UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

S.J., by and through her next friend, S.S.; C.T.; P.W., a minor child by and through her next friend, C.W.; S.E.S., a minor child by and through her next friend, J.L-S.; T.S., a minor child, by and through his guardian, M.S.; S.A., minor child by and through her next friend, M.A.; R.R., a minor child by and through his next friend, M.D.; B.B., a minor child by and through her next friend C.B.; I.B., a minor child by and through her next friend, A.B.; and Caring for Complex Kids Coalition,	)	Civil Action No. 2:20-cv-04036 MDH
Plaintiffs.	)	
v.	)	
JENNIFER TIDBALL, in her official capacity as Acting Director of Missouri Department of Social Services, and MISSOURI DEPARTMENT OF SOCIAL SERVICES,	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Regulations

Miscellaneous

PRELIMINARY STATEMENT

Ranging in age from one to 18 years old, the individual Plaintiffs (Plaintiff Children or the Children) are nine Medicaid-enrolled children who are living with medically complex conditions. Plaintiff Caring for Complex Kids Coalition is an association of Missouri parents and caretakers of children with medically complex conditions. Defendants have determined that private duty nursing services are medically necessary for the Children and authorized Medicaid coverage of them. However, Defendants are failing to arrange for these services. As a result, the Children's families are searching for nurses themselves, all while trying to provide the missing skilled nursing care on their own. Compare O.B. v. Norwood, 838 F.3d 837, 840 (7th Cir. 2016) (granting injunction when the state Medicaid agency "left the search [for private duty nurses] to be conducted by parents who apparently lacked the knowledge or experience required to hire the needed number of nurses without a painfully protracted search").

Plaintiffs are likely to succeed on the merits of their claims. Defendant Tidball is violating the Medicaid Act's Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provision which requires the state Medicaid agency to "arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment" that children have been found to need. 42 U.S.C. § 1396a(a)(43)(C). In addition, Plaintiffs are likely to succeed on their claims that Defendants are not meeting their obligations under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (the Rehabilitation Act). These laws require Defendants to provide services in the most integrated setting appropriate for the person with disabilities, to minimize the risk that such persons will be forced into institutions to receive services, and to avoid methods of administration that have the effect of discriminating on the basis of disability. See 42 U.S.C. § 12131-32; 29 U.S.C. § 794.

The mounting harms caused by Defendants' violations have become untenable. Plaintiff Children are not receiving critical health care services that their providers, Defendants, and the families all agree the Children need. As a result, some of them are cycling through institutional settings, some have been stuck in these settings for prolonged periods, and all are at serious risk of institutionalization. Meanwhile, the families are emotionally and financially strained to the breaking point. See G.T. Decl. ¶¶ 14-16 (Exh. 1); J.L-S. Decl. ¶¶ 20-23 (Exh. 2); M.A. Decl. ¶¶ 16-19 (Exh. 3); A.B. Decl. ¶ 14 (Exh. 4); M.S. Decl. ¶ 11 (Exh. 5); M.D. Decl. ¶¶ 10-11 (Exh. 6); C.B. Decl. ¶¶ 13, 47 (Exh. 7); S.S. Decl. ¶¶ 18-21 (Exh. 16); C.W. Decl. ¶¶ 5, 8-10 (Exh. 8). Accordingly, Plaintiffs seek a Preliminary Injunction requiring Defendants to take immediate action to arrange for the necessary in-home nursing services during the pendency of this lawsuit.

ARGUMENT

I. THE STANDARD FOR PRELIMINARY RELIEF

"Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Kroupa v. Nielsen, 731 F.3d 813, 818 (8th Cir. 2013) (quoting Dataphase Sys. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981)); see Lankford v. Sherman, 451 F.3d 496, 503 (8th Cir. 2006) (same). Plaintiffs meet these factors.

II. PLAINTIFF CHILDREN WILL SUFFER IRREPARABLE HARM WITHOUT A PRELIMINARY INJUNCTION.

Defendants' failure to arrange for the necessary private duty nursing services is resulting in untenable, ongoing emotional, physical, and financial harm for the Children and their families:

- Plaintiff S.E.S. is receiving no private duty nursing services, although Defendant has authorized her to receive 16 hours per day when she is not in school and eight hours a day when she is in school. Her family has been providing all of her care when she is not in school. They are wearing thin. Her mother must wake up five to ten times a night

to adjust S.E.S.'s sleeping position and adjust her breathing equipment. S.E.S. required surgery after cracking a bone in her leg when her mother was forced to move her alone in an effort to address breathing issues. J.L.-S. Decl. ¶¶ 10, 20-21.

- Plaintiff S.A. was discharged from the hospital on February 14, 2020 with Defendants' authorization to receive 98 hours per week of services. But since being discharged, S.A. received only one 10-hour shift of private duty nursing services. Her parents are sleeping in four-hour shifts and are worn down. Her mother cannot work as much as she used to, and the family is financially strained. M.A. Decl. ¶¶ 15-18.

- Plaintiff C.T. is not receiving the services approved by Defendants in the evenings or overnight. Her father lost his job because he was trying to care for C.T. C.T. struggled to breathe at home because, without nursing services, dried saliva built up in her tracheostomy and her airway nearly closed off. G.T. Decl. ¶¶ 8-11, 14.

- Plaintiffs P.W., B.B., and I.B. are not receiving reliable overnight care, and their parents must stay up or take turns sleeping at night to monitor their children's breathing. C.W. Decl. ¶¶ 9-10; C.B. Decl. ¶¶ 45-46; A.B. Decl. ¶¶ 10-11. Plaintiff S.J. and her family similarly suffer with insufficient nursing. S.S. Decl. ¶¶ 20-21.

- T.S. is receiving only 70-86 hours of nursing a week, though Defendants authorized him to receive 112 hours. His grandmother, M.S., cannot work a regular job because she has to be available when there is no nursing coverage. M.S. Decl. ¶ 11.

- According to Defendants, R.R. should be receiving 112 hours of nursing, but he still lacks weekend coverage and has no substitute nurses when the regular nurses take off for vacations or their own appointments. His grandmother was forced to quit her job to care for R.R., and his grandparents take turns sleeping. M.D. Decl. ¶ 7.

While the Children's families want them to live at home, they do not know how much longer they can care for the Children at home without the necessary skilled nursing services.

It is well settled that the lack of needed medical care constitutes irreparable harm. See, e.g., Kai v. Ross, 336 F.3d 650, 656 (8th Cir. 2003) (danger to plaintiffs' health gives them a strong argument of irreparable injury); Henderson v. Bodine Aluminum, 70 F.3d 958, 961 (8th Cir. 1995) ("It is hard to imagine a greater harm than losing a chance for potentially life-saving medical treatment."). Plaintiff Children have complex, life-threatening medical conditions. Many of them rely on ventilators to breathe. Without adequate monitoring by a skilled nurse, these children may die. Cole Decl. ¶ 13 (Exh. 9); Foster Decl. ¶ 7 (Exh. 15). This is not a theoretical concern. Jaci, a

Medicaid-enrolled child with medically complex conditions, died when she was two years old. Although Defendants had determined that Jaci needed private duty nursing services, she was not receiving them on the night she died. Batiste Decl. ¶ 11 (Exh. 10); cf. Nemnich v. Stangler, No. 91-4517-CV-C-5, 1992 WL 178963, at *2 (W.D. Mo. Jan. 7, 1992) ("This Court finds death to be irreparable harm.").

Plaintiff Children and their families are also harmed by having to obtain care in institutional settings, even though the families, their providers, and Defendants all agree that in-home private duty nursing is the type of care they need. Plaintiff C.T. spent over a year in the hospital while she waited for Defendants to arrange private duty nursing services. G.T. Decl. ¶ 6. During her years-long hospitalization, she missed her family, became depressed, and had to be prescribed psychiatric medication. Id. ¶ 5. Thereafter, she returned to the hospital twice in a six-week span due to the lack of private duty nursing. Id. ¶¶ 8, 11. Yet even in her short time at home, C.T. has improved—working to move her limbs and seeking therapies to allow her to eat and breathe on her own. Id. ¶ 17. Plaintiff I.B. was hospitalized for an additional four months while her nurses and family searched for private duty nursing services. A.B. Decl. ¶ 5. She returned to the hospital after being at home for three days due to the lack of nighttime private duty nursing. Id. ¶ 6. When I.B. returned home, she took her first steps with her siblings' encouragement. Id. ¶ 14. Plaintiffs R.R., P.W., and T.S. were institutionalized for months due to the failure of Defendants to arrange for private duty nursing services. M.D. Decl. ¶ 3; C.W. Decl. ¶ 6; M.S. Decl. ¶ 2. In addition to isolating them, these prolonged hospital stays increase the risk for Plaintiff Children to contract life-threatening, hospital-borne infections. Cole Decl. ¶ 22. Without nursing services, the Children and their families are constantly being forced to play the odds, choosing between living in the

community without adequate nursing services, or being forced into institutions to receive care while being exposed to life threatening infections.

Unnecessary institutionalization is an irreparable harm. See Marlo M., ex rel. Parris v. Cansler, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010); Crabtree v. Goetz, No. Civ.A. 3:08-0939, 2008 WL 5330506, at *25 (M.D. Tenn. Dec. 19, 2008) (unnecessary institutionalization 'would be detrimental to [plaintiffs'] care, causing, inter alia, mental depression, and for some Plaintiffs, a shorter life expectancy or death"); Long v. Benson, No. 4:08cv26-RH/WCS, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008) (moving from community to a nursing home would be an "enormous psychological blow"). Further, once an individual enters an institution, it becomes much more difficult to transition back into the community and "sometimes proves irreversible." M.R. v. Dreyfus, 663 F.3d 1100, 1118 (9th Cir. 2011) (finding that institutionalization creates an unnecessary risk of such reliance on institutional structures that function in the community becomes compromised). See Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 600–01 (1999) (noting that unjustified institutionalization "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment"). As stated by Dr. Sessions Cole, Interim Chief, Division of Allergy and Pulmonary Medicine at Washington University School of Medicine in St. Louis:

> Hospitals are not and cannot be a child's home . . . Living in a hospital room and hospital bed is restrictive to a developing child, as they cannot enjoy the freedom of movement and safe exploration that a child enjoys at home. Consequently, the development of a child living for weeks or months unnecessarily in a hospital, compared to that of a child living at home, will be delayed. Delays can occur across all domains, including motor, cognitive, and social skills.

Cole Decl. ¶ 18.

III. THE HARM TO PLAINTIFFS CLEARLY OUTWEIGHS ANY POTENTIAL HARM TO DEFENDANTS.

The balance of hardships weighs decidedly in favor of Plaintiffs. The harm being suffered by Plaintiffs absent an injunction is significant. Further, Plaintiffs seek only that Defendants comply with federal Medicaid and disabilities Acts. As stated by the Seventh Circuit:

> Because the defendants are required to comply with the Act[s], we do not see how enforcing compliance imposes any burden on them. The Act itself imposes the burden; this [preliminary] injunction merely seeks to prevent the defendants from shirking their responsibilities under it.

Haskins v. Stanton, 794 F.2d 1273, 1277 (7th Cir. 1986) (granting preliminary injunction); see also Ill. Hosp. Ass'n v. Ill. Dept of Public Aid, 576 F. Supp. 360, 371 (N.D. Ill. 1983) ("Once a state has voluntarily elected to participate in the Medicaid program . . . [it cannot] characterize its duty to comply with the requirements of [the program] as constituting a hardship to its citizens.").

The harm to Plaintiffs' lives and health far outweighs any alleged harm to Defendants. See, e.g., Hiltibran v. Levy, No. 10-4185-CV-C-NKL, 2010 WL 6825306, at *7 (W.D. Mo. Dec. 27, 2010); Lankford v. Sherman, No. 05-4285-CV-C-DW, 2007 U.S. Dist. LEXIS 14950, at *13 (W.D. Mo. Mar. 2, 2007); White v. Martin, , No. 02-4154-CV-CNKL, 2002 U.S. Dist. LEXIS 27281 (W.D. Mo. Oct. 3, 2002), at *22 (collecting cases); Nemnich, 1992 WL 178963 at *3. Moreover, the cost to Defendants to cover in-home nursing is well below the cost of care in the hospital: $803 for 24 hours of private duty nursing compared to $4000 per day for inpatient hospitalization. Cole Decl. ¶ 23. [1] The balance of harms decidedly favors Plaintiffs.

[1]Defendants' policy restricts private duty nursing services to 16 hours per day with limited exceptions. MO HealthNet Division Provider Manual, § 13.10 (Exh. 11). The cost for 16 hours is $535 per day. Cole Decl. ¶ 23. The Medicaid EPSDT provisions do not allow states to set a cap on the amount of treatment that a child can receive; rather, treatment needs to be provided as necessary to "correct or ameliorate" the child's condition. 42 U.S.C. § 1396d(r)(5).

IV. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS UNDER MEDICAID'S EPSDT PROVISIONS, THE ADA, AND THE REHABILITATION ACT.

To obtain a preliminary injunction, Plaintiffs need only demonstrate the likelihood of success on the merits of one of their legal claims. See NTD I, LLC v. Alliant Asset Mgmt. Co., LLC, 337 F. Supp. 3d 877, 890 (E.D. Mo. 2018) (granting injunction where "Plaintiffs have established some likelihood of success on the merits of at least one claim in this matter"). Moreover, Plaintiffs need only establish an even chance of success. The Eighth Circuit "has rejected a requirement [that] a party seeking preliminary relief prove a greater than fifty percent likelihood that he will prevail on the merits." PCTV Gold, Inc. v. SpeedNet, LLC., 508 F.3d 1137, 1143 (8th Cir. 2007). Plaintiffs have a strong likelihood of prevailing on all of their legal claims.

1. Missouri Likely Violates the Medicaid EPSDT Act.

Congress passed the Medicaid Act in order to furnish medical assistance to low-income people. See 42 U.SC. § 1396-1. "Participation [in Medicaid] is voluntary, but if a state decides to participate, it must comply with all federal statutory and regulatory requirements." Lankford, 451 F.3d at 504. Participating states receive federal funding for providing Medicaid services. 42 U.S.C. § 1396b. Missouri participates in Medicaid, and typically receives approximately 66 cents from the federal government for each dollar spent on Medicaid services. See Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for Oct. 1, 2019 Through Sept. 30, 2020, 83 Fed. Reg. 61157, 61159 (Table 1).

Each participating state must designate a "single State agency" to administer its Medicaid program in compliance with federal requirements. 42 U.S.C. § 1396a(a)(5). In Missouri,

Defendant Department of Social Services (DSS) is the designated single state agency. Defendant Tidball is responsible for overseeing DSS and, as such, is sued in her official capacity.

The Medicaid Act requires participating states to make certain services available to program enrollees. See 42 U.S.C. § 1396a(a)(10)(A). One mandatory service is Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) for Medicaid-enrolled children and youth under age 21. 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r). The treatment component of EPSDT requires states to cover any of the 30 services listed in § 1396d(a) when necessary to "correct or ameliorate" a child's illnesses and conditions. Id. § 1396d(r)(5). Private duty nursing is among the services listed in Section 1396d(a), id. § 1396d(a)(8), and is thus a mandatory EPSDT service. Private duty nursing is "nursing services for recipients who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility." 42 C.F.R. § 440.80. Private duty nursing requires a skilled caregiver and must be provided by a registered nurse (RN) or a licensed practical nurse (LPN). Id.

EPSDT is a "robust" benefit, designed to ensure that children receive care so that more serious health problems are averted. Centers for Medicare & Medicaid Services ("CMS"), EPSDT-A Guide for States: Coverage in the Medicaid Benefit for Children and Adolescents, 1 (June 2014) ("CMS, EPSDT Guide"), available at https://www.medicaid.gov/sites/default/files/2019-12/epsdt_coverage_guide.pdf (Exh. 12). "The goal of EPSDT is to assure that individual children get the health care they need when they need it—the right care to the right child at the right time in the right setting." Id. Accordingly, the EPSDT mandate requires states to do more than merely cover services and pay claims when and if they are submitted to the agency. Specifically, the state Medicaid agency must "arrang[e] for (directly or through referral to appropriate agencies,

organizations, or individuals) corrective treatment" that a child needs. 42 U.S.C. § 1396a(a)(43)(C).

To comply with the EPSDT mandates, Defendant Tidball must proactively arrange for EPSDT services and ensure that those services are provided. As explained by the federal agency responsible for EPSDT, each state must "[d]esign and employ methods to assure that children receive . . . treatment for all conditions identified as a result of examination or diagnosis." CMS, State Medicaid Manual, CMS Pub. 45, Ch. 5, Sec. 5310, available at https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html; see also, 42 C.F.R. §§ 441.56(e) (requiring state Medicaid agency to "set standards for the timely provision of EPSDT services which meet reasonable standards of medical . . . practice. . . and must employ processes to ensure timely initiation of treatment, if required, generally within an outer limit of six months after the request for screening services."), 441.61(b) (requiring state Medicaid agency to "make available a variety of individual and group providers qualified and willing to provide EPSDT services.").

Numerous courts have required states to take affirmative steps to comply with this EPSDT mandate. For example, in O.B. v. Norwood, Medicaid-enrolled children with medically complex conditions were receiving far fewer hours of in-home private duty nursing services than the state Medicaid agency had determined they needed. 170 F. Supp. 3d 1186 (N.D. Ill. 2016). The children argued that the defendant violated the EPSDT statute, 42 U.S.C. § 1396a(a)(43)(C), by failing to arrange for the needed services. The district court granted plaintiffs' request for a preliminary injunction, finding that the Medicaid agency had likely violated EPSDT, given that it had authorized services but had not acted to assure that the approved services were actually delivered. 170 F. Supp. 3d at 1196. The court ordered the Medicaid agency to "take immediate and

affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to Plaintiffs . . . at the level approved by the Defendant, as required by the Medicaid Act." Id. at 1197-98.

On appeal, the Seventh Circuit found the state agency at fault, noting that it had "given up on searching (if it ever did) for nurses for children whom the agency deems entitled to home nursing." 838 F.3d 837, 840 (7th Cir. 2016). That court held that EPSDT requires states to provide or ensure the provision of services, not merely pay for them, and affirmed the injunction. Id. at 841-43; see Chisholm v. Hood, 110 F. Supp. 2d 499, 507 (E.D. La. 2000) (holding "states are further obligated to actively arrange for [EPSDT] corrective treatment" under § 1396a(a)(43)(C)); Salazar v. Dist. of Columbia, 954 F. Supp. 278, 330 (D.D.C. 1996) (finding that D.C.'s failure to ensure that EPSDT-eligible children receive diagnosis and treatment for health problems violated the provision); A.H.R. v. Wash. State Health Care Auth., No. C15-5701JLR, 2016 WL 98513, at *14 (W.D. Wash. Jan. 7, 2016) (finding agency violated the Medicaid Act by failing to arrange for private duty nursing services); see also Memisovski v. Maram, No. 92 C 1982, 2004 WL 1878332, at *50 (N.D. Ill. Aug. 23, 2004) (stating that EPSDT "differ[s] from merely providing 'access' to services; the Medicaid statute places affirmative obligations on states to assure that these services are actually provided to children on Medicaid in a timely and effective manner") (citing Stanton v. Bond, 504 F.2d 1246, 1250 (7th Cir. 1974) ("The mandatory obligation upon each participating state to aggressively notify, seek out and screen persons under 21 in order to detect health problems and to pursue those problems with the needed treatment is made unambiguously clear. . . .")).

Defendants have authorized and approved reimbursement of set amounts of private duty nursing services, typically 16 hours per day, for each Plaintiff Child. M.D. Decl. ¶ 4; C.B. Decl. ¶ 37; S.S. Decl. ¶ 14; C.W. Decl. ¶ 4; G.T. Decl. ¶¶ 7, 9; M.S. Decl. ¶ 6; A.B. Decl. ¶ 4; M.A. Decl.

¶¶ 10-11; J.L-S. Decl. ¶¶ 9-10. Defendants' agent, the Bureau of Special Health Care Needs, provides families with a list of home health agencies and tells families to contact the agencies on the list. M.D. Decl. ¶ 8; S.S. Decl. ¶ 17; C.W. Decl. ¶ 7; M.S. Decl. ¶¶ 8-9; A.B. Decl. ¶ 5; J.L-S. Decl. ¶¶ 12-13. However, despite the best and ongoing efforts of their families, the Children are not receiving the authorized services that Defendants have determined are necessary to treat and ameliorate their conditions. M.D. Decl. ¶¶ 4-6; C.B. Decl. ¶¶ 37, 41-42; S.S. Decl. ¶¶ 15-17; C.W. Decl. ¶ 5, 9; G.T. Decl. ¶¶ 7, 9, 13; M.S. Decl. ¶ 6; A.B. Decl. ¶¶ 4, 7, 10; M.A. Decl. ¶¶ 15; J.L-S. Decl. ¶¶ 11. Defendants are fully aware that Plaintiff Children do not receive nearly the amount of care that they require. M.D. Decl. ¶¶ 8; S.S. Decl. ¶ 17; C.W. Decl. ¶ 7; M.S. Decl. ¶ 9; A.B. Decl. ¶ 8; M.A. Decl. ¶¶ 9-10; J.L-S. Decl. ¶ 15. Merely authorizing coverage of EPSDT-mandated services for Plaintiff Children without actually arranging for the delivery of those mandatory services is insufficient under the EPSDT mandate. Accordingly, Plaintiffs are likely to succeed on their EPSDT claim.

2. Missouri Likely Violates the ADA and Section 504 of the Rehabilitation Act.

The ADA prohibits public entities from discriminating against persons with disabilities:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Section 504 of the Rehabilitation Act similarly prohibits recipients of federal funds from discriminating based on disability. 29 U.S.C. § 794(a). Title II of the ADA and Section 504 are typically read together. See Folkerts v. City of Waverly, Iowa, 707 F.3d 975, 983 (8th Cir. 2013).

One form of disability discrimination is a violation of the "integration mandate," which prohibits discrimination in the form of unjustified segregation of persons with disabilities. Steimel

v. Wernert, 823 F.3d 902, 910 (7th Cir. 2016) (citing Olmstead, 527 U.S. at 597-603). As specified in regulations, the integration mandate requires Defendants to administer their services and programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities. See 28 C.F.R. § 35.130(d) (ADA); 28 C.F.R. § 441.51(d) (Rehabilitation Act). The integration mandate protects individuals like the Children who are at risk of institutionalization due to Defendants' failure to provide community-based services. See Steimel, 823 F.3d at 911; Pashby v. Delia, 709 F.3d 307, 322 (4th Cir. 2013); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1185 (10th Cir. 2003); A.H.R., 2016 WL 98513, at *15 (collecting cases); Hiltibran, 2010 WL 6825306, at *4 (W.D. Mo. Dec. 27, 2010) (finding plaintiffs at substantial risk of institutionalization in violation of integration mandate where "families admit that it is likely that they may have to place Plaintiffs in nursing homes to ensure that they receive" services).[2]

Defendants, therefore, have an affirmative "obligation to provide medically necessary services, such as the private duty nursing services at issue here, in the most integrated setting appropriate to Plaintiffs' needs." A.H.R., 2016 WL 98513, at *14; see also Bennett-Nelson v. Louisiana Bd. of Regents, 431 F.3d 448, 454–55 (5th Cir. 2005) ("[B]oth the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals."). Under the test set out in Olmstead, a state must provide community-based treatment for a person with disabilities when: (1) treating professionals have found that the person can handle and benefit from a community setting, (2) the person wants to be in the community setting, and (3) community-based services can be reasonably

[2] See also U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C. at question 6, available at https://www.ada.gov/olmstead/q&a_olmstead.htm#_ftnref14 (Exh. 13).

accommodated taking into account the resources of the state and the needs of others with comparable disabilities. Olmstead, at 601-03.

Plaintiff Children are qualified individuals with disabilities, who have been unnecessarily institutionalized, are cycling in and out of institutionalization, and/or are at serious risk of institutionalization, due to Defendants' failure to provide in-home nursing services. M.D. Decl. ¶ 11; C.B. Decl. ¶¶ 43-45; S.S. Decl. ¶ 22; C.W. Decl. ¶¶ 6, 11; G.T. Decl. ¶¶ 6-8, 11, 18; M.S. Decl. ¶ 12; A.B. Decl. ¶¶ 11-12, 14; M.A. Decl. ¶¶ 12, 14, 19; J.L-S. Decl. ¶¶ 24; cf. Cleveland Decl. ¶¶ 17, 20 (Exh. 14). The Children's caretakers have attested that, although the Children and their families want them to remain at home, they are struggling to continue to provide the care the Children need and that one accident or parental absence could mean disaster. See also Batiste Decl. ¶ 11; Cleveland Decl. ¶¶ 21-26. Similarly, Drs. Cole and Foster testified that the lack of private duty nursing at home forces families to admit children to the hospital to receive the care. Cole Decl. ¶¶ 12, 15; Foster Decl. ¶ 7. And, once children are hospitalized—for any reason—they are often forced to remain in the hospital or another facility for months. Cole Decl. ¶¶ 10, 14.

Moreover, Plaintiff Children meet three Olmstead elements. The Children and their families want them to remain at home. M.D. Decl. ¶ 11; C.B. Decl. ¶ 37; S.S. Decl. ¶¶ 12, 21; C.W. Decl. ¶ 11; G.T. Decl. ¶ 5, 17; M.S. Decl. ¶ 12; A.B. Decl. ¶¶ 11, 13-14; M.A. Decl. ¶ 19; J.L-S. Decl. ¶ 24. Defendants have found in-home private duty nursing care appropriate based on the recommendations of the Children's treating providers.[3] Finally, Defendants can reasonably accommodate the relief Plaintiffs seek, namely to provide the in-home nursing that Defendants have authorized. Defendants have many tools at their disposal to accomplish this, including case

[3] Private duty nursing services are prior authorized by the Bureau of Special Health Care Needs after a finding, with the support of a treating physician, that the services are medically necessary. See MO HealthNet Division Provider Manual, §§ 13.08-13.11A.

management services, which cover providing referrals, scheduling appointments, and monitoring to ensure that needed services are in fact being provided. See Doc. 1, Compl. ¶¶ 38, 87-88; 42 C.F.R. § 440.169(d)(1)-(4).

Thus, Plaintiffs are likely to succeed on their ADA and Rehabilitation Act claims. See A.H.R., 2016 WL 98513, at *5 (holding children who were not receiving all authorized hours of in-home nursing services had shown likelihood of success on ADA claim because they would likely be forced into institutional settings if the nursing services were not provided within a short period of time); Brantley v. Maxwell-Jolly, 656 F. Supp. 2d 1161, 1170 (N.D. Cal. 2009) (enjoining reduction of services that would place plaintiffs at serious risk of institutionalization).

V. THE PUBLIC INTEREST FAVORS THE ISSUANCE OF INJUNCTIVE RELIEF.

When issuing injunctive relief against a government body, the Eighth Circuit has found that enforcement of the federal law is necessarily in the public interest. See Glenwood Bridge, Inc. v. Minneapolis, 940 F.2d 367, 372 (8th Cir. 1991); see also Lankford, U.S. Dist. LEXIS 14950* at 13; Heather K. v. Mallard, 887 F. Supp. 1249, 1261 (N.D. Iowa 1995) (collecting Eighth Circuit decisions). "Congress and the Missouri General Assembly expressed the public interest by enacting the Medicaid program in the first place." Nemnich, 1992 WL 178963 at *4. It is always in the public interest to prevent a violation of federal law.

Additionally, the families of the Children, as Medicaid beneficiaries, by definition have very limited financial resources. Judicial intervention to protect these vulnerable families benefits the public. Defendants' actions have taken an immeasurable toll on the families of Plaintiffs, who would benefit greatly from preliminary injunctive relief. Foster Decl. ¶¶ 11-13. The father of C.T. lost his job and was unable to visit a dying family member before she passed. G.T. Decl. ¶¶ 15-16. S.A.'s mother and R.R.'s grandmother also had to stop working due to the failure of Defendants

to arrange private duty nursing services. M.A. Decl. ¶ 18; M.D. Decl. ¶ 7. Plaintiffs' families report overwhelming guilt, anxiety, financial strain, and lack of sleep due to the lack of nursing services. M.D. Decl. ¶¶ 10-11; C.B. Decl. ¶¶ 39, 45, 47; S.S. Decl. ¶¶ 18-21; C.W. Decl. ¶ 8-11; G.T. Decl. ¶¶ 15-17; M.S. Decl. ¶ 11; A.B. Decl. ¶ 14; M.A. Decl. ¶¶ 15-16, 19; J.L-S. Decl. ¶¶ 19-23. The public interest favors interim enforcement of the Medicaid Act and the integration mandate of both the ADA and the Rehabilitation Act.

CONCLUSION

Plaintiffs respectfully ask the Court to grant their motion for a preliminary injunction.

Date: March 16, 2020

Respectfully submitted,

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Certificate of Service

I, Joel Ferber, hereby certify that Plaintiffs will effect service of a true and correct copy of Plaintiffs' Suggestions in Support of Motion for Preliminary Injunction on Defendants Tidball and Missouri Department of Social Services via a process server.

Date: March 16, 2020 /s/ Joel Ferber