**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF LOUISIANA**

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| **HELEN PITTS, KENNETH ROMAN, DENISE HODGES, and RICKII AINEY, on behalf of themselves and all others similarly situated,** | **Civil Action No. 3:10-cv-00635-JJB-SCR** |
| **Plaintiffs,** | **Judge James J. Brady** |
| **v.** | **Magistrate Judge Stephen C. Riedlinger** |
| **BRUCE GREENSTEIN, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, and LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,** | **CLASS ACTION** |
| **Defendants.** | |

**DEFENDANTS' RESPONSE IN OPPOSITION**
**TO THE MOTION FOR A PRELIMINARY INJUNCTION**


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## I. INTRODUCTION

In August 2010, the Louisiana Department of Health and Hospitals ("DHH") promulgated a rule changing the way in which personal care services are allocated to Medicaid-eligible individuals in the State's Long-Term Personal Care Services ("LT-PCS") program. The change included a reduction in the maximum number of hours that the State would provide from 42 hours per week to 32 hours per week. Shortly thereafter, four individuals filed this lawsuit, alleging that the State's reduction of the cap from 42 hours per week would force them and thousands of others into nursing homes, thereby violating the Americans with Disabilities Act (ADA). Last May, the Court ruled that there was a genuine dispute of material fact as to whether the ADA required the State to make any changes to the LT-PCS program.

The timing and basis of the Plaintiffs' Motion for a Preliminary Injunction is inexplicable and unjustified. The Plaintiffs do not seek to maintain the status quo, but to change it. More than a year has passed since the beginning of the litigation. Contrary to the Plaintiffs' predictions in their complaint, the number of LT-PCS recipients transitioning to nursing homes has not increased—has, in fact, decreased—even though the State has now reduced services for nearly all of the beneficiaries, including thousands who were receiving more than 32 hours a year ago. Moreover, in response to the Court's summary judgment ruling and questions at oral argument, the State promptly undertook several modifications to its home- and community-based services ("HCBS") programs to accommodate individuals who believe they will need to move to a nursing home without more than 32 hours of paid assistance. The Plaintiffs acknowledge that these steps have been positive. And when class counsel has informed Defendants that specific individuals require additional assistance—including every individual referenced in the Plaintiffs' motion—Defendants have provided informal relief through individualized accommodations.

Given that Defendants' have made and may continue to make changes to their programs, their demonstrated willingness to accommodate individuals brought to their attention by class counsel, and the lack of evidence suggesting the 32-hour cap has led to an increase in nursing facility admissions, there is no need for judicial intervention prior to a decision on the merits. Accordingly, the Court should deny the motion.

## II. RECENT DEVELOPMENTS

Defendants' previous filings have described the full array of Louisiana's HCBS programs, the substantial and growing financial commitment the State has made to those programs, DHH's past success in serving more individuals in the community every year, and its ongoing efforts to reduce the nursing home population.[1] Following the Court's May order, DHH has made a number of modifications to these programs.

### A. Replacement Of The EDA Waiver With The CC Waiver

Louisiana recently replaced the Elderly & Disabled Adult ("EDA") waiver with the more comprehensive Community Choices ("CC") waiver. As previously explained, each beneficiary enrolled in the waiver receives an acuity-based "budget" of up to $40,046 per year, which he or she may allocate to an appropriate mix of services. Defs.' Statement of Undisputed Facts ("SUF"), Doc. 11-1, at ¶¶ 54-55. In the EDA waiver, the beneficiary could use the budget to arrange for not only personal assistance services (which include both the personal care services at issue in this case and companion care services, *id.* ¶ 58), but also support coordination, transition intensive support coordination, environmental accessibility adaptation, transition services, and Adult Day Health Care services. *Id.* ¶ 57. Since the CC waiver replaced the EDA

[1] *See generally* Memorandum in Support of Defendants' Motion to Dismiss, Doc. 11-1, at 3-14; First Declaration of Hugh R. Eley, Doc. 11-2, at ¶¶ 7-43; Defendants' Reply to Plaintiffs' Opposition to the Motion for Summary Judgment, Doc. 39, at 3-11.

program on October 1, 2011, beneficiaries have the additional options of physical therapy, occupational therapy, respiratory therapy, speech/language therapy, nursing services, home delivered meals, assistive devices and medical supplies, respite services (temporary support for informal caregivers), and non-medical transportation. Exhibit 1, Third Declaration of Hugh R. Eley ¶ 18. Because the CC waiver offers these additional services and allows beneficiaries to receive more personal care services than LT-PCS, the CC waiver will generally be the more attractive option for individuals with the most severe disabilities.[2]

**B. Creation Of A Process For Granting Expedited Waiver Slots**

There are a limited number of CC waiver slots. *Id.* ¶ 22. The program is always near capacity, but turnover allows DHH to extend offers to individuals on the waiting list on a rolling basis. Offers are made in the order that individuals applied for the program, unless an individual falls within one of the designated "priority" groups. *Id.* ¶¶ 23-26. In June 2011, DHH issued an emergency rule that created a process through which people who are receiving the maximum number of hours of LT-PCS (32 hours per week) can enroll in the waiver without delay if, but for the provision of additional services through the waiver, they would require admission to a nursing home. *Id.* ¶¶ 28-43.[3] Under the rule, waiver slots are made available to qualified applicants on an expedited basis "[n]otwithstanding the priority group provisions" for the waiver's waiting list. *Id.* Att. B. This means that recipients of expedited waiver offers get access to CC services ahead of other individuals on the waiting list. *See id.* ¶¶ 28, 54.

[2] In addition to expanding the array of services available through the waiver, DHH is requesting the addition of 500 new slots for the upcoming fiscal year. Third Eley Decl. ¶ 49-51. The final decision to fund the expansion will be made by the Governor's Division of Administration and the legislature.

[3] The rule is codified at La. Admin. Code tit. 50, § 8105(E). It was initially published at 37 La. Reg. 1490, 1491 (June 2011), and then republished without amendment at 37 La. Reg. 2558, 2559 (Sept. 2011). The latter version appears as Attachment B to the Third Declaration of Hugh R. Eley.

Requests for an expedited waiver offer are made by phone or by referral to DHH staff. *See id.* ¶ 31. If the applicant meets the threshold criterion of having exhausted the available LT-PCS resources, a Medical Certification Specialist from one of DHH's Regional Offices schedules a "home visit" to evaluate whether the applicant will enter a nursing home without waiver services, whether alternative support is available from other formal or informal sources, and whether CC waiver services are appropriate for the individual under the circumstances. *See id.* ¶¶ 31-33. The Medical Certification Specialist's findings are examined by the Service Review Panel ("SRP"), which decides whether to offer the applicant an expedited slot. *Id.* ¶ 34-35. DHH is currently able to act on a request within two weeks of receiving it. *Id.* ¶¶ 30, 59, 63. Individuals who are denied an expedited waiver offer can reapply if their circumstances change. *Id.* ¶ 37.

DHH has reserved 100 slots for these emergency placements. *Id.* ¶ 41. To date, it has received over 30 applications, and has extended offers to several people. *Id.* ¶¶ 38-40, 75-77.[4]

### C. Elimination Of The 90-Day Stay Rule For High Priority Offers To Nursing Home Residents

In addition to the emergency slots reserved for individuals who have "maxed out" their LT-PCS services, DHH has revised the criteria for its "priority groups" for regular CC waiver slot offers. Individuals in the priority groups quickly receive waiver offers despite the waiting list. When the parties were before the Court in May, the priority groups were: (1) victims of abuse and neglect who would require institutionalization to prevent future abuse and neglect in the absence of access to the waiver; (2) individuals with Amyotrophic Lateral Sclerosis (ALS);

[4] At least three other individuals who requested expedited waiver offers received offers through the regular process for offering slots. Third Eley Decl. ¶ 72. Two individuals were referred to the Office of Citizens with Developmental Disabilities for services through that office's waiver programs. *Id.* ¶ 40. Several requests came from people who were not enrolled in LT-PCS at all or were not approved for 32 hours. *Id.* ¶ 39.

(3) individuals residing in nursing facilities for at least 90 days. SUF ¶¶ 62, 74-78. DHH has now removed the 90-day stay requirement for the third group. On June 20, 2011, the rules were modified to allow any individual "approved for a stay of more than 90 days" to receive a high-priority CC waiver offer. Third Eley Decl. Att. B. As a result, DHH can now extend a waiver offer to an individual promptly upon his or her admission to a nursing home, without the person staying there for 90 days. *Id.* ¶ 44-48. DHH determined that individuals who are not "approved for a stay of more than 90 days" are typically admitted to address short-term needs such as rehabilitation after a hospital stay and do not require CC waiver services to leave the nursing facility. *Id.* ¶ 45.

**D. Over 1,500 LT-PCS Recipients Offered Slots In The EDA/CC Waiver**

As Defendants have previously informed the Court, as part of the changes to the LT-PCS program, DHH eliminated the rule that put LT-PCS recipients at the bottom of the waiting list for waiver services. SUF ¶¶ 68-71. Prior to implementation of the 32-hour cap, DHH placed a lower priority on providing waiver services to individuals who were already receiving some personal care services than those who were receiving none. With the implementation of the cap, DHH recognized that LT-PCS recipients could benefit from the additional services available through the waiver, and it therefore moved them out of the "lowest priority" category. As a result of the new policy, about 1,500 LT-PCS recipients have been offered slots in the waiver, including over 600 who previously received more than 32 hours per week. Third Eley Decl. ¶¶ 27, 74. Of those, two of the four original named plaintiffs—Helen Pitts and Denise Hodges—and over 300 other people who had been receiving over 32 hours of LT-PCS now receive CC waiver services instead. *Id.* ¶¶ 73-74.

### E. A Decrease In Nursing Facility Admissions

On September 5, 2010, DHH began applying the 32-hour cap to current LT-PCS recipients on a rolling basis after their next annual reassessment and to new recipients when they enrolled in the program. At the time, about 3,900 individuals were approved to receive more than 32 hours of LT-PCS per week. *Id.* ¶ 5. As of October 1, 2011, about 2,500 of those individuals had been reassessed for 32 hours or less; about 375 have not yet been reassessed; and about 1,000 no longer receive LT-PCS. *Id.* ¶¶ 6-8.

The number of LT-PCS recipients transitioning into nursing homes has not increased since DHH began applying the 32-hour cap. *Id.* ¶¶ 4-12. In fact, data for the first three quarters since the 32-hour cap took effect show that transitions to nursing homes are lower than they were in the quarter before the cap took effect:

| Quarter | LT-PCS Population at Start of Quarter | Number Transitioning to NFs | Percent Transitioning to NFs | Number Reduced from Above 32 by Start of Quarter |
|---|---|---|---|---|
| **July-Sept. 2010** | 12,124 | 347 | 2.86% | 0 |
| **Oct.-Dec. 2010** | 12,227 | 270 | 2.21% | 19 |
| **Jan.-Mar. 2011** | 12,668 | 280 | 2.21% | 250 (approx.) |
| **Apr.-June 2011** | 12,923 | 292 | 2.23% | 785 (approx.) |
| **July-Sept. 2011** | 13,325 | n/a | n/a | 1,530 (approx.) |

Third Eley Decl. ¶¶ 9-11 & Att. A. Thus, while the size of the LT-PCS population has increased substantially since September 2010, *id.* ¶¶ 14-15, both the percentage and the absolute number of transitions into nursing homes dropped. The State's preliminary data for the third quarter of 2011 suggest the downward trend in nursing home transitions will continue to hold steady. *Id.* ¶ 12.

### F. Informal Accommodations

From the time the lawsuit was filed, class counsel have brought about 20 individuals to the attention of DHH who they allege need in excess of 32 hours of care. *Id.* ¶ 71. Defendants

have voluntarily agreed to keep in place existing plans of care for each of these individuals unless the commencement of waiver services made an extension unnecessary. *Id.* ¶ 70. Defendants have already agreed to extend or restore the previous level of LT-PCS for all of the individuals mentioned in the Plaintiffs' motion as well as for several individuals who are not, and Defendants are prepared within reasonable limits to make similar accommodations for other putative class members identified by the Plaintiffs. *Id.*

## III. ARGUMENT

The context surrounding the Plaintiffs' request for a preliminary injunction makes their motion highly unusual. The Plaintiffs did not see fit to move for preliminary relief until a year into the litigation, four months after the Court's summary judgment ruling, and after DHH had applied the challenged 32-hour cap to nearly everyone in the LT-PCS program. The Plaintiffs do not contend that any recent action by DHH warrants the extraordinary relief they seek. To the contrary, after oral argument in April, Defendants began taking significant steps to make additional HCBS available to LT-PCS recipients. DHH created a process for granting expedited access to CC waiver services for LT-PCS recipients who believe they need additional HCBS to avoid institutionalization. And DHH revised its rules to eliminate the wait for CC waiver slots for someone who does enter a nursing facility. The Plaintiffs concede that the amendment of the CC waiver rules "clearly represents a step in the right direction," Pls.' Mem. of Law in Support of Motion for a Prelim. Injunct. (Pls.' Mem.), Doc. 73-2, at 7, and they acknowledge that Defendants have also accommodated individuals brought to their attention by class counsel. Meanwhile, the passage of time has revealed no increase in the number of LT-PCS recipients transitioning to nursing facilities. The Plaintiffs' request for extraordinary relief directing DHH to make further changes to its HCBS programs thus comes despite the events of the last year—not because of them.

The Plaintiffs' motion asks the Court to find that they have a substantial likelihood of prevailing on the merits, even though last spring the Court ruled that there was a genuine dispute of material fact as to whether the ADA required the State to make any changes to the LT-PCS program, and the development of the facts to date does not support the allegations and predictions in the Complaint. The requested relief is based entirely on speculative harm to unnamed and unidentified class members. There is no basis or need for extraordinary judicial action at this stage of the litigation. The Court should deny the motion for a preliminary injunction and reserve judgment on the merits until the parties are able to fully develop the record and the Court can make a reasoned decision on all of the facts.

### A. The Plaintiffs Do Not Have Standing To Seek Relief For Speculative Harm To Unnamed Class Members.

The class cannot properly seek the proposed changes to how DHH awards expedited CC waiver slots because they have not shown that any of the named plaintiffs are harmed by the alleged deficiencies in DHH's policies. The plaintiffs identify four groups of "class members" who allegedly remain at risk of institutionalization:

(1) Individuals who request expedited waiver services after the 100 slots currently allocated to expedited waiver offerees are filled;

(2) Individuals who have been approved for fewer than 32 hours per week of LT-PCS;

(3) Individuals "who are not able to remain in the community without deterioration while their applications for emergency [CC] slots are pending"; and

(4) Individuals who will be denied an expedited CC waiver slot because their risk of eventual institutionalization is not sufficiently immediate.

*Id.* at 9. The named plaintiffs cannot show that they are personally harmed by the rules governing expedited CC waiver slots, nor have they attempted to. As a result, the Plaintiffs lack standing to seek relief on behalf of these four groups, and the Court may not properly grant the relief they request.

Named plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (quoting *id.*). And they "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 ( 2000); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quoting *id.*); *see also Hodgers-Durgin v. De la Vin*, 199 F.3d 1037, 1044-45 (9th Cir. 1999) (en banc) ("Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief."); *Johnson v. Rodriguez*, 110 F.3d 299, 304 n.8 (5th Cir. 1997) ("[A]s a general rule class injuries attributable to members of a class but not sustained by a named class representative cannot be remedied in the class action lawsuit.").

In *Lewis v. Casey*, 518 U.S. 343 (1996), the Supreme Court applied this principle to hold that injunctive relief must be tailored to redress the injuries of the named plaintiffs rather than the injuries of unnamed class members. In that case, a certified class of all adult prisoners incarcerated by the Arizona Department of Corrections claimed that they had been denied their constitutional right to access the courts. *See id.* at 346. The district court issued an injunction requiring prison officials to make various changes to their policies regarding access to their law libraries, including changes to ensure that lockdown prisoners had regular access to the libraries and that illiterate and non-English-speaking inmates had sufficient direct assistance to make their time in the library effective. *See id.* at 347-48. The Supreme Court held that this injunction was overbroad because the only injury demonstrated by a named plaintiff resulted from the prison's failure to provide special services to inmates who were illiterate. *See id.* at 357. Insofar as there were inadequacies in the prison's policies regarding services "required by non-English speakers,

by prisoners in lockdown, and by the inmate population at large," "they have not been found to have harmed any plaintiff in this lawsuit, and hence were not the proper object of this District Court's remediation." *Id.* at 358. The illiterate named plaintiff, the Court explained, "lacked standing to complain of injuries to non-English speakers and lockdown prisoners." *Id.* at 358 n.6.

The named plaintiffs in this case face the same difficulty as the named plaintiff in *Lewis v. Casey*. None of them purports to belong to any of the four groups they believe remain at risk of institutionalization, and none of them has shown that they have been personally harmed by the alleged defects in how the State allocates expedited CC waiver offers. Their memorandum in support of their motion barely mentions two of the three named plaintiffs—Kenneth Roman and Rickii Ainey—and they have not shown that the third—Elizabeth Foster—falls within any of the groups the Plaintiffs claim remain at risk of institutionalization.

Even if the named plaintiffs have standing to challenge the 32-hour cap on LT-PCS, that does not mean that they have standing to seek broad changes to the rules governing expedited slots in the CC waiver. Again, *Lewis v. Casey* is instructive: "The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." 518 U.S. at 357. "The actual-injury requirement would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches . . . if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." *Id.*

Because the Plaintiffs have not shown that any of the named plaintiffs has been or will imminently be harmed by the rules governing the allocation of CC waiver slots, the class lacks standing to seek changes to the waiver process.

**B. The Plaintiffs Have Not Satisfied The Preliminary Injunction Requirements.**

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. NRDC,* 555 U.S. 7, 20 (2008). The Fifth Circuit "ha[s] cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 196 (5th Cir. 2003) (emphasis added; internal quotation marks omitted).

Preliminary relief of the kind sought by the Plaintiffs here—a mandatory preliminary injunction that goes beyond maintaining the status quo—is "particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Martinez v. Mathews*, 544 F.2d 1233, 1243 ( 5th Cir. 1976); *accord O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc) (motions for a mandatory preliminary injunction or a preliminary injunction that alters the status quo "must be more closely scrutinized to assure that the exigencies of the case support the granting of [such] a remedy . . . ."); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 ( 9th Cir. 1994). Furthermore, when plaintiffs seek injunctive relief against state agencies, federal courts must give "appropriate consideration . . . to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976); *cf. Olmstead v. L.C.*, 527 U.S. 581, 610 (1999) (Kennedy, J., concurring, joined by Breyer, J.) (noting 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").

### 1. The Plaintiffs Have Not Met Their Burden Of Showing That They Are Likely To Succeed On The Merits.

"The *sine qua non* of [the preliminary-injunction analysis] is whether the plaintiffs are likely to succeed on the merits." *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993). If the Plaintiffs cannot show a "substantial likelihood of success on the merits, [the Court] need not address" the remaining factors in order to deny them preliminary relief. *La Union del Pueblo Entero v. FEMA*, 608 F.3d 217, 225 (5th Cir. 2010). The Plaintiffs cannot make the required showing here because (a) Louisiana has already taken steps to reasonably accommodate individuals who require more than 32 hours per week of personal care services and (b) the Plaintiffs' request for additional accommodations would fundamentally alter the State's programs.

#### a) Louisiana Has Already Taken Steps To Modify Its Programs To Accommodate The Needs Of Those Who Need More Than 32 Hours Of Paid LT-PCS Services.

Louisiana is committed to dedicating available resources to provide individuals with disabilities a full array of quality, long-term care services that will enable them to live in the settings of their choice, and it has a comprehensive, effectively working plan to provide those services in the community when appropriate. The State has demonstrated that commitment not only through the dramatic expansion of its HCBS programs over the last several years, [5] but also through the steps it has taken since the Plaintiffs filed this lawsuit to accommodate LT-PCS recipients who require assistance for more than 32 hours per week in order to avoid unnecessary institutionalization. *Cf. Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 620 (9th Cir. 2005)

[5] The Advocacy Center has recognized DHH's efforts to expand HCBS services in the state. *See* Seniors and People with Disabilities Avoid Institutionalization, Louisiana is First State in the Country to Expand Eligibility for Home and Community Based Services, http://www.advocacyla.org/index.php/news-reader/items/seniors-and-people-with-disabilities-avoid-institutionalization.html (dated Aug. 10, 2011) (last visited Oct. 27, 2011).

("So long as states are genuinely and effectively in the process of deinstitutionalizing disabled persons 'with an even hand,' [the courts] will not interfere." (quoting *Olmstead*, 527 U.S. at 605 (plurality opinion))).

The modifications already made by the State are in fact more generous than those originally proposed by the Plaintiffs. The Plaintiffs initially asked the State to restore the previous level of personal assistance they received through the LT-PCS program. Instead, the State has decided to allow LT-PCS recipients who would otherwise require institutionalization to move to the front of the waiting list for CC waiver services. The CC waiver allows recipients to receive more hours of personal assistance than the Plaintiffs sought in their Complaint plus additional services that are not available in the LT-PCS program. Third Eley Decl. ¶ 18. DHH expects that this broader array of services will generally be more effective in keeping individuals out of nursing homes than adding a few more hours of LT-PCS would be. *Id.*

Additionally, the absence of any waiting list for individuals in nursing homes to enroll in the CC waiver demonstrates the effectiveness of Louisiana's HCBS programs. The *Olmstead* Court recognized that a State could be fully compliant with the ADA even if there was a waiting list for people in nursing homes to obtain HCBS waiver services. 527 U.S. at 605-06. In Louisiana, nursing home residents do not need to wait for a waiver offer. The Plaintiffs recognize that allowing LT-PCS recipients to access expedited waiver slots "clearly represents a step in the right direction," Pls.' Mem. at 7, but they maintain that the State's HCBS programs still are not quite good enough. But the ADA does not require the State's modifications to be perfect.[6] Nor does it require the State to provide precisely the modifications the Plaintiffs

[6] *See Fink v. N.Y.C. Dep't of Personnel*, 53 F.3d 565, 567 (2d Cir. 1995) ("[The RA] does not require the perfect elimination of all disadvantage that may flow from the disability . . . ."); *see also Stewart v. County of Brown*, 86 F.3d 107, 112 (7th Cir. 1996); *Fink v. Richmond*, 405 Fed. App'x 719, 723 (4th Cir. Dec. 16, 2010) (unpublished).

request.[7] Rather, the State must be given some "leeway" in how it administers its HCBS programs. *Olmstead*, 527 U.S. at 605; *see also Pa. Protection & Advocacy, Inc. v. Pa. Dep't of Public Welfare*, 402 F.3d 374, 381-82 (3d Cir. 2005) ("When an agency has implemented a sufficient compliance plan (*i.e.*, when it has demonstrated a commitment to comply with the ADA and RA), [a federal court] must be wary of judicial mandates that could thwart or undermine the agency's authority to carry out that plan as it sees fit.").

**b) The Plaintiffs' Request For Further Changes To The CC Waiver Offer Would Fundamentally Alter That Program.**

The Plaintiffs propose a list of changes to how DHH operates the new emergency slots in the CC waiver program. Pls.' Mem. at 28-29. Their proposed changes include:

(1) Offering expedited CC waiver slots to any "individuals who need more than 32 hours per week of LT-PCS to avoid a decline in health, safety, or welfare that will lead to the individual's eventual, though perhaps not immediate, placement in an institution";

(2) Allowing individuals whom DHH has approved for fewer than 32 hours per week to request expedited CC waiver slots without first asking for more LT-PCS;

(3) For anyone who was receiving more than 32 hours of LT-PCS on September 5, 2010, and who requests an expedited CC waiver slot, restoring or maintaining their previous level of LT-PCS between the time of their request and DHH's decision, and between the offer and the commencement of services.[8]

As set forth below, the Plaintiffs' requests would fundamentally re-align DHH's policy determinations of how best to best use a limited resource (EDA/CC waiver slots) to serve

[7] *See Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 484 (8th Cir. 2007) (Title I of the ADA does not require the plaintiff's "most preferred alternative" or "an accommodation that is ideal from the [plaintiff's] perspective, only an accommodation that is reasonable"); *see also Fink v. N.Y.C.*, 53 F.3d at 567; *Trepka v. Bd. of Educ. of the Cleveland City Sch. Dist.*, 28 Fed. App'x 455, 460 (6th Cir. Jan. 24, 2002) (unpublished); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996).

[8] Although the Plaintiffs suggest that 100 CC waiver slots may be insufficient to accommodate the entire class, Pls.' Mem. at 9, they have not asked the Court to void the current 100-slot cap. Pls.' Mem. at 28-29 & Proposed Order. In any event, that relief would be premature. Most of the slots remain unfilled, and DHH will consider whether to add more if and when the time comes. *See* Third Eley Decl. ¶ 41.

individuals at risk of institutionalization, and would pose logistical and practical difficulties that take the Plaintiffs' demands well beyond requests for "reasonable accommodation."

**(1)** DHH cannot, without fundamentally altering the CC waiver, offer expedited slots to "individuals who need more than 32 hours per week of LT-PCS to avoid a decline in health, safety, or welfare that will lead to the individual's eventual . . . placement in an institution."

First, a standard that requires the State to provide each LT-PCS recipient a level of benefits sufficient "to avoid a decline in health, safety, or welfare" would be impossible to administer in a program that serves primarily the elderly and individuals with degenerative disabilities and diseases. *See, e.g.*, Decl. of Lisa Richards, Doc. 73-3, at 113 (explaining that Elizabeth Foster's "dementia is gradually progressing, which will lead to a greater and greater need for assistance"). Nor are Defendants aware of any sound diagnostic tool that could be used to assess whether someone requires a specified number of hours of paid assistance in order "to avoid a decline in health, safety or welfare" that would result in "eventual" admission to a nursing facility. As a result, the availability of the EDA/CC waiver would be entirely subjective.

Second, because the Plaintiffs' "eventuality" standard sets such a low bar, its practical effect would be to eliminate DHH's ability to give expedited offers to those LT-PCS recipients who require them most immediately while displacing other groups on the waiting list, including those in the high priority groups.

Even though the number of waiver slots is fixed, the turnover in the waiver population currently allows DHH to offer slots to individuals in the high priority groups (those subject to abuse and neglect, those with ALS, and those already in nursing homes) with virtually no wait. There is a significant waiting list for LT-PCS recipients and individuals without any access to HCBS, but the list does move and DHH is able to make hundreds of new offers every quarter. In

the last year, over 1,500 LT-PCS recipients have been offered EDA/CC waiver slots. Because individuals who receive expedited waiver slots skip ahead of all of the people just mentioned, expanding the category of individuals eligible for expedited slots would very likely prevent DHH from promptly offering waiver services to everyone in the high-priority groups and would prolong the already-lengthy waits faced by others on the waiting list.

*Olmstead* prohibits these unfair results. Under *Olmstead*, the ADA does not require States to modify their programs to accommodate individuals—even those who are currently institutionalized—when, "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 . . . disabilities." 527 U.S. at 604. If the ADA does not allow a court to order a State to move an institutionalized plaintiff ahead of others on the waiting list, it certainly does not allow a court to order the State to move community-based plaintiffs ahead of others on the waiting list. The Plaintiffs' requested modification is therefore exactly the kind that *Olmstead* says would be a fundamental alteration.[9]

**(2)** The Plaintiffs also seek an order directing DHH to allow individuals who have been approved for fewer than 32 hours of LT-PCS per week to obtain expedited CC waiver slots. These individuals are not class members[10] and the named plaintiffs lack standing to seek this

[9] The Plaintiffs' challenge to the use of the word "immediate" in the protocol for processing expedited waiver requests rests on an over-reading of that document. The word "immediate" does not appear in the rule or the guidance that is actually applied by the Service Review Panel. The word was used to describe the kind of information a Medical Certification Specialist should look for during a home visit. DHH is reissuing the protocol to clarify that the Medical Certification Specialist need not limit the information collected to evidence demonstrating a need for "immediate" institutional placement. *See* Third Eley Decl. Att. C.

[10] Individuals who are approved for fewer than 32 hours receive that amount of LT-PCS not because of the 32-hour cap but because of DHH's methodology for allocating services within the permissible range—a methodology the Plaintiffs are "not challenging" in this case. Pls. Opp'n to the Mot. for S.J., Doc. 38, at 19 n.105

relief. In any event, granting the Plaintiffs' request would fundamentally alter both the LT-PCS program and the CC waiver program.

First, allowing individuals who are allocated fewer than 32 hours of LT-PCS to request an expedited CC waiver slot would fundamentally alter the LT-PCS program by allowing individuals to circumvent the existing appeals process—a process required by both state statute and federal Medicaid regulations. *See* 42 C.F.R. § 431.200 *et seq.*; La. Rev. Stat. § 46:107. That process gives individuals approved for less than the program maximum the option of appealing DHH's decision and receiving up to 32 hours of LT-PCS. Third Eley Decl. ¶ 57-58. If they remain approved for fewer than 32 hours it is because they have decided not to appeal or because they were unable to demonstrate an error in DHH's determination of their acuity level. *Id.* ¶ 58.[11]

The Plaintiffs effectively ask the Court to wipe out the LT-PCS appeals process and allow anyone who thinks they need more help to request an expedited CC waiver offer instead of more LT-PCS. The Plaintiffs cite no legal authority to support their argument that individuals should be allowed to circumvent the agency's established and well-functioning procedures.

Second, well over 12,000 LT-PCS recipients are currently approved for less than 32 hours of LT-PCS. Allowing them to apply for expedited waiver slots would likely increase the number of requests to a level where DHH could not process them in a timely fashion. *Id.* ¶¶ 59-61.

With the number of requests it receives now, DHH can process and grant a request within two weeks. *Id.* ¶ 30. This quick turnaround would be impossible if the agency were inundated with requests from people receiving less than 32 hours. As a result, those who are eligible under the current rules would face new delays in the processing of their requests. *Id.* ¶ 59.

[11] If the Plaintiffs are correct that some individuals choose not to file an appeal because they view the process as too inconvenient or not worth their time, this suggests that their needs are not as great as the Plaintiffs paint them.

Granting the Plaintiffs' request would also divert agency resources away from other important matters. *Id.* ¶ 60. Each home visit with an applicant for an expedited slot requires approximately three hours of the Medical Certification Specialist's time. *Id.* That is time not spent on his or her other responsibilities: implementing the new CC waiver, reviewing critical incidents among the waiver population, assisting waiver recipients and applicants, and providing extra assistance to those transitioning out of nursing facilities. *Id.* The current demands of the process for granting expedited waiver slots are burdensome but manageable. *Id.* ¶ 59. The additional burden of processing requests from people who have been approved for less than 32 hours per week would make it impossible for DHH staff to carry out their other duties. *Id.* ¶¶ 59-61. Because DHH has determined that the people approved for fewer than 32 hours are more independent than those approved for 32 hours, the percentage of their requests that are actually be granted would likely be relatively small, and the costs associated with processing their requests would well outweigh the benefits. *See id.* ¶ 58.

Third, for the reasons discussed above in connection with the Plaintiffs' "eventual" institutionalization standard, offering an expedited CC waiver slot to individuals who have not yet been approved for 32 hours of LT-PCS would cause additional delays for other people on the waiting list, including people who currently receive no state-funded HCBS at all. *Id.* ¶ 54.

**(3)** Finally, the Plaintiffs ask that, for anyone who was receiving more than 32 hours of LT-PCS on September 5, 2010, DHH be required to restore their previous level of services during the periods (1) between their request for an expedited waiver offer and the Service Review Panel's determination about whether to grant the request and (2) when the request is granted, between the panel's decision and the commencement of waiver services. Again, the ADA does not require DHH to alter its program as the Plaintiffs propose.

The time between a request for expedited CC waiver services and the commencement of those services is already short: about six weeks. *See id.* ¶¶ 30, 36, 59, 63. Moreover, because of the administrative realities of operating a program with over 13,000 beneficiaries, processing a DHH directive to override the 32-hour cap for an individual takes around a week, and sometimes more. *Id.* ¶ 64. Consequently, the restored LT-PCS level would still be unavailable for the individual for a good portion of the period that he or she is waiting for CC services to begin. In the event that DHH becomes aware of a situation where an increase in hours is necessary to avoid institutionalization during that brief period, it retains the discretion to make accommodations as appropriate. There is no need for an administratively burdensome, blanket rule of the type the Plaintiffs' propose.

**c) The Plaintiffs' Alternative Request For Changes To LT-PCS Would Fundamentally Alter That Program.**

In the alternative to their request for changes to the CC waiver, the Plaintiffs ask for a preliminary injunction requiring the State to "continue the [LT-PCS] services of class members whose services have not yet been reduced to the 32-hour maximum at the current level, and to provide a mechanism for class members whose services have already been reduced to obtain [LT-PCS] services in excess of the 32-hour cap." Pls.' Mot. at 28. Because DHH has already reassessed almost everyone in the LT-PCS program using the new rule, Third Eley Decl. ¶¶ 6-7, maintaining services at their current level is an option only for a negligible portion of the class.

The alternative relief requested is completely unjustified and unnecessary in light of Defendants' decision to offer expedited access to the CC waiver for individuals who believe they need more than the 32 hours of paid assistance available through the LT-PCS program in order to avoid institutionalization. The Plaintiffs are not specific about what kind of "mechanism" the State must create, and Defendants cannot conceive of any "mechanism" for identifying class

members and determining how many hours to provide each that would not fundamentally alter the LT-PCS program or impose an undue burden on DHH. But because the Plaintiffs' proposal is so lacking in detail, neither Defendants nor the Court can properly assess the financial and administrative burdens associated with creating and implementing it. In any event, the Plaintiffs are not substantially likely to obtain a judgment ordering DHH to create a "mechanism" for LT-PCS recipients to exceed the program's 32-hour cap.

**(1) Providing Additional LT-PCS Beyond The 32-Hour Cap Would Fundamentally Alter The Nature Of The Service.**

First, allowing class members to receive services above the 32-hour cap would fundamentally alter the LT-PCS program because it would violate Louisiana's state Medicaid plan. The state plan provides that the State will furnish up to 32 hours of paid personal care services to individuals who meet the State's criteria. *See id.* ¶ 67 & Att. E. It is a fundamental tenet of Medicaid law that the federal government will only provide federal financial participation for services covered by the state plan. Therefore, if the State were to provide additional hours beyond those set forth in its state plan, the State would have to pay for those additional services with 100% state dollars. (Currently, the federal government reimburses the State in excess of 70% for its Medicaid expenditures.) By contrast, if the State provides additional services through the CC waiver (as it is doing), its expenditures are federally reimbursed. The Plaintiffs' proposal to provide LT-PCS beyond what is approved in the state plan would be fiscally disastrous for the State. *See id.*[12]

[12] It is also important to note that the very fact that the Centers for Medicare & Medicaid Services ("CMS") approved this state plan amendment implicitly reflects a judgment that the service, with the 32-hour cap, is "sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b).

Second, the Plaintiffs' proposed relief would fundamentally alter the nature of the benefit provided in the LT-PCS program. Louisiana does not allocate services in the LT-PCS program based on how many hours of assistance an individual requires to avoid entering a nursing home, to avoid "risk of institutionalization," or even more vaguely, "to avoid a decline in health, safety, or welfare that will lead to the individual's eventual . . . placement in an institution." Pls.' Mem. at 29. The State provides a limited benefit of 18 to 32 hours of personal care services. Third Eley Decl. ¶¶ 57, 69. The agency relies on an evidence-based uniform assessment tool not to determine how many hours of assistance each recipient "needs" but the recipient's demonstrated independence in performing ADLs as compared with others in the LT-PCS program. *Id.* ¶¶ 66, 69. The agency then allocates service hours based on the recipient's relative acuity and the funding available. *Id.* This means that providing more services to individuals at one part of the acuity spectrum leaves others with less. *Id.* ¶ 69.

DHH adopted this resource-allocation methodology in 2009 after evaluating and experimenting with a number of different alternatives and consulting with experts in the field. *Id.* Based on the State's experience with this methodology so far, DHH believes it produces an allocation of LT-PCS hours that is more fair and efficient than the agency's previous approach and gives individual beneficiaries more flexibility in how they utilize the services available. *Id.* The Plaintiffs' preferred methodology for allocating service hours would be not only different but unworkable. Defendants are unaware of any established diagnostic tool for determining how many hours of state-funded assistance any particular individual "needs" to avoid a risk of institutionalization. *Id.* ¶ 47. This kind of prediction is difficult, if not impossible, because placement in an institution is often the result of the entirely unpredictable: a slip-and-fall or a difficult family decision about what is best for all involved. *Id.* No less significantly, providing

individuals with higher levels of acuity with whatever services they need to remain in their homes would reduce the amount of funding DHH can devote to LT-PCS recipients with lower levels of acuity or to filling new waiver slots. *See id.* ¶¶ 68-69.

The Plaintiffs' proposed redefinition of the benefit available through the LT-PCS program is thus exactly the kind of redefinition that the Supreme Court has held States are not required to undertake. In *Alexander v. Choate*, individuals with disabilities challenged a State's "reduction from 20 to 14 in the number of inpatient hospital days per fiscal year that Tennessee Medicaid would pay hospitals on behalf of a Medicaid recipient." 369 U.S. 287, 289 (1985). The Court held that the State was not required to change its rules to provide more than 14 days of coverage for individuals with disabilities even if they had a greater need. *See id.* at 302-03. As the Court explained, "Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage." *Id.* at 303. Nothing in federal disability discrimination law, the Court held, "require[d] the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs." *Id.* For exactly the same reason, federal law does not require Louisiana to redefine the "particular package of health care services" available through the LT-PCS program to satisfy the amorphous objective of eliminating risk of institutionalization.

**(2) Requiring An "Exceptions Mechanism" Would Significantly Increase The Costs Of The Program, Jeopardizing The Financial Stability Of The HCBS Program As A Whole.**

Enrollment in the LT-PCS program grew by over 10% in the last year alone, thereby presenting significant fiscal challenges for the State. Without the cap, LT-PCS expenditures

would be significantly greater, and the State would have been unable to accommodate the program's dramatic enrollment growth. But the creation of an "exceptions mechanism" could erase all of those savings and more, especially as the Plaintiffs do not propose any limitation on the upper limit of hours that they are seeking (not even the 42 hour limit to which Plaintiffs' counsel previously agreed as part of the *Barthelemy* settlement). *See* Third Eley Decl. ¶¶ 68-69.

While the State's HCBS programs have continued to grow, there is no evidence that capping LT-PCS at 32 hours has led to an increase in nursing home utilization that might, as the Plaintiffs expected, increase total long-term care costs. *See id.* ¶¶ 4-16. Under *Olmstead*, the millions of dollars in new spending that would accompany the Plaintiffs' proposed modification is sufficient to reject their claim, *cf.* 527 U.S. at 603-05, and the Court must give "appropriate deference to the program funding decisions of state policy makers." *Id.* at 610 (Kennedy, J., concurring, joined by Breyer, J.). "No State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities." *Id.* at 612 (Kennedy, J., concurring). The State's decisions about how to allocate its limited resources may be "unfortunate" or even tragic. *Id.* "The judgment, however, is a political one and not within the reach of the [ADA]." *Id.* at 612.

The Plaintiffs do not squarely answer the State's evidence, because their analysis of the costs and benefits of the 32-hour cap applies the wrong legal standard. They have focused solely on whether the average cost of treating a class member in the community is less than the average cost of treating her in a nursing home. *Olmstead* held that that analysis was incorrect. Like the Plaintiffs here, the district court in *Olmstead* had "compared the cost of caring for the plaintiffs in a community-based setting with the cost of caring for them in an institution. That simple comparison showed that community placements cost less than institutional confinements." 527

U.S. at 604; *see also id.* at 594-95. The district court held that this was enough for the plaintiffs to prevail, but the Supreme Court disagreed because "a comparison so simple overlooks costs the State cannot avoid." *See id.* at 604-06 (plurality opinion); *see also id.* at 604 & n.15 (observing, for example, that a State may not be able to offset increased overall HCBS expenditures with the immediate closure of institutions); *cf. id.* at 607 (Stevens, J., concurring) (courts must consider "costs unrelated to the treatment of [the individual plaintiffs]"). Plaintiffs thus ask the Court to rest its decision on exactly the same calculus that the Supreme Court rejected in *Olmstead*. Courts must consider system-wide, not individual-specific, costs.

Even if the individual-specific analysis were appropriate, the Plaintiffs' simplistic analysis is incomplete. The Plaintiffs argue that raising the cap on LT-PCS to 42 hours is reasonable because the cost of providing the average beneficiary a full year of nursing facility services is less than the cost of providing the average beneficiary a full year of LT-PCS at 42 hours per week. That analysis is inadequate for at least two reasons. First, it overlooks that many LT-PCS recipients who are actually admitted to a nursing facility for a long-term stay will not remain institutionalized because they will receive a CC waiver slot. Second, the Plaintiffs' comparison also fails to recognize that some people who are "at risk of institutionalization" with 32 hours of LT-PCS will never transition to a nursing facility, that some people who receive 42 hours of LT-PCS will still transition to a nursing facility, and that the State will need to pay for some amount of LT-PCS during the period(s) when the individual is not in a nursing facility. A more complete analysis would compare whether the total cost of the mix of LT-PCS and nursing facility services that an individual will receive over the course of her lifetime will be more or less if the cap on LT-PCS is 32 hours or 42 hours. *See generally* Vernon L. Greene, *Nursing Home Admission Risk and the Cost-Effectiveness of Community-Based Long-Term Care: A Framework*

*Analysis*, 22 Health Services Research 655 (Dec. 1987). In any event, given that capping the LT-PCS program at 32 hours has allowed the State to continue serving an increasing HCBS population, the ADA provides no basis for reversing the State's decision.

For these reasons and more, the Plaintiffs are unlikely to succeed on the merits. [13]

**2. The Plaintiffs Have Not Established That They Would Suffer Irreparable Harm In The Absence Of A Preliminary Injunction.**

The Plaintiffs must also "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). Further, this likely injury must be imminent. *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1984).

As discussed below, the Plaintiffs' evidence does not demonstrate a likelihood of irreparable harm in the absence of preliminary relief. And the year they waited before moving for preliminary relief weighs against a finding in their favor. *See, e.g.*, *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004); *Kan. Health Care Ass'n, Inc. v. Kan. Dept. of Soc. and Rehab. Servs.*, 31 F.3d 1536, 1543-44 (10th Cir. 1994).

**a) Defendants Have Voluntarily Removed Any Threat Of Irreparable Harm To Every Individual Brought To Their Attention By Class Counsel.**

DHH has already extended or restored the level of service that each of the named plaintiffs was receiving before the 32-hour cap took effect. DHH has done the same for each of the seven unnamed plaintiffs identified in the Plaintiffs' motion and several other individuals the Plaintiffs do not mention in their motion. Third Eley Decl. ¶ 70. These extensions will remain in effect through at least February 29, at which time DHH will assess whether further extensions

[13] In addition to the arguments set forth above, Defendants maintain that capping the LT-PCS program at 32 hours per week is not "discrimination" within the meaning of the ADA, even if some LT-PCS recipients are at risk of, or in fact require, institutionalization. *See* Defs.' Mot. to Dismiss, Doc. 11; Defs.' Reply to Pls.' Opp'n to the Mot. for S.J., Doc. 39; Defs.' Response to the Statement of Interest of the U.S., Doc. 48. Defendants have not repeated those arguments here in light of the Court's denial of summary judgment in May. However, Defendants respectfully request that the Court reconsider that aspect of its decision.

are appropriate for all or some of the individuals. *Id.* As a result, none of them currently face any threatened harm as a result of the 32-hour cap. DHH is inclined to offer similar extensions to other individuals whom class counsel bring to Defendants' attention, provided that the number of requests remains reasonably small. *Id.*

Moreover, four of the unnamed individuals cited by the Plaintiffs as facing irreparable harm—I.M.L., V.U.S., S.M., and E.B.—have already received offers to enroll in the CC waiver. *Id.* ¶¶ 72, 75. Two received expedited offers under the June 2011 Rule; two received ordinary offers from the waiting list. *Id.* One of the named plaintiffs, Rickii Ainey, has likewise been offered an expedited slot. *Id.* ¶ 76.

**b) The Plaintiffs Have Not Demonstrated A Likelihood Of Irreparable Harm To The Broader LT-PCS Population.**

While the Plaintiffs cannot show a likelihood of irreparable harm to any of the individuals identified in their motion because of the extensions granted by Defendants, they suggest that "there is no reason to assume that all class members who need such extensions have contacted Plaintiffs' counsel." Pls. Mem. at 9-10. But the Plaintiffs' speculation that a large group of unidentified beneficiaries will be irreparably harmed by the denial of their motion is belied by the absence of any noticeable increase in transitions from LT-PCS to nursing facilities during the year that DHH has been implementing the 32-hour cap. Third Eley Decl. ¶¶ 4-12.

The Plaintiffs' inability, after a year of litigation, to identify more than a handful of individuals who they believe are at risk of institutionalization reinforces the statistical evidence. The Advocacy Center, whose lawyers serve as lead class counsel, has deep connections to the community of individuals with disabilities and is well known to individuals receiving LT-PCS. Many if not most recipients will contact the Advocacy Center if they are having issues with their

Medicaid services. *Id.* ¶ 71. Moreover, the Advocacy Center has been soliciting class members for a year. *Id.* ¶ 71 & Atts. F-H.[14]

The availability of expedited CC waiver slots mitigates the risk that the Advocacy Center has failed to identify some individuals who would be institutionalized without preliminary relief. While DHH's rules allow the agency to fill at most 100 waiver slots with expedited offers at any given time, all but a handful remain available now. *Id.* ¶ 41. The current allotment is unlikely to run out before the parties file dispositive motions this Spring, and DHH will consider revising its rules to allow more expedited waiver offers if need be.

**3. Balancing The Equities And Consideration Of The Public Interest Weigh Heavily Against Granting The Plaintiffs' Request For A Preliminary Injunction**

Even if the Plaintiffs could establish likelihood of success on the merits and irreparable harm, the Court should deny the motion because they have failed to establish that the balance of equities tips in their favor and the injunction is in the public interest. When the government is the party the plaintiffs seek to enjoin, these two factors merge. *See Nken v. Holder*, 556 U.S. 418 (2009); *see also Spiegel v. City of Houston*, 636 F.2d 997, 1002 (5th Cir. 1981).

As set forth above and in the declaration of Hugh R. Eley, the preliminary injunction requested by the Plaintiffs would have significant negative consequences for the State's HCBS program and its beneficiaries. *See generally* Third Eley Decl. ¶¶ 52-69. Assistant Secretary Eley's analysis of the programmatic impact of the Plaintiffs' proposed injunction merit careful

[14] *See, e.g.*, DHH Changes EDA Waiver Rules, http://advocacyla.org/index.php/news-reader/items/dhh-changes-eda-waiver-rules.html (dated July 5, 2011) (last visited Oct. 27, 2011) ("[If] you need more than 32 hours a week of LT-PCS to avoid having to go into a nursing facility, please contact [the Plaintiffs' counsel] . . . ."); Judge Rules: *Pitts v. DHH* Can Proceed, http://advocacyla.org/index.php/news-reader/items/judge-rules-pitts-v-dhh-can-proceed html (dated May 25, 2011) (last visited Oct. 27, 2011) ("If you are receiving or are about to receive LT-PCS services, and you need more than 32 hours of service to be able to avoid going into a nursing home, contact the Advocacy Center."); Class Action Filed To Stop Cuts In Home Care, http://advocacyla.org/index.php/news-reader/items/class-action-filed-to-stop-cuts-in-home-care.html (dated Sept. 22, 2010) (last visited Oct. 27, 2011).

attention and his conclusions warrant deference. *Cf. Winter*, 555 U.S. at 27 (reversing the entry of a preliminary injunction where the district court "failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises"); *Cellnet Commc'ns Inc. v. FCC*, 149 F.3d 429, 441 (6th Cir. 1998) ("[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review.").

First, the Plaintiffs proposed changes to the CC waiver would negatively affect countless others seeking access to the same service, and would introduce significant administrative difficulties. Third Eley Decl. ¶¶ 52-64. Making expedited CC waiver offers to LT-PCS recipients approved for less than 32 hours and LT-PCS recipients facing only "eventual" institutionalization would increase the time others wait for waiver offers and increase the time it takes DHH to process expedited waiver requests from those who are currently eligible. *Id.* ¶¶ 53-54, 59-61. Given the minimal showing applicants would need to make under the Plaintiffs' "eventuality" standard, the 100 expedited waiver slots currently available would quickly be filled, creating a backlog for others and/or reducing the number of regular spot available to people who do not receive LT-PCS. *Id.* ¶ 54. Maintaining all service levels over 32 hours, or restoring pre-cap service levels that were over 32 hours, for individuals waiting to receive CC services through an expedited slot would be unlikely to prevent a significant number of people from entering nursing homes, and it would be unfeasible to try to change service levels for such a short period of time. *Id.* ¶¶ 36, 62-64.

Further, the problems that the Plaintiffs' proposal would create for others on the CC waiting list would be irreversible. DHH will not be able to revoke waiver offers made pursuant

to the preliminary injunction in the event that Defendants ultimately prevail. The effects of the preliminary injunction would be felt long past the conclusion of the litigation.

Second, the equities and the public interest also counsel against granting the Plaintiffs' broader request for a preliminary injunction requiring DHH to create a "mechanism" for awarding more than 32 hours of LT-PCS to class members. *See id.* ¶¶ 65-69. DHH set the 32-hour cap in order to constrain the growing costs of LT-PCS in a way that would allow the State to continue providing assistance to a growing population. *See id.* The agency has determined that this cap strikes the right balance between the interests of different groups of elderly Medicaid beneficiaries and individuals with disabilities, *id.*, and that conclusion warrants respect. *Cf. Olmstead*, 527 U.S. at 612 (Kennedy, J., concurring) ("No State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities."). The funding required to comply with a preliminary injunction would need to be drawn from the other programs that provide medical assistance to other beneficiaries. Third Eley Decl. ¶¶ 68-69. And the harm to the State's pecuniary interests is exacerbated because the Plaintiffs request that the Rule 65(c) security requirement be waived. *See Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 379 (5th Cir. 2008) ("Since the [plaintiffs] appear unable to meet the bond requirement of Rule 65(c), we hold that the damage the preliminary injunction might cause [the defendant] greatly outweighs any threatened injury to the Retirees.").

The Plaintiffs' proposed injunction is all the more burdensome to the extent that it would require DHH to establish a "mechanism" for determining which recipients should receive more than 32 hours. As described above, the LT-PCS program is not designed to provide a small group of individual recipients with an unlimited amount of personal care assistance, up to the amount necessary to maintain their current level of health. Third Eley Decl. ¶¶ 68-69. DHH's

comprehensive plan for providing HCBS calls for an LT-PCS program that provides a limited benefit to a larger population and other programs, including the CC waiver, that are more appropriate for those who are more dependent on others. By converting the LT-PCS program into one that provides whatever amount of services someone "needs," the preliminary injunction would interfere substantially with how the State has decided to structure the package of services it provides.

The Court should therefore deny the Plaintiffs' request for relief for the same reasons the court in *M.R. v. Dreyfus*, 767 F. Supp. 2d 1149, 1175 (D. Wash. 2011), declined to preliminarily enjoin Washington State's reduction of its state plan personal care service:

> [E]ven if a few of the plaintiffs ultimately require institutionalization as a result of the State's reduction in services, the Court cannot conclude that the threat to these individuals outweighs the State's interest in preserving the carefully orchestrated personal care services program that currently serves more than 45,000 i ndividuals. For the same reasons, the Court cannot conclude that the possible threat of institutionalization for a few personal care service beneficiaries outweighs the State's interest in balancing the competing needs of a host of different state-sponsored social service programs that currently provide aid to a diverse group of medically and financially disadvantaged state residents.

*Id.* Neither the public interest nor equity warrants a different decision here.

## IV. CONCLUSION

For the foregoing reasons, the Court should deny the Plaintiffs' motion.

Dated: October 28, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify on this 28th day of October, 2011, that a true and correct copy of the foregoing **Defendants' Response in Opposition to the Motion for a Preliminary Injunction** was filed electronically using the CM/ECF system. Notice of this filing will be sent via operation of the Court's electronic filing system to the following:

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