UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GERALD N., and JOAN B. each on their own behalf and on behalf of a class of persons similarly situated,

Plaintiffs,

v. Case No. 04-C-0193

MILWAUKEE COUNTY,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, AN EXPEDITED SCHEDULING CONFERENCE AND FOR PERMISSION TO FILE FIRST AMENDED COMPLAINT

INTRODUCTION

This case has grown out of a dispute over appropriate funding for disability services in Milwaukee County. Unlike any other Wisconsin county, there are two distinct systems for funding disability services. The essence of plaintiffs' claim is that the "under 60" group receives more favorable funding treatment in comparison to the "60 and over" group who are served by the Family Care program. Another issue arose when a particular residential provider complained to the County about the level of funding, threatened to terminate and then did terminate its contract for serving persons who are 60 and over. The County has taken the position that it can move the affected individuals over their guardians' objections and, if the guardians refuse, to seek their replacement with guardians who will approve the moves. This threat to employ different procedures against guardians of persons 60 and over and the clients themselves is another way in which the Family Care group is treated

less favorably than similar persons under the age of 60. This violates the Americans with Disabilities Act, the Rehabilitation Act, the Equal Protection guarantees in both the United States and Wisconsin Constitutions, and various Wisconsin statutes.

The current named plaintiffs, Gerald Nelson and Joan Bzdawka, were the first to be threatened with moving to another facility over their guardians' objections based on the funding dispute involving their residential provider, Homes for Independent Living. Two other clients of HIL are now in that situation as well. They are Sandra Ehrlichman and Marilyn Berdikoff. The Milwaukee County Department on Aging has given notice that Ms. Bzdawka and Ms. Ehrlichman will be moved on or after April 16, 2004. The guardians of the others have been told that Mr. Nelson and Ms. Berdikoff will also be moved but they have not been given notice of a specific date or place.

Nelson and Bzdawka filed a motion for preliminary injunction in order to keep them in their current residential and day program placements pending further proceedings. They are not seeking a broad declaration concerning the ultimate legal issues in the case at this point. They are only seeking to preserve the status quo. Unfortunately, Sandra Erhrlichman and Marilyn Berdikoff are not yet parties in the case and a class has not yet been certified. They cannot request the same temporary relief unless they are first allowed to join the case as plaintiffs. That is the reason for the additional motion for permission to file a first amended complaint. The "first amended" language is intentional. This case is very complex and it is likely that there will be additional legal claims once discovery has clarified several factual issues. It is possible that additional defendants will be added. Plaintiffs are not in a position to amend the complaint in regard to additional claims and parties at this time. Once the Court has resolved the request for temporary relief, it would be appropriate to set

deadlines for discovery, substantive amendments to the complaint, a class certification motion and dispositive motions.

HIL has always been willing to sign a new annual contract to continue serving clients 60 and over if the rates are increased. It has also told DOA or MCDA (apparently the Department prefers this acronym to "DOA" in its own correspondence.) that it will continue to serve the named plaintiffs and others affected by the funding issue under the existing rate structure. HIL actually had an agreement with MCDA to do this and then the notices regarding Joan Bzdawka and Sandra Ehrlichman went out anyway. This situation presents all of the factors calling for a temporary order to prevent imminent harm and the Court should enter a preliminary injunction to preserve the status quo.

PROCEDURAL BACKGROUND

Gerald Nelson and Joan Bzdawka's guardians first attempted to stop the Department on Aging's plans to move them by filing petitions in Milwaukee County Probate Court under Wisconsin Chapter 55. The Bzdawka petition was filed on November 14, 2003 and the Nelson petition was filed on November 17, 2003. Both petitions also sought the same declaratory and injunctive relief that is being pursued here, but the County moved to dismiss on the grounds that a Chapter 55 review procedure was not the proper forum for these issues. Rather than litigate an issue of procedure, Nelson and Bzdawka filed the current action on January 28, 2004 in Milwaukee County Circuit Court. (Case No. 04CV000862). Plaintiffs' counsel and the County's counsel agreed that the substantive issues could all be resolved in the civil action and stipulated to the dismissal of the Probate

Court petitions. They were dismissed by Judge Kitty Brennan on February 17. [Pledl-A].[1] The County filed its notice of removal on February 25 and answered the complaint on March 8. After receiving notices that threatened to move several HIL clients on April 5, plaintiffs filed a preliminary injunction motion on March 31. That deadline was extended. Additional notices were then sent to the guardians for Joan Bzdawka and Sandra Ehrlichman announcing that they would be movedon or after April 16. The Department on Aging still intends to move Gerald Nelson and Marilyn Berdikoff but no definite date has been set for these moves.

STATEMENT OF FACTS

DISABILITY SERVICES - PROGRAMS AND FUNDING

There are no real disputes about the provision of disability services in Wisconsin and funding for those services. (The County admitted paragraphs 5, 8, 9, 10, 12 - 16 and 20 of the original complaint.) Every Wisconsin county is required to provide specified disability services. Wis.Stat., §46.215, 51.42 an 51.437. Persons receiving those services have various rights under the Wisconsin Patients Rights Statute including the right to the least restrictive environment and appropriate treatment. Wis.Stat., §51.61(1)(e) & (f). Wisconsin's long-term placement statute, Chapter 55, contains various substantive and procedural protections for individuals who meet the criteria for protective placement. The petitions filed in Probate Court on behalf of Nelson and Bzdawka were based on their special status

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[1] All references to affidavits will include the name of the affiant and paragraph number, for example: [Burr: ¶6]. All references to exhibits will include the name of the affidavit to which they are attached along with a page number if appropriate, for example: [Burr-A] or [Burr-A:3]. References to deposition transcripts will contain name and page number, for example: [Lyday:12-13]. There is one other point regarding deposition transcripts. The parties have initially received rough drafts and are waiting for finished transcripts so they are not being filed with the Court at this time.

under Chapter 55 as well as the other statutory provisions that apply to all individuals who receive disability services.

Since 1981, there has been a move towards serving more persons with disabilities in the community. The funding vehicle for this transition has been a series of programs based on agreements that each state signs with the Federal government waiving certain Medicaid regulations in order to redirect funds that had been going to institutional care. They are commonly known as "waiver" programs. In Wisconsin, the specific programs are the Community Integration Program (CIP), Community Options Program (COP) and Brain Injury Waiver (BIW). The waiver programs had been the primary means of funding community services for persons with disabilities in Wisconsin before Family Care.

Geri Lyday, Administrator of the Milwaukee County Disability Services Division was deposed on April 6, 2004. DSD was formerly known as the Adult Services Division. Ms. Lyday gave the following estimates of the number of individuals receiving services from the two units within DSD that provide long-term services for persons with developmental and physical disabilities:

Developmental Disabilities		Physical Disabilities	
CIP-1a program	250	COP program	750
CIP-1b program	3,500	CIP program	295
		BIW program	50

[Lyday: 13-15]. There are other smaller funding sources used by DSD but this is sufficient to show the approximate number of clients under 60 being served in waiver programs. Plaintiffs counsel had previously made a request that DSD provide the number of clients who would turn 60 during each calendar year from 2004 to 2010. Ms. Lyday responded in a

letter dated March 3, 2004 with the following data:

Year	DD Clients	PD Clients	Total
2004	44	104	148
2005	52	135	187
2006	59	134	193
2007	62	160	222
2008	61	139	200
2009	90	116	206
2010	72	119	191

Obviously, all of the roughly 5,000 clients currently being by served by DSD in these programs will eventually turn 60 if they live long enough.

Ms. Lyday was asked about the funding process for clients in the waiver programs. She explained the assessment process and how the plans were then reviewed and approved by the State. [Lyday: 26-28]. It is possible to supplement CIP plans with COP funds if additional funding is required. [26]. She did not believe that the assessors "have been approving things that people don't need" or "approving unnecessary services." [26-28]. She was asked about the role of the guardian and the following exchange ensued:

Q. And do you understand that to be a legal requirement from the state, that guardians of people who have guardians actually have to sign the person into a residential facility or a day program or an employment program or whatever?

MS. POULOS: Object to the question. It's asking for a conclusion beyond her knowledge. You can answer if you know.

BY MR. PLEDL:

Q. If you know, you can answer.

A. I know that it is a requirement of the waivers. So individuals participating in the waiver in order to receive funding, the guardian must sign off on the plan. [Lyday: 37-38].

This is consistent with Mr. Burr's affidavit. He said that in his experience, the only way in

which admissions to CBRFs have occurred orcan occur is with guardian involvement and approval. [Burr: ¶16].There are also specific provisions in the regulations pertaining to both types of group homes regarding guardian approval for the admission to occur. Wis. Adm. Code, HFS §83.16(1) (CBRF admissions); and HFS §88.06(2)(b) (Adult Family Home admissions.) These various regulations concerning guardian approval are also consistent with the basic authority of theguardian, who "may have custodyof the person, may receive all notices on behalf of the person and may act in all proceedings as an advocate of the person." Wis. Stat., §880.38(1).

Mr. Burr's affidavit contains a detailed listing of the daily rates received from Milwaukee County DSD for persons under 60 who are funded through the waiver programs. [Burr: ¶¶26 29]. Ms. Lyday was notable to say whether the DSD rates in the affidavit were accurate or not and agreed that her staff would verify them. [Lyday: 47-49]. She said that DSD did give rate increases to individual providers although it did not give out increases on an ongoing basis. [42]. She recalled a rate increase given to some providers in 2002, but would have to ask her staff for information concerning any other rate increases. [43-45]. She said that DSD does not have a policy against rate increases for providers based on increased costs. [44].

FAMILY CARE

The Wisconsin Legislature authorized the establishment of pilot programs around the State that would provide similar care but using a funding system different from the waiver programs. Wis. Stat., §§46.2805 - 46. 2895. Marjorie (Meg) Gleeson, Assistant Director for Long-Term Support for the Milwaukee County Department on Aging was deposed on April 7 and 8. She described the basic principle of Family Care. The current

monthly rate is $1,810.61 for clients receiving the most common level of service and $674.49 for clients who have fewer needs based on an evaluation. [Gleeson:14-17]. Milwaukee County currently has about 5200 persons in Family Care and about 160 of those are at the lower rate. [20]. The State pays the appropriate monthly amount times the number of members and then Milwaukee County pays for specified services out of these funds. [20-21]. About 26% of the Family Care members live in CBRFs, Adult Family Homes or Residential Care Apartment Complexes and these residential services are paid out of the monthly capitated amount. [22]. The $1810.61 is an average amount and this means that there are clients receiving services that cost less as well as clients receiving services that cost more. [28].

Ms. Gleeson said that HIL was their highest cost provider, but Family Care had not taken any steps to terminate their contract prior to the time HIL did so. [Gleeson I: 41]. She said that HIL had "always request[ed] a rate increase on an annual basis." [Gleeson II; 19]. Other providers did so as well, [20], however, no Family Care provider has ever been given a rate increase based on cost increases. [22]. Ms. Gleeson was not aware of anything in the Family Care legislation or regulations that would prohibit giving rate increases to CBRF providers. [22]. She did not know whether the provider grievance process could address a rate dispute like this. [40-41]. Here is the next exchange:

> Q. And is there anything else that HIL could've done other than what they did to attempt to secure a higher rate from Family Care and continue serving these people?
>
> A. Not that I'm aware of, no. [Gleeson II: 41]

When asked about what recourse the Department on Aging would have if the guardians wanted their wards to stay in the HIL homes where they now live and refused to sign them

into other CBRFs, Ms. Gleeson said she believed that DOA could seek to change the guardians. [54].

Mr. Burr's affidavit says that he notified the Department on Aging that HIL was willing to continue serving the affected clients while the litigation was pending. [Burr: ¶36]. The Department on Aging accepted this offer. Burr-D is a letter from Diane Baumbach, DOA Contract Specialist, to Mr. Burr dated March 10, 2004. Ms. Gleeson said that she approved this letter. [Gleeson II: 42-43]. It said:

> You offered to keep Gerald N. and Joan B. in their current residences past the contract termination date of April 1, 2004 at the existing service rates. MCDA-CMO accepts your offer contingent upon the execution of the enclosed Memorandum of Understanding effective April 1, 2004.

[Burr-D]. HIL executed and returned the Memorandum of Understanding as required, but according to Ms. Gleeson: "We did not sign the MOU. [Gleeson II: 42]. There was no explanation beyond "seeking further advice about the MOU." [Id.] DOA made no other efforts to resolve the impasse and did not consider waiving its rate policies in this instance.

Mr. Burr's affidavit lists the different rates being paid by various funding sources for the five HIL homes located in Milwaukee County and summarizes those rates as follows:

> The average daily CBRF rate for all 18 Milwaukee County DSD clients is $174.82 and including the 4 clients from other counties results in an average daily rate for all clients other than those funded by Milwaukee County DOA of $180.53. The average daily rate for the 5 DOA clients is $161.80.

[Burr: ¶27]. There is also a 21% difference between what DSD and DOA pay for the Paragon day program rate. [¶29]. Despite the losses that these rates represent, HIL is willing to continue serving all of the affected clients at the existing rates. The last line of Mr. Burr's affidavit says "we continue to believe that it is in our clients' best interests not to move them until the legal issues have been resolved. [Burr: ¶37].

THE PLAINTIFFS

Gerald Nelson, Joan Bzdawka, Marilyn Berdikoff and Sandra Ehrlichman are all facing an involuntary move that will take them out of the homes and day programs to which they are accustomed. They will lose friends and face unfamiliar surroundings. Mr. Burr related the concerns of HIL staff about the other Joan and the negative effects of the move. [Burr: ¶34]. He believes that moving the others presents a substantial risk that they will deteriorate and even require a more restrictive placement. [Id.]. Mr. Miller is concerned that moving Joan Bzdawka will be harmful to her. [Miller: ¶17]. Sandra Ehrlichman's guardian (her sister) is especially concerned because of behavior problems that Sandra has had since her father's death. [Steeves: ¶10]. A special team from Southern Wisconsin Center was brought in for a consultation. [Id.]. Ms. Steeves believes that a move would be harmful and is concerned that she will deteriorate and be placed back in an institution. [Steeves: ¶18-19].

Plaintiffs also hope to present testimony or written reports from Dr. Marta Muller, an HIL staff psychiatrist, as to any effects that the proposed moves will have on the affected residents. (Her evaluations are not yet complete and counsel does not yet have any written reports to share with the County's counsel.)

ARGUMENT

I. PLAINTIFFS SHOULD BE PERMITTED TO AMEND THEIR COMPLAINT TO ADD TWO ADDITIONAL INDIVIDUALS WHO ARE FACING THE SAME TREATMENT BY MILWAUKEE COUNTY.

Leave to amend a complaint should be "freely given" unless there has been undue delay or prejudice to the defendant. Rule 15(a), Federal Rules of Civil Procedure; *Foman v. Davis*, 371 U.S. 178, 182 (1962). The decision is left to the court's discretion. *Tavarez v. O'Malley*, 826 F. 2d 671, 678 (7th Cir. 1987). This case is at a very early stage. The Court has not yet scheduled or conducted a scheduling conference. The amendment does not make any substantive changes to the complaint beyond adding parties and a jurisdictional statement. The County will not be prejudiced. The two new plaintiffs are already members of the putative class. They could file a separate action but it would be related to this case and that would just create the need to consolidate. The interests of justice and judicial economy call for permitting the amendment.

II. PLAINTIFFS ARE ENTITLED TO THE ENTRY OF A PRELIMINARY INJUNCTION TO PREVENT MILWAUKEE COUNTY FROM MOVING THEM TO A DIFFERENT RESIDENTIAL FACILITY AND DAY PROGRAM WITHOUT THEIR GUARDIANS' CONSENT.

A. Introduction - standards for granting a preliminary injunction.

A party must meet two threshold requirements to obtain a preliminary injunction: (1) "some likelihood" of succeeding on the merits, and (2) lack of adequate remedy at law such that movant will suffer irreparable harm if preliminary relief is denied. *Washington v. Indiana High School Athletic Association, Inc.*, 181 F.3d 840, 845 (7th Cir. 1999); *Abbott Laboratories v. Mead Johnson & Co.,* 971 F.2d 6, 11 (7th Cir. 1 992). Once the movant meets these two threshold requirements, the Court then proceeds to balance the harms to

the parties, and any effect on the public interest. *Washington*, 181 F.3d at 845; *Roth v. Lutheran General Hospital,* 57 F.3d 1446, 1453 (7th Cir. 1995).

The plight of the plaintiffs here presents the classic case in which a court must grant preliminary relief if its final judgment is to have any force or effect. The essence of their claim is that County disability service clients who are 60 and over have an inferior funding system, are subject to having the decisions of their guardians discounted and must then move from their homes and day programs in situations where similar persons under 60 would not be affected. This is discrimination under the American with Disabilities Act and §504 of the Rehabilitation Act.[2] There is ample evidence that any move will be harmful and disruptive. Once that disruption and the associated trauma have occurred, any ruling in plaintiffs' favor will be completely ineffectual. There will be no similar harm to the County if it is restrained from moving the plaintiffs and this is always a powerful argument for maintaining the status quo.

B. Plaintiffs have standing to challenge the Milwaukee County Department on Aging's policies and procedures.

The plaintiffs are challenging a set of policies and procedures that affect 60 and over clients as a group. The County may try reframe the case as being just about HIL or may argue that HIL and the Department on Aging would probably be unable to agree on a rate increase even if the Department's policy of never granting rate increases to anyone were

[2] Plaintiffs have also asserted substantive claims under Wisconsin Chapters 51 and 55 and the United States and Wisconsin Constitutions. Given that complete relief can be granted at this juncture based on the Federal statutory claims, plaintiffs have chosen not to argue these claims in connection with their preliminary injunction motion. However, the state-law and §1983 claims are not being abandoned. Plaintiffs do intend to assert and argue these claims after further discovery and factual development. Also, some discussion of Chapters 55 and 880 is necessary and was included in the statement of facts to describe the role of the guardian under Wisconsin law and the handling of placement issues by the circuit court as a backdrop for the plaintiffs' discrimination claims.

changed. This would misplace the proper focus of the standing inquiry:

> When the government erects a barrier that makes it more difficult for member of one class to obtain a benefit than it is for members another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier to establish standing.

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 666 (1993). The Seventh Circuit has said:

> [S]tanding does not require a perfectly clear title to the claim sued upon. *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 75, 78-79 (2d Cir.2002); *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1204 (10th Cir.2001). This is a corollary of the probabilistic character of the requirement of standing, upon which we have commented in other cases, such as *Diaz v. Duckworth*, 143 F.3d 345, 347 (7th Cir.1998), and Price v. Pierce, 823 F.2d 1114, 1118 (7th Cir.1987); see also *Hohn v. United States*, 262 F.3d 811, 818 (8th Cir.2001). "A reasonable probability that a plaintiff will get an apartment that he wants sooner if he wins his suit is a sufficiently tangible expected benefit of suit to confer standing under the liberal principles that prevail nowadays," as we said in *Price*...

Morlan v. Universal Guaranty Life Insurance Company, 298 F. 3d 609, 620 (7th Cir.2002). This liberal standing rule was also discussed in a case involving a veterans hiring preference: "Each class member is better off when the preference is being enforced than when it isn't. They may not get the job, but they are guaranteed the preference." *Veterans Legal Defense Fund v. Schwartz*, 330 F.3d 937, n.2 (7th Cir.2003); see *Uhl v. Thoroughbred Technology and Telecommunications, Inc.*, 300 F.3d 978, 986 (7th Cir.2002) (one named plaintiff may represent both "cable side" and "non-cable" subgroups in case concerning fiber optic cables buried on railroad rights-of-way since membership in either group will not be determined until the line is surveyed).

There is sufficient evidence to show that HIL will continue to serve the named plaintiffs and other HIL residents who will turn 60 if DOA's policy is changed. It is the finality

of the "no increase" policy and not any specific potential rate increase that has brought HIL and DOA to this point. HIL is not satisfied with the rate increases it has received from the Disability Services Division for persons under 60, but there have been some rate increases and there is the possibility of future increases. Rational providers may well decide to continue a contractual relationship with a funding source under these circumstances as HIL has done with DOA up to this point and continues to do with DSD. Concern for their clients will also encourage many providers to continue even when financial conditions are not perfect. The bottom line is that DOA's "no increase" policy and the policy of overriding guardian decisions are having a negative effect on the persons being served by HIL right now and this will continue in the future. (Additional HIL clients now served by DSD will reach their 60th birthday and encounter the same discriminatory policy along with clients of other providers.) These plaintiffs as well as the putative class itself have standing to challenge both policies.

C. <u>Plaintiffs have shown a likelihood of success on the merits on their claims under the Americans with Disabilities Act and §504 of the Rehabilitation Act.</u>

The first threshold requirement, likelihood of success on the merits "generally weighs most heavily in a court's determination." *Davids v. Coyhis*, 857 F. Supp. 641, 646 (E.D. Wis. 1994). The standard is much lower than certainty or substantial probability; it is enough that the Plaintiff's chances are "better than negligible." *National People's Action v. Village of Wilmette,* 914 F.2d 1008, 1010 (7th Cir. 1990), *cert. denied,* 499 U.S. 921 (1991). The level of proof is not the same as that required at a trial on the merits. "[A]necdotal accounts" are sufficient. *Abbott Laboratories,* 971 F.2d at 15; see *Vaughan Mfg. Co. v. Brikam Int'l. Inc.,* 814 F.2d 346, 349 (7th Cir. 1987).

It is clear that DOA's policies and practices disfavor persons 60 and over in several ways. First, the lower rates for identical services and the "no increase" policy affect basic access to residential care and day programming and the right of individuals to stay in their homes. Second, DOA's policy of overriding guardian decisions violates basic rights of guardians and wards. Third, the lower DOA rates substantially increase the likelihood of moving, disruption and admission to an institution. Since persons under 60 are not affected in the same, the differential treatment is clear. The only question is whether this particular form of differential treatment is discrimination under the ADA and the Rehabilitation Act.

The Americans with Disabilities Act is a comprehensive "national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1). The "Rehabilitation Act is materially identical to and the model for the ADA." *Crawford v. Indiana Department of Corrections*, 115 F.3d 481, 483 (7th Cir. 1997) (other citations omitted). "[Title II of the ADA] essentially simply extends the antidiscrimination prohibition embodied in §504 to all actions of state and local governments." H.R.Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 303, 367.

A violation of Title II may be established by showing: (1) that the affected clients of a disability service provider are "qualified individuals with a disability."; (2) that the clients "are being excluded from participation in or denied the benefits of some service, program or activity by reason of their disability"; by (3) a public entity. *Wisconsin Community Service v. City of Milwaukee*, Case No. 01-C-0575 (E.D. Wis. March 18, 2004), slip op. at 13, ("WCS II") citing see *First Step, Inc. v. City of New London*, 247 F.Supp. 2d 135, 149 (D.Conn. 2003); *Innovative Health Systems, Inc. v. City of White Plains*, 931 F. Supp. 222, 238 (S.D.N.Y. 1996). The County is a public entity and has admitted that the named plaintiffs

and the putative class members are qualified individuals pursuant to 42 U.S.C. §12131(2) and 29 U.S.C. §705(9). (Complaint ¶¶76 & 81; Answer ¶¶76 & 81). The only issue is whether the County's actions constitute discrimination.

(1) The Americans with Disabilities Act and the Rehabilitation Act prohibit actual and potential institutional segregation of persons with disabilities.

"[B]oth [the Rehabilitation Act] and the Americans with Disabilities Act entitle disabled persons (as the plaintiffs undoubtedly are) to care in the least restrictive possible environment." *Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003). This is based on the United States Supreme Court's landmark ruling in *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999). Institutionalization is a form of discrimination even if the plaintiffs can identify no comparison class. 527 U.S. at 598. Institutional placement "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." 527 U.S. at 600. It also "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement and cultural enrichment." 527 U.S. at 601.

The *Olmstead* concept is not limited to persons in institutions trying to get out. The Tenth Circuit has applied it to a publicly-funded prescription drug benefit where the plaintiffs merely alleged that it increased the likelihood of nursing home placement. *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1182 (10th Cir. 2003). It said:

> The integration regulation simply states that public entities are to provide "services, programs and activities in the most integrated setting appropriate" for a qualified person with disabilities. 28 C.F.R. §35.130(d). Those protections would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation. Second, while it is true that the plaintiffs in *Olmstead* were

> institutionalized at the time they brought their claim, nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA;s integration requirements.

335 F.3d at 1181. Plaintiffs do face an increased risk of deterioration and institutionalization due to the impending moves. This is more than enough to satisfy the minimal burden that plaintiffs carry at the preliminary injunction stage.

Returning to *Bruggeman* once again, there is another way in which the integration principle is implicated. The Seventh Circuit did not simply say that there was a right to get or stay out of an institution:

> There may be an element of paradox in the idea that a residential institution, such as an ICF/DD . . . or . . . Community Integrated Living Arrangement . . . provides a less restrictive alternative than living at home, especially when some of the plaintiffs are seeking nonresidential services, enabling them to continue to live at home, though this may be their second choice. The paradox is dispelled by recognizing that parents, by reason of age or incapacity, may not be capable of taking good care of their adult disabled children, in which event the home environment may, realistically, be more restrictive of the child's opportunity to develop than an institutional alternative.

324 F.3d at 911-912. This discussion is an excellent rejoinder to the County's apparent theory that it can move people wherever it wants as long as the types of facilities are roughly equivalent. First, as already noted, any move increases the risk of real institutionalization. Second, and more to the point that Judge Posner was making, the concept of least restrictive environment can include many nuances depending on what services or placement will facilitate the "opportunity to develop". Social contacts were specifically identified by the *Olmstead* court as worthy of protection under the ADA's integration regulations. 527 U.S. at 601. Moving someone from familiar surroundings and established relationships to another placement that may appear similar on paper is in fact more restrictive and would violate the integration requirements of the ADA and §504.

(2) The Department on Aging's rate policy also violates the equal opportunity and enjoyment provisions of the ADA and §504.

The Department of Justice's ADA regulations go well beyond any conventional theory of discrimination that requires the comparison of a suspect class to another group. They include the following prohibitions as forms of actionable discrimination:

> A public entity, in providing any aid, benefit or service, may not directly or through contractual, licensing, or other arrangements, on the basis of disability --
>
> (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit or service;
>
> (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded others;
>
> (iii) Provide a qualified individual with a disability with an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
>
> (iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits or services that are as effective as those provided to others;
>
> . . .
>
> (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

28 C.F.R. §35.130(b)(1). The question is how to evaluate and measure the diminishment of the opportunity, right, privilege, advantage, etc.

The scope of these provisions was examined by the Second Circuit in *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003), cert denied, --- U.S. --- (March 22, 2004). The defendants argued that there was no discrimination against the plaintiffs with AIDS who

were challenging the shoddy delivery of various social services because everyone was receiving the same bad services. 331 F.3d at 277. As the Court described the issue:

> Put another way, we must determine whether the "concept of discrimination" embraced by the ADA demands that plaintiffs identify a "comparison class" of "similarly situated individuals given preferential treatment." *Olmstead v. L.C.*, 527 U.S. 581, 598, 119 S.Ct. 2176, 144 L.Ed. 2d 540 (1999) (plurality op.). We follow our fellow circuits and the suggestions of the *Olmstead* plurality in concluding that it does not.

331 F.3d at 273. It quoted extensively from *Bultmeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283 (7th Cir. 1996), which held that disparate impact need not be shown in a reasonable accommodation case.

Therefore, even in the absence of any comparison class, plaintiffs will prevail under 28 C.F.R. §35.130(b)(1) (i), (ii), (iii), (iv) & (vii). However, the plaintiffs here have identified a comparison class, persons with disabilities under the age of 60. The differential rate treatment and procedural issues involved guardians are classic discrimination between two distinct groups within the larger class of all persons with disabilites. This is also actionable under the same regulations. *Olmstead*, 527 U.S. at 598; *Henrietta D.*, 331 F.3d at 273. 28 C.F.R. §35.130(b)(1)(vii) is particularly on target.

(3) The Department on Aging has refused to grant or even consider a reasonable accommodation to its rate policy.

Under the ADA and Rehabilitation Act, public entities are required to provide "reasonable modifications or accommodations in their rules, policies and practices when necessary to avoid discrimination." 42 U.S.C. § 12131(2); *WCS II*, slip op at 15; *Innovative Health Systems*, 931 F.Supp. at 239. The whole accommodation process is based on the concept that a rule or policy of general application is an obstacle to something that the

claimant wants. If that were not the case, the claimant would actually be entitled to the benefit that he or she seeks. By definition, granting an accommodation means stretching a rule of general application to benefit persons with disabilities. *Bay Area Addiction Research v. City of Antioch*, 179 F.3d 725, 732 (9th Cir. 1999), citing The Americans with Disabilities Act: Title II Technical Assistance Manual §11-3.6100, illus. 1 (1993).

The test that has developed in housing cases under the FHA and ADA is whether the accommodation is (1) reasonable and (2) necessary (3) to afford a handicapped person equal opportunity. *WCS II*, slip op. at 15; *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 773 (7th Cir. 2002). The decisional process uses the *McDonnell Douglas* burden-shifting analysis whereby the plaintiff has a minimal initial burden that then shifts to the defense which must show unreasonableness or undue hardship. *ORP v. Milwaukee*, 300 F.3d at 784; see *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993) ("what is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands."). Similarly, the Court in *Henrietta D.* said the plaintiff's initial burden is "not a heavy one." 331 F.3d at 280, quoting *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2nd Cir. 1995). And as this Court recently held, the equal opportunity element makes little sense outside of the housing realm. *WCS II*, slip op. at 15-16. Therefore, plaintiffs need only show some likelihood of success on the issues of reasonableness and necessity.

DOA's policy (or practice or whatever) of never granting a provider rate increase and maintaining lower rates than DSD is exactly the kind of rule of general application that is subject to the accommodation requirement. Persons living in CBRFs operated by providers who give more intensive and higher cost services are particularly in need of this

accommodation, however, if DOA rates are signficantly below DSD rates anywhere in the system there will be contract terminations and moves to the detriment of the clients. Some process of targeted rate increases, even if not system-wide, could ameliorate the worst situations. Simply standing on the rate policy as DOA is doing is a blanket denial of a reasonable accommodation which is actionable in its own right. *Wisconsin Correctional Service v. City of Milwaukee*, 173 F.Supp.2d 842, 853 (E.D. Wis. 2001) ("*WCS I*"), citing cf. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

Plaintiffs are not suggesting that the Court can or should engage in the entire balancing test at this point. First there should be discovery on rates, client moves and the evaluation methodology that drives the placement process. It is sufficient for the purpose of the initial preliminary injunction that plaintiffs have a reasonable likelihood of prevailing on the accommodation claim regarding the rate issue and that is certainly the case.[3]

C. Plaintiffs do not have an adequate remedy at law and will suffer irreparable harm.

Plaintiffs must ordinarily show that a lack of an adequate remedy at law will lead to irreparable harm if preliminary relief is denied. *Abbott Laboratories*, 971 F.2d at 11. “The question is whether the Plaintiff will be made whole if he prevails on the merits and is awarded damages.” *Miller v. LeSea Broadcasting, Inc.*, 896 F. Supp. 889, 894 (E.D. Wis. 1995), quoting *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir. 1984). It is enough that the movant show a possibility of irreparable injury. An actual likelihood is not required. *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989). Violations of

[3] Plaintiffs are not suggesting that there is a potential accommodation that will fix the differential treatment of guardians by DOA. That policy is pure discrimination. It is to be hoped that granting accommodations to the rate policy will eliminate the funding disputes that lead to conflict with guardians of persons 60 and over.

the ADA and §504 are within a special category of cases where proof on liability, without any proof of irreparable harm, is sufficient to grant an injunction. See *Wisconsin v. Stockbridge-Munsee Community*, 67 F.Supp.2d 990, 995 (E.D. Wis. 1999) (statutory injunction denied under Indian Gaming Act); see also *Baxter v. City of Belleville*, 720 F.Supp. 720, 734 (S.D. Ill. 1989) (statutory injunction issued under FHA). A more recent case, brought under the ADA and FHA, held that the reference to injunctive relief in the FHA was sufficient to invoke the exception. *United States v. Edward Rose & Sons*, 246 F.Supp.2d 744, 754 (E.D. Mich. 2003). The result should be the same under the ADA given the comparable availability of injunctive relief and the "national mandate" language in 42 U.S.C. §12101(b)(1).

Clearly damages are inadequate to compensate the plaintiffs here so they can show irreparable harm in any event. Their loss of friends, familiar surroundings and established programs that are working well cannot be compensated by money. The harm will be immediate as soon as they are moved. Also, since they must be below a certain income and asset level to be eligible for Family Care, receiving a sum of money would be problematic in and of itself. All of these factors satisfy this element of the preliminary injunction equation.

D. Milwaukee County will not suffer any harm from the granting of a preliminary injunction.

After the threshold factors are met, the first of the two balancing considerations is the potential harm to the party opposing the motion. *Abbott Laboratories*, 971 F.2d at 11-12. The process used is a “sliding scale,” that is, the greater the likelihood that Plaintiff will succeed on the merits, the less of a showing plaintiff must make on the remaining factors.

Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1393 (7th Cir. 1992); *Storck USA, L.P. v. Farley Candy Co.,* 14 F.3d 311, 314, (7th Cir. 1994). Further, it "is an acceptable equitable principle that a court does not have to balance the equities in a case where the defendant's conduct has been willful." *Wisconsin v. Stockbridge-Munsee Community*, 67 F.Supp.2d at 1020, citing *EPA v. Environmental Waste Control*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

Given the willful nature of its conduct, the County does not have any basis for objecting to the entry of an injunction on this ground, but it will not suffer harm at any rate. HIL has been and remains willing to serve the affected individuals at the existing rate. It thought there was such an agreement until the County reversed itself. With an interim agreement, the County will be no worse off than if this entire dispute had never happened. This factor does not prevent and actually calls for the entry of a preliminary injunction.

E. <u>The public interest calls for the entry of a preliminary injunction.</u>

The second balancing consideration is what effect the preliminary injunction will have on the public interest. *Abbott Laboratories*, 971 F.2d at 11-12. Once again, the process used is a "sliding scale," that is, the greater the likelihood that Plaintiff will succeed on the merits, the less of a showing Plaintiff must make on the remaining factors. *Diginit, Inc. v. Western Union ATS, Inc.,* 958 F.2d 1388, 1393 (7th Cir. 1992). The courts recognize that the public interest may be harmed either by granting or denying a preliminary injunction. *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1371-72 (7th Cir. 1989). However, even probable harm to the public interest does not prevent the granting of a preliminary injunction in appropriate cases. *Abbott Laboratories*, 971 F.2d at 12, n. 3. Effective care and treatment in the least restrictive setting for persons with disabilities is one of the preeminent public policies of the State of Wisconsin. Wis. Stat., §§51.001 and 55.001. The issues in this case are of vital importance to the citizens of Milwaukee County, including those with and without disabilities. Issuing a preliminary injunction so that the parties and the Court can deal with the merits in a deliberate and rational way is clearly in the public interest.

III. <u>AN EXPEDITED DISCOVERY AND BRIEFING SCHEDULE IS NECESSARY IN ORDER TO RESOLVE THE QUESTION OF CLASS CERTIFICATION AND THE ULTIMATE MERITS OF THE CASE.</u>

Plaintiffs are also requesting that the Court conduct an expedited scheduling conference in this case. Federal courts have wide discretion to schedule the proceedings before them. The court may initiate a scheduling conference or one of the parties may make such a request by motion. *DiDomenico v. New York Life Insurance Co,* 837 F.Supp. 1203, 1206 (M.D. Fla. 1993). There is also specific authority for an expedited hearing in

declaratory judgment cases. "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." Rule 57, Federal Rules of Civil Procedure; *Temp-Resisto Corp. v. Glatt*, 18 F.R.D. 148, 152 (D.N.J. 1955). The Rules also provide for expedited consideration of a motion for preliminary injunction, and provides for the trial on the merits "to be advanced and consolidated with the hearing on the application [for preliminary injunction]." Rule 65, Federal Rules of Civil Procedure. As one court held:

> Exigencies of time have been consistently recognized as a sufficient basis for accelerating the procedural calendar of cases in which injunctive relief, as opposed to declaratory relief is sought. See, *e.g., Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2d Cir. 1966). See also 5 Wright & Miller, Federal Practice and Procedure §1346 (1969).

Drinan v. Nixon, 364 F.Supp. 853 (D.Mass. 1973).

The urgency for the plaintiffs and the putative class that they seek to represent is obvious. More and more persons under 60 who receive Milwaukee County disability services will reach their 60th birthday every month and the financial issues which have already become acute for one provider will ripple throughout the system. The level of disruption for both the clients and the County will snowball if this matter does not move forward with the assistance of an expedited scheduling order.

CONCLUSION

The conditions for amending the complaint to add two plaintiffs have been met. Plaintiffs have met each of the criteria for granting a preliminary injunction in order to preserve the status quo. It is also appropriate to conduct an expedited scheduling conference.

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