IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

S.J., *et al.*,	) Case No. 20-cv-004036
	)
Plaintiffs,	)
	) JUDGE M. DOUGLAS HARPOOL
v.	)
	)
JENNIFER TIDBALL, *et al.*,	)
	)
Defendants.	)
	)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTRODUCTION

Plaintiffs, nine children with medically complex conditions enrolled in Missouri's Medicaid program and an association of parents of medically complex children, allege that Missouri's administration of its long-term care system for people with physical disabilities violates Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 ("ADA") as interpreted by the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). Compl. ¶¶ 229-246, ECF No. 1. The individual plaintiffs currently live at home with their parents or grandparents and have been prescribed private duty nursing ("PDN") services. *Id.* ¶ 3. Plaintiffs allege that, due to the State's method of administering its Medicaid program, medically complex children, including the nine individual plaintiffs, have not been receiving these necessary services. *Id.* ¶ 6. As a result, these individual plaintiffs allege that they are now at serious risk of institutionalization. *Id.* Plaintiffs request injunctive relief, *id.* ¶ 1, and have moved for a preliminary injunction. Pls.' Mot. for Prelim. Inj., ECF No. 23.

Defendants have moved to dismiss plaintiffs' ADA claim under Fed. R. Civ. P. 12(b)(6), Suggestions in Supp. of Defs.' Mot. to Dismiss, ECF No. 36, and have opposed the motion for a preliminary injunction. Defs.' Opp'n to Pls.' Mot. for Prelim. Inj., ECF No. 39. Defendants argue in part that plaintiffs' ADA claim should be dismissed because plaintiffs have not alleged that any failure to provide medically necessary services "was related to disability discrimination" or based on plaintiffs' disabilities. ECF No. 36 at 14; *see also* ECF No. 39 at 7 (raising similar arguments in opposing plaintiffs' motion for a preliminary injunction). Defendants' opposition to plaintiffs' motion for a preliminary injunction advances similar arguments and also argues that

plaintiffs cannot show that they would suffer an irreparable harm because they do not allege that a lack of PDN services results in specific injuries. ECF No. 39 at 11.

The United States respectfully files this Statement of Interest to highlight three well-settled principles of law: (1) a plaintiff need not allege disparate treatment or animus to state a claim under Title II's integration mandate; (2) a serious risk of unnecessary segregation may give rise to a Title II claim; and (3) serious risk of unnecessary segregation may constitute a threat of irreparable harm.

INTEREST OF THE UNITED STATES

The United States submits this Statement of Interest because this litigation implicates the proper interpretation and application of Title II of the ADA.[1] As the federal agency charged with enforcement and implementation of Title II of the ADA, 42 U.S.C. §§ 12133-12134, the Department of Justice has an interest in supporting the proper and uniform application of the ADA, in furthering Congress's intent to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," *id.* § 12101(b)(2), and in furthering Congress's intent to reserve a "central role" for the federal Government in enforcing the standards established in the ADA. *Id.* § 12101(b)(3).

PLAINTIFFS' FACTUAL ALLEGATIONS

Plaintiffs S.J., C.T., P.W., S.E.S., T.S., S.A., R.R., B.B., and I.B., are nine minor children under the age of 21 enrolled in Medicaid for whom defendants have authorized medically necessary in-home PDN services. ECF No. 1 ¶¶ 2, 3. According to the Complaint, none of the children is receiving all of the hours of nursing care for which they have been authorized. *Id.*

[1] The Attorney General is authorized "to attend to the interests of the United States" in any case pending in federal court. 28 U.S.C. § 517.

The organizational plaintiff, the Caring for Complex Kids Coalition, is a group of parents and caregivers of medically complex children. According to the Complaint, these children also are not consistently receiving the medically necessary in-home PDN services for which they have been authorized by the State. *Id.* ¶ 21.

Defendants are responsible for administering the State's Medicaid program. *Id.* ¶¶ 22-23. Plaintiffs allege that the defendants' methods of administering the State's Medicaid program have put medically complex children at risk of unnecessary institutionalization. *Id.* ¶ 236. In particular, defendants have allegedly failed to arrange for medically necessary and authorized PDN services "by failing to establish and implement meaningful and effective policies, practices, and procedures to administer this benefit." *Id.* ¶ 73.[2] As a result, plaintiffs allege they are at serious risk of unnecessary institutionalization in the form of hospitalizations or admissions to another institution. *E.g.*, *id.* ¶¶ 110, 117, 134, 155, 166, 175, 189, 211, 224. Indeed, some plaintiffs have allegedly already suffered unnecessary hospitalizations due to the State's failure to arrange for necessary and authorized PDN services. *E.g.*, *id.* ¶¶ 118, 128, 155, 179.

STATUTORY AND REGULATORY BACKGROUND

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It found that, "historically, society has tended to isolate and segregate individuals with

[2] Medicaid-eligible children under the age of 21 are entitled to receive all medically necessary treatment services described in the Medicaid Act at 42 U.S.C. § 1396d(a), which sets forth a number of services that may be made available under a State Medicaid Plan. *See Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1235 (11th Cir. 2011) (holding that under the Medicaid Act's Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") requirements, State Medicaid programs must provide "all medical services and treatment 'necessary . . . to correct or ameliorate'" eligible child's conditions); *see also* 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a); 42 U.S.C. § 1396d(r)(1)-(5) (setting forth federal EPSDT requirements).

disabilities" and that "individuals with disabilities continually encounter various forms of discrimination, including . . . segregation." 42 U.S.C. §§ 12101(a)(2) and (5). Congress determined that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, *independent living*, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(7) (emphasis added). Title II of the ADA prohibits disability discrimination in public services: "[N]o 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.

Congress directed the Attorney General to promulgate regulations to implement Title II. 42 U.S.C. § 12134. These regulations require public entities, *inter alia*, 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) ("the integration mandate"). The "most integrated setting" is one which "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. B at 690 (2015). The regulations also require public entities "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

In *Olmstead*, the Supreme Court held that, under the ADA and its regulations, "unjustified institutional isolation of persons with disabilities is a form of discrimination." *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999). The Court reasoned that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted

assumptions that persons so isolated are incapable or unworthy of participating in community life." *Id.* The Court concluded that individuals with disabilities are entitled to community-based services "when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with . . . disabilities." *Id.* at 607 (plurality opinion).

States must make the requested modifications unless they can prove the modifications' unreasonableness by establishing that the modifications would fundamentally alter the services they provide (*i.e.*, the fundamental alteration defense). The Supreme Court explained, "Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the state has undertaken for the care and treatment of a large and diverse population of persons with . . . disabilities." *Id.* at 604 (plurality opinion).

DISCUSSION

A. Plaintiffs Need Not Allege Disparate Treatment or Animus to State a Claim under Title II's Integration Mandate.

Defendants argue that plaintiffs' Title II claim should be dismissed because plaintiffs have not alleged "improper conduct" by defendants or disparate treatment relative to other Medicaid recipients. ECF No. 36 at 18. But plaintiffs need not allege improper conduct or disparate treatment to state a violation of Title II's integration mandate.

By its terms, Title II's integration mandate imposes an affirmative obligation on 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). Reflecting this affirmative obligation, the Supreme Court held in *Olmstead* that unnecessary segregation is itself a form of discrimination under Title II.

As a result, the Court found that a public entity violates Title II when it fails to provide community-based services to persons with disabilities when (1) such services are appropriate; (2) the affected persons do not oppose community-based treatment; and (3) community-based services can be reasonably accommodated "taking into account the resources available to the State and the needs of others with . . . disabilities." *Id.* at 607 (plurality opinion); *see also id.* at 611 (Kennedy, J., concurring) (noting plaintiffs made "no allegation that Georgia officials acted on the basis of animus" but recognizing plaintiffs could show discrimination even without such alleged animus); *see also, e.g.*, *United States v. Mississippi*, 400 F. Supp. 3d 546, 554 (S.D. Miss. 2019) ("Where a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant." (quoting *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454-5 (5th Cir. 2005))). The Court in *Olmstead* also squarely rejected the argument that plaintiffs must identify a

"comparison class" of "similarly situated individuals given preferential treatment" to state a violation of the integration mandate. 527 U.S. at 598 & n. 10.

Accordingly, that the plaintiffs here did not allege improper motive or disparate treatment is of no legal import.

B. A Serious Risk of Unnecessary Segregation May Give Rise to a Title II Violation.

Defendants argue that plaintiffs lack an injury in fact sufficient to confer standing because they are not yet institutionalized. ECF No. 36 at 8; ECF No. 39 at 5. But individuals with disabilities need not wait until they are institutionalized to assert a claim under Title II's integration mandate. 28 C.F.R. § 35.130(d). Individuals with disabilities at serious risk of unnecessary institutionalization may state a claim for violation of Title II's integration requirement.

By their terms, neither Title II nor the integration mandate applies only to institutionalized individuals. Instead, the plain text of each protects the rights of all "qualified individuals with a disability." 42 U.S.C. § 12132; 28 C.F.R. § 35. 130(d). Although the Eighth Circuit has not yet reached this question, this District Court has recognized the viability of at-risk claims. *See Hiltibran v. Levy*, 793 F. Supp. 2d 1108, 1114 (W.D. Mo. 2011) ("Persons at risk of institutionalization may make an integration mandate challenge without having first been placed in institutions.").

Every court of appeals to have addressed this issue has likewise recognized that Title II applies to persons with disabilities who are at serious risk of institutional placement. *See Steimel v. Wernert*, 823 F.3d 902, 911-12 (7th Cir. 2016) (rejecting the argument that the integration mandate applies only to people who have been institutionalized); *Davis v. Shah*, 821 F.3d 231, 263 (2d Cir. 2016) ("[A] plaintiff may state a valid claim for disability discrimination by

demonstrating that the defendant's actions pose a serious risk of institutionalization for disabled persons."); *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) ("[I]ndividuals who must enter institutions to obtain Medicaid services for which they qualify may be able to raise [a] successful Title II … claim[] because they face a risk of institutionalization."); *M.R. v. Dreyfus*, 697 F.3d 706, 734 (9th Cir. 2012) ("An ADA plaintiff need not show that institutionalization is 'inevitable' or that she has 'no choice' but to submit to institutional care in order to state a violation of the integration mandate. Rather, a plaintiff need only show that the challenged state action creates a serious risk of institutionalization."); *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003) (rejecting the argument that individuals with disabilities who "stand imperiled with segregation [because of state policy] may not bring a challenge to that state policy under the ADA's integration regulation without first submitting to institutionalization"). As these courts reasoned, the integration mandate would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation. *E.g.*, *Davis*, 821 F.3d at 263; *Fisher*, 335 F.3d at 1181.

Moreover, at-risk claims under Title II's integration mandate by their nature satisfy all of the requirements for standing, including an injury-in-fact, because they involve threats to health, safety, and welfare: a plaintiff typically alleges (1) either an actual injury from an existing denial of services or an imminent injury from a threatened cut to services, (2) caused by the defendant, (3) that would be redressed if the defendant's actions were enjoined. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (to satisfy the "injury in fact" requirement for standing, a plaintiff must identify an injury that is "actual or imminent, not conjectural or hypothetical").

Plaintiffs have alleged and presented facts in support of their motion for a preliminary injunction that they are suffering an actual injury in fact and are at serious risk of unnecessary institutionalization. They allege ongoing actual injury in the form of the lack of medically necessary services, ECF No. 1 ¶¶ 12-20, and have submitted declarations asserting the same. *See* Suggestions in Supp. of Pls.' Mot. for Prelim. Inj., ECF No. 24, Ex. 1 ¶¶ 7, 9; Ex. 2 ¶¶ 10, 11; Ex. 3 ¶ 15; Ex. 4 ¶¶ 4, 7; Ex. 5 ¶ 6, Ex. 6 ¶ 4; Ex. 7 ¶ 39; Ex. 8 ¶¶ 5, 9.[3] Defendants do not appear to dispute that plaintiffs are unable to obtain the PDN services that have been authorized as medically necessary, and concede that Medicaid recipients in the state generally have difficulty accessing PDN services. *See, e.g.*, ECF No. 39 at 13 ("Defendants are aware of the shortage of private duty nurses in Missouri who are willing to work for Medicaid providers."). Furthermore, plaintiffs have alleged that they are at serious risk of unnecessary institutionalization because of this lack of services, and have submitted declarations asserting the same. ECF No. 1 ¶¶ 6, 108, 109, 120, 133, 150, 151, 165, 174, 185, 210, 223; ECF No. 24, Ex. 1 ¶ 18; Ex. 2 ¶ 23; Ex. 3 ¶ 19; Ex. 4 ¶ 11; Ex. 5 ¶ 12; Ex. 6 ¶ 11; Ex. 7 ¶ 47, Ex. 8 ¶ 11. Moreover, the risks faced by plaintiffs are not merely speculative or conjectural—plaintiffs allege they have already suffered unnecessary hospitalizations due, at least in part, to the persistent lack of PDN, *e.g.*, ECF No. 1 ¶¶ 118, 128, 155, 179, and offer declarations outlining these hospitalizations in detail. ECF No. 24, Ex. 1 ¶¶ 3, 6, 13; Ex. 2 ¶¶ 19, 24; Ex. 3 ¶ 12; Ex. 4 ¶ 5; Ex. 6 ¶ 3; Ex. 7 ¶¶ 44, 45; Ex. 8 ¶ 6.

[3] Plaintiffs have filed Exhibit 16, a declaration by the next friend of plaintiff S.S., under seal. This Statement does not address any assertions therein.

C. Serious Risk of Unnecessary Segregation May Constitute a Threat of Irreparable Harm.

Defendants argue, in part, that plaintiffs will not suffer an irreparable harm in the absence of injunctive relief because plaintiffs' alleged serious risk of segregation is speculative and not linked causally to a lack of PDN services. ECF No. 39 at 10-13. Defendants do not contest that segregation, if it occurs, would constitute irreparable harm.

In *Olmstead*, the Supreme Court recognized the harm that results from unnecessary institutionalization. 527 U.S. at 601. The Court noted that "institutional confinement severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." 527 U.S. at 601. Following *Olmstead*, numerous courts have held that the harms caused by unnecessary segregation can constitute irreparable harm for the purposes of granting an injunction. *E.g.*, *L.S. v. Delia*, No. 11-0354, 2012 WL 12911052 at *14-15 (E.D.N.C. Mar. 29, 2012); *Pashby v. Cansler*, 279 F.R.D. 347, 355 (E.D.N.C. 2011); *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1307 (M.D. Fla. 2010); *Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010); *Crabtree v. Goetz*, No. 08-0939, 2008 WL 5330506, at *25 (M.D. Tenn. Dec. 19, 2008); *Long v. Benson*, No. 08-0026, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008).

This principle applies equally to the irreparable harm threatened by serious risk of unnecessary segregation. In *M.R.*, the Ninth Circuit, reversing a lower court's denial of a motion for preliminary injunction in a Title II case, held that plaintiffs had demonstrated a likelihood of irreparable injury by showing that state actions would deprive plaintiffs of medically necessary care and thus place plaintiffs at serious risk of institutionalization. 697 F.3d at 726. The lower court had denied plaintiffs' request for a preliminary injunction, in part because it found that plaintiffs' deteriorating medical conditions, and other problems not attributable to the state,

contributed to their risk of institutionalization. *Id.* The Ninth Circuit rejected this reasoning, explaining that plaintiffs need not show that the risk of institutionalization is "exclusively attributable" to, *id.* at 726, or exclusively caused by the challenged state action. *Id.* at 730. Thus, evidence that defendants' failure to provide adequate services would exacerbate plaintiffs' medical conditions and put plaintiffs at serious risk of segregation demonstrated a likelihood of irreparable injury. *Id.* at 733.

Courts have also held in other cases brought under Title II's integration mandate that plaintiffs may suffer irreparable harm even if faced with only temporary segregation. In *Marlo M.*, the court issued a preliminary injunction to halt a proposed termination of funding for the services that plaintiffs, adults with developmental disabilities and mental illness who had been living in their own homes for years, relied on to stay in their homes. 679 F. Supp. 2d at 637. The court held that evidence showing that plaintiffs "will suffer regressive consequences if moved, even temporarily" demonstrated irreparable harm. *Id.* at 638. Likewise, in *Haddad*, the court found that plaintiff had established risk of irreparable injury if required to enter a nursing home, based on a declaration from plaintiff's physician stating that such a placement would be detrimental to plaintiff's health and well-being. 784 F. Supp. 2d at 1307. In *L.S. v. Delia*, the court held that affidavits describing effects of the state's failure to provide adequate services—including the threat of institutionalization and serious physical and mental injury resulting from "forced entry into an institutional setting"—established irreparable harm. 2012 WL 12911052 at *14-15. And in *Long v. Benson*, the court held that "each day [plaintiff] is required to live in the nursing home will be an irreparable harm" because plaintiff had shown that his perceived quality of life in the nursing home would be worse than at the plaintiff's own home. 2008 WL 4571903 at *2.

Plaintiffs have alleged that they are currently experiencing irreparable harm in the form of unmet medical needs and are at serious risk of suffering further irreparable harm in the form of unnecessary segregation. The purpose of a preliminary injunction is to *prevent* irreparable harm. *E.g.*, *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) (per curiam); *Dataphase Sys. v. C L Sys.*, 640 F.2d 109, 113 n. 5 (8th Cir. 1981); *see also Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction"). Plaintiffs must show that they face more than a mere "possibility" of harm, *Winter*, 555 U.S. at 22, but if the court finds that plaintiffs are currently being irreparably harmed by the lack of necessary medical care, *see* ECF No. 24 at 2-3 (summarizing the factual support for this conclusion); ECF No. 24, Ex. 1 ¶¶ 7, 9; Ex. 2 ¶¶ 10, 11; Ex. 3 ¶ 15; Ex. 4 ¶¶ 4, 7; Ex. 5 ¶ 6, Ex. 6 ¶ 4; Ex. 7 ¶ 39; Ex. 8 ¶¶ 5, 9, and/or that they face a serious risk of irreparable injury in the form of unnecessary segregation because of their unmet medical needs, *see* ECF No. 24 at 4-5 (summarizing how the lack of care has already allegedly led to unnecessary institutionalizations); ECF No. 24, Ex. 1 ¶ 18; Ex. 2 ¶ 23; Ex. 3 ¶ 19; Ex. 4 ¶ 11; Ex. 5 ¶ 12; Ex. 6 ¶ 11; Ex. 7 ¶ 47, Ex. 8 ¶ 11, granting relief would be warranted if the other requirements for granting a preliminary injunction are met.

CONCLUSION

The United States respectfully requests that the Court consider this Statement of Interest in this litigation.

Date: June 15, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2020, I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of such filing to all counsel of record.

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