UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

Plaintiffs,

v. **Case No. 4:09CV00033 WRW**

STATE OF ARKANSAS, et al.,

Defendants.

_____/

BRIEF IN SUPPORT OF "DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, DEFENDANTS' MOTION FOR AN ENLARGEMENT OF TIME TO RESPOND TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION"
AND
DEFENDANTS INITIAL RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Defendants file this brief in support of "Defendants' Motion To Strike Plaintiff's Motion For Preliminary Injunction Or, In The Alternative, Defendants' Motion for an Enlargement Of Time To Respond To Plaintiffs' Motion For Preliminary Injunction" (hereinafter referred to as "Defendants' Motion"). Since the Court has not yet had an opportunity to rule on Defendants' Motion, and since a response to Plaintiff's Motion For Preliminary Injunction (hereinafter referred to as "Plaintiff's Motion") is due without a favorable ruling on Defendants' Motion, the Defendants also include herein an initial response to Plaintiff's Motion.

I. THE COURT SHOULD STRIKE THE BELATED AND INAPPROPRIATE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff's Motion For Preliminary Injunction is a transparent attempt to disrupt Defendants trial preparation, to present allegations without opportunity for a fair rebuttal, and to obtain relief that it would not otherwise receive in a full and fair trial on the merits. In an attempt by Plaintiff to avoid the reliable and compelling opinions of the Defendants' experts whose reports are forthcoming in a few weeks (they are due on April 27, 2010 in accordance with the parties' discovery plan), and to possibly even distract or disrupt the preparation of those reports in the very limited time allowed by the schedule negotiated by the parties, the Plaintiff has chosen to try to ambush the Defendants before their defense can be completed. The evidence, however, reveals the lack of urgency and the lack of merit to this request for preliminary injunction, and, therefore, the lack of justification for filing this Motion at this crucial time in preparation of the defense.

A. THE CONWAY HUMAN DEVELOPMENT CENTER IS FULLY REGULATED AND ACCREDITED WHICH CONTRADICTS ANY CLAIM OF URGENCY OR IRREPARABLE HARM

The Plaintiff does not license or regulate the operation of Conway Human Development Center ("CHDC") or any other Intermediate Care Facilities for People with Mental Retardation ("ICF/MR"). The federal agency responsible for licensing and regulating CHDC, and approximately 7,500 other ICF/MR facilities, is the Centers for Medicare and Medicaid Services ("CMS"). The ICF/MR Program was established in 1971, when legislation was enacted that provided for federal financial participation (FFP) for ICF/MRs as an optional Medicaid service. To qualify for Medicaid reimbursement, ICF/MRs must be certified by CMS and comply with stringent federal standards in eight areas, including: management, **client protections**, facility staffing, active treatment services, **client behavior and facility practices**, **health care services**,

physical environment, and dietetic services. 42 CFR Part 483, Subpart I, Sections 483.400-483.480 (emphasis added).

CHDC always has been certified by CMS and there has never been a period when CHDC's certification has lapsed.[1] CHDC is also accredited by the Commission on Accreditation of Rehabilitation Facilities ("CARF").[2] CHDC has been accredited by CARF since 1998. CARF conducted its most recent survey of CHDC from December 7, 2009 to December 9, 2009, which was more recently than any of the Plaintiff's consultants visited CHDC. In January 2010, CARF granted CHDC another three year accreditation, through January 2013.[3] Defendants Exhibit A. CARF did not raise any of the alleged concerns addressed by the Plaintiff's Motion.

The fully accredited status of CHDC clearly belies any claim of harm or urgency in Plaintiff's Motion.

B. THE SIGNIFICANT DELAY OF THE PLAINTIFF IN SEEKING A PRELIMINARY INJUNCTION BELIES ANY CLAIM OF IRREPARABLE HARM

The Plaintiff opened its investigation in 2002. The Plaintiff had more than six (6) years to review in great detail all of the services provided at Conway Human Development Center ("CHDC"). Before filing suit in January of 2009, the Plaintiff used multiple experts to conduct tours and reviewed thousands of documents. The Plaintiff had the full cooperation of the State of Arkansas and had reasonable access to all records and personnel.

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[1] Plaintiff even relies on the standards set forth by CMS to make its claims. Plaintiff's Memorandum at 37-38, 41-42. CMS is specifically tasked with regulating ICF/MRs and is obviously in a much better position to conduct surveys and determine whether professional standards are being met than the Plaintiff. To make its claims, however, Plaintiff ignores the conclusions reached by CMS, that CHDC is meeting all standards, including professional judgment standards, and has decided to do its own review of CHDC and apply different requirements.

[2] "CARF is a well-respected, international, independent, nonprofit accreditor of human service providers and networks in the areas of aging services, behavioral health, child and youth services, employment and community services, and medical rehabilitation." www.carf.org/providers.aspx?content=content/about/toc.htm

[3] A three-year accreditation is awarded to programs providing the highest quality of services under the CARF standards. CHDC has been awarded three year accreditations by CARF every three years since 1998.

When the Plaintiff issued its "findings letter" on April 21, 2004, it specifically alleged issues as to "significant harm or risk of harm from shortcomings in the facilities' health care, habilitative treatment services, restraint practices, and protection from harm policies." The Plaintiff also alleged "that the State does not provide services to individuals with disabilities in the most integrated setting appropriate to individual residents' needs." The Plaintiff noted that CHDC housed residents "aged 11 to 66". Relevant to the present inquiry, the Plaintiff alleged:

> (a) "Conway's psychotropic medication management substantially departs from generally accepted professional standards." Plaintiff's exhibit 1 at 25.
> (b) "Conway's use of restraints substantially departs from accepted professional standards of care and exposes residents to excessive and unnecessary restrictive interventions." Plaintiff's exhibit 1 at 27.
> (c) "Conway fails to provide basic oversight of resident care and treatment that is critical to ensuring the reasonable safety of its residents." Plaintiff's exhibit 1 at 30.
> (d) "Conway's provision of special education services does not comport with federal law because it fails to provide individualized educational programs that are reasonably calculated to enable students to receive an appropriate education." Plaintiff's exhibit 1 at 35. "Federal law and regulations require that, to the maximum extent appropriate, children with disabilities, including children in institutions at Conway, receive educational services in the least restrictive setting." Plaintiff's exhibit 1 at 40. ". . . these students did not experience school in an appropriate setting with appropriate instructional materials." Plaintiff's exhibit 1 at 41.
> (e) "Arkansas is failing to serve some residents of Conway in the most integrated setting appropriate to their individualized needs." Plaintiff's exhibit 1 at 41.

Despite these alleged findings, the Plaintiff did not file a lawsuit or seek a preliminary injunction in 2004 or in any of the next five (5) years.[4] Apparently, no irreparable harm was occurring during the period of 2002 to 2009, during which time the DOJ voiced the same concerns as they currently are voicing in their preliminary injunction motion.

[4] To clarify, the Defendants seriously dispute the DOJ's allegations of unconstitutional or unlawful conditions. But if the DOJ seriously believed their allegations to be true, those conditions (by the DOJ's own admission) have been in place for many years.

On June 20, 2008, a DOJ consultant, Ramasamy Manikam, Ph.D., submitted to the DOJ a written report based on a June 19 to June 21, 2007, site visit to CHDC, which included the reading of case records and reports, and interviews with professional and direct care staff. In Manikam's 2008 report, Manikam cited issues of restraint usage at CHDC, as well as issues regarding services for children and young adults. With respect to restraint, Manikam alleged:

> a. "[T]he behavioral and psychopharmacological treatments for the residents at CHDC are not very effective and staff has to resort to emergency use of restraints to keep residents' behavior under control. . . "
> b. "[T]he Papoose board has become an instrument of threat and punishment with some staff. . . [it] was used when situations did not warrant it . . . ";
> c. "[O]n some occasions, staff actions or inactions injure residents when they are placed in restraints. . .";
> d. "[I]n other cases, residents were placed in available positions and exposed to attack by other residents . . .";
> e. "[A]n important area of programming, neglected at CHDC, is the integrating of the resident to the milieu subjecting the resident to restrictive procedures . . "; and
> f. "[T]he sum of my reviews, interviews, and observations at CHDC, suggest that the inefficient psychological assessments and ineffective psychological interventions contribute to the number of restraints and overreliance on reactive behavioral procedures used in its residents."

Manikam, June 20, 2008, Consultant's Report on Site Visit, Conway Developmental Health Center, Conway, Arkansas at 13-15, 22. With respect to services for children and young adults, Manikam alleged: "CHDC cannot be considered to be the Least Restrictive Environment for a number of students (for example, MC and SH)." Manikam, June 20, 2008, at 19. Manikam made recommendations to debrief residents (where appropriate) and staff "involved in addressing incidents/accidents/restraints etc" and to make a "primary" goal to "eliminate/reduce restraints." Manikam, June 20, 2008, at 23, 24. Thus, the DOJ knew of alleged issues as to restraint and least restrictive environment for school age children, similar to those raised in this

Motion for Preliminary Injunction, since at least June of 2008.[5] Yet, the Plaintiff did not seek an injunction in June 2008, or any reasonable time thereafter, after learning of these issues.

The Plaintiff filed the present lawsuit in January of 2009. The Plaintiff chose not to seek a preliminary injunction at that time.

Following the filing of the present lawsuit, tours of CHDC by Plaintiffs experts spanned four (4) weeks from July 2009 through September 2009. Most of Plaintiff's touring experts spent nine (9) days at CHDC and sometimes as many as seven (7) experts were onsite at the same time. Plaintiff's counsel was present for all of these tours and had unlimited opportunity to communicate with these experts. Plaintiff's counsel and experts requested thousands of pages of documents. CHDC staff produced may documents the same day or within a few days. The disruption, burden, and stress to the staff at CHDC was tremendous.

The Plaintiff's counsel had the opportunity to observe, and to discuss with Plaintiff's experts, the children living at CHDC and the services provided to those children. The Plaintiff, however, chose not to seek a preliminary injunction in September of 2009 at the conclusion of its experts tours, or at any reasonable time thereafter. Apparently, there was no irreparable harm to the residents at CHDC at that time.

Late in September 2009, during the last week of tours by its experts, the Plaintiff sought Defendants' agreement to extend the trial date and to extend the time to which the parties had agreed for Plaintiffs to complete its expert reports. Absolutely no mention was made of any need for immediate relief or for a preliminary injunction. The Plaintiff, instead, chose to seek even more time than originally agreed to complete its expert reports, which further contradicts any

[5] Please note, despite the alleged urgency, the report of Manikam was not provided to the Defendants until December of 2009, shortly before the Complaint was filed. Apparently, there was no urgency in revealing the findings of Manikam.

claimed urgency to have this matter heard.[6] As a result of this extension of time, and due to the understandable limited availability of the Honorable J. Leon Holmes, Chief Judge, the case was delayed from April of 2010 to September 2010, a delay of approximately five (5) months. The Plaintiff requested the delay of this allegedly "urgent" case so that its experts could have the additional months to complete their reports, but now seeks to deny the Defendants their agreed to period of time to complete their expert reports.

On December 23, 2009, the Plaintiff's experts completed their reports which are cited extensively in Plaintiff's Motion and which form the alleged basis for a preliminary injunction.[7] However, despite the alleged urgency in Plaintiff's Motion, no preliminary injunction was sought by the Plaintiff until over two (2) months later. Even if the Plaintiff claims it needed over two (2) months to complete its Motion, the Defendants should receive at least a similar period to prepare a response. If the matter was not so urgent as to allow the Plaintiff to casually complete its Motion, then Defendants should receive a fair period to respond to this voluminous Motion.

On February 15, 2010, the Defendants timely disclosed their experts' identity as required by the agreement of the parties. The Defendants' experts only have until March 25, 2010, to complete any visits to CHDC, and only until April 27, 2010, to complete their reports. At this crucial time, Defendants' experts must be able to focus on their expert reports and must have full access to the staff at CHDC and to Defendants' legal counsel. Not coincidently, the Plaintiff filed its Motion on March 9 in the middle of the very crucial period for Defendants' experts, and

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[6] At a minimum, this demonstrates the unfairness of Plaintiff's position in taking the full opportunity of the time available to complete its expert reports, but now seeking to disrupt the completion of the reports of Defendants' experts.

[7] The Plaintiff now seeks to file declarations of their experts that expand upon or alter the opinions in their reports which is a violation of the Scheduling Order. The reports of Plaintiff's experts were due December 23, 2009, and all efforts to belatedly supplement their reports should be denied. Defendants also reserve the right to move to exclude all or portions of the Plaintiff's consultants' declarations and reports as well as the testimony of any or all of Plaintiff's consultants pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993) and the Court's Amended Scheduling Order.

Defendants' Counsel, to complete their expert reports. Responding to a motion for preliminary injunction at this inappropriate and unfair time will be highly prejudicial to the Defendants.

The suspect timing of Plaintiff's Motion is made apparent by Plaintiff's allegations in this Motion. The Plaintiff has had all of the information that forms the basis for its allegations since at least December 2009, and in many regards much sooner. The Plaintiff was given detailed information through their initial investigation in 2003, and many of the instances that the Plaintiff cites were evident during their initial investigation. The same is true of the DOJ's return visit in June of 2007. All of the information relied on by Plaintiff in its Motion has been available to Plaintiff for months and, in many instances, years. If Plaintiff believed a preliminary injunction was warranted on the basis of these facts, then it would have been negligent or derelict in protecting the residents at CHDC to delay its request until March of this year.

The Plaintiff has not alleged any new facts that would justify the tremendous burden that would be put on the Defendants to respond to Plaintiff's Motion and simultaneously complete expert reports and prepare for trial. Plaintiff has taken full advantage of the discovery schedule to prepare its case, including expanded time for its consultants' reports, and now seeks to ambush the Defendants. Plaintiff's Motion for Preliminary Injunction is a transparent attempt to sabotage the Defendants' preparation of their case. The timing of Plaintiff's Motion is otherwise inexplicable.

Plaintiff's delay in seeking a Preliminary Injunction "belies any claim of irreparable injury pending trial." Hubbard Feeds v. Animal Feed Supplement, 182 F.3d 598 (8th Cir. 1999); See also Tough Traveler, Ltd. v. Outbound Products, 60 F.3d 964, 968 (2d Cir. 1995) (Plaintiff's delay "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." Ty, Inc. v. Jones Group, Inc., 237

F.3d 891, 903 (7th Cir. 2001) ("Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm if a preliminary injunction is not entered."); Palm Beach County Environmental. Coalition v. Florida, 587 F. Supp. 2d. 1254, 1257 (S.D. Fla. 2008) (stating that delay in both seeking injunctive relief when the substantial issues were known to the plaintiffs and failure to timely serve defendants "belie[] plaintiffs' argument that there will be immediate injury absent injunctive relief"); Golden Bear Int'l, Inc. v. Bear U.S.A., Inc., 969 F. Supp. 742, 748 (N.D. Ga. 1996) (Camp, J.) ("Preliminary injunctions are issued to prevent imminent and inevitable injury to the movant, and undue delay 'speaks volumes about whether a plaintiff is being irreparably injured.'") (citation omitted).

Clearly, there is no reasonable allegation of irreparable harm as evidenced by the Plaintiff's lack of urgency in bringing this Motion.

C. THE PLAINTIFF UNFAIRLY SEEKS TO DEPRIVE THE DEFENDANTS OF THE BENEFIT OF THEIR NEGOTIATED AGREEMENT ALLOWING REBUTTAL OF THE PLAINTIFF'S CONSULTANTS

In the Spring of 2009, the parties negotiated, with some difficulty and disagreement, a discovery schedule that would fit into the time frame suggested by the Court. The Court had set a trial date in April of 2010, so the parties unequally divided the available time. The State was not pleased with the limited time it received in the negotiations, but accepted the due dates in exchange for other aspects of the negotiated schedule. For example, the State placed great weight in and relied heavily on the fact that the Plaintiff would designate its experts early on in the process (July 1, 2009) and would submit its reports first (October 21, 2009) which would allow the State sufficient time to plan its expert strategy, to locate experts, to retain experts, and to have its experts available and able to complete their reports in the very short time allowed. The State accepted a very limited time for completing its expert reports, and significantly less

time than provided to Plaintiff's experts, because the schedule allowed them the benefit of being able to respond fairly and fully to the issues to be revealed by Plaintiff's experts.

In complete disregard of its obligations under the negotiated agreement, the Plaintiff now seeks a ruling from the Court before the Defendants have been provided the negotiated period to respond. The Plaintiff seeks to ambush the Defendants before they receive the full benefit of their agreed upon schedule for rebuttal.

The State was focused upon the extremely important comparison of the time allowed to Plaintiff's experts to complete their reviews and reports versus the time allowed to the State's experts to complete their reviews and reports. Because the State's experts must review everything reviewed by the Plaintiff's experts, and must usually review even more information than Plaintiff's experts to place the issues in proper context and to cover information often overlooked by Plaintiffs experts, the State's experts should receive as much time, if not more, than Plaintiff's experts. Under the original agreement on the schedule, the following was the allotment of the limited time available:

> Plaintiff's expert - NINE (9) MONTHS· from filing of Complaint to the due date of their expert report.
>
> State's experts - THREE (3) MONTHS from receipt of Plaintiff's experts' reports to the due date of their reports.

This discrepancy was tolerable only because the Plaintiff was required to present the opinions of their experts first and to thereby allow the Defendants to have a full and fair opportunity to respond thereto before any trial or decision on the merits. If there had been no promise to allow a full and fair response, there would have been no agreement to allow the Plaintiff to conduct discovery and to complete expert reports.

After two (2) negotiated extensions of time, both requested by the Plaintiff and both resulting in more time being given to the Plaintiff's experts than to the State's experts, the early promise to allow rebuttal by Defendants remained crucial and perhaps became even more important. The new allotment of time became:

> Plaintiff's experts - ELEVEN (11) MONTHS from filing the Complaint to the due date of their reports.
>
> State's experts - FOUR (4) MONTHS from receipt of the Plaintiff's experts' reports to the due date of their reports.

This discrepancy continued to be tolerable only if the Plaintiff honored its commitment to allow a full and fair opportunity to Defendants to complete their discovery, their expert reviews, and their expert reports.

The relevant consideration is the unfair comparative advantage in time that Plaintiff's experts have over the State's experts. The State is clearly and undeniably prejudiced if it is denied its negotiated benefit of a full and fair opportunity to rebut the allegations of Plaintiff's experts. The State was willing to live with this unequal allotment of time if it had the benefit of early disclosure of expert opinions and a reasonable period for rebuttal, but it is not willing to accept this schedule if it is denied the benefit of their negotiation.

The State will be comparatively harmed by the loss of the benefit of the bargain as to the agreed upon schedule. Although this prejudice is hard to quantify or demonstrate, it is obvious that the State's experts will have less time to complete their reports if the Defendants are distracted by a response to the Plaintiff's Motion for Preliminary Injunction. The prejudice to the State will result in less effective and less thorough rebuttal reports than would have been obtained if the negotiated schedule had been honored. The Plaintiff should be forced to demonstrate respect for the schedule it negotiated and the State should receive the full benefit of

the schedule it negotiated. When one considers the comparative time allowed to both the Plaintiff's experts and the State's experts, the State is prejudiced by the Plaintiff's delayed filing of its Motion for Preliminary Injunction. Changes to that schedule now will severely harm the defense and will result in a need to set a longer schedule that may delay the September 2010 trial date. The delay is not acceptable to the State.

The Plaintiff has not honored the agreement of counsel. The Plaintiff should be bound by its agreement and denied any belated request for preliminary injunction. The Court should not reward the manipulations by the Plaintiff to obtain a ruling on a preliminary injunction especially where there is no demonstrated urgency.

The State will be severely prejudiced by the belated filing of a motion for preliminary injunction as it disrupts its well-planned and efficient defense. The defense of the State will be significantly compromised by the need to divert the attention of its administrators, employees, experts, and attorneys to responding to the request for preliminary injunction rather than completing their important expert reports and otherwise preparing for trial, which is set for September of 2010.[8] This trial date was set following an October 21, 2009 telephone conference between this Court and the parties. Although Plaintiff's experts already had finished their tours of the Center as of this conference date, Plaintiff stated no objection to a trial date sometime in the Fall of 2010.

To the limited extent the Defendants can prepare a response to the request for preliminary injunction in such a short time allowed, after the Plaintiff took months or years to prepare its Motion, the Defendants should not be forced to rush their experts' opinions or to divulge those

[8] In fact, the Plaintiff has now served their Eighth Request for Production of Documents that seeks an extensive number of documents (eighty numbered paragraphs of requested documents and subparts) which further interferes with the preparation of Defendants' case. The Plaintiff has also noticed the depositions of twenty (20) more state officials/employees for the weeks of April 19 and April 26 which also interferes with the completion of Defendants' expert reports.

opinions before the agreed upon deadline of April 27, 2010. The Plaintiff's experts did not have to divulge their thoughts or initial findings before their reports were due on December 23, 2009.

Magistrate Judge Jones recognized the importance of the mutually-negotiated deadlines set forth in the Amended Scheduling Order in his December 7, 2009 Order denying Plaintiff's request to add additional experts beyond these deadlines provided in the Amended Scheduling Order. Judge Jones noted, that the deadline in the Amended Scheduling Order "was more than a courtesy, it was a negotiated deadline relied upon by the Defendants." December 7, 2009 Order at 7. Similarly, Defendants have relied upon the due date for their experts' reports.

The Plaintiff seeks to avoid its agreement that Defendants need not complete their expert reports until April 27, 2010. The Plaintiff seeks to disrupt or interfere with the completion of these reports in the very limited time allowed by agreement of the parties.

D. THE PLAINTIFF CANNOT PREVAIL ON ITS CLAIMS IF THE DEFENDANTS ARE GIVEN FULL AND FAIR OPPORTUNITY TO COMPLETE THEIR DISCOVERY AND EXPERT REPORTS

In Youngberg, the U.S. Supreme Court cautioned that "interference by the federal judiciary with the internal operations of these institutions should be minimized." Youngberg v. Romeo, 457 U.S. 307, 322 (1982). Where a Plaintiff seeks to enjoin a government agency, the parties and the Court must respect the "well-established rule" that the government is granted the "widest latitude" in the dispatch of its affairs. Rizzo v. Goode, 423 U.S. 362, 378-79 (1976). "Federal courts operate according to institutional rules and procedures that are poorly suited to the management of state agencies." Angela R. v. Clinton, 999 F.2d 320, 326 (8th Cir. 1993). Accordingly, courts "should refrain from micromanaging the state and its agencies." United States v. Missouri, 535 F.3d. 844, 851 (8th Cir. 2008).

The type of preliminary injunction that Plaintiff seeks in this motion – a preliminary injunction that (1) disturbs the *status quo*, (2) is mandatory as opposed to prohibitory,[9] and (3) affords Plaintiff substantially all of the relief it seeks to recover at the conclusion of a full trial on the merits – is disfavored and requires Plaintiff to show that four factors weigh heavily and compellingly in its favor.

> A preliminary injunction that alters the *status quo* goes beyond the traditional purpose for preliminary injunctions, which is only to preserve the status quo until a trial on the merits may be had.... Mandatory injunctions are more burdensome than prohibitory injunctions because they affirmatively require the nonmovant to act in a particular way, and as a result they place the issuing court in a position where it may have to provide ongoing supervision to assure that the nonmovant is abiding by the injunction.... Finally, a preliminary injunction that awards the movant substantially all the relief he may be entitled to if he succeeds on the merits is similar to the "Sentence first–Verdict Afterwards" type of procedure parodied in Alice in Wonderland, which is an anathema to our system of jurisprudence.

SCFC ILC, Inc. v. VISA USA, Inc., 936 F.2d 1096, 1098-99 (10th Cir. 1991); See also Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979) (noting that because a preliminary injunction that alters the status quo is "particularly disfavored" the movant must make a strong showing of entitlement); Harris v. Wilters, 596 F.2d 678, 680 (5th Cir. 1979) ("Only in rare instances is the issuance of a mandatory preliminary injunction proper.").

Plaintiff seeks a mandatory injunction granting much of the relief sought in its Complaint without providing Defendants the full benefit of discovery, expert rebuttal, or a trial on the merits. Plaintiff's Motion seeks to preemptively adjudicate this matter by depriving Defendants of their due process. Plaintiff's Motion does not allege facts that weigh heavily or compellingly in its favor. Plaintiff has merely relayed its consultants' opinions in a motion that only serves to

[9] Mandatory injunctions compel action, while prohibitory injunctions forbid action. Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996) (stating that a mandatory injunction orders a party to "take action" and a prohibitory injunction "restrains" a party from further action).

disrupt Defendants' preparation for trial. As discussed below, many or all of those consultants' opinions will be proven false.

Although Defendants' experts are deeply immersed in conducting their review of CHDC, they have reported verbally numerous misrepresentations and errors made by Plaintiff's experts. The Defendants' experts have verbally advised that the information digested to date does not support the conclusions reached by Plaintiff's experts. Given a full and fair opportunity to complete these reviews, the Defendants are reasonably optimistic that the reports of Plaintiff's experts will be fully and convincingly discredited at trial. The Plaintiff has made many factual misrepresentations and a response to all of those misrepresentations will require Defendants to dedicate substantial resources away from its report preparation and trial preparation.

As an example of the type of misrepresentations and the type of response that Defendants would be required to prepare, the Plaintiff inaccurately claims that

> CHDC residents die at the strikingly young age of 46.5 years. Exhibit 7 (Declaration of Edwin Mikkelson) at 8. According to comparative studies, 72 years of age is the approximate normal life span for individuals with developmental disabilities who live in an institution, a quarter of a century longer than residents of CHDC. Id.

Plaintiff's Memorandum of Points and Authorities at 5. [10] This allegation is unsupported by the data and is outrageously false. It was obviously intended to create sensational newspaper headlines and to bias the Court, but it is baseless.

Plaintiff's citation is to its consultant, Dr. Edwin Mikkelsen's declaration, which is attached Plaintiff's Memorandum. Dr. Mikkelsen is a psychiatrist. His declaration states:

> After reviewing summaries of mortalities that occurred at CHDC over a two-year period, I calculated the average age of death for CHDC residents to be 46.4 years. According to comparative

[10] The Defendants object to having to reveal any of their experts' opinions prior to the date agreed upon by the Plaintiff. However, Defendants want to demonstrate the frivolous nature of Plaintiff's Motion.

> studies, rates of approximately 72 years of age are the normal life span for individuals with developmental disabilities who live in an institution, a quarter of a century longer than residents of CHDC.

Plaintiff's Memorandum of Points and Authorities, Exhibit 7 at 8.[11] Dr. Mikkelsen's declaration appears to be based in part upon a section of his report, which was also attached to Plaintiff's Memorandum of Points and Authorities as Exhibit 7.A.1. Dr. Mikkelsen's report states, in part,

> Two states (CT and MA) publish Mortality Reviews that are available to the public, and which provide sufficient detail to make direct comparisons with the CHDC data that I have compiled. I also have enough direct experience with the state-operated facilities in CT and MA to determine that the physical and intellectual characteristics of the residents in these facilities are comparable to the population that resides at the CHDC. These states also, specifically, report on the average age of death of those individuals who reside in their facilities, separate from the population that reside in other residential settings.
>
> The average age of death of individuals who reside in the large residential facilities in MA is 71.7 years. CT continues to operate one large state residential facility, which is the Southbury Training School. This facility is larger than those in MA and has a census of over 500 individuals, which is comparable to the CHDC population. The average age of death at this large state-operated facility is 72.8 years. Thus, the residents of these state-operated facilities enjoy life spans that are approximately 25 years longer than those o f the CHDC residents.

Plaintiff's Memorandum of Points and Authorities, Exhibit 7.A.1 at Ch.2, p. 8. The two documents cited by Dr. Mikkelsen are attached as Defendants' Exhibits B and C. The conclusions of Dr. Mikkelsen are seriously flawed.

Dr. Mikkelsen admitted during his deposition that he did not have data regarding the age of the residents of the Southbury Training School or Massachusetts facilities. Exhibit F at 218. Without knowing the distribution of the ages of the residents, this type of analysis has no value. Obviously, a facility with an older population would have an older average age of death than a

[11] The Defendants object to this belated attempt to supplement his expert report beyond the agreed upon deadline.

facility with a younger population.[12] Furthermore, CHDC has an extremely high concentration of persons who are medically fragile which is not accounted for in any calculation by Dr. Mikkelsen. The conclusions by Dr. Mikkelsen are not statistically or scientifically sound.

Defendants engaged a nationally-recognized expert to specifically respond to this and other allegations. A draft section of the report of this Defendants' expert is attached as Defendants' Exhibit D. As described by that expert, based on Dr. Mikkelsen's flawed reasoning, which Plaintiff has inappropriately endorsed and incorrectly represented to the Court as a scientific fact, the most dangerous place for an individual with developmental disabilities to live in Connecticut or Massachusetts is in their own home. Exhibit D at 9. It is unlikely that Dr. Mikkelsen would agree with this reasonable interpretation of his flawed analysis as he is a staunch opponent of institutional settings. Actually, when a statistically valid analysis of Dr. Mikkelsen's data is done, it becomes clear – CHDC has lower mortality rates than the "comparable" facilities identified by Dr. Mikkelsen. Exhibit D at 13. The Plaintiff has disgracefully and falsely criticized the services at CHDC.

Plaintiff's Motion is replete with this type of misleading information. As another example, Plaintiff misleadingly alleges that "CHDC utilizes 41 different forms of mechanical restraint, including straitjackets, 'restraint chairs,' and 'papoose boards.' Exhibit 26 at 4; Exhibit 27 at 4." Plaintiff's Memorandum of Points and Authorities at 14. Plaintiff, and its consultant, Dr. Matson, deliberately inflated this number for its sensational impact. In an apparent effort to shock the Court with his statistic, Dr. Matson counted the same type of restraint multiple times and included items such as wheelchairs in his tally. Exhibit E at 2.

[12] For example, unlike CHDC, the Connecticut and Massachusetts facilities did not have any children. Also, for example, the average age of residents at the Connecticut facility is much higher than the average at CHDC.

To further demonstrate the depth of response required to expose the inaccuracies of Plaintiff's Motion, Defendants engaged a consultant to specifically respond to Plaintiff's allegations about the use of restraints at CHDC. A draft portion of Defendants' consultant's report on this issue is attached as Exhibit E. As noted in that report:

> Since the initiation of DOJ's interest in the facility mechanical restraints at CHDC have been steadily declining, a fact that was not included in the DOJ experts' reports. . . By 2009 the facility had cut this figure nearly in half...."

Exhibit E at 3. This observation is further evidence that Plaintiff's Motion is disingenuous. The Plaintiff initiated its investigation of CHDC in 2003. In 2005, Plaintiff knew that certain restraints were being used at CHDC, in accordance with CMS regulations, at even a higher level than today, but Plaintiff did not seek to enjoin Defendants then. Since 2005, the use of restraints has dropped nearly in half. Again, the Plaintiff seeks to unfairly shock the Court, and the press, to inappropriately obtain some advantage in this litigation.[13]

To properly respond to all of the allegations in Plaintiff's baseless motion, Defendants would have to marshal significant resources, direct resources away from their expert report preparation and trial preparation, and prematurely disclose its trial defense.

II. AS A LESS ADEQUATE ALTERNATIVE, THAN STRIKING PLAINTIFF'S MOTION, THE DEFENDANTS REQUEST THAT ANY RESPONSE TO PLAINTIFF'S MOTION BE DELAYED UNTIL AFTER THE REPORTS OF DEFENDANTS' EXPERTS HAVE BEEN COMPLETED

Given the great scope of the injunctive relief requested by the DOJ and the severe adverse impact that such relief would have on Defendants, residents at CHDC, and

[13] In fact, the Plaintiff focuses on the children at CHDC in order to further the emotional appeal of its Motion. However, the Plaintiff has known of the services being provided to these children for years but strategically chose to wait until a period of time to file its Motion to cause the most harm to Defendants' case. The Defendants hope that the Court rejects this inaccurate and exaggerated emotional appeal and allows the Defendants sufficient time to complete their valid rebuttal of Plaintiff's claims.

developmentally disabled individuals served by Defendants,[14] Defendants need sufficient time to conduct discovery and prepare a response to Plaintiff's Motion.

The reports of the Defendants' experts are already due on April 27, 2010. A response to Plaintiffs' Motion could be completed within two (2) weeks of those reports being disclosed, or by May 11, 2010. This is not a lengthy period to wait to ensure a full and fair adjudication of the issues raised by the Plaintiff, especially in light of the self-serving delay of Plaintiff in bringing this Motion. The Court should prefer an accurate and complete presentation of the evidence by both parties over a unilateral, biased, and inaccurate presentation by the Plaintiff.

The Defendants respectfully request that, as a less adequate alternative, that the Court enlarge the time for Defendants to respond to Plaintiff's Motion until May 1, 2001. If the Court forces the Defendants to respond to the Plaintiff's Motion before that time, the Defendants request that the deadline for their expert reports be extended until forty-five (45) days after the Court rules on Plaintiff's Motion, and possibly will request that the trial be delayed.

III. THE PLAINTIFF CANNOT MEET THE REQUIREMENTS NECESSARY FOR THE COURT TO GRANT A PRELIMINARY INJUNCTION

It is well-settled in the Eighth Circuit that motions for preliminary injunctions are generally measured against the factors set forth in the seminal decision in Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir.1981). See Lankford v. Sherman, 451 F.3d 496, 503 (8th Cir. 2006) (same factors); Interbake Foods, L.L.C. v. Tomasiello, 461 F.Supp.2d 943, 954-55 (N.D. Iowa 2006); Doctor John's, Inc. v. City of Sioux City, Iowa, 305 F.Supp.2d 1022, 1033-34 (N.D. Iowa 2004); Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405, 1411 (N.D. Iowa 1996); Straights and Gays for Equality v. Osseo Area Schools-District, 471 F.3d 908,

[14] For example, CHDC provides extremely valuable respite services for some children that are experiencing severe behavioral problems and cannot be accommodated in the community. The only alternative would be admission to a psychiatric facility that is not as well suited to address their needs. After these individuals are stabilized at CHDC, they are returned to the community. The injunctive relief requested by Plaintiff would harm these children.

911 (8th Cir.2006) (same factors); Lankford v. Sherman, 451 F.3d 496, 503 (8th Cir.2006) (same factors). These so-called " Dataphase factors" include the following: (1) the movant's probability or likelihood of success on the merits, (2) the threat of irreparable harm or injury to the movant absent the injunction, (3) the balance between the harm to the Plaintiff and the harm that the injunction's issuance would inflict on other interested parties, and (4) the public interest. Dataphase, 640 F.2d at 114.

When applying the Dataphase factors, the burden is on the movant to establish that a preliminary injunction is appropriate. Lankford, 451 F.3d at 503; Baker Elec. Co-op., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir.1994); Modern Computer Sys., Inc., v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir.1989). " 'No single Dataphase factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction.' " Baker Elec. Co-op., 28 F.3d at 1472 (quoting Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc., 815 F.2d 500, 503 (8th Cir.1987) (citing Dataphase)).

"The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full, effective relief." Kansas City Southern Transport Co., Inc. v. Teamsters Local Union #41, 126 F.3d 1059, 1066 -1067 (8th Cir. 1997) (citing Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir.1984)). "The burden of establishing the propriety of a preliminary injunction is on the movant." Iowa Protection and Advocacy Services, Inc. v. Gerard Treatment Programs, L.L.C. ,152 F.Supp.2d 1150, 1156 (N.D. Iowa, 2001)(quoting Baker Elec. Co-op., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir.1994)).

A. PLAINTIFF CANNOT DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS AGAINST DEFENDANTS

The first factor that the Court must consider when ruling on a motion for preliminary injunction is the likelihood or probability of success on the merits. Dataphase, 640 F.2d at 114. Likelihood of success on the merits requires that the movant support its position in governing law. Baker Elec. Co-op., 28 F.3d at 1473-74; ILQ Inv., Inc. v. City of Rochester, 25 F.3d 1413, 1416 (8th Cir.1994) (first amendment and prior restraint of expression); City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 556-58 (8th Cir.1993) (Indian tribe's regulatory authority and authority of states to regulate activities on tribal lands); Aziz v. Moore, 8 F.3d 13, 15 (8th Cir.1993) (denial of injunctive relief was proper because federal courts "must abstain from imposing injunctions on prison officials [in an action under 42 U.S.C. § 1983 action] 'in the absence of a concrete showing of a valid claim and constitutionally mandated directives for relief,' ") (quoting Rogers v. Scurr, 676 F.2d 1211, 1214 (8th Cir.1982)).

"[A]t the early stage of a preliminary injunction motion, the speculative nature of this particular ['likelihood of success'] inquiry militates against any wooden or mathematical application of the test. Instead, a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir.1998) (internal citations omitted). In this case, the Plaintiff has not provided sufficient support for the claims it has asserted.

1. *Plaintiff Does not have the Authority to Seek the Relief Requested*

Even if Plaintiff could state a claim for relief under the Fourteenth Amendment or the ADA, CRIPA limits the remedies that Plaintiff can obtain in this case. The CRIPA statutes provide that the DOJ may initiate an action only for "such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment" of

constitutional rights, privileges, and immunities. 42 U.S.C. § 1997a(a) (emphasis added); See also Messier v. Southbury Training Sch., 916 F. Supp. 133, 137-38 (D. Conn. 1996) (contrasting the types of relief available to private plaintiffs with the Attorney General's right under CRIPA to seek only "minimum corrective measures"). "It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." Youngberg v. Romeo, 457 U.S. 307, 321 (1982); See also 42 U.S.C. § 1997i (stating that provisions of CRIPA "shall not authorize promulgation of regulations defining standards of care").

In its motion, Plaintiff requests the following relief:

> 1. Cease all admissions of school-aged children to CHDC;
> 2. Direct specific treatment decisions for school-aged children and prohibit CHDC's psychiatrist from treating those children in accordance with his professional judgment and appoint another psychiatrist to second-guess decisions by CHDC's psychiatrist;
> 3. Substitute the Plaintiff's judgment regarding the use of restraints for the judgment of the licensed, qualified professionals at CHDC that know the residents at CHDC;
> 4. Defendants retain a child psychiatrist; preclude the use of specific restraints based solely on the Plaintiff's uninformed opinions;[15]
> 5. Hire an independent team of doctoral level behavioral clinicians to second-guess the treatment decisions of licensed professionals who work with the residents of CHDC everyday;
> 6. The appointment of a consultant to second-guess the decisions that parents and guardians of those children have made to have their children at CHDC and placement of those children in other settings, regardless of the preferences of the parents or guardians;
> 7. Appoint a consultant, at Defendants' expense, to be a "Community Placement Evaluator," who must have experience in moving children out of institutions; The "Community Placement Evaluator" would then have 90 days to access all children at CHDC and direct the Defendants which children should be removed from CHDC, then Defendants would have 30 days to develop a transition plan to implement the unilateral treatment decision of the consultant, which is being substituted for the informed decisions of parents, guardians, and treating professional.

[15] The specific restraints that Plaintiff wants precluded are recognized by CMS regulations as appropriate methods of restraint when used as part of a treatment plan.

Plaintiff's Memorandum at 45-48.

These requests clearly demonstrate that Plaintiff is not seeking "minimum corrective measures," but rather to expand Defendants' system of care for the developmentally disabled beyond what is minimally required by the ADA and the Constitution. Plaintiff seeks to impose a system of care based solely on it policy goals. Plaintiff would have an injunctive order issue from this Court that usurps the functions of state officials and reduces them to "mere functionaries in carrying out the court's commands." Newman v. Alabama, 683 F.2d 1312, 1320 (11th Cir. 1982). Such relief is not authorized by CRIPA. Plaintiff consequently cannot show a likelihood of success on any of its claims for relief.

2. *Plaintiff's Substantive Due Process Claim Will Fail Because it Cannot Prove That Defendants Substantially Departed from Accepted Professional Judgment.*

States are not constitutionally obligated to provide social services to their citizens. Youngberg v. Romeo, 457 U.S. 307, 317 (1982). The State of Arkansas has opted to provide such service to it citizens who have been diagnosed with a mental illness or developmental disability. Because the State has chosen to provide those services, the U.S. Supreme Court has held that the Due Process Clause of the U.S. Constitution's Fourteenth Amendment imposes an affirmative duty on the State to protect certain rights of the individuals that it serves. Specifically, the U.S. Supreme Court has held that persons in state custody have "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." Youngberg, 457 U.S. at 324. Courts have consistently held that "reasonable care" does not impose a constitutional standard of optimal treatment and minimal levels of care are sufficient. Id. at 323; Hanson v. Clarke County, 867 F.2d 1115, 1120 (8th Cir. 1989) (finding no constitutional right to

optimal placement); Canupp v. Sheldon, 2009 U.S. Dist. LEXIS 113488, at *30 (M.D. Fla. Nov. 23, 2009) (noting that the U.S. Constitution does not require institutionalized persons to receive optimal treatment and mental health services); Hargett v. Adams, 2005 U.S. Dist. LEXIS 6240, at *36, 50, 53-55 (N.D. Ill. Jan. 13, 2005) (finding that Illinois' treatment program was not "optimal," but did not violate constitutional standards).

The State is required only to provide such treatment as an appropriate professional would consider "reasonable in light of [a person's] liberty interests in safety and freedom from unreasonable restraints." Youngberg, 457 U.S. at 322; Lelsz v. Kavanagh, 807 F.2d 1243, 1251 (5th Cir. 1987); Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d.1239, 1250 (2d Cir. 1984); Armstead v. Pingree, 629 F. Supp. 273, 276 (M.D. Fla. 1986).

In determining what constitutes "reasonable care," the Supreme Court in Youngberg emphasized that the State "has considerable discretion in determining the nature and scope of its responsibilities." 457 U.S. at 317. Judicial deference must be afforded to the judgment that a qualified professional exercises: "It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." Id. at 321. In fact, decisions made by such professionals are presumptively valid. Id. at 323; P.C. v. McLaughlin, 913 F.2d 1033, 1043 (2d Cir. 1990) (stating that courts should not "ascertain whether in fact the best course of action was taken").

Plaintiff has made no allegation that treatment decisions at CHDC are arbitrary or capricious, nor does it claim that such treatment decisions were based on stereotypes of the disabled rather than an individualized inquiry into the needs of each resident at CHDC. See P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2nd Cir. 1990)) (holding that the Rehab Act "does not require all handicapped persons to be provided with identical benefits," and that the Act "did not

clearly establish an obligation to meet [Plaintiff's] particular needs *vis a vis* the needs of other handicapped individuals...."; See also Phillips v. Thompson, 715 F.2d 365, 368 (7th Cir. 1983) (rejecting appellants' argument that the state had the affirmative duty under the Rehab Act "to create less restrictive community residential settings for them," and holding that because "there is no contention that these class members, because of their handicap, are being denied access to community residential living that Illinois is affording to others," the Rehab Act "simply has no application to appellants' claim") (emphasis added).

In Porter v. Knickrehm, the plaintiff brought a § 1983 claim alleging that in the State of Arkansas the human development centers' admission and discharge procedures violated constitutional equal protection and procedural due process rights. Porter v. Knickrehm, 457 F.3d 794 (8th Cir. 2006). The Court affirmed Judge Wright's District Court decisions, holding that "[p]rocedures under Arkansas statutes and under the internal policies of state human development center (HDC) for admission of mentally retarded persons to such centers satisfied procedural due process." Id. at 799. The Court found that "[o]nly minimal protections were needed to meet procedural due process requirements for admitting mentally retarded individual to state human development center (HDC), where admission occurred voluntarily by authority of legal guardian." Id. at 798 (citing Parham v. J.R., 442 U.S. 584,606 (1979)). In the instant matter, the Plaintiff seeks to circumvent State laws and regulations by imposing its policy preference for deinstitutionalization on the Defendants. This Court has already found that the procedures for admission and discharge at the State's human development centers meet constitutional due process standards.

In the instant matter, Plaintiff has attempted to substitute its judgment for that of the Defendants' professionals and seeks to deprive the Defendants of the opportunity to fully

respond to Plaintiff's allegations in accordance with the schedule Plaintiff previously agreed upon. Defendants maintain that Plaintiff's allegations are unfounded. Defendants have conferred with their experts that are expected to testify at the trial in this matter, and those experts have confirmed that their preliminary reviews support findings that the professionals at CHDC are exercising professional judgment in accordance with professional standards and all of Plaintiff's consultants' conclusions will be challenged at trial.

Even without the Defendants' consultants' investigations completed or their reports finished, the Plaintiff cannot meet its burden. Conflicting expert testimony will *not* overcome the presumption that the decisions of the treating professionals were valid. A plaintiff cannot meet its burden of proof by presenting nothing more than (1) a difference of professional opinion as to which practices are appropriate or (2) expert testimony that another course of action would have been better. Youngberg, 457 U.S. at 321; Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998); Lelsz, 807 F.2d at 1243; Society for Good Will, 737 F.2d at 1248; Doe v. Gaughan, 617 F. Supp. 1477, 1487 (D. Mass. 1985), aff'd, 808 F.2d 871 (1st Cir. 1986); See also Thomas S. v. Flaherty, 902 F.2d 250, 252 (4th Cir. 1990) (noting that Youngberg prohibits courts from "weigh[ing] the decisions of the treating professionals against the testimony of the [plaintiffs'] professionals to decide which of several acceptable standards should apply"); Pennsylvania, 902 F. Supp. at 584 ("Optimal courses of treatment as determined by some expert, while laudable, do not establish the minimal constitutional standard.").

Plaintiff cites two cases to support its position that "a State violates the Due Process Clause when it provides medical care that substantially departs from professional standards." Plaintiff's Memorandum at 30 (citing Rennie v. Klein, 720 F.2d 266, 269; Morgan v. Rabun, 128 F.3d 694, 697-98 (8th Cir. 1997). Both of those citations are misleading. In Morgan v. Rabun

and Rennie v. Klein, the plaintiffs were involuntarily committed patients in mental health facilities who were treated with psychotropic medications against their will. The courts in those cases applied the standards identified above.

In Morgan v. Rabun, the Eight Circuit considered the substantive due process rights of an involuntarily committed man who was a threat to others. Morgan v. Rabun, 128 F.3d 694, 698 (8th Cir. 1997). The Court found that "an individual's liberty interest in avoiding forcible administration of psychotropic drugs is not unconditional. We must balance this liberty interest against the relevant state interests to determine whether Morgan's constitutional rights were violated." Id. at 696-97 (citing Youngberg v. Romeo, 457 U.S. 307, 320-21). That Court did not hold, as Plaintiff cited, "a State violates the Due Process Clause when it provides medical care that substantially departs from professional standard." Plaintiff's Memorandum at 30. The Morgan Court reasoned that "[t]he governmental interests in running a state mental hospital are similar in material aspects to that of running a prison. Administrators have a vital interest in ensuring the safety of their staff, other patients, and of course in ensuring the patients' own safety." Id. at 697 (citing Washington v. Harper, 494 U.S. 210, 227, (1990)). The Court reasoned further that its "role is not to determine conclusively that Morgan was indeed dangerous. Rather, we must simply make certain that Dr. Rabun exercised professional judgment in making the determination that Morgan was dangerous." Id. at 697-98 (citing Youngberg, 457 U.S. at 321 (adopting the standard that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised"). In the instant matter, Plaintiff has not alleged that professional judgment was not exercised. Plaintiff has only alleged that its consultants recommend different treatment.

In Rennie v. Klein, the Court merely reaffirmed its recognition of the right of an involuntarily committed, mentally ill patient to refuse the administration of antipsychotic drugs. Rennie v. Klein, 720 F.2d 266 (3rd Cir. 1983). The Court held that a mentally ill patient who has been involuntarily committed "must have his constitutional right to refuse antipsychotic drugs measured [against] whether the patient constitutes a danger to himself or to others." Id. at 269. The Court held further "[b]ecause that evaluation must be the product of the medical authorities' professional judgment, such a judgment and the resulting decision to administer medication will be presumed valid unless it is shown to be a 'substantial departure from accepted professional judgment, practice or standards.'" Id. (citing Youngberg, 457 U.S. at 323.

The Court's inquiry is limited to deciding "whether the treatment or residence setting that actually was selected was a 'substantial departure' from prevailing standards of practice." Society of Good Will, 747 F.2d at 1248-49. "Liability may be imposed only when [a] decision by [a] professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Youngberg, 457 U.S. at 323. Liability is *not* established when experts simply opine that "with appropriate supports, at least half of the over 510 CHDC residents are appropriate for a more integrated setting now." Plaintiff's Memorandum at 10 (citing Plaintiff's Consultant's Declaration, Exhibit 3 at 8-9.). Plaintiff cannot meet the Youngberg standard necessary to overcome the presumption of validity and, consequently, cannot demonstrate a basis for the intrusive relief that it seeks. The care and safety of individuals at CHDC, at the very least, demonstrate the exercise of professional judgment that is presumptively valid and aligned with contemporary, accepted professional judgment, practice, and standards.

If the Court determines that a hearing on this matter is necessary, Defendants will offer testimony from treating professionals and nationally-recognized experts to demonstrate that professional judgment is exercised at CHDC.[16]

3. *Plaintiff Cannot Establish a Violation of the ADA.*

Olmstead does not require deinstitutionalization or a state to close its institutions. Despite Plaintiff's conjecture that "at least half of the over 510 CHDC residents are appropriate for a more integrated setting now[,]" deinstitutionalization of all eligible disabled persons is not required by the ADA. Plaintiff's Memorandum at 10. The Court in Conner v. Branstad, held that "if Congress had actually intended to require states to provide community based programs for mentally disabled individuals currently residing in institutional settings, it surely would have found a less oblique way of doing so." Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993); See also U.S. v. Oregon, 782 F. Supp. at 514 ("[P]remature or inappropriate community placements would result in a much higher risk of potential harm than residents are exposed to at [the facility].").

I. The ADA Does Not Give Plaintiff The Authority To Second-Guess Medical Decisions.

All decisions made by a professional are presumptively valid. Youngberg v. Romeo, 457 U.S. 307, 232 (1982). "[L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Id. Plaintiff has not alleged any such substantial deviation from professional judgment. The professional judgment standard is met even where experts disagree with care or treatment

[16] Defendants reserve the right to move to exclude all or portions of Plaintiff's consultants' declarations and reports as well as the testimony of any or all of Plaintiff's consultants pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993) and the Court's Amended Scheduling Order.

decisions that were actually made or where they think another course of conduct would have been better. Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1248 (2nd Cir. 1984). "[P]rofessional judgment has nothing to do with what course of action would make patients safer, happier, and more productive." Id. The issue is "not whether the optimal course of treatment, as determined by some experts, is being followed." Id.

The relief requested by Plaintiff necessarily involves a determination of the appropriateness of medical services, including psychiatric care. Treating physicians and other professionals have concluded that the medical needs of all residents at CHDC are being met. Such medical decisions are not reviewable under ADA or the Rehab Act. The Eight Circuit has specifically held that "a lawsuit under the Rehab Act or the Americans with Disabilities Act (ADA) cannot be based on medical treatment decisions" Burger v. Bloomberg, 418 F. 3d 882 (8th Cir. 2005) (citing Schiavo v. Schiavo, 403 F. 3d 1289, 1294 (11th Cir. 2005) ("[t]he Rehabilitation Act, like the ADA, was never intended to apply to decisions involving ... medical treatment."); Fitzgerald v. Corr. Corp. of Amer., 403 F. 3d 1134, 1144 (10th Cir. 2005) (inmate's claims under Rehab Act and ADA were properly dismissed for failure to state claim as they were based on medical treatment decisions)).

In Buchanan, et al. v. Maine, the First Circuit noted that "[T]he [Rehabilitation Act and ADA] do not guarantee any particular level of medical care for disabled persons." Buchanan, et al. v. Maine, 469 F. 3d 158, 174 (1st Cir. 2006). That Court found that "[t]here [was] no evidence that Buchanan was either discriminated against or not provided the additional services [he sought] 'by reason of his disability.'" Id. In reaching that conclusion, the Circuit Court noted that there are:

> two situations in which a challenge based on a treatment decision might be made: (1) the treatment decision was so unreasonable as

> to be arbitrary and capricious, raising an implication of pretext for some discriminatory motive, and (2) if not pretextual, the treatment decision was based on stereotypes of the disabled rather than an individualized inquiry as to the plaintiff's conditions...There was nothing unreasonable about the treatment decisions in this case and certainly no stereotyping, so neither of these arguments is available.

Buchanan, 469 F. 3d at 176.

The holdings in these appellate cases are consistent with Justice Kennedy's concurring opinion in Olmstead. In his opinion, Justice Kennedy noted that "[I]t is undisputed that the State's own treating professionals determined that community-based care was medically appropriate for respondents." Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 609, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999). Not only did Olmstead not address whether medical treatment decisions are subject to review under the ADA and the Rehab Act, it effectively carved out medical decision-making from the scope of the ADA and Rehab Act.

At CHDC, Defendants care for over 500 residents with significant medical issues, 24-hours a day. Plaintiff cites to three isolated incidents to support its claim that professional judgment is not exercised. Plaintiff's Memorandum at 31. At trial, Defendants will show that Plaintiff should have had a primary care physician or nurse review medical records at CHDC, rather than the psychiatrists that it employed. Nevertheless, this list of isolated incidents, from across a broad spectrum of medical services provided at CHDC, does not show a substantial departure from accepted professional judgment and consequently does not prove a constitutional violation. See Williams v. Wasserman, 164 F. Supp. 2d 591, 619 (D. Md. 2001) ("It is true, and unfortunate, that the representative plaintiffs suffered injuries while they were hospitalized. Those injuries, however, do not necessarily indicate a constitutional violation."). Plaintiff's consultants' opinions are also unreliable because they are based on anecdotal stories and isolated

incidents that do not rise to the level of a constitutional violation. Pennsylvania, 902 F. Supp. at 589 ("[I]solated examples of problems, while regrettable, do not establish constitutional violations.") (citing Shaw v. Strackhouse, 920 F.2d at 1143); Society for Good Will, 737 F.2d at 1245 ("Isolated instances of inadequate care, or even of malpractice, do not demonstrate a constitutional violation.")

At best, Plaintiff's consultants' conclusions reflect a difference of professional opinion, but they do not establish a *prima facie* case that Defendants have violated the Youngberg standard. See Johnson v. Murphy, 2001 U.S. Dist. LEXIS 24013, at *54-55 (M.D. Fla. June 28, 2001); Williams, 164 F. Supp. 2d at 619; United States v. Oregon, 782 F. Supp. 502, 513 (D. Or. 1991). In most instances, Plaintiff's consultants simply disagree with the treatment decisions made by Defendants' treating professionals. It is insufficient for Plaintiff to merely insert conclusory language, such as "[i]n a substantial departure from accepted professional standards...." That does not create grounds for the Court to find a constitutional violation.

In some cases, however, Plaintiff's consultants deliberately manipulate information to mislead the Court. For example, the Plaintiff inaccurately claims that:

> CHDC residents die at the strikingly young age of 46.5 years. Exhibit 7 (Declaration of Edwin Mikkelson) at 8. According to comparative studies, 72 years of age is the approximate normal life span for individuals with developmental disabilities who live in an institution, a quarter of a century longer than residents of CHDC. Id.

Plaintiff's Memorandum of Points and Authorities at 5. [17] This allegation is unsupported by the data and is outrageously false. It was obviously intended to create sensational newspaper headlines and to bias the Court, but it is baseless. See Argument I. D above.

[17] The Defendants object to having to reveal any of their experts' opinions prior to the date agreed upon by the Plaintiff. However, Defendants want to demonstrate the frivolous nature of Plaintiff's Motion.

If the Court determines that a hearing on this matter is necessary, Defendants will introduce additional evidence to refute every allegation by Plaintiff regarding medical care provided at CHDC.

II. The ADA Does Not Give Plaintiff The Authority To Second-Guess Public Education Services.

Plaintiff cites Monahan v. State of Nebraska, for the proposition that "[t]he lack of appropriate special education services also causes irreparable harm." Plaintiff's Memorandum at 19 (citing Monahan v. State of Nebraska, 645 F.2d 592 (8th Cir. 1981)). Plaintiff claims that the Court held that "plaintiff had established a threat of irreparable harm sufficient to support a preliminary injunction where the plaintiff student had been making 'little progress' in her then-current placement, and 'the resulting harm to [plaintiff] was irreparable and ... preliminary relief was appropriate to limit such harm." Id. Plaintiff's citation to this case is an attempt to mislead the Court.

That case was originally filed as Monahan v. State of Nebraska, 491 F. Supp. 1074 (D. Neb. 1980). The District Court in that case granted a preliminary injunction to the plaintiff solely on the basis of a Nebraska state statute that allegedly conflicted with a federal statute. Id. at 1095. That Court did not address the plaintiff's Rehab Act claim. See Monahan v. State of Nebraska, 687 F.2d 1164, 1167 (1982). The Defendant appealed that case to the Eight Circuit, which is cited by the Plaintiff in the instant matter. Plaintiff's Memorandum at 19 (citing Monahan v. State of Nebraska, 645 F.2d 592 (8th Cir. 1981) for the proposition: plaintiff had established a threat of irreparable harm sufficient to support a preliminary injunction where the plaintiff student had been making "little progress" in her then-current placement, and "the resulting harm to [plaintiff] was irreparable and ... preliminary relief was appropriate to limit

such harm."). This citation is an attempt to mislead the Court regarding the current standard in the Eighth Circuit.

In Monahan v. State of Nebraska, 645 F.2d 592 (8th Cir. 1981), the Eighth Circuit remanded to the District Court. The District Court dismissed the case because the State of Nebraska had amended the allegedly conflicting state statute, rendering the relief plaintiff sought moot. Rose v. State of Nebraska, 530 F. Supp. 295, 299 (D. Neb 1981).[18] That decision was appealed by the plaintiff because, like the Plaintiff in the instant matter, she believed she was entitled to relief under the Rehabilitation Act. In Monahan v. State of Nebraska, 687 F.2d 1164 (1982), the Eighth Circuit held "'[N]either the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." Monahan v. State of Nebraska, 487 F.2d 1164, 1170 (8th Cir. 1982) (citing Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979).

The Court reasoned that it could not "read § 504 [of the Rehab Act] as creating general tort liability for educational malpractice, especially since the Supreme Court, in interpreting the [Education for All Handicapped Children Act], has warned against a court's substitution of its own judgment for educational decisions made by state officials." Id. at 1170-71.

Monahan v. State of Nebraska is authoritative precedent, relevant for to the instant matter, but not for the reasons cited by Plaintiff. In Monahan, the Eighth Circuit articulated a standard for the judging the deviation from accepted professional standards. The Court held that "either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children." Monahan v. State of Nebraska, 687 F.2d 1164, 1171 (1982). Plaintiff does not, and could not, allege that the provision of

[18] The name change in the caption of this case was the result of relief being denied to the originally named plaintiff. Marla Rose was the remaining plaintiff. Rose v. State of Nebraska, 530 F. Supp. 295, 297 (D. Neb 1981).

education services at CHDC is being done in bad faith or is a gross misjudgment. If the Court deems that a hearing is necessary on this issue, Defendants will offer evidence to show that all decisions surrounding the educational services at CHDC meet and exceed professional judgment.

III. The Plaintiff Does Not Have The Authority To Second-Guess The Use of Restraints at CHDC.

The State is required only to provide such treatment as an appropriate professional would consider "reasonable in light of [a person's] liberty interests in safety and freedom from unreasonable restraints." Youngberg, 457 U.S. at 322; Lelsz v. Kavanagh, 807 F.2d 1243, 1251 (5th Cir. 1987); Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d.1239, 1250 (2d Cir. 1984); Armstead v. Pingree, 629 F. Supp. 273, 276 (M.D. Fla. 1986).

In determining what constitutes "reasonable care," the Supreme Court in Youngberg emphasized that the State "has considerable discretion in determining the nature and scope of its responsibilities." Youngberg, 457 U.S. at 317. Judicial deference must be afforded to the judgment that a qualified professional exercises: "It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." Id. at 321. In fact, decisions made by such professionals are presumptively valid. Id. at 323; P.C. v. McLaughlin, 913 F.2d 1033, 1043 (2d Cir. 1990) (stating that courts should not "ascertain whether in fact the best course of action was taken").

The cases cited by Plaintiff in its Memorandum are not dispositive. In those cases restraints were used as punishments in contravention of federal regulations. See Thomas S. v. Flaherty, 902 F.2d 250, 252 (4th Cir. 1990); See also Lelsz v. Kavanagh, 807 F.2d 1243, 1251 (5th Cir. 1987). Plaintiff has not, and could not, allege that professionals at CHDC use restraints as punishment. It is improper that Plaintiff would even cite to this type of caselaw, knowing that restraints are used at CHDC in accordance with all federal regulations.

The only other basis for Plaintiff's claims that the use of restraints at CHDC is improper is its reliance on CMS regulations. Plaintiff's Memorandum at 37-38, 41-42. As noted above, CMS is the federal agency responsible for developing regulations governing ICF/MR facilities. CMS has its own lawyers and administrative court to enforce its regulations and ensure that the facilities it certifies comply with all relevant professional standards. By its citation and reliance on CMS regulations, Plaintiff acknowledges that CMS standards reflect the professional standards that it is applying in this case. As noted above, CMS has certified that CHDC has complied with all relevant federal regulations, including management, client protections, facility staffing, active treatment services, client behavior and facility practices, health care services, physical environment, and dietetic services. See 42 CFR Part 483, Subpart I, Sections 483.400-483.480. CMS determines compliance with its regulations using a survey process in which its surveyors conduct specific reviews of specific information. None of Plaintiff's consultants have had any experience as a CMS surveyor and their familiarity with the regulations is limited. The better qualified CMS surveyors have already concluded that CHDC's use of restraints meets all professional standards incorporated into the CMS regulations.

In an effort to support its misleading argument, Plaintiff alleges that "CHDC utilizes 41 different forms of mechanical restraint, including straitjackets, 'restraint chairs,' and 'papoose boards.' Exhibit 26 at 4; Exhibit 27 at 4." Plaintiff's Memorandum at 14. Plaintiff, and its consultant, Dr. Matson, deliberately inflated this number for its salacious impact. See Argument I. D. above.

If the Court deems that a hearing on these issues necessary, Defendants will offer evidence of the context for the use of restraints at CHDC, the applicable professional standards, and accurate factual evidence of the use of restraints at CHDC.

4. *The Requested Relief would be a Fundamental Alteration to Defendants' Programs that Serve All Disabled Citizens of Arkansas*

Title II of the ADA, which applies to public services furnished by governmental entities, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. An "integration mandate" contained in the DOJ's regulations implementing the ADA states that services must be provided "in the most integrated setting appropriate to the needs of the qualified individuals with disabilities." 28 C.F.R. § 35.130(d).

In Olmstead, the U.S. Supreme Court held that "unjustified isolation" can constitute discrimination under the ADA only "when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."[19] Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 587. If a state is found to have discriminated in such a manner, it must make reasonable modifications to resolve the discrimination, but its responsibility to provide community-based treatment options "is not boundless." Id. at 603. A modification is not reasonable (and thus not required) if it will impair a state's ability to (1) maintain a range of facilities for the care and treatment of persons with diverse disabilities and (2) administer services and apportion resources equitably across a broad spectrum of need. Id. at 603-06.

[19] Plaintiff ignores this language in Olmstead and argues that the input of treatment professionals is not required. Plaintiff's Memorandum at ___. This contention cannot be reconciled with the plain language of Olmstead and further demonstrates the Plaintiff's attempt to mislead the Court with its erroneous reprerepresentations of the ADA.

Moreover, the ADA does not require a state to implement modifications that entail a "fundamental alteration" of the state's overall program for administering mental health services. Id. at 603-04; 28 C.F.R. § 35.130(b)(7) ("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 services, program, or activity."). "[T]he fundamental-alteration component ... allow[s] the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 604.

Thus, to rebut *prima facie* evidence of discrimination under the ADA, a Defendants may show that they are making a reasonable modification through their "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." Id. at 605-06. Alternatively, Defendants may demonstrate that the relief sought amounts to a "fundamental alteration" of its program. Id. at 603-04; See also Easley *ex rel.* Easley v. Snider, 36 F.3d 297, 305 (3d Cir. 1994); ARC of Washington State, Inc. v. Braddock, 427 F.3d 615, 618 (9th Cir. 2005); Messier v. Southbury Training Sch., 1999 U.S. Dist. LEXIS 1479, at *36 (D. Conn. Jan. 5, 1999); Williams v. Wasserman, 937 F. Supp. 524, 531 (D. Md. 1996); Dees v. Austin Travis County Mental Health & Mental Retardation, 860 F. Supp. 1186, 1190 n.7 (W.D. Tex. 1994).

Although the integration mandate requires states "to make 'reasonable modification in policies, practices, or procedures' that are 'necessary to avoid discrimination on the basis of disability...'", ARC of Washington State, Inc. v. Braddock, 427 F.3d 615, 618 (9th Cir. 2005) (citing 28 C.F.R. § 35.130(b)(7)), such compliance does not include an obligation to make "modifications [that] would fundamentally alter the nature of the service, program, or activity." Id.; Olmstead v. L. C. by Zimring, 527 U.S. at 605; Bryson v. Shumway, 308 F.3d 79, 86 (1st Cir. 2002) (acknowledging that § 1396n(c) contemplates state waiver plans with definite limits on the number of individuals served, and the right of states to include a limit on the number of waiver slots they request.).

Olmstead does not require, as Plaintiff argues, deinstitutionalization of all eligible disabled persons. Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993) ("[I]f Congress had actually intended to require states to provide community based programs for mentally disabled individuals currently residing in institutional settings, it surely would have found a less oblique way of doing so."); United States v. Oregon, 782 F. Supp. 502, 514 (D. Or. 1991) ("[P]remature or inappropriate community placements would result in a much higher risk of potential harm than residents are exposed to at [the facility].").

If a hearing is deemed necessary by the Court, Defendants will produce evidence to demonstrate that the relief sought by Plaintiff will constitute a fundamental alteration. Defendants programs serve disabled people throughout the State of Arkansas. The Defendants carefully allocate resources to provide the most services to the most individuals. Plaintiff's requested relief is so onerous and broad that its effects may not even be able to be calculated. For example, among many other requests for relief, within 90 days, Plaintiff wants Defendants to hire "an independent team of doctoral-level behavioral clinicians with actual training and

experience in contemporary, evidence-based behavioral management programs." Plaintiff's Memorandum at 46. The purpose of that team would be to review treatment decisions by licensed psychologists currently treating CHDC residents. Id. There is the obvious financial burden that this type of requirement would have. This requirement, like all of the requests made by Plaintiff, would take resources away from other programs that Defendants operate. It may also be a challenge to recruit a sufficient number of professionals to comprise the Plaintiff's "team." The Plaintiff appears to have specific ideas for the type of individuals it wants on its "team," but it has no suggestion how to recruit them. That burden will be on the Defendants. The creation of such a team would fundamentally alter the system that exists at CHDC. As noted above, if the Court deems that a hearing in this matter is necessary, Defendants will offer evidence to support its fundamental alteration defense at that hearing.

B. NO IRREPRABLE HARM

The second Dataphase factor is the threat of irreparable harm to the movant absent the injunction. Dataphase, 640 F.2d at 114. In the Eighth Circuit, "a party moving for a preliminary injunction is required to show the threat of irreparable harm." Baker Elec. Co-op., 28 F.3d at 1472 (citing Modern Computer Sys., 871 F.2d at 738, and Dataphase). The lack of irreparable harm is sufficient ground for denying or vacating a preliminary injunction. Aswegan v. Henry, 981 F.2d 313, 314 (8th Cir.1992) (citing Modern Computer Sys., 871 F.2d at 738). Stated differently, "[t]he threshold inquiry is whether the movant has shown the threat of irreparable injury." Glenwood Bridge, 940 F.2d at 371 (quoting Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir.1987)). More specifically, the Eighth Circuit has held that the movant's failure to sustain its burden of proving irreparable harm ends the inquiry "and the denial of the injunctive request is warranted." Gelco Corp. v. Coniston Partners, 811 F.2d 414, 420. Accord

Modern Computer Sys., 871 F.2d at 738. The Eighth Circuit has also explained, "the basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). Thus, to warrant a preliminary injunction, the moving party must demonstrate a sufficient threat of irreparable harm. See Adam-Mellang v. Apartment Search, Inc., 96 F.3d 297, 299 (8th Cir.1996).

Plaintiff's delay in seeking a Preliminary Injunction "belies any claim of irreparable injury pending trial." Hubbard Feeds v. Animal Feed Supplement, 182 F.3d 598 (8th Cir. 1999); See also Tough Traveler, Ltd. v. Outbound Products, 60 F.3d 964, 968 (2d Cir. 1995) (Plaintiff's delay "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 903 (7th Cir. 2001) ("Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm if a preliminary injunction is not entered."); Palm Beach County Environmental. Coalition v. Florida, 587 F. Supp. 2d. 1254, 1257 (S.D. Fla. 2008) (stating that delay in both seeking injunctive relief when the substantial issues were known to the plaintiffs and failure to timely serve defendants "belie[] plaintiffs' argument that there will be immediate injury absent injunctive relief"); Golden Bear Int'l, Inc. v. Bear U.S.A., Inc., 969 F. Supp. 742, 748 (N.D. Ga. 1996) (Camp, J.) ("Preliminary injunctions are issued to prevent imminent and inevitable injury to the movant, and undue delay 'speaks volumes about whether a plaintiff is being irreparably injured.'") (citation omitted).

The standard is well-settled, Plaintiff is required to show a "real and immediate" threat of substantial, irreparable harm before the Court should intervene. O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Watkins Inc. v. Lewis, 346 F.3d 841 (8th Cir. 2003) (Failure to show

irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction.); Adam-Mellang v. Apartment Search, Inc., 96 F.3d 297 (8th Cir. 1996) (Failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction.) In the instant matter, Plaintiff fails to identify any specific individual at risk any actual, imminent harm or danger.[20] If Plaintiff had identified any such individual during its tours of CHDC or in its review of documents, the Defendants would certainly have moved on it own accord to protect that individual, without requiring the intervention from the Court.[21]

On the issue of actual harm, Plaintiff simply "takes us into the area of speculation and conjecture," O'Shea, 414 U.S. at 497, and does nothing but recite generalities such as, "[l]ong term, unnecessary segregation causes irreparable harm." Plaintiff's Memorandum at 17 (citing Plaintiff's consultant's declaration, Exhibit 12 at 22). In short, Plaintiff has not alleged imminent harm to any particular person served by Defendants. Plaintiff's broad policy initiative to encourage more community treatment does not meet the test for irreparable injury. Issuance of an injunction on this basis would be improper because the relief, even as articulated by Plaintiff,

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[20] In fact, the proposed relief that Plaintiff seeks to be implemented immediately risks far more harm to the developmentally disabled citizens of Arkansas than do current practices by the Defendants.

[21] The absence of any alleged specific injury to any particular individual also raises an issue as to ripeness of Plaintiff's request for injunctive relief. A claim is not ripe for adjudication if it depends on contingent future circumstances that may not occur as anticipated, or may not occur at all. Texas v. United States, 528 U.S. 296, 300 (1998). A ripeness challenge requires a court to assess both the fitness of the issues for consideration and the hardship to the parties of withholding the court's consideration. Id. at 300-01. The purpose of the ripeness doctrine, among other things, is to prevent judicial interference before a proceeding has been formalized and its effects felt in a concrete way by the parties. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). The Eighth Circuit has repeatedly stated that a case is not ripe if there is no showing that the injury is "direct, immediate, or certain to occur." Public Water Supply District No. 10 of Cass County, Mo. v. City of Peculiar, Mo., 345 F.3d 570, 573 (8th Cir.2003). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." KCCP Trust v. City of North Kansas City, 432 F .3d 897, 899 (8th Cir.2005) (quoting Texas v. United States, 523 U.S. 296 (1998)). Accordingly, courts examining the ripeness of a particular case must consider "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. (internal citations omitted). Finally, "[t]o be ripe for decision, the harm asserted must have matured enough to warrant judicial intervention. The plaintiffs need not wait until the threatened injury occurs, but the injury must be certainly impending." Paraquad v. St. Louis Housing Authority, 259 F .3d 956, 958 (8th Cir.2001).
In this case, the Plaintiff presents only anecdotal evidence of isolated injuries that have occurred in the past and vaguely asserts that there is potential for harm to occur in the future. The Plaintiffs' claims are contingent upon the occurrence of future events. The Plaintiff cannot demonstrate that it is facing a direct, immediate injury, or an injury that is certain to occur, particularly where the underlying facts in the allegations are as flawed as those proffered by Plaintiff and its consultants. For example, the Plaintiff requests an injunction preventing the Defendants from admitting any additional children into CHDC, but Plaintiff has not identified any particular individual whose admission it seeks to block. Plaintiff cannot know the implications of potentially blocking an admission to CHDC because it has not even considered representing the interests of any particular individual. Plaintiff has an obligation to show that it is requesting relief that is related to an actual or imminent injury being incurred by someone. Instead, Plaintiff supports its allegations and request for relief by offering platitudes and questionable professional standards from its consultants. Neither Plaintiff nor its consultants did a complete analysis of medication administration or the use of restraints at CHDC, or the specific impact on any particular individual residing at CHDC.

is amorphous. Milliken v. Bradley, 418 U.S. 717, 738 (1974) (quoting Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 16 (1971) (The power of the federal courts to restructure the operation of local and state governmental entities is not plenary. It "may be exercised 'only on the basis of a constitutional violation.'"); See also Rizzo v. Goode, 423 U.S. 362, 377 (1976)

In an effort to support its position, Plaintiff cites several cases, from various jurisdictions, but Plaintiff cannot show the constitutional harm required in Youngberg. The Plaintiff cites Henderson v. Bodine Aluminum, Inc. for the proposition that "[d]eath and permanent injury cause by failure in medical care constitutes irreparable harm." Plaintiff's Memorandum at 16 (citing Henderson v. Bodine Aluminum, Inc., 70 F.3d 958, 961 (8th Cir. 1995)). The plaintiff in Henderson was denied medical coverage by her insurance company sought an injunction to allow her to have treatment for breast cancer. Henderson, 70 F.3d 958, 961. In the instant matter, Plaintiff has made no such allegations of a life-threatening illness.

Plaintiff's citation to Rodde v. Bonta simply does not support its position, but it does support the Defendants' position. In Rodde, the Ninth Circuit held the shutting down of defendant's only hospitals designed to serve disabled individuals violated Title II because the services designed for the general population, while available to the disabled, "would not adequately serve the unique needs of the disabled who therefore would be effectively denied services that the non-disabled continued to receive." Rodde, 357 F.3d 988, 998 (9th Cir. 2004). The relief that Plaintiff seeks through its motion would create the same problems that the Ninth Circuit warns against in Rodde.

Plaintiff's citation to National Ass'n of Psychiatric Health Systems v. Shalala, is equally misleading. That case did not hold, as Plaintiff cites, "[t]he inappropriate use of mechanical restraints causes irreparable harm." Plaintiff's Memorandum at 16. Plaintiff has baldly

misrepresented that case to the Court. In Shalala, private hospitals brought an action against the Secretary of Health and Human Services seeking to enjoin a final rule requiring a practitioner to evaluate a patient, face-to-face, within one hour after the patient has been placed in restraints or in seclusion. Shalala, 120 F.Supp.2d 33, 44 (D.D.C.2000). The Court denied the motion for preliminary injunction because the plaintiffs "failed to show what, if any, irreparable harm would befall them should the Court refuse to enter an injunction." Id. at 44.

Plaintiff cites Parham v. J.R. in an attempt to support its claim that children at CHDC are being isolated. Plaintiff's Memorandum at 17 (citing Parham v. J.R., 442 U.S. 584, 627-28 (1979). In Parham the U.S. Supreme Court evaluated Georgia's procedural due process that was afforded children prior to their admission to the state mental health facilities. The Court held that the State's due process procedures were constitutional. Id. at 620. Plaintiff's citation to the dissenting opinion of the Court shows Plaintiff's desperate attempt to manipulate this Court by emotionally referring to Justice Brennan's concern that the needs of children be met. Defendants already provide a broad spectrum of unique services to the children they serves at CHDC and throughout the State of Arkansas.

Plaintiff's citation to Disability Advocates Inc. v. Patterson, is irrelevant. That case addressed the State of New York's Olmstead plan and its waiver services. In the 128-page opinion from the Eastern District, the Court does not mention "irreparable harm" anywhere. See Disability Advocates Inc. v. Patterson, 653 F. Supp.2d 184 (E.D.N.Y. 2009).

Plaintiff has not identified any actual or imminent harm that will incur. Its specious claims do not establish the constitutional harm required by Youngberg. If the Court deems that a hearing on this matter is necessary, Defendants will offer factual and expert evidence to demonstrate that Plaintiff's argument of irreparable harm has no merit.

C. THE DAMAGE THAT AN INJUNCTION WILL CAUSE CHDC, DDS, DHS, AND THE STATE OF ARKANSAS FAR OUTWEIGHS THE THREATENED INJURY TO PLAINTIFF.

The third Dataphase factor requires the Court to balance the harm to the Plaintiff if the requested relief is not granted against the harm to the Defendants and other interested parties if the injunction is issued. Dataphase, 640 F.2d at 114. The "balance of harms" analysis is not identical to the "irreparable harm" analysis. Pottgen v. Missouri State High Sch. Activities Ass'n., 40 F.3d 926, 929 (8th Cir.1994). Irreparable harm focuses on the harm or potential harm to the movant. Dataphase, 640 F.2d at 114. In contrast, the balance of harms analysis examines the harm of granting or denying the injunction upon both of the parties to the dispute and upon other interested parties, including the public. Id.; See also Glenwood Bridge, 940 F.2d at 372 (considering the effect of granting or denying the injunction on the public's interest in a public works construction project as well as upon the parties in the balance of harm analysis); Modern Computer Sys., 871 F.2d at 737-38 (harm to other interested parties also considered).

In conducting the "balance of harms" analysis required under Dataphase, an illusory harm to the movant will not outweigh any actual harm to the nonmovant. Frank B. Hall & Co. v. Alexander & Alexander, Inc., 974 F.2d 1020, 1023 (8th Cir. 1992). To determine what must be weighed, courts have looked at the potential economic harm to each of the parties and to interested third parties of either granting or denying the injunction as relevant. Baker Elec. Co-op., 28 F.3d at 1473. Present harm as the result of past misconduct is not sufficient to justify the injury to the non-movant of granting a preliminary injunction requiring some additional corrective action because such relief "goes beyond the purpose of a preliminary injunction." Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co., 997 F.2d 484, 489, 490 (8th Cir. 1993).

Plaintiff has failed to articulate any irreparable harm. Therefore, it cannot show that its hardship outweighs the potential hardship to the Defendants, the individuals served by Defendants, the families and friends of the individuals served by Defendants, and the taxpayers of the State of Arkansas. Yakus, 321 U.S. 414, 440. ("The award of an interlocutory [i.e. preliminary] injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff.")

The balancing of the equities weighs heavily in favor of CHDC, DDS, DHS, and the State of Arkansas. The Defendants are operating a statewide system of care for the developmentally disabled. Defendants provide numerous services for many unique individuals. The allocation of resources is carefully planned to provide the most services for the most individuals. Plaintiff arrogantly indicates in its Memorandum that the relief it seeks will "cause no significant harm to Defendants." Plaintiff's Memorandum at 42. The Plaintiff has not even made not effort to understand the services that the Defendants provide. In balancing the hardships, the Court should consider whether the injunctive relief being sought is prohibitory or mandatory, as is the case here. See generally 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 2948.2 (2d ed. 1995 & Supp. 2009).

The purpose of a preliminary injunction is to preserve the *status quo* pending final determination of the lawsuit. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981). See also Rathmann Group v. Tanenbaum, 889 F.2d 787, 789-90 (8th Cir.1989) (quoting Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir.1984) "'The primary function of a preliminary injunction is to preserve status quo until, upon final hearing, a court may grant full effective relief.'") "Only in rare instances is the issuance of a mandatory preliminary injunction proper." Harris v. Wilters, 596 F.2d 678, 680 (5th Cir. 1979); See also Wetzel v. Edwards, 635

F.2d 283, 286 (4th Cir.1980); Citizens Concerned for Separation of Church and State v. City and County of Denver, 628 F.2d 1289, 1299 (10th Cir.1980), cert. denied, 452 U.S. 963, 101 S.Ct. 3114, 69 L.Ed.2d 975 (1981); Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir.1976). "Mandatory preliminary relief, which goes well beyond simply maintaining the status quo *pendente lite* is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." Martinez, 544 F.2d 1233, 1243.

In the instant matter, the Plaintiff seeks substantially all of the same relief that it could hope to receive after a full and fair trial. In cases where, as here, the preliminary injunction would give Plaintiff all or most of the relief to which it would be entitled if it were successful at trial on the merits, preliminary relief may be "excessively burdensome." Wright & Miller, supra, § 2948.2. The Plaintiff is not seeking to stop the Defendants from engaging in any particular activity, but rather seeks to use the Court's power to impose affirmative requirements on the Defendants that reflect Plaintiff's policy preferences for the State of Arkansas's administration of programs for the developmentally disabled. Plaintiff here seeks what the Eleventh Circuit rejected in Newman v. Alabama: to make State officials "mere functionaries in carrying out the court's commands." 683 F.2d at 1320.

"Federal courts operate according to institutional rules and procedures that are poorly suited to the management of state agencies." Angela R. v. Clinton, 999 F.2d 320, 326 (8th Cir. 1993). Accordingly, courts "should refrain from micromanaging the state and its agencies." United States v. Missouri, 535 F.3d 844, 851 (8th Cir. 2008). In the mental health context, the U.S. Supreme Court has warned that "interference by the federal judiciary with the internal operations of these institutions should be minimized." Youngberg, 457 U.S. at 322.

The U.S. Supreme Court has cautioned, principles of federalism must be respected:

> Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law" . . . . When the frame of reference moves . . . to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.

Rizzo v. Goode, 423 U.S. 362, 378-79 (1976) (citations omitted). These principles apply when "injunctive relief is sought against ... those in charge of an executive branch of an agency of state or local governments." Id. at 380.

"[F]ederal courts should accord deference to state policymakers' programmatic and political funding decisions regarding mental health funding." Frederick L. v. Dep't of Pub. Welfare of Pa., 364 F.3d 487, 493 (3d Cir. 2004); See also Sanchez, 416 F.3d at 1067 (quoting from Olmstead that "a State must have sufficient leeway 'to maintain a range of facilities and to administer services with an even hand'"). Even in the Olmstead decision, the Court recognized "the federalism costs inherent in referring state decisions regarding the administration of treatment programs and the allocation of resources to the reviewing authority of the federal courts," Olmstead, 527 U.S. at 610 (Kennedy, J. concurring). Justice Kennedy noted that respect should be granted to states to determine how best to provide appropriate community-based mental health programs "taking into account the resources available to the State and the needs of others with mental disabilities." Id. at 607 (plurality opinion). "It is of central importance, then, that courts apply [the Olmstead] decision with great deference to the medical decisions of the responsible, treating physicians and, as the Court makes clear, with appropriate deference to the program funding decisions of state policymakers." Id. at 610 (Kennedy, J., concurring).

Plaintiff contends that the balancing of the equities favors it because if its relief is granted, "CHDC must simply invest the minimum resources and administrative support necessary to protect the lives and safety of its residents." Plaintiff's Memorandum at 43. Plaintiff has no idea what type of resources and supports are necessary to protect the lives and safety of the residents at CHDC and the other individuals served by Defendants. In Olmstead, the United States, the same Plaintiff that now seeks an injunction, filed an amicus curiae to the U.S. Supreme Court stating "a comparison so simple overlooks costs the State cannot avoid; most notably, a 'State ... may experience increased overall expenses by funding community placements without being able to take advantage of the savings associated with the closure of institutions.'" Olmstead, 527 U.S. at 604 (quoting Br. for U.S. as *Amicus Curiae* at 21). Plaintiff dismissive comment, that its relief will "cause no significant harm to Defendants," is a clear indication that the Plaintiff does not understand the services that Defendants provide or the type of relief that it seeks.

If the Court deems that a hearing is necessary, the Defendants will offer evidence of the depth and breadth of the services that they provide for the disabled and the careful allocation of resources by the Defendants. Defendants will also introduce evidence of the full impact that Plaintiff's careless request for relief would actually have on the Defendants and the individuals that Defendants serve.

D. THE PUBLIC INTEREST REQUIRES THAT PLAINTIFF'S REQUEST FOR INJUNCTION RELIEF BE DENIED

The final Dataphase factor requires the Court to consider the public interest. Dataphase, 640 F.2d at 114; Pottgen v. Missouri State High School Ass'n, 40 F.3d 926, 929 (8th Cir. 1994); Branstad v. Glickman, 118 F. Supp. 2d 925, 943 (N.D. Iowa 2000). The public interest factor invites the court to consider broad observations about conduct that is generally recognizable as

costly or injurious. Id. This factor also allows the Court to consider the public's interest in minimizing unnecessary costs to be met from public coffers. B & D Land and Livestock Co. v. Veneman, 231 F.Supp.2d 895, 912 (N.D. Iowa 2002).

In this case, the public interest does not weigh in favor of granting a preliminary injunction. "Where a Plaintiff seeks an injunction that will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (citations omitted). Even if the Court finds that a violation of the law has occurred, not every violation of the law entitles a Plaintiff to an injunction. See e.g. TVA v. Hill, 437 U.S., at 193, 98 S.Ct., at 2301; Hecht Co. v. Bowles, 321 U.S., at 329, 64 S.Ct., at 591.

Plaintiff's argument that the public interest favors granting the injunction misses the point. Plaintiff argues that if its allegations are true, then generally it would be in the public interest to grant the relief it seeks. Plaintiff does not even attempt to argue that the preliminary relief it seeks is justified. There is no public interest that is served by granting the preliminary injunction that Plaintiff seeks.

Plaintiff cites Jaffe v. Redmond for the proposition that "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." Plaintiff's Memorandum at 44 (citing Jaffe v. Redmond, 518 U.S. 1, 11 (1996)). Defendants do not dispute this proposition. The proposition does not support Plaintiff's position though.

The Plaintiff is required to show that a preliminary injunction is in the public interest, not that "the mental health of our citizenry... is a public good....." Plaintiff' has not even attempted

to put forth an argument that, specifically, granting a preliminary injunction would be in the public good.

Similarly, Plaintiff cites Nat'l Ass'n of Psychiatric Health Systems v. Shalala for "finding that the public interest supported upholding a rule that required medical review of restraints after one hour because 'restraints and seclusion are dangerous interventions' and 'severe psychological and physical injuries' result from the inappropriate use of restraints'[sic]" Plaintiff's Memorandum at 44 (citing Nat'l Ass'n of Psychiatric Health Systems v. Shalala, 120 F. Supp. 2d. 33, 45 (D.D.C. 2000)). CHDC has the same policy. Plaintiff is well aware of that policy and has not even alleged that CHDC administers its policy in any other way. At a hearing on this matter, CHDC will introduce evidence to document its policy that if a restraint is necessary it is only administered in accordance with professional judgment and never for more than an hour.

In Arkansas Medical Society v. Reynolds, the District Court enjoined the State's plan to reduce its reimbursement rates to Medicaid providers. The plaintiff produced evidence that reducing the reimbursement rate for specific providers would impact their ability to receive services. The Court in Reynolds granted the injunction to "maintain the status quo with respect to those services until plaintiffs' claims [could] be adequately investigated and adjudicated." Arkansas Medical Society v. Reynolds, 834 F. Supp. 1097, 1103 (E.D. Ark. 1992)). In the instant matter the Defendants are not seeking to alter the status quo. Instead, it is the Plaintiff who seeks to change the status quo. Defendants contend that the status quo should be maintained. The trial in this matter is scheduled for September 2010. As discussed above, Plaintiff's allegations do not allege any irreparable harm.

Like many of the cases cited in Plaintiff's Memorandum, Plaintiff has miscited Reynolds. Plaintiff cites Reynolds for holding that "'[i]n view of the public interest involved, medical care to patients, the Court feels that the weight of discretion is on the side of granting the motion [for preliminary injunction].' (internal citations omitted)." Plaintiff's Memorandum at 44 (citing Arkansas Medical Society v. Reynolds, 834 F. Supp. 1097, 1102, 1103-04 (E.D. Ark. 1992)). Contrary to Plaintiff's representation, Reynolds did not reach such a conclusion. The Court in Reynolds specifically held that "It cannot at this time be said who the balance of harm and the public interest favors, and the Court makes no findings in that regard." Reynolds at 1103.

Plaintiff's citation appears to be a quote from Arkansas Society of Pathologists v. Harris, No. LR-C-80-02 (E.D. Ark. June 4, 1980). In that case the Arkansas Society of Pathologists successfully enjoined a proposed regulatory change proposed by HCFA that would have required the pathologists to bill hospitals for their services instead of directly billing patients, as their practice had been. Ultimately, Congress amended the Medicare Act to allow its proposed regulatory change.[22] Plaintiff's misquotation of case law represents the way in which it has carelessly asserted claims against the Defendants. Plaintiff's reckless accusations undermine the hard work that is done everyday at CHDC, DDS, DHS and the entire state of Arkansas to provide all levels of service to developmentally disabled individuals.

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[22] Congress enacted §108 of the Tax Equity and Fiscal Responsibility Act of 1982. Section 108 directed the secretary of the Department of Health and Human Services to distinguish between services performed by hospital-based physicians

> (A) which constitute professional medical services, which are personally rendered for an individual patient by a physician and which contribute to the diagnosis or treatment of an individual patient and which may be reimbursed as physician services under Part B of [Medicare], and
>
> (B) which constitute professional services which are rendered for the general benefit to patients in a hospital or skilled nursing facility and which may be reimbursed only on a reasonable cost basis ... .

Under subsection B of this section, pathologists were to look to hospitals for compensation for professional component services to Medicare patients from payment to hospitals made under Part A of Medicare.

The Defendants provide critical services for the developmentally disabled in the State of Arkansas. They provide a complete spectrum of services for the developmentally disabled. CHDC has been certified by CMS since that federal agency has offered the certification and for the past thirteen (13) years CHDC has sought, and obtained, private accreditation from CARF. Plaintiff does not have the skill or expertise to make recommendations to change the care provided to the residents of CHDC or any individual served by Defendants programs. Yet, Plaintiff would have the Court enter an injunction to disrupt the programs operated by Defendants without any consideration for the impact that those changes would have on the individuals served by Defendants. Among other things, Plaintiff's relief would also usurp the rights of parents and guardians to make decisions for their loved ones. Notably, in over fifty (50) exhibits attached to Plaintiff's Motion for Preliminary Injunction and Memorandum, there is not a single affidavit from a parent or guardian of a child at CHDC. If a hearing on this matter is deemed necessary, the Defendants will produce, among other witnesses, parents and guardians who will be impacted by the Plaintiff's wanton request for relief.

CONCLUSION

Defendants respectfully move the Court to enter an Order striking Plaintiff's belated and inappropriate Motion for Preliminary Injunction. Plaintiff's Motion has no basis in law or fact and was not filed in good faith. Plaintiffs Motion for Preliminary Injunction is a transparent attempt to disrupt Defendants trial preparation, to present allegations without opportunity for a fair rebuttal, and to obtain relief it would not otherwise receive in a full and fair trial on the merits. In an attempt by Plaintiff to avoid the reliable and compelling opinions of the Defendants' experts, pursuant to the agreed upon Scheduling Order, the Plaintiff has chosen to

try to ambush the Defendants before their defense can be completed. The evidence, however, reveals the lack of urgency and the lack of merit to this request for Preliminary Injunction.

In the alternative, the Defendants request an enlargement of time for the Defendants to respond to Plaintiff's Motion to (a) allow the Defendants the full and fair opportunity to complete their experts' reports as agreed to by the parties, (b) allow the Defendants to complete their expert reports that are expected to directly contradict the findings of Plaintiff's experts before ruling on the Plaintiff's Motion, and (c) allow the Defendants sufficient time to conduct other discovery and to respond to the factual misrepresentations made in the Plaintiff's Motion.

In any case, the Plaintiff cannot meet the requirements for obtaining a preliminary injunction. If a hearing is required, Defendants will effectively dispute all of the allegations of Plaintiff's Motion. The request for a preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas B. York, hereby certify that on this 23rd day of March 2010, I served a true and correct copy of Defendants ***Brief In Support of Defendants' Motion To Strike Plaintiff's Motion For Preliminary Injunction or, In the Alternative, Defendants' Motion For An Enlargement Of Time To Respond To Plaintiff's Motion For Preliminary Injunction*** via the Courts electronic filing system, upon the following:

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