UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

STEVEN HILTIBRAN, by and through his Mother and guardian, Debra Burkhart; NICHOLAS TATUM, by and through his Mother and next friend, Stacy Tatum; RONALD COONTZ, by and through his Mother and guardian, Patricia Coontz; and NENA HAMMOND, Plaintiffs,	)	Case No. 10-4185-CV-C-NKL
v.	)	
RONALD J. LEVY, in his official capacity As Director of the Missouri Department of Social Services; and IAN McCASLIN, M.D., in his official Capacity as Director of the MO HealthNet Division, Defendants.	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517, because this litigation implicates the proper interpretation and application of the integration mandate of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et. seq*. *See Olmstead v. L.C.*, 527 U.S. 581 (1999).[1] The Attorney General has authority to enforce Title II of the ADA, and pursuant to Congressional mandate, to issue regulations setting forth the forms of discrimination prohibited by Title II. 42 U.S.C § 12134. Accordingly, the United States has a strong interest in the resolution of this matter.

Plaintiffs are four individuals with disabilities who live in the community with their families but are at risk of unnecessary institutionalization because of defendants' discriminatory policies. Plaintiffs each have medical incontinence and require the use of incontinence supplies, particularly adult diapers. (Decl. of Debra Burkhart, attached to Pltfs.' Sugg. as Exh. 13, ¶¶1,4; Decl. of Patricia Coontz, attached to Pltfs.' Sugg. as Exh. 14, ¶1; Decl. of Stacy Tatum, attached to Pltfs.' Sugg. as Exh. 15, ¶¶1-2; Decl. of Nena Hammond, attached to Pltfs.' Sugg. as Exh. 16, ¶3.) Defendants have refused to provide plaintiffs with incontinence briefs so long as they reside in the community. Yet if plaintiffs were willing to leave their own homes and enter a nursing home – at a cost of nearly $40,000 per year (about 20 times the cost of providing incontinence briefs in the community) – defendants would provide them with these medically necessary services. (Burkhart Decl. ¶17; Coontz Decl. ¶6; Hammond Decl. ¶5; Tatum Decl. ¶3.) The

[1] 28 U.S.C. § 517 states that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

ADA does not, however, permit the State to require plaintiffs to be unnecessarily institutionalized merely to gain access to covered services. Missouri's policy is nearly identical to that at issue in *Fisher v. Oklahoma Health Care Auth.,* 335 F.3d 1175, 1185 (10th Cir. 2003), where the Court held that the State of Oklahoma violated the ADA by having a policy to limit the number of prescription drugs available to Medicaid recipients who resided in the community but not to those in nursing homes and other institutions, which placed plaintiffs at risk of entering a nursing home to obtain needed medications. *Id*. at 1185.

Plaintiffs have established a strong likelihood of success on the merits of their claim that Missouri's failure to provide community-based services to individuals at risk of institutionalization violates Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131-12134, Section 504 of the Rehabilitation Act, 29 U.S.C. §794, and their implementing regulations (as interpreted in *Olmstead,* 527 U.S. 581). Furthermore, absent an injunction, plaintiffs will face irreparable harm. The balance of equities weighs in plaintiffs' favor, and granting this injunction is in the public interest.

ARGUMENT

A. *Olmstead* and the Integration Mandate

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities. 42 U.S.C. § 12132.[2]

One form of discrimination prohibited by the ADA is a violation of the "integration mandate." The integration mandate arises out of Congress's explicit findings in the ADA, the regulations of the Attorney General implementing Title II,[3] and the Supreme Court's decision in *Olmstead,* 527 U.S. at 586. In *Olmstead*, the Supreme Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. *Id*. at 607.

The risk of institutionalization itself is sufficient to demonstrate a violation of Title II. *Fisher*, 335 F.3d at 1181. In *Fisher*, the Tenth Circuit rejected defendants' argument that plaintiffs could not make an integration mandate challenge until they were placed in the institutions. The court reasoned that the protections of the integration mandate "would be

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[2] The ADA requires that "[N]o 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." Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"). The rights, procedures, and enforcement remedies under Title II are the same as under section 504. *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994).

[3] The regulations provide that "a public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d); *see also* 28 C.F.R. § 41.51(d). The preamble discussion of the ADA "integration regulation" explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. § 35.130(d), App. A. at 571 (2009).

meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation." *Id*. *See also Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 637 (E.D.N.C. 2010) (granting preliminary injunction in case where plaintiffs were at risk of institutionalization).[4]

B. Plaintiffs Satisfy the Requirements for a Preliminary Injunction

A movant must establish four elements before a preliminary injunction may issue: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc,* __ U.S. __, 129 S.Ct. 365, 374 (2008); *Dataphase Sys., Inc., v. C L Sys., Inc*., 640 F.2d 109, 113 (8th Cir. 1981). While "[n]o single factor is dispositive," *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006), the "most significant" of the four factors is whether the plaintiff is likely to be successful on the merits. *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp*., 59 F.3d 80, 83 (8th Cir. 1995) (quoting *S & M Constrs., Inc. v. Foley Co*., 959 F.2d 97, 98 (8th Cir. 1992), *cert. denied*, 506 U.S. 863 (1992)). Courts should first determine whether the movant has made a "threshold showing that it

[4] *See also Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1164 (N.D. Cal. 2009); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 985 (N.D. Cal. 2010); and *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1109 (N.D. Cal. 2009) (all granting preliminary injunctions where plaintiffs were at risk of institutionalization due to cuts in community-based services); *Ball v. Rogers*, 2009 WL 13954235, at *5 (D. Ariz. April 24, 2009) (holding that defendants' failure to provide adequate services to avoid unnecessary institutionalization was discriminatory); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1309 (D. Utah 2003) (ADA's integration mandate applies equally to those individuals already institutionalized and to those at risk of institutionalization); *Crabtree v. Goetz*, 2008 WL 5330506, at *30 (M.D. Tenn. Dec. 19, 2008) (unpublished decision) ("Plaintiffs have demonstrated a strong likelihood of success on the merits of their [ADA] claims that the Defendants' drastic cuts of their home health care services will force their institutionalization in nursing homes.").

is likely to prevail on the merits" and then "proceed to weigh the other *Dataphase* factors." *Planned Parenthood Minn., N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008). Plaintiffs have met the standard for a preliminary injunction.

1. Plaintiffs Are Likely to Succeed on the Merits of Their ADA Claims

Plaintiffs satisfy the three fundamental requirements of a claim under *Olmstead*. *Olmstead*, 527 U.S. at 607. The first two elements—that plaintiffs are appropriate for and do not oppose community placement—are not in dispute. Finally, plaintiffs' request that the State provide medically necessary incontinence supplies to Medicaid recipients in order to avoid institutionalization is reasonable given the State's resources and its ability to serve others with disabilities.

Missouri, through its Medicaid program, covers medically-necessary incontinence briefs for individuals aged four through twenty years. *See* Allen Letter, February 23, 2010 (Attached as Exh. 1 to Pls.' Mem. In Supp. of Mot. for Prelim. Inj., ECF No. 5-2). [5] However, upon an individual's 21st birthday, the State automatically stops providing the incontinence supplies. *Id.* Inexplicably, according to the State, when a person with a disability who is a recipient of Early and Periodic Screening Diagnostic and Treatment ("EPSDT") services[6] turns twenty-one and becomes ineligible for EPSDT services, the incontinence briefs transform from a medical supply into a "personal hygiene item." *Id.* But the State covers incontinence briefs for individuals of all

[5] Specifically, "[i]ncontinence supplies for participants age 20 and under are covered through the HCY (Healthy Children And Youth) Program, under the Durable Medical Equipment (DME) program . . . Disposable underpads, diapers, pull-ons, and protective underwear/briefs are limited to age 4-20 and require precertification . . . The state regulation 13 CSR 70-60.010 for DME is available on the Secretary of State's website at www.sos.mo.gov."

[6] EPSDT benefits are mandatory services for all Medicaid eligible children that states who chose to accept Medicaid funds must provide. 42 U.S.C. § 1396d(r)(1)-(5).

ages who reside in *nursing homes or hospitals*. *Id*. Thus, in order for plaintiffs to obtain medically necessary incontinence briefs, they must submit to a nursing home or hospital; they cannot live in the community.

Plaintiffs, Steven Hiltibran, Nicholas Tatum, Ronald Coontz and Nena Hammond, currently reside in the community and receive Medicaid. They have severe disabilities including cerebral palsy, static encephalopathy and seizure disorders, mental retardation, and spinal cord injuries which render them incontinent. (Burkhart Decl. ¶¶1,4; Coontz Decl. ¶1; Decl. of Stacy Tatum, attached to Pltfs.' Sugg. as Exh. 15, ¶¶1-2; Hammond Decl. ¶ 3.) Plaintiffs range in age between 22 and 49. (Burkhart Decl. ¶1; Tatum Decl. ¶1; Coontz Decl. ¶1; Hammond Decl. ¶2.)

Plaintiffs' treating doctors have all certified that their medical conditions require incontinence briefs. (Decl. of Dr. Harper, attached to Pltfs.' Sugg. as Exh. 17 ¶ 7; Decl. of Dr. Belancourt, attached to Pltfs.' Sugg. as Exh. 19 ¶¶ 7-11; Decl. of Dr. Porter, attached to Pltfs.' Sugg. as Exh. 18. ¶¶ 6-9; Decl. of Dr. Anzalone, attached to Pltfs.' Sugg. as Exh. 20 ¶¶ 3-7.) Without the briefs, plaintiffs would suffer skin breakdowns, ulcers, sepsis (an overwhelming bacterial infection that can trigger an "uncontrollable immunological and hormonal cascade" potentially leading to septic shock and death), full-body fungal infections, urinary tract and kidney infections, staph and yeast infections, permanent changes to the groin, and increased susceptibility to cancer. (Dr. Harper Decl. ¶ 7; Dr. Belancourt Decl. ¶¶ 7-11; Dr. Porter Decl. ¶¶ 6-9; Dr. Anzalone Decl. ¶¶ 3-7; Decl. of Dr. Huskey, attached to Pltfs.' Sugg. as Exh. 21 ¶¶ 7-9; Decl. of M. Yadria Hurley, attached to Pltfs.' Sugg. as Exh. 22 ¶¶ 6-9.) Indeed, Ms. Tatum has already experienced skin breakdowns and infections because she re-uses incontinence briefs to

save money. (Hammond Decl. ¶¶ 6-8.) These medical complications necessitate hospitalizations and nursing home placements. (Decl. of David B. Gray, Ph.D, ECF No. 5-24 ¶10.) For example, Dr. Huskey states that "incontinence is one of the leading causes of institutionalization, and individuals suffering from incontinence are at serious risk of institutionalization." (Dr. Huskey Decl. ¶¶ 10-13, 24.) *See also* CMS State Operations Manual, CMS publication number 100-07, Appendix PP, § 483.25(d), available at www.cms.gov/Manuals/IOM/list.asp ("Urinary incontinence and related loss of independence are prominent reasons for a nursing home admission.")

Plaintiffs, who desperately want to avoid nursing home placement, have struggled to pay for the incontinence supplies in the face of overwhelming financial hardship and have barely managed to pay for them through a combination of donations from charities and family members. However, any minor change in the plaintiffs' support networks would leave the plaintiffs no choice but to enter a nursing home or risk severe medical complications. Plaintiffs' families know it is likely that they may have to place plaintiffs in nursing homes to ensure that they receive sufficient incontinence supplies. (Burkhart Decl. ¶¶17,21; Tatum Decl. ¶11; Coontz Decl. ¶12; Hammond ¶13.) Such a precarious situation renders the plaintiffs at risk of institutionalization.

Each of the plaintiffs receives Supplemental Security Income (SSI) of approximately $674 per month which is intended to provide a "standard of living at the established Federal minimum income level." 20 C.F.R. § 416.110. SSI covers only enough for the basic necessities of life, and forcing plaintiffs to pay for medical supplies requires them to dip below this established Federal minimum income level. *See Atkins v. Rivera,* 477 U.S. 154, 157 (1986)

("SSI assistance [is] intended to cover basic necessities, but not medical expenses. Thus, if a person in this category also incurs medical expenses during that month, payment of those expenses would consume funds required for basic necessities.") For instance, Mr. Hiltibran's mother already must forgo other necessities to provide for Steven's care. (Burkhart Decl. ¶18.)[7] Mr. Tatum's mother "has trouble meeting all of [her] expenses every month and sometimes ha[s] to do without eating in order to afford the diapers and all of the related costs of caring for Nicholas and [her] other two children." (Tatum Decl. ¶9.) Similarly, Mr. Coontz's mother is "struggling to pay for his diapers" and states that the additional expense has "taken a toll on [their] lives." (Coontz Decl. ¶¶8,10.) And Ms. Hammond often has "difficulty paying [her] rent, utilities, and other bills, as well as purchasing food and other necessary items. It is a constant financial struggle to get by, trying to pay for diapers and also meet all of [her] other basic needs." (Hammond Decl. ¶10.) Indeed, because of this cost, Ms. Hammond re-wears used diapers. (Id.)

The monthly cost of diapers imposes a significant hardship on plaintiffs as it consumes an out-sized share of their near-poverty-level incomes. For instance, the cost of Mr. Hiltibran's diapers ($80 per month) represents approximately 12% of his limited income ($674 per month in SSI benefits). (Burkhart Decl. ¶¶1,17.) The cost of Mr. Tatum's diapers ($100 per month) represents 18% of his income (SSI benefits of $547 per month). (Tatum Decl. ¶¶1,3.) The cost of Mr. Coontz's diapers (approximately $300 per month) represents approximately 43% of his income (SSI and SDI benefits totaling $694 per month). (Coontz Decl. ¶¶3,6.) And the cost of Ms. Hammond's diapers (approximately $18-$90 per month) represents between 2% and 13% of

[7] Steven and his mother live together in a home built by Habitat for Humanity and pay $225 a month for the mortgage. (Burkhart Decl. ¶17,18.) Steven and his mother live off of Steven's SSI benefits of $674.00 per month as his mother cannot work because she must supervise her son's care 24 hours per day. (Id. ¶1,18,19.)

her total monthly income ($694 per month from SSI and Social Security). (Hammond Decl. ¶¶4,5.)

Plaintiffs here, like the plaintiffs in *Fisher*, are barely avoiding institutionalization under the burden of paying for their incontinence supplies due to their "precarious health and finances." *Fisher*, 335 F.3d at 1184. In *Fisher,* the court found that a five-prescription cap imposed on individuals living in the community, but not those living in nursing homes, placed them at "high risk for premature entry into a nursing home." *Id*. The court examined each plaintiff's financial situation to determine the impact of the prescription cap. *Id.* at 1184-85. As a result of the state's policy, one *Fisher* plaintiff would spend 36.6% of her $547 monthly income on prescriptions, an amount the court found "will place a severe burden on her finances and could easily force her to enter a nursing home." *Id*. at 1184. Thus the court found there was "no question" that she would be harmed absent an injunction. *Id*. For two other *Fisher* plaintiffs who would devote 8.28% and 8% of their total monthly income (SSI totaling $725 and $313 per month, respectively) towards prescriptions, the court found that "[t]his may not be devastating, but it will likely have a real effect on [plaintiffs'] finances given their poverty. . ." *Id*. As a result, the Tenth Circuit Court of Appeals reversed the lower court's denial of a preliminary injunction and found that due to the plaintiffs' precarious health and finances, the state's prescription drug cap placed them at risk of institutionalization. *Id*.

Plaintiffs here are in the same precarious position as the plaintiffs in *Fisher* and are devoting between approximately 7.5% and 43% of their SSI income to pay for incontinence supplies. That plaintiffs have thus far avoided institutionalization due to their emphatic "desire

to remain in the community does not mean that they do not face a substantial risk of harm." *Id*. at 1184-85.

Defendants provide adult briefs to nursing home residents, but not to persons with disabilities who reside in the community.[8] Courts have routinely recognized that a request to receive services in the community when the individual is entitled to those same services in an institution is a reasonable modification and not a fundamental alteration of a state's program. For instance, in *Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003), the court stated that *Olmstead* controls where the issue centers on "what location these services will be provided. Mr. Townsend simply requests that the services he is already eligible to receive under an existing state program (assistance in dressing, bathing, preparing meals, taking medications, and so on) be provided in the community-based adult home where he lives, rather than the nursing home setting the state requires." *Id*. at 517. Similarly, in a pre-*Olmstead* case, *Helen L. v. DiDario*, 46 F.3d 325, 337-39 (3d Cir. 1995), the court determined that the state had violated the ADA's integration mandate by failing to provide state-funded attendant care services for plaintiff in her

[8] Plaintiffs have repeatedly communicated with case managers, counsel from the Missouri Department of Social Services and even pursued an administrative appeal only to be told repeatedly that Missouri does not provide briefs to adults. (Correspondence from Director of DSS, Exhs. 2 and 3; Administrative Judge's ruling, Exh. 4.; Coontz Decl. ¶8, Tatum Decl. ¶7, Hammond ¶11, Burkhart Decl. ¶¶9, 15-16.) In their brief, defendants now suggest that plaintiffs *"may* qualify for waiver programs that provide incontinence briefs" and that if a plaintiff were to face institutionalization, "it is *likely* that the plaintiff would qualify for a waiver program that would provide such coverage," while also stating that "it is not clear whether [plaintiffs] would be admitted to the [waiver] program[s]." (Defs.' Br. at 9,10.) (emphasis added). This Court should reject defendants' attempt to avoid the issuance of a preliminary injunction based on a new litigation position completely inconsistent with defendants' prior actions. Moreover, irrespective of the defendants' new litigation position plaintiffs are at serious risk of institutionalization because defendants have consistently denied their requests for coverage of incontinence supplies.

own home, rather than in a nursing home. *See also Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004), 2008 WL 2097382 at *39-41 (N.D. Ill. March 26, 2008) (finding the plaintiff demonstrated a likelihood of success and later proved a Title II claim at trial where the requested accommodation of private-duty nursing care in the community would be the same as the service provided in the institution).[9]

Additionally, defendants cannot evade their duty to provide services in the most "integrated setting appropriate to the needs of qualified persons with disabilities" by relying upon plaintiffs' sporadic and uncertain ability to secure supplies through other sources such as a church or other charities (Burkhart Decl. ¶17; Hammond Decl. ¶10). Defendants bear the burden of providing more than just the "'theoretical' availability" of alternative services and must ensure that plaintiffs can secure necessary services in order to avoid the risk of institutionalization. *See Brantley*, 656 F. Supp. 2d at 1174; *V.L.*, 669 F. Supp. 2d at 1120.

Defendants argue that because their state Medicaid plan is approved by CMS, plaintiffs cannot prevail on their ADA and Rehabilitation Act claims. (Def. Sugg., Doc. 17 at 8.) Defendants' argument is flawed for two reasons. First, the approved State Medicaid plan does not indicate any limitation on the coverage of medical supplies, such as incontinence briefs.[10] Instead, the approved State Medicaid plan expressly provides that "Medically necessary supplies, which are not routinely furnished in conjunction with patient care visits and which are direct,

[9] *See also Jones v. Dept. of Public Aid*, 867 N.E.2d 563, 573 (Ill. App. 3d 2007) (reasonable modification to require a state to offer services in a home or community-based setting that are available in an institution.); *Fisher* 335 F.3d at 1182.

[10] Under 42 U.S.C. § 1396a(a)(10)(D), "home health services" is a mandatory benefit for anyone who, under the State Medicaid plan, is entitled to nursing facility services. Explicitly included within "home health services" are "medical supplies, equipment, and appliances suitable for use in the home." 42 C.F.R. § 440.70(b)(3).

identifiable services to an individual patient, are reimbursable to the [patient's home health] agency." *See* June 3, 2010 Amendment to Missouri State Medicaid plan, Att. 3.1-A ¶ 7.c., *available at* http://www.cms.gov/MedicaidGenInfo/downloads/MO-10-02-179.pdf (attached hereto as Exhibit B.).

Second, the State's obligations under the ADA are not defined by the scope of the federal-state Medicaid program. Title II of the ADA is an independent legal obligation on states to operate programs, services, and activities in ways that do not discriminate on the basis of disability. *See Townsend*, 328 F.3d at 518, n.1. Complying with the Medicaid Act is not sufficient to comply with the ADA. Quite the contrary, courts have routinely held that a state may run afoul of the ADA even while carrying out CMS approved state plans, waiver services, and amendments. *See e.g.*, *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004) (plaintiffs' claims allowed to proceed without regard to HHS' approval of state's Medicaid plan and waiver programs); *Crabtree v. Goetz*, No. Civ. A. 3:08-0939, 2008 WL 5330506, at *2, 31, (M.D. Tenn. Dec.19, 2008) (same); *Haddad v. Arnold*, No. 10-414, slip op. at 29 (S.D. Fla. July 9, 2010) (attached as Exhibit A.) (The *Haddad* Court held that CMS' approval of defendants' waiver program did not prevent plaintiff's claim under the ADA, citing HHS guidance clarifying that while a state can be in compliance with Medicaid law, it may need to take additional steps to ensure that it is in compliance with other federal statutes, including the ADA.); *Grooms v. Maram*, 563 F. Supp. 2d 840 (N.D. Ill. 2008) (allowing plaintiff's integration claim to move forward despite the fact that HHS had approved the underlying waivers).

2. Plaintiffs Will Suffer Irreparable Harm if Defendants Are Not Enjoined

This Court should order a preliminary injunction because there is a threat of irreparable harm if injunctive relief is not granted, and that harm is not compensable by money damages in this case. *Doe v. LaDue*, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007) (citing *Northland Ins. Co. v. Blaylock*, 115 F. Supp. 2d 1108, 1116 (D. Minn. 2000)). The harms plaintiffs face – serious deterioration of their health and physical conditions and institutionalization – are exactly such incompensable harms. As discussed above, without incontinence supplies, plaintiffs' physicians have recognized that each individual is at serious risk of skin deterioration, pressure sores, and infection, as well as institutionalization.

Unnecessary institutionalization—even temporarily—results in irreparable harm. *See Marlo M.*, 679 F. Supp. 2d at 638; *Crabtree*, 2008 WL 5330506, at *25 (unnecessary institutionalization "would be detrimental to [plaintiffs'] care, causing, inter alia, mental depression, and for some Plaintiffs, a shorter life expectancy or death"); *Long v. Benson*, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008) (moving from the community to a nursing home would be an "enormous psychological blow").[11] Further, once an individual enters an institution, it becomes much more difficult to transition back into the community. (Gray Decl. ¶13.)

3. The Balance of Hardships Tips in Plaintiffs' Favor

The state may not be heard to argue hardship from providing medically necessary incontinence supplies through Medicaid when it already makes these supplies available to

[11] The *Olmstead* Court itself recognized another harm that results from unnecessary institutionalization. Specifically, the Court recognized that needless institutionalization perpetuates "unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and that severing individuals from their communities "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead*, 527 U.S. at 600-01.

individuals under 21 in the community and to all individuals living in institutional settings. Any cost saved by offering them to eligible Medicaid recipients living in the community is negligible and is clearly outweighed by the benefit of allowing plaintiffs to remain in their homes. *Long*, 2008 WL 4571903, at *3 ("If … ultimately … the Secretary prevails in this litigation, little harm will have been done. To the contrary, [plaintiff's] life will have been better, at least for a time."). Furthermore, allowing plaintiffs to receive incontinence supplies in their homes will save money because the costs of providing the incontinence supplies to plaintiffs at home (approximately $480 to $1,800 per year[12]) are significantly less than the total cost of plaintiffs' care in a nursing home (approximately $40,000 per year). (Gray Decl. ¶12.) Furthermore, the cost for unnecessary hospitalizations due to infections and other medical complications that are likely without proper incontinency care "could cost an average of $1,768 for one day which can exceed the cost of covering the adult diapers for a disabled individual for an entire year." (Id.) The lack of hardship to defendants is in stark contrast to the significant hardship the plaintiffs face if no injunction is granted.

4. Granting a Preliminary Injunction is in the Public Interest

There is a strong public interest in granting the injunction to eliminate the discriminatory effects that arise from segregating persons with disabilities into institutions. As the Supreme Court in *Olmstead* explained, the unjustified segregation of persons with disabilities can stigmatize them as incapable or unworthy of participating in community life. *Olmstead,* 527 U.S. at 600. In *V.L.,* the court stated that the public interest inquiry was satisfied where "'[i]t

[12] These estimates are based upon plaintiffs' costs of diapers of $80 to $300 per month. However, the State would only be responsible for a portion of the total cost as the federal Medicaid program would contribute approximately one-half towards the costs.

would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential [public] benefits for any period of time.'" *V.L.*, 669 F. Supp. 2d at 1122 (citing *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir.1983)). *See also Haddad*, slip op. at 38 ("[T]he public interest favors preventing the discrimination that faces Plaintiff so that she may avoid unnecessary institutionalization … [and] upholding the law and having the mandates of the ADA and Rehabilitation Act enforced…."); *Accord Marlo M.*, 679 F. Supp. 2d at 639; *Crabtree*, 2008 WL 5330506, at *30; *Heather K. v. Mallard*, 887 F.Supp. 1249, 1260 (N.D. Iowa 1995); *Benjamin H. v. Ohl*, 1999 WL 34783552, at *16-17 (S.D. W.Va. Jul. 15, 1999).

CONCLUSION

For the reasons stated above, the Court should grant Plaintiffs' Motion for Preliminary Injunction. With the Court's permission, counsel for the United States will be present at any upcoming hearings.

Dated: October 15, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2010, a copy of foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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