312-8 at 168-74 (Exhibit K to Apr. 3, 2017 Declaration of

Garth Corbett Regarding Exhibits in Support of Plaintiffs' Motion and Memorandum of Law in Support of Motion for Preliminary Injunction).

26. Each individual with IDD who is admitted to a nursing facility must be provided with an individualized service plan that is developed by an interdisciplinary team of IDD professionals, that includes measurable goals and objectives to promote the acquisition of skills and improvement in functioning, and that identifies the professionals responsible for providing and monitoring these services, as required by federal active treatment procedures. 42 C.F.R. §§ 483.120(a)(2) & (b), 483.440(c)(1) & (2); *see also Rolland*, 483 F. Supp. 2d at 114; *Rolland* Active Treatment Order.

27. The service plan must include training in personal skills, identify needed mechanical and technological equipment, ensure that individuals spend a major portion of each day out of bed and out of their bedroom area, and have regular opportunities for choice. 42 C.F.R. §§ 483.440(c)(6)(i)-(vi).

28. The service plan must be implemented in a manner that results in a program of active treatment which is implemented by trained staff. 42 C.F.R. § 483.440(d).

29. The service plan must include a section on transition that identifies concrete and preferred alternatives which would allow the individual to move to an integrated setting. 42 C.F.R. §§ 483.120(a)(2) & (b), 483.440(b) & (c); *see also Rolland*, 483 F. Supp. 2d at 114; *Rolland* Active Treatment Order.

30. A service coordinator or case manager is responsible for monitoring, coordinating, and ensuring the delivery of needed services and the interventions described in the service plan, as well as for modifying the plan as needed. 42 C.F.R. § 483.440(f).

31. If the individual requires specialized services, the state must provide those services with the frequency, intensity, and duration that meet the federal standard for active treatment. 42 C.F.R. §§ 483.440(a)-(f), 483.120(b); *see also Rolland*, 483 F. Supp. 2d at 114; *Rolland* Active Treatment Order.

32. Specialized services must be provided continuously, consistently, and aggressively in order to meet the federal standard for active treatment. 42 C.F.R. §§ 483.120(a)(2) & (b), 483.440(a)-(f); *see also Rolland*, 483 F. Supp. 2d at 114; *Rolland* Active Treatment Order.

33. Specialized services must be provided by qualified and trained staff in order to meet the federal standard for active treatment. 42 C.F.R. §§ 483.120(a)(2) & (b), 483.440(a)-(f); *see also Rolland*, 483 F. Supp. 2d at 114; *Rolland* Active Treatment Order.

34. Periodic reviews of the service plan must be conducted to determine whether the individual continues to need a nursing level of care and to require confinement in a nursing facility. These periodic reviews must also determine whether specialized services are necessary to provide habilitation and active treatment. 42 U.S.C. §§ 1396r(b)(3)(F)(i), 1396r(e)(7)(A)-(B); 42 C.F.R. §§ 483.128, 483.132, 483.134, 483.136, 483.440(f).

35. In violation of the NHRA, 42 U.S.C. § 1396r(e)(7)(A)-(B) and 42 C.F.R. §§ 483.112, 483.116, 483.126, and 483.132, Defendants have failed to develop and implement a PASRR program that timely and accurately screens nursing facility applicants for IDD before their admission to a nursing facility; assesses whether their needs can be met in an alternative, less restrictive setting than a nursing facility prior to placement in the facility; determines if the nursing facility is an appropriate placement for the individual; and advises the applicant or resident of the available alternatives to a nursing facility placement.

36. In violation of the NHRA, 42 U.S.C. § 1396r(e) and 42 C.F.R. §§ 483.106, 483.112, 483.116, 483.130, and 483.132, Defendants have failed to develop and implement a PASRR program that timely and accurately determines, based upon sufficient medical information, data, and records, if an individual with IDD meets the conditions and criteria for a categorical admission, including either an exempt admission or an expedited admission, and then determines, at the expiration of the time period allowed for exempt or expedited admissions, if the individual's needs can be met in an alternative, less restrictive setting than a nursing facility and if the individual needs specialized services.

37. In violation of the NHRA, 42 U.S.C. § 1396r(e) and 42 C.F.R. §§ 483.112, 483.116, 483.130, 483.132, 483.136, and 483.440(a)-(c), Defendants have failed to develop and implement a PASRR program that accurately identifies individuals with IDD, comprehensively evaluates all of their habilitative needs in the fifteen required habilitative areas prior to admission to a nursing facility, and assesses which specialized services are appropriate to address each of those needs.

38. In violation of the NHRA, 42 U.S.C. § 1396r(e) and 42 C.F.R. §§ 483.126 and 483.132, Defendants have failed to develop and implement a PASRR program that appropriately determines if the nursing facility can meet all of the individual's needs and provide all necessary specialized services to meet the federal active treatment standard.

39. In violation of the NHRA, 42 U.S.C. § 1396r(e), 42 C.F.R. § 483.100 *et seq.*, and 42 C.F.R. § 483.440(a) & (c), Defendants have failed to provide each individual with IDD in a nursing facility with a comprehensive functional assessment of all ten IDD functional areas, as necessary to meet the federal active treatment standard and procedures.

40. In violation of the NHRA, 42 U.S.C. § 1396r(e), 42 C.F.R. § 483.100 *et seq.*, and 42 C.F.R. § 483.440(a)-(f), Defendants have failed to provide each individual with IDD in a nursing facility with an appropriate individual service plan that is developed by an interdisciplinary team of IDD professionals, that includes measurable goals and objectives to promote the acquisition of skills and improvement in functioning, that includes transition options, and that identifies the professionals, as necessary to meet the federal active treatment standard and procedures.

41. In violation of the NHRA, 42 U.S.C. § 1396r(e), 42 C.F.R. § 483.100 *et seq.*, and 42 C.F.R. § 483.440(a)-(f), Defendants have failed to provide adequate service coordination to develop, implement, monitor, and modify the individual service plan and transition plan; to coordinate this plan with the nursing facility plan of care; and to ensure the delivery of all needed nursing and specialized services, as necessary to meet the federal active treatment standard and procedures.

42. In violation of the NHRA, 42 U.S.C. § 1396r(e), 42 C.F.R. § 483.100 *et seq.*, and 42 C.F.R. § 483.440(a)-(f), Defendants have failed to provide each individual with IDD in a nursing facility with specialized services with the frequency, intensity, and duration, with the requisite continuity, consistency, and scope, and through qualified and trained IDD staff, as necessary to meet the federal active treatment standard.

43. In violation of the NHRA, 42 U.S.C. § 1396r(e), 42 C.F.R. § 483.100 *et seq.*, and 42 C.F.R. § 483.440(a)-(f), Defendants have failed to ensure that nursing facilities comply with all PASRR requirements and plan, provide, and coordinate nursing services and specialized services, as necessary to meet the federal active treatment standard.

44. In violation of the NHRA, 42 U.S.C. § 1396r(e), 42 C.F.R. § 483.100 *et seq.*, and 42 C.F.R. § 483.440(a)-(f), Defendants have failed to provide the full range of needed specialized services, have failed to provide or arrange for an adequate array and capacity of service providers and IDD professionals qualified to provide these specialized services, and have failed to ensure that individuals with IDD are not inappropriately placed or retained in nursing facilities without needed services.

45. In violation of the NHRA, 42 U.S.C. § 1396r(e), 42 C.F.R. § 483.100 *et seq.*, and 42 C.F.R. § 483.440(a)-(f), in addition to limiting the scope and availability of specialized services for individuals with IDD, Defendants have failed to provide even those limited services to all individuals who need them in order to receive active treatment.

II. Texas Violates the Reasonable Promptness and Freedom of Choice Provisions of the Medicaid Act.

A. Texas Violates the Reasonable Promptness Provision of the Medicaid Act.

46. 42 U.S.C. § 1396a(a)(8) of Title XIX of the Social Security Act requires states to provide Medicaid benefits to all eligible persons with reasonable promptness and for as long as medically necessary. *See Romano v. Greenstein*, 721 F.3d 373, 377-78 (5th Cir. 2013) (noting that § 1396a(a)(8) requires that a state plan for Medicaid assistance must "provide that all individuals wishing to make application for medical assistance under the plan shall have an opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals"); *Doe v. Chiles*, 136 F.3d 709, 721 (11th Cir. 1998) (requiring the provision of medical assistance and medically necessary services within ninety days of application); *Steward*, 189 F. Supp. 3d at 635; *Rolland v. Cellucci*, 52 F. Supp. 2d at 239-40 (failure to provide medically necessary services to individuals with IDD in nursing facilities states a claim under the reasonable promptness provision of the Medicaid Act).

47. The Secretary's regulations defining and implementing the statutory right to the prompt provision of services, 42 C.F.R § 435.930(a) & (b), mandate that the provision of services must not be delayed by the agencies' administrative procedures. *Doe*, 136 F.3d at 717; *Rolland*, 52 F. Supp. 2d at 240.

48. The Court has already determined that the reasonable promptness claim presented in this case is privately enforceable under 42 U.S.C. § 1983. *Steward*, 189 F. Supp. 3d at 634-35 (citing *Romano v. Greenstein*, 721 F.3d 373, 377-78 (5th Cir. 2013)) (holding that § 1396a(a)(8) satisfies both Blessing's three-part test and the explicit individual rights-creating language required by Gonzaga); *see also S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 602 (5th Cir. 2004); *Doe v. Kidd*, 501 F.3d 348, 356-57 (4th Cir. 2007) (reasonable promptness gives rise to enforceable right); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 183 (3d Cir. 2004) (holding that an analysis based upon *Gonzaga*, *Blessing*, and other cases "compels the conclusion that the provisions invoked by plaintiffs—42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10), and 1396d(a)(15)—unambiguously confer rights vindicable under § 1983"); *Bryson v. Shumway*, 308 F.3d 79, 88-89 (1st Cir. 2002); *Westside Mothers v. Haveman*, 289 F.3d. 852, 863 (6th Cir 2002).

49. Under PASRR, individuals with IDD at risk of entering or residing in nursing facilities must receive: (1) a pre-admission evaluation to determine if they are appropriate for community living and to identify the need for specialized services if admitted to nursing facilities; and (2) specialized services that meet the federal active treatment standard, based on comprehensive functional assessments within thirty days of admission to a nursing facility. 42 U.S.C. § 1396r(e)(7); 42 C.F.R. §§ 483.112, 483.120, 483.132, 483.440(a) & (c).

50. Individuals with IDD at risk of admission or admitted to nursing facilities are entitled to receive these Medicaid-funded evaluations, assessments and services with reasonable

promptness. *Dunakin*, 99 F. Supp. 3d at 1320-21 (W.D. Wash. 2015); *Rolland v. Romney*, 273 F. Supp. 2d 140, 141 (D. Mass. 2003) (in response to a motion to provide timely specialized services the court held that "Defendants must provide service plans and active treatment to each and every class member for whom specialized services is appropriate").

51. By its policies, practices, actions, and omissions, HHSC limits pre-admission evaluations to approximately three percent of all individuals with IDD who are admitted to nursing facilities, thereby denying the remaining ninety-seven percent of individuals with IDD prompt evaluations to determine if they could be served in an alternative placement or need specialized services. Moreover, HHSC fails to ensure that timely post-admission evaluations and the provision of medically necessary services occur immediately after the period permitted by exempt or expedited categorical admissions. This deliberate design of Texas's PASRR program, coupled with HHSC's failure to ensure timely PASRR evaluations for categorical admissions, results in extended delays and the outright denial of medically necessary care to individuals with IDD in violation of 42 U.S.C. § 1396a(a)(8).

52. By its policies, practices, actions and omissions, HHSC fails to promptly assess the needs of people with IDD admitted to nursing facilities, and then to promptly provide all medically necessary specialized services to meet individuals' habilitative needs, resulting in extended delays and the outright denial of medically necessary care to individuals with IDD, in violation of 42 U.S.C. § 1396a(a)(8).

53. By its policies, practices, actions and omissions, HHSC fails to track and deliver all specialized services necessary to constitute a program of active treatment for individuals with IDD in nursing facilities, resulting in delays and outright denial of medically necessary care to individuals with IDD in nursing facilities in violation of 42 U.S.C. § 1396a(a)(8).

54. HHSC fails to offer and ensure the timely provision, adequate array, and capacity of community services necessary for qualified individuals with IDD who are institutionalized or referred to placement in nursing facilities to live in the most integrated setting appropriate to their needs, in violation of 42 U.S.C. § 1396a(a)(8).

B. Texas Violates the Freedom of Choice Provisions of the Medicaid Act.

55. The freedom of choice provision in § 1396n(c)(2)(C) states "a waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that . . . such individuals who are determined to be *likely* to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded 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 mentally retarded." *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1014 (D. Minn. 2016) (emphasis added) (citing 42 U.S.C. § 1396n(c)(2)(C)).

56. Corresponding regulations clarify that CMS may decline to grant a waiver or terminate a waiver unless the state agency provides "assurance that when a beneficiary is determined to be likely to require the level of care provided in a hospital, [nursing facility], or ICF/IDD, the beneficiary or his or her legal representative will be: (1) [i]nformed of any feasible alternatives available under the waiver; and (2) [g]iven the choice of either institutional or home and community-based services." 42 C.F.R. § 441.302(d); *Ball by Burba v. Kasich*, 244 F. Supp. 3d 662, 685 (S.D. Ohio 2017) (*citing Ball v. Rogers*, 492 F. 3d 1094, 1107 (9th Cir. 2007)); *Guggenberger*, 198 F. Supp. 3d at 1018.

57. The freedom of choice provisions of the Medicaid Act, 42 U.S.C. § 1396n(c)(2)(B)-(C), require states to provide individuals eligible for inpatient hospital services,

nursing facility services, or an intermediate care facility for persons with IDD with: (1) notice of and equal opportunities to apply for and access medically necessary community-based services; (2) an assessment of their eligibility for feasible community-based service alternatives to a hospital, nursing facility, or intermediate care facility; and (3) meaningful choice between these institutional placements and community-based services. 42 C.F.R. § 441.302(d); *Ball*, 244 F. Supp. 3d at 685; *Guggenberger*, 198 F. Supp. 3d at 1018. The notice, assessment, and choice requirements apply both to individuals who are at risk of admission to a nursing facility as well as those already institutionalized in a nursing facility. *Steward*, 189 F. Supp. 2d at 637; *Dunakin*, 99 F. Supp. 3d at 1322-23; *Rolland*, 52 F. Supp. 2d at 240-41.

58. The Court has already determined that the freedom of choice claim presented in this case is privately enforceable under 42 U.S.C. § 1983. *Steward*, 189 F. Supp. 3d at 635-37. Since this Court's decision, other courts have found 42 U.S.C. § 1396n(c)(2)(B)-(C)'s freedom of choice provision to be privately enforceable under 42 U.S.C § 1983. *See Guggenberger*, 198 F. Supp. 3d at 1014-15; *see also Ball*, 244 F. Supp. 3d at 683-84.

59. In violation of 42 U.S.C. § 1396n(c)(2)(B)-(C) and 42 C.F.R. § 441.302(d), HHSC does not provide residents of nursing facilities with IDD with: (a) notice of and equal opportunities to apply for and access medically necessary community-based services before such individuals are admitted to a nursing facility; (b) an assessment of their eligibility for such services; and (c) meaningful choice between these institutional and community-based services. According to HHSC's own data, approximately ninety-seven percent of all individuals with IDD are admitted to nursing facilities without notice, assessment, and a choice of community services.

60. HHSC has failed to modify its outreach, education, and choice process, and its PASRR evaluation program, so that each individual with IDD or their guardian has the freedom

to make an informed and meaningful choice before entering a nursing facility, thereby violating the freedom of choice provision of Title XIX of the Social Security Act (Medicaid).

61. HHSC has failed to modify its outreach, education and choice process so that each individual with IDD or their guardian has the freedom to make an informed and meaningful choice before entering a nursing facility in violation of Texas law, which requires that persons with IDD be given information about community-based options prior to being institutionalized in a nursing facility or other similar institutional setting. Tex. Gov't Code Ann. §§ 531.02442 and 531.042.

III. Any Waiver of Federal Rights to Receive Specialized Services or to Choose to Live in the Community Must Be Knowing and Informed.

62. As Congress made clear in enacting the NHRA, a central purpose of the NHRA was to ensure that PASRR-eligible people with IDD in nursing facilities promptly receive all needed specialized services and active treatment. *See supra* ¶¶ 17-34. This right to services constitutes a constitutionally-protected property interest. *See Guggenburger*, 198 F. Supp. 3d at 1119-20 (finding that Medicaid-eligible plaintiffs with IDD had a constitutional property interest in obtaining Medicaid-funded waiver services where they were available); *Daniels v. Woodbury Cty*., 742 F.2d 1128, 1132 (8th Cir. 1984) ("Applicants who have met the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause.") (*quoting Holbrook v. Pitt*, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981)); *McCartney ex rel. McCartney v. Cansler*, 608 F. Supp. 2d. 694, 698-99 (E.D.N.C. 2009) (Medicaid recipients have statutory rights to entitlements that implicate due process rights).

63. Likewise, the rights to live and receive services in the community and to interact with non-disabled peers implicate liberty interests in freedom of association and freedom of movement. *Thomas S. ex rel. v. Flaherty*, 699 F. Supp. 1178, 1203-04 (W.D.N.C. 1988)

(holding that the right to freedom of association of institutionalized individuals with IDD were violated where they were denied opportunities to associate with non-institutionalized persons as a result of being confined to a segregated institution.); *cf. Sawyer v. Sandstorm*, 615 F.2d 311, 316 (5th Cir. 1980) (citing *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)) ("The right to freely associate is not limited to those associations which are 'political in the customary sense' but includes those which 'pertain to the social, legal, and economic interests of the members."); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976), *cert den.*, 429 U.S. 964 (1976) ("The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others" are implicit in the first and fourteenth amendments); *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958) ("[T]he right to travel . . . is basic in our scheme of values.").

64. In order to relinquish or waive a federal right, such as rights under the NHRA to promptly receive specialized services and active treatment, and/or rights under the ADA to live and receive services in the most integrated setting, such a waiver must be "knowing" and "voluntary." To meet this test, the person must be provided adequate and individualized information tailored to the individual's ability to understand the nature and consequences of foregoing exercise of that right. *See United States v. Stout*, 415 F.2d 1190, 1192-93 (4th Cir. 1969) ("[F]ederal law is well-settled that waiver is the voluntary and intentional relinquishment of a known right, and courts have been disinclined lightly to presume that valuable rights have been conceded in the absence of clear evidence to the contrary.").

65. In determining if an individual temporarily relinquishes or "improperly or unknowingly waives" a right, *Clark v. California*, 739 F. Supp. 2d 1168, 1185-86 (N.D. Cal.

2010), courts consider the "totality of the circumstances" and in doing so consider factors including: whether the individual has an intellectual or mental disability, their educational background, and relevant experience, s*ee, e.g.*, *Gonzalez v. Hidalgo Cty.*, 489 F.2d 1043, 1047 (5th Cir. 1973) (remanding due process case where migrant worker sued housing authority where record was not clear that uneducated master tenant who signed adhesion contract spoke little English and "was 'actually aware or made aware of the significance of the fine print now relied on as a waiver of constitutional rights'"); *United States v. Klat*, 180 F.3d 264 (5th Cir. 1999) (per curiam) (holding magistrate judge did not err in refusing to dismiss plaintiffs' court appointed counsel in commitment hearing where plaintiffs' mental condition and competency was directly at issue in determining if waiver of right to counsel was knowing and intelligent); *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811, 813-14 (N.D. Tex. 2002); *compare Pelayo v. U.S. Border Patrol Agent No. 1*, 82 Fed. Appx. 986 (5th Cir. 2003) (affirming denial of motion to dismiss where person deported was alleged to have lacked the capacity to choose voluntary departure and waive his rights as evidenced by being disoriented, mumbling and unable to answer questions from border patrol agent) *with Nose v. Attorney General of the United States*, 993 F.2d 75 (5th Cir. 1993) (undisputed summary judgment evidence established that alien participating in Visa Waiver Pilot Program (VWPP) knowingly waived her right to deportation hearing where alien was highly educated person with established English language proficiency who had spent over two years at a major United States university and who had consulted with attorney to entry to United States under VWPP); *Udd v. Massanari*, 245 F.3d 1096, 1102 (9th Cir. 2001) (termination of social security benefits for man with schizophrenia who was unable to understand the cessation of his benefits and the need to file an appeal in order to attempt to maintain them constituted a denial of due process).

66. Similarly, individuals with IDD in Texas nursing facilities should not be deemed to have opposed specialized services or community placement, and thereby relinquished their rights to receive specialized services and treatment in the nursing facility, or their right to receive services and live in the most integrated setting, unless Texas establishes that these rights were knowingly and intentionally waived after being provided with adequate and individualized information tailored to the person's ability to understand their options and the consequences of their decisions. Defendants have an affirmative obligation to ensure that information about these rights is provided such that an individual with IDD or their guardian can make an informed and voluntary choice whether to relinquish and knowingly waive these rights.

IV. The Court's Class Certification Decision Remains Appropriate and Should Not Be Modified.

67. The Court's prior determination that this case should proceed as a class action was appropriate then and remains appropriate today. *Steward v. Janek*, 315 F.R.D. 472 (W.D. Tex. 2016), *discretionary review denied*, No. 16-90019 (5th Cir. Aug. 5, 2016). Nothing has changed that requires the Court to revisit that decision or revise its definition of the plaintiff class.

68. The class continues to satisfy the requirements of Fed. R. Civ. P. 23(a), because (1) there remain approximately 3600 individuals with IDD in nursing facilities, making joinder impractical, thereby satisfying the numerosity prong of Rule 23(a)(1); (2) there remain common questions of fact and law, such as whether individuals with IDD in nursing facilities are provided sufficient specialized services, adequate transition planning and opportunities to make an informed choice about whether to remain in a segregated setting (common questions of fact), as well as whether the active treatment requirements of 42 C.F.R. § 483.440(a)-(f) must be met in nursing facilities (common question of law), thereby satisfying the commonality prong of Rule

23(a)(2); (3) the legal claims asserted and the relief sought by the named plaintiffs remain similar to those of the class, thereby satisfying the typicality prong of Rule 23(a)(3); and (4) the named plaintiffs have and continue to adequately represent the class, thereby satisfying the representation prong of Rule 23(a)(4). *Steward*, 315 F.R.D. at 482-83, 486-87 (citing, *inter alia*, several Quality Service Review (QSR) reports that document facts and systemic deficiencies which impact individuals with IDD in nursing facilities, and which provide the basis for proving violations of federal law). More recent QSR reports for 2016 and 2017, as well as other evidence presented at trial, continue to demonstrate similar common question of facts, similar common questions of law, similar legal claims, and similar types of relief needed.

69. The class also continues to satisfy the requirements of Fed. R. Civ. P. 23(b), because Defendants' policies and practices, which violate the Medicaid Act, the ADA, and Section 504 of the Rehabilitation Act, apply to all members of the class and a single injunction that required modification of those policies and practices would cure the federal law violations for all members of the class. *Steward*, 315 F.R.D. at 492. The more recent QSR report and evidence of deficient PASRR and ADA policies and practices—like the failure to evaluate ninety-seven percent of individuals with IDD before they are admitted to a nursing facility, the failure to provide specialized services other than service coordination to most individuals with IDD in nursing facilities, the failure to require the provision of active treatment, the failure to provide information that would allow an individual to make an informed choice about where to live, and the failure to provide services in the most integrated setting to all individuals who are appropriate for transition to the community—all can be remedied by a single injunction, without regard to the individual circumstances of each class member.

<u>PLAINTIFFS' AND THE UNITED STATES' CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT</u>

V. Texas Violates Title II of the Americans with Disabilities Act.

A. The Americans with Disabilities Act Prohibits Unnecessary Institutionalization of People with Disabilities.

70. The Americans with Disabilities Act "provide[s] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1); *see also Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir. 1995) (quoting S. Rep. No. 101-116, at 20 (1989) (Senate Report); H.R. Rep. No. 101-485, pt. II, at 50 (1990) (House Report (Part II)), *cert. denied sub nom.*, *Sec'y of Pub. Welf. v. Idell S.*, 516 U.S. 813 (1995); H.R. Rep. No. 101-485, pt. IV, at 23 (1990).

71. Congress acknowledged prior to the ADA's passage that "then current laws were 'inadequate' to combat 'the pervasive problems of discrimination that people with disabilities are facing.'" *Helen L.*, 46 F.3d at 331 (quoting Senate Report at 18; House Report (Part II) at 47). Forms of discrimination that concerned Congress included segregation of people with disabilities in institutions and their concomitant exclusion from the community and society at large. Senate Report at 5-6 ("One of the most debilitating forms of discrimination is segregation imposed by others."); House Report (Part II) at 29 ("Discrimination against people with disabilities includes segregation[] [and] exclusion . . . .").

72. To this end, Congress enacted the ADA in 1990. "The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation." H.R. Rep. No. 101-485, pt. III at 26 (1990) (House Report (Part III)).

73. In enacting the ADA, Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such

forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"; that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization"; and that "the Nation's proper goals regarding individuals with disabilities are to assure . . . full participation[] [and] independent living." 42 U.S.C. § 12101(a)(2)-(3), (7); *see also* House Report (Part III) at 49-50 ("The purpose of [T]itle II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life."). Congress further found that "individuals with disabilities continually encounter various forms of discrimination, including . . . segregation." 42 U.S.C. § 12101(a)(5).

74. Thus, the ADA specifies that discrimination against people with disabilities includes "segregation" and "institutionalization." 42 U.S.C. § 12101(a)(3), (5).

75. Title II of the ADA provides that "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." 42 U.S.C. § 12132. Title II "incorporates the 'non-discrimination principles' of [S]ection 504 of the Rehabilitation Act and extends them to state and local governments," whether or not they receive federal funding. *Helen L.*, 46 F.3d at 331 (footnote omitted) (quoting *Easley v. Snider*, 36 F.3d 297, 300 (3d Cir. 1994)); *see also* 42 U.S.C. § 12131.

76. Defendants State of Texas and HHSC are "public entit[ies]" within the meaning of Title II of the ADA and, therefore, are subject to the ADA's provisions and obligations. 42 U.S.C. § 12131(1)(A).

77. A state's obligations under the ADA are not limited by the scope of Medicaid requirements—Title II of the ADA creates an independent and additional legal obligation on

states. *See Townsend v. Quasim*, 328 F.3d 511, 518 n.1 (9th Cir. 2003) (stating that Medicaid Act conditions are not relevant to whether plaintiffs can demonstrate a *prima facie* violation of the integration regulation). A state may run afoul of the ADA even while carrying out CMS-approved state plans, waiver services, and amendments. *See, e.g.*, *Davis v. Shah*, 821 F.3d 231, 264 (2d Cir. 2016) ("[A state's] discretion to decide whether to provide coverage . . . under the Medicaid Act, however, does not affect its duty to provide those services in a non-discriminatory manner under the ADA. A state's duties under the ADA are wholly distinct from its obligations under the Medicaid Act."); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 601-03, 614-15 (7th Cir. 2004) (allowing plaintiff's claims to proceed without regard to federal approval of state's Medicaid plan and waiver programs); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003) (even though a waiver program is optional, a state may not, under Title II of the ADA, amend optional programs in such a way as to violate the integration mandate); *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1302-03 (M.D. Fla. 2010) (rejecting defendant's argument that plaintiff's ADA challenge requesting waiver services to avoid serious risk of institutionalization failed because it sought to circumvent Medicaid rules); *Grooms v. Maram*, 563 F. Supp. 2d 840, 858 (N.D. Ill. 2008) (same).

78. The Attorney General is required to issue regulations implementing Title II of the ADA. 42 U.S.C. § 12134(a).

79. The Attorney General's integration regulation implementing Title II of the ADA provides, *inter alia*, that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) ("the integration mandate"). An integrated setting is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."

28 C.F.R. pt. 35, App. B. at 693 (2016); *Disability Advocates, Inc. v. Paterson (DAI I)*, 598 F. Supp. 2d 289, 320 (E.D.N.Y. 2009) (concluding that "the proper interpretation of the regulations' definition of 'most integrated setting' is set forth in the regulations themselves: whether a particular setting 'enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible'") (quoting 28 C.F.R. § 35.130(d), App. A).

80. Accordingly, the ADA and its integration regulation reflect a preference for community placement. "In short, where appropriate for the patient, both the ADA and [Section 504 of the Rehabilitation Act] favor integrated, community-based treatment over institutionalization." *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 379 (3d Cir. 2005) (citation omitted); *see also* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d); *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 337 (D. Conn. 2008) ("The ADA's preference for integrated settings is not consistent with a procedure in which remaining at [the institution] is the default option for residents."); U.S. Dep't of Health & Human Servs., Health Care Fin. Admin. State Medicaid Dir. Letter, Jan. 14, 2000, at 1 ("[N]o one should have to live in an institution or nursing home if they can live in the community with the right support."), *available at* https://www.medicaid.gov/Federal-Policy-Guidance/downloads/SMD011400C.pdf.

81. One form of disability discrimination under Title II, therefore, is a violation of the "integration mandate." This mandate—arising out of the statute itself, the regulations of the Attorney General implementing Title II, and the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999)—requires that when a state provides services to people with disabilities, it must do so "in the most integrated setting appropriate to [their] needs." 28 C.F.R. § 35.130(d); *Olmstead*, 527 U.S. at 592, 607; 42 U.S.C. § 12132

82. The Supreme Court in *Olmstead* explicitly held that "[u]njustified isolation . . . is properly regarded as discrimination based on disability." *Olmstead*, 527 U.S. at 597. The Court noted that "in findings applicable to the entire statute, Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.'" *Id.* at 600. The Court held that unnecessary institutionalization violates the ADA because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," and "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 600-01.

83. The Supreme Court concluded that the ADA requires public entities to provide community services in the most integrated setting when: (a) such services are appropriate, (b) the affected persons do not oppose community-based treatment, and (c) community services can reasonably be accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. *Olmstead*, 527 U.S at 607.

84. A public entity violates Title II of the ADA when it segregates people with disabilities in public or private facilities or promotes the segregation of people with disabilities in such facilities through its planning, system design, funding choices, or service implementation. *See, e.g.*, 28 C.F.R. § 35.130(d); *Steimel v. Wernert*, 823 F.3d 902, 911 (7th Cir. 2016) (explaining that a state may "violate the integration mandate if it operates programs that segregate individuals with disabilities or through its planning, service system design, funding choices, or service implementation practices, promotes or relies upon the segregation of individuals with disabilities in private facilities or programs") (internal quotation marks and alterations omitted); *Fisher*, 335 F.3d at 1181-82 (reversing grant of summary judgment where

defendants' restructuring of medication entitlements could place people at serious risk of unnecessary institutionalization in nursing facilities); *DAI I*, 598 F. Supp. 2d at 316-19 (finding that defendants' planning, funding, and administration of a service system was sufficient to support an *Olmstead* claim and rejecting the argument that public entities could not be held liable when services were provided in privately-operated facilities); *see also Martin v. Taft*, 222 F. Supp. 2d 940, 981 (S.D. Ohio 2002) (finding that liability does not depend on whether the public entity owns or runs institutional settings). In addition, "[a] public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability," including unnecessary institutionalization. 28 C.F.R. § 35.130(b)(3), (d); 28 C.F.R. § 41.51(b)(3), (d); 45 C.F.R. § 84.4(b)(2), (4); *see also Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Conn.*, 706 F. Supp. 2d 266, 277-78 (D. Conn. 2010) (plaintiffs stated a violation of the ADA where defendants' methods of administration failed to adequately assess and identify the long-term needs of people with disabilities in nursing facilities, in order to determine whether they could be served in the community, and to provide them with information regarding the availability of alternatives to nursing facility care, thereby denying them the right to choose to live in the community instead of an institution); *Dunakin*, 99 F. Supp. 3d at 1319-20 (plaintiff stated a claim for an ADA violation by alleging that defendants' failure to comply with PASRR requirements when administering its PASRR program denied plaintiff and plaintiff class the opportunity to receive an evaluation for an alternative to nursing facility placement); *Kathleen S. v. Dep't of Pub. Welfare of Pa.*, 10 F. Supp. 2d 460, 471 (E.D. Pa. 1998) (finding violation of ADA by state defendants whose methods of administration at state institution caused

eighty-eight people to be unnecessarily segregated in the hospital even though they were able to live in the community with appropriate supports).

85. Texas violates Title II of the ADA by planning, funding, designing, administering, and implementing its IDD service system in a manner that unnecessarily segregates qualified individuals with IDD in nursing facilities for whom integrated residential settings are appropriate and who do not oppose living in those settings. *See*, *e.g.*, *Disability Advocates, Inc. v. Paterson (DAI II)*, 653 F. Supp. 2d 184, 187-88 (E.D.N.Y. 2009) (violation of ADA where approximately 4300 people with mental illness, virtually all of whom were qualified for and did not oppose integrated placements, were nonetheless being served in segregated settings), *vacated on other grounds*, 675 F.3d 149 (2d Cir. 2012); *see also infra* §§ V.E, F.

86. Texas violates Title II of the ADA by planning, funding, designing, administering, and implementing its IDD service system in a manner that unnecessarily places qualified individuals with IDD at serious risk of being admitted to nursing facilities, who could live in integrated settings and do not oppose living in those settings. *See*, *e.g.*, *Davis*, 821 F.3d at 263 (collecting cases where "courts of appeals applying the disability discrimination claim recognized in *Olmstead* have consistently held that the risk of institutionalization can support a valid claim under the integration mandate"); *see also infra* §§ V.E, F.

87. Texas violates Title II of the ADA by planning, administering, funding, and operating an IDD service system that: (1) results in the unnecessary admission of people with IDD to nursing facilities; (2) limits opportunities for people with IDD to transition out of nursing facilities; (3) fails to provide people with IDD or their guardians with individualized information,

opportunities, and supports necessary to allow them to make an informed choice[2] about whether to enter or remain in a segregated nursing facility; (4) denies timely and meaningful access to community programs; and (5) requires that people with IDD be confined in segregated institutional settings in order to receive needed services.

B. People with IDD in Nursing Facilities Are Qualified Individuals with Disabilities and Are Appropriate to Receive Services in Integrated Community Settings.

88. Title II of the ADA provides that "'qualified individual[s] with a disability' may not 'be subjected to discrimination.'" *Olmstead*, 527 U.S. at 602 (quoting 42 U.S.C. § 12132).

89. People with disabilities are qualified and appropriate for community-based programs, like home and community-based waiver services, for which they meet the essential eligibility requirements. *Olmstead*, 527 U.S. at 602 (qualified individuals are persons with disabilities who "'mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity'") (quoting 42 U.S.C. § 12131(2)); *DAI II*, 653 F. Supp. 2d at 227 ("[T]he Supreme Court held that a setting is 'appropriate' for individuals if those individuals meet 'the essential eligibility requirements for habilitation in a community based program.'") (quoting *Olmstead*, 527 U.S. at 603).

90. Community placement should be considered appropriate when a state is serving persons in the community whose disabilities and support needs are similar to residents of the institution. *See DAI II*, 653 F. Supp. 2d at 187, 245-46. Similarly, community placement should be considered appropriate when the person previously lived in the community with supports that adequately addressed similar needs. *See, e.g.*, *Radaszewski ex rel. Radaszewski*, 383 F.3d at 612-

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[2] An "informed choice" includes providing adequate, individualized information in a form that accommodates a person's cognitive needs, that is a meaningful choice among actual options that are or can be made available, and with reasonable efforts to accommodate preferences and address barriers that limit such options.

13 (Medicaid-eligible person who lived at home with services demonstrated that services were preferred and appropriate for him, making him a qualified individual with a disability); *Townsend*, 328 F.3d at 516 (same).

91. Further, a person asserting an *Olmstead* claim need not rely on a public entity's own treatment professionals to determine whether the person is qualified and appropriate to participate in a state's community service system. *See Joseph S.*, 561 F. Supp. 2d at 290-91 (rejecting the argument that the state's treatment professionals must be the ones to make an appropriateness determination); *see also Day v. District of Columbia*, 894 F. Supp. 2d 1, 23-24 (D.D.C. 2012) (recognizing that plaintiffs need not prove the public entity's treatment professionals have determined eligibility for community services and noting that "lower courts have universally rejected the absolutist interpretation proposed by defendants"); *DAI II*, 653 F. Supp. 2d at 258-59 (finding that plaintiffs need not provide determinations from state treatment professionals to demonstrate that they are qualified for community placement and noting that holding otherwise would "eviscerate the integration mandate"); *Frederick L. v. Dep't of Pub. Welfare (Frederick L. I)*, 157 F. Supp. 2d 509, 540 (E.D. Pa. 2001) (finding that states cannot avoid the integration mandate by failing to make recommendations for community placement); *Long v. Benson*, No. 4:08cv26, 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (noting that the right to receive services in the community would become illusory if the state could deny the right by refusing to acknowledge the appropriateness of community placement).

92. Because Medicaid-eligible people with IDD in nursing facilities are "qualified individuals with disabilit[ies]," and meet the essential eligibility criteria of the State's long-term service system for people with IDD, the rights and protections of Title II of the ADA apply to them. *See* 42 U.S.C. § 12131(2). Medicaid-eligible individuals with IDD who meet the requisite

institutional level of care (nursing facilities and/or Intermediate Care Facilities for Individuals with Intellectual and Developmental Disabilities (ICF/IID)) necessarily meet the essential eligibility criteria of the State of Texas's long-term care services system for people with IDD, including the State's Home and Community-based Services (HCS) waiver program, and are therefore qualified and appropriate for those programs. 40 Tex. Admin. Code § 9.155 (2016); *see also Grooms*, 563 F. Supp. 2d at 848, 850-51 (denying summary judgment and finding that plaintiff was qualified under the ADA where "he had severe, long-term disabilities, he was Medicaid-eligible, and he was at risk of being placed in a medical institution"). Finally, Medicaid-eligible people with IDD who live in nursing facilities in Texas have similar needs to those already served in the State's community service system and many have previously lived in the community with similar needs. Accordingly, such individuals with IDD in or at serious risk of entering nursing facilities in Texas are appropriate for community placement.

C. Nursing Facilities Are Institutions that Segregate People with IDD from the Community.

93. Nursing facilities are, by definition, segregated institutions. *See* 42 U.S.C. § 1395i-3(a) (defining skilled nursing facilities as institutions); Defs.' Answer to U.S.'s Compl., ECF No. 143, ¶ 50 ("The State of Texas admits that most nursing facilities are institutions . . . ."); *see also Doe*, 501 F.3d at 351 (discussing level of care needed to reside in "an institution like a nursing home"); *Radaszewski ex rel. Radaszewski*, 383 F.3d at 601-02, 610 (discussing "an institutional setting—whether it be a nursing home facility, a hospital, or another type of care facility"); *Fisher*, 335 F.3d at 1181-82, 1184-85 (people at risk of entering nursing facilities were at risk of entering institutions); *Thorpe v. District of Columbia*, 303 F.R.D. 120, 126 (D.D.C. 2014) (". . . .an institution (*e.g.*, a nursing facility)"); *Cruz v. Dudek*, No. 10-23048-CIV, 2010 WL 4284955, at *16 (S.D. Fla. Oct. 12, 2010) (noting the high expense of providing

"institutional care in a nursing home"); *Hunter ex rel. Lynah v. Cook*, No. 1:08-CV-2930-TWT, 2011 WL 4500009, at *5 (N.D. Ga. Sept. 27, 2011) (noting that plaintiffs were not "required to segregate themselves by entering an institution"—in this case, a nursing facility—to state a Title II claim (quotation omitted)).

94. Texas's nursing facilities are hospital-like settings that congregate people with disabilities and isolate and segregate people with IDD from their families, peers, and communities. Texas nursing facilities meet the ADA and *Olmstead* criteria for segregated settings.

95. Texas's nursing facilities are not integrated settings that "enable[] individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, App. B; *see also* Defs.' Answer to U.S.'s Compl., ECF No. 143, ¶ 50 ("The State of Texas admits that most nursing facilities . . . are not at all times integrated settings.").

D. People with IDD and Their Guardians Do Not Oppose Receiving Services in Integrated Settings.

96. The ADA prohibits Texas from discriminating against people on the basis of disability, which in turn requires Texas to provide integrated, community services to qualified and appropriate individuals with disabilities who do not oppose such services. *See* 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any such entity."); 28 C.F.R. § 35.130(d); *Olmstead*, 527 U.S. at 600 (acknowledging that "unjustified institutional isolation of persons with disabilities is a form of discrimination").

97. Services for qualified individuals with IDD should therefore be provided in community settings where appropriate, unless the affected person knowingly opposes receiving services in the most integrated setting. *See Olmstead*, 527 U.S. at 607 (where "the affected

persons do not oppose" community-based treatment, Title II of the ADA requires that states provide qualified individuals that option); 42 U.S.C. § 12201(d) ("Nothing in this Act shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept."); *see also* 28 C.F.R. § 35.130(d), (e)(1) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."); *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 379; *Frederick L. v. Dep't of Pub. Welfare (Frederick L. II)*, 364 F.3d 487, 491-92 (3d Cir. 2004); *DAI I*, 598 F. Supp. 2d at 320 (citing *Frederick L. II*, 364 F.3d at 491-92); *Messier*, 562 F. Supp. 2d at 337; *supra* ¶ 80.[3]

98. People with disabilities, their family members, or their guardians, who express an interest in transitioning to community settings cannot be said to oppose placement in such settings. *See, e.g.*, *Olmstead*, 527 U.S. at 602-03 (plaintiffs desired a community placement). Evidence that people likely would not oppose community services if provided adequate, individualized information about community services also indicates non-opposition to community-based services. *See, e.g.*, *DAI II*, 653 F. Supp. 2d at 260-67 (finding that plaintiffs were not opposed to community services where (1) residents had little or no choice about moving into the institutional setting, (2) many were uninformed about their options, (3) about half had "expressed an interest" in community settings, and (4) many residents, with "accurate information and a meaningful choice" would choose to receive services in an integrated setting); *Messier*, 562 F. Supp. 2d at 332-34, 339-42 (finding that plaintiffs were not opposed to community services where a survey reflected mixed and various expressions of "interest" by

[3] Although a state may put forward a fundamental alteration defense, Texas has not done so here. *See infra* § V.E.

guardians in community placement and an enhanced choice process included guardian statements that they would consider community placement if it met their ward's needs).

99. In determining whether people with disabilities who do not affirmatively request community placement oppose community placement, it is relevant whether the person had the opportunity to make an informed choice to live in the segregated setting. *See Messier*, 562 F. Supp. 2d at 337, 342 (rejecting the state's use of responses to a general and ambiguous survey question to exclude residents of a large institution from consideration for a community placement where responses were given without the benefit of adequate information about community placement and explaining that "defendants cannot establish compliance with the integration mandate by showing that class members never requested community placement"); *DAI II*, 653 F. Supp. 2d at 260-67 (finding that plaintiffs were not opposed to living in more integrated setting where there was "convincing evidence that many would choose to live in [a community setting] if given an informed choice" and explaining that for people who had been institutionalized for a long time, it was common to be fearful, reluctant, or ambivalent about transition without additional assistance). Where people with disabilities or their guardians do not express a preference concerning community placement, they cannot be said to oppose community placement. *See* 28 C.F.R. § 35.130(d), (e)(1); *Messier*, 562 F. Supp. 2d at 337-38; *DAI II*, 653 F. Supp. 2d at 260-67.[4]

100. In order to determine whether a person prefers to enter or remain in a segregated setting, a state must do more than wait for a person to affirmatively request community

[4] Texas law also embodies a preference for community placement, for example, when it requires guardians to consider the most integrated setting for the person. *E.g.*, Tex. Health & Safety Code § 592.013 ("Each person with an intellectual disability has the right to live in the least restrictive setting appropriate to the person's individual needs and abilities and in a variety of living situations . . . ."); Tex. Estates Code § 1151.351(b)(4) (people under guardianship have the right to receive services in the most integrated setting).

placement. Courts have recognized the importance of educating even non-disabled guardians and family members about community placement options and providing "concrete options for placement" rather than an "abstract possibility that [the person] could live in a more integrated setting." *Messier*, 562 F. Supp. 2d at 333-34, 337, 339-42 (finding that even where the process provided quarterly assessments at which guardians could check "yes" or "no" when asked if they wanted the state to "actively pursue" community placement, defendants' procedure was not in compliance with the ADA because the interdisciplinary teams were permitted to refrain from considering community placement if the guardian checked "no," depriving guardians of the opportunity to consider such placement, and because evidence indicated that some guardians were "not familiar with what resources would be available"); *see also Frederick L. I*, 157 F. Supp. 2d at 540 (finding that states cannot avoid the integration mandate by failing to make recommendations for community placement); *cf.* 42 U.S.C. § 12201(d) (indicating that a person with a disability need not accept an accommodation, which necessarily must first be made available); 28 C.F.R. § 35.130(d), (e)(1) (same).

101. While people with disabilities or their guardians may knowingly decline community services, *see Olmstead*, 527 U.S. at 602, the state must offer appropriate services to people, consistent with their preferences, and provide sufficient, individualized information and opportunities in order to allow them to make an informed choice concerning whether to remain in—or, for those facing admission, whether to enter—a segregated setting. Allowing people with disabilities and their guardians to make an informed choice necessarily includes providing sufficient individualized information and opportunities to ensure they understand the options available to them. *See, e.g.*, *Messier*, 562 F. Supp. 2d at 337-39, 340-42 (finding that defendants

should have given individuals and their guardians opportunity to consider community placement prior to determining that they had declined transition to the community).

102. Where the State fails to periodically give residents of institutions sufficient, individualized information about community services, a prior indication that they prefer to remain in the facility does not necessarily mean they knowingly "oppose" community placement for purposes of *Olmstead*. Where people with disabilities and their guardians have not received sufficient individualized information and opportunities, consistent with professional standards and practices for informed choice, to explore community living, they cannot be found to knowingly oppose that option. *See DAI II*, 653 F. Supp. 2d at 260-67 (relying on evidence of lack of choice in moving into an adult care home, evidence of lack of information about alternative housing options, and evidence that "with accurate information and a meaningful choice, many Adult Home residents would choose to live and receive services in a more integrated setting, such as supported housing" to determine that plaintiffs satisfied *Olmstead*'s do not oppose prong); *see also Kenneth R. ex rel. Tri-Cty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 270 n.6 (D.N.H. 2013) ("[T]he *meaningful* exercise of a preference will be possible only *if* an adequate array of community services are available to those who do not need institutionalization, . . . and preferences may be 'conditioned by availability, . . . limited by information, and are likely to evolve in a system that complies with the ADA.'") (emphases in original) (quoting plaintiffs' brief with approval in certifying class); *In re District of Columbia*, 792 F.3d 96, 100 (D.C. Cir. 2015) (lack of transition services, including information regarding community alternatives to institutionalization, could form basis for *Olmstead* claim); *Messier*, 562 F. Supp. 2d at 340-42 (finding some guardians were still "not familiar with what resources would be available" and documentation showed guardian statements that were ambivalent or undecided

even after state enhanced its interdisciplinary team process to include a "quarterly assessment of choice," and concluding that process remained inadequate under ADA).

103. Ensuring that people with disabilities and their guardians can make an informed choice whether to enter or remain in a segregated facility includes offering particular community options, and ensuring the person has appropriate opportunities to understand what community services and activities involve, before a determination can be made that such people "oppose" that option and knowingly choose to enter or remain in a segregated facility. *See In re District of Columbia*, 792 F.3d at 100; *Kenneth R. ex rel. Tri-Cty. CAP, Inc./GS*, 293 F.R.D. at 270 n.6; *see also Messier*, 562 F. Supp. 2d at 333-34, 340-42 (describing the importance of providing a process that enables guardians to make an informed decision about whether to transition people with IDD to the community, including continued provision of concrete options, education, and assessment of the person's needs in the community, even where a guardian responds "no" when asked if they would like to actively pursue transition); *DAI II*, 653 F. Supp. 2d at 260-67.

104. These requirements are heightened when people have disabilities that require accommodations that are necessary to enable them to make an informed choice—particularly disabilities like IDD that limit both the ability to understand and to make choices—and do not have guardians. Ensuring people with disabilities can make an informed choice also requires that Texas reasonably accommodate their disabilities by providing individualized information about community placement and opportunities to understand community living options, consistent with professional standards and practices. *See infra* at ¶¶ 109-10.

105. In providing "notice concerning benefits or services or written material concerning waivers of rights or consent to treatment," Texas is required to "take such steps as are

necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap." 45 C.F.R. § 84.52(b).

106. Where the state fails to make adequate and appropriate community services available for a person, a person's alleged "choice" to enter an institution or to remain institutionalized does not constitute a meaningful choice to "oppose" community services as contemplated by *Olmstead* or the ADA's integration mandate. *See, e.g.*, *Olmstead*, 527 U.S. at 593, 603 (plaintiff EW refused inappropriate discharge from institutional setting to a homeless shelter, and remained institutionalized, and the Court held that EW did not oppose community integration); *Messier*, 562 F. Supp. 2d at 331, 342 (considering the actual availability of placement opportunities as relevant evidence to determining whether guardians had made an informed choice to oppose community placement).

107. As Congress noted in its Findings, a central purpose of the ADA is to redress the historical isolation and segregation of people with disabilities and to prevent their unnecessary institutionalization. *See* 42 U.S.C. § 12101(a)(2)-(3). Congress also expressed that people with disabilities should be entitled to the same federally-protected rights to be free of such discrimination as other minorities. *Id.* at § 12101(a)(4)-(8); *see supra* § V.A.

108. Additionally, as discussed above, under the ADA, people have the right to live and receive services in the most integrated setting appropriate, which is a setting that allows people with disabilities to interact with their non-disabled peers to the fullest extent possible. *Olmstead*, 527 U.S. at 592 (citing 28 C.F.R. pt. 35, App. A, p. 450 (1998)). Consistent with courts' decisions in a variety of other contexts, as described below, before the Court can determine that people with IDD knowingly oppose community placement, the State must have provided them with sufficient, individualized information and opportunities in order to allow

them to make an informed decision whether to relinquish their right to live and receive services in the community, where appropriate, and to interact with non-disabled peers.

109. It is well established in ADA cases that a state has an affirmative duty to provide reasonable accommodations and effective communications to ensure that people with IDD do not improperly or unknowingly waive their rights and to ensure them an equal opportunity to participate in services and procedures. *See, e.g.*, *Clark*, 739 F. Supp. 2d at 1185-86 (explaining that "[m]any developmentally disabled prisoners have impaired communication skills" and "are unable to read and write. They have difficulty understanding instructions, especially multi-step instructions, and difficulty with any task that requires writing, such as filling out requests for medical or mental health care and grievances. It is difficult for them to express themselves, and they often need assistance choosing words to make their point. As a result, developmentally disabled prisoners often have difficulty communicating, self-advocating, and understanding what takes place during prison administrative proceedings and grievance processes. They are therefore at risk for unintentionally waiving their rights.") (citations omitted); *Hahn ex rel. Barta v. Linn Cty.*, 130 F. Supp. 2d 1036, 1047-48 (N.D. Iowa 2001) (denying county's motion for summary judgment where plaintiff with developmental disability sought facilitated communication as a reasonable accommodation to participate in county's developmental disability services). Additionally, courts have recognized a right to refuse medical treatment which "carries with it a concomitant right to such information as a reasonable patient would deem necessary to make an informed decision regarding medical treatment," including "knowledge of the risks or consequences that a particular treatment entails." *Pabon v. Wright*, 459 F.3d 241, 246, 249 (2d Cir. 2006); *see also White v. Napoleon*, 897 F.2d 103, 113 (3d Cir.

1990) (prisoners have right to make an informed choice whether to accept medical treatment and to receive information about any available viable treatment alternatives).

110. For people with intellectual disabilities, whose needs place them at heightened risk of unintentionally waiving their rights, reasonable accommodations include going beyond simply telling them that a service is available, and require providing appropriate assistance to access that service, using effective communication, and otherwise ensuring that they understand what the services and processes entail. *See Clark*, 739 F. Supp. at 1179 (holding that, because many people with intellectual disabilities have impaired communication skills, difficulty understanding instructions, expressing themselves, and self-advocating, "'[i]t is not enough simply to say the books are there, when the plaintiffs contend that they do not have the assistance necessary to use the books properly'" and that, with respect to disciplinary proceedings, "[o]nly through effective communication can defendants guarantee that developmentally disabled prisoners have meaningful access to these proceedings") (*quoting Cruz v. Hauck*, 627 F.2d 710, 720 (5th Cir. 1980); *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988)); *accord Armstrong v. Davis*, No. C 94-02307-CW, 1999 WL 35799705, at *7 (N.D. Cal. Dec. 22, 1999) ("Individuals with mental retardation often are passive and dependent, and may easily acquiesce to authority."); *cf. Folkerts v. City of Waverly*, 707 F.3d 975, 983-84 (8th Cir. 2013) (police officer fulfilled duty under ADA to accommodate suspect with intellectual disabilities when officer "altered his questioning style, more fully explained the *Miranda* rights, interviewed [the person] in a less intimidating room, drove [the person] to his parents' home and explained the situation to them, and arranged alternative and friendlier booking procedures"). Similarly, the state must affirmatively provide people with IDD in nursing facilities with individualized information and

accommodations, in order to ensure they understand the services available to them and to avoid "unintentionally waiving" their rights under *Olmstead* to live in an integrated setting.

111. Plaintiffs and the United States have satisfied *Olmstead*'s requirement to show that people with IDD are qualified and appropriate for community placement and that they "do not oppose" community placement on the basis that many people with IDD in and at serious risk of entering Texas's nursing facilities have not made an informed choice to enter or remain in a segregated nursing facility. That is, many such people with IDD have not been provided sufficient individualized information and accommodations to understand community living options, they have not been provided appropriate identification, screening, and evaluation prior to admission to a nursing facility, they have not been provided services that allow them to experience community activities, they have not been offered appropriate services to meet their needs in the community, or they have not otherwise made an informed choice to enter or remain in a segregated nursing facility. To the contrary, there is a variety of evidence that many people have expressed an interest in living in the community or an interest in learning more about the community, and that many more would not oppose living in the community if given sufficient information and opportunities to understand their options.

E. The State Can Reasonably Accommodate the Relief Sought and that Relief Will Not Fundamentally Alter Texas's Service System.

112. The final prong to demonstrate an *Olmstead* violation is to show that the state can reasonably accommodate placement in the community. *Olmstead*, 527 U.S. at 607.

113. The ADA requires that public entities make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, including the unnecessary segregation or institutionalization of people with disabilities, unless the public entity can demonstrate that such modifications would fundamentally alter the nature of

the service, program, or activity. 28 C.F.R. § 35.130(b)(7); *see also Olmstead*, 527 U.S. at 597 (holding that unjustified isolation is discrimination).

114. A plaintiff may meet its burden of showing that a modification is reasonable through a *prima facie* showing, by suggesting the existence of a plausible accommodation. *Frederick L. II*, 364 F.3d at 492 n.4 (plaintiff has burden of "articulating a reasonable accommodation" that would allow institutionalized persons with disabilities to move to the community); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003) (once the plaintiff suggests "the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits . . . she has made out a *prima facie* showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant") (quoting *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995)). If the plaintiff makes that showing, then the public entity may assert as an affirmative defense, and bears the burden to prove, that the proposed modification would constitute a "fundamental alteration" of its services, programs, or activities. *Olmstead*, 527 U.S. at 603-06; *Henrietta D.*, 331 F.3d at 280-81; *Frederick L. II*, 364 F.3d at 492 n.4.

115. Ensuring that the State: (1) identifies and evaluates people with IDD who are at serious risk of nursing facility admission, including complying with its obligations under federal law to assess whether people's needs could be met in Texas's community service system prior to allowing them to enter nursing facilities, and arranges services to avoid unnecessary institutional placements; (2) provides people with IDD or their guardians the individualized information, opportunities, and services necessary to make an informed choice about whether to enter or remain in a nursing facility; (3) provides an appropriate service array and system capacity of community services in integrated settings such that qualified individuals with IDD can safely

receive long-term care services at home or in their communities; and (4) conducts effective monitoring, oversight, and training to ensure that its IDD system meets its intended goals, constitute a reasonable modification to Texas's system of services for people with IDD and would not be a fundamental alteration of this service system. *See, e.g.*, *Steimel*, 823 F.3d at 911, 916-17 (modifications to prevent institutionalization were reasonable because the mandate "extends to persons at serious risk of institutionalization or segregation and is not limited to individuals currently in institutional or other segregated settings") (internal citations and alterations omitted); *Rolland v. Patrick*, 562 F. Supp. 2d 176, 180-81 (D. Mass. 2008) (finding reasonable a plan requiring the state to provide "transition services" in the community, provide specialized services in nursing facilities, and "identify the personal preferences, interests, relationships, environmental and physical support requirements, health care and dietary needs, of each class member who may be a candidate for community placement").

116. That a requested modification aligns with the jurisdiction's own policy or with nationally recognized practices is evidence that the modification is reasonable. *See, e.g.*, *Saylor v. Regal Cinemas*, No. WMN-13-3089, 2016 WL 4721254, at *19 (D. Md. Sept. 9, 2016); *see also* Pls.' and U.S.'s Findings of Fact (FOF) § VII.

117. It is reasonable for Texas to modify its policies, procedures, and practices to enable people to make an informed choice of whether to enter, or remain in, a nursing facility in order to avoid unnecessary segregation.

118. Texas is required by CMS to provide information and opportunities to beneficiaries in its Medicaid-funded institutional and community programs through person-centered planning processes that "[p]rovide[] necessary information and support to ensure that the individual directs the process to the maximum extent possible, and is enabled to make

informed choices and decisions." 42 C.F.R. § 441.725. Conforming the State's practices to its existing obligations is inherently reasonable.

119. The requirements for informed choice in the person-centered planning processes ensure that people are provided with individualized information, opportunities, and support necessary to allow people with IDD to make an informed choice. 42 C.F.R. § 441.301(c) (HCBS waivers) (requiring that the person-centered planning process "[p]rovides necessary information and support to ensure that the individual directs the process to the maximum extent possible, and is enabled to make informed choices and decisions," "[o]ffers informed choices to the individual regarding the services and supports they receive and from whom," and "[r]ecords the alternative home and community-based settings that were considered by the individual"); 42 C.F.R. § 441.530(a)(1)(ii), (iv)-(v) (CFC) (services and supports must be made available in a setting that "is selected by the individual," "[f]acilitates individual choice regarding services and supports, and who provides them," and "[o]ptimizes but does not regiment individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact"); 42 C.F.R. § 483.10(c)(1)-(5) (nursing facilities) (right to participate in the development of a person-centered plan of care).

120. National standards and Texas's own policies, procedures, and practices underscore the importance of providing informed choice to people with IDD and indicate that providing such choice is a reasonable modification and would not fundamentally alter Texas's system. *See, e.g.*, *Saylor*, 2016 WL 4721254, at *19.

121. These reasonable modifications to Texas's choice program that are necessary to comply with the ADA and that reflect accepted professional standards for allowing people with IDD and their guardians to make an informed choice whether to enter or remain in a segregated

setting would include ensuring that persons with IDD receive individualized information about community living and opportunities to experience community settings:

a. that are tailored to their ability to understand and to their cognitive and other disabilities, *see* 28 C.F.R. § 35.160(a) (requiring public entities to "take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others");

b. that address their fears, concerns, prior experiences, or barriers to living in the community;

c. that include individualized opportunities to engage in community activities, to spend time with non-disabled peers, to visit community programs, to meet providers of community services, and to hear from families and peers about community living; and

d. that address the impact of institutionalization on the lives, experiences, and options of people with IDD who have been in nursing facilities for many years.

122. It is reasonable for Texas to modify its policies, procedures, and practices to divert people with IDD from being segregated in nursing facilities. National standards and Texas policy and planning documents underscore the importance of diversion in preventing unnecessary segregation. *E.g.*, FOF ¶¶ 238-244, 279-80, 291, 930.

123. It is reasonable for Texas to modify its policies, procedures, and practices to ensure an appropriate service array and system capacity, in order to provide sufficient

community services and timely access to those services to enable people with IDD to live in the most integrated setting appropriate to their needs.

124. It is reasonable for Texas to modify its policies, procedures, and practices to conduct effective monitoring, oversight, and training to ensure that its IDD system meets its intended goals.

125. Since Texas can reasonably modify its system to accommodate the relief that Plaintiffs and the United States seek, Plaintiffs and the United States have set out a violation of Title II of the ADA.

126. Once a plaintiff sets out a prima facie case, a public entity may raise an affirmative defense that the proposed modification would constitute a "fundamental alteration" of its services, programs, or activities. *Olmstead*, 527 U.S. at 603-06; *Henrietta D.*, 331 F.3d at 280-81.

127. When a state already offers community services to some people with IDD, as Texas does here, providing those same services to additional people with IDD is not a fundamental alteration. *See DAI I*, 598 F. Supp. 2d at 335-36 ("Where individuals with disabilities seek to receive services in a more integrated setting—and the state *already provides* services to others with disabilities in that setting—assessing and moving the particular plaintiffs to that setting, in and of itself, is not a 'fundamental alteration.'"); *Townsend*, 328 F.3d at 518-19 ("*Olmstead* did not regard the transfer of services to a community setting, without more, as a *fundamental* alteration. Indeed, such a broad reading of fundamental alteration regulation would render the protection against isolation of the disabled substanceless.").

128. Although a State can raise a fundamental alteration defense, to do so, it must prove that it has a "comprehensive, effectively working plan for placing qualified persons with . .

. disabilities in less restrictive settings." *Frederick L. v. Dep't of Pub. Welfare of Pa. (Frederick L. III)*, 422 F.3d 151, 155-59 (3d Cir. 2005).

129. "[T]here is wide-spread agreement that one essential component of an 'effectively working' plan is a measurable commitment to deinstitutionalization." *Day*, 894 F. Supp. 2d at 28 (citing, *inter alia*, *Frederick L. III*, 422 F.3d at 157; *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381; *Williams v. Quinn*, 748 F. Supp. 2d 892, 897-98 (N.D. Ill. 2010)). An effectively working plan is one that includes and implements specific and measurable goals for community placement by a target date. *Frederick L. III*, 422 F.3d at 157; *Day*, 894 F. Supp. 2d at 28-29.

130. A key inquiry for whether a jurisdiction has an effectively working plan is whether it *actually moves* people to integrated settings and reduces the number of institutionalized people. *Day*, 894 F. Supp. 2d at 28-29 (finding that the Defendant had not demonstrated a measurable commitment to deinstitutionalization based on the negligible decrease in the nursing facility population); *Jensen v. Minn. Dep't of Human Servs.*, 138 F. Supp. 3d 1068, 1071 (D. Minn. 2015) ("Vague assurances of future integrated options is insufficient; to be effective, [an] Olmstead Plan must demonstrate success in actually moving individuals to integrated settings in furtherance of the goals."); *see also Frederick L. III*, 422 F.3d at 157 (an effective plan must "demonstrate[] a reasonably specific and measurable commitment to deinstitutionalization for which [the State] may be held accountable").

131. Factors relevant to whether a state has a comprehensive, effectively working plan include whether the plan has "reasonably specific and measurable targets for community placement," including goals, benchmarks, and timeframes for which the entity can be held accountable. *Frederick L. III*, 422 F.3d at 157-59 (rejecting a state's proffered *Olmstead* plan that did not have such specific and measureable targets where plan included closing "*up to* 250

[institutional] beds a year," and noting that "[g]eneral assurances and good-faith intentions neither meet the federal laws nor a patient's expectations. Their implementation may change with each administration or Secretary of Welfare, regardless of how genuine . . . ."); *see also Frederick L. II*, 364 F.3d at 500-01; *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 383-85; *Jensen*, 138 F. Supp. 3d at 1071-74 (*Olmstead* Plan "must contain concrete, reliable, and realistic commitments, accompanied by specific and reasonable timetables, for which the public agencies will be held accountable" and approving plan where there was "concrete baseline data and specific timelines to establish measurable goals," where goals were "not only measurable, but strategically tailored to make a significant impact in the lives of individuals with disabilities across the state," and where the state "provides a rationale for each of the metrics used, explains why each metric was chosen, and explains how each metric will adequately reflect improvement over time").

132. To have an effectively working *Olmstead* Plan, a public entity must plan for the deinstitutionalization of specific groups of people in particular institutions. *Frederick L. III*, 422 F.3d at 158-59 (holding that the public entity could not succeed on a fundamental alteration defense when it did not articulate "when, if ever, eligible patients at [a particular institution] could be discharged"); *cf. Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 383-85 (holding that a fundamental alteration defense failed when the particular population at issue was excluded from the *Olmstead* planning process). In addition, a public entity's *Olmstead* Plan should track transitions of particular groups of people who are unnecessarily segregated, such as people residing in nursing facilities, and an effective Plan should demonstrate actual reductions of those groups. *See, e.g.*, *Day*, 894 F. Supp. 2d at 28-29 (considering the number of people with

disabilities who transitioned from nursing facilities in assessing the effectiveness of jurisdiction's *Olmstead* Plan where putative class was people with disabilities housed in nursing facilities).

133. In addition, to demonstrate that a Plan is comprehensive and effectively working, a jurisdiction "must prioritize its allocation of funding to meet and achieve the *Olmstead* Plan's goals. The State may not rely on the excuse of insufficient funding to avoid following through on the important commitments it has made in [its] *Olmstead* Plan." *Jensen*, 138 F. Supp. 3d at 1074. As the Third Circuit has held, "budgetary constraints alone are insufficient to establish a fundamental alteration defense." *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 380; *see also M.R. v. Dreyfus*, 663 F.3d 1100, 1118-19 (9th Cir. 2011), *amended by* 697 F.3d 706 (9th Cir. 2012) (same); *Fredrick L. II*, 364 F.3d at 495; *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 995 (N.D. Ca. 2010) (rejecting defendants' justification of termination of adult daycare services placing plaintiffs at serious risk of institutionalization in skilled nursing facilities due to severe state budget cuts).

134. A comprehensive, effectively working plan is a necessary component of a successful fundamental alteration defense. Texas has failed to meet its burden to prove that it has such a plan or that its plan is effectively working for people with IDD in nursing facilities. Texas's "failure to articulate [its] commitment in the form of an adequately specific comprehensive plan for placing eligible [people] in community-based programs by a target date places the 'fundamental alteration defense' beyond its reach." *See Frederick L. III*, 422 F.3d at 158-59; *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381-82; *Hampe v. Hamos*, 917 F. Supp. 2d 805, 821-22 (N.D. Ill. 2013).

F. Texas Uses Methods to Administer its Services System that Discriminate Against People with IDD.

135. Methods of administration, such as Texas's, "[t]hat have the effect of subjecting qualified individuals with disabilities to discrimination," 28 C.F.R. § 35.130(b)(3), including excluding people with IDD from access to the services and supports that they need to reside in integrated, community settings, violate 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(3) and (d), and *Olmstead*, 527 U.S. at 607.

136. Methods of administration of programs, such as Texas's, that provide habilitation and support to enable people with IDD to live in community settings but that cause such services to be largely unavailable to allow people in nursing facilities who have IDD and complex medical needs to transition violates 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(3) and (d), and *Olmstead*, 527 U.S. at 607. *See Kathleen S.*, 10 F. Supp. 2d at 471 (finding violation of ADA by state defendants whose methods of administration at state institution caused eighty-eight people to be unnecessarily segregated in the hospital even though a community placement was the most integrated setting appropriate to their needs).

137. Policies and practices, such as Texas's, that limit the ability of people with IDD with complex medical needs to transition from a nursing facility to the community by restricting the "level of need" (LON) assignment available to them violate 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(3) and (d), and *Olmstead*, 527 U.S. at 607.

138. A state's failure to adopt methods of administration of its developmental disability system that are necessary to enable people with IDD to live in the most integrated setting appropriate, including failures to (a) conduct regular or ongoing analyses of the adequacy, sufficiency, and availability of residential, day, therapy, and specialized providers and support services, and to effectively identify any service gaps or deficiencies that impede the prompt

diversion or transition of people with IDD from nursing facilities; (b) develop and implement a plan to effectively address service gaps that impede the prompt diversion or transition of people with IDD from nursing facilities; (c) develop additional provider capacity and support to meet the needs of qualified individuals with IDD in, or at serious risk of entering, nursing facilities, including the needs of qualified individuals with IDD in rural areas and all counties, and the needs of qualified individuals with IDD with complex medical and/or behavioral conditions; and (d) require or otherwise ensure that HCS providers continue serving people with IDD who are temporarily in hospitals or nursing facilities, violates 42 U.S.C. § 12132 and 12201(d), 28 C.F.R. § 35.130(b)(3), (d), and (e)(1), and *Olmstead*, 527 U.S. at 607.

139. A state's failure to adopt methods of administration of its developmental disability system that are necessary to enable people with IDD in or at serious risk of entering nursing facilities to make an informed choice of whether to enter or remain in a segregated setting or to transition to an integrated setting in the community violates 42 U.S.C. § 12132 and 12201(d), 28 C.F.R. § 35.130(b)(3), (b)(7), (d), and (e)(1), and *Olmstead*, 527 U.S. at 607. *See Conn. Office of Prot. & Advocacy for Persons with Disabilities*, 706 F. Supp. 2d at 277-78 (plaintiffs adequately stated a violation of the ADA where defendants' methods of administration failed to adequately provide people with disabilities in nursing facilities information regarding the availability of alternatives to nursing facility care, thereby denying them the right to choose to live in the community instead of an institution).

140. When a state's PASRR screening and evaluation program limits its diversion resources to as few as three percent of all people with IDD who are referred for admission to nursing facilities, as Texas's program does, the state engages in a method of administering its Medicaid institutional and community service waiver programs that results in unnecessary

institutionalization of people with IDD in nursing facilities, in violation of the ADA. *See Dunakin*, 99 F. Supp. 3d at 1320 (holding that allegation that defendants implement PASRR processes in a manner that perpetuates unnecessary institutionalization is sufficient to state a claim under the ADA); *see also Conn. Office of Prot. & Advocacy for Persons with Disabilities*, 706 F. Supp. 2d at 277-78 (plaintiffs adequately stated a violation of the ADA where defendants' methods of administration failed to adequately assess and identify the long-term needs of people with disabilities in nursing facilities, in order to determine whether they could be served in the community); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1151, 1175-76 (N.D. Ca. 2009) (holding that plaintiffs were likely to succeed on the merits of their claim that defendants violated the ADA where defendants' methods of administration resulted in cutting funding to community-based day services and placing elderly adults with disabilities at serious risk of institutionalization).

141. A state that, like Texas, administers its service planning policies and practices for people with IDD in nursing facilities in a manner that denies transition planning to all people who do not affirmatively request to transition to the community subjects them to unnecessary institutionalization in violation of 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(3) and (d), and *Olmstead*, 527 U.S. at 607. C*f. Kathleen S.*, 10 F. Supp. 2d at 471 (holding that defendants used discriminatory methods of administration by failing to timely initiate plans to transition people with mental disabilities from the state hospital to the community).

142. People with IDD in nursing facilities could reside in integrated, community settings if they were able to access the full array of community programs, services, and supports that Defendants provide for other people with IDD and if Texas revised its diversion and transition policies and practices.

PLAINTIFFS' AND THE UNITED STATES' CLAIMS UNDER THE REHABILITATION ACT

VI. Texas Violates the Anti-Discrimination Provisions of Section 504 of the Rehabilitation Act.

143. Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794(a), is a disability anti-discrimination statute that applies to recipients of federal funds.

144. Courts typically consider ADA and Section 504 claims together because the analysis for those claims is very similar. *See Frame v. City of Arlington*, 657 F.3d 215, 223-24 (5th Cir. 2011) ("The ADA and the Rehabilitation Act generally are interpreted *in pari materia.* Indeed, Congress has instructed courts that 'nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under title V [i.e., Section 504] of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to such title.'"); *see also Kemp v. Holder*, 610 F.3d 231, 234-35 (5th Cir. 2010); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287-88 & n.76 (5th Cir. 2005) (en banc). Accordingly, the conclusions of law above regarding Title II of the ADA apply equally to the Plaintiffs' and the United States' Section 504 claims.

145. Where a defendant receives federal financial assistance to operate its IDD system, it is subject to the requirements and obligations of Section 504. 28 C.F.R. § 41.51(a).

146. The regulations accompanying Section 504 provide that: "Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d).

147. These regulations further prohibit recipients of federal financial assistance from "utiliz[ing] criteria or methods of administration . . . [t]hat have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap." 28 C.F.R. § 41.51(b)(3)(i); 45 C.F.R. § 84.4(b)(vii)(2).

148. By planning, administering, funding, and operating an IDD service system that: (1) results in the unnecessary admission of people with IDD to nursing facilities; (2) limits opportunities for people with IDD to transition out of nursing facilities; (3) fails to provide people with IDD or their guardians with individualized information, opportunities, and supports necessary to allow them to make an informed choice about whether to enter or remain in a segregated nursing facility; (4) denies timely and meaningful access to community programs; and (5) requires that people with IDD be confined in segregated institutional settings in order to receive needed services, the Defendants violate Section 504. 29 U.S.C. § 794(a).

149. The Defendants' criteria and methods of administering their system of long-term services for persons with IDD, including their home and community-based services waivers, subject them to illegal discrimination in the form of unnecessary segregation in violation of Section 504 and its implementing regulations.

DECLARATORY AND INJUNCTIVE RELIEF

VII. Declaratory and Injunctive Relief Is Warranted.

150. Declaratory relief is appropriate both to resolve disputed legal rights as well as to determine that such rights were violated by a defendant's past conduct. *See Richards Grp., Inc. v. Brock*, No. 3:06-CV-0799-D, 2008 WL 2787899, at *4-5 (N.D. Tex. July 18, 2008) (under the Declaratory Judgement Act, courts "may declare the rights and other legal relations of any interested party seeking such declaration," and have "broad discretion" to do so) (quoting 28 U.S.C. § 2201) (internal quotation marks omitted). Here, the Court should issue a declaration of rights of people with IDD concerning the State's obligation under PASRR and the reasonable promptness provisions of the Medicaid Act to provide active treatment to people with IDD in nursing facilities, and should issue a declaration with respect to the State's obligation under the

ADA, Section 504 of the Rehabilitation Act, and *Olmstead* to provide services in the most integrated setting to people who have not made an informed choice to enter or remain in nursing facilities.

151. Injunctive relief is also warranted. Upon finding the State liable for violations of federal statutes, this Court has ample authority to enter a final injunction that is targeted to remedy the violations. Fed. R. Civ. P. 65. "To obtain permanent injunctive relief, a plaintiff must demonstrate: '(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'" *ITT Educ. Servs., Inc. v. Arce*, 533 F.3d 342, 347 (5th Cir. 2008) (quoting *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Plaintiffs and the United States meet this standard.

152. Texas's actions have caused irreparable injury to people with IDD who are in nursing facilities or at serious risk of being admitted to such facilities. The irreparable injury resulting from Defendants' ongoing refusal and failure to provide people with IDD with the professionally-appropriate assessments of their habilitative needs, specialized services to meet those needs, and active treatment is severe and ongoing.

153. Additionally, most people with IDD in nursing facilities, or at serious risk of being admitted to nursing facilities, are qualified and appropriate for and have not made an informed decision to enter or remain in nursing facilities, and so, do not oppose receiving services in the community. Although community programs are the most integrated setting appropriate to meet their needs, they remain unnecessarily institutionalized in nursing facilities,

or at serious risk of such institutionalization. They are harmed by such institutionalization and deprived of participating in integrated community programs. *See, e.g.*, *Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010) (finding irreparable harm even if institutionalization were only temporary and recognizing the "regressive consequences" that such placements have on people); *Crabtree v. Goetz*, No. 08-0939, 2008 WL 5330506, at *25 (M.D. Tenn. Dec. 19, 2008) (finding that unnecessary institutionalization "would be detrimental to [plaintiffs'] care, causing, *inter alia*, mental depression, and for some Plaintiffs, a shorter life expectancy or death"); *Long v. Benson*, No. 08cv26, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008) (finding irreparable harm where person would be forced to leave his community placement and enter a nursing home and specifically recognizing the "enormous psychological blow" that such placements would cause due to the " very substantial difference in [plaintiff's] perceived quality of life in the apartment as compared to the nursing home, each day he is required to live in the nursing home"); *Cota*, 688 F. Supp. 2d at 997-98 (irreparable harm where thousands of people were placed at risk of institutionalization as a result of changes in eligibility criteria for adult day healthcare due to state budget cuts); *Brantley*, 656 F. Supp. 2d at 1176.

154. The *Olmstead* Court itself recognized the harm that results from unnecessary institutionalization: "[C]onfinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead*, 527 U.S. at 601. Many people with IDD in nursing facilities remain institutionalized and, further, are deprived of specialized services and active treatment. Many of these people have suffered regression and deterioration. They need, but are not receiving, specialized services that would allow them to gain skills, become more independent, and function outside of an institution. They are deprived

of community and family connections and the opportunity to participate in day-to-day community activities, which themselves constitute a form of discrimination and segregation.

155. In addition, the violation of federal laws enacted to protect the health, safety, welfare, and civil rights of vulnerable people is itself a form of harm. *See, e.g.*, *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) ("[W]hen a civil rights statute is violated, 'irreparable injury should be presumed . . . .'"). By planning, administering, funding and operating its long term care service system in a manner that limits access to community programs for people with IDD, requires them to be confined in segregated institutional settings, and then fails to provide specialized services and active treatment in that institutional setting, Texas has caused irreparable harm to these individuals.

156. Systemic injunctive relief is warranted for failure to comply with Section 504, Title II of the ADA and *Olmstead* where, as in myriad other types of civil rights cases, a public entity's conduct, such as its failure to provide services in the most integrated setting, is generally applicable to a group of people. *See DAI II*, 653 F. Supp. 2d at 312-14; *Messier*, 562 F. Supp. 2d at 345; *see also In re District of Columbia*, 792 F.3d at 101 (rejecting request for interlocutory review of class certification where *Olmstead* claim could meet test under 23(b)(2) that "final injunctive relief . . . [would be] appropriate respecting the class as a whole"); *A.H.R.*, No. C15-5701JLR, 2016 WL 98513, at *10-11, 14-19 (granting preliminary injunction where state health care authority failed to "arrange and pay for" sufficient private duty nursing care for group of medically complex children, stating that the authority "has an obligation to provide medically necessary services, such as the private duty nursing services at issue here, in the most integrated setting appropriate to Plaintiffs' needs").

157. Systemic injunctive relief for Plaintiffs is also warranted for failure to comply with the PASRR, promptness and choice provisions of the Medicaid Act, due to Texas's conduct, including failure to provide medically necessary services, which is generally applicable to a group of people. *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 23 (D. Mass. 2006) (judgment in favor of § 1983 class alleging violation of Medicaid Act for failure to provide adequate in-home services); *Rolland v. Patrick*, 483 F. Supp. 2d at 118.

158. The scope of the relief granted depends upon the scope of the violation proven at trial. *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

159. Based on the evidence set forth at trial, the proposed findings of fact, and the conclusions of law above, declaratory and injunctive relief as requested by Plaintiffs and the United States are warranted here to ensure that Texas provides people with IDD with an effective diversion and transition system and services, and planning; an informed choice to receive services in integrated settings; an appropriate array and capacity of community services to prevent their unnecessary institutionalization; and effective monitoring, oversight, and training to ensure its IDD system meets its goals, as required by the ADA and Section 504 of the Rehabilitation Act.

160. Based on the evidence set forth at trial, the proposed findings of fact, and the conclusions of law above, declaratory and injunctive relief as requested by Plaintiffs are warranted here to ensure that Texas provides people with IDD with accurate and appropriate PASRR screening; evaluations of alternative placements and the need for specialized services prior to admission to a nursing facility; and comprehensive functional assessments and all needed specialized services that meet the federal standard for active treatment as set forth in 42

C.F.R. § 483.440(a)-(f) for people with IDD in a nursing facility, consistent with the Medicaid Act.

161. Judgment will be entered for Plaintiffs and the United States. Consistent with principles of federalism, the Court should direct the parties to meet and confer up to thirty days about the process for developing a proposed remedial order, and to submit their proposal for that process to the Court at the end of the thirty-day period. The proposed remedial order should address steps Defendants shall take to: (1) enable people with IDD referred to nursing facilities to be accurately identified, appropriately screened, and provided services in order to avoid unnecessary institutional placements and be diverted from nursing facility admission whenever appropriate; (2) receive all needed specialized services and a program of active treatment consistent with federal standards set forth in 42 C.F.R § 483.440(a)-(f) if admitted to a nursing facility; (3) be provided information, opportunities, services, and supports that would allow them to make an informed and meaningful choice whether to enter or remain in a segregated nursing facility; and (4) be offered timely access to the State's community service system if they are appropriate for and do not oppose receiving services in an integrated setting.

DATED: January 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2019, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Garth A. Corbett*
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