IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ERIC STEWARD, by his next friend and mother, Lilian Minor, *et al.*,	§	
Plaintiffs,	§	
v.	§	CIV. NO. 5:10-CV-1025-OG
RICK PERRY, Governor, *et al*.	§	
Defendants.	§	

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Plaintiffs Eric Steward, Linda Arizpe, Andrea Padron, Patricia Ferrer, Benny Holmes, and Zackowitz Morgan (collectively, "plaintiffs") hereby file this Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint, and respectfully state as follows:

I. INTRODUCTION

Defendants have filed a limited Motion to Dismiss (the "Partial Motion to Dismiss") (Dkt. No. 30), which seeks to dismiss one of the three defendants and all of the claims under the Medicaid Act. Significantly, the Partial Motion to Dismiss does not challenge either of the central causes of action in this case, the claim under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 or the claim under § 504 of the Rehabilitation Act of 1973 ("Rehab Act"), 29 U.S.C. § 794.

Because Governor Perry, as opposed to the State of Texas, has no sovereign immunity, and because he has a central role both in the maintenance and the remediation of the federal law violations alleged in this case, he is an appropriate party and should not be dismissed. Furthermore, numerous federal courts have held, in factual situations similar to this one, that plaintiffs can state a claim under the Pre-Admission Screening and Annual Resident Review ("PASARR") provisions of the Nursing Home Reform Amendments ("NHRA") to the Medicaid Act, 42 U.S.C. § 1396r(e)(7), as well as the reasonable promptness, comparability, and freedom of choice provisions of the Act, 42 U.S.C. § 1396a(a)(8), § 1396a(a)(10), and § 1396n(c). Therefore, these claims should not be dismissed and the Motion should be denied in its entirety.

II. BACKGROUND

Central to the claims at issue in the Partial Motion to Dismiss are the PASARR provisions of the NHRA. In order to lend context and content to the arguments in this Response,

it is important to understand the conditions which prompted Congress to enact the NHRA, its basic requirements, and Texas's response to these statutory mandates.

A. The Legislative History of the Nursing Home Reform Amendments.[1]

Before the mid-1970s, there were few federal standards for, and little federal reimbursement of, institutional care for persons with developmental disabilities.[2] States provided their own facilities for housing individuals with disabilities. This state-provided care, however, was grossly inadequate and abuse was common. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 7 (1981) (cataloguing inhumane, unsanitary, and dangerous institutional conditions for individuals with mental retardation).

In 1971, Congress gave States the option of obtaining federal Medicaid reimbursement for care provided in intermediate care facilities for individuals with mental retardation, known as ICF/MRs. 42 U.S.C. §§ 1396a(a)(31)(A) & 1396d(a)(15). Texas and other States chose to provide ICF/MR services in their Medicaid programs. As a condition of receiving federal funds, States are required to ensure that adequate care is provided to persons with developmental disabilities in ICF/MRs specifically including a program of ~~"a~~ctive treatment."[3] 42 U.S.C. § 1396d(d)(2).

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[1] Because the Motion does not seek to dismiss either the ADA or Rehab Act claims, this section focuses on the legal context for the NHRA claims.

[2] As defined by federal law, the term ~~"d~~evelopmental disabilities" includes mental retardation and a range of other disabilities, sometimes referred to as ~~"r~~elated conditions," which occur before the age of twenty-two. *See* 42 U.S.C. § 1396d(d). Plaintiffs' Complaint adopts the federal definition and refers generally to ~~"p~~ersons with developmental disabilities." Defendants' Partial Motion to Dismiss mirrors this nomenclature.

[3] Texas, like most States, has elected to operate and fund ICF/MR facilities, including both large public institutions called State Supported Living Centers (SSLCs) and smaller, private residential programs called ~~"p~~rivate ICF/MRs." As a condition of receiving extensive federal funding for these facilities, Texas has agreed to comply with federal ICF/MR regulations that govern the operation, services, resident rights, and environmental standards of these institutions. *See* 42 C.F.R. §§ 483.400 *et seq*. The process and standard for providing care to ICF/MR residents is called active treatment, which is described in §§ 483.440(a)-(f).

Federal regulations describe active treatment as an individually tailored series of programs and therapies designed to help an individual with developmental disability reach an optimal level of independence. The care provided is ~~"~~directed toward . . . [t]he acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible [and] [t]he prevention or deceleration of regression or loss of current optional functional status." *Id.* at § 483.440(a)(1). An active treatment program can include training and vocational programs, physical, occupational, and speech therapies, and behavioral and interpersonal counseling. The specific contours of every individual's program are based upon that individual's needs.

In order to avoid the burden and costs of complying with ICF/MR requirements, but to ensure that they continued to receive federal funding, States soon began to transfer large numbers of persons with developmental disabilities from their ICF/MR institutions to nursing facilities.[4] Many nursing facilities, ill-equipped to offer appropriate habilitation or treatment for these conditions, soon became warehouses for persons with developmental disabilities. Because active treatment was not required in nursing facilities, the conditions of individuals with developmental disabilities placed in those facilities deteriorated. As a consequence, Congress found itself subsidizing the nursing facility care of individuals with developmental disabilities that did not meet professional standards—precisely the situation it sought to rectify when it made compliance with active treatment standards a condition for receipt of federal funding for the care of persons with developmental disabilities in ICF/MRs.

In 1985, the Senate convened hearings to investigate the effects of improper institutionalization of individuals with developmental disabilities, including the inappropriate

[4] Nursing facility care has long been a required Medicaid service. 42 U.S.C. § 1396d(f).

transfer of these individuals from state-operated institutions to nursing facilities.[5] The Senate heard testimony about the warehousing of individuals with developmental disabilities in nursing facilities and the failure to provide proper care in those settings. The widespread practice of dumping individuals with developmental disabilities into nursing facilities was also documented by the General Accounting Office in a 1987 report. *See Medicaid: Addressing the Needs of Mentally Retarded Nursing Home Residents*, GAO/HRD-87-77 (1987).[6] A full two-thirds of the residents evaluated by GAO were determined to require active treatment. *Id*. at 23. However, not a *single one* of these residents was receiving this necessary treatment. *Id.*

B. The Nursing Home Reform Amendments to the Medicaid Act.

Congress responded with the Omnibus Budget Reconciliation Act of 1987 ("OBRA '87"), Pub. L. No. 100-203, § 4211(c), 101 Stat. 1330-198 (1987), which included a dramatic reform of nursing facility care for persons with developmental disabilities. OBRA '87 incorporates the Nursing Home Reform Amendments (NHRA), 42 U.S.C. § 1396r, which are designed to prevent and remedy the pervasive warehousing and neglect of people with disabilities in nursing facilities. Congress intended the NHRA to end the inappropriate placement of mentally ill or mentally retarded individuals in nursing facilities. H.R. Rep. 100-391(I) at 459, *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-279 (1987).

The NHRA mandates a pre-admission screening and resident review process ("PASARR") for all persons with developmental disabilities referred or admitted to nursing

[5] *Care of Institutionalized Mentally Disabled Persons: Joint Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Labor, Health and Human Services, Educ., and Related Agencies of the Senate Comm. on Appropriations*, 99th Cong., S. Hr'g. 99-50 (1985) at 352.

[6] Available online at http://www.eric.ed.gov/PDFS/ED288331.pdf.

facilities.[7] The screening and review must be done by a qualified mental retardation professional. The PASARR review is designed to determine whether an individual is appropriate for admission and retention in a nursing facility because he needs the level of nursing services that can only be provided in a nursing facility, and, if so, whether he needs active treatment. 42 U.S.C. §§ 1396r(b)(3)(F)(ii), 1396r(e)(7)(A)&(B). A basic condition for federal reimbursement of nursing facilities is that the State determine, pursuant to a thorough assessment according to PASARR standards, that available community alternatives cannot meet the person's needs, and that the individual must be placed in a nursing facility. 42 C.F.R. § 483.132. If the resident review determines that the resident is inappropriately placed in the nursing facility, the State must arrange for the discharge of the resident. *Id.*; 42 U.S.C. §§ 1396r(e)(7)(C)(ii)(I), (ii)(II), (iii)(I), & (iii)(II). Congress intended the number of nursing facility residents with developmental disabilities to decline dramatically as a result of the PASARR screening.

The second major change—the mandatory provision of active treatment—was imposed to ensure that individuals with developmental disabilities obtain the care they need to function with as much independence and self-determination as possible. Specifically, as part of the PASARR screening, Congress required that States determine whether nursing facility residents with developmental disabilities require ~~"s~~specialized services."[8] *Id.* § 1396r(e)(7)(B)(ii). Specialized services consist of an active and continuous treatment program, which includes

[7] The NHRA initially contained a requirement that an annual review be conducted for each nursing facility resident to determine whether the individual continued to need a nursing facility level of care. In 1996, the NHRA was amended to eliminate the requirement of an annual resident review on the ground that such reviews were duplicative of other annual assessments that were required. *See* Pub. L. No. 104-315 (1996). However, the NHRA continued to require a preadmission review for all individuals with developmental disabilities and PASARR reviews whenever there was a significant change in an individual's condition. 42 U.S.C. § 1396r(e)(7)(B)(iii).

[8] In a 1990 amendment to the Medicaid statute, Congress substituted the term "specialized services" for ~~"a~~ctive treatment," but made it clear the two terms are synonymous in the context of the PASARR requirements. Pub. L. No. 101-508, § 4801(e)(4), 104 Stat. 1388-216 (1990).

aggressive, consistent implementation of specialized and generic training, treatment, and health services that are aimed at allowing the individual to function as independently and with as much self-determination as possible, as well as services designed to prevent or decelerate regression and loss of abilities. *See* 42 C.F.R. § 483.120(a)(2), *citing* 42 C.F.R. § 483.440(a)(1) (active treatment). If the individual requires specialized services, the State is required to provide them.[9] 42 C.F.R. §§ 483.116(b), 483.120(b), 483.130(m) and (n) (requiring assurances that specialized services will, in fact, be provided).

When the Secretary subsequently issued the PASARR regulations, specialized services were defined with specific reference to the federal ICF/MR active treatment regulations. The Secretary's definition reflects three distinct duties: (1) the State alone is responsible for the provision of specialized services; (2) the nursing facility is responsible only for traditional nursing services;[10] and (3) the State is ultimately and fully responsible for ensuring that all of these services, taken together, constitute a program of active treatment, as defined by 42 C.F.R. § 483.440(a)-(f). This definition has never been challenged, amended, or further refined.[11]

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[9] The House Committee on Energy and Commerce, in introducing the bill enacted as the NHRA, plainly stated that "[i]n the Committee's view, the responsibility for providing, or paying for the provision of, active treatment *lies with the States*." H.R. Rep. 100-391(I) at 462, *reprinted in* 1987 U.S.C.C.A.N. 2313-282 (emphasis added).

[10] The Secretary's interpretation of the regulations explicitly relieves nursing facilities from having to provide specialized services:

> Response: As noted above, we do not envision holding a facility accountable for deficiencies in the State's actions with respect to specialized services. We believe the law would need to be changed for us to do so. Facilities attempting to address a resident's needs would not be in jeopardy of sanctions unless they were otherwise out of compliance with the NF requirements.

57 Fed. Reg. 56,477.

[11] In subsequent amendments to the statute, Congress left undisturbed the Secretary's definition of specialized services as equivalent to active treatment, as well as the interpretation of Congress' intent that such services must be provided to all persons with mental retardation who have been determined to need these services by the PASARR process. H.R. Rep. No. 104-817, at 1-4, *reprinted in* 1996 U.S.C.C.A.N. 4198, 4198-201; Pub. L. No. 104-315, § 1(b), 2(c).

In enacting the NHRA, Congress intended to prevent the inappropriate placement of individuals with developmental disabilities in nursing facilities, a problem highlighted by the 1987 GAO report. Congress also intended to ensure that if the resident requires specialized services, the State actually provides them. *See id.*; §§ 1396r(e)(7)(C)(i)(IV) & (ii)(III). The Secretary's regulations carefully reflected these intentions and mandates, and established screening, diversion, placement and treatment requirements that Texas has ignored.

C. Texas's Implementation of the NHRA.

Texas institutionalizes more than four thousand persons with developmental disabilities in nursing facilities at any given time.[12] Compl. ¶ 26. Thousands more are admitted or at risk of admission each year.[13] *Id.* As more fully described in the Complaint, Texas ignores Congress' mandate, the Secretary's requirements, and the rights of persons with developmental disabilities in nursing facilities by operating a wholly inadequate PASARR program. *Id.* ¶¶ 90-96. Specifically, in violation of the NHRA and PASARR regulations, Texas's PASARR program fails to identify accurately whether a person who seeks admission to a nursing facility has a developmental disability, whether the individual could be served appropriately in another, less restrictive facility, and whether the person needs specialized services. *Id.* ¶¶ 74-78. Concomitantly, Texas fails to provide an array of specialized services that meet federal active treatment standards to persons with developmental disabilities who are in nursing facilities, to the same extent and in the same manner that it does for persons with developmental disabilities who live in ICF/MRs. *Id.* ¶¶ 79-80.

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[12] In fact, the number may be considerably higher than this. As a result of pervasive deficiencies in its PASARR process, defendants do not have an accurate list or even a general estimate of the total number of persons with developmental disabilities who are currently institutionalized in nursing facilities in Texas.

[13] The lack of accurate identification makes projections about the number of persons at risk of institutionalization even more problematic.

As a result of these deficiencies, a substantial portion of persons with developmental disabilities who are screened for admission should and could be served in alternative settings. *Id.* ¶¶ 82-83, 99. Similarly, a substantial portion of persons with developmental disabilities who currently reside in nursing facilities should be and could be served in more integrated community settings. *Id.* ¶¶ 84, 100. Finally, virtually all of the persons with developmental disabilities who are in nursing facilities qualify for specialized services, but virtually none of them are receiving active treatment, as defined in federal regulations and as required by federal law. *Id.* ¶¶ 85-87.

D. Texas's Community Service Programs.

Texas operates several distinct community programs for persons with developmental disabilities, in addition to its private ICF/MR program. All of these other community programs are funded in significant part by the federal government, either through Home and Community-Based Services ("HCBS") waiver programs authorized by 42 U.S.C. § 1396n(c), or traditional Medicaid state plan services such as personal care attendants or home health care. The HCBS waiver provision authorizes the Secretary to waive certain other Medicaid provisions in order to encourage States to provide services in the community, provided that the cost of doing so is not greater than the cost of providing similar services in an institution, like a nursing facility. *Id.*; *see also* 42 C.F.R. § 430.25(b). States are required to inform persons who seek admission to, or who reside in, a nursing facility about all of its HCBS waiver programs, must offer them a choice of the waiver program, and must administer its waiver programs in a manner that is fair and efficient for all persons, including those institutionalized in nursing facilities. 42 U.S.C. § 1396n(c)(2).

The Secretary has approved several waiver programs in Texas, at least three of which could serve certain nursing facility residents with developmental disabilities. *See* Texas

Dept. of Aging and Disability Services Reference Guide 2011 at 31-44 (online at http://cfoweb.dads.state.tx.us/ReferenceGuide/guides/FY11ReferenceGuide.pdf). First, Texas's Home and Community-based Services ("HCS")[14] waiver provides a broad range of residential and non-residential services to persons with intellectual disabilities and is the State's largest waiver. Second, the Community Living and Assistance Support Services ("CLASS") waiver serves persons with disabilities other than intellectual disabilities, but including "related conditions," and offers a range of services as an alternative to institutionalization. Third, the Community Based Alternatives ("CBA") waiver provides many services similar to those in HCS and CLASS for adults with disabilities in order to avoid placement in an institutional facility. While the HCS waiver has a long waiting list, access to the other two waivers is readily available to nursing facility residents through Texas's Money Follows the Person ("MFP") program.[15]

Texas neither provides nursing facility residents with developmental disabilities information about these waivers, nor offers them meaningful choices between nursing facility placement and community waiver programs. Compl. ¶¶ 53-54. Instead, it administers these waivers in a manner that is neither fair nor efficient, discriminates against persons with developmental disabilities in nursing facilities, and is inconsistent with the federal statutory and regulatory requirements for operating waiver programs. Compl. ¶ 55-57.

[14] Plaintiffs use the acronym HCS to refer to Texas's specific waiver program and the acronym HCBS to refer generically to the general category of community-based waivers authorized by 42 U.S.C. § 1396n.

[15] The MFP program allows nursing facility residents to gain immediate access to the CBA, CLASS and several other waiver programs without having to go on a waiting list.

III. ARGUMENT

A. Plaintiffs Have Stated Cognizable Claims Under the Medicaid Act.

1. Plaintiffs Have Stated a Claim Under the NHRA.

"[T]o survive a motion to dismiss, [plaintiffs] need only allege enough facts to state a claim to relief that is plausible on its face.'" *Matrixx Initiatives, Inc. v. Siracusano*, --- S. Ct. ---, 2011 WL 977060, at *12 n.12 (Mar. 22, 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Significantly, defendants do not contend that plaintiffs have failed to state viable claims as to all alleged violations of the NHRA. Specifically, they do not challenge the claims that Texas: (1) fails to accurately identify persons who have developmental disabilities; (2) fails to screen these individuals to determine if they need a nursing facility level of care; (3) fails to divert individuals from nursing facilities to alternative placements; (4) fails to assess individuals with developmental disabilities to determine if they need specialized services, and, if so, what type and level of such services; and (5) fails to provide an appropriate scope, intensity, and frequency of specialized services. *Compare* Compl. ¶¶ 230-34, *with* Partial Motion to Dismiss. Rather, defendants only object to one narrow aspect of one claim—the scope of their obligation to provide specialized services that satisfy federal active treatment requirements. Part. Mot. to Dismiss at 34-36. Specifically, defendants assert that plaintiffs' claim that defendants have "fail[ed] to provide specialized services constituting active treatment as measured by 42 C.F.R. § 483.440(a)-(f)" overstates their obligation and that they need "only provide specialized services, as measured by Section 483.440(a)(1)." Part. Mot. to Dismiss at 36.

Defendants' concession that plaintiffs have stated a cognizable claim regarding the failure to provide specialized services sufficient to constitute active treatment as required by 42 C.F.R. § 483.440(a)(1) should end the inquiry at this stage of the proceeding. The

determination of the extent of any violation and the scope of relief to which plaintiffs may be entitled is not appropriate at the motion to dismiss stage—determining the precise contours of defendants' active treatment obligations is best addressed during the merits or remedial phase of the litigation. *See Lewis v. New Mexico Dep't of Health*, 261 F.3d 970, 977 (10th Cir. 2001) (determining the reach of Medicaid statute ~~"i~~s more appropriately reserved for resolution on the merits of the case"); *Cler v. Illinois Educ. Ass'n*, 423 F.3d 726, 729 (7th Cir. 2005) (finding it inappropriate to grant motion to dismiss based on uncertain meaning of statutory term, ~~"p~~repaid legal services").[16]

2. Plaintiffs Have Stated a Claim Under the Reasonable Promptness Provision of the Medicaid Act.

a. Congress Clarified that the Medicaid Act Applies to Services, and, Regardless, Plaintiff's Claim Is Not Limited to the Provision of Services.

In the Complaint, Plaintiffs alleged that Texas violates the reasonable promptness provision of the Medicaid Act by failing to provide appropriate habilitation services in a timely manner, both in the nursing facility and in the community. *See* Compl. ¶¶ 25-26. Defendants argue that, under a prior version of the Medicaid Act, Plaintiffs' claims fail to state a claim under the Fifth Circuit's holding in *Equal Access for El Paso, Inc. v. Hawkins*, 562 F.3d 724, 727-79 (5th Cir. 2009), which construed the term ~~"m~~edical assistance" to mean only payment for and not the actual provision of care and services. Part. Mot. to Dismiss at 36-38. The 2010 amendment to the Medicaid Act, which expanded the definition of ~~"m~~edical assistance" to include ~~"p~~ayment

[16] Defendants' assertion that the scope of active treatment required by § 483.440(a)(1) does not encompass any of the requirements contained in other subparts of § 483.440 has been rejected by the one court that has addressed the issue. *Rolland v. Patrick*, 483 F. Supp. 2d 107, 113-14 (D. Mass. 2007). Recognizing that subpart (a) provides the general definition of active treatment and that subparts (b) through (f) provide the specifics, the court easily concluded ~~"t~~hat paragraphs (b) through (f) of section 483.440 apply as well." *Id.* at 114. Defendants' suggestion that the First Circuit decision in *Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003) somehow supports their position was also raised in *Rolland* and rejected by the district court on remand. *Rolland*, 483 F. Supp. 2d at 113-14.

of part or all of the cost of [certain delineated] care and services ***or the care and services themselves***, or both," 42 U.S.C. § 1396d(a) (2010) (emphasis added), effectively abrogates the holding in *Equal Access for El Paso*. Congress has expressed its intention that "medical assistance" should not be limited merely to payment.

In the face of this clear congressional intent, defendants' only argument is that the 2010 amendment of the definition of "medical assistance" is not a valid law based on one district court's decision in *Florida ex rel. Bondi v. United States Department of Health & Human Services*, --- F. Supp. 2d ---, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011), which involved a challenge to an entirely different provision of a different health care program than the one at issue here.[17] Part. Mot. to Dismiss at 37-38. However, defendants acknowledge that the *Florida* ruling is not binding on this Court, and the *Florida* court has stayed its decision pending appeal. *Florida ex rel. Bondi v. United States Department of Health & Human Services*, --- F. Supp. 2d ---, 2011 WL 723117, at *10 (N.D. Fla. March 3, 2011).[18] Until the Fifth Circuit or Supreme Court says otherwise, the 2010 amendment to the Medicaid Act, 42 U.S.C. § 1396d(a), remains the law in this circuit.[19] Consequently, plaintiffs have stated viable claims under § 1396a(a)(8).

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[17] This case declared that the Patient Protection and Affordable Care Act (PPACA), Pub. L. Nos. 111-148 & 111-152 (2010), of which the Medicaid amendment set forth above is a very small part, is unconstitutional due to the requirement that some individuals must purchase health insurance. Finding that the separate provisions of the PPACA are not severable, the *Florida* court declared the entire Act to be void. *Florida*, 2011 WL 285683.

[18] This is hardly surprising because at least three other courts have addressed the constitutionality of the PPACA on the merits and concluded, contrary to the *Florida* court, that the Act is constitutional. *Mead v. Holder*, --- F. Supp. 2d ---, 2011 WL 611139 (D.D.C. Feb. 22, 2011); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010); *Liberty Univ., Inc. v. Geithner*, --- F. Supp. 2d ---, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010). One additional court has concluded that the individual mandate of the PPACA is unconstitutional, but determined that the remainder of the Act, including the Medicaid amendment at issue here, is severable. *Va. ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).

[19] While defendants indicate that they intend to preserve a defense based on the invalidity of the 2010 Medicaid amendment, they do not articulate the basis for such a claim. Part. Mot. to Dismiss at 37-38. For purposes of their Partial Motion to Dismiss, such an argument is, therefore, waived. *Magee v. Life Ins. Co. of N. Am.*, 261 F. Supp. 2d 738, 748 n.10 (S.D.Tex. 2003); *United States v. Kavalchuk*, No. 09-CR-178-JD, 2011 WL 1236045, at *7 (D.N.H. March 31, 2011) (issues "unaccompanied by some effort at developed argumentation" are waived (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

Moreover, plaintiffs' reasonable promptness claim with respect to specialized services in the nursing facility is not limited to just the provision of services. Plaintiffs also allege that defendants fail to authorize and cover under their medical assistance program the full scope of specialized services to which plaintiffs are entitled. Compl. ¶¶ 78-80, 87. Defendants do not dispute that these allegations state a reasonable promptness claim, even under the pre-existing definition of medical assistance.

b. Plaintiffs' Reasonable Promptness Claim Is Not Limited to Services and Supports Provided Through the HCS Waiver System.

Defendants also argue that plaintiffs' reasonable promptness claim fails because plaintiffs allegedly are not entitled to reasonable promptness in the delivery of services where the waiver cap was met and there is a waiting list. Part. Mot. to Dismiss at 30-32. There is a waiting list only with respect to the HCS waiver program, and thus, defendants predicate their entire argument, without support or citation, on the presumption that plaintiffs seek services only under the HCS program. *See id.* But plaintiffs' reasonable promptness claim with respect to community services is not limited to services and supports provided through the HCS waiver program. *See* Compl. ¶¶ 128, 135, 212-217, 222-24, 228 (not limiting claim to any particular waiver program). Plaintiffs are willing to accept appropriate community services under any of Texas's community support programs through which they can obtain the services needed to allow them to live in the most integrated setting. These other programs include the MFP program, the CLASS waiver, the CBA waiver, and other Medicaid-covered state plan services, such as personal care assistance. There is no waiting list for many of these programs and services. Because defendants' challenge to the viability of this claim is predicated entirely on the existence of a lengthy waiting list for HCS services, it should be denied.

Even with respect to community services under the HCS waiver, the claim is viable. Plaintiffs' claim does not insist that defendants must increase the size of the HCS waiver. *See* Compl. ¶¶ 210-27, 231-32.[20] Rather, services and the payment for such services must ~~be~~ furnished with reasonable promptness to all *eligible* individuals." 42 U.S.C. § 1396a(a)(8) (emphasis added). While this statutory provision can be violated by unreasonably delaying medical assistance to individuals already determined eligible, *see Doe v. Chiles*, 136 F.3d 709, 711 (11th Cir. 1998), it can also be violated by denying eligibility pursuant to an illegal eligibility requirement. *See, e.g.*, *King v. Smith*, 392 U.S. 309, 333 (1968); *Quern v. Mandley*, 436 U.S. 725, 740 (1978); *Carleson v. Remillard*, 406 U.S. 598, 600 (1972); *Townsend v. Swank*, 404 U.S. 282, 285-86 (1971). As the Supreme Court explained in *King*, applying the analogous reasonable promptness provision of the Aid to Families with Dependent Children program, ~~"~~In denying AFDC assistance to appellees on the basis of this invalid regulation, Alabama has breached its federally imposed obligation to furnish aid to families with dependent children' . . . with reasonable promptness to all eligible individuals." 392 U.S. at 333; *see also Townsend*, 404 U.S. at 286; *Quern*, 436 U.S. at 740.

Plaintiffs have alleged that the restrictive eligibility criteria which effectively exclude individuals with developmental disabilities in nursing facilities from accessing the HCS and other waiver programs violate the Medicaid Act, as well as the ADA and Section 504 of the Rehab Act.[21] *See* Compl. ¶¶ 210-227, 231-232. Just as in *King, Quern*, *Carleson* and *Townsend*,

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[20] Relying upon *McCarthy v. Gilbert*, Civ. No. 03-CA-231-SS (W.D. Tex. 2003), *see* Motion, Ex. 1, defendants assert that the existence of a waiting list for the HCS waiver precludes a promptness claim. Other cases have held to the contrary. *See Benjamin H. v. Ohl*, No. Civ. A. 3:99-0338, 1999 WL 34783552, at *15 (S.D. W.Va. July 15, 1999) (applying § 1396a(a)(8) to a waiver waiting list claim and finding that long waiting lists and lengthy delays in obtaining waiver services likely violated reasonable promptness).

[21] Admittedly, there is a lengthy waiting list for HCS services. Except for certain groups which are provided a priority or are permitted to access the HCS waiver through the MFP program, individuals on the waiting list can expect to wait in excess of six years. But adult nursing facility residents with developmental disabilities are neither

the allegations that defendants have denied plaintiffs and the class access to medical services, whether in a waiver program or otherwise, pursuant to an invalid eligibility rule, state a claim under the reasonable promptness provision.

3. Plaintiffs Have Stated a Claim Under the Comparability Requirement of the Medicaid Act.

Plaintiffs also allege that defendants are violating the comparability provisions of the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B), by failing to provide persons with developmental disabilities in nursing facilities with services to which they are entitled under the Medicaid program, while providing similar services to other, similarly-needy persons in ICF/MRs and state supported living centers in Texas. It is defendants' failure to offer the same type, level, and intensity of specialized services to plaintiffs as they offer to ICF/MR residents that is the focus of plaintiffs' comparability claim.[22] Compl. ¶¶ 124, 132, 134, 228-29.

While defendants are correct that the comparability rule requires that ~~"~~the amount, duration, and scope of available services cannot differ among Medicaid recipients based on how they became eligible for Medicaid," Part. Mot. to Dismiss at 41, they also cannot differ among Medicaid recipients within a particular categorically or medically needy group. *Sobky v. Smoley*, 855 F. Supp. 1123, 1140-41 (E.D. Cal. 1994); 42 C.F.R. § 440.240. Plaintiffs are all individuals who qualify for medical assistance under the Texas Medicaid program based upon their disability. Residents of ICF/MRs and state supported living centers also qualify for medical assistance based upon their disability. Residents of nursing facilities with developmental disabilities have the same need for active treatment as residents of ICF/MRs and state supported

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provided with a priority nor permitted to access the HCS waiver through the MFP program. This discriminatory and unreasonable exclusion from the HCS program states a viable promptness claim.

[22] Plaintiffs' comparability claim only addresses the discriminatory denial of specialized services, not waiver services. Compl. ¶¶ 228-29. As a result, defendants' discussion regarding comparability for services provided under Texas's waiver programs is simply irrelevant to the issues in this case. Part. Mot. to Dismiss at 32.

living centers. Compl. ¶¶ 85-88, 99. Federal law mandates that defendants make available to both groups those services sufficient to achieve active treatment. 42 U.S.C. §§ 1396r(e)(7)(B)(ii)(II) & (C)(i) (nursing facility residents); 42 C.F.R. § 483.120(a)(2) (nursing facility residents); 42 U.S.C. §1396d(d)(2) (ICF/MR residents); 42 C.F.R. § 483.440 (nursing facility and ICF/MR residents); *Rolland*, 318 F.3d at 57 ("For individuals with mental retardation, . . . the Secretary crafted a definition of specialized services that incorporated the active treatment standard traditionally applied in ICF/MRs"). However, defendants make available the services necessary to constitute active treatment only to residents of ICF/MRs, and not to nursing facility residents. Compl. ¶¶ 87-88, 90, 96, 229, 236-38. This differential treatment of similarly-needy Medicaid recipients with respect to the availability of a medical service to which both groups are equally entitled under federal law is precisely what the comparability provision was targeted to prevent.

Not surprisingly, the one court to address this specific issue regarding the disparate availability of specialized services and active treatment between nursing facility and ICF/MR residents had no difficulty in concluding that it stated a claim under § 1396a(a)(10)(B). *Rolland v. Cellucci,* 52 F. Supp. 2d 231, 238-39 (D. Mass. 1999) (holding that "Plaintiffs' claim that individuals residing in ICF/MRs receive active treatment . . . , while those individuals residing in nursing facilities are not receiving ample services . . . supports a cognizable claim of a violation of the comparability provision"). Therefore, defendants' assertion that plaintiffs have failed to allege a viable violation of the comparability rule must be rejected.

4. Plaintiffs Have Stated a Claim under the Freedom of Choice Provision of the Medicaid Act.

The Medicaid statute requires that recipients be given a choice between Medicaid programs. 42 U.S.C. § 1396n(c)(2)(C).[23] Courts have applied this provision to guarantee

[23] Specifically, the statute provides that States must ensure that

persons with developmental disabilities a choice between different Medicaid programs. *See Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1352 (S.D. Fla. 1999) (state Medicaid plan violated 42 U.S.C. § 1396n(c)(2)(C) because it gave individuals with disabilities ~~"n~~o real choice" between ICF/DDs and HCBW services).

The fundamental purpose of 42 U.S.C. § 1396n(c)(2)(C) is to provide individuals who require an institutional level of care a choice concerning the type of Medicaid services they receive. In order to make this choice meaningful, Medicaid recipients must be informed of *all* feasible alternatives, including, but not limited to, the various waiver programs, the MFP program, and regular Medicaid state plan services, such as personal care attendant services, home health care services, or private duty nursing services. They also must be allowed to apply for these services and be afforded meaningful access to the application process.[24]

The Complaint alleges that defendants have, in violation of 42 U.S.C. § 1396n(c)(2)(B) & (C), failed to provide residents of nursing facilities with developmental disabilities with: (1) notice of and equal opportunities to apply for and to have access to community-based services; (2) an assessment of their eligibility for such services; and (3) meaningful choice between institutional and community-based services. Compl. ¶¶ 216, 227. Defendants argue that there is no requirement to inform eligible individuals of a particular

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> such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, *at the choice of such individuals*, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded . . ." *Id.* (emphasis added).

[24] States that elect to participate in the HCBS waiver program must comply with additional freedom of choice regulations:

> HCFA will not grant a waiver under this subpart and may terminate a waiver unless the Medicaid agency . . . (d) Assur(es) that . . . the recipient or his or her legal representative will be (1) informed of any feasible alternative under the waiver; and (2) given the choice of either institutional or home and community based services.

42 C.F.R. § 441.302(d).

waiver program if that waiver program is full. Part. Mot. to Dismiss at 39. Defendants' contention is flawed for several reasons.

First, Medicaid recipients retain their right to be informed of alternatives, regardless of a particular waiver's status or capacity. This right is especially critical in Texas, where the waiting list for HCS services is long. It is imperative that individuals be informed about alternatives in a timely manner so that they can exercise their right to be added to the waiting list if they desire.[25] The failure to notify persons with developmental disabilities in nursing facilities about each existing waiver program, regardless of the capacity of the program, denies them critical information needed to make a meaningful choice about whether to enter, or remain in, a nursing facility. As a result, it constitutes a denial of freedom of choice and consequently a denial of access, depriving plaintiffs of the opportunity even to join the waiting list.

Second, there are several 1915(c) HCBS waivers in Texas, in addition to HCS, for which class members are eligible, including CBA, CLASS, CWP, TxHmL, and DBMD, some or all of which currently have capacity.[26] The fact that one waiver is full, does not relieve defendants from their duty to inform individuals of ~~"f~~easible alternative[s]" under 42 U.S.C. § 1396n(c)(2)(C). In a similar factual situation, the *Rolland* court found that individuals with developmental disabilities in nursing homes stated a claim for violation of the freedom of choice provision of 42 U.S.C. U.S.C. § 1396n(c)(2)(C) by alleging that defendants' administration of

[25] Defendants' own regulations implementing this federal requirement require them to provide individuals who are about to enter a nursing facility with information about ~~"a~~ll long-term care and long-term support options appropriate to the clients' needs that are currently available." However, defendants recognize that there is a distinction between ~~"c~~urrently available" and ~~"i~~mmediately available," for the regulation goes on to specify that ~~"[~~i]f the client … selects an option that is not immediately available for any reason, the agency must provide assistance in placing the client's name on a waiting list for that option." 1 Tex. Admin. Code § 351.15(b).

[26] Nursing facility residents have access to the CBA and CLASS waivers under the MFP program without having to go on any waiting list.

the Medicaid program failed to inform class members of feasible alternatives to nursing facilities, including ICF/MR, PCA services and HCBS waiver programs. *See Rolland*, 52 F. Supp. 2d at 241. Likewise, here the universe of feasible alternatives is not narrowly limited to the HCS waiver, but rather properly encompasses all community-based services, supports, and programs available under the Texas Medicaid program, including the other waiver and MFP programs, as well as individual state plan services.

Defendants have failed to inform plaintiffs of the availability of Medicaid services provided through HCS and other waiver programs which has, in effect, denied them access to these programs. Compl. ¶¶ 216, 227. In doing so, defendants have failed to offer plaintiffs a choice about whether to receive community or institutional services. Each of these failures violates plaintiffs' rights to be informed of available services and to choose the services they wish to receive under 42 U.S.C. § 1396n(c)(2)(C) and 42 C.F.R. § 441.302(d). Therefore, plaintiffs have stated a claim under the freedom of choice provision, 42 U.S.C. § 1396n(c)(2)(C).

B. Plaintiffs Have a Private Right of Action Under 42 U.S.C. § 1983 to Enforce the Relevant Sections of the Medicaid Act

1. The Standard for Private Rights of Action.

Section 1983 authorizes a civil action against any individual who, ~~"u~~nder color of any statute, ordinance, regulation, custom, or usage of any State" deprives an individual ~~"o~~f any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Rights under federal statutes, as well as the Constitution, may be the basis of a § 1983 action. *Maine v. Thiboutot*, 448 U.S. 1, 4-5 (1980); *see also Rosado v. Wyman*, 397 U.S. 397, 422-23 (1970) (enforcing Social Security Act in § 1983 action). The Supreme Court has set forth a three-part test for determining if Congress intended to create a right under § 1983: (i) Congress intended that the provision benefit the plaintiff; (ii) the statute is not vague and amorphous, and

(iii) a binding obligation is unambiguously imposed on the States by the statute. *See Blessing v. Freestone,* 520 U.S. 329, 340-41 (1997); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 503 (1990) (applying factors to allow enforcement of a Medicaid Act provision requiring state plans to include payment rates that ~~"t~~he State finds, and makes assurances satisfactory to the Secretary" are ~~"r~~easonable and adequate" to meet the costs of ~~"e~~fficiently and economically operated facilities").[27]

In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court clarified that the first *Wilder/Blessing* prong is not met merely by showing that ~~"t~~he plaintiff falls within the general zone of interests that the statute is intended to protect." *Id.* at 283. Rather, ~~"i~~t is *rights,* not the broader or vaguer ‗benefits' or ‗interests' that may be enforced" under § 1983. *Id.* (reiterating that *Blessing,* 520 U.S. at 340, ~~"e~~mphasizes that it is only violations *of rights,* not *laws,* which give rise to § 1983 actions").

In determining whether Congress intended to confer individual rights, courts must look at whether the text contains ~~"r~~ights- or duty-creating language;" that is, language with an ~~"u~~nmistakable focus on the benefited class." *Gonzaga*, 536 U.S. at 284 n.3; *see also ASW v. Oregon*, 424 F.3d 970, 976 (9th Cir. 2005) (~~"t~~hese particular statutory provisions are unambiguously framed in terms of the specific individuals benefited and contain explicit duty creating language); *Price v. City of Stockton*, 390 F.3d 1105, 1110 (9th Cir. 2004); *Shotz v. City of Plantation*, 344 F.3d 1161, 1171 n.16 (11th Cir. 2003) (noting that ~~"r~~ights are often thought of as necessarily including a correlative duty, compelling behavior respecting that right"); *Rolland*,

[27] If the *Wilder/Blessing* factors are met, there is a presumption that the provision is enforceable under § 1983, unless the State can show that Congress specifically foreclosed that remedy, either expressly in the statute or by creating a ~~"c~~omprehensive enforcement scheme" incompatible with enforcement through § 1983. *Blessing*, 520 U.S at 341. The Supreme Court has repeatedly listed the Medicaid Act in the category of statutes that do not provide such a comprehensive enforcement scheme. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (citing *Wilder*, 496 U.S. at 521).

318 F.3d at 52 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979)) (~~"t~~he right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action").

To illustrate rights-creating language, the *Gonzaga* Court quoted from Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 (~~"n~~o person shall . . . be subjected to discrimination"). To illustrate duty-creating language, the Court cited to several statutes approved by the Court in *Cannon*, 441 U.S. at 690 n.13. *See Gonzaga*, 536 U.S. at 284 n.3. As noted by the *Cannon* Court, duty-creating language may be enforced by an individual as long as it is a duty that runs ~~"d~~irectly [to] a class of persons that include[s] the plaintiff," rather than to the ~~"p~~ublic at large." 441 U.S. at 690 n.13. Indeed, many of the statutes cited by the *Cannon* Court focus more on the duty of the defendant than on the rights of the plaintiff. *See Cannon*, 441 U.S. at 690 n. 13 (collecting cases).

In sharp contrast to the provision of the Family Educational Rights and Privacy Act (~~"F~~ERPA") at issue in *Gonzaga*, which spoke at an aggregate level of policy and practice, 536 U.S. at 289, the Medicaid provisions at issue in this case have a distinct focus on the individual Medicaid recipients who are the intended beneficiaries of the specific rights and duties delineated. As shown below, the text and structure[28] of the statutory provisions relied upon by plaintiffs meet the *Wilder/Blessing/Gonzaga* standard.

[28] ~~"E~~vidence of congressional intent to create a federal right can be found in a statute's language as well as in its overarching structure." *Cal. State Foster Parent Ass'n,* 624 F.3d 974, 980 (9th Cir. 2010) (quoting *Ball v. Rodgers*, 492 F.3d 1094, 1105 (9th Cir. 2007)).

2. The Medicaid Act Creates Enforceable Rights.

Defendants boldly assert that *none* of the provisions of the Medicaid Act create rights which are judicially enforceable. Part. Mot. to Dismiss at 18-22. They support this contention with two arguments, neither of which survive even the most elemental scrutiny.

First, defendants assert that the Medicaid Act confers rights solely on the Secretary, who can cut off federal funding if she determines that the State is violating federal law.[29] Part. Mot. to Dismiss at 18-20. This argument has been considered and explicitly rejected by both the Supreme Court and the Fifth Circuit.

The Supreme Court first addressed this argument in *Wright v. City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 424-29 (1987), and held that ―HUD's authority to audit, enforce annual contributions contracts, and cut off federal funds . . . are insufficient to indicate a congressional intention to foreclose § 1983 remedies." *Id.* at 428. Similarly, in *Wilder*, 496 U.S. 498, the State of Virginia argued that the Secretary's right to cut off federal reimbursement in the event that a State violates its obligations under the Medicaid Act precludes the existence of a private right of action under § 1983. The Court had little difficulty rejecting this argument, noting that the Secretary's authority ―to withhold approval of plans . . . , or to curtail federal funds to States whose plans are not in compliance with the Act . . . cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." *Id.* at 522-23. The Supreme Court addressed and rejected this same argument yet a third time in *Blessing*, 520 U.S. at 346-48. Relying upon *Wright* and *Wilder*, the Court easily concluded that the federal Secretary's ―limited powers to audit and cut federal

[29] Put in the parlance of § 1983 jurisprudence, defendants are asserting that the Medicaid Act contains a ―comprehensive enforcement scheme" that signals Congressional intent to foreclose private enforcement. *Blessing*, 520 U.S. at 346-47.

funding" were not sufficient to preclude private enforcement of those provisions of Title IV-D of the Social Security Act which might confer federally enforceable rights on plaintiffs.[30] *Blessing*, 520 U.S. at 348.

Despite these three Supreme Court decisions holding that the federal Secretary's ability to withhold federal funding does not undermine a private right of action under § 1983,[31] defendants cavalierly assert that *Gonzaga* has overruled or effectively abrogated these holdings. Part. Mot. to Dismiss at 20. However, the *Gonzaga* Court, citing both *Wright* and *Blessing* with approval, explicitly noted that it was not addressing whether the statute ~~c~~reat[ed] a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 284 n.4.

Not surprisingly, in light of the above-cited Supreme Court precedent, the Fifth Circuit, both before and after *Gonzaga,* has concluded that the authority of a federal agency to cut off federal funds does not preclude private enforcement of specific provisions of the underlying federal law. Most recently, the Fifth Circuit in *Johnson v. Housing Authority of Jefferson Parish* rejected the argument that HUD's authority to cut off funds to a housing authority that was violating the National Housing Act precluded private enforcement of the Act. 442 F.3d 356, 365-66 (5th Cir. 2006).

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[30] While *Blessing* held that there was no generalized right to enforce the statutory scheme of Title IV-D, it remanded the case ~~d~~r the District Court to construe the complaint in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting" and ~~t~~o determine whether any specific claim asserts an individual federal right." *Id.* at 346. Indeed, contrary to defendants' broad assertion that Spending Clause legislation can never confer privately enforceable rights, the *Blessing* Court specifically noted that ~~[~~42 U.S.C.] § 657 may give [respondent] a federal right to receive a specified portion of the money collected on her behalf by Arizona." *Id.*

[31] In addition to *Wright*, *Wilder*, and *Blessing*, the Supreme Court has also held that § 1983 provides a private cause of action to enforce provisions of the Social Security Act in at least two other cases. *Maine*, 448 U.S. at 4-6 (holding that § 1983 provided private individuals with a cause of action to enforce provisions of the Social Security Act); *Maher v. Gagne*, 448 U.S. 122, 128-29 (1980).

Even more directly on point, the Fifth Circuit in *S.D. ex rel. Dickson v. Hood* held that the Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") provisions of the Medicaid Act, 42 U.S.C. §§ 1396d(a)(4)(B) and 1396d(r)(5), in conjunction with 42 U.S.C. § 1396a(a)(10)(A)(i), are enforceable under § 1983. 391 F.3d 581, 602-04 (5th Cir. 2004). The *S.D.* court correctly noted that *Blessing* continues to set forth the test for determining whether a particular federal statute is enforceable pursuant to § 1983 and that *Gonzaga* simply clarified how the first prong of that test—whether the statute contained sufficient "rights creating" language to demonstrate that Congress "intended to confer individual rights upon a class of beneficiaries"—should be applied. *Id.* at 602 (quoting *Gonzaga*). With respect to the question of whether the Medicaid Act contains a sufficiently comprehensive enforcement scheme to indicate Congressional intent to foreclose a remedy under § 1983, the Court noted that the defendant had failed to make such a showing. *Id.* at 606 n.33.[32] Therefore, defendants' assertion that the Secretary's ability to withhold funds for noncompliance precludes a private right of action under § 1983 under any provision of the Medicaid Act is directly contrary to consistent holdings of the Supreme Court and Fifth Circuit.

Second, defendants suggest that *Gonzaga* established "a general principle that excludes Spending Clause legislation from judicial enforcement." Part. Mot. to Dismiss at 20. Recognizing that *Gonzaga* did not overrule either *Wilder* or *Wright*, they suggest that these cases

[32] Defendants also suggest that the fact that a State could include within the broad confines of its Medicaid program certain services for which federal reimbursement is not available somehow undermines plaintiffs' ability to establish a federally-protected right regarding any aspect of the State's Medicaid program, including those for which it receives federal funding. While the provision by a State of non-mandatory medical assistance under its Medicaid plan with state-only funds might exempt that portion of its Medicaid program from federal judicial review, *see Rosado*, 397 U.S. at 420, those provisions of a State's Medicaid program, both mandatory and optional, for which it receives federal funds, must comply with the requirements of the Medicaid Act. *Wilder*, 496 U.S. at 502: *S.D.*, 391 F.3d at 585-86. Because plaintiffs' claims only concern Medicaid services for which defendants receive federal financial assistance, defendants' assertions regarding solely state-funded services have no bearing on the private cause of action analysis.

represent ―narrow exceptions" to the general rule, implying that they should be limited to their particular facts. However, if *Gonzaga* had established such a general rule, it would have been unnecessary for that Court to have engaged in the detailed analysis of the specific statutory provision in FERPA to determine if it contained sufficient ―rights creating" language.[33] *Gonzaga*, 536 U.S. at 287-89. The *Gonzaga* Court also would not have cited *Blessing* with approval, for *Blessing* explicitly recognized that Spending Clause legislation can be privately enforced pursuant to § 1983. *Blessing*, 520 U.S. at 345-46.

Not only is this Spending Clause exclusion argument not supported by Supreme Court precedent, it has also been rejected by the Fifth Circuit. In *Frazar v. Gilbert* the Fifth Circuit was confronted with, and explicitly rejected, the argument that ―the Medicaid Act, as legislation enacted pursuant to the Spending Clause, was not the supreme law of the land under the Supremacy Clause and therefore the *Ex Parte Young* exception to Eleventh Amendment state immunity was inapplicable." 300 F.3d 530, 550 (5th Cir. 2002), *rev'd sub nom on other grounds, Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004). Noting that this very argument had been rejected by the Sixth Circuit in *Westside Mothers v. Haveman*, 289 F.3d 852, 859-60 (6th Cir. 2002), the *Frazar* Court held that ―[f]or purposes of the Supremacy Clause and *Ex Parte Young*, the mandates set out in [the] Medicaid statute are more than contractual, they are federal law." *Frazar*, 300 F.3d at 550. The First and Fourth Circuits also have rejected this same contention. *Antricam v. Odom*, 290 F.3d 178, 188 (4th Cir. 2002) (noting that this ―novel argument is . . . at odds with binding precedent"); *Rosie D. ex rel. John D. v. Swift*, 310 F.3d 230, 235-38 (1st Cir. 2002).

[33] There is no question that FERPA is Spending Clause legislation.

More significantly, in *S.D.*, the Fifth Circuit held that various provisions of the Medicaid Act are privately enforceable. 391 F.3d at 602-06. There is simply no way to reconcile *S.D.* with defendants' assertion that, post-*Gonzaga*, no provisions of the Medicaid Act (or any other Spending Clause legislation) are privately enforceable. *See also Johnson*, 442 F.3d at 366 (concluding post-*Gonzaga* that a provision of the National Housing Act was privately enforceable).

In addition to being foreclosed by binding precedent, defendants' argument is also directly contrary to the clearly expressed intent of Congress. As the Supreme Court has made clear, the *Blessing* test, as clarified by *Gonzaga*, "focuses on congressional intent." *Blessing*, 520 U.S. at 341 Following *Suter v. Artist M.*, 503 U.S. 347, 358-59 (1992), in which the Court suggested that a provision's inclusion as a state plan requirement was a factor weighing against a finding that it created an enforceable right, Congress enacted 42 U.S.C. § 1320a-2. This statute provides that "[i]n an action brought to enforce a provision of [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." Congress explained that "[t]he intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in the federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.*" H.R. Conf. Rep. 103-761 at 926, *reprinted in* 1994 U.S.C.C.A.N. 2901, 3257; *see also S.D.*, 391 F.3d at 603 (relying on § 1320a-2 to find the EPSDT provision of the Medicaid Act created an enforceable right).

Defendants' contention that the Medicaid Act does not create rights, thereby insulating their illegal conduct from any judicial review, is not only novel, but contrary to

established Supreme Court and Circuit Court precedent[34] and the expressed intent of Congress. It must be rejected.

3. The Nursing Home Reform Amendments to the Medicaid Act Are Privately Enforceable.

a. The Language Chosen By Congress Demonstrates that the NHRA Is Privately Enforceable.

In enacting the NHRA, Congress sought to stem the inappropriate placement of individuals with developmental disabilities into nursing facilities that are unable to provide them with needed treatment and insisted that States ensure that those admitted to such facilities receive active treatment. It clearly used "rights- and duty-creating" language in doing so. *Gonzaga*, 536 U.S. at 284 n.3.

With respect to the preadmission screening and resident review requirements of the NHRA, Congress explicitly identifies the intended beneficiaries of this provision as "mentally ill and mentally retarded individuals" in nursing facilities. *See* 42 U.S.C. § 1396r(e)(7)(A)(i). The section imposes a clear duty on "the State," using the mandatory terms "must have" and "responsibility to have . . . or to perform" to describe the nature of the obligation imposed.[35] *Id*. This subsection creates a right of every person with developmental

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[34] *Rolland*, 318 F.3d 42 (§ 1396r(e)(7)); *Rabin v. Wilson-Coker*, 362 F.3d 190 (2d Cir. 2004) (§ 1396r-6); *Grammar v. John J. Kane Regional Ctrs.-Glen Hazel*, 570 F.3d 520 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1524 (2010) (§§ 1396r(b) & (c)); *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007) (§ 1396a(a)(8)); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (§ 1396a(a)(43)); *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 457-58 (7th Cir. 2007) (§ 1396a(a)(8)); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1015 (8th Cir. 2006), *vacated in part, on other grounds sub nom, Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007) (§§ 1396a(a)(30)(A) & 1396d(a)(13)); *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006) (§ 1396a(a)(10)); *Ball*, 492 F.3d 1094 (§§ 1396n(c)(2)(C) & (d)(2)(C)); *Okla. Chapter of Am. Academy of Pediatrics v. Fogarty*, 472 F.3d 1208, 1212 (10th Cir. 2007) (assuming that § 1983 provides cause of action to privately enforce §§ 1396a(a)(8), 1396a(a)(10)(A), 1396d(a)(4)(B), and 1396d(r)).

[35] Subsection (e)(7)(A)(i) also cross references to subsection (b)(3)(F), which specifically provides that a nursing facility cannot admit an individual with mental retardation "unless the *State mental retardation or developmental disability authority has determined* . . . that, because of the physical and mental condition of the individual, the individual requires the level of services provided by a nursing facility, and, if the individual requires such level of services, whether the individual requires specialized services . . . ." 42 U.S.C. § 1396r(b)(3)(F)(ii). The cross

disabilities to a pre-screening assessment prior to nursing facility admission. Rather than the aggregate focus of the FERPA provision at issue in *Gonzaga*, these provisions have an unmistakable focus on the individual and use mandatory, not precatory, language to describe the State's obligations.

With respect to assessment of the resident's need for specialized services, the NHRA creates a similar, individually-focused and mandatory obligation.[36] The unmistakably individual focus of this provision is evident from the phrase, "in the case of each resident of a nursing facility who is mentally retarded." It continues to focus on the individual throughout, referring to "the *resident's* physical and mental condition," "whether or not *the resident* requires specialized services," "with respect to a . . . mentally retarded *resident*," and "significant change in the *resident's* physical or mental condition." The mandatory nature of the obligation imposed upon the State is equally clear and unambiguous: "the State mental retardation . . . authority *must* review and determine . . . ," and "[a] review and determination . . . *must be conducted* promptly."[37]

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reference to subsection (b)(3)(F) makes clear that it is the State's responsibility to ensure that individuals with mental retardation are properly screened prior to admission.

[36] Subsection (e)(7)(B), entitled "State requirement for resident review," mandates:

> (ii) For mentally retarded residents
>
> … in the case of each resident of a nursing facility who is mentally retarded, the State mental retardation or developmental disability authority must review and determine (using any criteria developed under subsection (f)(8) of this section)--
>
> (I) whether or not the resident, because of the resident's physical and mental condition, requires the level of services provided by a nursing facility or …an intermediate care facility . . . ; and
>
> (II) whether or not the resident requires specialized services. . . .

[37] That the obligation placed upon the State to conduct such reviews is obligatory is further reinforced by subdivision (iv) which prohibits the "State mental retardation authority" or the "State" from "delegate[ing] (by subcontract or otherwise) their *responsibilities* under this subparagraph…." (emphasis added).

Contrary to defendants' conclusory assertions that the focus of these provisions is on the "nursing homes—not the nursing home residents," Part. Mot. to Dismiss at 25-26, a plain reading of the text of the statute reveals the contrary. Indeed, the Second Circuit considered this very issue, and held that "[i]t is clear from the plain language of this provision that it was not intend[ed] to benefit the putative plaintiff[s]'—here the health care providers. Rather, the provision is obviously intended to benefit Medicaid beneficiaries." *Concourse Rehab. & Nursing Ctr. Inc. v. Whalen*, 249 F.3d 136, 143-44 (2d Cir. 2001) (internal citation omitted).

Finally, with respect to the mandatory obligation to provide specialized services, and the corollary right of a nursing facility resident with developmental disabilities to receive specialized services, the NHRA clearly focuses on the individual residents who are the intended beneficiaries of these mandatory services. Section 1396r(e)(7)(C) details the steps that the State must take in response to the preadmission screening and resident review. Like the two sections discussed above, it begins with a mandatory command, "the State *must* meet the following *requirements*." *Id.* It then requires that "in the case of a *resident* . . . who is determined . . . to require specialized services . . . the State *must* . . . inform the *resident* [of alternatives] . . . , offer the *resident* [choices] . . . , and "regardless of the *resident's* choice [of setting], *provide for* . . . such specialized services." 42 U.S.C. § 1396r(e)(7)(C)(i) (emphasis added); *see also* § 1396r(e)(7)(C)(ii). The repeated references to "the resident" make clear the individualized focus of the provision. The repeated use of the word "must" to describe the State's obligations to inform the resident of his or her alternatives and to provide specialized services again utilizes the mandatory textual language that establishes an enforceable right under the *Wilder / Blessing / Gonzaga* test.

b. The Secretary's Regulations Further Demonstrate that the NHRA Is Privately Enforceable.

The regulations further confirm that the statute creates enforceable rights in nursing facility residents with developmental disabilities to preadmission screening, resident review, and specialized services. While it is true that regulations, standing alone, cannot create rights enforceable under § 1983, *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001), it is equally true that where Congress has explicitly delegated substantive authority to the Secretary of an administrative agency to promulgate regulations in a particular area, those regulations are entitled to "legislative effect." *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Wis. Dep't of Health & Human Servs. v. Blumer*, 534 U.S. 473, 497 n.13 (2002) ("[w]e have long noted Congress' delegation of extremely broad regulatory authority to the Secretary in the Medicaid area"); *Sandoval*, 532 U.S. at 284 (listing cases in which the Court has enforced validly promulgated regulations interpreting statutory provisions). Congress, at numerous points in section 1396r, explicitly delegated substantive authority to the Secretary regarding preadmission screening, resident review, and specialized services. Section 1396r(e)(7)(A)(i) provides that preadmission screening must be conducted "using any criteria developed under subsection (f)(8)."[38] Section 1396r(e)(7)(B) similarly requires that resident reviews conform to "criteria developed under subsection (f)(8)." Section 1396r(e)(7)(G)(iii) explicitly provides that "[t]he term 'specialized services' has the meaning given such term by the Secretary."

In reliance upon the specific rulemaking authority conferred by this statute, the Secretary has issued regulations authoritatively construing the provisions of the NHRA at issue here. As instructed by Congress, the PASARR regulations define "specialized services" as the

[38] Section 1396r(e)(7)(f)(8) gives the Secretary authority to establish minimum criteria for States to use in making determinations under subsections (b)(3)(F) and (e)(7)(B) and to monitor state compliance with respect to State obligations under (e)(7)(C)(ii).

equivalent of active treatment in ICF/MRs. 42 C.F.R. § 483.120(a). They establish criteria for preadmission screening and specialized services and require States to comply with them, in fulfillment of the Congressional instruction at §§ 1396r(f)(1) and (8) for the Secretary to establish and enforce criteria that ensure that the care in nursing facilities is adequate to protect the health, safety and welfare of residents. 42 C.F.R. §§ 483.104 - 483.136. Like the regulations favorably referenced by the Supreme Court in *Sandoval*, 532 U.S. at 284, the Secretary's mandate to the State to provide nursing facility residents with developmental disabilities with preadmission screening, resident review, and specialized services both construes Congress's intent and enforces Congress's purpose to create enforceable rights.

Like the statute, the PASARR regulations use mandatory language to require the provision of screening and resident review, and to guarantee specialized services to all nursing facility residents with developmental disabilities who have been assessed to need them.[39] With respect to preadmission screening, they provide that the State mental retardation authority "must determine" whether the individual requires care in a nursing facility and, if so, if he or she requires specialized services. 42 C.F.R. § 483.112(a). The State must ensure that the individual receives written notice of the determination.[40] *Id.* § 483.128(a). The State must use evaluation criteria prescribed by the Secretary. *Id.* § 483.128(e). The State "must provide for or arrange for the provision of specialized services . . . to all NF residents with . . . MR" who need them. *Id.* § 483.120(b). The State must give assurances that specialized services are, in fact, provided. *Id.* § 483.130(n). This regulatory implementation of Congressional intent is entitled to significant

[39] As the *Sandoval* court recognized, "When a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable." 532 U.S. at 291.

[40] *See also* § 483.106(a) ("[t]he State PASARR program must require (1) preadmission screening of all individuals with . . . mental retardation who apply as new admissions to Medicaid NFs").

weight, as the Supreme Court emphasized: "[s]uch regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. *Sandoval*, 532 U.S. at 284 (internal citations omitted).

c. Applicable Caselaw Further Confirms That The NHRA Is Privately Enforceable.

In light of the strong textual and other indicia of congressional intent to create enforceable rights regarding the preadmission screening and resident review provisions of the NHRA, it is hardly surprising that the two Circuit Courts of Appeal that have considered the question have found that the NHRA does contain the requisite mandatory, rights-creating language needed for private enforcement pursuant to § 1983. In a case raising claims virtually identical to those raised here, the First Circuit held, post-*Gonzaga,* that the provisions of the NHRA provide rights enforceable by § 1983. *Rolland*, 318 F.3d at 51-56. The First Circuit analyzed the text of the statutory provisions in light of the overall framework of the NHRA, its legislative history, and the Secretary's interpretation, as evidenced by the PASARR regulations. *Id.* at 51-52. The Court then turned to the *Wilder / Blessing / Gonzaga* test. Noting that the "[t]he NHRA speaks largely in terms of the persons to be benefited, nursing home residents," the Court easily found that the first prong of the three part test was met. *Id*. at 53.

Turning to the second prong, whether the right to specialized services is too vague and amorphous to be judicially enforceable, the Court concluded that that the statutory provision, in conjunction with the Secretary's regulations, provided "contextual guidance . . . sufficient to allow residents to understand their rights to services, States to understand their obligations, and

courts to review the State's conduct in fulfilling those obligations."[41] *Id.* at 54. The *Rolland* court also had no difficulty finding that the rights asserted under § 1396r(e)(7) "unambiguously bind states," noting the frequent and repeated use of the word "must" to denote the State's obligations. *Id.* at 55.

More recently, the Third Circuit also has considered whether the NHRA creates rights enforceable by § 1983. In *Grammer*, 570 F.3d 520, the Court held that the NHRA creates rights enforceable under § 1983 against a state-operated nursing facility. Contrary to defendants' suggestion that nursing facilities, not nursing facility residents, are the focus of the NHRA, the Third Circuit found that "[t]here is no question that the statutory provisions under which Grammer raises her claims meet the first *Blessing* factor. As both a Medicaid recipient and a nursing home resident, Grammer's mother was an intended beneficiary of 42 U.S.C. § 1396r." *Id*. at 527. Like the First Circuit, the Third Circuit, in reliance upon the repeated use of such phrases as "must provide," "must maintain" and "must conduct," easily concluded that the rights asserted were neither vague and amorphous nor precatory, thereby satisfying the second and third of the *Blessing* factors. *Id.* at 528. The *Grammer* Court also engaged in an extensive analysis of the impact of *Gonzaga* on its cause of action analysis. Because "[t]he FNHRA are replete with rights-creating language" and "use the word 'residents' throughout . . . in such a way as to stress that these 'residents' have explicitly identified rights," the Court easily concluded that "viewing the terms of the FNHRA . . . through the lens of *Gonzaga Univ.*, we hold that Congress did use rights-creating language sufficient to unambiguously confer individually enforceable rights." *Id.* at 529, 531.

[41] The Court relied in part on the Supreme Court's decision in *Lividas v. Bradshaw*, 512 U.S. 107, 134 (1994), holding that even if the right asserted is "not provided in so many words in the NLRA, [it is] immanent in its structure." Just as the *Lividas* Court found the right at issue to be inherent in the statutory scheme, so too the *Rolland* Court found that "petitioner's rights were sufficiently manifest in the statute's structure to avoid being vague and amorphous." 318 F.3d at 54.

While the Fifth Circuit has not directly addressed the issue of whether 42 U.S.C. § 1983 provides a cause of action for claims pursuant to the NHRA, it did "assume, without deciding" that the NHRA is privately enforceable. *Grant ex rel Family Eldercare v. Gilbert*, 324 F.3d 383, 387 n.5 (5th Cir. 2003) (citing with approval *Rolland*, 318 F.3d at 51-56, and *Martin v. Voinovich*, 840 F. Supp. 1175, 1197-1201 (S.D. Ohio 1993)). In addition to *Martin,* which held that § 1983 provides a cause of action for nursing facility residents to enforce the PASARR provisions of § 1396r against the state officials responsible for compliance, several other district courts have also reached the same conclusion. *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 294-304 (S.D.N.Y. 2008); *Tinder v. Lewis Cnty. Nursing Home Dist.*, 207 F. Supp. 2d 951, 954-55 (E.D. Mo. 2001); *Soto v. Lene*, No. 11-CV-0089 SLB LB, 2011 WL 147679, at *2 (E.D.N.Y. Jan. 18, 2011) ("[T]he NHRA creates rights that are presumptively enforceable through § 1983.").[42]

Based upon a careful analysis of the specific provisions of the NHRA at issue in this case, informed by the legislative history and structure of the Act, reinforced by the Secretary's authoritative regulatory interpretation, and supported by a consistent and convincing line of judicial authority, plaintiffs have asserted rights under the PASARR provisions of the NHRA that are privately enforceable against defendants pursuant to § 1983.

[42] Defendants cite to four district court decisions that found no private right of action for damages under the NHRA to enforce the nursing facility "quality of care" requirements of the Act and regulations. Part. Mot. to Dismiss at 29 n.25. All of these cases involved damage claims against private nursing facilities which were not state actors, and, therefore, not subject to suit under 42 U.S.C. § 1983. They fail to cite, much less discuss, the numerous cases referenced above which have found the provisions of the NHRA enforceable pursuant to § 1983. The one case they do cite, *Joseph S.*, is discussed only as to its statute of limitations analysis, not its holding that the NHRA is privately enforceable.

4. The Reasonable Promptness Provision of the Medicaid Act Is Privately Enforceable.

Defendants' sole argument regarding the enforceability of the reasonable promptness provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(8), is focused not on whether the provision is privately enforceable under 42 U.S.C. § 1983, but rather whether certain waiver services are covered by it.[43] It is not surprising that defendants do not dispute that § 1396a(a)(8) is privately enforceable, for every circuit that has considered the question has concluded that it is.[44] There is no serious question that § 1396a(a)(8) is privately enforceable, and defendants' Partial Motion to Dismiss does not assert otherwise.

5. The Comparability Provision of the Medicaid Act Is Privately Enforceable.

As with the reasonable promptness provision, defendants do not appear to challenge the private enforceability of the comparability provision, § 1396a(a)(10)(B), but rather its applicability to the facts of this case.[45] This is understandable because the Fifth Circuit in *S.D.*, 391 F.3d at 602-07, specifically held that § 1396a(a)(10)(A) is privately enforceable, and in *Blanchard v. Forrest*, 71 F.3d 1163, 1167-69 (5th Cir. 1996), that § 1396a(a)(10)(B) is

[43] Of course, the question of whether a particular waiver service is or is not being provided with reasonable promptness to eligible individuals runs to the merits of the claim, not whether plaintiffs have stated a claim, and certainly not whether the provision is privately enforceable under § 1983.

[44] *Kidd*, 501 F.3d at 356-57; *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 183 (3d Cir. 2004) (holding that an analysis based upon *Gonzaga*, *Blessing*, and other cases ~~c~~ompels the conclusion that the provisions invoked by plaintiffs—42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10), and 1396d(a)(15)—unambiguously confer rights vindicable under § 1983"); *Bryson v. Shumway*, 308 F.3d 79, 88-89 (1st Cir. 2002); *Chiles*, 136 F.3d at 714; *Haveman*, 289 F.3d. at 863; *Lewis*, 261 F.3d at 976-77.

[45] As the *Lewis* Court explained, the cause of action issue is answered by determining whether plaintiffs *may* be entitled to relief under the relevant statutory provision. The question of whether they *are* entitled to relief requires ~~a~~ more complicated analysis of the Medicaid statutes . . . more appropriately reserved for resolution on the merits of the case. 261 F.3d at 977.

enforceable.[46] Therefore, the comparability provision of the Medicaid Act provides plaintiffs with rights enforceable pursuant to § 1983.

6. The Freedom of Choice Provision of the Medicaid Act Is Privately Enforceable.

Defendants assert that § 1396n(c)(2)(C) is not phrased in terms of the persons benefited and therefore creates no privately enforceable rights for individuals with developmental disabilities who are at risk of institutionalization. Part. Mot. to Dismiss at 32-33. However, an examination of the actual text of the freedom of choice provision demonstrates that it is indeed individually focused and intended to benefit individuals who are at risk of institutionalization in a nursing facility.

The section's repeated references to "such individuals" makes clear that the obligations imposed upon the State are phrased in terms of the persons benefited. As the Ninth Circuit recently explained, in concluding that § 1396n(c)(2)(C) confers rights privately enforceable under § 1983, the language of the provision:

> satisfies the "rights creating" standard set forth in *Gonzaga*, and thus clears the first hurdle of the *Blessing* framework. . . . [T]he free choice provisions are focused on the rights owed to HCBS-eligible Medicaid recipients, as evinced through their repeated use of the word "individuals" and their specific articulations of the entitlements guaranteed—in this instance, the right to be informed of alternatives to traditional, institutional care and the right to choose from among those options.

Ball, 492 F.3d at 1109. The *Ball* Court expressly distinguished § 1396n(c)(2) from statutes at issue in cases such as *Blessing* and *Gonzaga*, noting specifically that the freedom of choice provisions

[46] The two subsections are very similar and often treated as a unitary statutory provision for § 1983 cause of action purposes. If anything, subsection (B) has a more individualized focus than subdivision (A).

> [s]eek to guarantee that *individual* patients are informed of noninstitutional care options and that *individual* patients retain the right to make a choice based on this information. And unlike the plaintiffs seeking to sue under the ~~"s~~substantial compliance" provisions discussed in *Blessing* and the ~~"p~~olicy or practice" provision in *Gonzaga*, the HCBS-eligible Medicaid recipients who comprise the plaintiff-class here are not simply cogs in a grander statutory scheme. If that were the case, then Congress would have just enacted a barebones HCBS program . . . and stopped there. There would be no need for Congress also to enact provisions mandating that participating states keep *each* eligible Medicaid recipient apprised of these non-institutional care options and afford *each* the opportunity to choose how to live.

Id. at 1111 (emphasis in original); *see also Wood v. Tompkins*, 33 F.3d 600 (6th Cir. 1994) (§ 1396n(c)(2) privately enforceable); *Michelle P. ex rel. Deisenroth v. Holsinger*, 356 F. Supp. 2d 763, 769 (E.D. Ky. 2005) (noting "~~in~~dividually focused terminology"); *Cramer*, 33 F. Supp. 2d at 1351 (disabled Medicaid recipients are "~~in~~tended beneficiaries"). Indeed, even the one case that defendants cite recognized that § 1396n(c)(2) creates enforceable rights under § 1983 for individuals at risk of institutionalization when waiver slots are available. *McCarthy*, slip op. at 13-14.[47]

Defendants' alternative argument—that the structure of the provision, mandating that the Secretary not grant a waiver unless the State provides assurances that it will inform all individuals at risk of institutional care of the feasible alternatives to such a placement, renders it unenforceable—is equally untenable. The Supreme Court rejected this very argument that required assurances cannot form the basis of an enforceable obligation. *See Wilder*, 496 U.S. at 513-14 ("~~W~~We reject that argument because it would render the statutory requirement of findings and assurances . . . essentially meaningless).

[47] Because nursing facility residents with developmental disabilities are able to access the CLASS and CBA waivers under the MFP program irrespective of the waiting list, even under defendants' interpretation of *McCarthy* they have a cause of action. In any event, the feasibility of alternatives goes to the merits of the claim, not the private enforceability of the statutory provision. *Michelle P.*, 356 F. Supp. 2d at 769.

The argument also has also been rejected by both the Sixth and Ninth Circuits. *Ball*, 492 F.3d at 1112; *Wood*, 33 F.3d at 608. Relying upon 42 U.S.C. § 1320a-2 and the Fifth Circuit's decision in *S.D.* applying that provision, the Ninth Circuit explained that

> the role § 1396n(c)(2)(C) . . . play[s] in delineating the mandatory contents of a state HCBS plan cannot detract from or override the otherwise clear "rights-creating" language Congress used in enacting the free choice provisions. To do so would be to ignore Congress's directive in the "Suter fix" statute [§ 1320a-2] that courts abjure reliance on that consideration.

Ball, 492 F.3d at 1112. Similarly, the Sixth Circuit, in reliance on *Wilder*, stated:

> as regards § 1396n(c)(2)(A), it would make little sense for Congress to require a participating state to assure in its Medicaid plan that it will protect the health and welfare of home care recipients, without also requiring that the state actually implement the promised safeguards

Wood, 33 F.3d at 608.

Section 1396n(c)(2)(B) imposes mandatory and enforceable obligations on defendants both to inform individuals with developmental disabilities who are at risk of institutionalization in nursing facilities of their alternatives to nursing facility care and to provide them with a choice between care in a nursing facility or in an alternative setting.[48] Based upon the individual focus and mandatory nature of the obligations imposed upon defendants by § 1396n(c)(2)(B), as interpreted by two Circuit Courts, this Court should find that the freedom of choice provision is privately enforceable pursuant to § 1983.

C. Plaintiffs Have Standing to Assert a Claim Under the Freedom of Choice Provision of the Medicaid Act

Defendants argue that the named plaintiffs do not have standing to pursue their claims under 42 U.S.C. § 1396n(c)(2)(C) because most have not applied for waiver services, and

[48] Defendants assertion that § 1396n(c)(2)(C) imposes no binding obligation on Texas because there are currently no openings for waiver services in the HCS waiver program does not speak to the enforceability of the provision, but rather whether plaintiffs have stated a claim thereunder. *See* section II(D), *supra.*

the one individual who did, Benny Holmes, had a waiver slot available to him. Part. Mot. to Dismiss at 11-12. The standing of the institutional plaintiffs to pursue this claim is not challenged.

There are three elements to standing: injury in fact; causation, and redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Plaintiffs have alleged in the Complaint that they have been denied their right to make a meaningful choice between institutional and community-based services due to defendants' failure to inform them of the services, supports and programs that would have enabled them to reside in the most integrated setting. Compl. ¶¶ 143, 152, 161, 174, 186, 205, & 227. All of the individual plaintiffs would prefer to reside in the community. *Id.* ¶¶ 144, 162, 176, 194, & 207. However, they and other Medicaid-eligible individuals with developmental disabilities clearly cannot *apply* for a waiver or other services that might provide an alternative to institutionalization if they do not have *knowledge* of those options. The obvious purpose of § 1396n(c)(2)(C) is to ensure that individuals with developmental disabilities, like plaintiffs, are advised of those options. Because plaintiffs were entitled to receive such information, but did not, they all have satisfied the ~~"in~~injury in fact" prong of the standing test. As the Supreme Court stated, ~~"a~~ plaintiff suffers an "injury in fact' when the plaintiff fails to obtain information which must be . . . disclosed pursuant to a statute." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *see also Grant*, 324 F.3d at 387. Plaintiffs' allegations that Texas state officials fail to provide them with information about waiver and other services that might enable them to avoid institutional placement or reduce the time spent in a nursing facility clearly satisfies the ~~"in~~injury in fact" requirement.

Causation is also satisfied, as plaintiffs allege that, because of defendants' failure to provide them with the statutorily-required information, "class members who would prefer to reside in a . . . more integrated community placement are not even aware that they may be eligible for community-based services . . . or how to apply for such services." Compl. ¶ 97. Redressability is similarly straight forward, as plaintiffs seek injunctive relief requiring defendants to provide them with the required information so that they can make an informed choice among the various alternatives that may be available to them. *Id.* Prayers for Relief, ¶ 2(f).

Defendants' standing argument regarding five of the six named plaintiffs is predicated entirely upon the statements in *Grant* that only persons who have applied for waiver services are entitled to information about those services. Part. Mot. to Dismiss at 11. However, those statements in *Grant* were *dicta*,[49] containing little analysis of the structure or purpose of § 1396n(c)(2)(C). 324 F.3d. at 388. They place the proverbial cart before the horse in two distinct respects. First, the interpretation of federal statutory law is distinct from the standing inquiry. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (standing exists if the right to recover "will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another"). "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id*. at 101-02. Yet that is precisely what the *Grant* court did. By pronouncing upon the meaning of § 1396n(c)(2) when it had determined that the underlying controversy was moot, the *Grant* court acted in excess of its authority, and its interpretation of the statute should not be accorded any precedential effect.

[49] The court dismissed Grant's appeal as moot because he began receiving waiver services before the appeal was heard. *Grant*, 324 F.3d at 386.

Second, because the *Grant* court's interpretation of § 1396n(c)(2)(C) was *dicta*, it does not carry any binding effect. *Poche v. Tex. Air Corps, Inc.*, 549 F.3d 999, 1003 (5th Cir. 2008) ("statements in . . . cases . . . unnecessary to their holdings . . . constitute[ ] only non-binding dicta"). Based upon both *Steel Co.* and *Poche*, the statements in *Grant* are non-binding and of no precedential effect.

In addition, the *Grant* court's reading of § 1396n(c)(2) does not stand up to careful analysis. As the text of the freedom of choice provision makes clear, the State must provide "with respect to individuals who . . . (iii) *may be eligible* for such home or community-based care under such waiver, for an evaluation of the need for . . . nursing facility services." § 1396n(c)(2)(B) (emphasis added). Subsection (C) then requires the State to ensure that "such individuals who are determined to be likely to require the level of care provided in a . . . nursing facility . . . are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals." When the "may be eligible" language of § 1396n(c)(2)(B)(iii) is read in conjunction with the "such individuals" language in § 1396n(c)(2)(C), it becomes clear that the information required to be provided must include information about waivers that an individual may be eligible for, not just those for which the individual has already applied. The notion that only those who already know about and have applied for waiver services can be informed about them simply makes no sense. *See Rolland*, 52 F. Supp. 2d at 241 (freedom of choice provision encompasses notifying individuals at risk of nursing facility placement of the existence of waiver services for which they may be eligible). The named plaintiffs, none of whom were informed about available alternatives to nursing facility care, all have standing to pursue their claims under § 1396n(c)(2). Indeed, defendants' own regulations require them to provide individuals applying for admission to nursing facilities with information about available alternatives to institutional

care and if the individual selects ~~a~~n option that is not immediately available for any reason, the agency must provide assistance in placing the client's name on a waiting list for that option." 1 Tex. Admin. Code § 351.15(b).

Furthermore, as defendants acknowledge, one of the named plaintiffs, Benny Holmes, had applied for a HCS waiver and, therefore, falls within even the *Grant* court's position on standing. Defendants assert that because he was twice placed in the HCS waiver program and currently has an HCS placement, as a matter of law he has suffered no injury in fact.[50] Part. Mot. to Dismiss at 12. However, as the Complaint makes clear, Mr. Holmes spent two years unnecessarily institutionalized in a nursing facility because he was not advised of the feasible alternatives to that nursing facility admission that were available to him under the waiver, as required by § 1396n(c)(2)(C). Compl. ¶¶ 187-198. Two years of needless and inappropriate institutionalization clearly constitutes a sufficient "~~in~~jury in fact" for standing purposes.

Finally, defendants' standing argument does not challenge the standing of the two institutional plaintiffs, the ARC of Texas and the Coalition of Texans with Disabilities, to raise this claim. These organizations have standing to assert the freedom of choice provision on behalf of their members. Thus, the claim survives regardless of any determination of the standing of any of the individual plaintiffs.

D. The Governor Is a Proper Party In this Case

Defendants seek to dismiss Rick Perry, the Governor of the State of Texas, as a party in this litigation. They argue that dismissal is appropriate because: (1) plaintiffs lack

[50] Defendants argue that Mr. Holmes does not have standing because he knew about the HCS waiver and was determined eligible for a slot, while arguing that the other named plaintiffs do not have standing because they did not know about the waiver and did not apply for it. This Catch-22 approach to standing cannot withstand scrutiny.

standing to assert Medicaid claims against the Governor; (2) the Governor is immune from suit under the Eleventh Amendment to the United States Constitution; and (3) plaintiffs have failed to state a claim against the Governor under the Medicaid Act. Because plaintiffs have standing and have stated claims under the ADA, § 504 of the Rehabilitation Act, as well as under the Medicaid Act, and because the Governor lacks sovereign immunity with respect to these federal claims, he is a proper party in this case.

1. Plaintiffs Have Standing to Assert Their Claims Against the Governor.

Defendants contend that plaintiffs do not have standing because the Governor has no direct control over the implementation of Medicaid program and services, and lacks the power to redress plaintiffs' asserted injuries. Part. Mot. to Dismiss at 9-10. However, the Governor is a key player both with respect to control over the Executive Commission of Health and Human Services ("HHSC") and the Department of Aging and Disability Services ("DADS"), the two entities that defendants concede are appropriate parties in this case.

The Governor is the chief executive officer of the State of Texas. Relevant to the issues in this case, he appoints the Executive Commissioner of HHSC. Tex. Govt. Code Ann. § 531.005. The Executive Commissioner, subject to the approval of the Governor, appoints the Commissioner of DADS, who serves at the pleasure of the Executive Commissioner. Tex. Govt. Code Ann. § 531.0056. Furthermore, the Executive Commissioner serves for only a two year term, providing the Governor with the ability to replace him should the Governor disagree with any actions he has taken or failed to take, any policies he has implemented or failed to implement, or personnel he has appointed. Tex. Govt. Code Ann. § 531.007. This biennial appointment authority provides the Governor with substantial control over the operation of

HHSC and DADS, as well as the ultimate responsibility for ensuring that these agencies comply with federal law.

In addition to being the chief executive officer of the State, the Governor is the chief budget officer. Tex. Govt. Code Ann. § 401.041. In this capacity, he convenes and presides over budget hearings and compiles the biennial appropriations budget. Tex. Govt. Code Ann. §§ 401.043, 401.0045. He has the duty to ensure that his budget requests are adequate to ensure compliance with federal law and the protection of the rights of Texas citizens under those laws. He also has a line item veto over any appropriations bills. Tex. Const. Art. IV, § 14. Both through the budget which he submits to the legislature and his line item veto, the Governor wields substantial power over the budgets of both HHSC and DADS, a power which can be used to facilitate or thwart the provision of compliance with the ADA, § 504, and the Medicaid Act, including the provision of the very community services and supports that are necessary to fulfill Texas's obligations under these federal statutes. For defendants to assert that the Governor has no responsibility or ability to provide redress for the injuries that plaintiffs have suffered ignores the broad scope of influence and authority that the Governor possesses.

Defendants' reliance on the Fifth Circuit's *en banc* decision in *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) is misplaced. *Okpalobi* challenged the legality of a law enacted by the Louisiana legislature over which the Governor and Attorney General had no enforcement role or responsibilities. The act created a species of tort liability which patients could assert against providers. Because the two state officials sued did not have ~~an~~y duty or ability to do anything . . . to redress the injuries alleged," the sharply divided court found that plaintiffs lacked standing. *Id*. at 405, 427. However, contrary to the situation in *Okpalobi*, the injuries alleged here do not flow from the acts of purely private litigants, but rather from the acts of state

officials—officials whom the Governor has appointed (or whose appointment he has approved), whom he can replace, and who implement budgets that the Governor has submitted to the legislature and signed. The relief that plaintiffs seek will likely necessitate revisions to the budgets of both HHSC and DADS, revisions that the Governor can facilitate or thwart through his line item veto.

The Governor's involvement and control over HHSC and DADS, and his responsibility to ensure that these agencies properly fulfill their duties under the ADA, § 504, and the Medicaid Act, are more than sufficient to establish that he is an appropriate party to this action. *See K.P. v. LeBlanc*, 627 F.3d 115, 123-24 (5th Cir. 2010) (standing established where defendant ~~h~~has definite responsibilities relating to" the plaintiffs' claims); *Rolland*, 52 F. Supp. 2d at 243 (finding that the Governor's role in the budget process and appointment of agency heads was sufficient to establish standing in case raising claims virtually identical to those raised here).

2. The Governor Is Not Immune from Suit Under the Eleventh Amendment for Violations of Federal Law.

Defendants claim that this class action law suit against the Governor for violations of the Medicaid Act is barred by the State's Eleventh Amendment immunity. U.S. Const. amend. XI. According to defendants, because the Governor has no connection with or specific responsibility to enforce the Medicaid statute, sovereign immunity bars plaintiffs from holding the Governor liable for Medicaid Act violations.[51] Part. Mot. to Dismiss at 12. In support of this claim, defendants rely entirely on the plurality opinion in *Okpalobi*, 244 F.3d 405. However, on the Eleventh Amendment issue, the *Okpalobi* Court was evenly split, rendering that aspect of the

[51] As discussed more fully below, the Governor has no immunity from suit for claims brought under the ADA or § 504. Thus, defendants' sovereign immunity argument could not conceivably result in dismissing the Governor as a party. Moreover, the argument is little more than the standing argument discussed *supra* recast as an immunity defense.

decision ―not controlling authority for future Eleventh Amendment questions in this Circuit." *Id.* at 436 n.6 (Benavides, J, concurring in part and dissenting in part).

In a more recent opinion, *K.P.*, 627 F.3d at 124, the Fifth Circuit again addressed the Eleventh Amendment issue over which the *Okpalobi* court was unable to garner a majority. The *K.P.* court first noted that ―[t]he fact that the state officer, by virtue of his office, has _*some connection*' with the enforcement of the act is the important and material fact." *Id*. at 124 (emphasis added) (quoting *Ex Parte Young*, 209 U.S. 123, 157 (1908)). It then rejected the defendants' assertion, based on *Okpalobi*, that there needs to be a ―special' relationship – not just _some connection'" between the defendants and plaintiffs' injury under *Ex Parte Young.* Concluding that the defendants in *K.P.* had ―some enforcement authority," the court found that they had ―the requisite connection with [the statute] to fall within the *Ex Parte Young* exception." 627 F.3d at 125.

Here, the Governor clearly has more than just ―some connection" with the implementation and enforcement of the Medicaid statute and a very direct connection with the enforcement of the ADA and § 504, pursuant to which the State of Texas receives considerable federal funding. As described above, Governor Perry is responsible for directing, supervising, and controlling the executive departments of state government, for submitting a Medicaid State Plan and developing *Olmstead* plans, and for requesting funds from the legislature for executive agencies so that Medicaid and other state programs can be implemented and services provided in a manner that is consistent with federal law.[52] Compl. ¶¶ 22 & 133; Tex. Govt. Code Ann.

[52] Indeed, this statutory and legislative authority enables the Governor – along with the Legislative Budget Board – to direct the transfer of Medicaid funds when program appropriations are insufficient to meet the expenditure requirements mandated by either state or federal law. *See Cmty. Health Choice, Inc., v. Hawkins,* 328 S.W.3d 10, 15 (Tex. App.—Austin 2010, no pet.) (funds allocated by the legislature to HHSC for Medicaid are a non-specific appropriation; as a result, when Medicaid appropriations are insufficient to meet expenditures that either state or federal law mandate, the Governor and the Legislative Budget Board are authorized to direct the transfer of sufficient amounts of funds to HHSC from Medicaid appropriations made elsewhere).

§§ 401.0445 & 531.0056. In fact, the Governor has issued several executive orders specifically designed to promote community integration of persons with disabilities and to enforce the ADA's integration mandate. *See* Tex. Gov. Exec. Order No. RP 13 (Apr. 18, 2002), 27 Tex. Reg. 3647; Tex. Gov. Exec. Order No. GWB 99-2 (Sept. 28, 1999), 25 Tex. Reg. 1820.

Just as in *K.P.*, the Governor has ~~"t~~he requisite connection [with the Medicaid program, and the implementation of the ADA and § 504] to fall within the *Ex Parte Young* exception" to the Eleventh Amendment. *See K.P.*, 627 F.3d at 125.

3. Plaintiffs Have Stated a Claim Against Governor Rick Perry.

Defendants incorrectly claim that plaintiffs have failed to state a claim against Governor Perry under Rule 12 (b)(6). Part. Mot. to Dismiss at 15.[53] Defendants' argument for dismissing the complaint is based on a general claim: that Governor Perry has no responsibility under federal law for providing the relief that plaintiffs request. *Id.* However, in light of the fact that courts are obligated to look only at the pleadings and to consider factual allegations in the complaint as true, there is no basis under Rule 12(b)(6) for dismissing the Governor with respect to any of the legal claims asserted in this case.

a. The Governor is a ~~"P~~ublic Entity" for Purposes of Title II of the ADA and Section 504.

Defendants claim that ~~"a~~s a matter of law, Governor Perry is not a _public entity' within the meaning of Title II of the ADA." Part. Mot. to Dismiss at 16. Defendants acknowledge that the other state officials sued in this case may be appropriate defendants under Title II of the ADA when sued in their official capacities, including the Commissioners of HHSC and DADS. However, without citation of any authority, they assert that: (1) the Governor is not

[53] Defendants also contend plaintiffs' claims should be dismissed under Rule 12(b)(1) based on their lack of standing. Because plaintiffs address that argument in section III(D)(1), *supra,* this section will focus on defendants' argument for dismissal under Fed. R. Civ. P. 12(b)(6). Further, defendants do not claim that plaintiffs lack standing to sue Governor Perry under either the ADA or Section 504. Part. Mot. to Dismiss at 42.

a state official under Title II of the ADA; or (2) that a Governor cannot be sued in his or her official capacity for prospective injunctive relief under the ADA. *Id.* Neither assertion can withstand scrutiny under established federal law.

In *McCarthy el rel. Travis v. Hawkins*, 381 F. 3d. 407, 414 (5th Cir. 2004), the Fifth Circuit held that an *Ex Parte Young* suit could be brought under Title II of the ADA against public officials in their official capacity. In reaching this result, the *McCarthy* Court relied upon *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), in which the Supreme Court explained that ~~"a~~n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity . . . for the real party in interest is the entity." Because the ADA specifically includes a State as a ~~"p~~ublic entity," 42 U.S.C. § 12131(1)(A), and the Governor is the chief executive officer of Texas, a suit against the Governor in his official capacity is ~~"t~~o be treated as a suit against the entity," in this case the State of Texas.

Although the court in *McCarthy* did not address the Governor's liability within the context of Title II of the ADA, other courts have. For example, in *Miranda B. v. Kitzhaber*, persons with mental illness sued the Governor of Oregon, as well as other state officials, under Title II of the ADA and Section 504. 328 F.3d 1181 (9th Cir. 2003). The Ninth Circuit held that a suit for prospective injunctive relief against the Governor and other state officials was appropriate and should not be dismissed. *Id*. at 1188-1189. Indeed, numerous Governors have been sued in their official capacity for Medicaid, ADA, Section 504, and constitutional violations.[54] There is nothing in either the ADA or Section 504 that exempts Governors from

[54] *See, e.g.*, *Croft v. Governor of Tex.*, 562 F.3d 735 (5th Cir. 2009) (a constitutional claim); *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009) (ADA and Section 504 claims); *Bruggeman ex rel. Bruggeman v. Blagojevich*, 219 F.R.D. 430 (N.D. Ill. 2004) (ADA and Section 504 claims); *Martin v. Taft*, 222 F. Supp. 2d 940 (S.D. Ohio 2002) (Medicaid and ADA claims); *Little Rock Family Planning Servs., P.A. v. Dalton*, 860 F. Supp. 609 (E.D. Ark. 1994) (Medicaid claims), *aff'd*, 60 F.3d 497 (8th Cir. 1995); *Harris v. James*, 883 F. Supp. 1511 (M.D. Ala. 1995) (Medicaid claims), *rev'd on other grounds*, 127 F.3d 993 (11th Cir. 1997); *Appleyard v. Wallace*, 754 F.2d. 955 (11th Cir. 1985) (Medicaid claims), *rev'd on other grounds sub nom*, *In re Netbank, Inc.*

being sued in their official capacity. To the contrary, it is a common practice, and it is perfectly appropriate in this case, given Governor Perry's responsibility to ensure compliance with the ADA, § 504, and the Medicaid Act, and his issuance of several executive orders thereunder.[55]

Next, defendants argue that Governor Perry is not a proper party under the Rehabilitation Act because he is not a recipient of federal funds. Part. Mot. to Dismiss at 17. Specifically, defendants assert that Governor Perry does not receive or distribute Medicaid funds. *Id*. This argument fails for a number of obvious reasons. First, defendants ignore the reality that when the Governor is sued in his official capacity as the chief executive officer of the State, the question is not whether he personally receives federal financial assistance, but whether the State of Texas does. No one can seriously contend that Texas does not receive federal financial assistance to operate its Medicaid program, including its ICF/MRs, its HCBS waivers, its nursing facilities, and a host of other community-based services. In addition, plaintiffs have alleged that Governor Perry accepts federal financial assistance to operate Texas's Medicaid program, but fails to ensure its compliance with federal requirements for that program. Compl. ¶ 218. At the motion to dismiss stage, this allegation must be accepted as true. Defendants' effort to exclude the Governor from the reach of the § 504 claim must be rejected.

Sec. Litig., 259 F.R.D. 656 (N.D. Ga. 2009); *St. Michael Hosp. of Franciscan Sisters, Milwaukee, Inc., v. Thompson*, 725 F. Supp. 1038 (W.D. Wis. 1988) (Medicaid claims).

[55] Defendants also cite *Nelson v. Schwarzenegger*, No. C 09-04937 JW PR, 2010 WL 890028 (N.D. Cal. March 8, 2010) for the proposition "that the governor was not a proper plaintiff because he was not a "public entity" for purposes of the ADA." Part. Mot. to Dismiss at 16. The opinion, which is little more than two pages long, does not analyze or discuss this issue in any detail. Moreover, it never refers to the Ninth Circuit's opinion in *Miranda B.* It appears that this *pro se* litigant did not sue Governor Schwarzenegger in his official capacity. As a result, the Governor would not have been an appropriate party under Title II of the ADA.

b. The Governor Is Responsible For, and Has the Authority to Correct, the ADA, § 504, and Medicaid Violations Set Forth in the Complaint.

Defendants next maintain that plaintiffs' pleadings are insufficient to state a cognizable claim against Governor Perry upon which relief can be granted because (1) the Governor allegedly does not play a significant role in the administration of the Texas Medicaid Program, (2) plaintiffs have not asserted claims that establish any action on the part of Governor Perry that caused, or could cause, their alleged injuries, and (3) the relief being sought cannot be effectuated through the Governor. Part. Mot. to Dismiss at 15. These arguments ignore both the considerable responsibility and significant authority that the Governor has for complying with the ADA, § 504, and the Medicaid Act.[56]

In a case nearly identical to the one at bar, several individuals with developmental disabilities brought a class action under §1983 against the Governor of Massachusetts and various other state officials for violations of the ADA, § 504 of the Rehabilitation Act, the Medicaid Act, and the PASARR requirements of the NHRA. *Rolland*, 52 F. Supp. 2d at 243. Defendants filed a motion to dismiss, asserting that plaintiffs failed to state a cognizable claim against the Governor and the Secretary of the Executive Office of Health and Human Services (~~"E~~EOHHS"). They argued that neither played a significant enough role in the State's Medicaid program to be held liable for plaintiffs' injuries. Just like in the instant case, the defendants in *Rolland* argued that only the single state Medicaid agency was responsible for the administration of Massachusetts's Medicaid program, and, therefore, the Governor could not have taken any

[56] Certainly Governor Perry believes he has ample authority in all these areas. In Executive Order RP 13, Perry ~~"o~~rder[ed]" HHSC to ~~"d~~irect" the Texas Department of Mental Health and Mental Retardation (now DADS) ~~"to~~ implement" a new waiver program to provide community-based services to individuals on the HCS waiver waiting list. In Executive Order RP 65, he ordered HHSC to adopt rules mandating that all girls obtain the HPV vaccine prior to admission to sixth grade. In both cases, HHSC fully complied with his directives.

action that caused injuries to the plaintiff class. *Id.* In rejecting this argument, the district court concluded that:

> No case holds the provision which empowers a single state agency to administer a state's Medicaid program was in any way promulgated with the intention of exonerating or limiting the liability of other governmental officials who fail to conform their required actions to federal law.

Id. Further, the court noted that the plaintiffs' amended complaint contained ~~"s~~several unfulfilled administrative duties that may fall outside the DMA's mandate" including that: (i) the Governor is responsible for seeking funds from the legislature and to direct, supervise and control the executive departments of state government; (ii) it is the Governor's responsibility to appoint directors of executive agencies; and (iii) it is the Governor who appoints the EOHHS Secretary who is responsible for the oversight and control of all of the state's Medicaid departments, including DMA. *Id*. As a result, the court found that while

> it remains to be seen whether the plaintiff can prove the Governor . . . [has] a role in the provision of Medicaid services . . . [t]o the extent that those responsibilities go beyond those enumerated and required in the state Medicaid plan, the Governor . . . may well be [an] appropriate defendant.

Id.[57] The same responsibilities and duties that the *Rolland* court held provided a basis for including the Governor as a party are also present here.[58] *See* Compl. ¶ 22.

Many other courts have found that a State's governor is an appropriate party for purposes of ADA, § 504, and Medicaid claims. *See Boudreau ex rel. Boudreau v. Ryan*, No. 00

[57] At the end of its decision, the court comments that "~~t~~here appears to be no dispute that the Governor and other state officials are appropriate defendants with regard to the ADA." *Rolland*, 52 F. Supp. 2d at 243. That is the case here as well. Defendants' motion to dismiss does not allege that the Governor is not an appropriate defendant regarding the ADA. Here, of course, Governor Perry is properly sued in his official capacity.

[58] The Governor himself has recognized that other agencies over which he has considerable influence and control are critical to the development of an effective community-based service system. *See* Executive Order RP 13 (ordering "~~a~~ll affected agencies and public entities [to] cooperate fully with" HHSC in the development of the Promoting Independence Plan)

C 5392, 2001 WL 840583, at *6 (N.D. Ill. May 2, 2001) (refusing to dismiss the Governor in a case involving Medicaid, the ADA and Section 504), *aff'd in part, and vacated in part on other grounds sub nom*, *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003); *Gueli v. United States*, No. 806 CV 1080 T27 MSS, 2006 WL 3219272 (M.D. Fla. Nov. 6, 2006) (finding Governor to be appropriate party when sued in his official capacity; case dismissed on other grounds); *Bragg v. Chavez*, No. Civ 07-0343 JB/WDS, 2007 WL 6367133, at *13 (D.N.M. Nov. 13, 2007) (Medicaid and ADA claims). Thus, defendants' effort to dismiss the claims against the Governor must be denied.

E. Plaintiffs' Claims Are Not Barred by the Statute of Limitations

Defendants argue that certain aspects of plaintiffs' claims relating to their admission to nursing facilities are barred by the statute of limitations, because some individual plaintiffs were admitted to nursing facilities before December 20, 2008. Part. Mot. to Dismiss at 13-15 (asserting that claims alleged in Complaint ¶¶ 213-14, 227, 230-32 are time barred). It is ironic, to say the least, that state officials who are under a legal obligation to screen and identify individuals with developmental disabilities seeking admission to nursing facilities, in order to alert them to their legal rights and provide them with specialized services, would attempt to assert a limitations defense against the very persons who were not properly screened in the first place. Defendants' arguments fail for two reasons: (i) the statute of limitations is tolled in Texas for persons who have severe developmental disabilities, such as plaintiffs here; and (ii) the statute of limitations is tolled due to the continuing violations and present practices. For both of these reasons, defendants' statute of limitations argument should be rejected.

1. The Statute of Limitations Is Tolled As A Result of Plaintiffs' Severe Developmental Disabilities.

Critically, defendants' motion completely ignores a key exception to the statute of limitations: tolling by reason of disability. Here, the statute is tolled due to plaintiffs' severe developmental disabilities.

In determining whether a statute of limitations is tolled, federal courts apply the applicable state's tolling law. *See Hardin v. Straub*, 490 U.S. 536, 539 (1989). Under Texas law, if a person entitled to bring a personal action is of ~~"u~~nsound mind," a legal disability, when the cause of action accrues, then the time of the disability is not included in the limitations period. Tex. Civ. Prac. & Rem. Code Ann. § 16.001 (West 2010). Texas courts have applied the tolling statute to persons with developmental disabilities, such as plaintiffs. *See, e.g.*, *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 755-56 (Tex. 1993) (statute of limitations tolled for developmentally disabled plaintiff in suit brought by wife as guardian); *Chishty v. Tex. Dep't of Aging & Disability Servs.*, 562 F. Supp. 2d 790, 801 (E.D. Tex. 2006) (statute of limitations tolled for developmentally disabled in suit brought by mother as next friend); *cf. Casu v. CBI Na-Con, Inc.*, 881 S.W.2d 32, 34-35 (Tex. App.—Houston [14th Dist.] 1994, no writ) (statute of limitations tolled due to plaintiff's mental incompetence, "~~a~~cute paranoid psychosis," and defective cognitive and memory functioning). In holding that the statute of limitations is tolled for persons with developmental disabilities, the Texas Supreme Court has recognized that "~~m~~entally incompetent persons present a more compelling case for legal protection [than children]. They are frequently less communicative, more vulnerable and dependent than children." *Ruiz*, 868 S.W.2d at 755. The Texas Supreme Court also held that it was "~~a~~ware of the possibility that in a case such as this a limitation period may remain open for the lifetime of the plaintiff." *Id.* at 756 (internal quotations omitted).

Here, there is no doubt that the individual plaintiffs are "mentally incompetent" and of "unsound mind" as those phrases are used under Texas law, and were so at the time the cause of action accrued. Plaintiffs have serious and prolonged developmental disabilities that impair their cognitive functioning and render them unable to appreciate the magnitude and consequences of the lawsuit. *See* Compl. ¶ 1. For this reason, in similar lawsuits on behalf of developmentally disabled individuals under similar state tolling provisions, courts have held that the statute of limitations is tolled. *See Martin*, 840 F. Supp. at 1189 ("Thus, the Court concludes that because plaintiffs were mentally retarded at the time the action accrued, the limitations period as applied to plaintiffs is tolled."). Plaintiffs are quintessential examples of persons with severe developmental disabilities whom section 16.001 of the Texas Civil Practice and Remedies Code was designed to protect. Therefore, defendants' motion to dismiss on limitations grounds must be denied.[59]

2. The Statute of Limitations Is Also Tolled Because of Defendants' Continuing Violations of Federal Law.

The "continuing violations" doctrine also operates to toll the statute of limitations. In the Fifth Circuit, if a plaintiff shows a series of related acts, one or more of which falls within the limitations period, then the continuing violation theory applies to toll the running of the statute of limitations from the first such act. *See Messer v. Meno*, 130 F.3d 130, 134-35 (5th Cir. 1997) (reversed and remanded dismissal of discrimination claims where plaintiff successfully

[59] Despite completely omitting any discussion of the tolling statute in their Partial Motion to Dismiss, defendants may attempt to revive their statute of limitations argument by claiming that the statute of limitations should not be tolled because certain plaintiffs have guardians appointed for them. However, in Texas, the appointment of a guardian does not affect the tolling of the statute of limitations. *See Ruiz*, 868 S.W.2d at 755-56 (citing *Tzolov v. Int'l Jet Leasing, Inc.*, 232 Cal. App. 3d 117, 121 (1991) for the proposition that appointment of a guardian did not affect the statute of limitations, which continued to be tolled); *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995) (citing *Ruiz*, 868 S.W.2d at 756, and holding that the failure of a parent to bring suit within the statute of limitations on behalf of a minor does not affect the tolling). Moreover, several of the named plaintiffs and countless members of the class do not have guardians, and the statute of limitations is certainly tolled as to those plaintiffs. *See* Compl. ¶¶ 10, 13.

raised fact issue regarding a continuing violation). If an event occurs outside of the limitations period and there is a ~~"p~~ersisting and continuing system of discriminatory practices" that ~~"p~~roduces effects that may not manifest themselves as individually discriminatory except in cumulation over a period of time," then a continuing violation is established. *Id.* at 135.

Courts in the Fifth Circuit examine three factors and are more likely to find a continuing violation where: (i) the acts involve the same type of subject matter, (ii) the acts are recurring, and (iii) the acts do not have a degree of permanence. *See Berry v. Bd. of Supervisors of La. State Univ.*, 715 F.2d 971, 981 (5th Cir. 1983). Indeed, applying the same standards, the Court in *Martin* held that the continuing violations doctrine also tolled the running of the statute of limitations for persons with developmental disabilities bringing claims under the NHRA. *See Martin*, 840 F. Supp. at 1189. In *Martin*, the court held that each time a position became available in the community and the plaintiffs were denied a position because of a disability, then there was an alleged violation; therefore, the court held that the claims based on the ongoing and continuous pattern of alleged discrimination were not barred by the statute of limitations. 840 F. Supp. at 1189.

Here, as in *Martin*, there exists a series of numerous ongoing, related violations of federal law by defendants, many of which fall within the limitations period. For example, defendants failed to conduct the initial PASARR screenings and resident reviews, resulting in the inappropriate institutionalization and segregation of plaintiffs in nursing facilities. *See* Compl. ¶¶ 212, 222-23, 231-32. Under the NHRA, PASARR reviews are not a one-time obligation; resident reviews are to be conducted whenever there are ~~"s~~ignificant changes in the condition of nursing home residents." 42 U.S.C. § 1396r(e)(7)(C)(iii). Defendants have failed to conduct these ongoing reviews, resulting in plaintiffs' continued inappropriate placement in nursing

facilities.[60] *See* Compl. ¶¶ 212, 233, 238. Moreover, defendants' failure to conduct the required resident reviews continues to deprive plaintiffs of specialized services. *See id.* ¶¶ 229, 236, 238. For example, plaintiff Eric Steward received another PASARR evaluation in January 2011—*after this lawsuit was filed*—and yet Mr. Steward was not identified as having a developmental disability, despite having infantile cerebral palsy – clearly a related condition and, therefore, a developmental disability as defined by federal law. *See* 42 U.S.C. § 1396d(d). As a result, Mr. Steward's appropriateness for community placement has not been assessed, and he continues to be ineligible for specialized services. All of these related violations of the rights of the named plaintiffs and members of the plaintiff class continue to occur and, therefore, constitute an ongoing pattern of continuous discrimination and continuing violations of federal law justifying the tolling of the statute of limitations.

The only case cited by defendants in support of their limitations argument is *Joseph S.* However, the *Joseph S.* Court's decision to apply the statute of limitations to certain NHRA claims was based on the plaintiffs' concession that, although defendants allegedly persisted in their illegal conduct, the plaintiffs had not been subjected to any unlawful practices within the limitations period. 561 F. Supp. 2d at 313-14. Here, because some plaintiffs have never had even the initial PASARR screening and review, and others' condition has deteriorated while in nursing facilities and have not been reassessed as required by § 1396r(e)(7)(C)(iii), they all have all been subjected to continuing unlawful practices during the limitations period. Under these facts, *Joseph S.* supports plaintiffs' position that the NHRA claims are ongoing violations and are not barred by the statute of limitations. As a result, defendants statute of limitations argument fails as a matter of law.

[60] Plaintiffs have alleged that each has regressed and their condition has deteriorated during their time in the nursing facility. Compl. ¶¶ 141, 151, 158, 175, 197, & 208.

IV. CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, plaintiffs respectfully request that this Court enter an order denying the Partial Motion to Dismiss in its entirety. Plaintiffs request any other relief to which they may be entitled.

April 18, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Garth Corbett, hereby certify that all parties have been served through the Court's ECF system, or if such party does not accept service through the Court's ECF system, then by first class mail.

/s/ Garth A. Corbett
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