UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

S.J., by and through her next friend, S.S.; et al.,	)	
Plaintiffs.	)	
v.	)	Civil Action No. 20-cv-4036
JENNIFER TIDBALL, in her official capacity as Acting Director of Missouri Department of Social Services, and MISSOURI DEPARTMENT OF SOCIAL SERVICES,	)	
Defendants.	)	

PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs are nine Medicaid-enrolled children, ranging in age from one to 18 years old, who are living with medically complex conditions (the Children) and Caring for Complex Kids Coalition (CCKC), an association of Missouri caretakers of children with medically complex conditions. Plaintiff Children have been diagnosed with disabling health conditions. They require skilled medical regimens for routine bodily functions such as breathing, eating, and moving. The Children's health care providers have determined that they need private duty nursing services. Defendants have agreed and authorized Medicaid coverage of these services. However, Defendants are failing to arrange for the services, and the Children are going without them. Without services, the Children are at risk of serious health complications. Sometimes, they require treatment for conditions or injuries that could have been prevented had the approved coverage been provided. Other times, their families are unable to fill in for the missing nursing hours, and the Children must go into institutional placements for necessary care.

To remedy these ongoing harms, Plaintiffs filed a Complaint bringing claims under three statutes specifically designed to protect them. First, is the Early and Periodic, Screening, Diagnostic, and Treatment (EPSDT) provision of the Medicaid Act, which requires the state Medicaid agency to "arrang[e] for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment" that a Medicaid-enrolled child needs. 42 U.S.C. § 1396a(a)(43)(C); id. at §§ 1396a(a)(10)(A), 1396d(a)(4)(B), 1396d(r)(5) (requiring coverage of listed services when necessary to "correct or ameliorate" a child's condition), and 1396d(a)(8) (listing private duty nursing as a covered service).

EPSDT is a "robust" benefit, designed to ensure that children actually receive the treatment that they need. Ctrs. for Medicare & Medicaid Servs. (CMS), *EPSDT-A Guide for States:*

Coverage in the Medicaid Benefit for Children and Adolescents, 1 (June 2014) (CMS, *EPSDT Guide*), Doc 24-12. "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. As a result,

> [t]he state must set standards to ensure that EPSDT services are provided consistent with reasonable standards of medical and dental practice. The state must also ensure that services are initiated within a reasonable period of time. . . . Because states have the obligation to "arrang[e] for . . . corrective treatment" . . ., a lack of providers does not automatically relieve a state of its obligation to ensure that services are provided in a timely manner

Id. at 32 (quoting § 1396a(a)(43)(C)). "The affirmative obligation to connect children with necessary treatment makes EPSDT different from Medicaid for adults. . . ." Id. at 5. See also Katie A., ex rel. Ludin v. Los Angeles Cty., 481 F.3d 1150, 1158 (9th Cir. 2007) (section 1396a(a)(43)(C) creates "an obligation [for states] to see that the services are provided when . . . that they are medically necessary for a child."); Salazar v. Dist. of Columbia, 954 F. Supp. 278, 330 (D.D.C.1996) (D.C.'s failure to ensure that EPSDT-eligible children receive treatment for health problems violated § 1396a(a)(43)(C)).

Plaintiffs also bring claims under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, which both prohibit discrimination based on disability. See 42 U.S.C. § 12132; 29 U.S.C. § 794(a). Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999), emphasizes that "[u]njustified isolation" is "properly regarded as discrimination based on disability" under the ADA. Id. at 597. The Olmstead Court found that states need to integrate people with disabilities into the community, addressing "two evident judgments" with this integration mandate: institutional placement of those who can be in the community "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," and institutional placement "severely diminishes the everyday life activities of

individuals, including family relations, social contacts . . . and cultural enrichment." Id. at 600-01. Thus, under the ADA, public entities have an obligation to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). These protections extend to individuals, like the Children, who are currently at serious risk of institutionalization. See Hiltibran v. Levy, 793 F. Supp. 2d 1108, 1116 (W.D. Mo. 2011); Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003) (noting that otherwise the ADA's "protections would be meaningless").

The ongoing deprivation of private duty nursing services violates each of these statutes. Moreover, the lack of medically necessary care and resultant harms to the Children's health easily satisfy the Article III standing requirements. The Children have a privately enforceable right for Defendant Tidball to arrange for these services under the EPSDT provisions, as courts, including the Eighth Circuit, have consistently found. And finally, the serious risk of unnecessary institutionalization that the Children face—whether in a hospital or any other facility—fits squarely within the theory of disability discrimination that the Supreme Court described in Olmstead. The Court should deny Defendants' Motion to Dismiss.

I. PLAINTIFFS HAVE ESTABLISHED STANDING UNDER ARTICLE III.

Defendants argue that the Court lacks jurisdiction because Plaintiffs cannot enforce the EPSDT provision. Defs.' Mem. in Support of Mot. to Dismiss, 5-8, Doc. 36. They also dispute standing under Article III. As discussed below, the Court should reject these arguments.

A. Defendants have confused jurisdiction and a cause of action.

Defendants have confused two distinct doctrines: constitutional standing and the availability of a cause of action. While constitutional standing implicates a court's subject-matter jurisdiction, "it is firmly established that . . . the absence of a valid . . . cause of action does not." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998); see also Davis v. Passman,

442 U.S. 228, 239 n.18 (1979) (explaining difference between jurisdiction and a cause of action); Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 934 (8th Cir. 2012) (cautioning courts to be "careful not to conflate the two"). Defendants' arguments about whether the EPSDT provision confers an enforceable right concern whether Plaintiffs have a valid cause of action under § 1983, Doc. 36 at 6-8, and do not implicate Plaintiffs' Article III standing or this Court's jurisdiction. See, e.g., Backer ex rel. Freedman v. Shah, 788 F.3d 341, 344 (2d Cir. 2015) (finding Plaintiff had constitutional standing, but that § 1396a(a)(19) was not privately enforceable).

B. The Children have established Article III standing because their ongoing injuries are traceable to Defendants' policies and practices.

"When a motion to dismiss is made on standing grounds the standing inquiry must . . . be done in light of the factual allegations of the pleadings." Sanzone v. Mercy Health, 954 F.3d 1031, 1046 (8th Cir. 2020) (alteration omitted). The Children allege they are not receiving the private duty nursing services that Defendant Tidball has found are medically necessary for them. Doc. 1 ¶¶ 105, 116-19, 127, 130, 145, 161, 173, 182, 209, 222. Without these services, they are at serious risk of significant adverse health consequences, even death. Id. ¶ 98, 110, 125, 138-39, 152, 159-60, 183, 197-200. These are not hypothetical concerns. Several Children have already suffered injuries and health complications due to the lack of nursing. Id. ¶¶ 116-17, 210, 217, 221. Another child has died. See Doc. 24-10. To avoid these harms, the Children may resort to living in institutional placements to receive care. Doc. 1 ¶¶ 114-15, 118, 154-55, 166, 172-75, 189, 224.

These allegations establish several concrete and imminent injuries. *First*, the Children are not receiving the services—private duty nursing—that their health care providers and Defendants have found are necessary to correct or ameliorate their medically complex conditions. That is actual, concrete, and ongoing harm. See, e.g., NB ex rel. Peacock v. D.C., 682 F.3d 77, 83 (D.C. Cir. 2012) ("[V]iolations that threaten an individual's ability to obtain Medicaid coverage of

prescription medications[ ]satisfy the injury element of constitutional standing."). *Second*, the Children are "exposed to imminent harm arising from allegedly being improperly denied necessary medical treatment for a serious, ongoing condition." See Middlebrooks v. United States, 8 F. Supp. 3d 1169, 1177 (D.S.D. 2014). *Third*, being at risk of institutionalization is itself the invasion of a legally protected interest sufficient to support standing. See Steimel v. Wernert, 823 F.3d 902, 914 (7th Cir. 2016). Contrary to Defendants' implication, Doc. 36 at 8, "a plaintiff need not show that institutionalization is imminent or inevitable to have standing." Ball by Burba v. Kasich, 244 F. Supp. 3d 662, 681 (S.D. Ohio 2017); see also Fisher, 335 F.3d at 1181. *Fourth*, although they need not make such a showing, Plaintiffs have alleged that they are imminently facing institutionalization. Doc. 1 ¶¶ 114-15, 118, 154-55, 166, 172-75, 189, 224. As this district court has already found, plaintiffs face a substantial risk of institutionalization where, as here, "families admit that it is likely that they may have to place Plaintiffs in nursing homes to ensure that they receive" services. Hiltibran, 2010 WL 6825306, at *4; see also M.R. v. Dreyfus, 697 F.3d 706, 733 (9th Cir. 2012) ("predictable consequences" from loss of services is to "put Plaintiffs at serious risk of institutionalization").

Plaintiffs also adequately allege that these harms are traceable to Defendants and will be redressed by a favorable ruling. Plaintiffs allege that under the EPSDT provision, Defendant Tidball has failed to take necessary affirmative steps to arrange for the services that she has determined the Children need and that these failures are harming them. Doc. 1 ¶¶ 85-90, 107, 130-31, 148, 163, 186, 219. They further allege that Defendant's policy and practice of simply providing a list of home health agencies and leaving it to families to search on their own for nurses is insufficient. Doc. 1 ¶¶ 78, 107, 148, 163, 216. Compare Doc. 36 at 3 (arguing that all Defendant needs to do is approve and pay for care and provide plaintiffs with a list of nurses) with O.B. v.

Norwood, 838 F.3d 837, 840 (7th Cir. 2016) (affirming preliminary injunction and criticizing state's practice of leaving "the search [for private duty nurses] to be conducted by parents," resulting in "painfully protracted search[es]"). Moreover, Plaintiffs allege that Defendant's policies restrict the availability of nurses who are willing to participate in the Medicaid program. Doc. 1 ¶¶ 73, 76-84, 91-92, 164, 172, 184. While Defendants may ultimately dispute these allegations at summary judgment or trial, the Court must accept them as at this stage. See, e.g., Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv., 901 F.2d 673, 677 (8th Cir. 1990) ("In determining whether traceability and redressability are present we do not review the facts to see if appellants have proven their allegations."). The Children have adequately alleged ongoing harm and imminent risk of injury traceable to Defendants' policies and practices.[1]

C. CCKC has Organizational Standing.

Contrary to Defendants' claim, Doc. 36 at 12-13, CCKC's allegations satisfy the standing requirements. The Supreme Court has set out a three-part test for deciding whether a "traditional voluntary membership organization," like CCKC, has standing: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. Apple Advert. Comm'n, 432 U.S. 333, 342-43 (1977).

CCKC easily meets these requirements: M.S. has filed this suit as next friend of her grandchild and is the legal guardian of T.S. Doc. 1 ¶ 16. M.S. is a member and President of CCKC.

[1] Defendants attempt to shift blame to the Bureau of Special Health Care Needs, a sub-division of Department of Health and Senior Services. Doc. 36 at 2-3, 9. But the Department of Social Services (DSS) is the single-state Medicaid agency. See Compl. ¶¶ 23, 27-28; Doc. 39-7, ¶ 2. While DSS may delegate some tasks to other entities, as the single-state agency, it retains ultimate responsibility for ensuring compliance with the Medicaid Act. 42 U.S.C. § 1396a(a)(5); see also Katie A., 481 F.3d at 1159.

Id. ¶ 21. Like M.S., CCKC's other members are caretakers of children with medically complex conditions. CCKC challenges statewide practices that deprive Medicaid-enrolled children the private duty nursing services that Defendants have determined they need. The request for prospective injunctive and declaratory relief in this case is, thus, not individualized and fits squarely within CCKC's mission to "advocate for policies and practices that will improve the lives of medically complex children in Missouri, including access to Medicaid-covered private duty nursing services." Doc. 1 ¶ 21. This is sufficient to establish CCKC's standing. See, e.g., Kuehl v. Sellner, 887 F.3d 845, 851 (8th Cir. 2018) (finding second prong met based on organization's mission statement); see also International Union v. Brock, 477 U.S. 274, 287 (1986) (holding that Hunt's third prong bars suits for damages and union had standing because its case seeking injunctive relief did not require participation of individual members notwithstanding "unique facts" of each member's claim).

Defendants assert that CCKC must do more, including providing details regarding the location, composition, and specific health conditions of all members. Doc. 36 at 13 (citing Ass'n of Indep. Gas Station Owners v. QuikTrip, Inc., 2012 WL 2994079 (E.D. Mo. 2012)). To the extent Defendants suggest that CCKC must identify *all* members, that is incorrect. It is sufficient to show that "any one of them," would have standing. Hunt, 432 U.S. at 342. Further, Defendants ignore CCKC's allegations about its members: all are Missouri residents, who are parents or caretakers of children with medically complex conditions, the majority of whom are enrolled in Medicaid and are not receiving the private duty nursing that Defendants have found they need. Doc. 1 ¶ 21.

Additional details about CCKC's members are not relevant to the nature of the claim or the group's purpose. In QuikTrip, the court considered whether an association of gas station owners had standing to challenge a purported "price war" in the St. Louis Metro Area. The

association's standing faltered because it did not specify "what general interests its organization seeks to serve" or even whether its members were in the area affected by the price war. QuikTrip, 2012 WL 2994079, at *3. Without that, the court could not evaluate whether the interests pursued in the litigation were germane to the association's purpose. Here, CCKC identifies its general interest in the Complaint and describes how its members are affected by Defendants' challenged conduct. Doc. 1 ¶ 21. That is sufficient for purposes of CCKC's standing.

II. PLAINTIFFS HAVE THE RIGHT TO ENFORCE THE EPSDT PROVISION TO REQUIRE DEFENDANT TIDBALL TO ARRANGE FOR THE PRIVATE DUTY NURSING SERVICES SHE HAS FOUND ARE NECESSARY.

A. The EPSDT Provision of the Medicaid Act is privately enforceable.

As Defendant Tidball correctly notes, Blessing v. Freestone, 520 U.S. 329, 340 (1997), establishes the test for determining whether a particular statutory provision gives rise to a federal right under 42 U.S.C. § 1983. See Doc. 36 at 11-12. Under the test, courts evaluate three factors: First, Congress must intend the provision in question to benefit the plaintiff; second, the right contained in the provision must not be so "vague and amorphous" that its enforcement would strain judicial competence; third, the statute must unambiguously impose a binding obligation on the state. Id. at 340-41 (citations omitted). As the Eighth Circuit has noted, the Supreme Court clarified the first prong in Gonzaga Univ. v. Doe, 536 U.S. 2743, 284 (2002), finding that Congress must use unambiguous "rights-creating" language. See Midwest Foster Care and Adoption Ass'n v. Kincade, 712 F.3d 1190, 1196-97 (8th Cir. 2013).[2]

[2] Midwest Foster Care held care providers could not enforce certain subsections of the Child Welfare Act, concluding under the first Blessing prong that the statute did not "speak directly to the interests of Providers," 712 F.3d at 1197, and that the subsections were part of a provision that triggered "funding prohibitions," id. at 1201-02 (contrasting Medicaid provision at issue in Wilder). Here, by contrast, Plaintiffs are Children who are not getting services the EPSDT statute requires, and the provision they seek to enforce requires the state to arrange for those services.

Blessing instructs plaintiffs to plead their complaints in "manageable analytic bites" and courts to determine whether "each separate claim" satisfies the test. Blessing, 520 U.S. at 342; id. at 340. Here, Count I alleges that Defendant Tidball is violating the EPSDT provisions, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B), 1396d(r)(5) and 1396a(a)(43)(C), by failing to arrange for the private duty nursing services that the Children need to correct or ameliorate their conditions. Doc. 1 ¶¶ 226-27.

The Eighth Circuit has held these provisions create federal rights that Medicaid beneficiaries can enforce. See Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs., 293 F.3d 472, 478 (8th Cir. 2002). The Eighth Circuit noted there was no dispute that the EPSDT provision intend to benefit children who are entitled to services under that provision and that the statute imposes mandatory obligations: "The provision of EPSDT services 'must' be included in the state plan." Id. (quoting § 1396a(a)(10)(A)). The Eighth Circuit reasoned that "Section 1396a(a)(43) also articulates that a state plan 'must' include the provision of EPSDT services," and "mandates that a state plan provide for screening services, arrange corrective treatment for disorders uncovered by the screening services, and inform all eligible recipients of the availability of EPSDT services." Id. at 478, n.6. Finally, "EPSDT services . . . are defined in § 1396d(r)." Id. at 479. Thus, the Court held the provision is "not so ambiguous or amorphous that its enforcement strains judicial competence." Id.

Following similar reasoning, every Circuit Court to consider the EPSDT provisions has concluded that they are enforceable. See John B. v. Goetz, 626 F.3d 356 (6th Cir. 2010) (regarding § 1396a(a)(43)(A)); Watson v. Weeks, 436 F.3d 1152, 1159-62 (9th Cir. 2006) (same); S.D. v. Hood, 391 F.3d 585 (5th Cir. 2004) (concerning §§ 1396a(a)(10)(A), 1396a(a)(43)(B); Miller v. Whitburn, 10 F.3d 1315, 1319 (7th Cir. 1993) (regarding §§ 1396a(a)(10)(A), 1396d(a)(4)(B))).

District courts have also consistently held the EPSDT provision are enforceable.[3] As this consistent case law demonstrates, Plaintiffs may enforce the EPSDT provisions.

A state may rebut the presumption that a right is enforceable by demonstrating that Congress provided a comprehensive remedial scheme intended to preclude individual suits. See Blessing, 520 U.S. at 346. "[T]he Supreme Court has generally found a remedial scheme sufficiently comprehensive to supplant Section 1983 only where it culminates in a right to judicial review in federal court. . . [on behalf of] aggrieved individuals." New York State Citizens' Coal. for Children v. Poole, 922 F.3d 69, 84 (2d Cir. 2019) (quotes and alterations omitted). Defendant cites 42 U.S.C § 1396c in passing, but "Section 1396c provides Plaintiffs no such avenue for federal judicial review." Id. That provision provides a remedy for *aggregate*, not individual violations. It is, thus, not a comprehensive remedial scheme available to Medicaid beneficiaries. See, e.g., Wilder, 496 U.S. at 521-22 ("The Medicaid Act contains no . . . provision for private judicial or administrative enforcement . . . generalized powers' . . . to audit and cut off federal funds [are] insufficient to foreclose reliance on § 1983 to vindicate federal rights."); see also City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121-22 (2005) (Scalia, J.) (citing Wilder and listing Medicaid as a statute whose enforcement is not foreclosed); Pl. P'hood of Kan. v. Andersen,

[3] See, e.g., South Ark. Dev. Ctr. for Children & Families v. Gillespie, No 4:19-cv-00417-JM (E.D. Ark. Sept. 19, 2019) ("42 U.S.C. §§ 1396a(a)(10), 1396d(a)(4)(B), 1396d(a)(13)(C), 42 U.S.C. § 1396a(a)(43), and 1396d(r) create rights that may be enforced under 42 U.S.C. § 1983."); S.R. by & through Rosenbauer v. Penn. Dep't of Human Servs., 309 F. Supp. 3d 250, 260-61 (M.D. Pa. 2018) (defendants cited no case finding § 1396a(a)(43)(C) does not create a private right and holding "without difficulty" that EPSDT mandate is enforceable); O.B. v. Norwood, 170 F. Supp. 3d 1186 (N.D. Ill. 2016) (regarding §§ 1396a(a)(10)(A), 1396d(a)(4)(B), and 1396a(a)(43)(C)); A.H.R. v. Wash. State Health Care Auth., 2016 WL 98513, *12 (W.D. Wash. Jan. 7, 2016) (children can enforce EPSDT provision to obtain private duty nursing services because "'Congress clearly and unambiguously conferred rights' to those required services to individuals entitled to receive such benefits and '[did] not preclud[e] individual enforcement of those rights"); H.E. ex rel. Emerich v. Horton, 2016 WL 6582682 (N.D. Ga. Nov. 7, 2016); J.E. v. Wong, 125 F. Supp. 3d 1099, 1107 (D. Haw. 2015); Cruz v. Zucker, No., 2015 WL 4548162 (S.D.N.Y. Jul. 29, 2015).

882 F.3d 1205, 1229 (10th Cir. 2018) (reaffirming Wilder's holding in part "because the federal Secretary's withholding Medicaid funds would not redress [plaintiffs'] injuries at all").

Finally, citing Does v. Gillespie, 867 F.3d 1034 (8th Cir. 2017), Defendant contends that the placement of the EPSDT provision in the list of requirements for a "state plan" transforms the provision into one focused on the State rather than the children it is specifically designed to protect. Doc. 36 at 7-8. The Court should not extend Does here. First, as Defendant acknowledges, analyzing private enforcement requires a provision-by-provision analysis. See Blessing, 520 U.S. at 340; see also Doc. 36 at 11 ("Courts have found that while one portion of a statute may create a federal right, others may not."). Does dealt with a different provision of the Medicaid Act, § 1396a(a)(23), and did not address the EPSDT provision at all. Does, 867 F.3d at 1039; see also, Murphy by Murphy v. Harpstead, 421 F. Supp. 3d 695, 707 (D. Minn. 2019) ("Does has no impact on the Court's holding that [other] provision[s] of the Medicaid Act are privately enforceable.").

Moreover, Does did not—and could not—overrule Pediatric Specialty Care. That case, addressing the specific provision at issue here, remains good law. See United States v. Lippman, 369 F.3d 1039, 1044 (8th Cir. 2004) (a panel may not overrule circuit precedent); Northport Health Servs. of Arkansas, LLC v. Rutherford, 605 F.3d 483, 491 (8th Cir. 2010) (lower court "should follow the case which directly controls") (quote omitted). The Court should, thus, reject Defendant's invitation to read Does broadly, as its holding is limited to § 1396a(a)(23). Cf. BT Bourbonnais Care, LLC v. Norwood, 866 F.3d 815, 820–21 (7th Cir. 2017) ("nothing in Armstrong, Gonzaga, or any other case," means "plaintiffs are now flatly forbidden in section 1983 actions to rely on a statute passed pursuant to Congress's Spending Clause powers.").

In fact, the language Defendant relies on to analogize to Does supports finding a private right of action. Defendant urges that the phrase "the state plan must" means Congress intended the

EPSDT provision to focus on the state rather than the Children. Doc. 36 at 6-7. But the Eighth Circuit relied on that phrase to conclude that the EPSDT provision satisfies Blessing's requirement that the provision in question be mandatory on the state. See Pediatric Specialty Care, 293 F.3d at 478. See also 42 U.S.C. § 1320a-2 (clarifying that individuals aggrieved by a state's failure to comply with the federal mandates in state plan provisions can seek redress in the federal courts).

B. EPSDT requires Defendant Tidball to do more than simply pay for services.

Defendant also asserts that the definition of "medical assistance" limits the right created in the EPSDT provision to payment only. Doc. 36 at 9. This argument fails for a number of reasons. *First*, Defendant's interpretation would nullify the language of EPSDT provision, which requires the state to "arrange for . . . corrective *treatment*." See 42 U.S.C. § 1396a(a)(43)(C). That provision cannot reasonably be construed to apply solely to payment. See O.B. v. Norwood, 838 F.3d 837, 843 (7th Cir. 2016) (rejecting argument that "state . . . gets to choose whether to pay for services or to provide services," in part because EPSDT requires that state provide "*corrective treatment*") (emphasis in original). *Second*, Defendant's cramped reading ignores CMS's explicit instruction that the fundamental purpose of EPDST 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." CMS, *EPSDT Guide* at 1. "The affirmative obligation to connect children with necessary treatment makes EPSDT different from Medicaid for adults. . . ." Id. (citing § 1396a(a)(43)(C)).

Third, in 2010, the Medicaid Act was amended to make clear that Defendant's interpretation is incorrect. Congress made the amendment as a "technical correction," defining "medical assistance" to mean "payment of part of all of the costs of the following [enumerated] care and services, *or the care and services themselves, or both*." 42 U.S.C. § 1396d(a) (as amended by Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 125 Stat. 119, at § 2304 (March 23, 2010)) (emphasis added). Defendant correctly quotes the amended definition, but fails

to acknowledge its significance. The legislative history to the correction acknowledges that "medical assistance" previously referred only to payment but that, for 40 years, it had "generally been understood to refer to both the funds provided to pay for care and services and to the care and services themselves." H.R. REP. NO. 111-299, at 649-50, § 1781, 2009 WL 3321420 (Oct. 14, 2009). The correction responded to "recent court opinions" limiting the term to payment, which ignored the provision's long-standing interpretation and rendered aspects of the Medicaid Act "absurd." Id. (noting requirement to furnish medical assistance with reasonable promptness would be "absurd" because Medicaid is a vendor payment program). Numerous courts have noted the correction's importance. See Jefferson Cmty. Health Care Centers, Inc. v. Jefferson Par. Gov't, 849 F.3d 615, 625 (5th Cir. 2017); A.H.R., 2016 WL 98513, at *12; Dunakin v. Quigley, 99 F. Supp. 3d 1297, 1321 (W.D. Wash. 2015); Leonard v. Mackereth, 2014 WL 512456, at *6-8 (E.D. Pa. Feb. 10, 2014). Notably, Judge Posner authored Bruggeman ex rel. Bruggeman v. Blagojevich, 324 F.3d 906, 910 (7th Cir. 2003), the first appellate opinion limiting "medical assistance" to payment. But he reversed course in O.B., holding that in the amendment, "Congress intended to clarify that where the Medicaid Act refers to the provision of services, a participating State is required to provide (or ensure the provision of) services, not merely to pay for them." 838 F.3d at 843 (quote omitted). The EPSDT provision, thus, creates individualized rights for the Children to require Defendant Tidball to actually arrange for the Medicaid services the Children need.

III. PLAINTIFFS HAVE STATED A CLAIM UNDER THE ADA AND REHABILITATION ACT.

The ADA mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 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 of the Rehabilitation Act are typically read together. Folkerts v. City of Waverly, Iowa, 707 F.3d 975, 983 (8th Cir. 2013).

Defendants do not dispute that the Children are qualified individuals with disabilities. Rather, they assert that Plaintiffs have not been "denied" or "excluded from" benefits and that any failure to provide nursing services was not "based on discrimination by Defendants." Doc. 36 at 13-14. Defendants' position ignores the ADA's implementing regulations and the Supreme Court's Olmstead decision, which instruct that the unjustified segregation of persons with disabilities is itself a form of disability discrimination. The Attorney General's implementing regulations establish the "integration mandate," which requires public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). See also 28 C.F.R. § 441.51(d) (Rehabilitation Act). The integration mandate extends to individuals who are at risk of institutionalization. See Hiltibran, 793 F. Supp. 2d at 1116; see also Steimel, 823 F.3d at 914; Fisher, 335 F.3d at 1181; U.S. Dep't of Justice Civ. Rights Div., 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* (June 22, 2011), Doc. 24-13 ("DOJ Q&A").

Further, the ADA places an affirmative obligation on states to comply with the integration mandate regardless of "state of mind" or allegations of "improper conduct." Doc. 36 at 5, 14. See Bennett-Nelson v. Louisiana Bd. of Regents, 431 F.3d 448, 454–55 (5th Cir. 2005) (when a state fails to meet its ADA obligations the "cause of that failure is irrelevant."); Frederick L. v. Dep't of Pub. Welfare of Pa., 422 F.3d 151, 158–59 (3rd Cir. 2005) ("assurances and good-faith intentions . . . are simply insufficient guarantors in light of the hardship daily inflicted upon patients through unnecessary and indefinite institutionalization."); Fisher, 335 F.3d at 1182 (that the state's "actions

were merely 'reasonable' does not constitute a defense."). Plaintiffs have alleged that they are at serious risk of institutionalization due to Defendants' failure to provide nursing services in the most integrated setting, namely at home. Doc. 1 ¶¶ 114-15, 118, 154-55, 166, 172-75, 189, 224. They have therefore stated a claim under the ADA and the Rehabilitation Act.

IV. THE PLAINTIFFS' COMPLAINT PROPERLY SEEKS DECLARATORY RELIEF.

Finally, the Court should reject Defendants' contention that the Declaratory Judgement Act provides no independent cause of action. See Doc. 36 at 10-11. Plaintiffs do not claim that it does. Rather, they seek *relief* under the Declaratory Judgment Act. See Doc. 1 ¶ 10 (citing 28 U.S.C. §§ 2201-02, which is the Declaratory Judgment Act, not 28 U.S.C. §§ 1331 and 1343, as Defendants state); Davis, 442 U.S at 239 n.18 (distinguishing a cause of action and relief).

Defendants assert without authority that "Plaintiffs ADA and Section 504 claims are tied to the Medicaid Act," and rise and fall together. Doc. 36 at 11. But "[a] state's duties under the ADA are wholly distinct from its obligations under the Medicaid Act." Davis v. Shah, 821 F.3d 231, 264 (2d Cir. 2016). See also DOJ Q&A at q.7 ("A state's obligations under the ADA are independent from the requirements of the Medicaid program," and states may need to provide "services beyond what a state currently provides under Medicaid."). Plaintiffs have, thus, appropriately asked the Court to declare that Defendants' policies and practices related to their ability to make private duty nursing available to the Children violate the Medicaid EPSDT provision, the ADA, and Section 504. *See* Doc. 1 Count I (cause of action to enforce 42 U.S.C. § 1396a(a)(43)(C) pursuant to § 1983); Count II (cause of action to enforce 42 U.S.C. § 12133 of the ADA); Count III (cause of action to enforce 29 U.S.C. § 794a of the Rehabilitation Act).

CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss should be denied.

Date: May 8, 2020

Respectfully submitted,

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Certificate of Service

I, Joel Ferber, hereby certify that Plaintiffs have served of a true and correct copy of Plaintiffs' Suggestions In Opposition to Defendants' Motion to Dismiss by means of the Court's electronic filing system upon Defendants' Counsel of Record.

Date: May 8, 2020 /s/ Joel Ferber