UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

JACOB VAN METER, *et. al.*,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	Civil Action No. 1:09-cv-00633
MARY MAYHEW,[1] COMMISSIONER, MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION WITH INCORPORATED MEMORANDUM OF LAW

NOW COME the named Plaintiffs, by and through their undersigned counsel, and move for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.[2]

I. INTRODUCTION

In the summer of 2010, Eric Reeves, a 34-year-old young man with Cerebral Palsy began to walk for the first time in his life. He was able to take his first few steps as a result of months of physical therapy, which helped him gain strength and balance. He worked his way up to 210 steps. Then, because the state Medicaid agency determined that Eric had reached a "plateau," it stopped covering physical therapy for him. Eric's legs weakened again. Before long he was back in his wheelchair, back at square one, unable to walk again. Had the State of Maine been in compliance with federal Medicaid law, it is likely that Eric would have continued to receive physical therapy services and maintained his ability to walk because the State has a duty to provide him with "specialized services" that equate to "active treatment": services designed to allow an individual with disabilities to function as independently and with as much self-determination as possible, and to prevent or decelerate regression and loss of abilities.

[1] This action was originally filed against then Commissioner Brenda Harvey. Pursuant to Fed.R.Civ.P. 25(d), Mary Mayhew, as Ms. Harvey's successor, is automatically substituted as a party. *See Currier v. Leavitt*, 490 F.Supp.2d 1, n.1 (D. Me. 2007).
[2] Although the Court, on January 31, 2011, granted the Plaintiffs' Motion for Class Certification, this motion is brought only on behalf of the three individually-named Plaintiffs.

Active treatment, by its very definition, is intended to guard against such irreparable harm to individuals with developmental disabilities. Because Eric and the other named Plaintiffs have been and continue to be irreparably harmed by the state's failure to comply with the active treatment mandate, they seek a preliminary injunction to assure that they receive necessary services to prevent further regression and loss of abilities.

The three named Plaintiffs in this case are young men with diagnoses of Cerebral Palsy who are confined to nursing facilities due to the Defendant's failure to provide them with adequate services that if provided could enable them to live in the community. Each Plaintiff has the right under the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1974 to appropriate services in the least restrictive setting; however, until such services are made available to them, they have no choice but to live in nursing facilities. While they remain in nursing facilities, the law requires that Defendants ensure that they receive services "directed toward (i) The acquisition of the behaviors necessary … to function with as much self-determination and independence as possible; and (ii) The prevention or deceleration of regression or loss of current optimal functional status." 42 C.F.R. §§ 483.120(a)(2), 483.440(a). The Defendant has failed to provide these services. Because the lack of these services is causing Plaintiffs irreparable harm, as they regress, lose skills, and are denied the chance to develop new ones, Plaintiffs request a preliminary injunction that requires Defendant to comply with the Pre-Admission Screening and Resident Review (PASRR) requirements of the Nursing Home Reform Amendments (NHRA) and to provide these important services with "reasonable promptness" in compliance with federal Medicaid law.[3]

[3] *See* Counts V, VI and VII of Plaintiffs' First Amended Class Action Complaint.

II. STATEMENT OF FACTS

Background of the Pre-Admission Screening and Resident Review (PASRR) Process

In 1987, Congress passed the Nursing Home Reform Amendments to the Medicaid Act to address the widespread problem of warehousing people with psychiatric and developmental disabilities in the nation's nursing facilities. 42 U.S.C. § 1396r. Congress enacted the Pre-Admission Screening and Resident Review Provisions of the NHRA to prevent and remedy the unnecessary admission and confinement of people with psychiatric and developmental disabilities in nursing facilities by screening and assessing potential residents for their needs for supportive services. *Rolland v. Romney*, 318 F.3d 42, 45-46 (1st Cir. 2003).

The PASRR pre-admission screening ("PASRR Level I") is designed to identify individuals suspected of having mental illness, mental retardation, or related conditions. *See* 42 U.S.C. § 1396r(e)(7)(B); 42 C.F.R. §§ 435.1010, 483.128. "Related conditions" are chronic disabilities that manifest before age 22 and include disabilities that are attributable to Cerebral Palsy or epilepsy. *See* 42 U.S.C. § 1396r(e)(7)(G); 42 C.F.R. § 435.1010. If the PASSR Level I screening identifies that an individual is suspected of having mental illness, mental retardation, or related conditions, the State must conduct a PASRR Level II evaluation of that individual. *See* 42 U.S.C. § 1396r(e)(7); 42 C.F.R. § 483.128. The function of the PASRR Level II evaluation is to determine whether a person is appropriate for admission to a nursing facility because he or she needs a level of care that can only be provided in a nursing facility and, if so, whether the person needs specialized services while living in the nursing facility. 42 U.S.C. § 1396r(e)(7)(B)(ii); 42 C.F.R. §§ 483.126, 483.128, 483.132, 483.136.

If the PASRR Level II evaluation determines that an individual does not require nursing facility services, but instead that services can be provided in a non-institutional setting, states have a mandatory duty to offer the individual a choice of remaining in the facility or receiving services in an alternative,

appropriate, noninstitutional setting. 42 U.S.C. §§ 1396r(e)(7)(C)(i-ii); 42 C.F.R. §§ 483.118(c), 483.130(m). On the other hand, even if an individual qualifies for the level of care that is typically provided in a nursing facility, the PASRR Level II evaluation must determine whether a nursing facility is the appropriate setting for meeting an individual's needs and consider alternate placements. *See* 42 U.S.C. § 1396r(e)(7)(B)(ii); 42 C.F.R. §§ 483.126, 483.132(a)(4). For example, home and community-based "waiver" programs provide "Medicaid reimbursement to States for the provision of community-based services to individuals who would otherwise require institutional care." *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, n.12 (1999).

In the PASRR Level II evaluation, if the Defendant confirms that the person has a related condition, it must determine whether specialized services are needed based on characteristics commonly associated with the need for specialized services. 42 U.S.C. § 1396r(e)(7)(B)(ii); 42 C.F.R. §§ 483.120(a)(2), 483.136. The PASRR Level II evaluation must document, *inter alia*, the individual's need for assistance with activities of daily living; level of sensorimotor development; social development; academic and educational development; ability to live independently; and vocational development. *See* 42 U.S.C. § 1396r(e)(7)(B); 42 C.F.R. §§ 483.130, 483.136. Specialized services consist of an active and continuous treatment program that includes 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, and services designed to prevent or decelerate regression and loss of abilities. 42 U.S.C. § 1396r(e)(7)(G)(iii); 42 C.F.R. §§ 483.120(a)(2), 483.440(a)(1).

After conducting the PASRR Level II evaluation, the Defendant must notify the individual of its determinations. *See* 42 U.S.C. § 1396r(e)(7)(C); 42 C.F.R. § 483.130. This notice must include: (1) whether nursing facility level of care is necessary, (2) whether specialized services are necessary, (3) and

placement options available to the individual. *See* 42 U.S.C. § 1396r(e)(7)(C); 42 C.F.R. § 483.130. This notice must also inform the individual of his or her right to appeal the State's PASRR Level II evaluation determinations. 42 U.S.C. § 1396r(e)(7)(F); 42 C.F.R. § 483.130.

If the PASRR Level II evaluation determines that an individual needs specialized services, the State is required to "provide for (or arrange for the provision of)" needed specialized services. 42 U.S.C. § 1396r(e)(7)(C)(i)(IV); 42 C.F.R. § 483.118(c). Following admission to a nursing facility, annual reviews must be conducted to determine whether an individual with a related condition continues to need a nursing level of care and to require confinement in a nursing facility or whether the individual's needs could be met in the community. 42 U.S.C. § 1396r(e)(7)(B)(ii); 42 C.F.R. §§ 483.106(a)(3), 483.114(b), 483.130, 483.132.

Whenever the PASRR review process determines that the person needs services in the nursing facility or outside of the nursing facility, those services that are covered under Maine's MaineCare program must be provided with "reasonable promptness." 42 U.S.C. § 1396a(a)(8), (a)(10)(A); 42 C.F.R. § 435.930.

a. The Named Plaintiffs

i. Jacob Van Meter

Plaintiff Jacob Van Meter is a twenty-seven (27) year-old MaineCare recipient who resides in a nursing facility located in the Town of Ellsworth, County of Hancock, in the State of Maine. Aff. of Jacob Van Meter ¶ 2. Van Meter has Cerebral Palsy, a neurological disorder that profoundly and permanently affects his body movement and muscle coordination. *Id.* As a result of this disability, Van Meter requires assistance with his activities of daily living, including dressing, feeding, and mobility, among other activities. *Id.* Despite Van Meter's disability, his cognitive functions are not limited; he completed high school and is now taking college courses. *Id.*

For several years, Defendant failed to evaluate Van Meter to determine his need for specialized services and to determine whether alternate community placements were appropriate for him, as required by the NHRA. *Id.* at ¶ 3,7. As a result, Van Meter has been compelled unnecessarily to reside in a nursing facility, where he is surrounded by much older people and where he is cut-off from his peers and opportunities to grow, learn, socialize, work and do the activities that people his age experience. *Id.* at ¶ 3. He has been denied services that would help him learn skills to become more independent, such as an augmentive communication device for better communication, and a power wheelchair for better mobility. *Id.* at ¶ 4.

On July 9, 2010, after he filed the instant action, Defendant informed Van Meter that it had found him eligible to receive specialized services and for the first time specified the specialized services that Defendant alleges he is entitled to receive. *Id.* at ¶¶ 5-6. To date, however, Defendant has not provided Van Meter with most of the specialized services it determined that he needs, such as the communication services mentioned above. *Id.* at ¶ 6. Further, the services it did identify do not amount to "active treatment," because they do not reflect an active and continuous treatment program that includes 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, and services designed to prevent or decelerate regression and loss of abilities. Aff. of Lyn Rucker ¶ 13.

ii. Adam Fletcher

Plaintiff Adam Fletcher's claim is brought on his behalf through his legal guardian, Gail Fletcher. Aff. of Gail Fletcher on behalf of Adam Fletcher ¶ 1. Gail Fletcher's legal residence is in the Town of Ellsworth, County of Hancock, in the State of Maine. *Id.* at ¶ 2. Adam Fletcher is a twenty-eight (28) year-old MaineCare recipient who resides in a nursing facility located in the Town of Freeport, County

of Cumberland, State of Maine. *Id.* Up until August 5, 2010, for the previous three years, he had resided in a facility located in Braintree, Massachusetts, having been placed there by Defendant. *Id.* at ¶ 3.

Fletcher has Cerebral Palsy, a neurological disorder that has profoundly and permanently affects his body movement and muscle coordination. *Id.* at ¶ 4. As a result of his disability, Fletcher requires assistance with his activities of daily living including dressing, feeding, and mobility, among other activities. *Id.* Despite Fletcher's disability, his cognitive functions are not limited; prior to entering a nursing facility, Fletcher graduated from high school, was a member of the National Honor Society, and planned to attend college. *Id.*

For many years, Defendant failed to evaluate Fletcher to determine his need for specialized services and to determine whether alternate community placements were appropriate for him, as required by the NHRA. *Id.* at ¶ 5-6. As a result, Fletcher has been compelled unnecessarily to reside in a nursing facility, first in Massachusetts, and now in Maine. *Id.* For the past three years, Fletcher has been deprived of necessary services that could increase his level of independence and prevent the loss of his functions: there has been a marked decline in his abilities; he used to be much more capable, but has gotten worse physically; he used to be able to feed himself and shave himself, but now he even has trouble driving his own power wheelchair. *Id.* at ¶ 7.

On July 9, 2010, after Fletcher filed the instant action, Defendant informed Fletcher that it had found him eligible to receive specialized services and for the first time specified the specialized services that Defendant alleges he is entitled to receive. *Id.* ¶ 6. To date, however, Defendant has not provided Fletcher with most of the specialized services it determined that he needs. *Id.* Further, the services it did identify do not amount to "active treatment." Aff. of Lyn Rucker ¶ 13.

iii. Eric Reeves

Plaintiff Eric Reeves is a thirty-four (34) year-old MaineCare recipient who resides in a nursing

home in the City of Bangor, County of Penobscot, State of Maine. Decl. of Eric Reeves at ¶ 2. Reeves has Cerebral Palsy, a neurological disorder that has profoundly and permanently affected his body movement and muscle coordination. *Id.* at ¶ 3. As a result of his disability, Reeves requires assistance with his activities of daily living including dressing, feeding, and mobility, among other activities. *Id.* Despite Reeves' disability, his cognitive functions are not limited. *Id.* Prior to entering the present facility, Reeves had lived at various times in the community, even working for some time at a national retail store; however, due to the lack of appropriate services in the community, he was forced to live in a nursing facility. *Id.* For more than two years, Defendant failed to evaluate Reeves to determine his need for specialized services and to determine whether alternate community placements were appropriate for him, as required by the NHRA. *Id.* at ¶ 4. As a result, Reeves has been compelled unnecessarily to reside in a nursing facility for the past two years deprived of necessary services that could increase his level of independence and prevent the loss of his functions, such as his ability to walk. *Id.* at ¶ 7.

On July 9, 2010, after Reeves filed the instant action, Defendant informed Reeves that it had found him eligible to receive specialized services and for the first time specified the specialized services Defendant alleges determined that he needs. *Id.* at ¶ 5. To date, however, Defendant has not provided Reeves with most of the specialized services it determined that he needs, such as speech therapy and an augmentive communication device for greater communication abilities. *Id.* Further, the services it did identify, such as a referral to another facility, do not amount to "active treatment." *Id.* at ¶¶ 13-14.

III. ARGUMENT

Plaintiffs meet the criteria for issued a preliminary injunction. When determining whether to grant such relief, the Court must consider four factors: "(i) the likelihood that the movant will succeed on the merits; (ii) the possibility that, without an injunction, the movant will suffer irreparable harm; (iii) the balance of relevant hardships as between the parties; and (iv) the effect of the court's ruling on the

public interest." *Waldron v. George Weston Bakeries, Inc.*, 570 F.3d 5, 9 (1st Cir. 2009). "The party seeking the preliminary injunction bears the burden of establishing that these four factors weigh in its favor." *Esso Standard Oil Co. (Puerto Rico) v. Monroig-Zayas*, 445 F.3d 13, 18 (1st Cir. 2006).

The Plaintiffs Are Likely to Succeed on the Merits

"The sine qua non of [the] four-part inquiry is likelihood of success on the merits…." *New Comm Wireless Services, Inc. v. SprintCom, Inc.*, 287 F.3d 1, 18 (1st Cir. 2002). In evaluating a motion for preliminary injunction, "a court's conclusions as to the merits of the issues presented … are to be understood as statements of probable outcomes." *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991).

i. *The Defendant has violated Plaintiffs' rights under the NHRA by failing to provide required "specialized services"*

Defendant's failure to provide Plaintiffs Van Meter, Fletcher, and Reeves with "specialized services" compels the conclusion that Plaintiffs are likely to succeed on the merits of their claims. The First Circuit has confirmed that the NHRA requires states to provide individuals with developmental disabilities in nursing facilities specialized services "in a way that results in active treatment when combined with services provided by nursing facilities and others." *Rolland v. Romney*, 318 F.3d 42, 58 (1st Cir. 2003). Here, Defendant has admitted that not only did it fail to conduct a PASRR Level II evaluation for all of the Plaintiffs for many years in violation of the NHRA, Depo. of Kathy Bubar at 15-17, 24, but even after it finally completed the evaluations, it failed to provide Plaintiffs with most of the very services it identified. Aff. of Jacob Van Meter ¶ 6-7; Decl. of Eric Reeves ¶ 5-6; Aff. of Gail Fletcher ¶ 6.

"Active treatment" is an array of services that help individuals with developmental disabilities to acquire behaviors that increase independence and prevent the loss of functional abilities. 42 C.F.R. §§

483.120(a)(2),483.440(a)(1). Active treatment can be broken down into multiple components, including a Comprehensive Functional Assessment (CFA), 42 C.F.R. § 483.440(c)(3); the formation of an Interdisciplinary Team (IDT), 42 C.F.R. § 483.440(c); the creation of an Individual Program Plan (IPP), 42 C.F.R. § 483.440(c)(4-6); the consistent implementation of the IPP in all relevant settings in order to meet objectives, 42 C.F.R. § 483.440(d); the receipt of services by trained staff in accordance with the person's needs and IPP; accurate, systemic data about the person's performance toward meeting the criteria stated in the IPP objectives, 42 C.F.R. § 483.440(c) & (f); the development of increased skills and independence in functional life areas, or maintenance of an individual's functions to the maximum extent possible; and finally, the monitoring and change of the IPP based on the changing circumstances of the individual, 42 C.F.R. § 483.440(f). Aff. of Lyn Rucker, ¶ 2-9.

Defendant has already conceded that, until the present lawsuit was filed, it had unqualifiedly failed to comply with the PASRR requirements for individuals with "related conditions" such as Cerebral Palsy. Depo. of Kathy Bubar at 15-17, 24. On or about July 9, 2010, the Defendant issued a "final determination" indicating that each Plaintiff met the criteria for having an "other related condition" under Medicaid law and is eligible to receive specialized services. [PASRR II notifications]. Claire Harrison, a social worker acting on the Defendant's behalf, evaluated reports completed by Defendant's consulting physicians, Dr. Jerrold C. Edelberg and Dr. Cairbre MacCann, as well as the Plaintiffs' relevant medical records, and made recommendations for Plaintiffs to receive certain services, which Defendants categorizes as "specialized services." *Id.* Copies of the reports of Ms. Harrison (PASRR Level II), Dr. Edelberg, and Dr. MacCann are attached to the Declaration of Jeffrey Neil Young as Exhibits 2-8.

The Defendant's determination of what constitutes "specialized services" for each of the named Plaintiffs is wholly inadequate and inconsistent with the requirements of the NHRA. The Defendant

failed to identify "specialized services" that, when combined with other services provided by the nursing facility "result in a continuous and active treatment program." Aff.of Lyn Rucker, ¶ 14. The evaluations performed by the Defendant largely recommends additional assessments and evaluations, such as referrals to other nursing facilities; these assessments and evaluations are not "services," but rather determinations necessary to evaluate what services are needed. *Id*. The Defendant has failed to complete Comprehensive Functional Assessments for each of the named Plaintiffs, as required by 42 C.F.R. § 483.440(c)(3); Defendant completed only two of the expected ten assessment areas for Plaintiffs Van Meter and Fletcher, and only three of the expected assessment areas for Plaintiff Reeves. *Id.* at ¶ 15. Although there are Plans of Care for each of the named Plaintiffs in the nursing facility in which he currently resides, the Defendant has failed to complete Individual Program Plans for each of the named Plaintiffs. *Id.* at ¶ 16. In many instances the goals targeted in the Plans of Care are not based on any apparent assessment, and targeted outcomes established by the Plans of Care generally are not being achieved. *Id*. In sum, the requirements of Active Treatment are not being implemented as required by Medicaid regulation. *Id.* at ¶ 13.

Even if the services identified by Defendant back in July of 2010 were not legally and medically insufficient, the Defendant has failed to provide most of these very services it recommended for the Plaintiffs. For example, the Defendant's agent recommended that Plaintiff Eric Reeves receive a "comprehensive speech therapy evaluation and identification of communication devices"; to date, such an evaluation has not been provided. Decl. of Eric Reeves at ¶ 5. As another example, the Defendant's agent recommended that Plaintiff Jacob Van Meter receive an evaluation related to his speech and communication needs; increased access to the internet and adaptive computer equipment; and additional opportunities for social interaction with peers of his age; again, none of these have been provided. Affidavit of Jacob Van Meter at ¶ 6.

The Defendant's PASRR evaluations clearly fail to comply with applicable regulations, and as a result the Plaintiffs are not receiving anything close to the active treatment required by federal law. Further, even disregarding the inadequacy of the PASSR Level II evaluations Defendant has completed, Defendant has failed to provide most of the very services recommended by its own agent. Given the readily-apparent legal deficiencies in Defendant's PASRR process, the Plaintiffs are likely to prevail on their claim that the Defendant has violated the NHRA and its accompanying regulations.

ii. *The Defendant Has Violated Plaintiffs' Rights Under Federal Medicaid Law By Failing to Provide Services With "Reasonable Promptness"*

Because of the Defendant's long delay in providing services to them the Plaintiffs are also likely to prevail on their claim that Defendant has violated the requirement that "medical assistance … be furnished with reasonable promptness to all eligible individuals," as required by the Medicaid law. *See* 42 U.S.C. § 1396a(a)(8). The implementing regulation provides: "The agency must: (a) furnish Medicaid promptly to recipients without delay caused by the agency's administrative procedures; . . . . 42 C.F.R. §435.930. As alleged in Count VII of Plaintiffs' First Amended Class Action Complaint, 42 U.S.C. § 1983 permits Plaintiffs to enforce the "reasonable promptness" provision of the Medicaid law. *See Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002).

In *Boulet v. Cellucci*, 107 F.Supp.2d 61 (D. Mass. 2000), the District Court found that a class of plaintiffs with developmental disabilities were entitled to services in the community, but that the state had "not offered any of these services to the plaintiffs and certainly not in a way that matches their individual needs." *Id.* at 78. The court rejected the argument that the "reasonable promptness" requirement was met if the state provided just "some assistance, at the total discretion of the state," and instead found that "the assistance must correspond to the individual's needs." *Id.* at 79. Noting that "it is axiomatic that delays of several years are far outside the realm of reasonableness," the court had "little

trouble finding that the defendants have not been reasonably prompt" in providing services, especially "where some of the delays extend more than a decade." *Id.* at 80.

Similarly, in *Rosie D. v. Romney*, 410 F.Supp.2d 18 (D. Mass. 2006), the District Court found that the state's failure to provide required "early and periodic screening, diagnostic, and treatment" (EPSDT) services to Medicaid-eligible children violated the reasonable promptness provision of the Medicaid Act. *Id.* at 53. The court held that because the state failed to provide the comprehensive assessments, clinical oversight and monitoring, and in-home support services required by the EPSDT provisions, it had "not satisfied Congress' command to provide services with 'reasonable promptness.'" *Id.* As in *Boulet*, the court found that "[t]he fact that Defendants provide some services does not relieve them of the duty to provide all necessary services with reasonable promptness." *Id.*

Just as in *Rosie D.*, the Defendant here is failing to provide the evaluations, clinical oversight and monitoring, and necessary services required by federal law. The Plaintiffs and class members have never received specialized services in accordance with the NHRA, and have received inadequate services for the many years that they have inappropriately confined in nursing facilities, far "outside the realm of reasonableness." Because the Defendant has failed to provide most of the services it has identified, let alone provide them in a timely fashion, the Plaintiffs are likely to prevail on their claim that the Defendants have violated the "reasonable promptness" provision of the Medicaid law.

b. The Plaintiffs Will Suffer Irreparable Harm Unless Defendant is Enjoined.

"[W]hen the likelihood of success on the merits is great, a movant can show somewhat less in the way of irreparable harm and still garner preliminary injunctive relief." *E.E.O.C. v. Astra U.S.A., Inc.*, 94 F.3d 738, 743 (1st Cir. 1996). "It is usually enough if the plaintiff shows that its legal remedies are inadequate. If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel." *Ross-Simons of Warwick, Inc. v.*

Baccarat, Inc., 102 F.3d 12, 18-19 (1st Cir. 1996) (internal citations omitted).

The First Circuit has long held that the failure of the state to provide Medicaid benefits, causing individuals to forgo necessary medical care is "clearly irreparable injury." *Massachusetts Ass'n of Older Americans v. Sharp*, 700 F.2d 749, 753 (1st Cir. 1983). Numerous other courts have reached the same conclusion. *See Daniels v. Wadley*, 926 F. Supp. 1305, 1313 (M.D. Tenn. 1996) *vacated in part on other grounds sub nom Daniels v. Menke*, 145 F.3d 1330 (6th Cir. 1998); *Markva v. Haveman*, 168 F. Supp. 2d 695, 719 (E.D. Mich. 2001) (recognizing that there is no adequate remedy at law for denial of medical care and recognizing "the principle that denial or delay in benefits which effectively prevents plaintiffs from obtaining needed medical care constitutes irreparable harm. In other words, risk of further injury to health warrants injunctive relief."); *Brantley v. Maxwell-Jolly*, 656 F.Supp. 2d 1161, 1177 (N.D. Cal. 2009) (enjoining cuts to adult day health services and stating "reduction in public medical benefits standing alone is sufficient to demonstrate irreparable harm"). *See also, e.g., Beltran v. Meyers,* 677 F.2d 1317, 1322 (9th Cir. 1982) (holding irreparable injury shown when enforcement of a Medicaid rule "may deny [plaintiffs] needed medical care"); *Caldwell v. Blum*, 621 F.2d 491, 498 (2d Cir. 1980) (holding that Medicaid applicants established harm where they would "absent relief, be exposed to the hardship of being denied essential medical benefits"); *McMillan v. McCrimon*, 807 F. Supp. 475, 479 (C.D. Ill. 1992) (holding that "[t]he nature of their claim—a claim against the state for medical services—makes it impossible to say that any remedy at law could compensate them").

In *Benjamin H. v. Ohl*, No.Civ.A. 3:99-0338, 1999 WL 34783552 at *12 (S.D.W.V. July 15, 1999), the District Court found, in the context of a preliminary injunction analysis, that the plaintiffs, individuals with mental retardation and other developmental disabilities, "are not receiving the therapy, habilitation services, respite care, and other benefits to which they are entitled under Medicaid." *Id.* Echoing the fundamental purposes of the "active treatment" program, the court continued:

"Consequently, they are failing to develop skills which will enable them to achieve their greatest functional capacity and highest level of independence. They are even losing skills previously acquired because the services they are receiving are insufficient to maintain them." *Id.* In light of this, the Court held that "[t]he plaintiffs are suffering direct, serious, and irreversible harm, and will, in the future, suffer even greater harm, if the preliminary injunction is not issued." *Id.*

By its very definition, the "active treatment" mandate is intended to guard against irreparable harm to individuals with developmental disabilities—to ensure "[t]he prevention or deceleration of regression or loss of current optimal functional status." 42 C.F.R. § 483.440(a)(ii). The state's failure to provide services deemed necessary to prevent an individual's loss of abilities will, as a matter of course, harm that individual. The importance of this mandate is most glaringly illustrated in the case of Plaintiff Reeves: a young man who, when he was getting necessary physical therapy services, was able to walk for the first time in his life; without these services, he quickly lost "optimal functional status." Decl. of Eric Reeves ¶ 7. Just as the court in *Benjamin H.* recognized, the failure to provide adequate service to the Plaintiffs as soon as possible will lead to irreparable injury—a loss functioning that may never be regained due to the lack of timely attention to a number of particular abilities, as detailed further below.

i. Jacob Van Meter

Dr. Susan Ostertag, MD, has known and treated Plaintiff Van Meter since 2005. Aff. of Dr. Susan Ostertag, M.D., ¶ 3. In her opinion, "[t]here are a number of services, which if delivered in the nursing home, would increase [his] ability to function with more self-determination and independence as well as prevent or decelerate the regression or loss of his functioning." *Id.* at ¶ 6. Dr. Ostertag believes that Mr. Van Meter requires "speech therapy and possibly an augmentative communication device with an adaptive phone … [as well as] a functional power chair … [and] adaptive equipment to increase his written output." *Id.* at ¶ 7. These "services and equipment would both increase his independence and

prevent deceleration and loss of his functional abilities." *Id.* Additionally, Van Meter also needs "intensive and ongoing supports and assistance to engage in socialization with his peers and family, be involved in his community, and engage in recreation and leisure skills." *Id.* at ¶ 8. "Services that could provide this ongoing support are increased transportation and the provision of services at a day or vocational program." *Id.* He "needs additional supports to attend college." *Id.* Dr. Ostertag's conclusion is that "[c]ontinuing to have Jake reside in a nursing facility without additional therapy, equipment, and services designed to maximize his independence and prevent regression is irreparably harmful to [his] physical and mental well-being." *Id.* at ¶ 9. "Every day that goes by, without these services, is a lost opportunity and will only make any effort to achieve some semblance of independent living that much more difficult, if not impossible." *Id.*

ii. Adam Fletcher

Plaintiff Fletcher's mother and guardian, Gail Fletcher, states that Fletcher's "life continues to be very isolated, living among much older people who do not share his interests, and having no opportunities for socialization, recreation, work [and] education." Aff. of Gail Fletcher ¶ 6. Ms. Fletcher has "noticed a marked decline in his abilities due to the lack of appropriate services. He was much more capable in the past but he has gotten worse physically. His level of therapy hasn't been kept up. He used to be able to feed himself and shave himself, but now he even has trouble driving his own chair." *Id.* at ¶ 7.

Dr. Hugh Harwood, M.D., who has treated Fletcher since August of 2010, also believes that specialized services "would increase Adam's ability to function with more self-determination and independence, as well as prevent or decelerate the regression or loss of his functioning." Aff. of Hugh Harwood, M.D. ¶¶ 3,7. According to his doctor, Fletcher needs "increased access to the larger community, age-appropriate peers, and activities aimed at intellectual stimulation. Services and supports

that would allow this include a day program, increased availability of transportation, training and adaptations to use the computer better, and increased internet access. The foregoing services would increase Adam's independence and self-determination and prevent him falling even further behind his peers." *Id.* at ¶ 8. The lack of these specialized services, in Dr. Harwood's opinion, "is irreparably harmful to Adam's physical and mental well-being." *Id.* at ¶ 9.

iii. Eric Reeves

Plaintiff Reeves began by making progress and acquiring new skills when he arrived at East Side Rehabilitation; for a few months he received Physical Therapy and Occupational Therapy. Aff. of Lyn Rucker ¶ 12. With the therapy he started walking for the first time in his life. *Id.*; Decl. of Eric Reeves ¶ 7. However, he no longer gets PT; although the staff is supposed to help him walk, time rarely permits this, so now he is back to being unable to walk. *Id.*

Dr. Toby Atkins, MD, who has been Reeves' doctor for a number of years, believes that there are a number of services Reeves needs in order to increase his "ability to function with more self-determination and independence, as well as prevent or decelerate the regression or loss of his functioning." Aff. of Dr. Toby Atkins, MD, ¶ 5. According to Dr. Atkins, Reeves needs "speech therapy and possibly an augmentative communication device." *Id.* He needs physical therapy to help him regain independence in transfers and bed mobility, and increasing his range of motion. *Id.* "Additional occupational therapy would enable him to restore and maintain his ability to feed himself." *Id.* He also requires "increased access to the larger community and age-appropriate peers. Services that would allow this include a day program, increased availability of transportation, and assistance in furthering his education and employment opportunities." *Id.* at ¶ 6. In sum, Dr. Atkins believes that "[c]ontinuing to have Eric reside in a nursing facility without additional therapies and services designed to maximize his independence and prevent regression is irreparably harmful to [his] physical and mental well-being." *Id.*

at ¶ 7.

All three named Plaintiffs here have already suffered harm, and will continue to do so until the Defendant is required to provide them with medically necessary services, as mandated by Medicaid law. Like the plaintiffs in *Benjamin H.*, Plaintiffs here are failing to develop skills, and even losing existing skills, thus suffering direct, serious, and irreversible harm. It is clear that Plaintiffs' harm is not accurately measurable or adequately compensable by money damages, and thus an injunction is necessary to redress Defendant's violations.

c. The Hardship to the Plaintiffs in the Absence of a Preliminary Injunction Outweighs any Hardship That the Defendants May Experience in Complying With Federal Law

As discussed, the Plaintiffs face serious continuing harm as the result of the Defendant's failure to provide required specialized services. On the other hand, complying with the requirements of federal law cannot harm the Defendant. The Seventh Circuit has summed up this rationale as follows:

> Because the defendants are required to comply with the [law in question], we do not see how enforcing compliance imposes any burden on them. The Act itself imposes the burden; this injunction merely seeks to prevent the defendants from shirking their responsibilities under it.

Haskins v. Stanton, 794 F.2d 1273, 1277 (7th Cir. 1986) (granting preliminary injunction requiring defendant's compliance with federal Food Stamp law). See also *Ill. Hosp. Ass'n v. Ill. Dept of Public Aid,* 576 F. Supp. 360, 371 (N.D. Ill. 1983) ("Once a state has voluntarily elected to participate in the Medicaid program, . . . [it cannot] characterize its duty to comply with the requirements of [the program] as constituting a hardship to its citizens.").

The preliminary injunction that Plaintiffs request here seeks to require the Defendant to provide services that it is already required to provide under federal law, but has failed to deliver. The NHRA and its implementing regulations "imposes the burden," and the requested injunction seeks to prevent the defendant from continuing to shirk its responsibility to provide necessary services to some of the state's

most vulnerable citizens. "Insofar as the injunction prohibits the State from continuing to violate federal and state law, the injunction imposes no burden upon the State whatsoever." *Indiana State Bd. of Public Welfare v. Tioga Pines Living Center, Inc.*, 637 N.E.2d 1306, 1317 (Ind. Ct. App. 1994).

d. The Public Interest Favors the Granting of a Preliminary Injunction

"[E]quitable relief to ensure compliance with the Medicaid statute would obviously serve the public interest." *Rosie D. v. Romney*, 410 F.Supp.2d 18, 54 (D.Mass. 2006) (granting permanent injunctive relief based on violations of the "early and periodic screening, diagnostic, and treatment services" and "reasonable promptness" provisions of the Medicaid act). Congress passed the NHRA to address the widespread problem of warehousing people with psychiatric and developmental disabilities in the nation's nursing facilities. 42 U.S.C. § 1396r. Similarly, Congress enacted the PASRR Provisions of the NHRA to prevent and remedy the unnecessary admission and confinement of people with psychiatric and developmental disabilities in nursing facilities. *Rolland v. Romney*, 318 F.3d 42, 45-46 (1st Cir. 2003). Congress was seeking to remedy abuse and neglect of people with disabilities throughout the nation, undoubtedly a fundamental public interest that Plaintiffs now seek to enforce through this preliminary injunction. By seeking to ensure that the Defendant complies with federal law, the preliminary injunction clearly serves the public interest.

IV. NO BOND SHOULD BE REQUIRED

A party seeking a preliminary injunction may be required to post a bond or other form of security to the extent the Court "considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed.R.Civ.P. 65. Courts have waived the bond requirement under a variety of circumstances found here: where the plaintiffs, proceeding either individually or as a class, are indigent; where the litigation involves an important "public interest"; and where the plaintiffs have demonstrated a strong likelihood of success on the merits. 11A C. Wright & A.

Miller, *Federal Practice & Procedure* § 2954 (2d ed. 2010); *see also Maine Ass'n of Interdependent Neighborhoods v. Petit,* 647 F.Supp. 1312, 1319 (D. Me. 1986) ("[T]he Court may waive the security requirement where the party seeking injunctive relief has shown an extraordinarily high likelihood of success on the merits."). Because this case meets most, if not all, of these factors for waiving the bond requirement, no security should be required.

V. CONCLUSION

WHEREFORE, the named Plaintiffs respectfully request that the Court enter a preliminary injunction requiring the Defendant to comply with the PASRR requirements of the NHRA and to provide these services with "reasonable promptness" in compliance with federal Medicaid law.

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CERTIFICATE OF SERVICE

I, Jeffrey Neil Young, hereby certify that on April 13, 2011, I electronically filed Motion for Preliminary Injunction; Motion to Seal Affidavit of Lyn Rucker; Declaration of Jeffrey Neil Young; Affidavit of Lyn Rucker, with Exhibit A; Affidavit of Susan Ostertag, M.D.; Affidavit of Hugh Harwood, M.D.; Affidavit of Toby Atkins, M.D.; Affidavit of Jacob Van Meter; Affidavit of Gail Fletcher on Behalf of Adam Fletcher; Affidavit of Eric Reeves with the Clerk of the Court using the CM/ECF system which will send notification of such filing(s) to the following: James E. Fortin at James.Fortin@maine.gov; and Janine A. Raquet at Janine.Raquet@maine.gov.

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