UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

C.A. through their next friend P.A., **C.B.** through his next friend P.B., and **C.C.** through his next friend P.C., for themselves and those similarly situated,

Plaintiffs,

v.

Kelly Garcia, in her official capacity as Director of the Department of Health and Human Services.

Defendant.

C/A No. 4:23-cv-00009-SHL-HCA

BRIEF IN SUPPORT OF PLAINTIFFS' RESISTANCE TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

In this action, the Named Plaintiffs allege how they and other Iowan children in the putative class are being substantially harmed, and are at imminent risk of substantial harm, because they are unable to obtain the mental health services they need. In a highly detailed 54-page Complaint, Plaintiffs document the ongoing, longstanding failure of the Iowa Medicaid system to provide children with significant mental health needs with a well-defined set of medically necessary services known as intensive home and community-based mental health services, and the failure to provide them in a timely manner. Plaintiffs seek prospective relief only to remedy Defendant's ongoing failure to provide Plaintiffs with the care they are entitled to receive, and are not seeking money damages.

The allegations of the Complaint are far more than merely "plausible," and the Named Plaintiffs easily satisfy the Federal Rules' lenient pleading standard. Defendant offers no sound basis for dismissing Plaintiffs' claims under Federal Rule of Civil Procedure12(b)(6). As shown below, Defendant disregards the substantial authority upholding Medicaid claims alleging the failure to provide intensive home and community-based mental health services in circumstances nearly identical to those here (Point I). Defendant also misstates its legal obligations under both the ESPDT provisions of the Medicaid Act (Point II) and the Reasonable Promptness provisions of the statute (Point III). The statute of limitations does not bar Plaintiffs' claims for prospective relief (Point IV).

LEGAL STANDARD

When a court reviews a motion to dismiss, it must accept all factual allegations pleaded as true and view them in the light most favorable to the nonmoving party. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also Braden*

v. Wal-Mart Stores, Inc., 588 F.3d 585, 597 (8th Cir. 2009). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable." *Twombly*, 550 U.S. at 556. "[T]he complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden*, 588 F.3d at 594. This is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

ARGUMENT

I. Defendant Disregards the Well-Settled Authority Upholding Medicaid Claims Based Upon A Failure to Provide Sufficient Intensive Home and Community-Based Mental Health Services to Children.

In exchange for federal funding, states such as Iowa that choose to participate in the Medicaid program are required to provide certain well-defined medical services, called Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services, to Medicaid-eligible children under the age of twenty-one. 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43)(C), 1396d(a)(4)(B) 1396d(r); *see also Pediatric Specialty Care, Inc. v. Ark. Dep't of Hum. Servs.*, 293 F.3d 472, 478-79 (8th Cir. 2002) (describing the "binding obligation[s]" of EPSDT provisions). These services include treatment services necessary to correct or ameliorate a child's mental or physical health conditions. 42 U.S.C. §§ 1396a(a)(10)(A); 1396a(a)(43)(C); 1396d(a)(4)(B); 1396d(r). The EPSDT program is the "nation's largest preventative health program for children." H.R. 3299, 101st Cong. § 4213 (1989).

Under a well-settled body of law that Defendant disregards, courts have repeatedly held that the EPSDT provisions of the Medicaid Act require states to ensure the provision of intensive home and community-based mental health services for children who need them. In *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 22-26 (D. Mass. 2006), for example, the court found that the state

had violated its statutory obligations under both the EPSDT and reasonable promptness provisions of the Medicaid Act by failing to provide for home and community-based services for children with a serious emotional disturbance, including the "case management," "crisis services," and "in-home behavioral support services" at issue here.

Likewise, in *M.J. v. District of Columbia*, 401 F. Supp. 3d 1, 6, 9, 15 (D.D.C. 2019) the court allowed plaintiffs to proceed with a claim that the District of Columbia violated the EPSDT provisions by failing to provide for intensive community-based mental health services, including "Intensive Care Coordination," "Intensive Behavior Support Services," and "Mobile Crisis Services." *See also Katie A., ex rel. Ludin v. Los Angeles County*, 481 F.3d 1150, 1162 (9th Cir. 2007) (holding EPSDT requires states to "provide for arranging, directly or through referral, necessary corrective treatment" where the "complaint alleged that the class was entitled to and had not received 'medically necessary mental health services in a home-like setting'"); *John B. v. Menke*, 176 F.Supp.2d 786, 802-06 (M.D. Tenn. 2001) (holding that the state violated EPSDT requirements by failing to provide, among other things, treatment services and care coordination); *K.B. by Next Friend T.B. v. Mich. Dep't of Health & Hum. Servs.*, 367 F. Supp. 3d 647, 658 (E.D. Mich. 2019) (finding plaintiffs "adequately pled that Defendants failed to arrange the services required by [EPSDT]" including "intensive home and community-based mental health services").

II. Defendant Misstates Iowa's Legal Obligations Under the EPSDT Provisions of the Medicaid Act.

a) The EPSDT Provisions of the Medicaid Act Require States to Ensure That Medically Necessary Services Are Sufficiently Available to Children Who Need Them.

In addition to disregarding the authority cited above, Defendant incorrectly argues that the State can avoid liability by merely standing at the ready to pay a claim for Medicaid services should such services ever become available in the State and a claim ever be submitted. (*See* Brief

in Support of Def.'s Partial Mot. to Dismiss ("Def. Br."), Dkt. 22-1, at 7-11 (Section 1396a(a)(10)(A) claim), 14-16 (Section 1396a(a)(8) claim).) The Court should reject this argument because the Medicaid Act places an affirmative obligation on the State to ensure that required services are sufficiently available so that children are actually able to receive them.

This obligation is required under two separate but complementary provisions of the Medicaid Act. First, states that participate in the Medicaid program are required to develop a state Medicaid plan which must "*provide for making medical assistance available*" including, at a minimum, certain mandatory categories of medical assistance. 42 U.S.C. § 1396a(a)(10)(A) (emphasis added). One such mandatory category of medical assistance is EPSDT services. *Id.* § 1396d(a)(4)(B). Second, states must also comply with Section 1396a(a)(43)(C) of the Act, which includes an obligation to "*provide for -- arranging for* (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment." *Id.* § 1396a(43)(C) (emphasis added).[1]

In 2010, Congress amended the Medicaid Act to clarify that states are obligated to ensure the required Medicaid services are provided, not merely pay for them, and explicitly rejected the argument that Defendant makes here. It did so by amending the definition of "medical assistance," which previously referenced only "payment" for care and services," to explicitly include "*the care and services themselves.*" 42 U.S.C. § 1396d(a) (emphasis added). This effort "to correct any misunderstandings as to the meaning of the term, and to avoid additional litigation," was in response to the exact interpretation of the Act that Defendant promotes here. H.R. Rep. No. 299-111, at 649–50 (2009), 2009 WL 3321420. Congress rejected this interpretation, explaining that

[1] EPSDT services are further defined at 42 U.S.C. § 1396d(r)(5) and include, "[s]uch other necessary health care, diagnostic services, treatment, and other measures [ ] to correct or ameliorate defects and physical and mental illnesses and conditions." *Id*.

"for 40 years" the term "medical assistance" 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. 299-111, at 649–50 (2009) (emphasis added). *See also* S. Rep. 111-89, at 89 (2009), 2009 WL 3365933 ("The Committee Bill would clarify that 'medical assistance' encompasses both payment for services provided and the services themselves.").

Since 2010, the weight of authority has consistently held that states are required to ensure the provision of medical services, not merely to pay for them. In *O.B. v. Norwood*, 838 F.3d 837 (7th Cir. 2016) for example, Judge Posner, writing for the Seventh Circuit, found that "a participating State is required to provide (or ensure the provision of) services, not merely to pay for them."[2] (Internal quotation marks and citation omitted.) Plaintiffs there, as here, sought the adequate provision of home-based EPSDT services to children with a high level of medical need. The state "had approved and agreed to pay for" the services, but "made no attempt to find" or actually provide them. *Id.* at 839-40. The Seventh Circuit rejected the Defendants' "erroneous assumption[]" that "all that Medicaid requires of a participating state is *payment* for medical services, not the services themselves." *Id.* at 842 (emphasis in original). Judge Posner highlighted the absurdity resulting from Defendants' proposed interpretation: "[i]n other words, the state argues that it gets to choose whether to pay for services or to provide services, though of course if it fails to provide services and no one fills the gap, it won't have to pay either." *Id.*

Other courts have held the same. *See Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't Council*, 849 F.3d 615, 625 (5th Cir. 2017) (describing Congress' intent in amending definition of "medical assistance" as rejecting medical assistance as meaning payment); *Murphy*

[2] Notably, it was Judge Posner who originally set forth the "medical assistance as payment" holding in *Bruggeman v. Blogojevich*, 324 F.3d 906, 910-11 (7th Cir. 2003). He retracted this reading in *O.B.*, citing the 2010 amendment. *See O.B.*, F.3d 837 at 843.

v. Minn. Dep't of Hum. Servs., 260 F. Supp. 3d 1084, 1108 (D. Minn. 2017) (joining "numerous other courts" in holding that medical assistance refers to "both the payment for services and the provision of services themselves"); *S.J. v. Tidball*, No. 20-cv-04036, 2020 WL 5440510, at *3 (W.D. Mo. Sept. 10, 2020) (finding pleadings sufficient to survive a motion to dismiss where Plaintiffs alleged violation of EPSDT due to state's failure to "provide" services); *A. H. R. v. Washington State Health Care Auth*., 469 F. Supp. 3d 1018, 1040 (W.D. Wash. 2016) (holding "a participating State is required to provide (or ensure the provision of) services, not merely to pay for them" (internal quotation marks and citation omitted)); *Leonard v. Mackereth*, No. 11-cv-7418, 2014 WL 512456, at *6-7 (E.D. Pa. Feb. 10, 2014) (same); *John B. v. Emkes*, No. 98-cv-0168, 2011 WL 795019, at *5 (M.D. Tenn. Mar. 1, 2011) (same); *Chisholm v. Gee*, No. 97-cv-3274, 2017 WL 3730514, at *3 (E.D. La. Aug. 30, 2017) (same).

Moreover, the 2010 amendment simply clarified what the majority of courts had long held, that the Medicaid Act requires states to ensure that EPSDT services are provided, not merely to pay for them.[3] For example, in *Katie A. ex rel. Ludin v. Los Angeles County*, the Ninth Circuit determined that states "have an obligation to see that [EPSDT] services are provided" when medically necessary and that states are obligated to "actively arrange" for corrective treatment. 481 F.3d at 1158. The court held that, "the ultimate responsibility to ensure treatment remains with the state" and "Federal courts have scrutinized state Medicaid systems to be sure that those systems are adequately designed to provide EPSDT services." *Id.* at 1159. *See also Clark v. Richman*, 339 F. Supp. 2d 631, 646-47 (M.D. Pa. 2004) ("[The state's] obligations with respect to EPSDT services require [ ] proactive steps, such as actual provision of services."); *Menke*, 176 F. Supp. 2d

[3] The 2010 amendment was in direct response to *Bruggeman* and the handful of cases that followed suit, however those cases did not reflect the majority approach even at the time.

at 801 (rejecting state's attempt to "disclaim responsibility for the ultimate provision of EPSDT"); *Chisholm v. Hood*, 110 F. Supp. 2d 499, 507 (E.D. La. 2000).

In seeking to dismiss the EPSDT claims, Defendant incorrectly claims that the Sixth Circuit has "adopted" the "reasoning" that a state may fulfill its statutory obligations under § 1396a(a)(10)(A) solely by paying for services. (Def. Br. at 9.) Defendant relies primarily on the Sixth Circuit's decision in *Westside Mothers*, but that is a 2006 case that pre-dates the 2010 amendment. Notably, the Sixth Circuit recently clarified that it has "not issued an authoritative opinion determining whether [prior case-law] controls the definition of 'medical assistance' after Congress amended the statute." *See Nored as next friends of Nored v. Tenn. Dep't of Intell. & Developmental Disabilities*, No. 21-cv-5826, 2022 WL 4115962, at *8 (6th Cir. Sept. 9, 2022).

Defendant relies on two additional but similarly inapposite cases from the Sixth Circuit. Although *John B. v. Goetz*, 626 F.3d 356 (6th Cir. 2010), was decided post-amendment, the Sixth Circuit has specifically noted that "the speculation in *Goetz* regarding the definition of 'medical assistance,'" was "*dictum*," and that the "ultimate holding in that case had nothing to do with [the definition of medical assistance]." *Nored*, 2022 WL 4115962, at *8. Defendant's second cited case, *K.B. by Next Friend T.B. v. Michigan Department of Health & Human Services*, actually supports Plaintiffs. *K.B.* found that, regardless of the definition of "medical assistance," the State has a separate duty under Section 1396a(a)(43)(C) to "either provide services directly or hire others to do so." 367 F. Supp. 3d at 658 (finding that "the State [must] do more than just hire a provider and write a check").[4]

[4] While Defendant claims the Eighth Circuit has "articulated its understanding" that the Medicaid Act requires "the state to provide financial assistance rather than direct services or arrangement for direct services" (Def. Br. at 10), the Eighth Circuit did not rule on this issue in the cited case, *Pediatric Specialty Care*, which additionally pre-dates the 2010 Amendment. *See Pediatric Specialty Care, Inc.*, 293 F.3d at 480.

Defendant's argument also should be rejected because, as Congress noted in enacting the 2010 amendment, the interpretation of the statute urged by Defendant leads to "absurd" results contrary to the purpose of Medicaid. H.R. Rep. No. 299-111, at 649–50 (2009), 2009 WL 3321420. Congress noted, for example, that if medical assistance meant only payment for services, the provisions of the Medicaid Act that require that medical assistance be furnished with "reasonable promptness" would be "nearly incomprehensible" in a system where "virtually no beneficiaries receive direct payments from the state or federal governments." *Id.* Likewise, under Defendant's interpretation, the requirement under 42 U.S.C. § 1396a(a)(43)(C) that the "[s]tate plan for medical assistance must provide for . . . arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment" would, similarly, make no sense. *Id.*[5]

Finally, Defendant's interpretation of the statute is contrary to guidance from the Centers for Medicare & Medicaid Services ("CMS"), the federal agency that oversees the administration of Medicaid, which has likewise informed states that they have a duty "to assure that individual children get the health care they need when they need it." *See* Centers for Medicare and Medicaid Services, EPSDT-A Guide for States: Coverage in the Medicaid Benefit for Children and Adolescents at 1 (June 2014) ("CMS-EPSDT Guide").[6] Although a state has flexibility in how it administers the Medicaid program, ultimately "[s]tates must arrange (directly or through delegations or contracts) for children to receive the physical, mental, vision, hearing, and dental services they need to treat health problems and conditions." *Id.* "An agency's interpretation of the

[5] *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (holding the court should "not look merely to a particular clause" but "the whole statute," "the objects and policy of the law," and "the will of the Legislature" (internal quotation marks and citation omitted)); *Sanzone v. Mercy Health*, 954 F.3d 1031, 1040, as corrected (8th Cir. 2020) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute").

[6] *Available at* https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/epsdt_coverage_guide_29.pdf.

statute it is charged with implementing," "merit[s] some deference" given the agency's "specialized experience" and "broader . . . information available to the agency." *Draper v. Colvin*, 779 F.3d 556, 560 (8th Cir. 2015) (internal quotation marks omitted) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Here, the Complaint alleges in sufficient detail that intensive home and community-based services are not available to the children who need them in violation of Sections 1396a(a)(10)(A) and 1396a(a)(43)(C). Plaintiffs allege that providers have assessed the Named Plaintiffs and determined each of them to have multiple mental and behavioral health conditions and have recommended home and community based-services to treat or ameliorate those conditions. (*See* Complaint ("Compl."), Dkt. 1, at ¶¶ 15-30 (re: C.A.), 31-44 (re: C.B.), 45-59 (re: C.C.).) They further allege they have not been provided with such medically necessary services. *Id*. Plaintiffs have also alleged that, more broadly, Iowa does not provide Plaintiff Children with medically necessary intensive home and community-based services, including that Defendant does not provide intensive care coordination services (Compl. ¶¶ 52, 114-126), intensive in-home therapeutic services (Compl. ¶¶ 127-131), or crises response services (Compl. ¶¶ 132-138). Plaintiffs also charge that Defendant's own data show that specific home and community-based mental health services are not sufficiently available in Iowa. (Compl. ¶ 136.) They specifically claim that services which are medically necessary, and to which Plaintiffs are entitled under Medicaid, have been neither provided nor paid for. (Compl. ¶¶ 15, 20-25, 27, 31, 35-38, 42, 45, 50-54, 92-96, 114-138.)

Iowa does not "make available" those services to Plaintiffs and class members; nor does it "provide" or "arrange" for those services to be provided. Iowa does not "pay" for these services

either. The Complaint therefore adequately states a claim under Sections 1396a(a)(10)(A) and 1396a(a)(43)(C) of the Medicaid Act.[7]

b) Defendant's Attempt to Impose a Screening Request Requirement Under Section 1396a(a)(43)(C) Should be Rejected.

There is no merit to Defendant's argument that Plaintiffs' claims for needed treatment must be dismissed because they did not, first, formally request to receive "EPSDT screening services." (Def. Br. at 13.)

Plaintiffs' allegations that a licensed practitioner of the healing arts diagnosed them to have serious emotional disturbances and recommended specific home and community-based mental health services as medically necessary triggered the State's obligation to arrange for such treatment.[8] (*See* Compl. ¶¶ 18, 22 (re: C.A.); 34-36, 38 (re: C.B.); 48, 50 (re: C.C.).) These medical encounters constitute "screens," and are all that is required under the statute to trigger the State's obligation to ensure that medically necessary services are provided.[9] As CMS has counseled,

> any visit or contact with a qualified medical professional is sufficient to satisfy EPSDT's screening requirement, and states should consider a beneficiary who is receiving services to be participating in EPSDT, whether the beneficiary requested screening services directly from the state or the health care provider. . . . A child's diagnosis may be performed by a physician, dentist or other practitioner qualified to evaluate and diagnose health problems at locations, including practitioners' offices, maternal and child health (MCH) facilities, community health centers, rehabilitation centers, and hospital outpatient departments.

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[7] Defendants' argument that it is required only to pay for services, apart from being incorrect, applies only to Section 1396a(a)(10)(A) and has no bearing on Plaintiffs' claims under Section 1396a(a)(43)(C). *See*, *e.g.*, *K.B.*, 367 F. Supp. 3d at 658.

[8] The Medicaid Act requires states to ensure two types of screens are provided: pre-set, periodic screens (sometimes called well-child check-ups) and screens as needed to determine whether the child has a condition that needs attention (sometimes called interperiodic screens). *See* 42 U.S.C. §§ 1396a(a)(43)(B)—(C); 1396d(r)(1)-(4).

[9] Plaintiffs' allegations here are in contrast with Plaintiffs' statements in *Troupe v. Bryant*, No. 10-CV-153, 2016 WL 6585299, at *2 (S.D. Miss. Nov. 7, 2016), upon which Defendant relies. In that case, the Court found that Plaintiffs had "acknowledged that they had not requested screening or treatment from the Defendants." *Id.*

See CMS-EPSDT Guide at 6-8. CMS has also explained that "[t]he family or beneficiary need not formally request an EPSDT screening in order to receive the benefits of EPSDT." *Id.* at 6. *See also* CMS Letter to State Medicaid Directors 01-006 (Jan. 10, 2001) ("[W]e have long considered any encounter with a health care professional practicing within the scope of his/her practice inter-periodic screening.").[10] To require otherwise, would render the EPSDT program ineffective. As the Seventh Circuit has explained:

> It is difficult enough to activate the average affluent adult to seek medical assistance until he is virtually laid low. It is utterly beyond belief to expect that children of needy parents will volunteer themselves or that their parents will voluntarily deliver them to the providers of health services for early medical screening and diagnosis. By the time [a] child is brought for treatment it may too often be on a stretcher. This is hardly the goal of "early and periodic screening and diagnosis." EPSDT programs must be brought to the recipients; the recipients will not ordinarily go to the programs until it is too late to accomplish the congressional purpose.

Stanton v. Bond, 504 F.2d 1246, 1250-51 (7th Cir. 1974) (enforcing "[t]he 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"). Consistent with CMS administrative guidance and applicable case law, Plaintiffs' allegations establish that they have done all that they needed to do to trigger the State's obligation to arrange for them to receive the treatment services they need.

In support of its flawed legal argument, the State ignores Congress's intent to ensure that "persons under twenty-one years of age [ ] receive *all* reasonably necessary medical care regardless of ability to pay." *Rosie D.*, 410 F. Supp. 2d at 22 (emphasis in original). "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations

[10] Available at https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/smd011001a.pdf.

consistent with the legislative purpose are available." *Williams v. Emps. Mut. Cas. Co.*, 845 F.3d 891, 901 (8th Cir. 2017) (quoting *Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 575 (1982)). Moreover, Section 1396a(a)(43)(C), which requires the provision of corrective treatment, neither states that screening services must be requested nor lays out a procedure by which participants should request screening services. "[L]egislative intent is expressed by omission as well as by inclusion of statutory terms." *Reicksview Farms, L.L.C. v. Kiehne*, 541 F. Supp. 3d 935, 939 (N.D. Iowa 2021) (citation omitted). Defendant cannot require a particular form of request for "EPSDT screening services" where the statute does not. The Court should reject the Defendant's "request a screen" argument.

III. Defendant Misstates Iowa's Legal Obligations Under the "Reasonable Promptness" Provision of the Medicaid Act.

The Medicaid Act requires the State to "provide that all individuals wishing to make application for medical assistance under the [state Medicaid] plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). The question of reasonable promptness is an individualized one; Plaintiffs need not "allege a particular length of delay" to adequately state a violation of that provision. *Murphy*, 260 F. Supp. 3d at 1107-08. Plaintiff children have sufficiently stated a claim that Defendant fails to comply with the "reasonable promptness" provision.[11]

As described above, Defendant's argument that the "reasonable promptness" provision applies only to the State's obligation to pay for services, and not to ensure that children access medically necessary services within a reasonable timeframe, is unavailing. The weight of the caselaw, including published caselaw within this Circuit, requires a state to ensure the reasonably

[11] To the extent that the reasonableness of the delay is at issue in this matter, it is a factual question that must be reserved for a later phase of the case.

prompt provision of services, not just pay for them. *See*, *e.g.*, *id.* at 1108 ("[T]he reasonable promptness provision applies to both the payment for services and the provision of services themselves."); *see also Chisholm*, 2017 WL 3730514 at *3 (finding same).[12]

Defendant also appears to argue that Defendant need not provide medical assistance with reasonable promptness because Plaintiffs did not allege a formal request for "EPSDT screening services." (Def. Br. at 16.) For the reasons set forth in Part II.b., that argument lacks merit. Plaintiffs have alleged that they have requested, and that treating providers have recommended, the services sought here, but Plaintiffs have not received them in a reasonably prompt time frame, in violation of 1396a(a)(8). For example, the Complaint alleges that "[i]ndividual Named Plaintiffs have waited weeks, months, or even years to receive [specific home and community-based services] even after these services had been specifically recommended by the children's treating healthcare professionals." (Compl. ¶ 130.) C.B. waited over four years between the time that his treating physician first recommended that he "receive home and community-based mental health services" such as skills training and when he finally received those services. (Compl. ¶ 36.) At a later point, C.B. sat on a waitlist for over 3 months to receive such services. (Compl. ¶ 36.) Similarly, C.A. waited over a month to receive home and community-based skills training services,

[12] Citing 42 C.F.R. § 441.56(e), Defendant acknowledges that the treatment a child needs to correct or ameliorate their condition should be initiated within timeframes established in consultation with child's health care providers and within an outer limit of 6 months. (Def. Br. at 15.) But this regulation does not support the argument that Defendant need only pay claims for children's medically necessary care when and if they are submitted. To begin with, the regulation is not, as Defendant states, implementing 1396a(a)(8), the reasonable promptness provision. *See* 42 C.F.R. § 441.50 (stating statutory basis for the subpart as EPSDT provisions 1396a(a)(43)). Also, the wording of the regulation illustrates the point made by Congress when it enacted the 2010 clarification that a "payment only" reading would render some Medicaid provisions, including specifically the reasonable promptness provision, "nearly incomprehensible." *See* H.R. Rep. No. 299-111, at 650 (2009), 2009 WL 3321420.

during which time their mental health deteriorated and they were placed in a restrictive residential placement. (Compl. ¶ 24.) C.C. has waited months to receive community-based skills training services. (Compl. ¶ 51.)

Additionally, Plaintiff Children allege wider systemic issues regarding Defendant's failure to provide home and community-based mental health services within reasonable timeframes to the entire putative class. For example, the Complaint alleges that, as of July 2022, "half of all regions in Iowa" did not have services available to "deliver timely [mobile] crisis services." (Compl. ¶ 136.) Similarly, a March 2022 report detailed in the Complaint found that there were "children sitting in emergency rooms for hours and days because there are not safe places for them to go." (Compl. ¶ 101.) These allegations are more than sufficient to state a claim that Defendant does not furnish medical assistance with reasonable promptness.

IV. The Statute of Limitations Is Not Applicable Because Plaintiffs Seek Only Prospective Injunctive and Declaratory Relief Requiring Defendant to Cure Ongoing Violations.

There is no merit to Defendant's argument that the claims here (apparently including the claims under the Americans with Disabilities Act and the Rehabilitation Act, in addition to the Medicaid claims) are supposedly time-barred to the extent that they are dependent on events occurring prior to January 6, 2021. (Def. Br. at 16-17.) Plaintiffs allege ongoing violations of all three federal statutes; they seek injunctive and declaratory relief necessary to remedy those continuing violations. In these circumstances, Eighth Circuit authority is clear that the claims are not time-barred. Defendant cites no authority endorsing its argument that the Court should depart from well-settled law governing the viability of claims for continuing violations.

Plaintiffs seek only prospective relief requiring that the State provide federally mandated services to Plaintiffs and do not seek monetary compensation from Defendant. Statutes of

limitations "d[o] not generally apply in equity," *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 343 (2017), and they do not apply in these circumstances.

When assessing the applicability of a statute of limitations to claims for prospective relief the Eighth Circuit asks whether the "claim or claims involve[e] repeated enforcement of policies against a plaintiff rather than claims alleging merely ongoing consequences from an older, challenged action." *Montin v. Estate of Johnson*, 636 F.3d 409, 416 (8th Cir. 2011). The limitations period does not run from the first occurrence of the act, but from the last. *Varner v. Nat'l Super Mkts., Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996).

In this case, Plaintiffs are challenging Defendant's "continuing violation of rights," forcing them to live "each new day under an objected-to policy." *Montin*, 636 F.3d at 415 (citing, *inter alia*, *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring, joined by all members of the Court); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n. 15 (1968); *Heard v. Sheahan*, 253 F.3d 316, 318 (7th Cir. 2001)). Defendant's current failure to provide Plaintiffs with legally-required and medically necessary services continues a practice of violations that have been well-documented in the past and are ongoing. (Compl. ¶¶ 1 (alleging repeated calls to address "inadequacy of the State's mental health system for children"), 5 (alleging current failure to provide medically necessary services), 22-28 (describing the State's ongoing failure to provide medically necessary services to C.A.), 40 (outlining the "absence of intensive home and community-based services to support [C.B.]"), 57 (detailing the risk of institutionalization and lack of community integration for C.C. "[b]ecause he has been unable to access" medically recommended services), 108-38 (describing the ongoing failures of the State to provide services required under the EPSDT provisions of the Medicaid Act to members of the putative class).)

As pled, this longstanding failure persists and impacts Plaintiff Children and their loved ones on a daily basis. (*See generally id.*) The claims of Plaintiff Children should not be barred in whole or in part because Defendant's failure to comply with federal law continues undeterred.

Moreover, the events prior to 2021 alleged in the Complaint are highly relevant to the prospective relief that Plaintiffs seek. The State's long history of failing to fix its mental health system for children, and its failure to ensure the Named Plaintiffs and class members have adequate access to medically-necessary intensive home and community-based mental health services over a period of many years, help to demonstrate that the relief Plaintiffs seek is necessary to ensure that Iowa meets its statutory obligations to Iowan children with mental illness. The statute of limitations does not require that Plaintiffs' claims be dismissed in any respect; nor can the Defendant rely on the statute of limitations to preclude Plaintiffs' use of this important evidence. *See*, *e.g.*, *Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 954 (D. Minn. Feb. 26, 2018) ("[Defendant] does not provide support for the notion that the statute of limitations requires the exclusion of evidence…").

CONCLUSION

The Court should deny Defendant's motion. This case has serious consequences for the lives of thousands of vulnerable Iowan children and their families, many facing immediate medical needs. Plaintiff children request that the *Rule* 26(f) discovery conference be expeditiously scheduled so that this matter can proceed quickly.

Dated: February 27, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically with the Clerk of Court on February 27, 2023 to be served by operation of the Court's electronic filing system upon all parties.

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