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

ERIC STEWARD, by his next friend and mother, Lilian Minor, *et al.*,	§	
Plaintiffs,	§	
v.	§	CIV. NO. 5:10-CV-1025-OG
GREG ABBOTT, Governor, *et al.*,	§	
Defendants.	§	
THE UNITED STATES OF AMERICA,	§	
Plaintiff-Intervenor	§	
v.	§	
THE STATE OF TEXAS,	§	
Defendant	§	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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Plaintiffs Eric Steward, Linda Arizpe, Patricia Ferrer, Zackowitz Morgan, Maria Hernandez, Vanisone Thongphanh, Melvin Oatman, Richard Krause, Leonard Barefield, Tommy Johnson, Johnny Kent, and Joseph Morrell (collectively, the "Named Plaintiffs")[1] and the Arc of Texas and the Coalition of Texans with Disabilities (organizational plaintiffs) hereby file this Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint (Doc. 244)("3rd MTD"), and respectfully state as follows:

I. PRELIMINARY STATEMENT

This is a case involving the unnecessary institutionalization of thousands of individuals with intellectual and developmental disabilities ("IDD"), in violation of the Americans with Disabilities Act ("ADA") and its implementing regulations, 42 U.S.C. § 12101, *et seq*., 28 C.F.R. § 35.130, Section 504 of the Rehabilitation Act ("Section 504") and its implementing regulations, 29 U.S.C. § 794; 28 C.F.R. § 41.51, and the Medicaid Act, 42 U.S.C. §§ 1396a(a)(8), 1396n(c)(2), as well as the State's failure to provide needed and mandated screening and specialized services to those that are institutionalized in nursing facilities in Texas pursuant to the Nursing Home Reform Amendments to the Social Security Act, 42 U.S.C 1396r(e).

Plaintiffs have sufficiently alleged claims that are more than plausible based on Defendants' pattern and practice of planning, administering, operating and funding their developmental disability service system in a manner that wrongfully and unduly relies on segregated nursing facilities. Plaintiffs also allege that they specifically have been and are being denied the opportunity to receive prompt, adequate, appropriate services in an integrated community setting in violation of the law. Plaintiffs have specifically pled that certain Plaintiffs currently reside in nursing facilities and are unjustifiably segregated, even though they are

[1]Since the filing of the Second Amended Complaint, several of the Named Plaintiffs, Andrea Padron, Leon Hall, Michael McBurney and Benny Holmes, have died. Docs. 190, 185.

qualified for, and do not oppose community placement. *See, e.g.*, Plaintiffs' Second Amended and Supplemental Complaint ("2nd Am. Compl."), ¶¶ 362, 370, 372, 376 (Joseph Morrell); ¶¶ 243, 251, 253-54 (Maria Hernandez); ¶¶ 265-66, 270-71, 273, 275 (Melvin Oatman); ¶¶ 341, 343, 345 (Tommy Johnson); ¶¶ 346, 355-57, 359, 361 (Johnny Kent); *see also* ¶¶ 63,66, 93-94, 389-90. And while some of the Named Plaintiffs are residing in the community, they are all at risk of returning to a nursing facility. *See* Sections II.F.2 and III.A.2, *supra,* and 2nd Am. Compl. ¶ 63. Plaintiffs also have alleged facts that Defendants have policies and eligibility criteria that effectively exclude them from equal access to Defendants' community service system because of the nature and/or severity of their disabilities. And Plaintiffs also include disability organizations which have standing – as recognized by numerous courts – to assert claims on behalf of their members even if (as has been attempted here) Defendants take actions in an effort to moot individual member's claims. As explained more fully below, Defendants are fully on notice of the issues in this lawsuit, and the allegations of the Complaint are more than sufficient to advance this case to discovery.

When faced with individual and organizational Plaintiffs that have alleged claims asserting these deficiencies, Defendants engaged in a systematic effort to delay and undertake post-litigation efforts to repair their illegal behavior. First, the State sought to "pick off" individual Named Plaintiffs by offering them – and only them – relief. Then, the State attempted to make changes to its disability service system, in the hopes of mooting Plaintiffs' claims. The Defendants ask this Court to simply accept that the State has changed its disability service system, in response to this litigation, despite years of inadequacies, seeking dismissal without any discovery and without any guarantee of future compliance. As explained below, the State cannot so easily evade its obligations under the law.

In response to Plaintiffs' 2nd Am. Compl., the State of Texas has filed its 3rd MTD, which mostly repeats the arguments from Defendants' prior two motions – both of which sought dismissal of only Plaintiffs' claims under the Medicaid Act. But in an effort to further delay discovery and terminate the entire litigation, this Motion also seeks to dismiss Plaintiffs' ADA claims. In doing so, Defendants introduce numerous new facts and documents that post-date the 2nd Am. Compl. and that require the Court to consider new facts and evidence not contained in that pleading. This they cannot do, at least with respect to Defendants' Motion pursuant to Rule 12(b)(6). *See Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992). Therefore, the Court should not consider any of this new information concerning alleged program modifications with respect to any contention that Plaintiffs have failed to state a claim under either the ADA or Medicaid Act.

Defendants assert that this new material is relevant to the Court's jurisdiction, and only for that purpose, but then reference it throughout their Motion. 3rd MTD at 1. To the extent that Court elects to consider it, either to assess Defendants' challenges to the standing of the Named Plaintiffs, or as a matter of public record, the Court should recognize that this information goes well beyond the relevant pleading, has not been tested by discovery, and plainly does not have the impact or effect attributed to it by Defendants.

In their Motion, Defendants have attempted to introduce evidence and disputed facts under the guise of jurisdictional challenges, claiming that the Plaintiffs have received the relief they seek or otherwise will not succeed on the merits. But this is a motion to dismiss and not an opportunity to present evidence that contradicts the allegations of the complaint and to try the merits of Plaintiffs' claims. Plaintiffs strongly dispute that they have gotten full relief or that the Defendants' belated remediation efforts are sufficient. The Defendants' efforts to introduce

evidence at this stage under a claim of challenging jurisdiction are nothing more than an improper back door effort to challenge the pleadings.

There are many reasons, as explained below, why Defendants' Motion should be denied. To the extent that the Defendants believe that they have viable arguments on the merits, they must raise them later, after the Plaintiffs have had an opportunity to establish their case through discovery.[2]

II. RELEVANT FACTS AND BACKGROUND

Central to the claims at issue in Defendants' Third Motion to Dismiss are Title II of the ADA, and the Nursing Home Reform Amendments ("NHRA") to the Medicaid Act, and specifically the requirements of the new Pre-Admission Screening and Resident Review ("PASRR") provisions of the NHRA. In order to lend context and content to the arguments in this Response, it is important to understand the conditions which prompted Congress to enact Title II of the ADA, and the NHRA, its basic requirements, Texas's response to these statutory mandates, and Texas's efforts to reform its developmental disability service system after this litigation was filed. [3]

[2] Plaintiffs have determined, in light of the intervention of the United States, that it is no longer necessary to include Governor Abbott as a named party, and are willing to allow for his dismissal. In addition, Plaintiffs hereby provide notice that they are no longer pursuing their comparability claim under the Medicaid statutes.

[3] As defined by federal law, the term "developmental disabilities" includes mental retardation and a range of other disabilities, sometimes referred to as "related conditions," which occur before the age of twenty-two. *See* 42 U.S.C. § 1396d(d). The older term "mental retardation" has been replaced by "intellectual disabilities." This Opposition uses the term "intellectual and developmental disabilities" ("IDD") to include all developmental disabilities covered by federal law. Defendants' 3rd MTD mirrors this nomenclature.

A. Title II of the ADA: the Legislative History and Statutory and Regulatory Requirements

On July 12, 1990, Congress enacted the ADA, 42 U.S.C. § 12101 *et seq*., establishing the most important civil rights laws for persons with disabilities in our nation's history. Congress stated in its findings 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." 42 U.S.C. § 12101(a)(2). Congress also found that "discrimination against individuals with disabilities persists in . . . institutionalization . . . and access to public services." 42 U.S.C. § 12101(a)(3). Congress concluded that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . , segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5).

A major purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide clear, strong, consistent and enforceable standards addressing discrimination against individuals with disabilities.[4] 42 U.S.C. § 12101(b)(1)&(2). "Discrimination" under the ADA includes the segregation of persons with disabilities from society as a result of unnecessary institutionalization." As the Supreme Court stated in its landmark decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), "unjustified institutional isolation of persons with disabilities is a form of discrimination" because "[i]n order to receive needed medical services, persons with mental

[4] Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, presaged and mirrors the purposes of the ADA, and has been interpreted consistently with the ADA, although its scope is limited to public entities that receive federal funding. *Frame v. City of Arlington*, 657 F.3d 215, 223-24 (5th Cir. 2011) (rehearing *en banc*), *cert denied*, 132 S. Ct. 1561 (2012).

disabilities, because of those disabilities, relinquish participation in community life…." 527 U.S. at 600-601.

The regulations implementing the ADA require 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 ADA regulations prohibit public entities from utilizing "criteria or methods of administration" that have the effect of subjecting qualified individuals with disabilities to discrimination, including unnecessary institutionalization or "that have the purpose or effect of substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." *See* 28 C.F.R. §§ 35.130(b)(3), 41.51(b)(3); 45 C.F.R. § 84.4(b)(4). The ADA regulations further specify that "[a] public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service program or activity unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(8). Finally, the ADA requires that public entities must make reasonable modifications in their policies, practices or procedures when necessary to avoid discrimination on the basis of disability, including the unnecessary segregation or institutionalization of such individuals, unless the public entity can demonstrate that such modifications would fundamentally alter the nature of the service, program or activity. 42 U.S.C. §§ 12131, 12132; 29 U.S.C. § 794; 28 C.F.R. § 35.130(b)(7).

Title II's integration mandate, as interpreted by the Supreme Court in *Olmstead*, requires States to end the segregation of persons with disabilities in their service systems. The Department of Justice—the agency charged by Congress with enforcing the ADA—has supplemented its

regulations with numerous statements and detailed guidance, including its Statement on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, ("DOJ Statement"), June 22, 2011, available at http://www.ada.gov/olmstead/q&a_olmstead.htm. The DOJ Statement makes clear that the State is responsible for all services and service systems that it plans, administers, operates, or funds. The DOJ Statement specifically notes that Title II and *Olmstead* apply when the State funds and licenses private entities like nursing facilities as part of its service delivery system. The DOJ Statement also describes in some detail the State's obligation to comply with the ADA's integration mandate and *Olmstead,* noting that State plans to end unnecessary institutionalization must be both comprehensive and effectively working; must include specific numerical targets, timelines, and actions; and must be substantially implemented as described.

B. Texas's Community Services System for Individuals with Developmental Disabilities

Texas operates several distinct community programs for persons with developmental disabilities, in addition to its Intermediate Care Facilities for People with Developmental Disabilities ("ICF/DD") program. These community programs are funded in significant part by the federal government, either through Home and Community-Based Services ("HCBS") waiver programs authorized by 42 U.S.C. § 1396n(c), or traditional Medicaid state plan services such as personal care attendants or home health care. The HCBS waiver provision authorizes the Secretary of Health and Human Services ("the Secretary") to waive certain other Medicaid provisions in order to encourage States to provide services in the community, provided that the cost of doing so is not greater than the cost of providing similar services in an institution, like a nursing facility or ICF/DD. *Id.*; *see also* 42 C.F.R. § 430.25(b). States are required to inform persons who seek admission to, or who reside in, a nursing facility about all of its HCBS waiver programs, must

offer them a choice of the waiver program, and must administer its waiver programs in a manner that is fair and efficient for all persons, including those institutionalized in nursing facilities. 42 U.S.C. § 1396n(c)(2).

The Secretary has approved several waiver programs in Texas, at least four of which could serve nursing facility residents with developmental disabilities. First, Texas's Home and Community-based Services ("HCS")[5] waiver provides a broad range of residential and non-residential services to persons with IDD and is the State's largest waiver. Second, the Community Living and Assistance Support Services ("CLASS") waiver serves persons with disabilities other than intellectual disabilities, but including "related conditions," and offers a range of services as an alternative to institutionalization. Third, the Community Based Alternatives ("CBA") waiver provides many services similar to those in HCS and CLASS for adults with disabilities in order to avoid placement in an institutional facility. Fourth, the STAR+PLUS waiver is the managed-care equivalent of the Community Based Alternative ("CBA") waiver and provides a similar array of services. *See* 3rd MTD at 12-13. Recently, the CBA waiver was terminated and incorporated into the STAR+PLUS waiver. *Id*. at 13. While the HCS waiver has a long waiting list, access to the other three waivers have been available without a waiting list for nursing facility residents through Texas's Money Follows the Person ("MFP") Protocol[6] *Id*.

[5]Plaintiffs use the acronym HCS to refer to Texas's specific waiver program and the acronym HCBS to refer generically to the general category of community-based waivers authorized by 42 U.S.C. § 1396n.

[6] The MFP Protocol allows nursing facility residents to gain immediate access to the CBA, CLASS, STAR+PLUS and several other waiver programs without having to go on a waiting list. The Texas Money Follows the Person Demostration Operational Protcol (Nov. 2009) at 9-10, available at http://www.dads.state.tx.us/providers/pi/mfp_demonstration/operationalprotocol/operational-protocol.pdf (last visited December 17, 2015), as codified in H.B. 1867.

Despite this array of HCBS waiver programs, Texas continues to plan, administer, operate and fund its community service system in a manner that fails to provide sufficient access to all qualified nursing facilities residents with IDD, and particularly those with complex needs or certain clinical conditions. In addition, Texas neither provides nursing facility residents with IDD relevant and timely information about these waivers that can be understood by persons with IDD, nor offers them meaningful choices between nursing facility placement and community waiver programs prior to or during their confinement in nursing facility. 2nd Am. Compl. ¶¶ , 53-54, 84-86, 98, 100, 103, 394, 107-110, 331-345 (Tommy Johnson), ¶¶ 346-361 (Johnny Kent), ¶¶ 265-275 (Melvin Oatman) and ¶¶ 373-376 (Joseph Morrell). Instead, it has administered these waivers in a manner that is neither fair nor efficient, has discriminated against certain persons with the most significant developmental disabilities in nursing facilities, and is inconsistent with the federal statutory and regulatory requirements for operating waiver programs. 2nd Am. Compl. ¶¶ 63-64, 66, ¶ 254 (Maria Hernandez), ¶ 273 (Melvin Oatman), ¶¶ 343-345 (Thomas Johnson), ¶¶ 359-361 (Johnny Kent), ¶¶ 372-374 (Joseph Morrell), *see also* ¶¶ 383, 388, 390.

Prompted by this litigation and as required by the now terminated Interim Agreement ("IA") (Doc. 180), Texas has made several substantive modifications to its HCS waiver. Defendants applied for and obtained amendments to their HCBS Waiver. 3rd MTD at 12-13; Application for a §1915(c) Home and Community-Based Services Waiver ("2013-2018 HCS Waiver Application"), available at https://www.dads.state.tx.us/providers/hcs/HCSRenewalApp2013-2018.pdf. [7] First, it has revised the eligibility criterion which formerly excluded individuals with only developmental

[7]The 2013-2018 HCS Waiver Application is in effect for five years, from 2013 until 2018. Defendants acknowledge the 2013-2018 Waiver Application throughout their 3d MTD, including at 1-2.

disabilities (referred to "related conditions" in the NHRA) and not an intellectual disability, so that it now can serve all individuals with IDD who are in nursing facilities. *Id.* Second, Defendants have designated persons with IDD in or at risk of entering, nursing facilities as a priority group for the HCS waiver, thereby moving them from the bottom to the top of Texas's lengthy waiting list, albeit for a limited number of slots available on a biannual basis. As Defendants explain: "HCS waiver criteria designate individuals with IDD living in NFs or at risk of entering an NF as a target group that can bypass the HCS interest list." 3rd MTD at 48-9. Third, Defendants have also secured funding for 1300 HCS placements in the current biennium for this priority population, and have allocated slightly less than half of the new placements (600) to persons at risk of admission to nursing facility (the diversion population) and slightly more than half of the new placements (700) for persons already in nursing facilities for ninety days or longer (the transition population). *See* http://www.lbb.state.tx.us/Documents/Budget/Session_Code_84/HB1-Conference_Committee_Report_84.pdf at II-16, 31.c. Significantly, this time-limited, additional waiver capacity does not impact the remaining 3,300 nursing facility residents with IDD, many, or even most, of whom are qualified for and do not oppose an integrated community setting and who will still have to wait for waiver slots. *See, e.g.*, 2nd Am. Compl. ¶¶ 64, 93-94.

As required by the federally approved HCS waiver and by §§ III.C.5 (a) & (b), III.F, IV.B, C; V.E, F; VI.A, B of the Court-ordered IA, a new enrollment process was created. Defendants adopted a new enrollment process for informing and educating nursing facility residents and those at risk of entering nursing facilities about waiver options. Consistent with Defendants' obligations under 42 U.S.C. §§ 1396n(c)(2)(B) and (C) to ensure that individuals "are informed of the feasible alternatives to nursing facility services, if available under the waiver, at the choice of such

individuals," at least every six months, service coordinators evaluate and inform individuals in the waiver priority group of feasible alternatives to nursing facilities, and conduct a dialogue with these individuals to ensure that information about the feasible alternatives is understood. 2013-2018 HCS Waiver Application at 3. Defendants acknowledge that the Named Plaintiffs have feasible alternatives to the nursing facility through the revised HCS waiver. 3rd MTD at 12-13. Despite this acknowledgment, five Named Plaintiffs remain unnecessarily institutionalized in nursing facilities as a result of the manner in which Defendants administer and operate the HCS waiver, and thousands more remain segregated due to Defendants' decisions concerning the capacity of its community service system to assist nursing facility residents with IDD to live in the community. *See e.g.*, 2nd Am. Compl. ¶¶ 93-95, ¶¶ 243-254 (Maria Hernandez), ¶¶ 265-275 (Melvin Oatman), ¶¶ 331-345 (Tommy Johnson); ¶¶ 346-361 (Johnny Kent); ¶¶ 362-376 (Joseph Morrell); *see also* § II.F, *infr*a. Moreover, Defendants have failed to satisfy their obligations under 42 U.S.C. §§ 1396n(c)(2)(B) and (C) to inform Plaintiffs of these feasible alternatives and concomitantly have failed to provide the necessary information and facilitate the enrollment process. The Declaration of Luizama Botello, submitted by the Defendants as Ex. 1 to Defendants' 3rd MTD, is starkly deficient in describing any information provided to the Named Plaintiffs about feasible alternatives, consistent with §§ III.C.5 (a) & (b), III.F., IV.B, C; V.E, F; VI.A, B of the Court-ordered IA, the 2013-2018 HCS Waiver Application, and 42 U.S.C. § 1396(c)(2).

Virtually all of Defendants' post-litigation reforms were required by this Court's Order Approving the IA, or implemented to comply with that Order. Nevertheless, Defendants' failure implement these reforms have violated the rights and failed to satisfy the claims of several of the

Named Plaintiffs and have left thousands nursing facility residents with IDD unnecessarily institutionalized.

C. The Legislative History of the Nursing Home Reform Amendments

Before the mid-1970s, there were few federal standards for, and little federal reimbursement of, institutional care for persons with IDD. States provided their own facilities for housing individuals with disabilities. This state-provided care, however, was grossly inadequate and abuse was common. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 7 (1981) (cataloguing inhumane, unsanitary, and dangerous institutional conditions for individuals with mental retardation).

In 1971, Congress gave States the option of obtaining federal Medicaid reimbursement for care provided in intermediate care facilities for individuals with mental retardation, known as ICF/DDs (formerly ICF/MRs). 42 U.S.C. §§ 1396a(a)(31)(A) & 1396d(a)(15). Texas and other States chose to provide ICF/DD services in their Medicaid programs. As a condition of receiving federal funds, States are required to ensure that adequate care is provided to persons with IDD in ICF/DDs, specifically including a program of "active treatment."[8] 42 U.S.C. § 1396d(d)(2).

Federal regulations describe active treatment as an individually tailored series of programs and therapies designed to help an individual with IDD reach an optimal level of independence. The care provided is "directed toward . . . [t]he acquisition of the behaviors necessary for the client to function with as much self-determination and independence as possible [and] [t]he prevention

[8]Texas, like most states, has elected to operate and fund ICF/DD facilities, including both large public institutions called State Supported Living Centers ("SSLCs") and smaller residential programs called "private ICF/DDs." As a condition of receiving extensive federal funding for these facilities, Texas has agreed to comply with federal ICF/DD regulations that govern the operation, services, resident rights, and environmental standards of these institutions. *See* 42 C.F.R. §§ 483.400 *et seq.* The process and standard for providing care to ICF/DD residents is called active treatment, which is described in §§ 483.440(a)-(f).

or deceleration of regression or loss of current optional functional status." *Id.* at § 483.440(a)(1). An active treatment program can include training and vocational programs, physical, occupational, and speech therapies, and behavioral and interpersonal counseling. The specific contours of every individual's program are based upon that individual's needs.

In order to avoid the burden and costs of complying with ICF/DD requirements and particularly its active treatment mandate, but to ensure that they continued to receive federal funding, States soon began to transfer large numbers of persons with IDD from their ICF/DD institutions to nursing facilities.[9] Many nursing facilities, ill-equipped to offer appropriate habilitation or treatment for these conditions, soon became warehouses for persons with IDD. Because active treatment was not then required in nursing facilities, the conditions of individuals with IDD placed in those facilities deteriorated. As a consequence, Congress found itself subsidizing the nursing facility care of individuals with IDD that did not meet professional standards—precisely the situation it sought to rectify when it made compliance with active treatment standards a condition for receipt of federal funding for the care of persons with IDD in ICF/DDs.

In 1985, the Senate convened hearings to investigate the effects of improper institutionalization of individuals with IDD, including the inappropriate transfer of these individuals from state-operated institutions to nursing facilities.[10] The Senate heard testimony about the warehousing of individuals with IDD in nursing facilities and the failure to provide proper care in those settings. The widespread practice of dumping individuals with IDD into

[9]Nursing facility care has long been a required Medicaid service. 42 U.S.C. § 1396d(f).
[10]Care of Institutionalized Mentally Disabled Persons: Joint Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Labor, Health and Human Servs., Educ., and Related Agencies of the Senate Comm. on Appropriations, 99th Cong., S. Hr'g. 99-50 (1985) at 352.

nursing facilities was also documented by the General Accounting Office in a 1987 report. *See Medicaid: Addressing the Needs of Mentally Retarded Nursing Home Residents*, GAO/HRD-87-77 (1987).[11] A full two-thirds of the residents evaluated by GAO were determined to require active treatment. *Id*. at 23. However, not a *single one* of these residents was receiving this necessary treatment. *Id.*

D. The Nursing Home Reform Amendments to the Medicaid Act

Congress responded with the Omnibus Budget Reconciliation Act of 1987 ("OBRA '87"), Pub. L. No. 100-203, § 4211(c), 101 Stat. 1330-198 (1987), that included a dramatic reform of nursing facility care for persons with IDD. OBRA '87 incorporates the NHRA, 42 U.S.C. § 1396r, which is designed to prevent and remedy the pervasive warehousing and neglect of people with disabilities in nursing facilities. Congress intended the NHRA to end the inappropriate placement of mentally ill or developmentally disabled individuals in nursing facilities. H.R. Rep. 100-391(I) at 459, *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-279 (1987).

The NHRA mandates a PASRR process for all persons with IDD referred or admitted to nursing facilities.[12] The screening and review must be done by a qualified developmental disability professional. The PASRR review is designed to determine whether an individual is appropriate for admission and retention in a nursing facility because he needs the level of nursing services that can only be provided in a nursing facility, and, if so, whether he needs active treatment. 42 U.S.C.

[11]Available online at http://www.eric.ed.gov/PDFS/ED288331.pdf.

[12]The NHRA initially contained a requirement that an annual review be conducted for each nursing facility resident to determine whether the individual continued to need a nursing facility level of care. In 1996, the NHRA was amended to eliminate the requirement of an annual resident review on the ground that such reviews were duplicative of other annual assessments that were required. *See* Pub. L. No. 104-315 (1996). However, the NHRA continued to require a preadmission review for all individuals with developmental disabilities and a further review whenever there was a significant change in an individual's condition. 42 U.S.C. § 1396r(e)(7)(B)(iii).

§§ 1396r(b)(3)(F)(ii), 1396r(e)(7)(A)&(B). A basic condition for federal reimbursement of nursing facilities is that the State determine, pursuant to a thorough assessment according to PASRR standards, that available community alternatives cannot meet the person's needs, and that the individual must be placed in a nursing facility. 42 C.F.R. § 483.132. If the resident review determines that the resident is inappropriately placed in the nursing facility, the State must arrange for the discharge of the resident. *Id.*; 42 U.S.C. §§ 1396r(e)(7)(C)(ii)(I), (ii)(II), (iii)(I), & (iii)(II). Congress intended the number of nursing facility residents with IDD to decline dramatically as a result of the PASRR screening.

The second major change—the mandatory provision of active treatment—was imposed to ensure that individuals with IDD obtain the care they need to function with as much independence and self-determination as possible. Specifically, as part of the PASRR screening, Congress required that *States* determine whether nursing facility residents with IDD require "specialized services."[13] *Id.* § 1396r(e)(7)(B) (ii). Specialized services consist of an active and continuous treatment program, which includes aggressive, consistent implementation of specialized and generic training, treatment, and health services that are aimed at allowing the individual to function as independently and with as much self-determination as possible, as well as services designed to prevent or decelerate regression and loss of abilities. *See* 42 C.F.R. § 483.120(a)(2), *citing* 42 C.F.R. § 483.440(a)(1) (active treatment). If the individual requires specialized services, the *State* – not the nursing facility – is required to provide them.[14] 42 C.F.R. §§ 483.116(b), 483.120(b), 483.130(m) and (n) (requiring assurances that specialized services will, in fact, be provided).

[13]In a 1990 amendment to the Medicaid statute, Congress substituted the term "specialized services" for "active treatment," but made it clear the two terms are synonymous in the context of the PASRR requirements. Pub. L. No. 101-508, § 4801(e)(4), 104 Stat. 1388-216 (1990).
[14]The House Committee on Energy and Commerce, in introducing the bill enacted as the NHRA, plainly stated that "[i]n the Committee's view, the responsibility for providing, or paying for the

When the Secretary subsequently issued the PASRR regulations, specialized services were defined with specific reference to the federal ICF/DD active treatment regulations. The Secretary's definition reflects that: (1) the State alone is responsible for the provision of specialized services; (2) the nursing facility is responsible only for traditional nursing services;[15] and (3) the State is ultimately and fully responsible for ensuring that all of these services, taken together, constitute a program of active treatment, as defined by 42 C.F.R. § 483.440(a)-(f). This definition has never been challenged, amended, or further refined.[16]

In enacting the NHRA, Congress intended to prevent the inappropriate placement of individuals with IDD in nursing facilities, a problem highlighted by the 1987 GAO report. Congress also intended to ensure that if the resident requires specialized services, the State actually provides them. *See id*.; §§ 1396r(e)(7)(C)(i)(IV) & (ii)(III). The Secretary's regulations carefully reflected these intentions and mandates, and established screening, diversion, placement and treatment requirements that Texas has ignored.

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provision of, active treatment *lies with the States*." H.R. Rep. 100-391(I) at 462, *reprinted in* 1987 U.S.C.C.A.N. 2313-282 (emphasis added).

[15]The Secretary's interpretation of the regulations explicitly relieves nursing facilities from having to provide specialized services:

> Response: As noted above, we do not envision holding a facility accountable for deficiencies in the State's actions with respect to specialized services. We believe the law would need to be changed for us to do so. Facilities attempting to address a resident's needs would not be in jeopardy of sanctions unless they were otherwise out of compliance with the NF requirements.

57 Fed. Reg. 56,477.

[16]In subsequent amendments to the statute, Congress left undisturbed the Secretary's definition of specialized services as equivalent to active treatment, as well as the interpretation of Congress' intent that such services must be provided to all persons with mental retardation who have been determined to need these services by the PASRR process. H.R. Rep. No. 104-817, at 1-4, *reprinted in* 1996 U.S.C.C.A.N. 4198, 4198-201; Pub. L. No. 104-315, § 1(b), 2(c).

E. Texas's Implementation of the NHRA

Texas institutionalizes more than four thousand persons with IDD in nursing facilities at any given time.[17] 2nd Am. Compl. ¶¶ 36, 93. Thousands more are admitted or at risk of admission each year.[18] *Id.* As more fully described in the Second Amended Complaint, Texas ignores Congress' mandate, the Secretary's requirements, and the rights of persons with IDD in nursing facilities by operating a wholly inadequate PASRR program. *Id.* ¶¶ 5, 84-113. Specifically, in violation of the NHRA and PASRR regulations, Texas's PASRR program fails to identify accurately whether a person who seeks admission to a nursing facility has IDD, whether the individual could be served appropriately in another, less restrictive facility, and whether the person needs specialized services. *Id.* ¶¶ 5, 84-87, 93-95, 100-102, 106. Concomitantly, Texas fails to provide an array of specialized services that meet federal active treatment standards to persons with IDD who are in nursing facilities, to the same extent and in the same manner that it does for persons with IDD who live in ICF/DDs. *Id.* ¶¶ 88, 95, 97-106.

As a result of these deficiencies, a substantial portion of persons with IDD who are screened for admission should and could be served in alternative settings. 2nd Am. Compl. ¶¶ 93-94, 112-13. Similarly, a substantial portion of persons with IDD who currently reside in nursing facilities should be and could be served in more integrated community settings. *Id.* ¶¶ 1, 93-94. Finally, virtually all of the persons with IDD who are in nursing facilities qualify for specialized services, but virtually none of them are receiving active treatment, as defined in federal regulations and as required by federal law. *Id.* ¶¶ 5, 95, 112, 137, 147-48.

[17]In fact, the number may be considerably higher than this. As a result of pervasive deficiencies in its PASRR process, Defendants do not have an accurate list of the total number of persons with IDD who are currently institutionalized in nursing facilities in Texas.
[18]The lack of accurate identification makes projections about the number of persons at risk of institutionalization even more problematic.

F. The Status of the Named Plaintiffs

1. The Named Plaintiffs Residing in Nursing Facilities

There are currently five Named Plaintiffs who remain in nursing facilities including Maria Hernandez, Tommy Johnson, Johnny Kent, Joseph Morrell, and Melvin Oatman.

a. Plaintiffs Joseph Morrell, Johnny Kent, and Tommy Johnson

Plaintiff Joseph Morrell is 72 years old and has intellectual and other disabilities that affect his major life functions including: learning, communicating, and walking. He currently resides in a nursing facility in Texas. Declaration of Joseph Morrell in Support of Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint ("Morrell Decl.") ¶¶ 3, 8, 10; 2nd Am. Compl. ¶¶ 25, 362, 364. When Mr. Morrell was first admitted into his nursing facility, he was not provided with information about all the feasible alternatives to living in a nursing facility. Morrell Decl. ¶ 6-7, 2nd Am. Compl. ¶¶ 7, 374. He still has not received all of this information. *See* 2nd Am. Compl. ¶¶ 7, 374. Mr. Morrell is qualified for and, contrary to Defendants' contentions, has requested to transition to the community so that he can have a home of his own. Morrell Decl., ¶ 8-9; 2nd Am. Compl. ¶¶ 376. Meanwhile, Mr. Morrell continues to be unjustifiably segregated in his nursing facility and has not been provided the specialized services that he has been assessed to need by Texas' PASRR system, including speech, physical and occupational therapy as well a device to help him ambulate safely since he is losing his vision in one of his eyes. Morrell Decl. ¶ 10; 2nd Am. Compl. ¶¶ 369-372.

Plaintiffs Johnny Kent and Tommy Johnson reside in the same nursing facility as does Mr. Morrell. They both have intellectual disabilities and are qualified to live in the community and eligible for an available HCS waiver slot.[19] Although Mr. Johnson and Mr. Kent have resided in a

[19] Defendants selectively ignore fundamental changes to the HCS waiver enrollment process when they mischaracterize the current status of Named Plaintiffs Tommy Johnson, Johnny Kent

nursing facility since December of 2008, neither was provided with any information about the feasible alternatives at the time of their admission, and both still have not been provided adequate information to allow them to meaningfully understand available community living options. Declaration of Johnny Kent in Support of Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint ("Kent Decl.") ¶¶ 6-7, 9-11; Declaration of Tommy Johnson in Support of Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss Plaintiffs Second Amended Complaint ("Johnson Decl.") ¶¶ 9-11. Both men would like to receive information sufficient to enable them learn about what it would be like to live in the community, including having the opportunity to visit homes in the community and talk with people who have moved to the community. Kent Decl. ¶ 11; Johnson Decl. ¶ 12. If they were provided this information, Mr. Kent and Mr. Johnson may decide to move to the community. Kent Decl. ¶ 11; Johnson Decl. ¶ 12. Because Defendants have failed to follow their own policy changes made as required by §§ III.C.5 (a) & (b), III.F., IV.B, C; VI.A, B of the Court-ordered IA, the 2013-2018 HCS Waiver Application, and 42 U.S.C. § §1396(c)(2)(B) and (C) to provide these Named Plaintiffs residing in nursing facilities with an understanding of the feasible alternatives and to address barriers to community living, neither of these Named Plaintiffs has made, or can

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and Joseph Morrell as "on the interest list for the HCS waiver" and then add that these Plaintiffs "have not started the process of admission to the waiver." 3rd MTD at 5. Both the interest list and the application for admission, as Defendants elsewhere acknowledge, are now obsolete. *Id.* at 2, 3. It is Defendants, and specifically their service coordinators who, under the requirements of §§ III.C.5 (a) & (b), III.F., IV.B, C; VI.A, B to the IA, as well as pursuant to 42 U.S.C. § §1396(c)(2)(B) and (C), who are obligated to "start the process" by evaluating these Named Plaintiffs and informing them of all feasible alternatives in a manner designed to ensure they can understand the feasible alternatives, with the opportunity to visit these alternatives, and with an ongoing dialogue to address barriers, perceived or real, to community living.

make, an informed choice about community living.[20] *See* Kent Decl. ¶¶ 7-11; Johnson Decl. ¶¶ 8-12.

Additionally, although Mr. Kent and Mr. Johnson have been assessed to need specialized services, neither has received the specialized services or active treatment that they need to prevent or decelerate physical and psychological deterioration. Kent Decl. ¶¶ 12-15, Johnson Decl. ¶¶ 6-7. For example, Mr. Kent needs specialized speech, occupational, and physical therapy. Kent Decl. ¶ 14. He also would like day habilitative services. *Id*. ¶ 15. He has not, however, received any of these specialized services. Similarly, Mr. Johnson needs speech therapy to help him to learn to speak more clearly and physical therapy to help him learn to keep his balance and avoid injuries from falls. Johnson Decl. ¶ 7. Mr. Johnson would also like day habilitation services in the community. *Id*. ¶ 6. He has not received any of these specialized services. *Id*. ¶¶ 6-7.

b. Plaintiff Maria Hernandez

Plaintiff Maria Hernandez is 26 years old and has an intellectual disability as well as other disabilities that affect her major life functions such as communicating, walking, and eating. 2nd Am. Compl. ¶¶ 243-244, Declaration of Diane Hernandez in Support of Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint ("Hernandez Decl.") ¶¶ 4, 16-19. She is qualified, and would like, to transition from a nursing facility to live in the community. *See* 2nd Am. Compl. ¶¶ 1, 254, Hernandez Decl. ¶¶ 8-10, 13, 14. Although Ms. Hernandez was assigned an HCS waiver slot on or about May 10, 2013, she is still stuck in a nursing facility two years later because HCS-contracted providers have been unwilling

[20] There is nothing in the Named Plaintiffs' records that documents compliance with Defendants' own enrollment process that was developed as required by §§ III.C.5 (a) & (b), III.F, IV.B, C; V.E, F; VI.A, B of the IA, the 2013-2018 Waiver Application, or the law. *See generally* Botello Decl. (Doc 244-1).

to serve her, due to her complex medical needs. Hernandez Decl. ¶¶ 11-12. As a result, she remains indefinitely segregated in a nursing facility. *Id*. ¶¶ 10-12.; *see also* 2nd Am. Compl. ¶¶ 251-254.

While waiting at her nursing facility to transition to the community, Ms. Hernandez has not received the specialized services and active treatment that she needs. Hernandez Decl. ¶¶ 16-20; *see also* 2nd Am. Compl. ¶¶ 247-251. Consequently, she has continued to languish since the time that she was admitted to the nursing facility, including losing her ability to speak and developing physical deformities in her arms that compromise her ability to move. *Id*. ¶¶ 16-21. Ms. Hernandez also remains confined to her bed and bedroom for up to 24 hours per day, with virtually no opportunities for socialization, even within her nursing facility. *Id*. ¶¶ 19.

c. Plaintiff Melvin Oatman

Plaintiff Melvin Oatman resides in a nursing facility where he has lived for approximately the past eight years. 2nd Am. Compl. ¶¶ 265, 267, Oatman Decl. ¶ 3, Fourth Corbett Decl. ¶ 13. Mr. Oatman has a diagnosis of HIV/AIDS—a "related condition"—as well as other disabilities, all which affect his ability to do major life activities including walking. 2nd Am. Compl. ¶ 265; Fourth Corbett Decl. ¶ 14. Mr. Oatman is qualified to and is interested in possibly transitioning the community. 2nd Am. Compl. ¶ 275, Oatman Decl. ¶ 10. Mr. Oatman has never received any information about feasible alternatives to living in a nursing facility. 2nd Am. Compl. ¶ 273, Oatman Decl. ¶¶ 8-9, *see also* ¶ 10; Fourth Corbett Decl. ¶ 15. Subsequent to Mr. Oatman joining this lawsuit, Defendants modified their rules and definition of a "related condition," with respect to eligibility for DADS services in the community. Fourth Corbett Decl. ¶ 16. As a result of this modification, Defendants now contend that Mr. Oatman does not have a related condition and, therefore, is not qualified to receive services from DADS in the community. *Id*. ¶ 17. Consequently, Mr. Oatman is indefinitely and unnecessarily segregated in his nursing facility. *Id*. ¶ 18; *see also* Oatman Decl. ¶¶ 5, 10. Additionally, Mr. Oatman has never been offered or received

any of the specialized services that he needs. Fourth Corbett Decl. ¶ 17, *see also* Oatman Decl. ¶ 6.

2. The Named Plaintiffs Currently Living In the Community

Subsequent to the filing of the original Complaint, six of the Named Plaintiffs—Eric Steward, Patricia Ferrer, Linda Arizpe, Vanisone Thongphanh, Richard Krause, and Leonard Barefield—have moved out of the nursing facilities into small home settings or their family homes in the community. Without this litigation, each of these Named Plaintiffs would still be segregated in nursing facilities. Although they are now living in the community, they are all at risk of being referred, screened, or readmitted to a nursing facility.[21] Specifically, they previously were assessed by Texas's PASRR screening process and determined to need a nursing facility level of care, due to their disability and clinical condition. They each resided in a nursing facility for a substantial period of time. *See* 2nd Am. Compl. ¶¶ 150 (Eric Steward), 159-60, 171 (Linda Arizpe), 186, 195, 201 (Patricia Ferrer), 257 (Vanisone Thongphanh), 280-282 (Richard Krause), 303 (Leonard Barefield); Fourth Corbett Decl. ¶ 12 (Vanisone Thongphanh), Declaration of Marisol McNair in Support of Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint ("McNair Decl."), ¶ 7 (Leonard Barefield). Although they have now moved to the community, their disability and clinical needs remain essentially the same. They all have a significant likelihood of returning to nursing facilities if their medical conditions change or if problems arise in their community placement.[22] *See* 2nd Am. Compl. ¶ 171 (Linda Arizpe), ¶ 201

[21]The IA recognized this period of risk following departure from a nursing facility. Interim Agreement at 4 (Doc. 180) ("Individuals remain in the Target Population [and covered by the provisions of the IA] . . . until one year after transition or diversion from a nursing facility.").

[22] For example, Plaintiff Vanisone Thongphanh had an HCS waiver slot prior to his initial nursing facility admission. 2nd Am. Compl. ¶ 257; Fourth Corbett Decl. ¶ 2. After becoming ill and being hospitalized, he was admitted to a nursing facility where he became trapped for years because he lost his HCS slot due to the increased complexity of his medical needs. 2nd Am. Compl. ¶ 257; Fourth Corbett Decl. ¶¶ 4, 6.

(Patricia Ferrer); Fourth Corbett Decl. ¶ 12 (Vanisone Thongphanh). As a result, they all have standing to bring ADA and Section 504 claims on behalf of themselves and the putative class.

III. ARGUMENTS AND AUTHORITY

A. The Motion to Dismiss under Rule 12(b)(1) Must Be Denied Because the Court Has Jurisdiction Over Plaintiffs' Claims

1. Defendants Cannot Attack the Merits of Plaintiffs' Claims Through a 12(b)(1) Motion to Dismiss.

A motion to dismiss under Rule 12(b)(1) "should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "[T]he test for dismissal is a rigorous one and if there is any foundation of plausibility to the claim[,] federal jurisdiction exists." *Evans v. Tubbe*, 657 F.2d 661, 663 (5th Cir. 1981) (citing 13 Wright & Miller, § 3564, at 428). Ultimately, resolution of the jurisdiction question is not dependent upon whether a plaintiff's claims are meritorious; a lack of jurisdiction exists "only if the claims are plainly frivolous or patently without merit." *Id.* at 663 (internal quotes omitted).

In deciding a motion under 12(b)(1), a court may look to: (1) the complaint, (2) the undisputed facts in the record, or (3) the disputed facts resolved by the court to determine if subject matter jurisdiction is lacking. *See Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011). While a court may look at certain materials outside the pleading when deciding a factual attack on a Rule 12(b)(1) motion, courts should avoid considering the merits of a claim in answering the jurisdictional question. *See, e.g., Payne v. Progressive Fin. Servs., Inc.*, 748 F.3d 605, 608 (5th Cir. 2014) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [the plaintiff] could actually recover." (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946))); *Randall D. Wolcott, M.D., P.A.*, 635 F.3d at 762-63; *Montez v. Dep't of Navy*, 392 F.3d 147, 150 (5th Cir. 2004); *Williamson v. Tucker*, 645 F.2d 404, 415 (5th

Cir. 1981). If a 12(b)(1) motion attacks the merits of the claim, the court should analyze it under Rule 12(b)(6) or Rule 56. *Herrera v. NBS, Inc*., 759 F. Supp. 2d 858, 863 (W.D. Tex. 2010).

Where, as here, the "issues of fact are central both to subject matter jurisdiction and the claim on the merits," the Fifth Circuit has consistently held that the trial court should simply assume jurisdiction and proceed to the merits. *See, e.g*., *Montez*, 392 F.3d at 150; *Williamson*, 645 F.2d at 415-16 ("Where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case."); *see also Herrera*, 759 F. Supp. 2d at 863. In short, a Rule 12(b)(1) motion is not an invitation to launch a backdoor attack on the merits, which is more appropriately brought as a motion to dismiss under Rule 12(b)(6) or summary judgment under Rule 56. *See Payne*, 748 F.3d at 608 ("A Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction is not the proper mechanism to challenge the merits of [plaintiff's] claims."); *Williamson*, 645 F.2d at 415-16 ("[R]efusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides . . . a greater level of protection to the plaintiff [because] . . . the defendant is forced to proceed under Rule 12(b)(6) . . . or Rule 56 . . . ."); *Herrera*, 759 F. Supp. 2d at 861, 863.

Here, many of the new facts Defendants introduce in support of their 12(b)(1) motion go straight to the merits of Plaintiffs' claims. Permitting Defendants to introduce these facts through their 12(b)(1) motion would undermine pleading standards and allow Defendants to attack the facts pleaded in the complaint at a motion to dismiss stage. Under well-established Fifth Circuit precedent, the 12(b)(1) portion of Defendants' motion concerning the standing of the Named Plaintiffs is not the appropriate mechanism to consider the merits of Plaintiffs' claims. Thus, the

Court should decline Defendants' invitation to impermissibly explore the merits at this early stage in the proceedings.[23]

2. Elements of Standing and Justiciability

To have standing to sue under Article III, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Additionally, "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc.*, 528 U.S. at 181. At the pleading stage, Plaintiffs need only assert general factual allegations that they have been injured by Defendants. *Lujan*, 504 U.S. at 561; *Sierra Club v. Energy Future Holdings Corp.*, 921 F. Supp. 2d 674, 679 (W.D. Tex. 2013). Plaintiffs have provided sufficient facts, both in their Second Amended Complaint and in the evidence supporting this response, to show each prong of standing is met and that this is a justiciable controversy.

[23]The arguments in Sections A(2), (4), and (5), *infra* are presented in the alternative, and only need to be considered if the Court decides to consider Defendants' Rule 12(b)(1) Motion with respect to the Named Plaintiffs, and the related factual information. Similarly, the new factual information submitted by Plaintiffs in connection with this response was included only in an abundance of caution if the Court determines that additional facts should be considered on the 12(b)(1) portion of the 3rd MTD; as discussed below, the Court should not consider any of the additional facts provided by either Plaintiffs or Defendants in connection with the 12(b)(6) portion of the 3rd MTD.

"[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (internal quotes omitted). As long as Plaintiffs have live claims and assert ongoing violations of the ADA, the NHRA, and the Medicaid Act, as do the Named Plaintiffs here—both on behalf of themselves and members of the purported class—the case is not moot.

A claim may be also be moot if "subsequent events ma[k]e it *absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 189 (emphasis added). However, "[i]t is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id*. In the context of voluntary cessation of wrongful behavior, the party asserting mootness carries a heavy burden of persuasion in showing that the challenged conduct cannot reasonably be expected to begin again. *Id*. Thus, despite any purported improvements Defendants have made thus far, Defendants must still show that they will not simply return to their former insufficient service system. Defendants cannot meet this burden, because several of the core reforms—like expanded waiver capacity—are time-limited and/or facially insufficient to address the needs of all qualified persons with IDD in nursing facilities.[24]

3. The Organizational Plaintiffs Have Standing to Assert Their Claims

a. The Arc of Texas and the Coalition of Texans with Disabilities Both Have Advocated on Behalf of Their Members Related to These Claims.

The Arc of Texas is a nonprofit, volunteer organization in the State of Texas that for over 65 years has committed itself to expanding opportunities for people with IDD and including them

[24]The Fifth Circuit treats governmental unlawful conduct some "with some solicitude" and therefore the government's burden is lighter than a private litigant. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009). However, Defendants cannot meet even this lighter burden.

in our communities. 2nd Am. Compl. ¶¶ 26-28. The Arc of Texas expends agency resources to: (a) support individuals, families and other disability organizations in advancing public policies; (b) provide training programs; and, (c) build a statewide network of advocates so that persons with disabilities are able to more fully participate in their community. *Id.*; *see* Affidavit of Mike Bright ("Bright Aff.") ¶ 2-3, Doc. 70-1.

Similarly, for more than 37 years the Coalition of Texans with Disabilities ("CTD") has played an important role in ensuring that persons with IDD are fully included in all aspects of community living. 2nd Am. Compl. ¶¶ 29-31. CTD has expended it resources so that persons with IDD are able to live, work, learn, and more fully participate in all aspects of community living. *Id.* at ¶ 20. CTD has specifically devoted time and resources to pressing the State of Texas to restructure its PASRR program so that persons with IDD who are capable of living in the community with appropriate supports are able to do so, rather than being confined to nursing facilities and other institutional settings. *See* Affidavit of Denis Borel ("Borel Aff.") ¶¶ 2, 3, Doc. 70-2. CTD will continue to devote its resources to ensure that eligible individuals with IDD who either apply for, or live in, Texas nursing facilities receive the services, supports and alternative placement options that they may be entitled to through the PASRR program. *See* Borel Aff. ¶ 3.

Both The Arc of Texas and CTD continue to advocate for the inclusion of people with IDD in all aspects of society, including persons who are members and supporters of each organization. On behalf of their members, The Arc of Texas, and CTD, have worked to address the problems associated with the lack of community-based services for persons with IDD

who are segregated in institutional settings, including nursing facilities. *See* Bright Aff. ¶¶ 2, 3 and Borel Aff. ¶¶ 2, 3. Both The Arc of Texas and CTD have worked with the Texas State Legislature and the appropriate state agencies in efforts to address the problems associated with

the lack of funding for more community-based waiver programs and services so that individuals with IDD can avoid institutionalization in nursing facilities and other settings. *See* Bright Aff. ¶ 3; Borel Aff. ¶¶ 3, 4.

It was only after a concerted effort by the Named and Organizational Plaintiffs (including direct discussions with Defendants) failed to secure reasonable access to appropriate services and community-based waiver services, that the board of directors of both The Arc of Texas[25] and CTD authorized their Executive Directors to file this suit, in an effort to secure reasonable access to appropriate nursing facility services and community-based supports for eligible nursing facility applicants and residents with IDD. Bright Aff. ¶ 3, Borel Aff. ¶ 3.

b. The Arc of Texas and CTD Have Standing to Bring Suit in Their Own Right Based on Article III Standing and Based on Congress's Grant of an Express Right of Action.

(1) Article III Standing

The Arc of Texas and CTD allege direct injuries resulting from Defendants' ongoing failure to comply with federal law that adversely affects their ability to promote their organizational goals and initiatives and that require significant resource expenditures to ensure that persons with IDD have the opportunity to live, work and receive services in the community. *See* 2nd Am. Compl. ¶¶ 26-31 and Affs. of Bright and Borel. As a result, The Arc of Texas and CTD meet the constitutional standing requirements of Article III, as set forth in *Lujan*, 504 U.S. at 560-61.

[25]The Arc of Texas has participated in much of the groundbreaking litigation in Texas involving the rights of individuals with mental retardation and related conditions. For over twenty years, The Arc of Texas participated in the *Lelsz, et al. v. Kavanagh* litigation, and for much of that time it was a party to the litigation with full Article III standing. *See Ass'n for Retarded Citizens of Tex. v. Kavanagh*, 483 U.S. 1057 (1987) and *McCarthy v. Hawkins*, 381 F.3d 407 (5th Cir. 2004).

Both The Arc of Texas and CTD clearly satisfy the first prong of the *Lujan* test because they have suffered an "injury in fact." Defendants' discriminatory and illegal actions in violation of federal law have resulted in, among other things: (a) the denial of appropriate, integrated community services and supports for individuals with IDD in nursing facilities, including the failure to plan, administer, operate, and fund Texas's community-based service system; and (b) the failure to conduct proper PASRR screens and assessments so that the needs of persons with IDD can be appropriately met in a less restrictive setting than a nursing facility. *See* 2nd Am. Compl., *passim*. As a result, both Organizational Plaintiffs have expended organizational resources in an effort to remedy the deficiencies in Defendants' PASRR process and the concomitant failure to provide individuals with IDD in nursing facilities access to needed community-based services. *See* Bright Aff. ¶¶ 2, 3 and Borel Aff. ¶¶ 2, 3. It is well established that the expenditure of organizational resources constitutes an injury-in-fact. *Havens Realty Corp.v. Coleman*, 455 U.S. 363, 379 (1982); *Cleburne Living Center v. City of Cleburne, Texas*, 726 F.2d 191, 203 (5th Cir. 1984), *aff'd in part, vacated in part on other grounds* 473 U.S. 432 (1985).[26]

The second prong of the *Lujan* test requires that the injury-in-fact be causally related to Defendants' allegedly illegal conduct. Here, that requirement is easily met because the organizations' resources have been expended in efforts to remedy Defendants' PASRR deficiencies, inappropriate nursing facility placements, and segregated developmental disability service system that lacks adequate community-based resources. Bright Aff. ¶ 3; Borel Aff. ¶ 3. As the *Cleburne* Court made clear, if the organization's resources are expended in "combating the

[26]Defendants' claim that Organizational Plaintiffs have not suffered a direct injury simply ignores these facts. 3rd MTD at 22.

[defendants'] discrimination," the causal connection is met. *Cleburne*, 726 F.2d at 203; *see also ACORN v. Fowler*, 178 F.3d 350, 357 (5th Cir. 1999); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 29 (D.C. Cir. 1990).

Moreover, Defendants reliance on *Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d 298, (5th Cir. 2000) is misplaced. Defendants rely on *LeBlanc* to argue that the redirection of resources for litigation and legal counseling is insufficient to impart organizational standing. 3rd MTD at 22. But Organizational Plaintiffs have expended funds for more than just litigation and legal counseling—they have also spent a great deal of time and resources to try to change Defendants' discriminatory policies. 2nd Am. Compl. ¶¶ 27, 30; Bright Aff. ¶ 3, Borel Aff. ¶ 3. Moreover, like *Fowler*, *LeBlanc* was not decided at the pre-trial stage but rather at trial, and thus, it is not pertinent here. *LeBlanc*, 211 F.3d at 305.

Finally, the third and final part of the *Lujan* test, redressability, is satisfied because correcting the violations of federal law, as sought in this litigation, would advance the organizations' goals of securing compliance with the ADA's integration mandate and the NHRA's PASRR requirements. As such, the Arc of Texas and CTD have amply demonstrated "such a personal stake in the outcome of the controversy as to warrant [the] invocation of federal-court jurisdiction" and therefore have direct Article III. *See Havens*, 455 U.S. at 378-79.

(2) Congressional Right of Action Under the ADA and the Rehabilitation Act

The "broad language of the ADA and Rehabilitation Act evidences a Congressional intent to extend [organizational] standing to the full limits of Article III . . . " *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 407 (3d Cir. 2005). As a result, ADA and Section 504 of the Rehabilitation Act protections "extend[] to shield entities *themselves* from discrimination." *Id.*

Because the discrimination alleged by The Arc of Texas and CTD is based on their association with individual members with IDD, both organizational entities are aggrieved parties.

Congress may expressly grant a right of action to persons who otherwise would be barred by prudential standing rules. *Id.* at 405 (c*iting Warth v. Seldin*, 422 U.S. 490, 499 (1975). "Where Congress grants a right of action to an entity or association the entity may assert standing either in its own right or on behalf of its members. . . ., because the broad language of [the Americans with Disabilities Act] and [Rehabilitation Act] evidences a Congressional intent to confer standing . . . to bring discrimination claims based on their association with disabled individuals." *Id.* (*citing Warth,* 422 U.S. at 511). Indeed, the ADA's and Section 504's enforcement provisions do not limit relief to just "qualified *persons* with disabilities." *Id.* (emphasis added); *see also, MX Group, Inc. v. City of Covington*, 293 F.3d 326, 334-35 (6th Cir. 2002); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 47 (2d Cir. 1997); *Helping Hand, LLC v. Baltimore Cty., MD*, 515 F.3d 356, 363 (4th Cir. 2008). "Rather, the ADA grants the right to relief to "any person alleging disability on the basis of disability," 42 U.S.C. § 12133, and the Rehabilitation Act extends remedies to "any person aggrieved" by unlawful discrimination, 29 U.S.C. § 794a(a)(2)." *Addiction Specialists, Inc.*, 411 F.3d at 405.

Moreover, "any person" under the ADA includes the right to relief to organizational entities. *Id.* 405-06; *see also* 28 C.F.R. § 35.130(g)[27] ("A public entity shall not exclude or

[27]In *Addiction Specialists, Inc.*, 411 F.3d at 406, n.4, the court held that the principles set forth in this regulation also apply to Section 504. "Although this regulation was passed pursuant to the ADA, the broad remedial language of the RA is similarly intended to extend relief beyond qualified individuals with disabilities." *See Frederick L. v. Dep't of Pub. Welfare of Pa.*, 364 F.3d 487, 491 (3d Cir. 2004) (citing *Helen L. v. DiDario*, 46 F.3d 325, 330-32 (3d Cir.), *cert. denied*, 516 U.S. 813 (1995)) ("We have construed the provisions of the RA and the ADA in light of their close similarity of language and purpose."); *see also MX Group*, 293 F.3d at 333-35 (finding standing under both the ADA and Section 504); *Innovative Health*, 117 F.3d at 47

otherwise deny services, programs, or activities to an individual or *entity* because of the known disability of the individual with whom the individual or entity is known to have a relationship or association." (emphasis added)). In this case, both The Arc of Texas and CTD allege discrimination based on the denial of services and program benefits to individual association members with IDD. *See, e.g.*, 2nd Am. Compl. ¶¶ 379, 382, 383, 389 and 390. "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules," making the prudential limits imposed in pure associational standing cases *not* apply to those claims associations assert on their own behalf under the ADA and Rehabilitation Act. *Addiction Specialists*, 411 F.3d at 405; *cf. Havens Realty*, 455 U.S. at 372; *Warth*, 422 U.S. at 501.

Finally, the Congressional protections extended to organizational entities under the ADA and Section 504, also extend to an organizational entity's § 1983 claims when their other federal statutory claims are being asserted on the organization's own behalf. *Id*. at 405 n. 6.[28] In this case,

(same); *see Kemp v. Holder*, 610 F.3d 231, 234-35 (5th Cir. 2010) (relevant definition set forth in the ADA are applicable to Section 504 claims).

[28]The right to file suit under § 1983 is available to a wide range of plaintiffs including not-for-profit organizations. *See, e.g., Dep't of Tex., Veteran of Foreign Wars of U.S. v. Tex. Lottery Comm'n,* 760 F.3d 427, 431 (5th Cir. 2014) (plaintiff filed suit under § 1983 against the texas Lottery Commission for vilating their right to freedom of speech); *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Housing & Cmty. Affairs,* No. 3:08-cv-0546-D, 2008 WL 5191935 (N.D. Tex. Dec. 11, 2008) (non-profit housing organization that assisted low-income African-American persons in finding affordable housing had Article III standing to bring actions under the FHA and § 1982 and § 1983 for racial discrimination); *Equal Access for El Paso, Inc. v. Hawkins*, 562 F.3d 724 (5th Cir. 2009) (non-profit challenged Medicaid recipients' rights to receive medical assistance with reasonable promptness under provisions of the Medicaid § 1983) *see also Safeguard Mut. Ins. Co. v. Miller*, 472 F.2d 732, 733 (3d Cir. 1973); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 780 n.15 (1978) (recognizing that corporations are person within the meaning of the Fourteenth Amendment); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary,* 268 U.S. 510, 535 (1925) (recognizing the ability of corporations to protect property rights in federal court); *Gwynedd Props., Inc. v. Lower Gwynedd Twp.*, 970 F.2d 1195 (3d Cir. 1992) (entertaining a development corporation's § 1983 due process claim alleging that a municipality violated the corporation's right to reasonable use and development of its land); *Heritage Farms, Inc. v. Solebury Twp.*, 671 F.2d 743 (3d Cir. 1982) (*same*).

both Organizational Plaintiffs meet this requirement because their federal statutory claims under Title XIX of the Social Security Act and the NHRA are primarily being brought on behalf of their respective organizations. Bright Aff. ¶ 3; Borel Aff. ¶ 3.

c. The Arc of Texas and CTD Have Associational Standing

In addition to having standing to bring this action in their own right, The Arc of Texas and CTD have organizational standing to sue on behalf of their respective membership. An organization has such representational capacity when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. *Hunt v. Wash. Apple Advert. Comm'n*, 432 U.S. 333, 343-44 (1977).

When an organization asserts standing in a representative capacity, *Hunt* does not require organizational plaintiffs allege an injury. *Id*. at 343. Rather, the organization must establish that those whom it represents have suffered an injury sufficient to confer standing. *Id*.; *see also Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (injury in fact requirement in equal protection case does not require plaintiff prove that she would have obtained benefit in absence of challenged barrier). Defendants incorrectly contend associational standing requires the participation or identification of an organizational member. 3rd MTD at 23. To the contrary, *Hunt* permits representative standing only when neither the claim, nor the relief sought require the injured individual's participation. *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550-51 (5th Cir. 2010) (*citing Hunt*, 432 U.S. at 343, concluding individual participation not necessary in suit for declaratory and injunctive relief.); *Pharmacy Buying Assoc., Inc. v. Sebelius*, 906 F. Supp. 2d 604, 618 (W.D. Tex. 2012) *citing Ass'n of Am. Physicians & Surgeons, Inc.*, 627 F.3d at 550-51 (*same*); *see also Hosp.*

Council of W. Pa. v. City of Pittsburg, 949 F.2d 83 (3d Cir. 1991) ("It is clear that the . . . request for declaratory and injunctive relief does not require participation by individual members. The Supreme Court has repeatedly held that a request by an association for declaratory and injunctive relief does not require participation by individual association members."); *Self-Insurance Inst. of Am., Inc. v. Korioth*, 993 F.2d 479 (5th Cir. 1993) (in a case involving injunctive relief, individual associational members need not participate in the litigation).

Defendants further argue that the Organizational Plaintiffs have not identified individual members who would otherwise have standing to sue in their own right, and thus, neither organization has associational standing. 3rd MTD at 23. Defendants are incorrect as *Hunt* and its progeny do not require an organizational plaintiff claiming associational stand to specifically identify, by name, an individual member with standing, but rather to allege that at least one such member exists. *Disability Rights Wis., Inc. v. Walworth Cty. Bd.*, 522 F.3d 796 (7th Cir. 2008), *citing United Food Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 555 (1996); *see also Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999).

Here, both The Arc of Texas and CTD allege they have members with standing to sue in their own right because these members have IDD, reside in, or are at risk of residing in a nursing facility, do not have access to needed community-based services and supports, and are not provided with specialized services in the nursing facility necessary for them to become more independent and self-sufficient. Bright Aff. ¶¶ 2, 3; Borel Aff. ¶¶ 2, 4; 2nd Am. Compl. ¶¶ 28, 31. Thus, they have satisfied first prong of *Hunt*.

Hunt also requires some community of interest between the group and the injured member. This, requirement, however is not demanding and the Organizational Plaintiffs here met this part of the *Hunt* test. *See e.g., Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 58 (D.C. Cir.

1988). Here, the interests that The Arc of Texas and CTD seek to protect and advance in this litigation are relevant to their respective missions of advocating for services and supports that enable people with IDD to live safely and productively in integrated community settings, as opposed to being isolated in an institution. Bright Aff. ¶ 3; Borel Aff. ¶ 3.

Finally, the third *Hunt* requirement is typically satisfied when the plaintiff association seeks injunctive or declaratory relief. *See Hunt*, 432 U.S. at 343 ("[i]f in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured."). This is so, because neither the asserted claims nor requested relief requires the participation of individual members even when there is a need for participation of the association member in fact discovery or at trial. *Pernell v. City of San Jose,* 485 U.S. 1, 7 (1988); *Borrero v. United HealthCare of N.Y., Inc.*, 610 F.3d 1296 (11th Cir. 2010). In this case, The Arc of Texas and CTD seek declaratory and injunctive relief and thus, do not require their individual members to participate in the lawsuit, as a remedy will equally impact each of the members.

4. Plaintiffs Have Standing to Assert Their ADA and Section 504 Claims

All of the Named Plaintiffs have standing to assert ADA and Section 504 Claims, either because they remain unnecessarily institutionalized in nursing facilities or, as result of their disabilities and clinical conditions, are likely to return to nursing facilities if their conditions change or their community providers are no longer willing to serve them, as has happened repeatedly in the past. In any event, because *Lujan* only requires that one Plaintiff demonstrate standing—which clearly is the case here—Defendants' Motion under 12(b)(1) must be denied.

a. The Named Plaintiffs Who Remain in Nursing Facilities Have Standing to Assert ADA and Section 504 Claims.

As discussed above in Section II.F, five of the Named Plaintiffs remain in the nursing facilities. As Defendants concede, Ms. Hernandez is qualified for community services and would like to transition to the community, but remains indefinitely segregated in her nursing facility because the State's funded provider agencies have been unwilling and/or unable to assist her. Hernandez Decl. ¶¶ 8-10. Similarly, Plaintiff Joseph Morrell desires to move to the community, but is still segregated in a nursing facility as a result of Defendants' planning, administration, operation, and funding of their community service system. *See, e.g.,* Morrell Decl. ¶ 8. Plaintiffs Tommy Johnson and Johnny Kent are qualified to live in and participate in Defendants' community services, but have not been provided adequate information about all the feasible alternatives to residing in their nursing facility, consistent with DADS' own policies and procedures. *See* Kent Decl. ¶¶ 6, 9-10 Johnson Decl. ¶¶ 9-11. They both want to learn more about their community-living options and would consider community placement if they could find a suitable place to live that met their needs. *See* Kent Decl. ¶ 11, Johnson Decl. ¶ 12.[29] Plaintiff Melvin Oatman is also qualified to live in and participate in Defendants' community services, but has not been provided information about the feasible alternatives to residing in their nursing facility, consistent with DADS' own policies and procedures. *See* Oatman Decl. ¶¶ 8-9, Fourth Corbett Decl. ¶¶ 14-15, 18. Mr. Oatman wants to learn about their community-living options and believes that with such information, he would like to move to the community. *Id.* ¶ 10. Thus, Defendants' contention that all of the Named Plaintiffs with IDD, except for Ms. Hernandez, who wish to live in the community are doing so through Defendants' HCS waiver program is simply

[29] Defendants' insistence that Mr. Morrell, Mr. Johnson, and Mr. Kent categorically oppose moving out of their nursing facility is factually erroneous. *See* Morrell Decl., ¶ 8; Kent Decl. ¶ 11, and Johnson Decl. ¶ 12; *see also* discussion at Section II.F.1.a, *supra*.

inaccurate. *See* 3rd MTD at 4-5, 24. Instead, the Named Plaintiffs who are currently in nursing facilities have suffered, and continue to suffer an injury-in-fact and thus have standing to bring their ADA and Section 504 claims on behalf of themselves, as well as the putative class.

b. The Named Plaintiffs Living in the Community Can Show Injury In Fact, and Therefore, Have Standing to Assert ADA and Section 504 Claims.

The Named Plaintiffs who recently have transitioned to the community still have standing to bring claims under Title II of the ADA and Section 504 because: (1) given their disabilities and clinical conditions which caused their prior institutionalization in a nursing facility, there is a significant likelihood that they may have to return to a nursing facility if either their conditions change or their providers change—both of which has occurred with some frequency before; (2) their claims relate back to the filing of the Second Amended Complaint; and, (3) Defendants cease any actions that they allege were voluntary taken to comply with federal law. As a result, these Named Plaintiffs have suffered an injury in-fact and satisfy meet the requisite test for standing.

(1) The Named Plaintiffs Living in the Community Are at Serious Risk for Returning to Nursing Facilities, and Thus Have Standing to Bring ADA and Section 504 Claims.

The fact that several of the Named Plaintiffs recently moved to the community does not render their ADA and Section 504 claims moot because they are at serious risk of being screened for admission to a nursing facility if either their clinical conditions or their support providers change. As more fully discussed in Section II.B & F *supra*, this is not merely a conjectural possibility, but rather a distinct probability.

The Department of Justice and a number of Courts have recognized that a plaintiff can state a cause of action for violations of Title II's integration mandate where a public entity places an individual with a disability *at serious risk* of institutionalization. *See* DOJ ADA Statement, Question & Answer 7, available http://www.ada.gov/olmstead/q&a_olmstead.htm ("…the ADA

and the Olmstead decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals who are currently in institutional settings or other segregated settings."); *see also Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) (recognizing plaintiffs' ADA *Olmstead* claims that they remained at serious risk of institutionalization as a result of the state's discriminatory policies imposing stricter eligibility requirements for in-home personal care services); *M.R. v. Dreyfus*, 697 F.3d 706, 733 (9th Cir. 2011) (finding that the plaintiffs stated an *Olmstead* claim where the state's proposed reduction in community services would "exacerbate plaintiffs already severe mental and physical disabilities" and "put plaintiffs at serious risk of institutionalization"); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003)[30] ("*Olmstead* does not imply that disabled persons who, by reason of a change in a state policy, stand imperiled with segregation, may not bring a challenge to that sate policy under the ADA's regulation without first submitting to institutionalization").[31]

Additionally, while the risk of institutionalization must be serious, there is no requirement that it be "imminent" for an aggrieved individual with a disability to allege an at-risk *Olmstead* claim. DOJ ADA Statement, Question & Answer 7 ("…Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent."); *Pashby*, 709 F.3d at 322 (finding that plaintiffs' claims that as a result of defendants changes to their personal care policies they

[30]A number of district courts have likewise recognized an at-risk of institutionalization claim under Title II. *See e.g., V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009) and *Oster v. Lightbourne*, No. 09-4668-CW, 2012 WL 691833, at *15-16 (N.D. Cal. Mar. 2, 2012) (reductions in Medicaid-funded in-home supportive services that placed recipients with disabilities at risk of institutionalization violated the ADA's integration mandate as interpreted by *Olmstead*); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980 (N.D. Cal. 2010) (plaintiffs stated *Olmstead* claim where state reduced adult day healthcare services placing plaintiffs at risk of institutionalization).

[31] In reaching this conclusion, the court specifically noted that "nothing in the plain language of the [ADA Title II] regulations that limit protection to persons who are currently institutionalized." *Fisher*, 335 F.3d at 1181.

"may," "might," "probably would, or were likely" to enter an adult care home sufficient to state an at-risk *Olmstead* claim); *M.R.*, 697 F.3d at 734 ("An ADA plaintiff need not show institutionalization is 'inevitable' or that she has 'no choice' but to submit to institutionalization in order to state a violation of the integration mandate. Rather the plaintiff need only show that the challenged state action creates a "serious risk of institutionalization.").

Here, all of these Named Plaintiffs had been determined by Defendants to need a nursing facility level of care, resided in nursing facilities for years, and continue to be qualified for nursing facility level of care. The same disabilities and medical conditions that made them initially eligible for nursing facility-level of care have not disappeared, and are likely to deteriorate over time or become exacerbated by changing conditions. *See, e.g.*, 2nd Am. Compl. ¶¶ 171 (Linda Arizpe), 201 (Patricia Ferrer); *see also* Section II.F, *supra*. Thus, even though some of the Named Plaintiffs are now living in the community, if and when those changes occur, they are likely to be screened for admission to the nursing facility and readmitted pursuant to a PASRR screening. *See, e.g.*, *id.*, ¶ 257 (Vanisone Thongphanh); Fourth Corbett Decl. ¶ 12 (same). For example, Mr. Thongphanh, although he now lives in the community, had an HCS slot prior to his initial admission to a nursing facility. Fourth Corbett Decl. ¶ 2. After developing an upper respiratory infection, Mr. Thongphanh was hospitalized. *Id.* ¶ 3. Because of his medical condition, at the time he was discharged from the hospital he was referred and admitted to a nursing facility. *Id.* ¶ 4. Mr. Thongphanh subsequently lost his HCS waiver slot due to his increased medical needs. *Id.* ¶¶ 4, 6. These clinical and programmatic realities demonstrate the serious risk of re-institutionalization that these Named Plaintiffs face, and support their standing to assert an *Olmstead* claim under Title II of the ADA.

(2) Plaintiffs' ADA and Section 504 Claims Are Not Moot Because They Relate Back to the Time the Complaint Was Filed.

Though some of the Named Plaintiffs have transitioned to the community, because they have timely filed a motion for class certification prior to the Defendants' attempts to moot their claims, their claims relate back to the time of the filing of the Second Amended Complaint and, therefore, are not moot. *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 822 (5th Cir. 2014) *op. withdrawn* (Jan. 8, 2015) (even a class certification motion filed four days after receipt of offer of complete relief to individual plaintiff is sufficiently timely and diligent to prevent class claim from being mooted); *see also Suttles v. Specialty Graphics, Inc.*, No. A-14-CA-505 RP, 2015 WL 590241, at *5-6 (W.D. Tex. Feb. 11, 2015) (following the relating back rule in earlier-decided *Mabary* and declining to follow later-decided *Fontenot v. McGraw*, 777 F.3d 741 (5th Cir. 2015)); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1045 (5th Cir. 1981) (where a class certification motion is timely and diligently filed, a rejected Rule 68 offer made after the motion was filed but before it was decided, the claims "relate back" to the date of the complaint and are not moot); *see also Thorpe v. District of Columbia*, 916 F. Supp. 2d 65, 66 (D.D.C. 2013) ("…for class actions prior to a ruling on class certification when the 'claims are live when filed but moot before the adjudication of the class certification motion," courts have recognized an "inherently transitory" exception where "the population of the claimant population [sic] is fluid, but the population as a whole retains a live claim.") (internal citations omitted).

The purpose of the rule in the *Mabary - Zeidman* line of cases is to prevent the plaintiffs in this and other actions from being "picked off" by defendants seeking to moot their claims, in order to preclude class certification—which is exactly the tactic Defendants have used here. *See Zeidman*, 651 F.2d at 1050-51. In this case, Plaintiffs filed their Motion for Class Certification well before Defendants ever sought to provide community living arrangements to anyone of the

Named Plaintiffs, and thereby attempt to moot their claims. In fact, until the IA was entered as an order of this Court, Defendants only offered community placements through new HCS waiver slots to the specific individuals identified as Named Plaintiffs.

Under the relation-back doctrine, the Named Plaintiffs' claims are not moot, because they had live ADA and Section 504 claims when the Second Amended Complaint and the Amended Class Certification motion were filed. As a result, they had and have standing to assert the same ADA interests as other class members who live in nursing facilities, or who are or will be or should be screened for inappropriate admission to a nursing facility.

(3) Defendants' Voluntary Cessation of Their Unlawful Conduct Does Not Moot the Claims of the Named Plaintiffs Residing in the Community.

As a threshold matter, any policy changes Defendants have made are insufficient to resolve the injury Plaintiffs are experiencing and therefore do no moot Plaintiffs' claims. Defendants' legislative funding for their HCS waiver program at best benefits 20% (700 new HCS placements for 4,000 individuals) of the qualified individuals with IDD in Texas's nursing institutions. (Conf. Com. Report H.B.1) at II-16, 31.c., available at http://www.llb.state.tx.us/Documents/Budget/Session_Code_84/HB1-Conference_Commitee_Report_84.pdf. Defendants make no commitment, plan, or even proposal to do more. And for those 700 placements to actually be accessible to the individuals with IDD in nursing facilities, Defendants must effectively plan and administer their service system in order to enable individuals to learn about and obtain specific services that they need. Significant additional policy changes as well as commitments that they will continue would be necessary to resolve the violations at issue here.

With respect to those changes that have occurred recently, they have been instituted as a direct result of this litigation and there is no guarantee that they will continue. The changes are

time-limited, both by the current biennium (2015-2017) and the term of the HCS waiver (2013-2018). And there is no longer an IA in place requiring Defendants to make these changes. For the Named Plaintiffs who have benefited from these reforms and transitioned to the community, there is a distinct possibility that the waiver conditions may not be extended exacerbating the risk that these individuals will be returned to the nursing facility. Therefore, pursuant to the "voluntary cessation" doctrine, these Named Plaintiffs retain standing to assert ADA and Section 504 claims.

As discussed in Section III.A.2., *supra,* it is well established that a defendants' voluntary cessation of an unlawful practices does not moot a claim unless the unlawful conduct clearly will not recur. *Friends of the Earth*, 528 U.S. at 189 ("[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *Olmstead*, 527 U.S. at 594 n.6 (finding that when a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her post-complaint transfer to a community program will not moot the action); *see also Morrow v. Washington,* 277 F.R.D. 172, 199 (E.D. Tex. 2011) ("A long line of Supreme Court cases stands for the proposition that the 'voluntary cessation' of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case"); *Thorpe*, 916 F. Supp. 2d at 66 (rejecting defendants' request to dismiss ADA claims on the basis of mootness after plaintiffs moved out of the nursing facility into the community after the filing of the lawsuit, holding that the voluntary cessation exception to mootness applied in those types of ADA cases); *Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 286 (D. Conn. 2010), *A.R. v. Dudek*, Case No. 12-60460-CIV-ZLOCH/HUNT (N.D. Fla. Nov. 13, 2014), rpt. and rec. adopted Dec. 29, 2014 (disabled children's claims against state for unnecessary segregation in nursing facilities not moot where state's policy changes insufficient to ensure cessation of the alleged unlawful conduct).

Although Defendants have changed some of their policies, as described in Sections II.B, E, & F, *supra*, the Named Plaintiffs are continuing to suffer harm in spite of these changes. They continue to be unnecessarily segregated or at risk of being referred to a nursing facility if they experience a change in medical condition or with their providers. *See* § II. B & F, *supra* Moreover, these changes are insufficient to guarantee that Defendants' discriminatory conduct will not again recur and that the Named Plaintiffs will not again find themselves subjected to the same unlawful conduct.

c. Defendants' Arguments That Plaintiffs Lack Standing Due to the Nature of the Remedy Sought Fails As a Matter of Law.

Defendants claim that Plaintiffs lack standing because Plaintiffs seek an overly broad remedy, and, somewhat contradictorily, because the relief sought is unenforceable as a matter of law. 3rd MTD at 25-28. Defendants' allegations that Plaintiffs lack standing are legally and factually incorrect, and, therefore, should be rejected.

First, it should be apparent that the Court is quite capable of crafting a sufficiently precise remedy, as exemplified by its Order approving the IA. That Order described, with precision, how Defendants would remedy certain deficiencies in their disability services system. *See* Doc. 180. That Order, agreed to by Defendants, laid out specific steps over a period of two years to move the State towards partial compliance with federal law, while a comprehensive settlement agreement was being negotiated. The Court could fashion a similar order, albeit for a longer period of time and somewhat broader in scope, which would resolve Plaintiffs' claims and provide the specificity required under Rule 65.

Moreover, the remedy sought by Plaintiffs is in direct response to Defendants' continuous and system-wide failure to adequately plan, administer, operate, and fund Texas's community-based service system, and, is directly proportional to these alleged violations. 2nd Am. Compl.,

Part VII.2(a-i).[32] Defendants' failure to systematically and adequately provide HCS waiver slots to all qualified Plaintiffs and specialized services to nursing facility residents with IDD are but two examples of Defendants' ongoing violations of federal law. *See also* 2nd Am. Compl. ¶¶ 126-137.

Second, Defendants improperly argue that the nature and scope of Plaintiffs' requested injunctive relief goes to the issue of standing that can properly be resolved on a motion to dismiss under Rule 12(b)(1). Central to Defendants' improper assertion is that they confuse issues of standing with the enforceability of an injunction *order*. At this time, there is no injunction order—there is simply a prayer for relief describing in a short and plain statement the type of relief that will be requested. At this early stage, before any discovery has been conducted, before a trial has been held, and before liability has been found, Plaintiffs cannot know precisely what remedies are necessary to cure all outstanding violations of federal law and systemic deficiencies in Texas's disability service system. As a result, any arguments regarding the enforceability of Plaintiffs' requested relief are simply premature.

Defendants cite no case law that supports the idea that the enforceability of a *prayer for relief* affects Plaintiffs' standing to bring an injunction. Instead, Defendants cite to Federal Rule of Civil Procedure 65(d) and *Payne v. Travenol Labs., Inc.*, among other cases, for their basis as to why Plaintiffs lack standing. 3rd MTD at 26. But Rule 65(d) deals only with court orders, stating that "every *order* granting an injunction and every restraining order must: … (b) state its terms specifically; and (c) describe in reasonable detail – and not by referring to the complaint or

[32] The prayer seeks an injunction to ensure, among other things, that Defendants: (1) provide appropriate, integrated community services and supports for all class members, consistent with their individual needs; (2) complete accurate PASRR screens and assessments of class members to determine whether their needs could be appropriately met in a less restrictive setting than a nursing facility; and (3) provide needed specialized services, at the frequency, level, intensity, and duration needed to constitute active treatment, to class members as required by the NHRA.

other document – the act or acts restrained or required." Fed. R. Civ. P. 65(d). And in *Payne*, the Fifth Circuit overturned the district court's *order* because the court found that the prohibiting defendants from "discriminating," without more, was "too general." *See Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 897-98 (5th Cir. 1978). Each of the other cases cited by Defendants deal with *orders* as well.[33]

In the case at hand, Plaintiffs have requested injunctive relief in their *prayers for relief*. 2nd Am. Compl. at 84, Part VII.2(a-i). Rule 54(c) of the Federal Rules of Civil Procedure states that every "judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings*." Fed. R. Civ. P. 54(c) (emphasis added). The Fifth Circuit adds that "the remedies a federal court may bring to bear are not constrained by a litigant's prayer for relief." *Houston Indep. Sch. Dist. v. V.P.*, 582 F.3d 576, 598 (5th Cir. 2009); *see also Shook v. Bd. of Cty. Comm'rs*, 543 F.3d 597, 605 n.4 (10th Cir. 2008) (holding that at the pleading stage, plaintiffs are not required to "come forward" with an injunction that "satisfies Rule 65(d) with exacting precision"). Therefore, Plaintiffs' prayer for relief does not dictate whether the Court can fashion an enforceable injunction under Rule 65.

Third, Defendants misstate the law in attacking Plaintiffs' standing. *Lewis v. Casey* was an appeal of an injunction issued after a 3-month bench trial—not a decision at the pleadings

[33] *See Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 75 (1967) ("Whether or not the District Court's *order* was an 'injunction' within the meaning of the Norris-LaGuardia Act . . ."') (emphasis added); *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1223 (11th Cir. 2000) ("The underlying *preliminary injunction* lacked the precision and specificity necessary . . .") (emphasis added); *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981) ("Defendant also appeals the district court's *order* enjoining the corporation from 'engaging in the stated unlawful employment practice.') (emphasis added).

stage.[34] 518 U.S. 343, 346-47 (1996). While the Supreme Court overturned the injunction, the Court stated that "[t]he general allegations of the complaint in the present case may well have sufficed to claim injury by named plaintiffs, and hence standing to demand remediation, with respect to various alleged inadequacies in the prison system . . . [t]hat point is irrelevant now, however, for we are beyond the pleading stage." *Id*. at 357. Because Defendants are challenging Plaintiffs' pleadings, rather than a court order entered after a finding of liability, *Casey* is inapplicable.

5. Plaintiffs Have Standing to Bring Their Freedom of Choice Claims.

Plaintiffs have standing related to their freedom of choice claims because Defendants' failure to fulfill their obligations under 42 U.S.C. § § 1396n(c)(2)(B) and (C) has caused the Named Plaintiffs injury by delaying or altogether preventing them from exercising their right to choose whether or not to live in an integrated community setting, as opposed to entering or remaining in a segregated nursing facility. This injury is directly attributable to Defendants' failure to provide the Named Plaintiffs with information about the feasible alternatives to institutionalization. A favorable decision on this issue and an injunction to compel Defendants to follow the law will provide relief from this harm.

Defendants assert that Plaintiffs lack standing solely because they have not alleged an injury-in-fact due to Defendants' failure to advise them of the feasible alternatives to institutional care, as required by 42 U.S.C. § 1396n(c)(2) (B) and (C). 3rd MTD at 28 – 30. But for each individual with IDD who was or is needlessly segregated due to a lack of such information from Defendants or their agents, which includes all of the Named Plaintiffs, the injury is plain.

[34]The defendants in *Thorpe*, 916 F. Supp. 2d at 66-67, a very similar ADA nursing facility case, made the same argument, which the court rejected.

First, Defendants contend that because Plaintiffs were evaluated and determined eligible for nursing facility care, they have no claim predicated upon § 1396n(c)(2)(B). This argument ignores Plaintiffs' allegations in the Second Amended Complaint regarding Defendants' failure to properly evaluate Plaintiffs' need for nursing facility services, and to offer meaningful choices to institutionalization, at the time of the individual's admission to nursing facilities. *See* 2nd Am. Compl. ¶¶ 107–113, ¶¶ 248-49, 253 (Maria Hernandez), ¶¶ 258-59, 263 (Vanisone Thongphanh), ¶¶ 268-69, 273 (Melvin Oatman), ¶¶ 337-38, 343 (Tommy Johnson), ¶¶ 352-53, 359 (Johnny Kent), ¶¶ 369 -70, 374 (Joseph Morrell); *see also* Kent Decl. ¶¶ 6, 9; Johnson Decl. ¶¶ 9, 10; Morrell Decl. ¶¶ 6, 7.

In addition, Defendants' argument ignores that subsections (B) and (C) of § 1396n(c)(2) are interrelated. Subsection (B) requires the State to evaluate whether individuals who may require nursing facility services in fact need them; subsection (C) mandates, for those individuals who are likely to require the level of care in a nursing facility (*i.e*. those who pass the subsection (B) evaluation), that the State inform them of feasible alternatives to nursing facility care under the State's home and community-based waiver programs. Because the two subsections are inextricably interrelated, the standing analysis under § 1396n properly considers both sections.[35] Defendants' attempt to analyze each subsection as a separate claim, and then to argue that Plaintiffs' standing requires an independent showing for both subsections, is not supported by law and should be rejected.

In fact, contrary to Defendants' arguments to separate these activities, Defendants' own HCS waiver application inherently recognizes that the evaluation process and the provision of

[35]In any event, Plaintiffs have sufficiently alleged that Defendants fail to properly evaluate the Plaintiffs' eligibility and appropriateness for nursing facility care. *E.g.*, 2nd Am. Compl. ¶¶ 107 –113.

information about feasible alternatives to institutionalization are inextricably related. Under § 1396n and under the 2013-2018 HCS Waiver Application, it is incumbent on Defendants, through their service coordinators, to enroll nursing facility residents with IDD into the HCS waiver. For Named Plaintiffs Tommy Johnson, Joseph Morrell, Johnny Kent and Melvin Oatman, Defendants have failed to provide them with the information they need to exercise their freedom of choice on an ongoing basis, as waiver slots become available, directly causing them continuing injury by keeping them segregated in nursing facilities. As the 2nd Am. Compl. makes clear, Named Plaintiffs Eric Steward, Patricia Ferrer, Linda Arizpe, Richard Krause, and Leonard Barefield spent years unnecessarily institutionalized in nursing facilities because they were not advised of feasible alternatives to a nursing facility. 2nd Am. Compl. ¶¶ 150, 156, 158 (Eric Steward); ¶¶ 160, 168 (Linda Arizpe); ¶¶ 195, 198, 201 (Patricia Ferrer); ¶¶ 280, 288 (Richard Krause); 321, 328 (Leonard Barefield), *see also* ¶¶ 108-110. Named Plaintiffs Tommy Johnson, Johnny Kent, Joseph Morrell and Melvin Oatman continue to be injured by Defendants' violation of their rights under 42 U.S.C. §§ 1396n(c)(2)(B) and (C), and Defendants' 2013-2018 HCS Waiver Application. 2nd Am. Compl. ¶¶ 336, 343 (Tommy Johnson); ¶¶ 351, 359 (Johnny Kent); ¶¶ 364,373 (Joseph Morrell); ¶¶ 267, 273 (Melvin Oatman); *see also* ¶¶ 108-110; § II.F, *supra*. Years of needless and inappropriate institutionalization constitute a sufficient "injury in fact" for standing purposes.

Second, Defendants have ignored the requirements of §§ III.C.5 (a) & (b), III.F., IV.B, C; V.E, F; VI.A, B of the IA, the requirements of 42 U.S.C. § 1396n(c)(2) (B) and (C), and the 2013-2018 HCS Waiver Application, when they conclude that these Named Plaintiffs have no standing because "they have continuously refused *the idea* of moving out of their nursing home and into the community." 3rd MTD at 30, n. 49 (emphasis added). Defendants simply jump to this uninformed conclusion without complying with any of the required predicates in the law, the IA,

and the 2013-2018 HCS Waiver Application to sufficiently inform nursing facility residents with IDD of feasible alternatives in the community. These initial informational steps are critical to provide these Named Plaintiffs and other nursing facility residents with IDD with information about the feasible alternatives. Reaching a conclusion about the preferences of a nursing facility resident with IDD who, like Tommy Johnson, Johnny Kent and Joseph Morrell, has never lived in the community, without completing preliminary informational predicates, vividly demonstrates the inconsistency of Defendants' failure to comply with the requirements of the IA, 2013-2018 HCS Waiver Application, and the law.

Redressability, the last prong of the standing requirement, is more than amply demonstrated by the IA, which provides a clear and specific example of a remedy for the violation of Plaintiffs' rights under the freedom of choice provision of the Medicaid Act.

The plain language of the statute, its obvious purpose of avoiding and discontinuing unnecessary institutional placements, and common sense all confirm that Defendants are required to inform Plaintiffs of feasible alternatives to nursing facilities at each point in time when Plaintiffs have a choice between segregated nursing facility care and integrated community alternatives, including at or prior to nursing facility admission and also at the point in time when additional feasible alternatives become available.

Defendants rely on the CMS Technical Manual[36] ("Manual") to support their standing argument, but this Manual actually undermines Defendants' interpretation of § 1396n(c)(2)(C), especially in light of the expanded availability of HCS waiver slots for Plaintiffs. The Manual requires that "individuals [be] provided information about the services that are available under the

[36] A copy of the Manual is available online at http://www.dads.state.tx.us/providers/waiver_instructions/cms_waiver_instructions.pdf.

waiver and that they have the choice of institutional or home and community-based services *prior to the enrollment into the waiver program*." CMS Technical Manual at 107. Because Defendants, through their service coordinators, are required to facilitate enrollment on an ongoing basis in the HCS waivers that they acknowledge are available for all Named Plaintiffs, Defendants are obligated to provide Plaintiffs with ongoing information about feasible alternatives, whenever an individual is making a choice between remaining in an institutional setting or *considering* a transition to an integrated waiver setting, as part of their responsibility to facilitate enrollment in the HCS waiver.

All Named Plaintiffs were entitled to receive such information prior to their nursing facility admission, but did not. 2nd Am. Compl. ¶¶ 108-110,374; *see also* ¶¶ 108-110; Johnson Decl. ¶¶ 9-12; Kent Decl. ¶¶ 6,9-11; Oatman Decl.¶¶ 8-9; Morrell Decl. ¶¶ 6-8; Corbett Decl. ¶¶ 15, 18 (Melvin Oatman). Therefore, they all have satisfied the "injury in fact" prong of the standing test. For the Named Plaintiffs who remain in nursing facilities, they have sustained an injury in fact, both when they were admitted to the nursing facility and at least every six months thereafter.[37] Moreover, the federally approved changes to the HCS waiver program have rendered the notion of "applying" for waiver services anachronistic, at least for the Named Plaintiffs and other individuals with IDD currently residing in nursing facilities.[38] For the Named Plaintiffs who have

[37]Defendants' 3rd MTD is self-contradictory on this point. Defendants state that all the Named Plaintiffs with IDD may bypass the interest list for the HCS waiver and move directly to the community, 3rd MTD, at 2 and 13, but then later suggest that the HCS waiver is full and there is no slot available for Plaintiffs at this time." *See, e.g., id.*, at 5, 18, 49. It is unclear if these latter contradictory statements are simply obsolete residue left-over from Defendants' argument that the cap on HCS slots and the long wait on the interest list meant that the HCS waiver slots were not feasible alternatives. *E.g.*, Defendants' Partial Motion to Dismiss Plaintiffs' Amended Complaint at 39-40 (Doc. 67).

[38]Under this new system of enrollment in HCS waiver slots, Named Plaintiffs Joseph Morrell, Johnny Kent, Tommy Johnson and Melvin Oatman meet all the requirements for standing to bring their claim for violation of their freedom of choice.

been moved to the community after the 2nd Amended Complaint was filed, their standing relates back to the time when the original Complaint was filed and they were injured in fact.[39]

As the Supreme Court held, "a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be … disclosed pursuant to a statute." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *see also Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 387-90 (5th Cir. 2003).[40] Plaintiffs' allegations that Defendants fail to provide them with information about waiver and other services that might enable them to avoid institutional placement or reduce the time spent in a nursing facility satisfy all standing requirements including "injury in fact," causation and redressability.

B. Plaintiffs Have Stated Claims Upon Which Relief Can Be Granted.

A motion to dismiss under 12(b)(6) is "viewed with disfavor and is rarely granted." *Herrera*, 759 F. Supp. 2d at 863; *see also Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003) ("[T]his Court has consistently disfavored dismissal under Rule 12(b)(6)."). To survive a motion to dismiss, a complaint must only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Moreover, a plaintiff must plead only "'enough facts to state a claim to relief that is plausible on its face.'" *Thompson v. City of Waco, Tex.*, 764 F.3d 500, 503 (5th Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

[39]*See* discussion at Section II.F.2, *supra*.

[40]In *Grant*, the Fifth Circuit decided that Mr. Grant, a resident of a nursing facility from 1989 until at least 1993, did not have standing to claim a right of information under 42 U.S.C. § 1396n(c)(2)(C). Mr. Grant's lack of standing was explained by the court: "In 1989, Grant was admitted to the nursing care facility; he has not alleged that he applied for waiver services then or at any time before the pendency of this appeal. This deprives him of standing." *Grant*, 324 F.3d at 387. At the time of Mr. Grant's appeal in 2003, the process for enrollment into a community waiver slot in Texas required an application. Because Mr. Grant had not applied for the waiver, the Fifth Circuit decided he did not have standing to pursue his claim that defendants there had violated his right to receive information and to choose waiver services under 42 U.S.C. §§ 1396n(c)(2)(B) and (C). The current HCS waiver process renders the application by the resident obsolete and requires instead that the Defendants "facilitate enrollment" in the waiver.

(2007)). In considering a motion to dismiss for failure to state a claim, the court must accept all of the complaint's well-pleaded facts as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible when the plaintiff pleads facts that allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Thompson*, 764 F.3d at 503.

Unlike a motion to dismiss under 12(b)(1), the court may not look beyond the pleadings when deciding a motion to dismiss under 12(b)(6). *See Baker*, 75 F.3d at 196; *McCartney*, 970 F.2d at 47. Indeed, courts should generally only look within the four corners of the pleadings. *See, e.g., Randall D. Wolcott, M.D., P.A.*, 635 F.3d at 763 ("Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." (internal quotes omitted)); *Baker*, 75 F.3d at 196; *Herrera*, 759 F. Supp. 2d at 863-64 ("In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto."). The Court should not consider "affidavits and exhibits submitted by defendants . . . or rel[y] on factual allegations contained in legal briefs or memoranda . . . in ruling on a 12(b)(6) motion to dismiss." *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000); *see also Scanlan*, 343 F.3d at 537 (district court erred in going outside plaintiffs' complaint and considering report central to defendants' defense).

There are limited exceptions to this rule, and they are narrowly construed. *See, e.g., Davis v. Bayless*, 70 F.3d 367, 372, n.3 (5th Cir. 1995) (court may consider matters outside the pleadings if those materials are public record); *Scanlan*, 343 F.3d at 536 (court may consider documents attached to a motion to dismiss if they are referred to in the complaint and are central to the plaintiff's claim). However, none of these exceptions apply to the present case. Thus, in considering Defendants' motion to dismiss under 12(b)(6), the Court must take care to decide the

motion based only on the pleadings without reference to any facts introduced by Defendants in connection with their 12(b)(1) motion.

1. Plaintiffs Have Stated a Claim for Violations of Title II of the ADA and Section 504.

Title II of the ADA and Section 504 of the Rehabilitation Act are broad remedial antidiscrimination statutes that prohibit disability discrimination by public entities in the provision of their benefits, services and programs. *See* discussion Section II.A, *supra.* The "integration mandate" of Title II of the ADA requires public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d); *Olmstead,* 527 U.S. at 587. "*Olmstead* articulated a three-prong test to analyze whether a state's actions violate the integration mandate: '[U]nder Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when [1] the State's treatment professionals determine that such placement is appropriate, [2] the affected persons do not oppose such treatment, and [3] the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.'" *Cota,* 688 F. Supp. 2d at 994 (*quoting Olmstead,* 527 U.S. at 607).

Plaintiffs have more than adequately pled facts in their Second Amended Complaint to state a claim for violations of Title II of the ADA and Section 504, consistent with *Twombly* and *Iqbal*. Plaintiffs have alleged, and with the exception of Mr. Oatman, Defendants do not dispute,[41] that they are all qualified individuals with disabilities as defined by Title II and Section 504 who are qualified to receive and participate in Defendants' developmental services system that provides benefits, services, or activities in nursing facilities and the community. *See e.g.*, 2nd Am. Compl.

[41] *See* discussion of Mr. Oatman *supra,* at II.F

¶¶ 1, 10, 149,157 (Eric Steward); ¶¶ 11, 159, 167, 171 (Linda Arizpe); ¶¶ 13, 185, 187, 190, 192, 197, 201(Patricia Ferrer); ¶¶ 15, 228, 233, 235,236, 237 (Zackowitz Morgan); ¶¶ 16, 243-246, 249 (Maria Hernandez); ¶¶ 17, 255-56 (Vanisone Thongphanh);

¶¶ 19, 276, 285 (Richard Krause); ¶¶ 18, 265 (Melvin Oatman); ¶¶ 22, 316 (Leonard Barefield); ¶¶ 23, 331, 340 (Tommy Johnson); ¶¶ 24, 346-47 (Johnny Kent); ¶¶ 25, 362 (Joseph Morrell); *see also Townsend v. Quasim*, 328 F.3d 511, 516 (9th Cir. 2003) (finding that the plaintiff was a "qualified person individual with a disability" as defined by Title II of the ADA because he was eligible to receive services through the state's Medicaid program and desired to receive his services in the community with the necessary supports).[42] Plaintiffs have specifically pled that the Named Plaintiffs who currently reside in nursing facilities are unjustifiably segregated, are qualified for, and do not oppose community placement, and that to provide them with community services that would not constitute a fundamental alteration to Defendants' community service system for people with IDD. *See, e.g.*, 2nd Am. Compl. ¶¶ 362, 370, 372, 376 (Joseph Morrell); ¶¶ 243, 251, 253-54 (Maria Hernandez); ¶¶ 265-66, 270-71, 273, 275 (Melvin Oatman); ¶¶ 341, 343, 345 (Tommy Johnson); ¶¶ 346, 355-57, 359, 361 (Johnny Kent); *see also* ¶¶ 63, 66, 93-94, 389-90. And while some of the Named Plaintiffs are residing in the community, they are all at risk of returning to a nursing facility. *See e.g.*, 2nd Am. Compl. ¶ 171 (Linda Arizpe), ¶ 201 (Patricia Ferrer).

Defendants' contention that in order to state a claim for violations of Title II under *Olmstead*, a plaintiff must allege facts showing that a public entity has a policy "that makes services available in institutions but not in the community" is simply wrong as a matter of law.[43]

[42] All of the Named Plaintiffs are Medicaid eligible. *See* 2nd Am. Compl. ¶ 147.

[43]Defendants' assertion that Texas offers residential services and habilitation services both in institutions and in the community for people with IDD, and their argument that there is no Texas policy that Plaintiffs can identify to support their ADA claim, are questions of fact which should not be addressed on a 12(b)(6) motion. Similarly, Defendants' declarations in support of the

3rd MTD at 33. The ADA's integration mandate, as interpreted in *Olmstead*, contains no such requirement. Rather, Title II and its implementing regulations prohibit public entities from using any policies, practices, eligibility criteria or methods of administration that result in the unnecessary segregation of qualified individuals with disabilities or which deny them the opportunity to receive services in the most integrated setting to meet their needs. *See Olmstead*, 527 U.S. at 581.[44] The Department of Justice has determined that, "a public entity may violate the ADA's integration mandate when it: (1) directly or indirectly operates facilities and/or programs that segregate individuals with disabilities; (2) finances segregation of individuals with disabilities in private facilities; and/or, (3) through its planning, service system design, funding choices, or service implementation practices, promotes the segregation of individuals with disabilities in private facilities or programs." DOJ Statement at 3.[45] Defendants' narrow reading of what is

12(b)(1) portion of their 3rd MTD cannot be used to support their arguments in support of the portion of their motion that seeks dismissal of Plaintiffs' ADA and Section 504 claims under Fed. R. Civ. P. 12(b)(6).

[44]Nothing in the cases to which Defendants cite supports their contention that the *only* way to state an *Olmstead* claim is to show that the State only makes services available to people with disabilities in institutions and not in the community. To the contrary, these cases all specifically acknowledge that the focus of the integration mandate is to end segregation of people with disabilities and to ensure that they receive their services in the most integrated setting appropriate to meet their need. *See Fisher*, 335 F.3d at 1181 ("[T]here is nothing in the in the plain language of the regulations that limits protection to persons who are currently institutionalized. The integration mandate simply states that public entities are to provide 'services, programs, and activities in the most integrated setting appropriate' for a qualified person with a disability…"); *Radaszewski ex rel. Radaszewski v.Maram*, 383 F.3d 599, 611 (7th Cir. 2004) ("Nothing in the regulations promulgated under the ADA or the Rehabilitation Act or in the Court's decision in *Olmstead* conditions the viability of a Title II or section 504 claim on proof that services a plaintiff wishes to receive in a community integrated setting already exist in exactly the same form in the institutional setting"), and *Townsend*, 328 F.3d at 515-16 (recognizing that in enacting Title II "Congress aimed to eliminate this unjustified segregation and isolation of disabled persons through, among other provision of the ADA, Title II…").

[45]*See also* DOJ Statement, Q & A 8 "Do the ADA and *Olmstead* require a public entity to provide services in the community to persons with disabilities when it would otherwise provide such services in institutions? Yes."

required to state an *Olmstead* claim ignores the integration mandate's explicit focus on ending segregation and isolation of individuals with disabilities in all aspects of public services, benefits and programs. *Olmstead v. L.C.*, 527 U.S. 581 (1999); *Tennessee v. Lane*, 541 U.S. 509, 524 (2004); *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005) (citations omitted) (describing Title II's integration mandate as "serv[ing] one of the principal purposes of Title II of the ADA: ending the isolation and segregation of disabled persons.").

Here, the very core of Plaintiffs' allegations is that Defendants engage in a pattern and practice of planning, administering, operating and funding their developmental disability service system in a manner that unduly relies on segregated nursing facilities for persons with IDD, and denies them the opportunity to receive prompt, adequate, appropriate services in an integrated community setting. *See* 2nd Am. Compl. ¶¶ 1-3, 6, 7.a, 41-71, 147, 377-384, 385-391.

Plaintiffs also have alleged facts that Defendants have policies and eligibility criteria that effectively exclude them from equal access to Defendants' community service system because of the nature or severity of their disabilities.[46] *See* 2nd Am. Compl. ¶¶ 63, 66, respectively. Specifically, Plaintiffs have alleged that the HCS waiver's restrictive eligibility criteria, which excludes individuals with certain types of developmental disabilities, violates the ADA and Section 504 of the Rehab Act. *Id.*, ¶¶ 63, 66, 380-381, 389-390; *see also* Section II.B *supra*.

[46]Title II prohibits public entities from adopting a facially neutral rule that has a uniquely detrimental impact on people with disabilities. *See Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (facially neutral 30-day quarantine on animals violated the ADA where it had a particularly negative impact on people with disabilities who need to use service dogs as an accommodation). Additionally, when government entities use eligibility criteria "that screens out or tends to screen out an individual with a disability or any class of individuals with disabilities from fully equally enjoying any service, program, or activity" it violates the ADA "unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(8).

Finally, the ADA prohibits a public entity from engaging in methods of administration that have a discriminatory effect on people with disabilities. 28 C.F.R. §§ 35.130(b)(3), 35.130(b)(1)(ii); *see also* 28 C.F.R. § 41.51(b)(3)(i), 45 C.F.R. § 84.4(b)(4) (Section 504), *Alexander v. Choate*, 469 U.S. 287, 296-97 (1985); *Helen L v. DiDario.*, 46 F.3d 325 (3d Cir. 1995); *Crowder*, 81 F.3d at 1484.

Defendants incorrectly assert that Plaintiffs have not alleged that they were excluded from participation in Defendants' community programs for persons with IDD that are available to people who do not have IDD, and therefore they have failed to allege facts sufficient to "satisfy the third element of a prima facie discrimination case under 28 C.F.R. § 35.130(b)(3)." 3rd MTD at 36. But Defendants' interpretation of the ADA, and its methods of administration regulation, has been explicitly rejected by the Supreme Court in *Olmstead* and by the lower courts. *Olmstead,* 527 U.S. at 598 (rejecting state's argument that to show disability discrimination, a plaintiff show unequal treatment among similarly situated individual); *see also Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 755 (N.D. Tex. 2014); *Issac v. La. Dep't of Children & Family Servs*., No. Civ. A. 15-00013-SDD, 2015 WL 4078263, at *4 (M.D. La. July 6, 2015). Specifically, courts have interpreted Title II to prohibit discrimination in disability services that "is not equal to that afforded to others, or not as effective in affording equal opportunity," as well as prohibiting a public entity from "prevent[ing] a qualified individual from enjoying any aid, benefit, or service, regardless of whether other individuals are granted access…" *Van Velzor*, 43 F. Supp. 3d at 756 (quoting *Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir. 2003)). Therefore, a plaintiff can state a claim under Title II for discriminatory methods of administration by a public entity by alleging that he or she has been unjustifiably segregated and institutionalized, and in doing so "a plaintiff is not required to identify a comparison class of similarly situated individuals given

preferential treatment." *Van Velzor*, 43 F. Supp. 3d at 755 (internal quotation omitted); *Issac*, 2015 WL 4078263, at *4 ("a plaintiff need not show that his alleged denial of benefits is due to disparate treatment on the basis of disability").

Here, Plaintiffs have pled numerous facts in their Second Amended Complaint that Defendants administer their community services system for people with IDD in a discriminatory manner or with a discriminatory effect. 2nd Am. Compl. ¶ 383; *see also* ¶¶ 388, 390. Plaintiffs' have also alleged that Defendants have engaged in discriminatory methods of administration by failing to inform and offer the Named Plaintiffs available services, supports and programs that would enable them to reside in a less restrictive, more integrated setting. *See* 2nd Am. Compl. ¶ 254 (Hernandez), ¶ 273 (Oatman), ¶¶ 343-345 (Johnson), ¶¶ 359-361 (Kent), ¶¶ 372-374 (Morrell). Finally, Plaintiffs have alleged specific facts that Defendants have failed to afford them equal access to such services, supports and programs on the basis of the nature of their disability and placement. *See, e.g.*, 2nd Am. Compl. ¶¶ 63- 64, 66. These allegations set forth more than sufficient plausible facts, which at this stage of the proceedings must be accepted as true, to state a claim for disability discrimination under Title II of the ADA and its implementing regulations.

2. Plaintiffs Have Stated A Claim for Violations of the Medicaid Act.

a. The Medicaid Act Creates Enforceable Rights.

State participation in the Medicaid program is voluntary. However, once a State chooses to participate, those provisions of the State's Medicaid program for which it receives federal funds for both mandatory and optional services must comply with the requirements of the Medicaid Act. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990), *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 585-86 (5th Cir. 2004).

Defendants first assert that the entire Medicaid Act, taken as a whole, is unenforceable. 3rd MTD at 37-41. However, Plaintiffs do not seek to enforce the Medicaid Act as a whole, but

only assert claims under specific provisions of the Act, consistent with Supreme Court precedents. *See Suter v. Artist M.*, 503 U.S. 347, 357 (1992) (holding that enforceability must be determined on a provision-by-provision basis). Therefore, this argument for dismissal has no relevance here.

Next, Defendants argue that none of the individual provisions of the Medicaid Act's create enforceable rights. They support these contentions with two arguments, neither of which survives scrutiny. First, Defendants assert that the Medicaid Act confers rights solely on the Secretary, who can cut off federal funding if she determines that the State is violating federal law.[47] 3rd MTD at 37-51. This argument has been considered and explicitly rejected by both the Supreme Court and the Fifth Circuit.

The Supreme Court first addressed this argument in *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 424-29 (1987), and held that "HUD's authority to audit, enforce annual contributions contracts, and cut off federal funds . . . are insufficient to indicate a congressional intention to foreclose § 1983 remedies." *Id.* at 428. Similarly, in *Wilder*, 496 U.S. 498, the State of Virginia argued that the Secretary's right to cut off federal reimbursement in the event that a State violates its obligations under the Medicaid Act precludes the existence of a private right of action under § 1983. The Court had little difficulty rejecting this argument, noting that the Secretary's authority "to withhold approval of plans . . . , or to curtail federal funds to States whose plans are not in compliance with the Act . . . cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." *Id.* at 522-23. The Supreme Court addressed and rejected this same argument yet a third time in *Blessing*, 520 U.S. at 346-48. Relying upon *Wright* and *Wilder*, the

[47]Put in the parlance of § 1983 jurisprudence, Defendants are asserting that the Medicaid Act contains a "comprehensive enforcement scheme" that signals Congressional intent to foreclose private enforcement. *Blessing v. Freestone*, 520 U.S. 329, 346-47 (1997).

Court easily concluded that the federal Secretary's "limited powers to audit and cut federal funding" were not sufficient to preclude private enforcement of those provisions of Title IV-D of the Social Security Act which might confer federally enforceable rights on plaintiffs.[48] *Blessing*, 520 U.S. at 348.

Despite these three Supreme Court decisions holding that the Secretary's ability to withhold federal funding does not undermine a private right of action under § 1983,[49] Defendants assert that the Supreme Court's subsequent opinion in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), effectively overruled or abrogated these holdings. 3rd MTD at 39. However, the *Gonzaga* Court, citing both *Wright* and *Blessing* with approval, explicitly noted that it was not addressing whether the statute "creat[ed] a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 284 n.4, *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-122 (2005) (citing statutes, including the Medicaid Act, that do not incorporate a comprehensive scheme).

The Fifth Circuit, both before and after *Gonzaga*, has concluded that the authority of a federal agency to cut off federal funds does not preclude private enforcement of specific provisions of the underlying federal law. Most recently, the Fifth Circuit, in *Johnson v. Hous. Auth. of*

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[48]While *Blessing* held that there was no generalized right to enforce the statutory scheme of Title IV-D, it remanded the case "for the District Court to construe the complaint in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting" and "to determine whether any specific claim asserts an individual federal right." *Id.* at 346. Indeed, contrary to Defendants' broad assertion that Spending Clause legislation can never confer privately enforceable rights, the *Blessing* Court specifically noted that "[42 U.S.C.] § 657 may give [respondent] a federal right to receive a specified portion of the money collected on her behalf by Arizona." *Id.*

[49]In addition to *Wright*, *Wilder*, and *Blessing*, the Supreme Court has also held that § 1983 provides a private cause of action to enforce provisions of the Social Security Act in at least two other cases. *Maine v. Thiboutot*, 448 U.S. 1, 4-6 (1980) (holding that § 1983 provided private individuals with a cause of action to enforce provisions of the Social Security Act); *Maher v. Gagne*, 448 U.S. 122, 128-29 (1980).

Jefferson Parish, 442 F.3d 356, 365-66 (5th Cir. 2006), rejected the argument that HUD's authority to cut off funds to a housing authority that was violating the National Housing Act precluded private enforcement of the Act.

Directly addressing private enforcement of the Medicaid Act, the Fifth Circuit, in *Hood*, 391 F.3d at 602-04, held that the Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") provisions of the Medicaid Act, 42 U.S.C. §§ 1396d(a)(4)(B) and 1396d(r)(5), in conjunction with 42 U.S.C. § 1396a(a)(10)(A)(i), are enforceable under § 1983. The Fifth Circuit correctly noted that *Blessing* continues to set forth the test for determining whether a particular federal statute is enforceable pursuant to § 1983 and that *Gonzaga* simply clarified how the first prong of that test—whether the statute contained sufficient "rights creating" language to demonstrate that Congress "intended to confer individual rights upon a class of beneficiaries"—should be applied. *Hood,* 391 F.3d at 602 (quoting *Gonzaga*).[50] Therefore, Defendants' assertion that the Secretary's ability to withhold funds for noncompliance precludes a private right of action under § 1983 under any provision of the Medicaid Act is directly contrary to consistent holdings of the Supreme Court and Fifth Circuit.

Second, Defendants suggest that *Gonzaga* established "a general principle that excludes Spending Clause legislation from judicial enforcement." 3rd MTD at 39. Recognizing that *Gonzaga* did not overrule either *Wilder* or *Wright*, they suggest that these cases represent "narrow exceptions" to the general rule, implying that they should be limited to their particular facts. However, if *Gonzaga* had established such a general rule, it would have been unnecessary for that

[50] With respect to the question of whether the EPSDT provisions of the Medicaid Act contain a sufficiently comprehensive enforcement scheme to indicate Congressional intent to foreclose a remedy under § 1983, the Court noted that the defendant had failed to make such a showing. *Id.* at 606 n.33.

Court to have engaged in the detailed analysis of the specific statutory provision in FERPA to determine if it contained sufficient "rights creating" language. *Gonzaga*, 536 U.S. at 287-89. The *Gonzaga* Court also would not have cited *Blessing* with approval, for *Blessing* explicitly recognized that Spending Clause legislation can be privately enforced pursuant to § 1983. *Blessing*, 520 U.S. at 345-46. Taken together, these cases demonstrate that the Supreme Court has consistently permitted enforcement of rights in Spending Clause cases, albeit with caution.

Not only is this Spending Clause exclusion argument not supported by Supreme Court precedent, it has also been rejected by the Fifth Circuit. In *Frazar v. Gilbert*, the Fifth Circuit was confronted with, and explicitly rejected, the argument that "the Medicaid Act, as legislation enacted pursuant to the Spending Clause, was not the supreme law of the land under the Supremacy Clause and therefore the *Ex Parte Young* exception to Eleventh Amendment state immunity was inapplicable." 300 F.3d 530, 550 (5th Cir. 2002), *rev'd sub nom on other grounds, Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004). The *Frazar* Court held that "[f]or purposes of the Supremacy Clause and *Ex Parte Young*, the mandates set out in [the] Medicaid statute are more than contractual, they are federal law." *Frazar*, 300 F.3d at 550; *see also Westside Mothers v. Haveman*, 289 F.3d 852, 859-60 (6th Cir. 2002) (same). The First and Fourth Circuits also have rejected this same contention. *Antrican v. Odom*, 290 F.3d 178, 188 (4th Cir. 2002) (noting that this "novel argument is. . . at odds with binding precedent"); *Rosie D. ex rel. John D. v. Swift*, 310 F.3d 230, 235-38 (1st Cir. 2002).

Significantly, in *S.D.*, the Fifth Circuit held that various provisions of the Medicaid Act are privately enforceable. 391 F.3d at 602-06. This holding has been adopted by virtually every

Circuit of Appeal that has considered the issue.[51] There is simply no way to reconcile *S.D.* with Defendants' assertion that, post-*Gonzaga*, no provisions of the Medicaid Act (or any other Spending Clause legislation) are privately enforceable. *See also Johnson*, 442 F.3d at 366 (concluding post-*Gonzaga* that a provision of the National Housing Act was privately enforceable).

In addition to being foreclosed by binding precedent, Defendants' argument is also directly contrary to the clearly expressed intent of Congress. As the Supreme Court has made clear, the *Blessing* test, as clarified by *Gonzaga*, "focuses on congressional intent." *Blessing*, 520 U.S. at 341 Following *Suter*, 503 U.S. at 358-59, in which the Court suggested that a provision's inclusion as a state plan requirement was a factor weighing against a finding that it created an enforceable right, Congress enacted 42 U.S.C. § 1320a-2. This statute provides that "[i]n an action brought to enforce a provision of [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." Congress explained that "[t]he intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in the federal courts to the extent

[51] *Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003) (§ 1396r(e)(7)); *Rabin v. Wilson-Coker*, 362 F.3d 190 (2d Cir. 2004) (§ 1396r-6); *Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520 (3d Cir. 2009), *cert. denied*, 559 U.S. 939 (2010) (§§ 1396r(b) & (c)); *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007) (§ 1396a(a)(8)); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (§ 1396a(a)(43)); *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 457-58 (7th Cir. 2007) (§ 1396a(a)(8)); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1005 (8th Cir. 2006), *vacated in part, on other grounds sub nom, Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007) (§§ 1396a(a)(30)(A) & 1396d(a)(13)); *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006) (§ 1396a(a)(10)); *Ball v. Rodgers*, 492 F.3d 1094 (9th Cir. 2007) (§§ 1396n(c)(2)(C) & (d)(2)(C)); *Okla. Chapter of Am. Academy of Pediatrics v. Fogarty*, 472 F.3d 1208, 1212 (10th Cir. 2007) (assuming that § 1983 provides cause of action to privately enforce §§ 1396a(a)(8), 1396a(a)(10)(A), 1396d(a)(4)(B), and 1396d(r)).

they were able to prior to the decision in *Suter v. Artist M*." H.R. Conf. Rep. 103-761 at 926, *reprinted in* 1994 U.S.C.C.A.N. 2901, 3257; *see also S.D.*, 391 F.3d at 603 (relying on § 1320a-2 to find the EPSDT provision of the Medicaid Act created an enforceable right).

Finally, Defendants assert that "State officials cannot violate the Medicaid statutes … because they impose no affirmative obligation on States that accept federal reimbursement money to preserve their Medicaid programs in any particular manner." 3rd MTD at 40. In effect, Defendants argue that they can ignore, at will, the requirements that Congress has imposed even after accepting billions of dollars in federal reimbursement, because it is up to the Secretary to decide whether to cut off the flow of federal dollars. *Id.* This is nothing more than a restatement of the earlier argument that the Medicaid Act imposes obligations only on the Secretary based on her ability to cut off federal funds. *See*, *supra* at 1-3. As the Supreme Court appropriately noted in *Wilder*:

> Any argument that the requirements of findings and assurances [by the State] are procedural requirements only and do not require the State to adopt rates that are actually reasonable and adequate is nothing more than an argument that the State's findings and assurances need not be correct.
>
> We reject that argument because it would render the statutory requirements of findings and assurances, and thus the entire reimbursement provision, essentially meaningless.

496 U.S. at 513-14.

Defendants' contention that the Medicaid Act does not create rights, thereby insulating their illegal conduct from any judicial review, is not only novel, but also contrary to established Supreme Court and Circuit Court precedent and the expressed intent of Congress.

b. Ex Parte Young Does Not Foreclose Plaintiffs' Medicaid Claims

Defendants claim that the Supreme Court's recent decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015) precludes Plaintiffs from proceeding in equity

under *Ex Parte Young*. 3rd MTD at 51-53. However, *Armstrong* is not applicable to this case for a number of reasons. First, unlike *Armstrong*, this case seeks to enforce rights under the Medicaid Act pursuant to § 1983. Each of the three provisions of the Medicaid Act at issue—reasonable promptness, freedom of choice and the NHRA—meet the Supreme Court's test under *Wilder/Blessing/Gonzaga* for enforcement pursuant to a private right of action under § 1983, unlike the provider reimbursement rate provision at issue in *Armstrong*, which did not.[52] Because Plaintiffs are not relying on either the Supremacy Clause or an equitable basis for enforcement of the Medicaid Act, *Armstrong* is inapplicable and Defendants' arguments in that regard are irrelevant.

Second, the Supreme Court's analysis of whether the *Armstrong* plaintiffs could maintain a cause of action under the Supremacy Clause or in equity has no impact on the Court's earlier precedent concerning § 1983 actions. *See* Section III.B.2.c, *infra*. Finding that *Armstrong* did not apply, several courts since *Armstrong* have held that various Medicaid provisions are privately enforceable under § 1983. *See, e.g.*, *J.E. v. Wong*, No. CV 14-00399 HG-BMK, 2015 WL 5116774 (D. Haw. Aug. 27, 2015) (holding that *Armstrong* was distinguishable from plaintiffs' lawsuit under § 1983 and did not preclude plaintiffs' private right of action to enforce their rights to EPSDT services under §§ 1396a(a)(10) and (43)); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, No. 3:15-CV-00565-JWD-SCR, 2015 WL 6551836, at *26-27 (M.D. La., Oct. 29, 2015) (finding that defendants were "seeking to expand *Armstrong* beyond its express ambit" and noting that "[t]he mere fact that all the Medicaid laws are embedded within the requirements for a state

[52] *Armstrong* involved a provision of the Medicaid Act, § 1396a(a)(30)(A), concerning provider reimbursement rates, which had previously been held unenforceable in *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005). As a result, the plaintiffs in *Armstrong* were forced to seek an alternative avenue for relief via the Supremacy Clause.

plan does not, by itself, make all of the Medicaid provisions into ones stating a mere institutional policy or practice rather than creating an individual right); *Florida Pediatric Soc'y v. Dudek*, No. 05-23037, slip op. at *1-2 (S.D. Fla., May 1, 2015), ECF No. 1331 (rejecting the State's *Armstrong*-based arguments and holding that plaintiffs could maintain their § 1983 claims to enforce § 1396a(a)(8) (reasonable promptness), § 1396a(a)(10) (comparability) and § 1396a(a)(43) (EPSDT) of the Medicaid Act).

Third, Defendants claim that Congress has demonstrated its intent to foreclose private equitable relief through the Medicaid Act's and NHRA's lack of judicially administrable standards. 3rd MTD at 52. This argument lacks merit and is contradicted by recent case law. In *Planned Parenthood Se., Inc. v. Bentley*, No. 2:15CV620-MHT, 2015 WL 6517875, at *7 (M.D. Ala., Oct. 28, 2015), the court addressed the defendants' *Armstrong*-based administrability argument, as it pertained to Medicaid's free choice of provider provision (§ 1396a(a)(23)(A)), and explained that:

> [t]he equal-access provision at issue in *Armstrong* and the free-choice-of-provider provision at issue here could hardly be more different with respect to judicial administrability. It is difficult to imagine a requirement broader and less specific than" the equal-access provision's "judgment-laden standard." . . . By contrast, the free-choice-of-provider provision articulates "concrete and objective standards for enforcement.

Id. Here, contrary to Defendant's assertions otherwise, the ability to adjudicate Plaintiffs' claims under the Medicaid Act and NHRA are "well within a court's competence." *Id.; see also Rolland*, 318 F.3d at 54. Moreover, the "judicially-administrable" standard articulated in *Armstrong* also is requirement for a private right of action under § 1983, often referred to as the second *Blessing* factor. *Blessing*, 520 U.S. at 340-41 (the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence). As discussed in Section III.2.d-f *infra*, the Medicaid Act's

NHRA/PASRR, reasonable promptness, and freedom of choice provisions all contain judicially enforceable standards.

Finally, relying on *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204, 1210 (2013), Defendants contend that this lawsuit directly interferes with the Secretary's exclusive power to enforce the Medicaid Act, and that Plaintiffs' only recourse is to seek review of the Secretary's determination under the Administrative Procedure Act (APA). 3rd MTD at 53-54. But *Douglas* dealt with CMS's approval of rate reductions for Medicaid providers and the Court held only that a final decision by CMS as to whether a state plan complies with the Medicaid Act is entitled to deference. *Id*. at 1210. Here, CMS has not issued any final decision concerning Defendants' administration of their Medicaid or PASRR programs as it pertains to any of Plaintiffs' claims. Unlike the plaintiffs in *Douglas*, who challenged the Medicaid State Plan Amendment itself, Plaintiffs here claim that state policy, practices, and actions—not Texas's State Plan itself—violate federal law. *Id.* at 1209.

Moreover, the Fourth Circuit rejected the very argument Defendants make here. In *Pashby*, Medicaid beneficiaries sued the administrator of North Carolina's Medicaid Program, alleging that a new rule concerning the provision of Medicaid-covered personal care services violated the Medicaid Act's comparability provision. The state defendants sought dismissal of plaintiffs' claims and an order requiring plaintiffs to proceed against CMS under the APA. 709 F.3d at 317. The court held that plaintiffs were not required to proceed under the APA because they did not challenge the state plan amendment itself, but rather challenged a policy that was related to the state plan in violation of Medicaid's comparability requirements. *Id.*

c. The Standards for a Private Right of Action to Enforce the Medicaid Act.

Section 1983 authorizes a civil action against any individual who, "under color of any statute, ordinance, regulation, custom, or usage of any State" deprives an individual "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Rights under federal statutes, as well as the Constitution, may be the basis of a § 1983 action. *Maine,* 448 U.S. at 4-5; *see also Rosado v. Wyman*, 397 U.S. 397, 422-23 (1970) (enforcing Social Security Act in § 1983 action). The Supreme Court has set forth a three-part test for determining if Congress intended to create a right under § 1983: (i) Congress intended that the provision benefit the plaintiff; (ii) the statute is not vague and amorphous, and (iii) a binding obligation is unambiguously imposed on the States by the statute. *See Blessing*, 520 U.S. at 340-41; *Wilder*, 496 U.S. at 503 (applying factors to allow enforcement of a Medicaid Act provision requiring state plans to include payment rates that "the State finds, and makes assurances satisfactory to the Secretary" are "reasonable and adequate" to meet the costs of "efficiently and economically operated facilities"). If the *Wilder/Blessing* factors are met, there is a presumption that the provision is enforceable under § 1983, unless the State can show that Congress specifically foreclosed that remedy, either expressly in the statute or by creating a "comprehensive enforcement scheme" incompatible with enforcement through § 1983. *Blessing*, 520 U.S at 341.

In *Gonzaga*, the Supreme Court clarified that the first *Wilder/Blessing* prong is not met merely by showing that "the plaintiff falls within the general zone of interests that the statute is intended to protect." 536 U.S at 283. Rather, "it is *rights*, not the broader or vaguer 'benefits' or 'interests' that may be enforced" under § 1983. *Id.* (reiterating that *Blessing*, 520 U.S. at 340, "emphasizes that it is only violations *of rights*, not *laws*, which give rise to § 1983 actions").

In determining whether Congress intended to confer individual rights, courts must look at whether the text contains "rights-or-duty-creating language;" that is, language with an "unmistakable focus on the benefited class." *Gonzaga,* 536 U.S. at 284 n.3; *see also Romano v. Greenstein*, 721 F.3d 373, 379 (5th Cir. 2013) (§ 1396a(a)(8) reasonable promptness provision meets the standards set forth in *Gonzaga)*; *Delancey v. City of Austin*, 570 F.3d 590, 593 (5th Cir. 2009) (citing *Gonzaga* for the proposition that for a statute to create such private rights, its text must be phrased in terms of the persons benefitted); *Rolland*, 318 F.3d at 52 ("the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action").

To illustrate rights-creating language, the *Gonzaga* Court quoted from Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 ("no person shall . . . be subjected to discrimination"). To illustrate duty-creating language, the Court cited to several statutes approved by the Court in *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979). *See Gonzaga*, 536 U.S. at 284 n.3. As noted by the *Cannon* Court, duty-creating language may be enforced by an individual as long as it is a duty that runs "directly [to] a class of persons that include[s] the plaintiff," rather than to the "public at large." 441 U.S. at 690 n.13. Indeed, many of the statutes cited by the *Cannon* Court focus more on the duty of the defendant than on the rights of the plaintiff. *See id.*, 441 U.S. at 690 n.13 (collecting cases).

In sharp contrast to the provision of the Family Educational Rights and Privacy Act ("FERPA") at issue in *Gonzaga*, which spoke at an aggregate level of policy and practice, 536 U.S. at 289, the Medicaid provisions at issue in this case have a distinct focus on the individual Medicaid recipients who are the intended beneficiaries of the specific rights and duties delineated.

As shown below, the text and structure[53] of the statutory provisions relied upon by Plaintiffs meet the *Wilder/Blessing/Gonzaga* standard.

d. The NHRA

(1) The NHRA Is Privately Enforceable.

(i) The Language Chosen By Congress Demonstrates that the NHRA Is Privately Enforceable.

In enacting the NHRA, Congress sought to stem the inappropriate placement of individuals with IDD into nursing facilities that are unable to provide them with needed treatment and insisted that States ensure that those admitted to such facilities receive active treatment. It clearly used "rights- and duty-creating" language in doing so. *See Gonzaga*, 536 U.S. at 284 n.3.

With respect to the preadmission screening and resident review requirements of the NHRA, Congress explicitly identifies the intended beneficiaries of this provision as "mentally ill and mentally retarded individuals" in nursing facilities. *See* 42 U.S.C. § 1396r(e)(7)(A)(i). The section imposes a clear duty on "the State," using the mandatory terms "must have" and "responsibility to have . . . or to perform" to describe the nature of the obligation imposed.[54] *Id*. This subsection creates a right of every person with IDD to a PASRR assessment prior to nursing facility admission. Rather than the aggregate focus of the FERPA provision at issue in *Gonzaga*, these

[53] "Evidence of congressional intent to create a federal right can be found in a statute's language as well as in its overarching structure." *Cal. State Foster Parent Ass'n v. Wagner,* 624 F.3d 974, 980 (9th Cir. 2010) (quoting *Ball*, 492 F.3d at 1105).

[54] Subsection (e)(7)(A)(i) also cross references to subsection (b)(3)(F), which specifically provides that a nursing facility cannot admit an individual with mental retardation "unless the *State mental retardation or developmental disability authority has determined* . . . that, because of the physical and mental condition of the individual, the individual requires the level of services provided by a nursing facility, and, if the individual requires such level of services, whether the individual requires specialized services . . . ." 42 U.S.C. § 1396r(b)(3)(F)(ii). The cross reference to subsection (b)(3)(F) makes clear that it is the State's responsibility to ensure that individuals with IDD are properly screened prior to admission.

provisions have an unmistakable focus on the individual and use mandatory, not precatory, language to describe the State's obligations.[55]

With respect to assessment of the resident's need for specialized services, § 1396r(e)(7)(B) of the NHRA creates a similar, individually-focused and mandatory obligation.[56] The unmistakably individual focus of this provision is evident from the phrase, "in the case of each resident of a nursing facility who is mentally retarded." It continues to focus on the individual throughout, referring to "the *resident's* physical and mental condition," "whether or not *the resident* requires specialized services," "with respect to a . . . mentally retarded *resident*," and "significant change in the *resident's* physical or mental condition." The mandatory nature of the obligation imposed upon the State is equally clear and unambiguous: "the State mental retardation . . . authority *must* review and determine . . . ," and "[a] review and determination . . . *must be conducted* promptly." [57]

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[55]Defendants' assertion that the placement of these obligations in a provision specifying the required components of a state plan renders them unenforceable under § 1983 was rejected first by the Supreme Court in *Wilder*, 496 U.S. at 513-14, and then by Congress when it enacted 42 U.S.C. § 1320a-2 ("[i]n an action brought to enforce a provision of [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan").

[56] Subsection (e)(7)(B), entitled "State requirement for resident review," mandates:

> (ii) For mentally retarded residents
> … in the case of each resident of a nursing facility who is mentally retarded, the State mental retardation or developmental disability authority must review and determine (using any criteria developed under subsection (f)(8) of this section)--
> (I) whether or not the resident, because of the resident's physical and mental condition, requires the level of services provided by a nursing facility or …an intermediate care facility . . . ; and
> (II) whether or not the resident requires specialized services. . . .

[57]That the obligation placed upon the State to conduct such reviews is obligatory is further reinforced by subdivision (iv), which prohibits the "State mental retardation authority" or the "State" from "delegate[ing] (by subcontract or otherwise) their *responsibilities* under this subparagraph…." (emphasis added).

Finally, with respect to the mandatory obligation to provide specialized services, and the corollary right of a nursing facility resident with IDD to receive specialized services, the NHRA clearly focuses on the individual residents who are the intended beneficiaries of these mandatory services. Section 1396r(e)(7)(C) details the steps that the State must take in response to the preadmission screening and resident review. Like the two sections discussed above, it begins with a mandatory command, "the State *must* meet the following *requirements*." *Id.* It then requires that "in the case of a *resident* . . . who is determined . . . to require specialized services . . . the State *must* . . . inform the *resident* [of alternatives] . . . , offer the *resident* [choices] . . . , and "regardless of the *resident's* choice [of setting], *provide for* . . . such specialized services." 42 U.S.C. § 1396r(e)(7)(C)(i) (emphasis added); *see also* § 1396r(e)(7)(C)(ii). The repeated references to "the resident" make clear the individualized focus of the provision. The repeated use of the word "must" to describe the State's obligations to inform the resident of his or her alternatives and to provide specialized services again utilizes the mandatory textual language that establishes an enforceable right under the *Wilder / Blessing* / *Gonzaga* test.

Defendants claim that Congress's efforts to protect individuals with IDD from inappropriate admission to, or warehousing in, nursing facilities does not evidence a focus on individuals because Congress elected, as the means to achieve these goals, to mandate a program for pre-admission screening and the provision of specialized services that was to be delivered by the State in nursing facilities. But in doing so, Congress clearly created an entitlement both to professionally-adequate assessments and individualized services. *Joseph S. v. Hogan,* 561 F. Supp. 2d 280, 301 (E.D.N.Y 2008) ("The statute's requirements that individualized determinations be made, 42 U.S.C. §§ 1396r(e)(7)(A), 1396r(e)(7)(B), suggest that it was intended to create "an *individual* entitlement to services…"). In fact, as Defendants' note, 3rd MTD at 45, the statute

focuses on individuals, and allows those "adversely affected by a PASRR review" – in other words, individuals who do not receive the benefits Congress directed that they should – to challenge the denial of such benefits. 3rd MTD at 45 citing 42 U.S.C. §§ 1396r(e)(7)(A) or (B).

Congress made compliance with this mandate a condition for receiving federal Medicaid funding for services provided in a nursing facility. 42 U.S.C. § 1396r(e)(7); *Joseph S.*, 561 F. Supp. 2d at 299. Not surprisingly, it incorporated this mandate in the section of the Medicaid Act concerning the duties of nursing facilities, but did so with express language evidencing its intent that the screening, assessment, and services were directed to, and for the benefit of, individuals with IDD. Similarly, it left no doubt that while the nursing facility could not receive federal funding if it failed to comply with this new mandate, it remained the responsibility of the State, pursuant to its Medicaid State Plan, to ensure that reliable screening, adequate assessments, and individualized services actually occurred. 42 U.S.C. §§ 1396r(e)(7)(A)(i), (e)(7)(B)(i); *see also id.* § 1396r(b)(3)(F)(i) (outlining the requirements for the state's determinations); *Joseph S.*, 561 F. Supp. 2d at 301.

Contrary to Defendants' conclusory assertions that the focus of these provisions is "directed to nursing homes"—not the nursing home residents (3rd MTD at 44), a plain reading of the text of the statute reveals that the residents are indeed both the focus and intended beneficiaries of the preadmission screening, resident review and specialized services provisions of § 1396r(e). Indeed, the Second Circuit considered this very issue from the prospective of the nursing facility, and held that "[i]t is clear from the plain language of this provision that it was not 'intend[ed] to benefit the putative plaintiff[s]'—here the health care providers. Rather, the provision is obviously intended to benefit Medicaid beneficiaries." *Concourse Rehab. & Nursing Ctr. Inc. v. Whalen*, 249 F.3d 136, 143-44 (2d Cir. 2001) (internal citation omitted). And the First Circuit rejected the

very argument advanced by Defendants here. *Rolland*, 318 F.3d at 51-56 (discussed in detail, III.B.2(d)(1)(iii), *infra*).

Finally, Defendants claim that because Congress allowed individuals to appeal denials of proper assessments or services through a fair hearing process, or for the Secretary to terminate funding to States that fail to properly implement a PASRR program, the intended beneficiaries of the NHRA – persons with IDD – lack a private right of action to enforce their entitlement. 3d MTD at 45-47. This argument was explicitly rejected by the Supreme Court in *Wilder* and should be rejected here. *Wilder*, 496 U.S. at 523 ("The availability of state administrative procedures ordinarily does not foreclose resort to §1983…Nor do we find any indication that Congress specifically intended that this administrative procedure replace private remedies available under § 1983.") (internal citations omitted). Moreover, as Defendants concede, the statutory fair hearing and funding termination provisions are "'in addition to those otherwise available under State and Federal law and shall not be construed as limiting such other remedies …' 42 U.S.C. § 1396r(h)(8)." 3 MTD at 46.

(ii) The Secretary's Regulations Further Demonstrate that the NHRA Is Privately Enforceable.

The regulations further confirm that the statute creates enforceable rights in nursing facility residents with developmental disabilities to preadmission screening, resident review, and specialized services. While it is true that regulations, standing alone, cannot create rights enforceable under § 1983, *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001), it is equally true that where Congress has explicitly delegated substantive authority to the Secretary of an administrative agency to promulgate regulations in a particular area, those regulations are entitled to "legislative effect." *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 n.13 (2002) ("[w]e have long noted Congress' delegation of

extremely broad regulatory authority to the Secretary in the Medicaid area"); *Sandoval*, 532 U.S. at 284 (listing cases in which the Court has enforced validly promulgated regulations interpreting statutory provisions).

The Supreme Court has recently expanded this deference to the Secretary and federal officials at the Centers for Medicare and Medicaid Services (CMS), with respect to the intricate and complex provisions of the Medicaid Act. *Indep. Living Ctr.*, 132 S. Ct. at 1210. The Court noted that the "[t]he Medicaid Act commits to the federal agency the power to administer a federal program," that CMS had exercised its authority in doing so and therefore the court held that CMS was entitled to deference because "…the agency is comparatively expert in the statute's subject matter." and thus, its decision "carries weight." *Id.*

Congress, at numerous points in § 1396r, explicitly delegated substantive authority to the Secretary regarding preadmission screening, resident review, and specialized services. Section 1396r(e)(7)(A)(i) provides that preadmission screening must be conducted "using any criteria developed under subsection (f)(8)."[58] Section 1396r(e)(7)(B) similarly requires that resident reviews conform to "criteria developed under subsection (f)(8)." Section 1396r(e)(7)(G)(iii) explicitly provides that "[t]he term 'specialized services' has the meaning given such term by the Secretary."

In reliance upon the specific rulemaking authority conferred by this statute, the Secretary has issued regulations authoritatively construing the provisions of the NHRA at issue here. As instructed by Congress, the PASRR regulations define "specialized services" as the equivalent of

[58]Section 1396r(f)(8) gives the Secretary authority to establish minimum criteria for States to use in making determinations under subsections (b)(3)(F) and (e)(7)(B) and to monitor state compliance with respect to State obligations under (e)(7)(C)(ii). The citations to subsections (b)(3)(F) and (f)(8) in Plaintiffs' claim for relief are included to further clarify and delineate the scope of the State's responsibilities under subsection (e)(7).

active treatment in ICF/DDs. 42 C.F.R. § 483.120(a). They establish criteria for preadmission screening and specialized services and require States to comply with them, in fulfillment of the Congressional instruction at §§ 1396r(f)(1) and (8) for the Secretary to establish and enforce criteria that ensure that the care in nursing facilities is adequate to protect the health, safety and welfare of residents. 42 C.F.R. §§ 483.104 - 483.136. Like the regulations favorably referenced by the Supreme Court in *Sandoval*, 532 U.S. at 284, the Secretary's mandate to the State to provide nursing facility residents with IDD with preadmission screening, resident review, and specialized services both construes Congress's intent and enforces Congress's purpose to create enforceable rights.

Like the statute, the PASRR regulations use mandatory language to require the provision of screening and resident review, and to guarantee specialized services to all nursing facility residents with developmental disabilities who have been assessed to need them.[59] With respect to preadmission screening, they provide that the *State mental retardation authority* "must determine" whether the individual requires care in a nursing facility and, if so, if he or she requires specialized services. 42 C.F.R. § 483.112(a). The *State* must ensure that the individual receives written notice of the determination.[60] *Id.* § 483.128(a). The *State* must use evaluation criteria prescribed by the Secretary. *Id.* § 483.128(e). The *State* "must provide for or arrange for the provision of specialized services . . . to all NF residents with . . . MR" who need them. *Id.* § 483.120(b). The *State* must give assurances that specialized services are, in fact, provided. *Id.* § 483.130(n). Thus, while nursing facilities must provide nursing services, it is the State that bears the primary responsibility

[59]As the *Sandoval* Court recognized, "When a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable." 532 U.S. at 291.
[60]*See also* § 483.106(a) ("[t]he State PASARR program must require (1) preadmission screening of all individuals with . . . mental retardation who apply as new admissions to Medicaid NFs").

to conduct the screening, to perform the assessments, and to provide specialized services. And the Secretary left no doubt that it is State, and only the State, that bears the ultimate responsibility to ensure that the PASRR program complies with the NHRA, and, specifically, that individuals with IDD receive the benefits Congress bestowed upon them through the PASRR mandate. This regulatory implementation of Congressional intent is entitled to significant weight, as the Supreme Court emphasized: "[s]uch regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. *Sandoval*, 532 U.S. at 284 (internal citations omitted).

(iii) Applicable Case Law Further Confirms That The NHRA Is Privately Enforceable.

In light of the strong textual and other indicia of congressional intent to create enforceable rights regarding the preadmission screening and resident review provisions of the NHRA, it is hardly surprising that the two Circuit Courts of Appeal that have considered the question have found that the NHRA does contain the requisite mandatory, rights-creating language needed for private enforcement pursuant to § 1983. In a case raising claims virtually identical to those raised here, the First Circuit held, post-*Gonzaga*, that the provisions of the NHRA provide rights enforceable by § 1983. *Rolland*, 318 F.3d at 51-56. The First Circuit analyzed the text of the statutory provisions in light of the overall framework of the NHRA, its legislative history, and the Secretary's interpretation, as evidenced by the PASRR regulations. *Id.* at 51-52. The Court then turned to the *Wilder / Blessing / Gonzaga* test. Noting that the "[t]he NHRA speaks largely in terms of the persons to be benefited, nursing home residents," the Court easily found that the first prong of the three part test was met. *Rolland*, 318 F.3d at 53.

Turning to the second prong—whether the right to specialized services is too vague and amorphous to be judicially enforceable—the Court concluded that that the statutory provision, in

conjunction with the Secretary's regulations, provided "contextual guidance . . . sufficient to allow residents to understand their rights to services, States to understand their obligations, and courts to review the State's conduct in fulfilling those obligations." *Id.* at 54. The *Rolland* Court also had no difficulty finding that the rights asserted under § 1396r(e)(7) "unambiguously bind states," noting the frequent and repeated use of the word "must" to denote the State's obligations. *Id.* at 55.

More recently, the Third Circuit also has considered whether the NHRA creates rights enforceable by § 1983. In *Grammer,* 570 F.3d 520, the Court held that the NHRA creates rights enforceable under § 1983 against a state-operated nursing facility. Contrary to defendants' suggestion that nursing facilities, not nursing facility residents, are the focus of the NHRA, the Third Circuit found that "[t]here is no question that the statutory provisions under which Grammer raises her claims meet the first *Blessing* factor. As both a Medicaid recipient and a nursing home resident, Grammer's mother was an intended beneficiary of 42 U.S.C. § 1396r." *Id.* at 527. Like the First Circuit, the Third Circuit, in reliance upon the repeated use of such phrases as "must provide," "must maintain" and "must conduct," easily concluded that the rights asserted were neither vague and amorphous nor precatory, thereby satisfying the second and third of the *Blessing* factors. *Id.* at 528. The *Grammer* Court also engaged in an extensive analysis of the impact of *Gonzaga* on its cause of action analysis. Because "[t]he FNHRA are replete with rights-creating language" and "use the word 'residents' throughout . . . in such a way as to stress that these 'residents' have explicitly identified rights," the Court easily concluded that "viewing the terms of the FNHRA . . . through the lens of *Gonzaga Univ.*, we hold that Congress did use rights-creating language sufficient to unambiguously confer individually enforceable rights." *Grammer,* 570 F.3d at 529, 531.

Another district court, in a case virtually identical to this one, has recently reached the same conclusion. *Dunakin v. Quigley*, 99 F. Supp. 3d 1297 (W.D. Wash. 2015), *mot. for recon. denied*, No. C14-0567-JLR, 2015 WL 4076789 (W.D. Wash., July 1, 2015). Specifically, the court held that the NHRA was privately enforceable, finding that the NHRA was intended to benefit plaintiffs with IDD, just like Plaintiffs here. *Id.* at 1314-15. The defendant in *Dunakin*, like those here, argued that the NHRA and the PASRR regulations were not judicially enforceable because they did not satisfy the first prong of the *Blessing/Wilder* test as clarified by *Gonzaga*. *Id.*[61] Rejecting the defendants' analysis, the court examined the relevant sections of the PASRR provisions of the NHRA, finding that each contained rights-creating language. *Id.* at 1314-18 ("the provisions in the NHRA requiring a preadmission screening program including specific language referring to the persons benefitted: '[T]he state must have in effect a preadmission screening program, for making determinations…described in subsection (b)(3)(F) of this section for…mentally retarded individuals…who are admitted to nursing facilities. 42 U.S.C. § 1396r(e)'").

The *Dunakin* court also found that the language under the PASRR provisions of the NHRA that requires resident reviews under 42 U.S.C. § 1396r(e)(7)(B)(ii)(I), (II), was "even more 'rights-creating." *Id.* These provisions require:

> [I]n the case of each resident of a nursing facility who is mentally retarded, the State…must review and determine…whether or not the resident, because of the resident's physical and mental condition, requires the level of services provided by a nursing facility or requires the level of services of an intermediate care facility…and whether or not the resident requires specialized services for mental retardation.

[61]The defendants in *Dunakin* did not argue that the PASRR provision of the NHRA did not meet the second or third prongs of *Blessing*, and, therefore, the court did not address those factors in finding a private right of action under the NHRA/PASSR.

42 U.S.C. § 1396r(e)(7)(B)(ii)(I), (II). The *Dunakin* court also found that 42 U.S.C. § 1396r(e)(7)(C)(i)(I),(II), and (III), which require the provision of specialized services, also contained rights-creating language. It specifically held that, in contrast to the statutory provisions at issue in *Gonzaga*, the PASRR provisions of the NHRA "directly impact individual nursing home residents because they determine whether the resident will be placed in a nursing facility and what services the individual will receive." *Dunakin*, 99 F. Supp. 3d at 1316. Thus, the court concluded that "42 U.S.C. § 1396r(e)(7) places a 'unmistakable focus on the benefitted class,' which here are individuals with mental disabilities who have been or will be placed in nursing facilities." *Id*.

While the Fifth Circuit has not directly addressed the issue of whether 42 U.S.C. § 1983 provides a cause of action for claims pursuant to the NHRA, it did "assume, without deciding" that the NHRA is privately enforceable. *Grant ex rel Family Eldercare*, 324 F.3d at 387 n.5 (citing with approval *Rolland*, 318 F.3d at 51-56, and *Martin v. Voinovich*, 840 F. Supp. 1175, 1197-1201 (S.D. Ohio 1993)). In addition to *Martin*, which held that § 1983 provides a cause of action for nursing facility residents to enforce the PASRR provisions of § 1396r against the state officials responsible for compliance, several other district courts have also reached the same conclusion. *Joseph S.*, 561 F. Supp. 2d at 294-304; *Tinder v. Lewis Cty. Nursing Home Dist.*, 207 F. Supp. 2d 951, 954-55 (E.D. Mo. 2001); *Soto v. Lene*, No. 11-CV-0089 SLB LB, 2011 WL 147679, at *2 (E.D.N.Y. Jan. 18, 2011) ("[T]he NHRA creates rights that are presumptively enforceable through § 1983.").[62]

[62]In n.64 to their 3rd MTD at 47, Defendants cite one court of appeals decision and a number of district court decisions that found no private right of action *against a nursing facility* under the NHRA to enforce the nursing facility "quality of care" requirements of the Act and regulations. All but three of these cases involved damage claims against private nursing facilities which were not state actors, and, therefore, not subject to suit under 42 U.S.C. § 1983. Another was a claim

Based upon a careful analysis of the specific provisions of the NHRA at issue in this case, informed by the legislative history and structure of the Act, further reinforced by the Secretary's authoritative regulatory interpretation, and then supported by a consistent and convincing line of judicial authority, plaintiffs have asserted rights under the PASRR provisions of the NHRA that are privately enforceable against Defendants pursuant to § 1983.

(2) Plaintiffs Have Stated a Claim Under the NHRA.

Defendants' argument that Plaintiffs have failed to state a cognizable NHRA claim is based entirely upon their conclusory assertion that the provisions of the NHRA relied upon by plaintiffs do not impose any responsibilities on them.[63] 3rd MTD at 40-41. However, contrary to Defendants' contention, 42 U.S.C. §§ 1396r(e)(7)(A), (B), & (C), as well as 1396r(b)(3)(F),[64] do indeed impose specific obligations on the State. *See* Section III.B.2.d.i-iii, *supra*. It is difficult to envision how Congress could have more clearly indicated that these various responsibilities were those of the State.[65] Plaintiffs' allegations that Defendants fail to comply with all of these

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for injunctive relief against a private nursing facility operator, also not proper under § 1983. The remaining two, which involved government defendants, were damage claims for violations of the patient bill of rights provision of the NHRA—a provision and remedy not at issue in this case. Further Defendants fail to cite, much less discuss, the numerous cases referenced above which have found the PASRR provisions of the NHRA enforceable against state officials pursuant to § 1983. Finally, the only PASRR injunctive case that Defendants do list—*Grammer*—is cited not for its holding, but rather for its dissent.

[63]This may very well explain why Defendants have failed so completely to ensure that Plaintiffs and the class they seek to represent were: 1) accurately screened prior to their nursing facility admission; 2) assessed to determine whether admission to a nursing facility was appropriate and, if so, if they needed specialized services; and 3) actually provided with the specialized services they required.

[64]Plaintiffs cite § 1396r(b)(3)(F) in their claim for relief because § 1396r(e)(7)(A)(i) cross references to that section in order to fully define and clarify the nature and extent of the preadmission screening program that "the State must have in effect."

[65] Indeed, the heading of subdivision (7) of § 1396r(e) is "State requirements for preadmission screening and resident review." Defendants contention that the provisions in § 1396r(e) are not directed at them ignores the clear statutory language and intent.

obligations certainly states a claim for relief "that is plausible on its face." *Matrixx Invest., Inc. v. Siracusano*, 563 U.S. 27, 45 n.12 (2011).

Contrary to their generalized attack on all of Plaintiffs' NHRA claims, Defendants concede that Plaintiffs have stated a claim with respect to their failure to provide specialized services that satisfy federal active treatment requirements, although disputing the scope of that obligation. 3rd MTD 2 at 56. Defendants' concession that Plaintiffs have stated a cognizable claim regarding the failure to provide specialized services sufficient to constitute active treatment should end the inquiry at this stage of the proceeding. The determination of the extent of any violation and the scope of relief to which plaintiffs may be entitled is not appropriate at the motion to dismiss stage; determining the precise contours of Defendants' active treatment obligations is best addressed during the merits or remedial phase of the litigation. *See Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 977 (10th Cir. 2001) (determining the reach of Medicaid statute "is more appropriately reserved for resolution on the merits of the case"); *Cler v. Ill. Educ. Ass'n*, 423 F.3d 726, 729 (7th Cir. 2005) (finding it inappropriate to grant motion to dismiss based on uncertain meaning of statutory term, "prepaid legal services").[66]

Finally, contrary to their suggestion, Defendants' recent amendment to its State Medicaid Plan in 2012 to provide some additional services to nursing facility residents with IDD does not undermine Plaintiffs' claim for specialized services and active treatment under the

[66]Defendants' assertion that the scope of active treatment required by § 483.440(a)(1) does not encompass any of the requirements contained in other subparts of § 483.440 has been rejected by the one court that has addressed the issue. *Rolland v. Patrick*, 483 F. Supp. 2d 107, 113-14 (D. Mass. 2007). Recognizing that subpart (a) provides the general definition of active treatment and that subparts (b) through (f) provide the specifics, the Court easily concluded "that paragraphs (b) through (f) of section 483.440 apply as well." *Id.* at 114. Defendants' suggestion that the First Circuit decision in *Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003) somehow supports their position was also raised in *Rolland* and rejected by the district court on remand. *Rolland*, 483 F. Supp. 2d at 113-14.

NHRA. However, despite the expanded scope of specialized services, as Plaintiffs have extensively alleged in their 2nd Am. Compl., the State's practices for complying with the NHRA regulations on specialized services are grossly deficient, and affect all individuals with IDD in nursing facilities. See 2nd Am. Compl. ¶¶ 84-88, 95-, 97-106,112, 123-24; *see also* ¶¶126-137, 141, 148. This limited expansion is insufficient to ensure that Defendants actually provide all individuals with IDD in nursing facilities with a program of active treatment, as required by federal law. 42 C.F.R. § 483.120(b). *Id.*; *see also* discussion in Section II.E. *supra* .

e. The Plaintiffs Have Stated a Claim Under the Reasonable Promptness Provision of the Medicaid Act.

It is not surprising that Defendants do not dispute that § 1396a(a)(8) is privately enforceable, for every circuit that has considered the question has concluded that it is.[67] Indeed, as Defendants' acknowledge, the Fifth Circuit has recently held that § 1396a(a)(8) creates a right enforceable under § 1983. *Romano*, 721 F.3d at 377-78 (holding that § 1396a(a)(8) satisfies both *Blessing's* three-part test and the explicit individual rights-creating language required by *Gonzaga*). Because Defendants' challenge to the viability of this claim is predicated entirely on the existence of a lengthy waiting list for the HCS waiver, a circumstance that Defendants admit is no longer true, *see* 3rd MTD at 1-2; 13, it should be rejected.[68]

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[67]*See, e.g.*, *Kidd*, 501 F.3d at 356-57; *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); *Doe v. Chiles*, 136 F.3d 709, 714 (11th Cir. 1998); *Haveman*, 289 F.3d. at 863; *Lewis*, 261 F.3d at 976-77.

[68]Of course, the question of whether a particular waiver service is or is not being provided with reasonable promptness to eligible individuals runs to the merits of the claim, not whether the provision is privately enforceable under § 1983. Defendants' argument regarding whether § 1396a(a)(8) provides a cause of action with respect to the delivery of community-based waiver services does not speak to whether the reasonable promptness provision is privately enforceable under § 1983, which it clearly is, but rather to whether plaintiffs have stated a claim for relief under it, which they have. *See supra* at Section III.B.3.e.(2).

In their Second Amended Complaint, Plaintiffs allege that Defendants violate the reasonable promptness provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(8), by failing to provide appropriate specialized services in a timely manner to nursing facility residents with IDD. *See* 2nd Am. Compl. ¶¶ 392-393. Defendants concede that this states a claim under § 1396a(a)(8) to the extent that they are not providing specialized services as measured by 42 C.F.R. § 483.440(a)(1). 3rd MTD at 58.

Defendants argue that Plaintiffs' reasonable promptness claim regarding the provision of community-based services and supports fails because Plaintiffs allegedly are not entitled to prompt waiver services where the HCS waiver program is full and has a waiting list. 3rd MTD at 58-60. Regardless of whether and when the HCS waiver becomes available, nursing facility residents with IDD are eligible for and could benefit from community services provided through programs other than the HCS waiver, including the CLASS waiver, CBA waiver, STAR+PLUS waiver, and the MFP program.[69] Further, to the extent the Court elects to consider programmatic modifications to Texas's HCS waiver program because some are a matter of public record, there is no argument that the HCS waiver is full and Defendants' arguments with respect to waiting lists and the cases upon which they rely are simply not relevant. *See* http://www.lbb.state.tx.us/Documents/Budget/Session_Code_84/HB1-Conference_Committee_Report_84.pdf at II-16, 31.c.; 3rd MTD at 1-2, 13; *see also* Section II.B,

[69] Plaintiffs are willing to accept appropriate community services under any of Texas's community support programs through which they can obtain the services needed to allow them to live in the most integrated setting. *See* 2nd Am. Compl. ¶¶ 141, 148, 379-384, 389-391, 393 (not limiting claim to any particular waiver program). Under the MFP program, residents of nursing facilities are able to bypass the waiting lists for the CLASS, CBA and Star+Plus waivers and access the services and supports immediately. See The Texas Money Follows the Person Demostration Operational Protcol (Nov. 2009) at 9-10, available at http://www.dads.state.tx.us/providers/pi/mfp_demonstration/operationalprotocol/operational-protocol.pdf (last visited December 17, 2015), as codified in H.B. 1867.

supra. The newly-authorized waiver slots for this biennium must be provided promptly to any eligible individuals including the Named Plaintiffs and members of the class. *Doe*, 136 F.3d at 717. To the extent the Court considers matters outside of the pleadings, Defendants' 3rd MTD should be treated as a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See e.g.*, *Grynberg v. BP P.L.C.*, 855 F. Supp. 2d 625, 639 (S.D. Tex. 2012), *aff'd* 527 F. App'x 278 (5th Cir. 2013); *Delhomme v. Caremark Rx Inc.* 232 F.R.D. 573 578 (N.D. Tex. 2005). In that instance, the Court should grant Plaintiffs an opportunity to conduct discovery into facts solely in possession of the Defendants that would demonstrate that Plaintiffs have stated a claim under the reasonable promptness provision of the Medicaid Act. *See* Section I, *supra*, at 3-4.

f. The Freedom of Choice Provision of the Medicaid Act

(1) <u>The Freedom of Choice Provision Is Privately Enforceable.</u>

Defendants assert that §§ 1396n(c)(2)(B) and (C) are not phrased in terms of the persons benefited and, therefore, create no privately enforceable rights for individuals with IDD who are referred to or already in a nursing facility. 3rd MTD at 49-51. However, an examination of the actual text of the freedom of choice provision, and relevant cases upholding a private right of action under § 1983 to enforce that provision, demonstrates that the choice provision is indeed individually focused and intended to benefit individuals who are admitted to a nursing facility.

First, these subsections, taken together, repeatedly reference "individuals" and make clear that the obligations imposed upon Defendants are phrased in terms of the persons benefited. As the Ninth Circuit explained, in concluding that § 1396n(c)(2)(C) confers rights privately enforceable under § 1983, the language of the provision:

> satisfies the "rights creating" standard set forth in *Gonzaga*, and thus clears the first hurdle of the *Blessing* framework. . . . The free choice provisions are focused on the rights owed to HCBS-eligible Medicaid recipients, as evinced through their

> repeated use of the word "individuals" and their specific articulations of the entitlements guaranteed—in this instance, the right to be informed of alternatives to traditional, institutional care and the right to choose from among those options.

Ball, 492 F.3d at 1109. The *Ball* Court expressly distinguished § 1396n(c)(2) from statutes at issue in cases such as *Blessing* and *Gonzaga*, noting specifically that the freedom of choice provision:

> [s]eek to guarantee that *individual* patients are informed of noninstitutional care options and that *individual* patients retain the right to make a choice based on this information. And unlike the plaintiffs seeking to sue under the "substantial compliance" provisions discussed in *Blessing* and the "policy or practice" provision in *Gonzaga*, the HCBS-eligible Medicaid recipients who comprise the plaintiff-class here are not simply cogs in a grander statutory scheme. If that were the case, then Congress would have just enacted a barebones HCBS program, … and stopped there. There would be no need for Congress also to enact provisions mandating that participating states keep *each* eligible Medicaid recipient apprised of these non-institutional care options and afford *each* the opportunity to choose how to live.

Id. at 1111 (emphasis in original); *see also Wood v. Tompkins*, 33 F.3d 600 (6th Cir. 1994) (§ 1396n(c)(2) privately enforceable); *Michelle P. ex rel. Deisenroth v. Holsinger*, 356 F. Supp. 2d 763, 769 (E.D. Ky. 2005) (noting "individually focused terminology"); *Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1351 (S.D. Fla. 1999) (disabled Medicaid recipients are "intended beneficiaries"); *but, c.f.*, *McCarthy v. Hawkins*, Civ. No. A-03-CA-231-SS, slip op. at 13-14 (W.D. Tex. 2003) (recipients are intended beneficiaries if waiver services available, but not if the waiver cap has been reached).[70]

Second, § 1396n(c)(2) imposes mandatory and enforceable obligations on Defendants, both to inform individuals with IDD who seek admission to, or are confined in nursing facilities of their alternatives to nursing facility care, and to provide them with

[70]In Defendants' earlier motion to dismiss, Defendants argued that that § 1396n(c)(2)(C) imposes no binding obligation on Texas because there were no openings for waiver services in the HCS waiver program at the time for the Named Plaintiffs. *See* 2d MTD at 39-40 (Doc. 67). As Defendants now acknowledge, HCS waiver slots are reserved and available for all Named Plaintiffs, although clearly not for the remaining 3,300 Plaintiffs.

a choice between institutional care and care in an integrated community setting. Based upon the individual focus and mandatory nature of the obligations imposed upon Defendants by § 1396n(c)(2), as interpreted and applied by two courts of appeals, the freedom of choice provision is privately enforceable pursuant to § 1983.

Defendants' alternative argument—that the structure of the provision, mandating that the Secretary not grant a waiver unless the State provides assurances that it will inform all individuals at risk of institutional care of the feasible alternatives to such a placement, renders it unenforceable—is equally untenable. The Supreme Court rejected this very argument that required assurances cannot form the basis of an enforceable obligation. *See Wilder*, 496 U.S. at 513-54 ("the argument …would render the statutory requirement of findings and assurances … essentially meaningless").

Defendants' claim that the freedom of choice provision of the Medicaid Act is not enforceable under § 1983 has also been explicitly rejected by both the Sixth and Ninth Circuits. *Ball*, 492 F.3d at 1112; *Wood*, 33 F.3d at 608. Relying upon 42 U.S.C. § 1320a-2 and the Fifth Circuit's decision in *S.D.* applying that provision, the Ninth Circuit explained that:

> the role § 1396n(c)(2)(C) … play[s] in delineating the mandatory contents of a state HCBS plan cannot detract from or override the otherwise clear "rights-creating" language Congress used in enacting the free choice provisions. To do so would be to ignore Congress's directive in the "Suter fix" statute [§ 1320a-2] that courts abjure reliance on that consideration.

Ball, 492 F.3d at 1112. Similarly, the Sixth Circuit, in reliance on *Wilder*, stated:

> as regards § 1396n(c)(2)(A), it would make little sense for Congress to require a participating state to assure in its Medicaid plan that it will protect the health and welfare of home care recipients, without also requiring that the state actually implement the promised safeguards

Wood, 33 F.3d at 608. *See also Dunakin*, 99 F. Supp. 2d at 1322. And the Seventh Circuit, as recently as October 15, 2015, has stated:

> Because neither party argues otherwise, we assume for purposes of this appeal that 42 U.S.C. § 1983 supplies a private right of action to enforce claims under the relevant provision of the Act, which is 42 U.S.C. § 1396n(c)(2)(C);

Ill. League of Advocates for the Developmentally Disabled v. Ill. Dep't of Human Servs., 803 F.3d 872, 877-78 (7th Cir. 2015), *cf. Bertrand*, 495 F.3d at 456-58.[71] Finally, in *Grant*, the Fifth Circuit, like the Seventh Circuit, assumes in *dicta* that 42 U.S.C. § 1396n(c)(2)(C) gives rise to a private right of action for failure to provide information. *Grant*, 324 F.3d at 387, n. 5.

(2) Plaintiffs Have Stated a Claim Under the Freedom of Choice Provision of the Medicaid Act.

The Medicaid statute requires that recipients at risk of institutional care or currently residing in nursing facilities be given a choice between Medicaid programs. 42 U.S.C. §§ 1396n(c)(2)(B) and (C).[72] Courts have applied these provisions to guarantee persons with IDD a choice between different Medicaid programs. *See Cramer*, 33 F. Supp. 2d at 1352 (state Medicaid plan violated 42 U.S.C. § 1396n(c)(2)(C) because it gave individuals with disabilities "no real choice" between ICF/DDs and HCBS services). The fundamental purpose of 42 U.S.C. § § 1396n(c)(2)(B) and (C) is to provide individuals who require an institutional level of care a choice between institutional and community Medicaid services. In order to make this choice meaningful, Medicaid recipients must be informed of *all* feasible alternatives. [73]

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[71]This recent decision severely undermines Defendants reliance on *Bertrand*, 495 F.3d at 456-58. In any event, *Bertrand* did not directly address the question of whether 42 U.S.C. § 1396n(c)(2)(C) creates a private right of action; instead, Judge Easterbrook, writing for the panel, simply noted that "[plaintiff] does not say that he has been kept ignorant of options open to him." *Bertrand*, 495 F.3d at 459.

[72] Specifically, subsection (C) states that States must ensure 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 . . ." *Id.* (emphasis added).

[73]States that elect to participate in the HCBS waiver program must comply with additional freedom of choice regulations:

The Second Amended Complaint alleges that Defendants have, in violation of 42 U.S.C. § 1396n(c)(2)(B) & (C), failed to evaluate the Named Plaintiffs and other similarly situated residents of nursing facilities with IDD to determine if they are likely to require nursing facility care, and then to provide information to Plaintiffs in a manner designed to adequately inform them about all available feasible alternatives to nursing facility care, in order to provide these individuals with an informed choice of receiving care in a nursing facility or in the community. 2nd Am. Compl. ¶¶ 107-109.

Defendants have failed to provide meaningful information to the Named Plaintiffs about feasible alternatives to nursing facilities, before or after their admission to the nursing facilities. Medicaid recipients retain their right to be informed of feasible alternatives, regardless of a particular waiver's status or capacity.[74] The failure to notify persons with IDD in nursing facilities about each existing waiver program, regardless of the current capacity of the program, denies them critical information needed to make a meaningful choice about whether to enter, or remain in, a nursing facility. Knowing that waiver services, although not currently available, may be available in the future certainly could impact an individual's decision about whether to enter a nursing facility or remain in the community.

HCFA will not grant a waiver under this subpart and may terminate a waiver unless the Medicaid agency . . . (d) Assur(es) that . . . the recipient or his or her legal representative will be (1) informed of any feasible alternative under the waiver; and (2) given the choice of either institutional or home and community based services.
42 C.F.R. § 441.302(d).

[74]Defendants' own regulations implementing this federal requirement require them to provide individuals who are about to enter a nursing facility with information about "all long-term care and long-term support options appropriate to the clients' needs that are currently available." However, Defendants recognize that there is a distinction between "currently available" and "immediately available," for the regulation goes on to specify that "[i]f the client … selects an option that is not immediately available for any reason, the agency must provide assistance in placing the client's name on a waiting list for that option." 1 Tex. Admin. Code § 351.15(b).

Defendants now claim that there are 1,300 diversion and transition HCS waiver slots in this biennium reserved for individuals with IDD in or at risk of entering a nursing facility. As reflected in their 2013-2018 HCS Waiver Application, §§ III.C.5 (a) & (b), III.F., IV.B, C; V.E, F; VI.A, B of the IA, and required by 42 U.S.C. §§ 1396n(c)(2)(B) and (C), Defendants must facilitate enrollment in the waiver slots by identifying and evaluating the nursing facility residents with IDD and by providing to them comprehensive information, including visits to the community, about these feasible alternatives and to address any concerns and to document the entire process. As set forth in the Second Amended Complaint, this clearly has not happened. 2nd Am. Compl. ¶¶ 107–113, ¶¶ 258-59, 263 (Vanisone Thongphanh), 268-69, 273 (Melvin Oatman), ¶¶ 337-38, 343 (Tommy Johnson), ¶¶ 352-53, 359 (Johnny Kent), ¶¶ 369 -70, 374 (Joseph Morrell).

In a similar factual situation, the *Rolland* Court found that individuals with IDD in nursing facilities stated a claim for violation of the freedom of choice provision of 42 U.S.C. U.S.C. § 1396n(c)(2)(C) by alleging that Defendants' administration of the Medicaid program failed to inform class members of feasible alternatives to nursing facilities, including ICF/DD, PCA services and HCBS waiver programs. *See Rolland v. Cellucci*, 52 F. Supp. 2d 231, 241 (D. Mass. 1999). Likewise, here the universe of feasible alternatives is not narrowly limited to the HCS waiver, but rather properly encompasses all community-based services, supports, and programs available under the Texas Medicaid program, including the other waivers and the MFP Protocol, as well as individual state plan services. Defendants provide none of this information to individuals with IDD about to enter nursing facilities or while they are segregated in these facilities.[75]

[75]In their 3rd MTD, Defendants cite only four cases in their flawed argument that Plaintiffs fail to state a freedom of choice claim. MTD at 61-63. None of these cases support Defendants

Defendants have failed to inform Plaintiffs about available, feasible alternatives to nursing facility care under the various waiver programs that Texas operates and other services and supports available under the State Medicaid Program. By failing to provide this necessary and required information, Defendants have deprived Plaintiffs of the ability to make an informed choice about whether to receive community or institutional services. Each of these failures violates Plaintiffs' rights under 42 U.S.C. §§ 1396n(c)(2)(B) and (C) and 42 C.F.R. § 441.302(d).

IV. CONCLUSION AND REQUESTED RELIEF

For the forgoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint in its entirety. Plaintiffs request any other relief to which they may be entitled.

argument or are relevant to the facts in this case, given the status of various community programs and the allegations in the Second Amended Complaint.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Garth Corbett, hereby certify that all parties have been served through the Court's ECF system, or if such party does not accept service through the Court's ECF system, then by first class mail.

/s/ Garth A. Corbett

Garth A. Corbett