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

ILLINOIS LEAGUE OF ADVOCATES FOR THE DEVELOPMENTALLY DISABLED *et al.*	
Plaintiffs,	Case No. 13 C 01300
vs.	Hon. Marvin E. Aspen
ILLINOIS DEPARTMENT OF HUMAN SERVICES and **KEVIN CASEY**, *in his official capacity as Director of Developmental Disabilities*; and **COMMUNITY RESOURCE ALLIANCE,**	JURY DEMAND
Defendants.	

PLAINTIFFS' MOTION FOR LEAVE TO FILE INSTANTER PAGES IN EXCESS OF FIFTEEN PAGES

Plaintiffs, Illinois League of Advocates for the Developmentally Disabled, *et al*., by and through their attorneys, respectfully move for leave to file instanter their Reply in Support of Their Post-Hearing Brief which is in excess of fifteen (15) pages. In support, Plaintiffs state:

1. Due to the complexity of the arguments made in seeking a preliminary injunction and the length of the Defendants' Post-Trial Brief and Statement of Facts, Plaintiffs are unable to limit their Reply to the fifteen-page limit and respectfully request leave to file, contemporaneously with this motion, a brief in excess of fifteen (15) pages.

WHEREFORE, Plaintiffs respectfully request leave to file their Reply in Support of Their Post-Hearing Brief in excess of the fifteen (15) page limits.

DATED: April 10, 2014

Respectfully submitted,

PLAINTIFFS, ILLINOIS LEAGUE OF ADVOCATES FOR THE DEVELOPMENTALLY DISABLED, MURRAY PARENTS ASSOCIATION, INC., INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED: RITA WINKELER, KAREN KELLY, LAUREEN STENGLER, STAN KRAINSKI, ELIZABETH GERSBACHER, BARBARA COZZONE-ACHINO, ROBYN PANNIER, JEANNIE L. WILLIAMS, DAVID IACONO-HARRIS, DR. ROBERT POKORNY, and GAIL K. MYERS

BY: S/ JUDITH S. SHERWIN

One of Their Attorneys

Judith Sherwin, Esq. (#2585529)
jsherwin@taftlaw.com
Sherri Thornton-Pierce, Esq. (#6285507)
sthornton@taftlaw.com
Kathleen Howlett, Esq. (#6189355)
khowlett@taftlaw.com
Barton J. O'Brien, Esq. (#6276718)
bobrien@taftlaw.com
Gabriel Reilly-Bates, Esq. (#6280979)
gbates@taftlaw.com
Daniel R. Saeedi, Esq. (#6296493)
dsaeedi@taftlaw.com
Megan K. McGrath, Esq. (#6288408)
mmcgrath@taftlaw.com
Taft Stettinius & Hollister LLP
111 E. Wacker Drive, #2800
Chicago, Illinois 60601
Telephone: (312) 527-4000
Facsimile: (312) 527-4011

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ILLINOIS LEAGUE OF ADVOCATES FOR THE DEVELOPMENTALLY DISABLED, *et al*. **Plaintiffs,** vs. **LLINOIS DEPARTMENT OF HUMAN SERVICES**, *et al.,* **Defendants.**	Case No. 13 C 01300 Hon. Marvin E. Aspen

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PLAINTIFFS' REPLY IN SUPPORT OF THEIR POST-HEARING BRIEF

Plaintiffs Illinois League of Advocates for the Developmentally Disabled *et al.* ("Plaintiffs") through their attorneys, submit this reply in support of their post-hearing brief, and seek a preliminary injunction enjoining Defendants' Department of Human Services *et al.* ("Defendants") wrongful conduct. In support thereof, Plaintiffs state as follows:

INTRODUCTION

Defendants' post-hearing brief does not legally or factually refute Plaintiffs' claims. To the contrary, Defendants ignore Plaintiffs' evidence and instead rehash arguments rejected by this Court, as well as make new assertions unsupported by case-law. Defendants also attack the Plaintiffs' integrity by asserting that they and other guardians of profoundly developmentally disabled residents are, intentionally and in bad-faith, obstructing State's legitimate transition process. These tactics illustrate the paucity of Defendants' case. Defendants want this case to be about *Olmstead*- but it is not. Defendants want this case to be about the utopian philosophy of community-living for all, but as this Court noted in its opinion denying Defendants' Motion to Dismiss, Plaintiffs have alleged and, and with the hearing evidence, now proven that Defendants' actions are grounded in far more "draconian conduct." Through their submitted, and in many

instances, uncontested affidavits and live testimony provided at the hearing, Plaintiffs have proved the need for a preliminary injunction. The evidence shows that Defendants put into motion a plan and process to deprive Plaintiffs of their right to participate in the state's SODC program, as well as to have a choice of other residential options to which they are entitled by law. The evidence also shows Defendants have instead forced Plaintiffs to accept 2-4 bed group home options that are dangerous and unsafe. Injuries have occurred as a result, and the risk of such continued harms remains imminent. These harms favor the granting of a preliminary injunction.

Furthermore, Plaintiffs have proved the likelihood of success as to their claims. Concerning the ADA, Defendants' bold assertion that Plaintiffs have no right to participate in the SODC program is meritless and previously rejected by this Court. Defendants' insistence upon *Olmstead* as justification for their actions is also meritless and previously-rejected. And, Defendants' few citations to facts are impeached *by their own testimony*, not to mention refuted by Plaintiffs witnesses. Concerning choice, Defendants cannot offer anything more than their vague statements to guardians essentially stating that if Plaintiffs wanted to have other options, they had to find it themselves. This is <u>not</u> choice. This is the State, with all its weight, coldly putting the burden on guardians to figure it out on their own. As to Medicaid, Defendants' position that Medicaid does not entitle Plaintiffs to choice of institutional care was rejected by this Court. Defendants also cannot distinguish Plaintiffs' case law citations in support of their Medicaid claim, specifically *Leonard v. Mackereth,* which illustrates why Plaintiffs should prevail. As to Equal Protection, Defendants' asserted "rational bases" that are grounded in *Olmstead* and cost are refuted by this Court's rulings and the factual record.

Finally, Defendants' proposed compliance plan (should a preliminary injunction be granted), is nothing more than Defendants' current illegal conduct without exception. Plaintiffs need real options, real services, real programs, which comply with Federal law. This Court should enter a preliminary injunction, and prevent Plaintiffs from being subjected to further harm as a result of Defendants' reckless actions.

ARGUMENT

I. PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS ON THEIR ADA CLAIM.

This Court should find Plaintiffs established a likelihood of success on the merits of their ADA claim. Defendants provide little facts to rebut Plaintiffs' case, and instead re-argue legal defenses rejected by this Court when it denied Defendants' Motion to Dismiss. *See* Doc. 286. Defendants also rely on philosophical viewpoints about the community. This is not a case about the benefits of community in the abstract. This is a case about Defendants' deprivation of Plaintiffs' specific rights to program participation and the option of choice under Title II of the ADA and the Rehabilitation Act. Defendants have not countered Plaintiffs' evidence of federal violations of these laws.

A. Plaintiffs Cannot Be Eliminated from Programs and Services That Currently Exist, Including SODC Care.

As an initial matter, Defendants argue there is "no right to reside in any SODC." Doc. 391, p. 5. Thus, Defendants claim that since there is no right, Plaintiffs are not being denied the benefits of the "SODC Program," and "Defendants need not address the remaining merits" of this claim. *Id.* Defendants misstate Plaintiffs' rights and misunderstand the ADA. Defendants admit they operate an SODC program. Plaintiffs are being excluded from the SODC program without choice in the matter, and instead are being pushed into unsafe community

placements. Title II of the ADA forbids this deprivation. 42 U.S.C. 12132.[1] This Court, in denying Defendants' Motion to Dismiss, summarized Plaintiffs' ADA claim: "To effectuate these forced transfers out of SODCs, Defendants have implemented an assessment process that predetermines the appropriateness of community settings for SODC residents and overrides guardian wishes… The complaint alleges that class members at issue are disabled and that Defendants' conduct has denied them (or if not enjoined will deny them) the level of services they have received at SODCs." Doc. 286, p. 15. This Court concluded that "these allegations plausibly state discrimination claims under Title II and the Rehabilitation Act." *Id*. The evidence supports the claims as stated below.

B. Plaintiffs Have Shown Evidence of Intentional Discrimination.

Defendants' brief tellingly ignores most of the evidence of intentional discrimination presented at hearing and cited by Plaintiffs in their briefs. For the sake of judicial economy, Plaintiffs will not recite this evidence. *See* Doc. 382 (providing factual basis). Defendants instead argue without citation that CRA is not "reverse-engineering" its assessment process to contain a predetermined outcome. This position is shocking, given that "reverse-engineering" is exactly what Mark Doyle and Michael Mayer from CRA admitted they were doing. Doyle admitted that the "sole goal" of the CRA-ACCT Process was not to assess residents for the placement they needed, but rather, "to transition people to the community." Doc. 382, p. 6. Furthermore, Mayer admitted on cross-examination that he and CRA "reverse-engineer" the assessments to figure out how community placement will be done. *Id.* p. 7. This was a key moment of the hearing. He also admitted that 96-97% of SODC residents are designated for the community by CRA, and that this was "the purpose of the process." *Id.* This evidence, along

[1] The implementing congressional regulations further elaborate on this ADA right, and provide, among other things, that a "public entity shall not impose or apply criteria that screen out or tend to screen out an individual" from fully enjoying these services, programs and activities. See Pl. Brief, pp. 3.4 fn. 3, citing 28 C.F.R. 35.130.

with the several pieces of evidence showing deprivation of choice, illustrates Defendants' intentional discrimination. *Id.*, pp. 3-16.

Defendants further downplay a key piece of evidence at trial: the PAS Agent and its denial of choice. Defendants argue that "an SODC transfer does not have to go through a PAS agent, thus the DDPAS 10 form is irrelevant."[2] (Response, p. 6.) This new position is impeached by Defendants' own testimony. Both Casey and Dufresne admitted the PAS Agent was part of the CRA-ACCT Process. Doc. 382, p. 11. Dufresne's affidavit actually attached a process chart as an exhibit (Ex. 4) listing PAS as charged with the duties of "presenting options to guardians" and "presenting provider options." *Id.* Mayer testified that if a family does not wish to proceed with a CILA, the PAS Agent will discuss available options with the family or guardian. *Id.* Finally, the PAS Agent herself testified this was her role. *Id.* It is undisputed that the PAS Agent is an agent of Defendants and supervised by them. *Id.* Thus, the PAS Agent is important to Defendants' process to deprive Plaintiffs of their rights. The form that is used evidences this discrimination and is highly relevant. Defendants state that the form showed private ICF-DDs were listed as an option.[3] But this is not an acceptable explanation, because Plaintiffs cannot be deprived of the existing SODC Program in the manner Defendants have done, and because Defendants put forth no evidence that CRA, DHS or anyone else was actually helping Murray residents locate private ICF-DDs.

Defendants also point to Jacksonville as evidence that choice existed. Doc. 391, p. 2. Defendants take this position, despite refusing to produce many Jacksonville documents

[2] Defendant Casey was confronted with the DDPAS form that was attached to his declaration. When shown that ICF-DD and SODCs were listed as alternative choices, with SODCs marked "no" as to available options, Casey admitted he would have to change the form.

[3] Public SODCs and private ICF-DDs are not the same types of facilities. The State operates a separate SODC Program, and thus this program falls under the protection of Title II of the ADA. With respect to the differences between SODC placement and ICF-DDs, *see generally* Testimony of Greg Shaver.

because they were, as Defendants labeled them, "irrelevant." Doc. 132, p. 3. Nevertheless, the limited discovery on Jacksonville at the preliminary injunction stage impeaches Defendants' assertion. The evidence showed that 30 Jacksonville residents were shipped out of Jacksonville *en masse* immediately prior to closure on a temporary basis to other SODCs, not because the State respected choice, but because the State "didn't have sufficient time to get them assessed and develop housing." Doc. 382, p. 15. These residents are *still* being submitted to the CRA-ACCT Plan. *Id.* The evidence also showed that Defendants planned that for each Jacksonville resident who went to an SODC, another SODC resident had to be transitioned to the community. *Id.* Finally, the unrebutted testimony of Jeanine Williams showed Defendants refused to help send her ward to another SODC, and only did so once her ward had failed in a group home placement. *Id.* This testimony alone rebuts Defendants' Jacksonville assertions. And, Defendants never put on the witness stand an actual Jacksonville resident to support their assertions on Jacksonville. To the contrary, they made the decision to not cross-examine Jeanine Williams, and that decision was telling.

Defendants further argue that Plaintiffs were never told that they did not have choice. (Response, p. 2.) This is incorrect. As Plaintiffs cited in their briefs, several Plaintiffs were directly told at different times that they did not have choices. Doc. 382, p. 13.

Finally, Defendants argue they are entitled to start with the presumption that every disabled individual can succeed in the community with the proper supports. Defendants offer no legal support for this position, nor could they. This position directly counters the Medicaid statute and regulations. See Medicaid section, *infra*. There are no presumptions permitted. And, as evidenced at the hearing, Defendants have certified Murray residents for the community, have deprived the option of SODC care, have made several misrepresentations to Plaintiffs about

options, and have had the safety of their placements called into question through several incidents. Doc. 382, pp. 3-20. Clearly, their presumptions are inappropriate as well as illegal. Defendants are not entitled to deny Plaintiffs the level of services they have received at SODCs merely because they believe in a mistaken notion that all Murray residents can succeed in 2-4 bed group homes.

C. Defendants Cannot Hide Behind *Olmstead*.

Instead of rebutting the evidence Plaintiffs introduced at trial, Defendants instead devoted their brief to recycling previously-rejected *Olmstead* arguments. This strategy has already been rejected by this Court in its opinion denying Defendants' motion to dismiss. As this Court held:

> "Defendant's reliance on *Olmstead* here is misplaced. Surely *Olmstead* requires Defendants to provide community-based treatment when the three prerequisites, including patient consent, are satisfied. But Defendants' efforts to comply with *Olmstead* do not justify the alleged forcing of CILA placements on class members and their guardians who vigorously oppose such placements. While Defendants may wish to encourage community-based treatment for all who qualify and consent pursuant to *Olmstead*, Plaintiffs' complaint alleges far more draconian conduct."

Doc. 286, p. 12. Plaintiffs at the preliminary injunction hearing proved Defendants' "draconian conduct", *i.e.,* their specific plan to deprive Plaintiffs of the choice of SODC care. *Olmstead* does not justify such conduct, and actually held otherwise: "Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it." Doc. 286, p. 12.

D. Plaintiffs Have Not Merely Disagreed with CRA's "Professional Judgment," But Rather Have Shown the Deprivation of SODC Care and Choice.

Defendants have further argued that Plaintiffs merely disagree with CRA's "professional judgment" as to the residents' care, which Defendants argue is entitled to deference. This argument starts from a flawed premise: that CRA has provided competent, independent professional judgment as to the residents' care. To the contrary, CRA and DHS have put in

motion a plan to deprive Plaintiffs of their rights under the ADA and other statutes. Defendants have done so using CRA to "reverse-engineer" assessments so that everyone is certified for the community regardless of needs, and have ensured that 2-4 bed homes are the only option for Plaintiffs. This violation of the ADA is not entitled to deference.

Furthermore, the State employees who would have had the most competent professional judgment, the Murray staff and ID Team, who have cared for the Murray residents for years and even decades, have been excluded from the CRA-ACCT Process. Doc. 382, p. 16, Docs. 241-10, 241-23. These Murray professional employees, previously used to compile resident medical information, have questioned the integrity and competence of the CRA-ACCT Process. *Id*. DHS and CRA went as far as to change State policies (SOPP 181) to ensure that CRA, not the Murray Interdisciplinary Team, was making decisions, and that safeguards were eliminated. *Id*. [4] It would be a curious rule of law that allows Defendants to deprive rights under the ADA, and then hide behind their decisions as "professional judgment" entitled to deference.

For this reason, Defendants' cases are inapplicable. *Youngberg v. Romeo*, 457 U.S. 307 (1982), was a substantive due process case, not a Title II ADA deprivation case, with very different facts than here. *Youngberg* examined whether the extent to which a disabled plaintiff had a due process right to be free from restraints, and deference to qualified professionals was discussed in this regard. *Id.* at 322-23. *Youngberg* is not a shield to protect Defendants' discriminatory conduct to deprive Plaintiffs from program participation and freedom of choice, where Defendants admittedly operate an SODC program and under Medicaid are obligated to provide choice. The State is entitled to no deference for such conduct. If they were, then

[4] Defendants have argued that the Murray professional employees are biased because they do not want to lose their jobs. However, the bias argument works both ways. CRA earns $180,000 a month to implement DHS' Rebalancing Initiative. And, Murray Liaison Rick Starr implements the CRA-ACCT Plan after receiving a 25% raise and potential new job offer to do so. As this Court wisely noted in the hearing, "there are all kinds of economic interests on both sides of the case."

defendants could always fall back on a "professional judgment" defense when discriminatorily depriving individuals of program participation. Defendants' other cases are distinguishable for the same reason. *See Dixon Assoc. v. Thompson,* 91 Ill. 2d 518, 530 (1982) (applying *Youngberg* deference where plaintiffs alleged a due process claim that they were entitled to "adequate and humane care"); *Messier v. Southbury Training School*, 562 F.Supp.2d 294, 298-302 (D. Conn. 2008) (discussing *Youngberg* in the context of a due process claim to "adequate" care and "safe conditions"). *Youngberg* deference to medical professional judgment makes sense where something as amorphous as "adequate care" is sought under substantive due process. This is different from what Plaintiffs have alleged, which is that the State and CRA are depriving *specific* programs and services, and, as shown from the hearing, using the CRA-ACCT Process (including its assessments) against Plaintiffs in order to do so. *Youngberg* deference does not apply.

And, even to the extent *Youngberg* is relevant here (which it is not), as stated above, CRA's credibility, bias and "professional judgment" have been impeached. Defendants argue Plaintiffs "introduced no evidence undermining the clinical process used by CRA." Doc. 391, p. 7. Defendants have ignored large sections of Plaintiffs' briefs, as well as the evidence presented at hearing, which repeatedly call into question CRA's motives, tactics, philosophies, positions and actions. See Doc. 382, pp. 3-16 (discussing evidence undermining the CRA-ACCT Process and testimony of Michael Mayer, generally).

E. Defendants Have Not Provided a Reasonable Accommodation to Plaintiffs.

The factual bases stated above as to how Defendants have intentionally violated the ADA also illustrate why Defendants have not provided a reasonable accommodation. Simply put, Defendants deprived Plaintiffs access to SODC Program services, and instead only provided 2-4 bed group home options that have already proven to be dangerous and unsafe. The record is full

of evidence showing the unsafe conditions in the 2-4 bed group homes CRA and DHS selected. *See* Doc. 382, pp. 16-20. This is not a reasonable accommodation.

Despite this, Defendants argue that Plaintiffs have not proven a causal connection between their disability and the deprivation of services. This is meritless. The evidence showed that Defendants targeted only severely and profoundly developmentally disabled residents of SODCs, through the CRA-ACCT Process because they wish to recast their disabilities to make them appropriate for 2-4 bed placement, when in fact they are not appropriate. Defendants put into motion a plan to deprive Murray residents of their needed services and instead provide a 2-4 bed group home. The fact that Murray is closing is not, in and of itself, the basis of Plaintiffs' deprivation. Murray's closure is a result of Defendants' process. It is not the basis for Plaintiffs' claim. The recasting by Defendants through the CRA-ACCT Process and the intentional deprivation of programs and services that results are the bases for the discrimination, *i.e,* the "but for" cause.

F. Plaintiffs Have Been Disparately Impacted By the CRA-ACCT Process.

Plaintiffs have also shown, for the above reasons, that they have been disparately impacted by Defendants' actions. To counter this, Defendants again raise *Olmstead* as a defense for their actions. As stated above, this Court rejected that defense at the pleading stage and evidence submitted supports Plaintiff's' claims. For the reasons above, Defendants' defense based on *Youngberg* is also inapplicable. Plaintiffs have shown disparate impact under the ADA through Defendants' actions.

II. PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR MEDICAID CLAIM.

Plaintiffs have also established a likelihood of success on the merits of their Medicaid claim. In response to Plaintiffs' brief, Defendants' first claim that 42 USC 1396n(c)(2)(C) does

not afford a choice between waiver and community settings but only affords recipients a choice between various alternatives of community-based settings.[5] This interpretation of 42 USC 1396n(c)(2)(C) is belied by the statute's text, and by this Court's denial of Defendants' Motion to Dismiss ruling, where this Court stated that Plaintiffs' allegations- "that Defendants have deprived them of information and of choice, despite Section 1396n(c)(2)(C)'s mandate"- stated a valid claim. *See* Doc. 286, p. 20. As this Court noted in its ruling, Section 1396n(c)(2)(C), the "free choice provision," discusses the provision of information and choice of individuals between institutional options and available waiver options. *Id.*, pp. 19-20.

Furthermore, Defendants' reading of Section 1396n(c)(2)(C) misunderstands how the Medicaid program works. Prior to the promulgation of the waiver statute and regulations, Medicaid funds for the developmentally disabled could only be utilized in institutional settings. The advent of the waiver made it possible for the developmentally disabled to choose between institutional settings and community based settings - and to exercise that choice across the full gamut of available options. The very name "waiver" indicates that a choice is being made from the usual place for provision of services to a non-usual place. Prior to the waiver, the usual place was an institutional setting. Subsequent to Illinois' adoption of the waiver, the recipient of services for the treatment of developmental disabilities can choose to receive those services if they are available in a non-institutional setting, or instead choose the institutional setting. That is the first level of choice and it is the one which the waiver provision of the statute made possible. That is what 42 USC 1396n(c)(2)(C) seeks to accomplish. Should the recipient choose waiver services, *i.e.*, community based, non-institutional services, then the recipient can choose among various options: different sized CILAs, different providers, home based services, *etc.*, all

[5] Defendants also argue that this Court should not consider Docket No. 160-1, Plaintiffs' Memorandum in Support of their Medicaid claim. Since this Court has already ruled that Plaintiffs have stated a valid claim based on Section 1396n(c)(2)(C), this assertion is without merit.

depending on the services they need and require as determined by the assessment process and the recipient's choice.

Defendants' reading of 42 USC 1396n(c)(2)(C) is also belied by case law, which recognizes that the statute requires choice. *See Leonard v. Mackereth,* No. 11 cv 7418, 2014 WL 512456, *8 (E.D. Pa. Feb. 10, 2014) ("It is further undisputed that Plaintiffs cannot actually choose to switch from home-based OBRA Waiver services to institutional-based ICF/ORC services, and therefore do not have "freedom of choice" under 42 U .S.C. § 1396n(c)(2)(C)."); *Ball v. Rogers,* 492 F.3d 1094, 1107 (9th Cir. 2007) ("Based on the plain and precise language used in the statute, we conclude that Congress intended for the free choice provisions to confer upon the plaintiffs here—Medicaid recipients who qualify for HCBS—private rights that can be enforced via § 1983."); *Zatuchni v. Richman*, No. 07 cv 4600, 2008 WL 3408554, at *11 (E.D. Pa. Aug. 12, 2008) ("Nevertheless, it is clear enough that Congress intended to create individual rights in drafting Section 1396n(c)(2)(C), and that Plaintiff falls squarely within the zone of interest this provision is meant to protect as she requires the level of care provided in an ICF/MR."). Defendants, notably, did not distinguish *Leonard v. Mackereth* other than argue that Defendants did not deny choice. Doc. 391, p. 16. Thus, Defendants implicitly recognize the fallacy of their Section 1396n(c)(2)(C) interpretation, as stated above. The plaintiffs in *Leonard* prevailed precisely because they did not have a meaningful choice between institutional and community settings. *Leonard* also recognized the recent Congressional amendments to the Medicaid statute, contained in the Affordable Care Act, which refute the line of cases represented by *Bruggeman ex rel. Bruggeman v. Blagoevich*, 324 F.3d 906, 910 (7th Cir. 2003), and provide a clear intent to require the states to make specific options available, not just the provision of financial assistance. *Leonard,* 2014 WL 512456, at **6-8.

Defendants further state, without citation, that Plaintiffs did not provide any meaningful analysis of "but for" causation under Medicaid. Doc. 391, pp. 17-18. This is meritless. To the extent that Defendants have deprived Plaintiffs of choice under Section 1396n(c)(2)(C) of Medicaid, an entitlement statute, Plaintiffs have shown enough to establish their claim. There is no "but for" requirement to make a claim under Section 1396n(c)(2)(C). Defendants have provided no citation as to why Plaintiffs must establish anything else.

Finally, Defendants argue Plaintiffs did not establish lack of choice. As mentioned above in the ADA section, Plaintiffs have established lack of choice. *See* Doc. 382, pp. 3-16 (citing factual support). Suffice it to say that Defendants' entire case in showing why institutional options were available comes down to Defendants essentially telling Plaintiffs to find it themselves. *See* Doc. 391, p. 17 ("Plaintiffs were told they could work with Murray social workers to locate institutional options"). This "find it yourself" position is made all the harder by virtue of the fact that the Murray social worker, Bill Henson, testified as to how he and others were excluded from participation in the CRA-ACCT Process. Doc. 382, p. 16. Plaintiffs submitted detailed testimony as to how choice was denied. *Id.*, pp. 3-16.

Murray parents and guardians are not ignorant of their rights. They know the difference between the State actually offering tangible, available options of care, including SODC care, and the State providing no real options except the "figure it out on your own" option. If choice was provided, then where is the State's correspondence to Murray guardians telling them what specific options are available upon Murray's closure?[6] If choice was provided, where are the State's guardian witnesses who could attest to real options being provided? If the best the State can do as to showing choice is a random, vague email to Rita Winkeler (along with contradictory

[6] In a letter dated September 5, 2013, the PAS agent notified guardians of choices they may have. Although she included SODC placement, she testified at her deposition 15 days later that of 25 Murray residents she reviewed, none were eligible for an SODC.

statements to her) and a hostile guardian meeting a year before Murray's planned closure, with no follow-up correspondence or State plan for providing choice whatsoever, then Defendants have actually proven Plaintiffs' case.

The fact of the matter is that the State has intended to phase out all Murray residents into the community, and that prism explains all their actions to date. It explains, for example, something as shocking as the Murray guardian liaison being given orders from above to keep CRA "under the radar" with guardians. Doc. 382, pp. 15-16. It explains why guardians were never told about SODC availability, because there was none. *Id.* at 14. It explains why CRA "reverse-engineers" the assessment process to determine that everyone, even the most medically fragile and behaviorally unstable SODC resident, can fit to live in a 2-4 bed group home, because, as Mayer stated, that is the "purpose of the process." *Id.* at 7. And, it explains why a State agent refused to certify SODC availability as an option for guardians (in at least 20 different examples), because to do so would have meant that it actually was available. *Id.* at 11-12. This is <u>not</u> choice. This is gamesmanship with the guardians of profoundly developmentally disabled loved ones. This Court should find that Plaintiffs established a likelihood of success on their Medicaid claim.

III. PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS AS TO THEIR EQUAL PROTECTION CLAIM.

With regard to Plaintiffs' Equal Protection claim, DHS Defendants repeat the same arguments previously made in their Motion to Dismiss and rejected by this Court. Given the specific facts established at the hearing, Plaintiffs have established a likelihood of success on the merits of their Equal Protection claim. Defendants argue Plaintiffs equal protection claim must fail "as long as the Court can conceive of any rational basis that *could have* motivated Murray's closure and the implementation of the ACCT process." DHS Brief at p. 18, citing *D.B. ex rel.*

Curtis B. v. Kopp, 725 F.3d 681, 686-87 (7th Cir. 2013). However both of the purportedly "rational" bases Defendants provide- (1) *Olmstead*; and (2) cost-savings- do not justify, and could never justify, the actions that Defendants have taken in this case. Defendants cannot deprive Plaintiffs of SODC care and instead force Plaintiffs to accept dangerous and unsafe 2-4 bed group homes, and then justify it based on saving money. This is not a valid rational basis. There is no rational reason for the reckless conduct of Defendants.

Furthermore, Defendants' proffered bases have already been considered by the Court in Defendants' Motion to Dismiss, and the evidence presented at the preliminary injunction hearing expose these bases as neither rational nor real. First, Defendants claim that closing Murray and implementing the ACCT process furthers a "mandate" created not only by the ADA, but the Supreme Court ruling in *Olmstead*. Defendants read ADA and Olmstead as creating an "obligation" to assess individuals for potential community placement. DHS Brief at p. 19. As stated above, this Court has rejected Defendants' *Olmstead* arguments, stating that Defendants' "efforts to comply with *Olmstead* do not justify the alleged forcing of CILA placements on class members and their guardians who vigorously oppose such placements." Doc. 286, p. 12. As this Court explained, *Olmstead* "does not require—and it in fact explicitly discourages" Defendants' alleged conduct. *Id*. at p. 13. Plaintiffs proved at the hearing what this Court termed as Defendants' "draconian conduct." Defendants' repeated misapplication of *Olmstead* cannot serve as the rational basis for justifying its conduct.

Defendants' second asserted "rational basis"- that "cost is undeniably a factor rationally related to Defendants' conduct"- also fails. This cost defense was almost immediately retracted as "not the prime reason" for Defendants' plan, which may be in large part because the evidence which purportedly supports this factor is not at all clear. The rational basis of cost is presently

in the testimony of Kevin Casey. On direct Mr. Casey stated that the cost to care for an SODC resident is $239,000 and that this is the number "used" for obtaining the federal match. (Casey p. 27, l. 24). He then goes on to say that the cost of care in a CILA on average is $120,000. (Casey, p. 28, l. 20). He also claims the CILA cost for a Murray resident is $135,000 (p. 20-22) with no explanation as to why there is a difference. On cross examination, however, Casey changes his SODC cost figures citing the cost as $149,000, $170,000 or $239,000 with little or no explanation of why he can use these different figures. (See pages 77-80, Casey Testimony). The credibility of these cost figures is certainly held in question by this conflicting and changeable testimony.

This is in contrast to the factual situation in *Srail, et al., v. Village of Lisle*, 588 F.3d 940 (7th Cir. 2009). In response to plaintiffs' claim that by not extending its water system into their subdivision the village discriminated against them, the village of Lisle asserted it had a rational basis for this decision due to the expense of expansion. *Id.* at 947. Lisle presented actual, concrete evidence that it "faced a significant expense," as well having "real concerns that it would be unable to recoup that expense" because a survey of the subdivision's residents showed they were "uninterested in personally financing the expansion of the Lisle system." *Id*. Thus, concrete, specific evidence that the village had an economic concern gave it a rational basis to not expand its system to the subdivision. *Id*.

D.B. ex rel. Curtis B. v. Kopp, 725 F.3d 681 (7th Cir. 2013), cited by Defendants, is also distinguishable. In *Curtis B.*, the Seventh Circuit affirmed the dismissal of plaintiff's equal protection claim because the complaint itself gave defendants a rational basis for its actions. *Id.* at 686-87. Plaintiff alleged that an adult witnessed the behaviors which lead to a petition being filed again a juvenile. *Id.* at 686. The court found it was "objectively rational" for investigators to

"follow up on a report from an adult eyewitness" rather than open an investigation against other juveniles involved when no similar eyewitness could be found. *Id*.

By contrast here, there is evidence in the record showing that Defendants' conduct is not supported by a rational basis. The testimony of the Clinton County case-appointed guardian *ad litem* monitor Stewart Freeman, along with testimony from Murray workers, guardians, Greg Shaver and the group home caregivers themselves (Rhonda Gibson and Kelly Rapp), show that CRA-ACCT placements are unsafe and dangerous. Doc. 392, pp. 16-20. Plaintiffs also offered testimony showing failed Jacksonville and Murray group home placements, and the unavailability of other options. *Id.* at pp. 3-20. In contrast, Defendants merely offered Kevin Casey, whose credibility was undercut significantly on cross-examination. Even if an argument could be made at the pleading stage that Defendants had a rational basis for Murray's closure and the implementation of the ACCT process, this case is no longer at the pleading stage. The evidence presented at the preliminary injunction hearing shows this basis to be not only false, but dangerous.

The facts presented at the preliminary injunction provide a contrast to those considered in *Srail.* As detailed in Plaintiffs' post-hearing brief, there is little evidence beyond a broad and unsupported statement from Kevin Casey that the state will save money. This statement of Casey was undercut on cross-examination when he admitted it may not save money and that this was not the State's main reason for the process and transitions to the community. While Defendants assert that "cost of care for the developmental (sic) disabled in the community is undoubtedly less expensive than in an SODC," there are no facts which actually establish, substantiate or even suggest that such a conclusion is accurate. Further, Casey, Derek Dufresne, and Plaintiffs' expert agree that there may in fact be no cost savings as a result of the state's plan

to move the developmentally disabled into community placements. Thus, DHS Defendants' cost savings position is a moving target construct, not a rational basis for its program.

Finally, DHS Defendants make no effort in their brief to address Plaintiffs' evidence that SODC residents, specifically those at Jacksonville and Murray, are being treated differently than those developmentally disabled citizens who do not reside in an SODC. Instead, DHS Defendants continue to celebrate this discrimination as part of a movement or a trend. But this "trend," as followed by DHS Defendants, is not equal protection of the law. Indeed, Defendants argue they wish to take away funds used to pay for Plaintiffs' entitled services and use the money for other developmentally-disabled persons. This Court should find Plaintiffs established a likelihood of success as to the merits of their equal protection claim.

IV. THE EQUIP FOR EQUALITY REPORT AND THE RESPONSE OF KEVIN CASEY THERETO SHOULD NOT BE ADMITTED AS EVIDENCE.

Defendants seek, by their submission of the Equip for Equality ("EFE") report, to introduce an unsubstantiated document containing assertions of anonymous persons regarding events and conditions which may have been observed at times and places unknown. Not only is such a report inadmissible it is completely lacking in anything to give it requisite aspects of accuracy and credibility. In this case, there are no indicia of accuracy or credibility to attribute to the report in order to satisfy the federal rules of evidence even for the purposes of this hearing. Plaintiffs do not even have the name of the investigator, nor the dates and times of the investigation on which the report focuses. The Court is simply urged to accept the report because EFE receives federal funds to investigate. This is stretching the rule that allows some leeway for hearsay evidence at this stage of the proceedings, beyond acceptable bounds. Moreover, the fact that the report was given to Plaintiffs on December 20, 2013 does not help Defendants' cause. They had the report on October 23, 2013 and held on to it. It shows that this

"evidence" was nothing more than trial by ambush produced and used well after depositions were taken. Finally, EFE was rejected by this Court as an *amicus*. That alone shows why this report is irrelevant and biased. Now, Defendants seek to bring E4E through another door. The requested admission of this flawed report at this stage unfairly prejudices Plaintiffs. The memorandum from Kevin Casey should be excluded for the same reasons.[7]

V. PLAINTIFFS' RESPONSE TO DEFENDANTS' PLAN OF COMPLIANCE.

Defendant's purported compliance is lackluster, if not wholly nonresponsive, as to the Court's directive for each party to detail a plan for the prospective closing of Murray Developmental Center. Importantly, the Court's directive was designed implicitly with the parties' recognition of a possible preliminary injunction finding that the current plan likely violates federal law. Rather than complying with this directive, Defendants simply rehash the defensive position they have taken throughout this litigation. That is, Defendants claim the State's "person centered plan" is comprehensive, fair and results in valid placement "option" for the Plaintiff class members. Defendant's response on this matter wholly ignores the several factual bases highlighted by Plaintiffs during Preliminary Hearing testimony to demonstrate the faulty aspects of Defendants' plan under federal law, and offers no potential solution or timeline to correct the current "plan" if found faulty under federal law.

Specifically, Defendants attempt to shield their current transition plan and process under the pretext that it is undertaken by "medical professionals," and thus entitled to presumptive validity. This rehashed explanation is faulty (for reasons stated above) and non-responsive to the Court's directive when juxtaposed against the Hearing record, which reveals substantial evidence that the "plan" and the attendant "assessments" were conducted by contracted vendors with no

[7] Likewise, Defendants' attempt to put in testimonial evidence regarding E4E's report into the record (see transcript of Kevin Casey direct, pp. 33-37) should be stricken from the record.

other relation to Murray residents. Moreover, the record reveals that the "assessments" were based largely on a limited record review of patient files with little or no communication with guardians or Murray staff who facilitate the daily care of the residents. Doc. 382, pp. 3-10. Indeed, the record reveals that the "assessments" are not assessments at all since they start with a presumption that everyone can live in the community. (Transcript, testimony of Micahel Mayer, p. 52, l 1-8). And not surprisingly 96-97% of those "assessed" end up in the community because per Michael Mayer that is "purpose of the process". Transcript, Michael Mayer testimony, P. 71, l. 10-15.

Finally, Defendants purport to legitimize their current plan by now suggesting that any Murray resident may request and be considered for an alternate SODC placement without being subject to an assessment. This newly contrived "option" is not only unsupported by the record but, importantly, is contrary to Murray residents' best interests and federal law because it completely forgoes any attempt to balance a transfer of residents to the specific and full entitlement of each resident's medical care needs. Specifically, the remaining SODCs in Illinois are each different in terms of available services and levels of care. Pl. Trial Ex. 18. As such, a considered and individualized assessment of residents' options for alternative SODC placement is warranted to meet the requirements and rigor of federal law.

Importantly, Plaintiffs have never argued that transitions would be sufficient or aligned to federal law simply by virtue of a resident's (or guardian's) self-selection of an alternative SODC placement, without a legitimate and informed medical assessment to ensure its appropriateness. To the contrary, because of the remaining SODCs are not a "one size fits all" transition option, it behooves the Defendants to develop and meaningfully implement a full medical assessment of any resident who might request (or otherwise be considered for) an alternative SODC placement,

with such assessment specifically to include input from current care provider staff, family members and/or guardians knowledgeable with the individual residents' needs. These safeguard measures around SODC "choice" are nowhere in the State's current plan or the recitation of that plan which is set forth in the Defendant's post-hearing brief. Defendants' proposed plan is exactly what they are doing now and what they have done all along, which required Plaintiffs to apply to the Court for relief. It is unacceptable for the reasons stated above and as presented at the preliminary injunction hearing. As such, the Court should reject Defendant's recitation of a prospective "plan" as non-responsive.

CONCLUSION

Plaintiffs have presented cogent and compelling testimony to show that they meet the required elements for this court to enter a preliminary injunction against the Defendants. The evidence in the record from Plaintiffs' affidavits and live testimony are the reality of what Defendants' CRA-ACCT process has wrought. Specific examples have been provided of the dangerous and injurious conditions that have resulted from Defendants' CRA-ACCT process, which is based on Defendants presumption that everyone can live in the community. It does not square with the fantasy of Defendants' rosy picture of the Governor's Rebalancing Initiative, but rather, describes the results of the ill-conceived and ill-advised CRA-ACCT process.

Plaintiffs' cannot and do not live in a fantasy world. They live in a real world in which the reality is that their loved ones have been assessed by the MDC professional staff as are too behaviorally impaired and medically fragile to live in the community. In addition, many of their children, brothers and sisters have tried CILAs, have tried even some private ICF-DDs. They failed - again and again - and that is why they are in an SODC setting at Murray.

The evidence and the record are clear. The States' CRA-ACCT process does not comply with the ADA, the Rehabilitation Act, Medicaid, nor the Equal Protection Clause because it

deprives Plaintiffs of their entitlements to services they need and currently enjoy, and the right to choose to receive those services under Medicaid law. If the State is allowed to continue in its present course (as evidenced by their "compliance" plan) the violations of federal law will continue and Plaintiffs will continue to be irreparably harmed. The injury to Plaintiffs far outweighs any inconvenience which they State may suffer by having to redraw a plan that complies with federal law. Therefore, this court should find that the Rebalancing Initiative and the closure of Murray should be put on hold until such time as the State comes up with a legal and federally valid plan.

For the reasons stated above and in Plaintiffs' post-hearing brief, Plaintiffs ask this Court to enjoin Defendants from violating the ADA, Rehabilitation Act, Medicaid and the Equal Protection Clause, and causing Plaintiffs further harm.

Dated: April 10, 2014

Respectfully submitted,

ILLINOIS LEAGUE OF ADVOCATES FOR THE DEVELOPMENTALLY DISABLED, *et al.*, Plaintiffs

By: s/ Judith S. Sherwin
One of their Attorneys

Judith Sherwin, Esq. (#2585529)
jsherwin@taftlaw.com
Sherri Thornton-Pierce, Esq. (#6285507)
sthornton@taftlaw.com
Barton J. O'Brien, Esq. (#6276718)
bobrien@taftlaw.com
Daniel R. Saeedi, Esq. (#6296493)
dsaeedi@taftlaw.com
Megan K. McGrath, Esq. (#6288408)
mmcgrath@taftlaw.com
TAFT STETTINIUS & HOLLISTER LLP
111 E. Wacker Drive, #2800
Chicago, Illinois 60601
Telephone: (312) 527-4000

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