UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MELINDA FISHER, et al., Plaintiffs, v. KIM REYNOLDS, et al., Defendants.	Case No. 4:17-cv-00208-RGE-CFB **PLAINTIFFS' RESISTANCE TO DEFENDANTS' MOTION TO DISMISS**

Plaintiffs Melinda Fisher et al. resist Defendants' Motion to Dismiss and request that the Motion be denied in its entirety. Plaintiffs base their Resistance on the authority presented below and their Complaint, when read in its entirety and accepting its factual allegations as true, states a claim upon which relief can be granted against each and every Defendant.

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STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is facially plausible where its factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. The plaintiff must plead facts that show more than a mere speculation

or possibility that the defendant acted unlawfully. *Id.* at 678. The court accepts the plaintiff's factual allegations as true but is not required to do so for mere legal conclusions, *id.* at 678, and the court reads the complaint as a whole rather than each allegation in isolation. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Here, the Plaintiffs' complaint establishes a basis for relief on each of their causes of action, against each Defendant.

ARGUMENT

A. NOTICE AND DUE PROCESS

1. Plaintiffs Have Asserted a Constitutionally Protected Property Interest Under the Due Process Clause.

To state a procedural due process claim, a plaintiff must demonstrate: (1) the existence of a constitutionally protected liberty interest or property interest; and (2) that the defendant deprived the plaintiff of that interest without constitutionally adequate process. *See Kroupa v. Neilsen*, 731 F.3d 813, 818 (8th Cir. 2013); *Schmidt v. Des Moines Pub. Schs.*, 655 F.3d 811, 817 (8th Cir. 2011). In *Johnson v. Mathews*, the Eighth Circuit held that the plaintiffs had a protected property interest in continued receipt of presumptive disability benefits under federal program, based on the following principles established by the Supreme Court:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

539 F.2d 1111, 1116 (8th Cir. 1976) (citation omitted). The Plaintiffs rely on Medicaid HCBS services to support their daily lives and the Medicaid statute that authorizes these services recognizes the property interest of recipients, such as Plaintiffs, in their services.

In return for receiving federal Medicaid funding, states must meet minimum standards regarding administration, eligibility, services, and procedural protections. *Frew v. Hawkins*, 540 U.S. 431, 433 (2004) ("State participation is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements."). The statutory scheme requires states to guarantee certain services and protections; thus, Medicaid is an entitlement for individuals who qualify. *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981) ("An individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives).

As enrolled beneficiaries under the waivers, the Plaintiffs and others similarly situated have clear entitlement to the services they seek. *Murphy by Murphy v. Minnesota Dep't of Human Servs*, No. 16-2623, 2017 WL 2198133 at 17-18 (D. Minn. May 18, 2017). Waiver services used by the Plaintiffs, including those granted under the exceptions process, are part of the array of services under the approved waiver. Iowa law requires each beneficiary to be assessed on an annual basis to determine what their needs are and then a service plan is created that identifies the services necessary to meet the beneficiary's assessed level of need. Iowa Admin. Code 441-83.61(g)(1), 83.2(2), 83.82(2)(a); FAC ¶¶ 65, 70, 77. Further, Defendants explicitly and intentionally set out the right to an exception to policy in each of the three 1915(c) HCBS waiver applications approved by CMS. FAC ¶ 99. "If there is a need that goes beyond the budget amount and/or the waiver service limit, the participant has ***the right*** to request an exception to policy." (Application for 1915(c) Home and Community Based Services Waiver—Intellectual Disability Waiver p. 200-201) (emphasis added). In applications by a state for approval to provide waiver services, CMS requires that a state explain how an individual can exceed a set service limit when

it sets a limit on waiver services; this feature is designed to ensure an individual can access waiver services to meet their needs. CMS, 1915(c) Technical Guide, p. 133.[1]

The Defendants claim that the Plaintiffs do not have a property interest in receiving HCBS services above the caps established in state regulations because the Defendants have "sole discretion" under Iowa Code §17A.9A in deciding whether to generally grant exceptions to policy. (Def. Brief in Support of Motion to Dismiss, p. 6). However, if a statute or implementing regulations place substantive limitations on official discretion to withhold the award of the benefit upon satisfaction of the eligibility criteria, there is a legitimate claim of entitlement, as to which the Due Process Clause affords protection. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)); *see also*, *Daniels v. Woodbury Cnty, Iowa*, 742 F.2d 1128, 1132-33 (8th Cir. 1984) (plaintiffs have legitimate claim to general relief assistance benefits where Iowa law provides that they are eligible for benefits if certain conditions were met).

The Defendants have substantive limitations on their decision to approve waiver budgets and services that exceed the cost caps. State HCBS Waiver programs must: (a) demonstrate that providing waiver services will not cost more than providing these services in an institution; (b)

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[1] The Defendants conflate service limits, budget or cost neutrality, and individual cost limits. Under a 1915(c) waiver, a state may choose to have an individual cost limit per waiver participant, which Defendants have not done in the waivers in question. A state may choose to limit individual services or budgets, which Defendants have done through incorporating certain limits found in the Iowa Administrative Code into the waiver application, but must have a plan for what happens when an individual's needs exceed those limits. Cost neutrality is not an individual measure, but an examination of the average per participant expenditures for the waiver and non-waiver Medicaid services which must not be more costly than the average per person costs of furnishing institutional (and other Medicaid state plan) services to persons who require the same level of care. *See generally,* CMS, Application for a §1915(c) Home and Community-Based Waiver: Instructions, Technical Guide and Review Criteria, 70-74, 131-35, 272-81 (2015), https://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/downloads/technical-guidance.pdf. CMS is the federal agency charged with the responsibility of administering the Medicaid Act and as an agency interpretation, this manual is entitled to "respectful consideration." *See, e.g., S.D. ex rel.* Dickson, 391 F.3d 581, 590 n.6.

ensure the protection of participants' health and welfare; (c) provide adequate and reasonable provider standards to meet the needs of the target population; and (d) ensure that services follow an individualized and person-centered plan of care. 42 U.S.C. § 1396n(c). Therefore, the Defendants do not have sole and unfettered discretion in deciding to grant an exception to policy in cases where the costs of HCBS waiver services exceed the cap. They must provide waiver services in accordance with the above criteria, including providing the services identified in the beneficiary's service plan, but are prohibited from exceeding the cost of institutional care. None of the Plaintiffs HCBS services exceeds the cost of institutional care. (Docket 16-1 at pg. 34 and attachments Doocy Decl. ¶ 26, Fisher Decl. ¶ 33, Kuhl Decl. ¶ 30, Johnson Decl. ¶ 16, Wargo Decl. ¶ 26)). All of the plaintiff's requested services were identified in their service plans as necessary to meet their assessed level of need. (FAC¶¶ 111, 113, 115, 129-131, 138, 153-155, 171, 176, 197-198). Consequently, the Plaintiffs and others similarly situated have a legitimate claim of entitlement to such services, affording them with due process protections.

In their application to the Centers for Medicare and Medicaid services (CMS), the Defendants explicitly recognized that their discretion is limited when they created an exception to policy process in each of the three 1915(c) HCBS waiver applications approved by CMS. FAC ¶ 99. As discussed above, the relevant waiver applications grant the Plaintiffs the right to request an exception to policy. This right lacks meaning if Defendants can allow their agents to summarily refuse to grant an exception under any circumstances. "The law demands that the designated single state Medicaid agency must oversee and remain accountable for uniform statewide utilization review procedures conforming to bona fide standards of medical necessity." *J.K. ex. rel. R.K. v. Dillenberg,* 836 F. Supp. 694, 699 (D. Ariz. 1993). If a beneficiary's needs are above the service or budgetary cap, the beneficiary can expect to request an exception in order to have their needs

met and thus "have a legitimate and important interest in the services they seek which would enable them to more fully integrate into their communities and achieve independence in their lives like individuals without disabilities." *Guggenberger v. Minnesota,* 198 F. Supp. 3d 973, 1021 (D. Minn. 2016). Without the exception process, Defendants could not meet their obligations to "maintain persons in their own home or communities who would otherwise require care in a medical institution." Iowa Admin. Code, Preamble Ch. 83; s*ee also* 42 U.S.C. § 1396n(c)(2)(A).

Defendants also assert that there is no property interest in continuation of the exception because "exceptions have a definite end date and require reapplication at the conclusion of the period allotted to the exception." (Def. Brief, p. 5.) The cases that the Defendants cite, *McGuire v. Independent Sch. Dist. No. 833*, 863 F.3d 1030 (8th Cir. 2017) and *Christopher v. Windom Area Sch. Bd*., 781 N.W. 2d 904 (2010) are distinguishable from the case at hand because they involve time-limited employment contracts, not Medicaid Act requirements on states to provide services to those who continue to qualify for such services. 42 C.F.R. § 435.930(b). In fact, the Defendants are well aware that they have a continuing obligation to provide HCBS because their pattern and practice, before the advent of managed care, was to repeatedly grant exceptions on a regular basis for years. (FAC ¶¶ 94,107, 114, 156, 173, 194). "Property interests subject to procedural due process protection are not limited by a few rigid, technical terms… A person's interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (citation omitted). Thus, in Medicaid cases, courts have uniformly held that beneficiaries have a property interest in requested services, particularly when the request continues services they have previously received. *See, e.g., Jonathan C. v. Hawkins*, No. CIV A 9:05-CV-43, 2006 WL 3498494, at *12 (E.D. Tex. Dec. 5, 2006)

(beneficiary has a "protectable property interest in the requested future … services"); *Ladd v. Thomas*, 962 F. Supp. 284, 289 (D. Conn. 1997); *see also* 42 C.F.R. 438.210(c) (requiring plans to give notice when they deny re-authorization requests).

In addition, not of all of the Plaintiffs are asking for services where the cost exceeds the cap. Plaintiff MS's exception to policy allowed her sibling to be a provider that paid at a daily rate for supported community living services. Her total services or budget was not over the ID waiver cap. FAC ¶ 173. Plaintiff SG was approved for services at the maximum amount of allowable funding under her waiver. FAC ¶ 131. In sum, the Plaintiffs and others similarly situated Medicaid beneficiaries have a property interest in continuing to receive HCBS services based on their assessed needs and service plans, thus affording them the protections of due process.

2. Plaintiffs Have Alleged They Have Not Received Adequate Constitutional Procedural Protections.

Plaintiffs have stated a claim they were not provided with appropriate notice and the opportunity for a hearing, including rights to continued services pending their appeals. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). "Adequate notice is integral to the due process right to a fair hearing, for the 'right to be heard' has little reality or worth unless one is informed[.]" *Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 314 (1950); 42 C.F.R. § 431.205. In addition, Courts have held the lack of ascertainable standards deprives individuals of due process. In gauging eligibility for a program or benefit, state agencies must use ascertainable standards that are applied in a rational and consistent manner. *See Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968). In the Medicaid HCBS waiver context, courts have repeatedly held that standards determining waiver services, any limits on those services, and available exceptions processes must be ascertainable.

In *Michael T. v. Bowling*, the court found the lack of transparency in state's process for budgeting and granting exceptions was "potentially—if not effectively—standardless. Such a potentially rudderless determination creates a high risk of arbitrary and erroneous benefits determinations and, as such, is impermissible under the Due Process Clause." 2016 WL 4870284 at *11 (S.D.W.Va. 2016).

Plaintiffs have alleged they have either not received any notice, FAC ¶132, 142, 179, received untimely notice, FAC ¶¶ 121, 199, the notices have been confusing and unclear as to the reason for the decision, FAC ¶ 121, 183, or the right to receive continuing benefits pending an appeal have been arbitrarily denied, FAC ¶ 160-161. These failures have resulted in ongoing harm to the Plaintiffs. Defendants argue that Plaintiffs are not entitled to notice as Plaintiffs with exceptions to policies had an expectation that the exception would end. Although a state Medicaid agency, through its contractor, has the right to conduct periodic utilization reviews of a recipient's services, including Medicaid waiver services provided under the exceptions process, this procedure in no way converts Medicaid into a time-limited benefit not protected by due process. *See* 42 U.S.C. § 1396a(a)(8); 42 C.F.R. § 435.930(b). The cases cited by Defendants rely upon to support their argument are factually and legally inapposite. *See McGhee v. Miller,* 680 F.2d 1220 (8th Cir. 1982); *Malone v. Des Moines Area Comm. College*, 2005 WL 290008 (S.D. Iowa 2005). These employment law cases concern individuals who were at-will employees not vested with property interest in continued employment, not Medicaid beneficiaries' right to entitled Medicaid services. Authorizing services with an end date cannot constitute adequate notice when a beneficiary requests additional services beyond that end date. *See id.; see also Jonathan C.*, 2006 WL 3498494, at *14 (where state failed to provide notice that a request to re-authorize expiring services was denied, beneficiary's "rights were violated because he was not properly afforded the

notice of the reduction of his benefits or the opportunity to challenge [the] decision while the benefits are maintained pending the fair hearing and ultimate decision. . . . subject[ing him] to a cycle of denial").

Moreover, as explained in detail above, Defendants' obligation is not limited to giving notice when a service under a waiver cap is denied, reduced or terminated. Defendants have granted a right to services where there is "a need that goes beyond the budget amount and/or the waiver service limit" in the approved CMS waiver and granted "a right to appeal any decision made by the MCO. . ." Application for 1915(c) Home and Community Based Services Waiver—Intellectual Disability Waiver p. 200-201. Plaintiffs are entitled to these services, and must receive notice when they are terminated. 42 C.F.R. § 431.206. Thus, Plaintiffs due process claim should proceed as Plaintiffs have alleged facts that meet the *Matthews* factors.

3. Plaintiffs Have Established a Violation of Medicaid Notice and Hearing Provisions.

Plaintiffs Due Process claim also rests on enforcement under 42 U.S.C. § 1983 (hereafter § 1983) of the Medicaid Act's notice and hearing requirements found in 42 U.S.C. § 1396a(a)(3) and its regulations. Defendants do not challenge this specific claim in their motion to dismiss. Instead, they argue Plaintiff Melinda Fisher had actual notice when her case manager apprised her of the MCO's intent to deny HCBS and therefore she was not deprived due process.

Under 42 U.S.C. § 1396a(a)(3), a waiver beneficiary whose claim for medical assistance under the state plan is denied or is not acted upon with reasonable promptness is entitled to a fair hearing. Further, when "the agency denies an individual's claim for eligibility, benefits or services," the state must provide the beneficiary with written notice of the right to a hearing and the method of obtaining a hearing. 42 C.F.R. § 431.206(b), (c)(1) and (2). Written notice must contain a statement of what action the State intends to take along with "[a] clear statement of the

specific reasons supporting the intended action." 42 C.F.R. § 431.210. When a state contracts with MCOs to deliver Medicaid-covered services to beneficiaries, the state must ensure that the MCOs provide adequate notice and an opportunity for beneficiaries to appeal denials, termination, and reductions in service. 42 U.S.C. § 1396u-2(b)(4); 42 C.F.R. § 438.404.

Courts have consistently held that the due process requirements of notice and a fair hearing under the Medicaid statute are enforceable under § 1983. *See, e.g., Shakhnes v. Berlin*, 689 F.3d. 244, 253-56 (2d Cir. 2012); *Guggenberger,* 198 F. Supp. 3d at 1022-23. Plaintiffs' complaint alleges that Defendants in this case have failed to provide any written notice to Plaintiffs SG, BR, MSM, and others similarly situated. FAC ¶132, 142, 179. It also alleges that Defendants failed to provide timely notice to Melinda Fisher and Neal Siegel violating 42 C.F.R. § 431.211 and § 438.404(c) (notice must be sent to the beneficiary at least 10 days before the anticipated action). FAC¶¶ 121, 199. Further, filing an appeal based off the case manager's information and prior to receiving a written decision from the MCO would have been rejected by the MCO as premature. These allegations are sufficient for Plaintiffs to establish a violation of notice and procedural due process rights.

Defendants' argument that Plaintiffs have actual notice when a case manager or a provider is aware of the denial, reduction or termination applies an incorrect standard. The cited case law reference to *In re Shank,* a bankruptcy case reviewing when a final order is binding on a party, is inapplicable, as this does not address the notice standards set out in Medicaid statute. In any case, it is not a case manager or provider's legal responsibility to inform a beneficiary of their appeal rights and right to seek continuation of benefits; this obligation remains with Defendants. *N.B. et al. v. District of Columbia et al.,* ___ F.Supp. 3d ___, 2017 WL 1154941 at *4-5 (D.C. Cir. 2017) (citing *Grey Panthers v. Schweiker,* 716 F.2d 23, 32 (D.C. Cir. 1983) (holding that beneficiary's

ability to call insurance carrier and supplement written notice was constitutionally inadequate); *Vargas v. Trainor*, 508 F.2d 485, 489-90 (7th Cir. 1974) (holding that ability to gain more information by contacting caseworker did not cure insufficient written notice.); *Ortiz v. Eichler*, 616 F. Supp. 1046, 1062 (D. Del. 1985) ("Defendants' . . . contention that notice inadequacies are unimportant because claimants can call the agency for more detailed information—has been repeatedly rejected by other federal courts."). To argue that this is an acceptable practice affirms the Plaintiffs allegations that they are not provided with statutory due process with written notice and right to a hearing.

Defendants' failure to provide actual written notice and an opportunity to be heard violates the Medicaid statute. Plaintiffs have stated a claim of Medicaid due process violations, enforceable under § 1983. Defendants' motion to dismiss these claims must be denied.

B. REASONABLE PROMPTNESS

1. Plaintiffs Have Established a Reasonable Promptness Violation.

To state a claim for a violation of the Medicaid reasonable promptness provision, plaintiffs must show that they have been found eligible for Medicaid services, and the state has failed to provide those services within a reasonable time period. *See, e.g., O.B. v. Norwood*, No. 15 C 10463, 2016 WL 1086535, at *6 (N.D. Ill. Mar. 21, 2016); 42 C.F.R. § 435.930(a). Defendants concede that the claim under which plaintiffs have asserted their claim, 42 U.S.C. § 1396a(a)(8), is privately enforceable under § 1983, citing *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1007 (D. Minn. 2016) and *Lewis v. N.M. Dept. of Health*, 275 F.Supp.2d 1319, 1332-33 (D.N.M. 2013). Def's Brief at 9. The facts alleged by Plaintiffs state a reasonable promptness claim, which they are entitled to enforce under § 1983.

Here Plaintiffs' complaint pleads that Defendants have failed to provide services promptly. For example, Plaintiffs pled that Defendants have approved a certain amount of Medicaid-covered HCBS for Plaintiff BR based on an assessment of his needs. FAC ¶¶ 101, 105-07. However, though the Defendants, through their agents, found specific amounts of HCBS to be necessary for BR, they have failed to deliver adequate services for months after the services were approved. FAC ¶¶ 117-19, 132-35, 142-45, 158-59, 175-84, 192-201. BR has had a discharge notice from his provider since November 2016 with a discharge date of February. FAC ¶ 142. At the time Plaintiffs amended their complaint, six months after the discharge notice, no alternative placement has been found for BR despite efforts by his case manager. FAC ¶ 149.

Similarly, the other Plaintiffs all had services determined to be necessary by the State's initial level of care assessment and individualized services planning process, but Defendants, through their agents, have failed to provide those services for weeks, if not months. FAC ¶¶ 109-203. Defendants attempt to frame these failures as a "decrease to the waiver cap" rather than a "lapse in services" misrepresents Plaintiffs' allegations. Plaintiffs have indeed alleged that their services have "lapsed," or have otherwise not been provided. They have not stated that there is any change to their entitlement to services, rather, they have alleged that Defendants have failed to provide services to which they are entitled as determined by Defendants' initial level of care assessment and individualized services plan. Defendants' failure to provide these services has spanned many weeks for all Plaintiffs, and the delay is not reasonable. Thus, Plaintiffs have stated a claim for a violation of reasonable promptness.

Defendants misguidedly suggest that Plaintiffs may not make a reasonable promptness challenge to their exceptions process, since the exceptions process is not privately enforceable under *Blessing v. Freestone*, 520 U.S. 329 (1997). Whether the state law provision in Iowa Code

§17A.9A regarding exceptions is privately enforceable under § 1983 is irrelevant, however, as Plaintiffs have not sought to enforce this code. Rather, in determining whether a statutory provision is enforceable under § 1983, the court must examine the statute that gives rise the claim, in this case 42 U.S.C. § 1396a(a)(8). Defendants have conceded that this statutory provision that gives rise to plaintiffs' reasonable promptness claim is privately enforceable. Def's Brief at 9. Whether the exceptions process may be privately enforced is not a question before this court.

Indeed, Plaintiffs' reasonable promptness claim is not directed at Defendants' exception process. Nor could it be, since the exception to policy process is built into the program of services to which Plaintiffs are entitled, and does not operate distinctly from the HCBS Plaintiffs seek. Iowa's relevant waiver applications each state:

> If there is a need that goes beyond the budget amount and/or the waiver service limit, the participant has the right to request an exception to policy. The MCOs operate an exception to policy process for their members. In the event an MCO denies an exception to policy and determines the member can no longer have his or her needs safely met through the 1915(c) waiver, the MCO is required to forward this information to DHS.

(Exhibit C to PI Brief, see Iowa's Application for 1915(c) Waiver for Intellectual Disability, page 200-201). Once they are enrolled in a waiver, Plaintiffs are entitled to waiver services for which they are eligible. *See Price v. Medicaid Dir*., 310 F.R.D. 345, 374 (S.D. Ohio 2015); *Boulet v. Cellucci*, 107 F. Supp. 2d 61 (D. Mass. 2000); *Murphy*, 2017 WL 2198133 at *17-18. Because the waiver requires Defendants to consider making an exception, it is an integral part of the Defendants' scheme for allocating HCBS. Thus, there is no reason to separately evaluate whether the exception to policy is privately enforceable under the *Blessing* test. Plaintiffs have pled that they have not received services to which they are entitled promptly, and have stated a claim that Defendants have violated the Medicaid Act's reasonable promptness provision.

C. AMERICANS WITH DISABILITIES ACT AND REHABILITATION ACT

1. Plaintiffs Have Pled Actionable Integration Mandate Claims.

The Plaintiffs' *Olmstead* claims under Title II of the ADA and Section 504 of the Rehabilitation Act are more than plausible on their face given the facts and legal theories set forth by the Plaintiffs. In *Olmstead*, the Supreme Court held that "[u]justified isolation … is properly regarded as discrimination based on disability." 527 U.S. 581, 597 (1999). The well-recognized test for a violation of the integration mandate under both Title II of the ADA and Section 504 is set forth as a three-part test in *Olmstead*. *Olmstead,* 527 U.S. at 592. Plaintiffs are qualified individuals with disabilities who want to be served in the community rather than institutions, whose placement in the community and desired level of community integration is appropriate as supported by their eligibility for the waiver and their service plans, and whose placement in the community can be reasonable accommodated because community services are less expensive than institutional services for all of the named plaintiffs. (FAC ¶¶ 126,136, 147, 167, 185, and 198). The Plaintiffs therefore have cognizable claims under the ADA and Section 504.

Nothing the Defendants assert would be grounds for dismissal under Fed. R. Civ. P. 12(b)(6) for the *Olmstead* claims. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011) (quoting *Scheuer v. Rhodes*, 416 U.S. 233, 236 (1974)). The Defendants raise possible defenses to the *Olmstead* claims in asserting that the Plaintiffs' requests would be fundamental alterations to the program, but these arguments are related to the merits of the Plaintiffs' claims, not the sufficiency of the claims themselves, especially when taken in the light most favorable to the Plaintiffs. In addition, these are fact-specific inquiries that cannot be resolved without discovery and thus are not an appropriate basis for dismissal. *See, e.g., Radaszewski ex*

rel. Radaszewski v. Maram, 383 F.3d 599, 611 (7th Cir. 2004) (requiring additional evidence to determine whether there was a fundamental alteration).

The cases the Defendants cite regarding a requirement of ill-intent or failure to satisfy an affirmative duty are employment law cases under Title I of the ADA. The Defendants cite no authority as to how these cases relate to Title II of the ADA or the *Olmstead* analysis for determining a violation of the community integration mandate. Community integration cases explain that the *Olmstead* holding established that "the word 'discrimination' as used in § 12132 includes not only disparate treatment of comparably situated persons but also undue institutionalization of disabled persons, no matter how anyone else is treated." *Amundson ex rel. Amundson v. Wisc. Dep't of Health Servs.*, 721 F.3d 871, 873 (7th Cir. 2013). Therefore, the cases cited by the Defendant regarding the Plaintiffs' claims are not relevant to whether the Plaintiffs have stated a claim under the ADA and Section 504 community integration mandate.[2]

Even if it was appropriate to consider a fundamental alteration defense at this stage, the Defendants have provided no factual information as to why or how the Plaintiffs are requesting services that are not cost-neutral or otherwise fundamentally alter the nature of the program. *See* 28 C.F.R. § 25.130(b)(7); *Olmstead*, 527 at 605-07 (placing the burden on the state to demonstrate a fundamental alteration). The state has offered no evidence as to how the requested relief would

[2] The District Court in *Guggenberger* examined one of the cases cited by the Defendant, *Peebles v. Potter*, 354 F.3d 761 (8th Cir. 2004) but only for the purpose of whether the Rehabilitation Act's "solely by reason of … disability" language was relevant to the *Olmstead* claims under Section 504. *Guggenberger,* 168 F. Supp. 3d at 1033. The court found that the question of intent or Section 504's sole impetus did not need to be considered. *Id.* at 1033 (citations omitted) (finding that the Plaintiffs stated viable integration mandate claims cognizable under both the ADA and the Rehabilitation Act). The court also discussed a state's affirmative duty to ensure that individuals with disabilities receive services in the most integrating setting appropriate to their needs. *Id.*

change the state's costs when the managed care organizations are paid a fixed per member per month rate or, for that matter, that any other actions that state may need to take to meet its obligations would be a fundamental alteration. States may not rely on service limits in the very programs intended to serve the integration mandate to prevent enforcement of the mandate. *Steimel v. Wernert,* 823 F.3d 902, 916 (7th Cir. 2016) (citing 28 C.F.R. § 35.130(b)(8)). In contrast, each of the Plaintiffs provided information as to their individual cost-neutrality and cost-effectiveness as compared to institutionalization. (Docket 16-1, p. 34; Doocy Decl. ¶ 26, Fisher Decl. ¶ 33, Kuhl Decl. ¶ 30, Johnson Decl. ¶ 16, Wargo Decl. ¶ 26).

The Defendants raise issues that are relevant to their possible defenses to the Plaintiffs' *Olmstead* claims rather than challenged the sufficiency of the claims by the Plaintiffs. Defendants suggest that an individual cannot have an entitlement to exceed the cap and that considering an exception to policy as an entitlement would destroy cost neutrality and cause a fundamental alteration. Yet the process for accessing services above the limits set in the waiver is an integral part of Defendants' Medicaid waiver program. The Plaintiffs are merely asking that the process for accessing all the services provided for in the waiver, including through the exceptions policy, be ascertainable so they know what evidence they need to provide to receive these waiver services and so that they will receive sufficient due process to allow them to appeal any denial of such service requests. This does not fundamentally change the program. The Plaintiffs have stated ADA and Section 504 claims under the Rule 12(b)(6) and should have the opportunity to complete discovery and flesh out their claims.

D. PERSONAL RESPONSIBILITY

Defendant DHS is the single state agency wholly responsible for the implementation and management of the state's Medicaid program and is not simply a "contract manager." The single

state agency requirement "safeguards against the possibility that a state might seek to evade federal Medicaid requirements by passing the buck to other agencies that take a less generous view of a particular obligation." *K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107, 112 (4th Cir. 2013) (citation omitted); *see also Catazano ex rel Catazano v. Dowling*, 60 F.3d 113, 118 (2d Cir. 1995); *Parrales v. Dudek*, No. 4:15CV424-RH/CAS, 2015 WL 13373978, at *5 (N.D. Fla. Dec. 24, 2015) (finding Medicaid waiver recipients adequately stated *Olmstead* claim against defendant based on implementation of and failure to oversee managed care programs). In any case, Defendants are responsible for their contractor agents' actions. 42 U.S.C. 1396a(a)(5); 42 C.F.R. § 431.10; *see J.K. ex. rel. R.K. v. Dillenberg,* 836 F.Supp. at 699 (D. Ariz. 1993).

E. SOVEREIGN IMMUNITY

1. Neither of the Defendants is Immune to this Suit under the Eleventh Amendment.

Defendants correctly state that "the Eleventh Amendment bars suits in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury." *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citations omitted). *Ex parte Young* provides an exception to that general rule, permitting cases like this one that sue state officials in their official capacities for prospective injunctive relief where the plaintiffs have alleged that those officials are acting in violation of the Constitution or federal law. 209 U.S. 123 (1908); *see Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1037 (8th Cir. 2002). Plaintiffs' claims fall squarely within this well-established exception.

a. Plaintiffs' Suit Does Not Seek Damages.

Defendants mistakenly suggest that—because an injunction in favor of Plaintiffs would require them to provide additional Medicaid services, which cost money—Plaintiffs suit should be considered a claim for damages rather than one for injunctive relief, barred by the Eleventh Amendment. This same argument has been rejected by the Fourth Circuit, which held that,

> simply because the implementation of . . . prospective relief would require the expenditure of substantial sums of money does not remove a claim from the *Ex Parte Young* exception. . . [which] "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."

Antrican v. Odom, 290 F.3d 178, 185 (4th Cir. 2002) (quoting *Milliken v. Bradley*, 433 U.S. 267, 289 (1977)); *see also Missouri Child Care Ass'n*, 294 F.3d at 1042; *Guggenberger*, 198 F. Supp. 3d at 1001. The fact that granting Plaintiffs the relief they request will require the state to spend money does not convert the suit from a claim for prospective and equitable relief to one for damages. Defendants are not entitled to Eleventh Amendment immunity.

b. *Armstrong* Is Irrelevant to the Eleventh Amendment Inquiry.

Defendants erroneously suggest that Supreme Court's recent decision in *Armstrong v. Exceptional Child*, 135 S. Ct. 1378 (2015) supports their Eleventh Amendment argument and precludes enforcement of the Medicaid Act. Defendants' argument seriously misconstrues the holding in *Armstrong*, which did not consider the application of the Eleventh Amendment at all. Instead, *Armstrong* held that a particular provision of the Medicaid that governs equal access (42 U.S.C. § 1396a(a)(30)(A)) was not enforceable by health care providers under the Supremacy Clause of the U.S. Constitution. *Id.* at 1385. Thus, since Plaintiffs here have neither invoked 42 U.S.C. § 1396a(a)(30)(A), nor made its claims pursuant to the Supremacy Clause, this holding is not relevant to this case, much less does it compel this court to find that sovereign immunity bars this suit.[3]

c. Governor Reynolds Waived Immunity under the Eleventh Amendment.

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[3] Many cases post-*Armstrong* have enforced Medicaid provisions under § 1983. *See, e.g., Davis v. Shah,* 821 F.3d 231 (2d Cir. 2016); *Guggenberger,* 198 F. Supp. 3d at 1001; *Unan v. Lyon*, 2:14-CV-13470, 2016 WL 107193, at *11 (S.D. Mich. 2016) (enforcing reasonable promptness and distinguishing *Armstrong*), *aff'd in part, rev'd in part on other grounds and remanded*, 853 F.3d 279 (2017)

Finally, Defendants argue that plaintiffs have not established that Governor Reynolds has waived her immunity. A similar argument was defeated in a recent case in the Southern District of Ohio, where plaintiffs challenged the state's system for providing services to residents with developmental disabilities, naming the Governor as a defendant. *Ball by Burba v. Kasich*, No. 2:16-CV-00282, 2017 WL 1102688, at *7 (S.D. Ohio Mar. 23, 2017). The court there held that the Governor was not immune to plaintiff's Rehabilitation Act claims under the Eleventh Amendment, since the plaintiffs alleged "that the Governor, though the Governor's Office of Health Transformation, received over $400,000 in federal appropriations in 2016." *Id.* at *6. As such, the court held that the "Governor has waived his Eleventh Amendment immunity with respect to Plaintiffs' Rehabilitation Act claims by agreeing to accept federal funds." *Id.* Thus, the case cited by Defendants, *Kobe v. Haley*, 666 F. App'x 281, 300 (4th Cir. 2016), is distinguishable from the case at bar. There, plaintiffs only alleged that the Governor had "political influence over those who are responsible for ongoing violations and have the authority to end them," but failed to allege that she had waived immunity. *Id.* (emphasis in original). Here, plaintiffs have alleged in that Governor Reynolds "is responsible for directing, supervising and controlling the executive branch of state government and for assuring that all federal and state laws are fully executed." FAC ¶ 13. They have also alleged that the Governor "decided unilaterally to deliver Medicaid services through private managed care plans in Iowa." FAC ¶ 81. Plaintiffs have shown that the Governor has waived sovereign immunity in this case.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to deny Defendants' Motion to Dismiss in its entirety.

Respectfully submitted,
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