UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

S.J., et. al.,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 2:20-CV-04036 MDH
	)	
JENNIFER TIDBALL, et. al.,	)	
	)	
Defendants.	)	

DEFENDANTS JENNIFER TIDBALL AND MISSOURI DEPARTMENT OF SOCIAL SERVICES OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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COME NOW Defendants Jennifer Tidball, in her official capacity as an Acting Director of the Department of Social Services, and the Department of Social Services ("DSS"), by and through their undersigned counsel, and for their Opposition to Plaintiffs' Motion for Preliminary Injunction state as follows:

INTRODUCTION

Plaintiffs filed their Motion for Preliminary Injunction alleging Defendants violate provisions of the Medicaid Act by failing to comply with the Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") requirements to provide case management services and "arrange for" private duty nursing services ("PDN") services in Plaintiffs' homes. Plaintiffs also claim Defendants violate the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504") by failing to arrange for PDN services. There are 9 individual Medicaid beneficiaries suing through their next friends who are family members or custodians of the children. Plaintiff The Caring for Complex Kids Coalition purports to be an association of parents and caregivers of children with complex medical issues, but insufficient details of its composition are pled to know. This unincorporated association alleges that the majority of the

children whose parents and caregivers who are members have a need for PDN. The organization alleges that the unincorporated association advocates for policies and practices to improve the lives of medically complex children, "including access to Medicaid-covered" PDN services. (Doc. 1, par. 21).

MO HealthNet Division ("MHD") is a division of the Department of Social Services and it administers Medicaid health care coverage for eligible Missourians. *See* § 660.010.1, RSMo. MO HealthNet Division is an agency of the State of Missouri and a division of the Department of Social Services. § 208.201, RSMo. DSS has a cooperative agreement with The Department of Health and Senior Services ("DHSS") relating to the administration of Missouri Medicaid covered PDN services.

Plaintiffs' Motion for Preliminary Injunction seeks an order from this court "requiring Defendants to take immediate action to arrange for the necessary in-home nursing services during the pendency of this case." (Doc. 24, p. 2). For the reasons below, Plaintiffs' Motion for Preliminary Injunction should be denied.

ARGUMENT

I. STANDARD FOR PRELIMINARY INJUNCTION:

Preliminary injunctive relief is an "extraordinary remedy." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) (internal citations omitted). See Fed. R. Civ. P. 65. The party seeking injunctive relief bears the burden of proving that it should be granted. *Watkins Inc., 346 F.3d at 844 (citing Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987)).

"There are two types of preliminary injunctions: mandatory injunctions, which require a party to affirmatively take an action, and prohibitory injunctions, which require a party to refrain from a given action." *Gerhart v. United States Department of Health & Human Services***,** 2016

WL 8839016, p. 5, (U.S.D.C. S.D. Iowa, 2016) *citing* 11A Wright & Miller § 2942; *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996). "The burden of demonstrating that a preliminary injunction is warranted is a heavy one where, as here, granting the preliminary injunction will give plaintiff substantially the relief [she] would obtain after a trial on the merits." *NTD I, LLC v. Alliant Asset Management Company, LLC*, 337 F.Supp.3d 877, 884 (E.D. Mo., 2018) *citing Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991). *See also Blankenship v. Chamberlain*, 2008 WL 4862717, at *2 (E.D. Mo. Nov. 7, 2008) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)) (In seeking a mandatory injunction that disrupts the status quo, the plaintiff "must demonstrate not only that the four requirements for a preliminary injunction are met but also that they weigh heavily and compellingly in [her] favor."). Plaintiffs here request an order to require Defendants to take action so they are seeking a mandatory injunction. The burden for a mandatory injunction requires the movant show that the four requirements weigh heavily and compellingly in movants favor. Plaintiffs' cite to *PCTV Gold, Inc. v. SPEEDNET*, LLC, 508 F.3d 1137, 1143 (8th Cir. 2007) for its rejection of the proposition that a party seeking a preliminary injunction must show a greater the 50% likelihood of prevailing at a trial on the merits. (Doc. 24, p. 7). A movant still must meet all four requirements and show that they have a reasonable likelihood of prevailing on the merits and in a case like this where plaintiff is seeking by way of mandatory injunction the very relief movant would get at trial the burden is high.

II. PLAINTIFFS CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Plaintiffs lack standing to sue.

"Cases have established that the "irreducible constitutional minimum" of standing consists of three elements." *SPOKEO, INC. v. Thomas Robins*, 136 S. Ct. 1540, 1547 (2016) citing *Raines*

v. Byrd, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L.Ed.2d 849 (1997) citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *SPOKE, Inc.*, 136 S. Ct. at 1547 *(*citations omitted*.)* Plaintiffs have the burden of establishing these elements. *Id.* (citations omitted.)

To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S., at 560, 112 S. Ct. 2130 (internal quotation marks omitted). Plaintiffs' pleadings have not established an injury in fact. The provisions at issue in this case are sections of the Medicaid Act concerning state plans for medical assistance. The Eighth Circuit has previously decided that the provisions of the Medicaid Act directed at the State Plan required to become a state participating in Medicaid, did not establish a private right of action. *Janes Does, et al v. Gillispe*, et. al, 867 F.3d 1034, 1041 (8th Cir. 2016). "'A statute that speaks to the government official who will regulate the recipient of federal funding' does not confer the sort of '*individual* entitlement' that is enforceable under § 1983." *Gonzaga*, 536 U.S. at 287, 122 S. Ct. 2268 (quoting *Blessing*, 520 U.S. at 343, 117 S. Ct. 1353)." *Id.* "Even where a subsidiary provision includes mandatory language that ultimately benefits individuals, a statute phrased as a directive to a federal agency typically does not confer enforceable federal rights on the individuals." *Id.* Plaintiffs do not have a private right of action under Medicaid so they cannot show an injury in fact meaning they lack standing and this court lacks jurisdiction. Further, since Plaintiffs lack standing to bring suit, they also lack standing to pursue the requested Preliminary Injunction. Plaintiffs' Motion for Preliminary Injunction should be denied.

Assuming, arguendo, that plaintiffs had authority to bring this cause of action, Plaintiffs' speculative and hypothetical concern about possible future harm is not sufficient to confer Article III standing. As the United States Supreme Court stated, "[a]llegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be 'certainly impending' to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citations omitted). Plaintiffs herein have alleged that their purported injuries under the Medicaid Act are the speculative possibility of future hospitalization or institutional placement. Plaintiffs speak extensively in their declarations about injury to the family unit and to stress on parents and siblings because of how involved the family must be with the care of their medically complex child. While this is unfortunate, Medicaid is designed to benefit the individual beneficiary with individualized medical care and not redress issues of the family as a whole. While generally benefiting the whole family is a bonus of providing services to the medically complex child, the family is not is not entitled to benefits, only the medically complex child is. The discussions of the family issues that might arise due to the lack of private duty nursing should be disregarded for purposes of determining if Plaintiffs are able to show a threatened injury which "must be 'certainly impending' to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citations omitted).

Further, Plaintiffs cannot show an injury in fact that is "fairly traceable to the challenged conduct of the defendant[s]." *SPOKE, Inc*, 136 S. Ct. at 1547 *(*citations omitted.) There exists a shortage of nurses willing to provide private duty nursing in Missouri. (Ex. A, par. 10, Declaration of Dr. Kling). DSS, MO HealthNet, and acting Director Jennifer Tidball have no control over the number of nurses available and willing to perform private duty nursing. (Ex. A, par 10, Declaration of Dr. Kling.) In addition, there are many variables that impact an individual's ability to obtain

PDN, including the number of qualified nurses in the state and geographic area where a recipient lives, the number of such nurses willing to provide home care, the family dynamic within the home and the conditions of the home. It is pure speculation that a judicial decision will alter any individual's ability to obtain and keep PDN services given the impact of all of these variables. Because of the current shortage of nurses willing to perform private duty nursing in Missouri, and the many other variables that impact a particular individuals ability to obtain private duty nursing, Plaintiffs cannot show that their inability to obtain private duty nurses is fairly related to Defendants' conduct. Plaintiffs do not claim that PDN services are sufficiently available in the state for all Medicaid patients or even non-Medicaid patients. Plaintiffs fail to show that the inability to obtain PDN services is fairly traceable to the specific conduct of the Defendants.

Plaintiffs cannot show a reasonable likelihood of the alleged injury being redressed by a favorable judicial ruling. First the provisions of the Medicaid Act that Plaintiffs claim was breached by defendants is Section 1396a(a)(10)(A), which states that the State plan for medical assistance must "provide for making medical assistance available …". "The term 'medical assistance' means payment of part or all of the cost of the following care and services or the care and services themselves, or both . . ." 42 USC 1396d(a). PDN services are included in the care and treatment defined in the statute. 42 USC 1396d(a)(8). These provisions of the Medicaid Act show that Defendant DSS is permitted to make medical assistance available by paying for part or all of it, or providing the care and services or both. It does not require that the defendant do all three. In statutory construction, words are generally given their ordinary meaning and the term "or" is a disjunctive term. *See Brickner v. Federal Deposit Ins. Corp., 747 F.2d 1198, 1203 (8th Cir. 1984). See also Quindlen v. Prudential Ins. Co. of America*, 482 F.2d 876, 878 (5th Circuit 1973) (As a general rule, the use of the disjunctive in a statute indicates alternatives and requires that those

alternatives be treated separately.) Plaintiffs do not allege that the ordinary rules of statutory construction should be disregarded so that the statute means "and" where it says "or" and to do so would fly in the face of the words of the statute it seeks to enforce. Because of the word "or", plaintiffs cannot show a violation of the Section 1396a(a)(10)(A). Significantly, Plaintiffs do not claim MHD failed to pay for appropriate claims for PDN services.

Plaintiffs are not likely to prevail on their ADA and Section 504 of the Rehabilitation Act. To state a claim under 42 U.S.C. § 12132 a plaintiff must show that: "1) [s]he is a person with a disability as defined by statute; 2) [s]he is otherwise qualified for the benefit in question; and 3) [s]he was excluded from the benefit due to discrimination based upon disability." *Randolph v. Rogers*, 170 F.3d 850, 858 (8th Cir. 1999). Similarly, to state a claim under Section 504 of the rehabilitation act, a plaintiff must show "that he or she (1) is a qualified individual with a disability; (2) was denied the benefits of a program or activity of a public entity receiving federal funds; and (3) was discriminated against based on her disability." *M.Y., ex rel., J.Y. v. Special School Dist. No. 1*, 544 F.3d 885, 888 (2008). Plaintiffs cannot show that defendants denied or excluded them from benefits. Each of the Plaintiffs have alleged that they were granted PDN services though they were dissatisfied with the amount of the benefit they received.

Further, in order to succeed, plaintiffs must show that the EPDST or PDN service benefits were not provided based on disability discrimination. Plaintiffs do not allege that defendants were providing more EPDST or PDN Services to other Medicaid recipients. Defendants do not deny that plaintiffs qualify as disabled, but plaintiffs have done nothing to establish that any alleged deficiencies in benefits was based on disability discrimination by Defendants. Simply because plaintiffs do not receive PDN services and they are disabled does not warrant the speculative conclusion that the inability to receive that service is due to disability

discrimination on the part of defendants. .For these reasons, plaintiffs are not likely to prevail on the merits.

Further, in plaintiffs' Complaint they concede the difficulty of obtaining PDN services for many reasons other than defendants' conduct. Nurses often leave PDN employment to go to work at a hospital. (Doc. 1, par. 75). The PDN providers are often so short-staffed that they elicit the assistance of clients to help recruit nurses. PDN nurses get sick and become pregnant so they take medical and maternity leave, (Doc. 1, par. 74, 182) Nurses come to work one time and for whatever reason do not return to the home, (Doc. 1, par. 181) These admissions tend to belie Plaintiffs tenuous arguments that Defendants' alleged discrimination caused the purported failure to obtain PDN services.

For this and the other reasons set forth above, Plaintiffs lack standing to sue and therefore Plaintiffs' Motion for Injunctive relief should be denied.

B. Plaintiffs Misinterpret and Ignore Pertinent Portions of The Medicaid Act.

Plaintiffs cite the same law as defendants, but they reach different conclusions. Section 1396a(43)C states that a participating state's Medicaid plan must provide "for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services". This section also provides the Defendants options as to how to comply. One of those options is referral to appropriate agencies which is exactly what DHSS does through the Bureau of Special Health Care Needs. (Ex. B, p.1, Declaration of Paula Darr). DSS and DHSS have a cooperate agreement pursuant to which DHSS provides services to Medicaid. (Ex. B, p. 4, Declaration of Paula Darr) It provides a list of home nursing providers in the area where the child resides for beneficiary or his family to call. (Ex. B, p. 17, Declaration of Paula Darr). From this list, the family chooses the provider they wish to engage. (Ex. B, p.18, Declaration of Paula Darr). If the family then contacts the Bureau again to

report difficulties, the Bureau responds based on what the caller reports. (Ex.B, par. 19, Declaration of Paula Darr). The Bureau may send the names of more provider names for the family to contact. (Ex. B, par. 19, Declaration of Paula Darr). The Bureau has approximately sixty PDN providers associated with provider agreements. (Ex. C, p. 19, Declaration of Glenda Kremer). In addition, Missouri Medicaid has three managed care vendors: Home State Health, United Health Care, and Missouri Care who provide PDN services for beneficiaries within their organizations.. (Ex. D, p. 2, Declaration of Rebecca Logan). The Bureau has approximately 600 medically complex children in Missouri needing PDN care at any given time. The current rate MO HealthNet uses to reimburse qualified agencies for PDN services is $8.36 for each 15 minute interval of care. (Ex. E, par. 5, Declaration of Nate Percy) This rate is approved by the Center for Medicaid and Medicare Support ("CMS") in Missouri's State Plan and is appropriated by the Missouri legislature. (Ex. E, par. 5, Declaration of Nate Percy).

Plaintiffs argue that DSS must do more than it does to meet the requirements of the Medicaid provisions for early and periodic screening, diagnostic, and treatment services as it relates to PDN services, but Plaintiffs' argument incorrectly assumes that there is something more that can be done by DSS. It discounts the many variables that are not under Defendants' control that impact the ability to arrange for PDN services. (Ex.B, par.27 and 28, Declaration of Paula Darr.) Plaintiffs' argument also ignores other equally important elements of Medicaid. Title 42 U.S.C. § 1396a(a)(23) (1976 ed., Supp. II) gives recipients the right to choose among a range of *qualified* providers, without government interference. *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980). By providing the list of qualified PDN entities to Plaintiffs and their families, DSS facilitates the exercise of this right.

Plaintiffs' arguments that words "provide for" in the statute create a duty for Defendants to essentially guarantee that each child entitled to a service listed in 42 USC 1392a receives it without involvement of their family, is an overly zealous and unreasonable interpretation of the statute. The statutes cited by plaintiffs do not use mandatory language and do note create the burden suggested by plaintiffs. Further, the only cases cited by Plaintiff to support this interpretation are from other states, which is inappropriate here since this court has rarely found the Medicaid Act to provide a private cause of action.

Plaintiffs are not likely to win their case on the merits; therefore, the preliminary injunction should be denied.

III. PLAINTIFFS CANNOT SHOW THEY WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT ISSUED.

The majority of the Plaintiffs reside at home where Plaintiffs and their caregivers have chosen to life. The Plaintiffs are not institutionalized. There is a distinction between hospitalization, which is meant to deal with acute medical situations, and institutionalization, which is the transfer of a person from their home to a permanent or long-term facility. (Ex. , par. 8, Declaration of Dr. Kling.) Plaintiffs do not allege that there is a current need for the Plaintiffs to be hospitalized or institutionalized in the Complaint or in their Motion for Injunctive Relief, but Plaintiffs do allege a ***fear of the risk*** of hospitalization or institutionalization. Plaintiffs do not allege any specific injuries which are occurring to the Plaintiffs due to the lack of PDN services. The bulk of the injuries alleged are injuries to[eople other than the medically complex child entitled to the benefits. To the extent that Plaintiffs allege that they fear a future hospitalization, all families with medically complex children have that fear regardless of whether there are PDN services in the home or not and regardless of whether they are Medicaid beneficiaries or not. (Ex. A, par. 13, Declaration of Dr. Kling.) The sad truth is that even with PDN in the home, not all

hospitalizations will be avoided. (Ex. A, par. 7, Declaration of Kling.) And equally as true is the fact that caregivers and families of medically complex children have certain stressors that exist regardless of whether the child has PDN or not. (Ex. A, par. 7, Declaration of Dr. Kling.)

Plaintiffs seem to imply that every hospitalization they have encountered was due to a lack of nursing care, yet they offer no evidence to support that argument. A lay person is not capable of determining the medical cause of the condition resulting in hospitalization. The speculation of the family members and guardians of the Plaintiffs concerning the cause of a hospitalization is not probative and should not be used as a basis for imposing an injunction on Defendants. Plaintiffs offer testimony without proper foundation that some hospitalizations have been longer than they otherwise would have been due to the lack of PDN services. If a beneficiary and his or her family make the decision along with the physician to keep a child in the hospital longer rather than transferring the child to an intermediate facility or home with the family, Defendants have no role in that decision. (Ex. A, par. 7, Declaration of Dr. Kling.)

Plaintiffs cannot show irreparable harm if the injunction is not entered since the damages they allege are speculative. To the extent any of the alleged risks might occur, Plaintiffs plaintiff cannot tie them to the lack of nursing care because medically at risk children are at risk of hospitalization with or without PDN services. (Ex. A, par. 7, Declaration of Dr. Kling.) In other words, Plaintiffs cannot causally connect the risks to Defendants' conduct.

Plaintiffs cite cites three cases to support their claim that a risk of medical harm in any situation is sufficient to obtain a preliminary injunction, but that conclusion is not true for every case involving a risk of medical harm. In *Hestdalen v. Corizon Corrections Healthcare*, where plaintiff was seeking an injunction to obtain an ENT evaluation, the court held that when asserting irreparable harm "a party must show that the harm is certain and great and of such imminence that

there is a clear and present need for equitable relief." *Hestdalen v. Corizon Corrections Healthcare*, 2018 WL 6199570, *2 (Mo. D.C. E.D. 2018) citing *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012). The Court in Hestdalen found "plaintiff has failed to allege an irreparable harm that 'is certain and great and of such imminence' that there is a present need for equitable relief." Hestdalen at *3 citing *S.J.W.*, 696 F.3d at 778. There is no hard and fast rule that irreparable harm is a given simply because the injunction has to do with medical care. Hestdalen shows that injunctions related to health care can and sometimes should be denied.

Plaintiffs also cite three cases for the proposition that unnecessary institutionalization constitutes irreparable harm. These cases are different than what is at issue in the present case. Here, the fear most mentioned is the risk of hospitalization. Such risks are distinguishable from the cases cited by Plaintiffs which all involved moving people from community living situations into nursing homes or other permanent institutions. Further, the cases cited by plaintiffs were not related to PDN issues, but budget cuts and other administrative matters. The Plaintiffs herein are residing at home and the families have been coping without the PDN and keeping their families together for years so there is no reason to believe this situation is likely to change suddenly while this case is pending. Plaintiffs point to no condition the children have that makes the short time this case will be pending different than the months and sometimes years they claim to have been dealing with the PDN services shortage.

Plaintiffs claim that they are simply seeking to enforce the law. Plaintiffs seek more than the enforcement of the Medicaid Act. Plaintiffs when there is no hard evidence that the way DSS and Mo HealthNet is the cause of the problem which plaintiffs wish to remedy. Plaintiffs seek to have their interpretation of certain provisions of the act imposed on the Defendants in the form of

a mandatory injunction requiring that Defendants take immediate action to arrange for in-home nursing care during the pendency of this action. Plaintiffs assume that their potential harm is the result of Defendants acts, but they have made no pleadings showing that is the case. Other than asserting they cannot obtain PDN services as allocated, Plaintiffs offer no evidence their lack of services is causally connected to defendants' conduct. Plaintiffs do not offer this evidence because it does not exist.

IV. THE BALANCE OF THE EQUITIES DO NOT FAVOR PLAINTIFFS MORE THAN DEFENDANTS NOT DO THEY FAVOR THE DEFENDANTS.

Plaintiffs claim that the harm to them outweighs the potential harm to defendants, but this position is unwarranted. Defendants do not deny that there could potentially be harm to the plaintiffs while this is case is pending, but what the plaintiffs are essentially doing is asking this court to rule in their favor without a full hearing on the merits. The relief Plaintiffs seek from the preliminary injunction is the same relief they are seeking at trial which does case harm to defendants. Plaintiffs seek to have defendants subjected to a vague and indefinite order that simply requires defendants to immediately arrange for in home nursing services during the pendency of this suit. However, if that could happen it already would have. Defendants already have a Medicaid Plan in place that provides for the provisions of EPSDT services, including PDN services. (Ex. C, par.3, Declaration of Glenda Kremer). Defendants have provider agreements with approximately sixty PDN service providers. (Ex. C, par. 19, Declaration of Glenda Kremer). Defendants are aware of the shortage of private duty nurses in Missouri who are willing to work for Medicaid providers. (Ex. A, par.10, Declaration of Dr. Kling; Ex. B, p. 27 and 28, Declaration of Paula Darr; Ex. G p. 11, 12, 13, Declaration of Jennifer Tidball). Defendants have been working on changes to the regulations for PDN providers to increase the number of nurses available to provide PDN services, including allowing a Medicaid recipient

family member to become employed by a Medicaid PDN Provider to care for their family member and to allow graduate RNs and LPNs to nurses to provide private duty nursing. (Ex. F, par. 4 and 14, Declaration of Jessica Dresner.) Final approval of these new regulations will take several months as outlined in Exhibit F, Declaration of Jessica Dresner.) Defendants are doing all in their power to assist participants during the shortage of nurses willing to do PDN, but the shortage is beyond the control of Mo HealthNet and its associated entities. ((Ex. A, par. 14, Declaration of Dr. Kling; Ex G, p. 11, 12, and 13, Declaration of Jennifer Tidball.) Ordering defendants to find nurses willing to act as PDNs would not remedy the situation. There is a market shortage of nurses willing to be PDNs. Plaintiffs would reap no benefit from such an order due to the impossibility of defendants to comply.

V. The Public interest does not favor the issuance of an Injunction.

The defendants have not violated the Medicaid Act, the ADA or the Rehabilitation Act Section 504. Plaintiffs do not have standing to sue, and it is illogical to think that the public interest would be served by issuing an injunction in these circumstance.

CONCLUSION

Because Plaintiffs do not have standing, their Motion for Preliminary Injunction should be dismissed. Additionally, Plaintiffs' Motion for Preliminary Injunction should be dismissed because, even if this Court decides Plaintiffs have standing, they cannot show that they will likely prevail on the merits because Plaintiffs do not have a cause of action under the Medicaid Act because the Act provides for no private cause of action and Plaintiffs cannot show that Defendants discriminated against Plaintiffs on the basis of disability. Further, Plaintiffs allege only speculative harm in the Complaint and in their Motion for Preliminary

Injunction, which is insufficient to support an injunction. Because Plaintiffs' harm is speculative, it is not greater to than the potential injury to defendants from an Injunction indicating DSS is doing something improper.

Wherefore, for all of the reasons herein, Defendants Jennifer Tidball, in her official capacity as an Acting Director of the Department of Social Services, and the Department of Social Services pray that Plaintiffs' Motion for a Preliminary Injunction be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April 2020, a true and correct copy of the above and foregoing document was filed via the Court's electronic filing system which sent notice to the all counsel of record.

*/s/Mary L. Reitz*_____
Assistant Attorney General