FILED
AUSTIN DIVISION
2003 MY 23 PM 2:08
WESTERN DISTRICT OF TEXAS
U.S. CLERK'S OFFICE
BY: _____
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHRISTY MCCARTHY, et al.,
Plaintiffs,

-vs-

Case No. A-03-CA-231-SS

DON A. GILBERT, et al.,
Defendants.

ORDER

BE IT REMEMBERED on the 23rd day of May 2003 the Court reviewed the file in the above-styled cause, specifically Defendants' Motion to Dismiss Plaintiff Arc of Texas, Plaintiffs' response, and Defendants' reply; and Defendants' Motion to Dismiss, Plaintiffs' response and Defendants' reply. The above-styled cause was transferred to this Court on April 11, 2003 with eleven pending motions, many of which had been pending for several months. Having considered the motions to dismiss, responses and replies, the case file as a whole and the applicable law, the Court enters the following opinion and orders.

Factual and Procedural Background

The plaintiffs in this case are twenty-one Texas residents who suffer from mental retardation or developmental disorders such as cerebral palsy and autism and the Arc of Texas, a nonprofit organization in Texas that provides programs and support for individuals with mental retardation and other developmental disabilities and their families. *See* Second Am. Compl. at ¶ 17(a)-(v). The individual plaintiffs sue through their next friends. Due to their disabilities, the individual plaintiffs assert they qualify for Medicaid services under the Home and Community-based Waiver Services

("HCS") program and the Community Living Assistance and Support Services ("CLASS") waiver program. *Id.* at ¶¶ 1, 17. The plaintiffs allege they have all been on the waiting list for HCS or CLASS waiver services, or both, for at least a year and seek to represent a class of plaintiffs who have been on the waiting lists for HCS or CLASS waiver services for more than one year. *Id.* at ¶¶ 4, 17, 95-198. They contend the defendants never evaluated their eligibility for the waiver programs or denied their applications for waiver services but instead put them on a waiting list. *Id.* at ¶¶ 95-198.

The defendants are Albert Hawkins,[1] the Commissioner of the Texas Health and Human Services Commission ("THHSC"), the state agency that administers the Medicaid program in Texas, in his official capacity; Karen Hale, the Commissioner of the Texas Department of Mental Health and Mental Retardation ("TDMHMR"), which is responsible for administering the HCS waiver program, in her official capacity; and James R. Hine, the Commissioner of the Texas Department of Human Services ("TDHS"), which administers the CLASS waiver program, in his official capacity. *Id.* at ¶¶ 18-20; *see also* TEX. GOV'T CODE § 531.021; TEX. HEALTH & SAFETY CODE § 531.001 *et seq*. The defendants move to dismiss the Arc of Texas as a plaintiff for lack of standing pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. They also move to dismiss all of the plaintiffs' claims pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The plaintiffs filed a motion for class certification, but the Court delayed the time for the defendants to respond until the Court's ruling on the motions to dismiss.

---

[1] Since this case was filed, Albert Hawkins has become the Commissioner of THSSC and Don Gilbert, who was the original defendant, has retired. *See* Notice of Substitution of Albert Hawkins for Don Gilbert [#8]. Accordingly, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court substitutes Albert Hawkins for Don Gilbert as a defendant in this case.

Analysis

I. Standard for Motions to Dismiss

The defendants move to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[2] In deciding whether to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, "the Court must take the factual allegations as true, resolving any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). The Court should then dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 78 S. Ct. 99, 102 (1957). In analyzing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the Court evaluates the plaintiff's claims under this same standard. *See Benton v. United States*, 960 F.2d 19, 21 (5th Cir.1992).

II. Texas Medicaid Waiver Program

Medicaid is a program jointly funded by federal and state governments through which the federal government provides financial assistance to states so they can furnish medical services to low-income and disabled persons. *E.g., Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502, 110 S.Ct. 2510 (1990); 42 U.S.C. § 1396 *et seq.* ("Medicaid Act"). A state's participation in Medicaid is voluntary, but if a state chooses to participate in the program, it must comply with certain statutory

---

[2] The motions to dismiss were filed before the plaintiffs filed their Second Amended Complaint on December 23, 2002. Rather than requiring the defendants to refile their motions, the Court will apply the defendants' arguments in their motions to dismiss to the claims in the Second Amended Complaint.

and regulatory requirements. *Wilder*, 496 U.S. at 502. For instance, a state must submit a Medicaid plan to the Secretary of Health and Human Services for approval, describing the nature and scope of the state's Medicaid program. *Wilder*, 496 U.S. at 502. Among other requirements, the state plan must provide for medical assistance to be furnished to eligible applicants with reasonable promptness; grant an opportunity for a fair hearing to applicants whose claims for medical assistance are denied or not acted upon with reasonable promptness; and include reasonable standards for determining eligibility. 42 U.S.C. § 1396a(a)(3), (8), (17).

Under an amendment to the Medicaid Act, a state can apply to the Secretary of Health and Human Services for a waiver of certain statutory requirements so the state can develop home- and community-based programs as alternatives to placing Medicaid recipients in inpatient facilities under the state Medicaid plan. 42 U.S.C. § 1396n(c) (also known as "section 1915(c) waivers"); 42 C.F.R. § 440.180. To be approved, a waiver program must not result in higher overall expenditures than what would have been incurred through the plan. 42 U.S.C. § 1396n(c)(2).

Texas set up the HCS and CLASS waiver programs under this provision and received approval from the federal Center for Medicare and Medicaid Services. These programs provide services to avoid the need for institutionalization in an intermediate care facility for the mentally retarded ("ICF/MR") or nursing facility. The HCS program serves mentally retarded individuals who live in their own homes, with families, in foster care settings or in small group homes.[3] It includes services such as case management, respite care, minor home modifications, residential

[3] The Mental Retardation Local Authority ("MRLA") waiver program, which is the subject of another lawsuit before this Court, provides the same services as the HCS waiver but has a different case management entity. *See* Mot. to Dismiss at 10. In June 1998, the MRLA waiver replaced the HCS waiver in some portions of the state and will replace the HCS waiver statewide by September 2003. *Id.*

assistance, and counseling and therapy. *See* Second Am. Compl. at ¶ 74. The program serves approximately 4,900 recipients. *See* Mot. to Dismiss, Ex. 3, Att. 1. The CLASS waiver program provides services such as case management, physical and occupational therapy and minor home modifications to individuals with developmental disabilities other than mental retardation. *See* Second Am. Compl. at ¶¶ 77, 82. The CLASS program serves approximately 1,963 beneficiaries. *See* Mot. to Dismiss, Ex. 4, Att. 1. In applying for a waiver, a state "must indicate the number of unduplicated beneficiaries to which it intends to provide waiver services in each year of its program. This number will constitute a limit on the size of the waiver program unless the State requests and the Secretary approves a greater number of waiver participants in a waiver amendment." 42 C.F.R. § 441.303(f)(6). It is undisputed that the state has already met the limits of CLASS and HCS waiver participants set forth in its waiver applications.

The plaintiffs contend there are 17,500 people who have requested HCS waiver services and been placed on a waiting list, and there are 7,300 people who have requested CLASS waiver services and been placed on a waiting list. *See* Second Am. Compl. at ¶¶ 72, 80. They assert these individuals are currently institutionalized in an ICF/MR or run the risk of being institutionalized if the state does not provide them sufficient waiver services to avoid institutionalization. *Id.* at ¶¶ 91-92. The plaintiffs challenge the defendants' failure to provide HCS and CLASS waiver services to the individuals on the waiting lists as a violation of the Medicaid Act, the United States Constitution, the Americans with Disabilities Act, and the Rehabilitation Act of 1973. They seek declaratory and injunctive relief as well as attorneys' fees and costs of suit.

III. The Arc of Texas' Standing to Sue

The defendants move to dismiss the Arc of Texas as a plaintiff under Rule 12(b)(1) of the Federal Rules of Civil Procedure. For the Court to have jurisdiction over a matter under Article III, the plaintiff must prove it has standing to sue. Specifically, the plaintiff must show it suffers an injury-in-fact that is fairly traceable to the defendants' challenged conduct and is likely to be redressed by the relief the plaintiff seeks from the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992). An organization may sue on its own behalf based on an injury to the organization itself or in a representational capacity, on behalf of its members' injuries. To sue on its own behalf, the organization must show it has suffered a concrete and demonstrable injury to its activities that is "far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The organization's expenditure of resources in an attempt to counteract a defendant's allegedly unlawful practices is a sufficient injury, although devoting resources to litigation challenging the practices is not. *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999). An organization has standing to sue in a representational capacity on behalf of its members when: (1) its members have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434 (1977).

The Arc of Texas claims standing to sue on its own behalf and on behalf of its members. Because the defendants challenge Arc's standing at the motion to dismiss stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Fowler*, 178 F.3d at 357

(quotations omitted). However, because the Arc of Texas attached affidavits to its response, the Court will consider them as well as the allegations in the pleadings. In the complaint, the Arc of Texas states it "works to support families, advance public policies, provide training programs, and build a statewide network of advocates" for people with mental retardation and "continues to advocate for the inclusion of people with mental retardation and other developmental disabilities in all aspects of society." Second Am. Compl. at ¶ 17(p). It contends it has suffered an injury from the defendants' denial of waiver services to its members because it has been forced to devote more resources to providing services such as consultation, training, information, referrals and assistance. Its executive director, Mike Bright, testifies the Arc of Texas has worked for six years with the Texas legislature and state agencies to address the waiver service waiting lists. *See* Plaintiffs' Response, Ex. 1 ("Bright Aff."), at § 4. In *Cleburne Living Ctr., Inc. v. City of Cleburne, Tex.*, 726 F.2d 191, 203 (5th Cir. 1984), the Fifth Circuit held the association did not have standing to sue because it merely alleged the City Council's decision impaired its abstract interest in the advancement of interests of mentally retarded individuals. The Court stated the association would have had standing if it had shown (1) it provides counseling and referral services to mentally retarded individuals seeking group homes and (2) it had expended significant resources to combat the City Council's discrimination. *Cleburne*, 726 F.2d at 203. The Arc of Texas has alleged both of these factors. The defendants contend the Arc has not shown dollar amounts or specific resources expended on this effort; however, such evidence is unnecessary at the motion to dismiss stage. The Court finds the Arc of Texas has made a sufficient preliminary showing of concrete injury to demonstrate standing.

The Arc of Texas also asserts standing in a representative capacity. It alleges hundreds of its members are on CLASS and HCS waiting lists, including several plaintiffs in this lawsuit. *See*

Bright Aff. at § 3. These members have standing to sue in their own right, as they have applied for waiver services and been placed on waiting lists. *E.g.*, Plaintiffs' Response, Ex. 2 ("Pratt Aff."). The interests the Arc seeks to protect are relevant to the organization's purpose of advocating for the inclusion of individuals with mental retardation and developmental disabilities in the community. *See* Bright Aff. at § 2. Finally, the Arc of Texas' claims for declaratory and injunctive relief do not require the individual members to participate in the lawsuit. This lawsuit challenges the state agencies' apparent policy or practice of placing waiver applicants on waiting lists before determining their eligibility. The primarily legal questions involved do not require the Court to delve into the individuals' specific medical history or needs. Accordingly, the Court finds the Arc of Texas meets the *Hunt* test at this preliminary stage and has standing to sue on behalf of its members.

IV. Section 1983 Causes of Action

The plaintiffs' causes of action alleging violations of various provisions of the Medicaid Act (Counts I through IV and VI) and violations of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Counts VI and VII) must all be brought under 42 U.S.C. § 1983. Under section 1983, a plaintiff may sue a person who, acting under color of state law, deprived her "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983.

Section 1983 allows plaintiffs to assert rights under certain federal statutes; however, "a plaintiff must assert a violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S.Ct. 1353, 1359 (1997) (emphasis in original); *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502 (1980). Plaintiffs bear the burden of showing the statute creates an enforceable right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 122 S.Ct. 2268, 2276

(2002). In determining whether a plaintiff has asserted a statutory right, courts consider three factors: (1) whether Congress intended that the statutory provision benefit the plaintiff; (2) whether the right asserted is so "vague and amorphous" that enforcement of the right would strain judicial competence; and (3) whether the statute unambiguously imposes a binding obligation on states using mandatory, not precatory, terms. *Blessing*, 520 U.S. at 340-41, 117 S.Ct. at 1359. If the plaintiff demonstrates a statute creates a right, the rebuttable presumption that the right is enforceable under section 1983 is overcome if Congress specifically foreclosed a remedy under section 1983 expressly or implicitly, by creating a comprehensive enforcement scheme in the statute. *Blessing*, 520 U.S. at 341, 117 S.Ct. at 1360. The Supreme Court recently reiterated "it is *rights*, not the broader or vaguer 'benefits' or 'interests' that may be enforced under the authority of [section 1983]" and "reject[ed] the notion that [its] cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Gonzaga*, 536 U.S. at 283, 122 S.Ct. at 2275.

Only rarely has the Supreme Court held a statute enacted under Congress's spending power creates a right enforceable under section 1983. In *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502 (1980), the first case to recognize section 1983 suits may be brought to enforce rights created by federal statutes, the Court held plaintiffs could recover payments withheld by a state agency in violation of the Social Security Act. In *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 107 S.Ct. 766 (1987), the Court held the rent-ceiling provision of the Public Housing Act "was a mandatory limitation focusing on the individual family and its income" and therefore conveyed benefits "sufficiently specific and definite to qualify as enforceable rights." 479 U.S. at 430, 432, 107 S.Ct. at 773-74.

Finally, and most heavily emphasized by the plaintiffs, the Court in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 110 S.Ct. 2510 (1990), held a reimbursement provision of the Medicaid Act creates an enforceable right for individual health care providers. The provision, the Boren Amendment to the Medicaid Act, requires states to reimburse health care providers using rates the state "finds, and makes assurances satisfactory to the Secretary" are "reasonable and adequate" to meet the costs of "efficiently and economically operated facilities." *Wilder*, 496 U.S. at 507, 110 S.Ct. at 2516 (quoting the legislative history of Pub. L. No. 92-603). The Court held this provision was undoubtedly intended to benefit health care providers and is not too vague and amorphous because it requires the state "to judge the reasonableness of its rates against the objective benchmark of an 'efficiently and economically operated facilit[y]' providing care in compliance with federal and state standards while at the same time insuring 'reasonable access' to eligible participants." *Wilder*, 496 U.S. at 519, 110 S.Ct. at 2523. The Court was not concerned that states have some discretion in choosing among reasonable methods of calculating rates, because courts can inquire into the reasonableness of the rates and "there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act." *Wilder*, 496 U.S. at 520, 110 S.Ct. at 2523 (emphasis in original).

The *Wilder* decision does not mean all Medicaid Act provisions are enforceable under section 1983, however; the Fifth Circuit recently held a state's failure to "substantially comply" with participation goals or other systemwide performance standards, to adequately train and staff case managers, to report certain data, and to train health care providers in conjunction with its early and periodic screening, diagnostic, and treatment services program under Medicaid may not be challenged under section 1983. *Frazar v. Gilbert*, 300 F.3d 530, 545, 548 (5th Cir. 2002), *cert.*

granted in part sub nom Frew ex rel. Frew v. Hawkins, 123 S.Ct. 1481 (2003). Moreover, the Supreme Court acknowledged it has backed away from the *Wilder* decision in recent years: "Our more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes." *Gonzaga*, 122 S.Ct. at 2274. Therefore, it is necessary for the Court to evaluate each statutory provision the plaintiffs assert and decide whether Congress created a right enforceable under section 1983.

A. Comparability Requirement under 42 U.S.C. § 1396a(a)(10)(B)

The plaintiffs raise a cause of action under the comparability provision of the Medicaid Act, which requires a state Medicaid plan to provide "that the medical assistance made available to any individual . . . shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." 42 U.S.C. § 1396a(a)(10)(B). Additionally, the plaintiffs allege the defendants violated the regulation implementing this subsection of the act, which states: "Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b).[4] In their response to the motion to dismiss, the plaintiffs point to another regulatory provision not included in their complaint, which states: "The plan must provide that the services available to any categorically needy recipient under the plan are not less in amount, duration, and scope than those services available to a medically needy recipient." 42 C.F.R. § 440.250.

The plaintiffs claim this statutory provision and the corresponding regulations create an "equality principle" requiring state Medicaid programs to provide the same or similar medical

[4] The Court will assume for purposes of this Order that regulations can create enforceable rights under section 1983. The Fifth Circuit has not explicitly decided this question, although it noted even if regulations could create rights, the rights could not be enforceable unless the underlying statute itself created enforceable rights. *E.g., Gracia v. Brownsville Housing*, 105 F.3d 1053, 1057 (5th Cir. 1997).

treatment to all individuals within a particular category. *E.g., Blanchard v. Forrest*, 71 F.3d 1163 (5th Cir. 1996) (holding state violated 42 U.S.C. § 1396a(a)(10)(B) by providing greater retroactive payments to some Medicaid applicants than others); *Sobky v. Smoley*, 855 F.Supp. 1123, 1140 (E.D. Ca. 1994). They contend the defendants violate this requirement by not providing CLASS and HCS waiver services to all categorically needy individuals who have applied for them.

The first question in determining whether the plaintiffs may enforce a statutory provision under section 1983 is whether Congress intended the provision to benefit the plaintiffs. The waiver provision of the Medicaid Act expressly allows states participating in the waiver program to waive the comparability requirement of 42 U.S.C. § 1396a(a)(10)(B). *See* 42 U.S.C. § 1396n(c)(3). Therefore, Congress did not intend the comparability provision to benefit individuals seeking services under a waiver plan, and the plaintiffs have no right to sue to enforce the provision under section 1983.

B. Freedom of Choice Provision of 42 U.S.C. § 1396n(c)(2)(C)

The plaintiffs assert a violation of the freedom of choice provision of the Medicaid Act, which states:

> A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that . . . such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded.

42 U.S.C. § 1396n(c)(2)(C). The plaintiffs claim the defendants violated this provision by failing to inform them of feasible alternatives to ICF/MR facilities, including the CLASS and HCS waiver services, and failing to implement the plaintiffs' choices for Medicaid services by requiring the

plaintiffs to remain on waiting lists for extended periods of time. *See* Second Am. Compl. at ¶ 205.

The first inquiry is whether Congress intended this provision to benefit the plaintiffs. The plaintiffs point to cases holding this provision was designed to benefit Medicaid recipients. *E.g., Wood v. Tompkins*, 33 F.3d 600, 608 (6th Cir. 1994) (finding the provision serves "to protect the health and welfare of home care Medicaid recipients"); *Cramer v. Chiles*, 33 F.Supp.2d 1342, 1351 (S.D. Fla. 1999) (holding the provision was designed to benefit plaintiffs who are Medicaid recipients in intermediate care facilities). However, to hold Congress intended this provision to benefit the plaintiff would mean Congress intended every provision of § 1396n(c), which sets forth the requirements for granting waivers to states, to benefit every potential recipient of Medicaid waiver services simply because "the Medicaid program is generally intended to benefit qualifying recipients." *Frazar*, 300 F.3d at 539. The real issue is whether a particular subsection of section 1396n(c) "is 'phrased in terms' benefitting recipients in that it directly focuses on" their rights or if it "does not focus directly on" recipients but merely gives them "an indirect benefit." *Evergreen Presbyterian Ministries v. Hood*, 235 F.3d 908, 927, 929 (5th Cir. 2000). This subsection is not written in terms of "*individual* entitlement" and is "not concerned with 'whether the needs of any particular person have been satisfied." *Gonzaga*, 122 S.Ct. at 2277-78 (quoting *Blessing*, 520 U.S. at 343) (emphasis in original). Instead, it prescribes what states must include in their waiver applications to receive approval by the Secretary of Health and Human Services.

This subsection requires state waiver plans to inform individuals likely to require institutionalization of the "feasible" alternatives to being institutionalized "if available under the waiver." 42 U.S.C. § 1396n(c)(2)(C). While it appears Congress intended recipients to receive the benefit of being able to choose between the feasible alternatives, the subsection does not give

recipients this choice when the alternatives are not feasible or are not available under the waiver. A subsequent subsection acknowledges waiver plans may have limits on the number of recipients and the corresponding regulations require state waiver applications to indicate the number of unduplicated beneficiaries of the waiver services, which "will constitute a limit on the size of the waiver program unless the State requests and the Secretary approves a greater number of waiver participants in a waiver amendment." 42 C.F.R. § 441.303(f)(6). When this mandatory cap has already been reached, waiver services are no longer "feasible" and "available" to applicants, and plaintiffs applying for services after the slots have been filled do not have an entitlement to choose to receive them. *E.g., Makin v. Hawaii*, 114 F.Supp.2d 1017, 1027-28 (D. Haw. 1999) ("[W]hile the Medicaid Act requires a state to offer feasible alternatives available under the waiver to all eligible individuals, the [waiver] program is not 'available' under the statute when the slots available under the 'population limit' have been filled."). Therefore, the Court finds Congress did not intend to create an individual right enforceable under section 1983 for individuals who apply for Medicaid waiver services after the ceiling of recipients identified in the waiver application and approved by the federal government has been met or surpassed. The plaintiffs do not dispute that the ceilings have been met for both waiver programs. Therefore, they do not have a right to sue under section 1983 to enforce this provision.

C. Reasonable Promptness Requirement of 42 U.S.C. § 1396a(a)(8)

The plaintiffs also sue under the statutory provision requiring a state Medicaid plan to "provide that all individuals wishing to make application for medical assistance under the 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). Additionally, the plaintiffs assert the

defendants violated the regulation requiring the agency to "[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." *See* 42 C.F.R. § 435.930(a). The plaintiffs contend the defendants violated the reasonable promptness requirement by refusing to accept applications for waiver services and failing to provide applicants access to HCS and CLASS waiver services in a timely manner. *See* Second Am. Compl. at ¶¶ 208, 212.

As the plaintiffs point out, other courts have held the "reasonable promptness" provision creates an individual right enforceable under section 1983. *E.g., Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998); *Lewis v. New Mexico Dep't of Health*, 94 F.Supp.2d 1217 (D.N.M. 2000). However, these cases involved plaintiffs who had been found eligible for a particular Medicaid service and were waiting to receive the service: for instance, in *Chiles*, the plaintiffs had been found eligible for and were on the waiting lists to enter intermediate care facilities. *Chiles*, 136 F.3d at 711. In this case, the plaintiffs have not been determined eligible to receive the waiver services; in fact, they complain that the defendants put them on a waiting list upon receiving their applications instead of evaluating their eligibility. *E.g.*, Second Am. Compl. at ¶ 96. While the plaintiffs may technically qualify for HCS and CLASS waiver services, the cap on the number of waiver recipients functions as "a constraint on eligibility," and "[i]ndividuals who apply after the cap has been reached are not eligible." *Boulet*, 107 F.Supp.2d 61, 77 (D. Mass. 2000). The plaintiffs do not claim they were prevented from filing applications; instead, they allege their applications were not evaluated. Because the plaintiffs have not been determined "eligible," they have not satisfied the first prong of *Blessing*, as they are not among the class of individuals Congress intended to benefit. While this Court finds it problematic that the state can avoid the reasonable promptness requirement simply by putting applicants on a waiting list before considering their eligibility instead of afterward, the

statute, regulations and state waiver plan as approved by the federal agency establish the ceiling as an additional eligibility requirement and render applicants automatically ineligible. Therefore, the plaintiffs have no entitlement to reasonable promptness and cannot enforce this subsection under section 1983.

D. Fair Hearing Requirement under 42 U.S.C. § 1396a(a)(3)

The plaintiffs contend the defendants violated the due process requirements under the Medicaid Act by failing to give them notices and opportunities to be heard when their applications were not acted on with reasonable promptness. *See* Second Am. Compl. at ¶ 223. The due process provision requires a state Medicaid plan to "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 1396a(a)(3). The regulations adopted pursuant to this provision require state agencies to provide notice of a right to a hearing when an individual applies for Medicaid; when the agency takes any action affecting his or her claim; when a nursing facility notifies a resident of a transfer or discharge; and when the individual receives an adverse determination with regard to preadmission screening and annual review. 42 C.F.R. §§ 431.210; 431.206. The regulations require agencies to grant an opportunity for a hearing to any applicant whose claim for services is denied or any recipient who "believes an agency has taken an action erroneously." 42 C.F.R. § 431.220. An "action" is defined as "a termination, suspension, or reduction of Medicaid eligibility or covered services." 42 C.F.R. § 431.201.

Under the first prong of *Blessing*, the plaintiffs have shown they are individuals Congress intended this subsection to benefit. While the plaintiffs do not allege the state took an "action" against them as defined in the regulations, because it did not terminate, suspend or reduce their

benefits, they do allege the state did not act on their applications for waiver services with reasonable promptness and did not provide notice that their requested services were being denied or delayed. *E.g.*, Second Am. Compl. at ¶¶ 96, 98. Therefore, they are among the individuals to whom the statute grants an entitlement to notice. The Court needs more information about the procedure the state used before determining whether the state "acted" upon the plaintiffs' applications by placing them on waiting lists within the meaning of the Medicaid Act, even though it is clear the state did not take an "action" as it is defined in the statute. The Court also needs more factual development of the record to decide whether the state provided adequate notice under the statute. The due process provision is not too vague and amorphous for the Court to enforce; on the contrary, the regulations set forth specific notice and hearing requirements, and courts are accustomed to analyzing due process questions in both civil and criminal contexts. Finally, the statute and regulations speak in mandatory terms, using the word "must" and detailing precisely when and what notice and opportunity for a hearing is required. Several other courts have found this subsection creates a right enforceable under section 1983. *E.g., Bryson v. Shumway*, 308 F.3d 79, 90 (1st Cir. 2002) (holding subsection gives waiver applicants rights to notice when placed on a waiting list); *Meachem v. Wing*, 77 F.Supp.2d 431, 441 (S.D.N.Y. 1999). The Court holds the due process provision creates an enforceable right for these plaintiffs, although it makes no judgment regarding the merits of the claim.

E. Due Process Requirement under Fourteenth Amendment

The plaintiffs also argue the defendants violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. To demonstrate a procedural due process violation of constitutional proportions, a plaintiff must show (1) she was deprived of a property interest (2)

without notice and an opportunity to be heard. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705 (1972). To have a property interest in a benefit, a plaintiff must have "a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. Property interests are not found in the Constitution but in independent sources such as statutes, regulations, or contracts. *Roth*, 408 U.S. at 577-78, 92 S.Ct. at 2709. A plaintiff must show the relevant law unambiguously creates the asserted interest. *Hopkins v. Stice*, 916 F.2d 1029, 1031 (5th Cir. 1990).

As discussed above, the only entitlement the plaintiffs have under the Medicaid Act is to certain notice upon the state's receipt of their waiver applications and when their claims were not acted upon with reasonable promptness. In other words, they have shown they have a right to certain due process protections. It would be circular and absurd to allow the plaintiffs to raise a constitutional due process claim based on the agency's denial of their procedural due process right to notice and a hearing before denying their statutory right to notice and a hearing. The due process provision of the Medicaid Act meets and surpasses constitutional due process requirements. The Constitution does not provide a right to notice and a hearing when an applicant simply applies for a benefit and his application is not acted upon with reasonable promptness. That right is merely statutory, not constitutional. Accordingly, the Court finds the plaintiffs have not demonstrated a liberty or property interest sufficient to assert a constitutional due process violation.

F. Equal Protection Requirement under Fourteenth Amendment

Finally, the plaintiffs contend the defendants violate their constitutional right to equal protection by "establishing, subsidizing, and otherwise sanctioning enactments, programs, policies, and practices that have excluded, separated, and segregated persons with mental retardation or developmental disabilities." Second Am. Compl. at ¶ 225. The defendants argue the plaintiffs fail

to state an equal protection violation because they do not identify a similarly situated group that has received more favorable treatment. *E.g., Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382 (1982) ("The Equal Protection Clause directs that 'all similarly circumstances shall be treated alike.' But so too, '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'" (citations omitted)).[5] The complaint does not identify what group the defendants have treated more favorably than the plaintiffs. In their response, the plaintiffs state they have been treated differently than disabled individuals who have received waiver services. However, the people who have received waiver services are not similarly situated to the plaintiffs, because those people presumably applied for services before the plaintiffs did and therefore were not wait-listed. The plaintiffs do not allege the defendants discriminated against applicants who applied for waiver services at the same time by giving waiver services to some but placing others on a waiting list. Accordingly, the Court holds the plaintiffs have not stated a discrimination claim under the Equal Protection Clause.

V. Americans with Disabilities Act

Title II of the Americans with Disabilities Act ("ADA") states: "no qualified person 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. The plaintiffs contend the defendants violated Title II by failing to provide them "community mental retardation or developmental disability habilitation and support services in the most integrated setting appropriate" and failing to provide HCS and CLASS

[5] Unlike the Equal Protection Clause, the ADA does not require individuals making a discrimination claim under the statute to demonstrate uneven treatment of similarly situated individuals. *E.g., Olmstead v. Zimring*, 527 U.S. 581, 598, 119 S.Ct. 2176 (1999).

waiver services to individuals in ICF/MRs that would allow them to avoid institutionalization. Second Am. Compl. at ¶¶ 219-20. The defendants move to dismiss the plaintiffs' claim under Title II for failure of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, raising arguments under the Eleventh Amendment, Commerce Clause and the Tenth Amendment.

A. The *Ex Parte Young* Exception

The defendants contend the plaintiffs' ADA claim is barred by the Eleventh Amendment because they cannot invoke the *Ex parte Young* exception to Eleventh Amendment immunity. States and state agencies acting as the arms of the state are immune from suit in federal court under the Eleventh Amendment. However, a plaintiff may sue a state official in his official capacity for prospective injunctive relief if the plaintiff has standing to sue and demonstrates the official has a sufficient connection to the enforcement of the challenged statute. *See Ex parte Young*, 209 U.S. 123, 155-57 (1908) ("individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected [by] an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.").

The defendants contend the plaintiffs cannot invoke the *Ex parte Young* exception even though they sued state officials responsible for enforcing the statute, because Title II of the ADA only authorizes suits against state entities, which are immune under the Eleventh Amendment. The end result of this argument is the plaintiffs could not sue under Title II at all in this case, and plaintiffs could never sue to enforce Title II against state entities. The defendants rely on a Seventh

Circuit case holding a plaintiff could not sue a state official in his official capacity under Title II because "the proper defendant usually is an organization rather than a natural person," so "there is no personal liability under Title II." *Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir. 2000); *see also Lewis v. New Mexico Dep't of Health*, 94 F.Supp.2d 1217, 1230 (D.N.M. 2000).

However, a more recent Seventh Circuit decision notes *Walker* has been "uniformly rejected by the other courts to have considered the issue" and holds it "did not survive *Board of Trustees v. Garrett*, 531 U.S. 356, 374 n.9, 121 S.Ct. 955, 148 L.Ed.2d. 866 (2001), where the Supreme Court said that such a suit is indeed authorized by *Ex parte Young*." *Bruggeman v. Blagojevich*, 324 F.3d 906, 912-13 (7th Cir. 2003). In *Garrett*, the Supreme Court held states and state agencies are immune from Title I suits under the Eleventh Amendment because Congress exceeded its authority to abrogate states' sovereign immunity under section 5 of the Fourteenth Amendment. However, the Court indicated in a footnote its holding does not exclude suits against state officials under the *Ex parte Young* exception: "Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I still prescribes standards applicable to the States. Those standards can be enforced . . . by individuals in actions for injunctive relief under *Ex parte Young*." *Garrett*, 531 U.S. at 374 n.9, 121 S.Ct. 955. While Title I of the ADA covers employment discrimination on the basis of disability and "has somewhat different remedial provisions" from Title II, both expressly apply only to entities. *Garrett*, 531 U.S. at 360 n.1, 121 S.Ct. at 955; 42 U.S.C. § 12112. Therefore, this Court finds the Supreme Court's acknowledgment that the *Ex parte Young* exception is still open to ADA plaintiffs is applicable to suits under Title II of the ADA as well as Title I. Moreover, to hold otherwise would be to create

a catch-22 situation for ADA plaintiffs, and the Court will not follow such absurdity unless mandated to do so by relevant precedent.

B. Eleventh Amendment Immunity Defense

The defendants argue the state is immune from suit under Title II of the ADA because the statute exceeds Congress's Commerce Clause power and regulates the states in violation of the Tenth Amendment. Because the Court finds the plaintiffs validly invoked the *Ex parte Young* exception, it need not address the defendants' sovereign immunity arguments. Extending *Garrett* to Title II of the ADA, the Fifth Circuit held Congress went beyond its power under Section 5 of the Fourteenth Amendment in abrogating states' sovereign immunity under Title II because the statute imposes an affirmative accommodation obligation on the part of public entities. *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001). However, the Court made sure to point out the plaintiffs made no effort to properly proceed under *Ex parte Young*, because they amended their complaint to remove the state officials who were defendants. *Reickenbacker*, 274 F.3d at 976 n.9. The Court noted, "It is axiomatic that *Ex parte Young* does not provide an exception to sovereign immunity when a State (or its agency) is the defendant." *Id.* Likewise, it is axiomatic that the Eleventh Amendment is not implicated when state officials are properly sued under the *Ex parte Young* exception and the state or its agency is not a defendant. Therefore, the individual defendants cannot raise sovereign immunity arguments, because the state is not being sued as a sovereign.

C. Ability to Enforce Regulations

The defendants contend the plaintiffs cannot sue under the Title II regulations, particularly the integration mandate of 28 C.F.R. § 35.130(d), because Congress did not provide for enforcement of the regulations. The regulation states: "A public entity shall 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 plaintiffs allege the defendants violated this integration mandate by failing to provide CLASS and HCS waiver services that would prevent them from requiring institutionalization and allow them to be more integrated into the community. *See* Second Am. Compl. at ¶¶ 219-20.

The defendants point to the statutory enforcement provision of Title II, which provides for enforcement by "any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133. The statute does not expressly provide for enforcement of the regulations, unlike the corresponding enforcement provision for Title I of the ADA. *See* 42 U.S.C. § 12117(a) (providing for enforcement by "any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment."). The defendants argue Congress's failure to provide for enforcement of Title II regulations, unlike Title I regulations, demonstrates Congress did not intend for courts to enforce Title II regulations.

In this case, however, the plaintiffs do not seek to enforce the regulation under section 1983 using the *Ex parte Young* exception; instead, they assert a cause of action under Title II of the ADA and rely on the regulation to provide the Attorney General's interpretation of what the statute requires. The Supreme Court engaged in a similar analysis in *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 119 S.Ct. 2176 (1999), where the Court examined a Title II claim in light of the requirements in the implementing regulations, including the regulation at issue in this case. Based on an analysis of the statute and its regulations, the Court held states are required to provide community-based treatment for persons with mental disabilities under certain circumstances.

Olmstead, 527 U.S. at 607, 119 S.Ct. 2176. The *Olmstead* decision demonstrates plaintiffs can find support for their Title II claims in the regulations interpreting the statute. The question of whether plaintiffs can state an independent cause of action under the Title II regulations is not before this Court.

VI. Rehabilitation Act of 1973

The defendants contend section 504 of the Rehabilitation Act of 1973 is not enforceable against states under the Eleventh Amendment because the state did not validly waive its sovereign immunity by accepting federal funds. However, as discussed above, the Eleventh Amendment is not implicated in this case because the plaintiffs sued individual defendants for prospective relief under the *Ex parte Young* exception to sovereign immunity. *E.g., Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, 613 n.4 (5th Cir. 2003) (discussing Eleventh Amendment immunity and noting the plaintiffs had not avoided sovereign immunity by suing state officials in their official capacity). Therefore, the defendants' Eleventh Amendment argument is inapplicable in this case.

VII. Failure to State a Claim under ADA and Rehabilitation Act

The defendants argue the plaintiffs do not state a violation of the ADA and Rehabilitation and move to dismiss these claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. First, they contend only three of the plaintiffs are institutionalized, and these plaintiffs are not unjustifiably institutionalized. Further, the defendants claim even if the plaintiffs do state a discrimination claim, their "fundamental alteration" defense bars the claims.

Title II of the ADA prevents discrimination against or exclusion of disabled persons from participation and benefits of the services, programs and activities of public entities. 42 U.S.C. § 12132. In the opening provisions of the ADA, Congress made findings that "discrimination against

individuals with disabilities persists in such critical areas as . . . institutionalization" and "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices . . . [and] segregation . . . ." 42 U.S.C. § 12101(a)(3), (5). The Attorney General promulgated regulations pursuant to Title II, including the integration mandate, which states: "A public entity shall 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 regulations define "the most integrated setting appropriate to the needs of qualified individuals with disabilities" as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. Pt. 35, App. A.

The Supreme Court held in *Olmstead* unjustified isolation "is properly regarded as discrimination based on disability." *Olmstead*, 527 U.S. at 597, 119 S.Ct. 2176. In that case, two mentally retarded women sued because the state failed to remove them from institutions and place them in community-based programs after determining such placement was appropriate. The Court found Title II requires the state to provide community-based treatment for mentally disabled individuals when the state's treatment professionals have determined such placement is appropriate and the individuals do not oppose the treatment. *Olmstead*, 527 U.S. at 607, 119 S.Ct. 2176. However, this requirement is subject to the regulation stating: "A public entity shall 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). The Supreme Court stated the fundamental alteration defense allows states considerable leeway to maintain a range of facilities and administer services with an even hand:

> If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions.

Olmstead, 527 U.S. at 605-06, 119 S.Ct. 2176 (citations omitted). In other words, a state's obligation under the integration mandate is not absolute, and states must also take "into account the resources available to the State and the needs of others with mental disabilities." *Olmstead*, 527 U.S. at 607, 119 S.Ct. 2176.

The Rehabilitation Act prohibits discrimination against and exclusion of disabled individuals by programs or activities receiving federal funds. As the Fifth Circuit has recognized, "Title II of the ADA and § 504 of the Rehabilitation Act offer virtually identical protections." *Pace*, 325 F.3d at 617 n.11. One of the regulations issued pursuant to the Rehabilitation Act requires recipients of funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d).

The defendants argue the plaintiffs fail to state a claim under the ADA and Rehabilitation Act because they are not all currently institutionalized, unlike the plaintiffs in *Olmstead*, and only three plaintiffs currently live in ICF/MR group homes. However, the regulations speak of integration in general and do not require disabled individuals to be isolated to the extreme – i.e., in institutions– for the integration requirements to apply. Additionally, the *Olmstead* holding refers generally to "unjustified isolation," which is not limited to institutionalization. *Olmstead*, 527 U.S. at 598, 119

S.Ct. 2176. One district court rejected a similar argument that *Olmstead* does not apply to plaintiffs living at home who were on a waiting list for HCS waiver services, finding "the only alternative for Plaintiffs presently is institutionalization if they seek treatment under the statute," because "the Hawaii statute could potentially force Plaintiffs into institutions in violation of the ADA's non-discrimination policy since the State's Medicaid statute fails to offer all qualified disabled people services in the 'most integrated setting possible.'" *Makin*, 114 F.Supp.2d at 1033-34; *see also Martin v. Taft*, 222 F.Supp.2d 940, 981 (S.D. Ohio 2002). In this case, the Court finds the record unclear as to how many plaintiffs are actually institutionalized and how many of them are qualified to receive waiver services. Nonetheless, the integration mandate applies even to plaintiffs who are not currently institutionalized. Accordingly, the plaintiffs have stated a claim under the ADA and Rehabilitation Act.

The defendants contend even if the plaintiffs state a claim, their actions are protected by the fundamental alteration defense because of the mandatory ceiling on waiver services they can provide. While this defense seems to be quite strong, this question goes to the merits of the plaintiffs' claims, not their ability to state a claim under the statutes. Moreover, evaluation of the defense requires a more developed factual record. Therefore, the Court reserves ruling on this defense.

In accordance with the foregoing:

IT IS ORDERED that Defendants' Motion to Dismiss Plaintiff Arc of Texas is DENIED;

IT IS ORDERED that Defendants' Motion to Dismiss is GRANTED IN PART as to plaintiffs' claims under 42 U.S.C. § 1983 regarding violations of the Medicaid Act aside from the due process provision, Due Process Clause, and Equal Protection Clause, and DENIED IN PART

as to plaintiffs' claims under 42 U.S.C. § 1983 regarding violations of the due process provision of the Medicaid Act and plaintiff's ADA and Rehabilitation Act claims;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Sur-Reply [#10] is DISMISSED AS MOOT;

IT IS FINALLY ORDERED that the Defendants SHALL FILE a response to Plaintiffs' Motion for Class Certification by May 30, 2003.

SIGNED this the 23rd day of May 2003.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE