UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M.G., a minor and through her mother Christina Garcia; A.C., a minor, by and through her mother Alicia Cortez; C.V., a minor, by and through his father Jeremy Vaughan; and Disability Rights New Mexico, Inc.,

Plaintiffs/Appellees,
Cross-Appellants,

v.

DAVID SCRASE and his successor, in his official capacity as Secretary for the Human Services Department and State of New Mexico HUMAN SERVICES DEPARTMENT,

Defendants/Appellants,
Cross-Appellees.

Case No. 23-2093
On Appeal from the United States District Court for the District of New Mexico
The Honorable Margaret Strickland
Case No. 1:22-cv-00325-MIS-DLM

HSD'S BRIEF IN CHIEF

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STATEMENT REGARDING ORAL ARGUMENT

HSD does not request oral argument.

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GLOSSARY OF ABBREVIATIONS

DRNM	Disability Rights New Mexico
EPSDT	Early and Periodic Screening, Diagnostic and Training
HHA	Home Health Aide
HSD	Human Services Department
ISP	Individual Service Plan
LOC	Level of Care Assessment
MAP	Medical Assistance Program
MCOs	Managed Care Organizations
MOO	Memorandum Opinion and Order, HSD App V.3 at 594
MPI	Motion for Preliminary Injunction, HSD App V.1 at 173
PDN	Private Duty Nurses
RMPI	Revised Opposed Motion for Preliminary Injunction, HSD App V.3 at 556

INTRODUCTION

Appellants/Cross-Appellees State of New Mexico Human Services Department and Acting Secretary Kari Armijo[1] (collectively "HSD") appeal the District Court's Memorandum Opinion and Order ("MOO"), HSD App V.3 at 594, granting Plaintiffs' Second and Revised Opposed Motion for Preliminary Injunction and Memorandum in Support Thereof ("RMPI"), HSD App V.3 at 556. The injunction should be dissolved because, first, because the evidence did not support its entry; second, the mandatory injunction granted affirmative relief, not maintenance of the status quo, which is improper; third, Plaintiffs were not irreparably harmed by any action of HSD; fourth, Plaintiffs did not demonstrate prejudice if the injunction was not entered; fifth, the balance of the interests of the public versus the minor Plaintiffs mitigated in favor of denying the injunction; and sixth, the Court engaged in improper burden shifting to justify the entry of the injunction.

I. PRIOR OR RELATED APPEAL

[1] Originally named Defendant Dr. David Scrase was sued only in his official capacity as Secretary of HSD and has since retired. Suits against a defendant in an official capacity "generally represent only another way of pleading an action against an entity of which an officer is an agent" and should be treated as suits against the State. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (*quoting Kentucky v. Graham*, 473 U.S. 159, 165 (1985)).

Plaintiffs filed a cross appeal of the MOO on June 29, 2023, in which they assert that the District Court improperly denied representational standing to Disability Rights New Mexico, Inc. ("DRNM").[2]

II. GROUNDS FOR JURISDICTION

This is an appeal of the grant of a preliminary injunction under 28 U.S.C.§ 1292. The MOO was entered on May 26, 2023, HSD App V.3 at 594; this appeal was filed June 23, 2023. HSD App V.3 at 804.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Issue No. 1: Plaintiffs failed to meet their heightened burden of proof for the issuance of a mandatory injunction and they presented no admissible evidence to demonstrate entitlement to an injunction.

A. Plaintiffs failed to prove irreparable harm caused by HSD.

B. Any injury to Plaintiffs does not outweigh the harm to the HSD.

C. The injunction is contrary to the public interest.

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[2] HSD filed a motion to dismiss the cross appeal because the District Court specifically stated that the MOO did not address the standing of DRNM, the request that HSD provide additional information and relief for unnamed alleged DRNM constituents who are medically-fragile children not receiving private duty nursing services was not argued before the District Court and, after the MOO was entered, Plaintiffs filed for the first time a motion for class certification "and to recognize the associational standing of" DRNM. HSD App V.3 at 806. The motion to dismiss should be granted and the cross appeal should be dismissed.

D. Plaintiffs presented no evidence of a substantial likelihood of success on the merits on any claim made on the Complaint.

Issue No. 2: The injunction is impermissibly vague.

Issue No. 3: Plaintiffs lack Article III standing.

Issue No. 4. The injunction is foreclosed by *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015).

IV. STATEMENT OF THE CASE

The two named Plaintiffs, M.G. and C.V., are profoundly ill minor children who are classified as "medically fragile" under New Mexico's Medicaid program. *See generally* HSD App V.1 at 38. Plaintiffs' designation as "medically fragile" refers to the fact that each child has "a life-threatening condition characterized by reasonably frequent periods of acute exacerbation, which require frequent medical supervision or physician consultation and which, in the absence of such supervision or consultation, would require hospitalization." Medically Fragile Home and Community-Based Services Waiver, N.M. Human Servs. Dep't., 8.314.3.12(B)(1) NMAC. Plaintiffs' severe medical issues include, among others, difficulty breathing, frequent seizures, and the inability to feed or toilet themselves unassisted. HSD App V.1 at 61, 63-64, 66.

Medicaid directs federal funding to states, including New Mexico, for the provision of medical assistance to low-income individuals who would not otherwise be able to afford healthcare. *See generally* 42 U.S.C. § 1396. States participating in Medicaid must designate a single state agency to administer and supervise the Medicaid program and ensure compliance with the law. 42 U.S.C. § 1396a(a)(5). New Mexico has designated HSD for that purpose. *See generally* 42 U.S.C. § 1396. HSD does not provide health services directly to enrollees, like the Plaintiffs, nor does it provide enrollees with monies directly. HSD contracts with managed care organizations ("MCOs") that in turn contract with providers to provide direct services. The Medicaid Act, 42 U.S.C. § 1396, et. seq., (the "Medicaid Act") requires that a state Medicaid plan furnish healthcare services "with reasonable promptness to all eligible individuals," including Private Duty Nurses ("PDN") services to those living in their home communities, as opposed to uniformly requiring institutionalization for high-need patients. 42 U.S.C. §§ 1396a, 1396d(a)(8). One of the goals of the Medicaid program is to help disabled individuals to retain the capability for independence. 42 U.S.C. § 1396-1.

Plaintiffs filed their Complaint on April 28, 2022 against HSD, Dr. David Scrase, the then Secretary of HSD in his official capacity, and three MCOs: Presbyterian Health Plan, Inc., HCSC Insurance Services Company operating as

Blue Cross and Blue Shield of New Mexico; and Western Sky Community Care, Inc. (collectively the "MCOs'). Plaintiffs' claims arise out of HSD's alleged failure to provide them with the maximum number of hours of PDN services Plaintiffs were eligible for under the State's Medicaid program. HSD App V.1 at 39, 45, 107. The two minor Plaintiffs remain at home with their families. *See generally* HSD App V.1 at 38 and RMPI, HSD App V.3 at 556.

The MCOs moved for dismissal of Plaintiffs' claims seeking declaratory relief and punitive damages against them on the basis that Plaintiffs are not intended third-party beneficiaries of the contracts between the MCOs and HSD, Plaintiffs lack standing under Federal Rule of Civil Procedure 12(b)(1) and failed to state a claim under Rule 12(b)(6). HSD App V.1 at 88, 91. The MCOs requested dismissal of Plaintiffs' claims against them. HSD App V.1 at 102.

Taking all of Plaintiffs' allegations as true, on October 27, 2022, the District Court granted the MCOs' Motion, found that the New Mexico Patient Protection Act, §§ 59A-57-1 to 11, at 10(B), NMSA, did not invalidate the contracts' third-party beneficiary disclaimer, and Plaintiffs failed to state a claim as to their right to third-party enforcement against the MCOs, and dismissed the second, third and fourth causes of action made in the Complaint, and the first cause of action as to MCOs only. HSD App V.1 at 236.

On October 7, 2022, Plaintiffs filed their first Motion for Preliminary Injunction ("MPI"), HSD App V.1 at 173, requesting the District Court enter an injunction requiring HSD to provide them with more PDN hours. At the time, M.G. was receiving the maximum number of hours to which she was entitled and she did not seek relief in the MPI. The Court denied the MPI, finding that the original language did "not take into account either market factors or the steps [HSD has] already taken to fulfill their legal obligations" and Plaintiffs' proposed order violated Rule 56 in that it was overly vague. HSD App V.3 at 553.

Later, Plaintiffs filed the RMPI, HSD App V.3 at 556, which requested, among other things, that the Court order HSD to take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to Plaintiffs at the level already approved by HSD, as required by the Medicaid Act. HSD App V.3 at 578. Plaintiffs argued HSD could directly or through referral to appropriate agencies, organizations, or individuals provide the corrective treatment of in-home shift nursing services to Plaintiffs M.G. and C.V. pending final judgment in this action or until further order of the Court.

HSD cannot and is not required to provide tall the PDN hours to which Plaintiffs believe they are entitled. Neither the District Court nor Plaintiffs could

suggest how to obtain more PDN hours for Plaintiff, given the admitted nursing shortage. The MOO and the resulting injunction should be reversed. HSD is taking all the action reasonably available to administer and supervise the Medicaid program and ensure compliance with the laws and continues to pay for the all PDN services provided to Plaintiffs.

SUMMARY OF THE ARGUMENT

Plaintiffs are not entitled to a preliminary or permanent injunction. The injunction entered by the District Court altered the status quo by requiring HSD to provide more services to Plaintiffs then HSD was required to provide, which gave Plaintiffs all the relief to which they would be entitled had the case gone to trial. The injunction is based on an insufficient evidentiary record, was entered after improperly shifting the burden of proof to HSD, the injunction is impermissibly vague and *Armstrong* prohibits the Court from ordering HSD to increase reimbursement rates. Plaintiffs have not demonstrated irreparable harm and, even if they did, the injury to M.G. and C.V. does not outweigh the harm to the HSD. The injunction is contrary to the public interest. Further, Plaintiffs lack Article III standing and have failed to state a case for discrimination having presented no evidence that availability of PDNs is different for them as medically fragile minors than others in need of PDN services which dictated that the 42 U.S.C. Section 1983

("§ 1983") claim should fail.

ARGUMENT

ISSUE NO. 1: Plaintiffs Failed to Meet their Heightened Burden of Proof for the Issuance of a Mandatory Injunction and Presented no Admissible Evidence to Demonstrate Entitlement to an Injunction.

A. The Heightened Standard of Review for a Preliminary Injunction.

> A district court's decision crosses the abuse-of-discretion line if it rests on an erroneous legal conclusion or lacks a rational basis in the record. As we review a district court's decision to grant or deny a preliminary injunction, we thus examine the court's factual findings for clear error and its legal conclusions de novo.

Mrs. Field's Franchising, LLC v. MFGPC, 941 F.3d 1221, 1232-33 (10th Cir. 2019 (quoting *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 796-97 (10th Cir. 2019)). "[B]ecause a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *N.M. Dep't of Game & Fish v. U.S. Dep't of Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017) (*internal quotation marks omitted*).

B. Plaintiffs Did Not Demonstrate a Right to the Injunction.

To obtain a preliminary injunction, Plaintiffs must demonstrate that (1) they will be irreparably harmed if the preliminary injunction is denied; (2) the threatened injury to them outweighs any injury the opposing party would suffer under the preliminary injunction; (3) the injunction is not adverse to the public interest; and

(4) Plaintiffs have a substantial likelihood of success on the merits. MPI, HSD App V.1 at 184. Preliminary injunctions are extraordinary remedies requiring that the movant's right to relief be clear and unequivocal. *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1224 (10th Cir. 2008). Plaintiffs' assertion that if "the first three factors tip strongly in its favor" plaintiffs can establish "likelihood of success" merely "by showing that the questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation" is erroneous. *Id.* This so called "modified test" has not been the law in New Mexico or this Circuit for almost six years. *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016).

In *Jewell*, the plaintiff argued that a district court erred by failing to apply the "modified test" under which a plaintiff that has satisfied the first three prongs for an injunction can "meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Id.* The *Jewell* Court directly rejected this argument, noting that the "modified test is inconsistent with," and therefore abrogated by, "the Supreme Court's recent decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008)." *Id.*; *see also Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1163

(D.N.M. 2020) (noting that *Jewell* "reversed course from earlier Tenth Circuit doctrine that allowed movants to make a lesser showing of their likely success when the other preliminary injunction factors strongly weighed in their favor"). "Any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible," including "the requirement that the plaintiff must show he is likely to succeed on the merits." *Id.* Plaintiffs are not entitled to an injunction unless they affirmatively demonstrate a substantial likelihood of success on the merits as well as success on the other factors.

Plaintiffs did not address the fact that the injunction they sought is disfavored under Tenth Circuit law. This Circuit has identified three "types of specifically disfavored preliminary injunctions: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005) (*internal quotation marks omitted*). The entered injunction is disfavored on all these grounds. Disfavored preliminary injunctions "require a stronger showing by the movant" than other injunctions. *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016); *Trial Lawyers College v. Gerry Spence Trial Lawyers College*, 23 F.4th 1262, 1274

(10th Cir. 2022) ("the movant's burden is greater" when the requested injunction is disfavored).

The District Court admitted the entered injunction is "clearly" mandatory, MOO, HSD App V.3 at 600-601. The Court engaged in burden shifting to order HSD to take immediate and affirmative steps to arrange corrective treatment of in-home shift nursing services to Plaintiffs at the level already approved by HSD, as required by 42 U.S.C. § 1396 et. seq. (**"**the Medicaid Act"). Either directly or through referral. HSD App V.3 at 589. This injunction was entered despite the fact that Plaintiffs presented no evidence that a certain number of PDN hours were guaranteed and the Court assumed every hour of in-home skilled care for which M.G. and C.V. were eligible was to be provided by a PDN. No evidence was presented as to how many in home skilled care, including PDN hours, M.G. or C.V. were receiving prior to the entry of the injunction, or whether HSD had any role in any shortfall of hours provided or whether an increase in the reimbursement rates could increase the number of hours available to M.G. or C.V. These evidentiary failing should have been fatal to the mandatory injunction entered. The injunction also directed HSD to affirmatively provide notice to the MCOs to ensure the provision of PDN hours, to provide certain class-related discovery to Plaintiffs, *id.* at 589-590 and even included a mechanism for ongoing Court monitoring. *Id.* at

590-591. While the District Court recognized that the injunction was mandatory, it failed to analyze the injunction under the stricter standard required by the Circuit, shifted the burden of proof to HSD and failed to address the issue of the alteration of the *status quo*.

Plaintiffs have not provided any evidence, admissible or otherwise, that they are not currently receiving services or the MCOs breached their contracts. The requested injunction places the Court in a position where it may have to provide ongoing supervision to assure HSD is abiding by the injunction[3] ad effectuating the ordered change in the status quo. Plaintiffs did not satisfy the greater burden required for the entry of the mandatory injunction. *Trial Lawyers College*, 23 F.4th at 1275.

Even if the RMPI had not sought a mandatory injunction, it was still disfavored for a second, independent reason; Plaintiffs sought to alter the status quo. HSD App V.3 at 589-591, ¶¶ C and D. Without proof of the Plaintiffs' current level of PDN services or whether those services were guaranteed, the Court ordered PDN services to be "restored" if they are not, speculatively, currently provided. This is unquestionably an alteration of the status quo. Plaintiffs do not address this element

[3] This conclusion is evidenced by the fact that, currently, the District Court is considering the appointment of a special master to oversee the case, validating one of the reasons why the Tenth Circuit disfavors mandatory injunctions.

in briefing or arguing the RMPI and appear to have conceded they cannot meet this element. HSD App V.3 at 586, ¶ 20. As the Tenth Circuit explained, "the status quo is not defined by the parties' existing legal rights; it is defined by the reality of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights." *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1100 (10th Cir. 1991), *overruled per curiam on other grounds by O Centro Espirita Beneficente Uniao do Vegegal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegegal*, 546 U.S. 418 (2006). Plaintiffs did not seek maintenance of the status quo but a departure from the status quo, without presenting evidence, without a trial and without addressing legal and factual issues that are evidenced in the Complaint. The injunction changes that status quo by requiring HSD to effectively guarantee the provision of the maximum amount of PDN services claimed by Plaintiffs no matter what. Plaintiffs have not and cannot point to any policy, practice, or decision by HSD that has changed its relationship with M.G. or C.V. Indeed, the only change Plaintiffs can identify is the fact that M.G.'s prior PDNs were no longer interested in providing home care to her. HSD App V.3 at 585-586, ¶¶ 10-19. There was no evidence presented that the reason M.G.'s PDNs made the decision not to continue

to provide services to M.G. was related to wages rather than some other factors. The fact that some of M.G.'s previous PDNs decided not to continue to provide care to her does not evidence any change on the part of HSD. *See Schrier*, 427 F.3d at 1260 (to determine the status quo, courts are to "look to the reality of the existing status and relationship between the parties and not solely to the parties' legal rights.). The entered injunction changed the status quo and is disfavored for this reason as well.

Finally, Plaintiffs seek all the relief they could recover at the conclusion of a full trial on the merits and the District Court has, in essence, granted that relief without a trial or evidence. HSD App V.3 at 588. "[T]he limited purpose of a preliminary injunction 'is merely to preserve the relative positions of the parties until a trial on the merits can be held …'" *Schrier v. Univ. of Colo.,* 427 F.3d 1253, 1258 (10th Cir. 2005) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). In HSD App V.3 at 590-591, ¶ D, Plaintiffs requested the Court enter a consent decree for unnamed people that Plaintiffs have now, more than one year after the filing of the complaint and after the entry of the injunction, sought to certify as a class. *See* HSD App V.3 at 806. The requested injunction creates additional and new obligations on HSD and requires the Court, or a Special Master at HSD's expense, to provide ongoing supervision to assure HSD and multiple nonparties abide by the injunction ad the ordered changes in the status quo.

Before entry of the MOO, the Court inquired as to whether the Fair Hearing process has been invoked or taken place; it has not. *See* Transcript of May 18, 2023 Hearing, HSD App V. 3 at 670, 32:18-24, (Q: Have you ever invoked the fair hearing process with HSD? A: No."). The Fair Hearing is Plaintiffs recourse under the Medicaid Act and it is the process in place to resolve issues like those raised in this lawsuit. If the purpose of the lawsuit is to resolve issues regarding the provision of in-home skilled services, then the Fair Hearing process is a valuable and unused tool available to Plaintiffs, is a practical and cost-effective administrative precursor to litigation and is the dispute resolution method spelled out in the Medicaid Act. While it is true that there are not enough nurses available nationwide, there are other options to determine the best in home skilled care to accomplish M.G.'s and C.V.'s Individualized Service Plan ("ISP") goals within the Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") budget. Those could have been developed cooperatively in the Fair Hearing process, as envisioned on the Medicaid Act, without wasting judicial resources

C. Plaintiffs Did Not Demonstrate Irreparable Harm.

A party seeking a preliminary injunction must first demonstrate that irreparable injury is likely before the other traditional equitable requirements will be considered. *DTC Energy Grp., Inc. v. Hirschfeld*, 912 F.3d 1263, 1270 (10th Cir.

2018) (*quotation omitted*). "Absent a showing of irreparable harm, the Court need not reach the other factors of the inquiry because [the] plaintiff does not provide sufficient support for issuance of injunctive relief." *May v. U.S. Bank, N.A.*, No. 13-cv-1621, 2013 WL 3200473, at *2 (D. Colo. June 24, 2013). The purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that would surely result without the injunctive relief. *DTC Energy*, 912 F.3d at 1270 (quoting *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005)). For this reason, "allegations of past harm are inadequate to establish irreparable harm." *Donahue v. Kan. Bd. of Educ.*, No. 18-3130, 2019 WL 2359370, at *2 (10th Cir. June 4, 2019).

Plaintiffs sought an injunction requiring HSD to provide all of the PDN hours that they assert have been authorized for them. MPI, HSD App V.1 at 199. M.G. contends that she has been authorized to receive 84 hours of PDN services per week. *Id.* at 177-178, ¶ 15 and Declaration of Christina Garcia, M.G.'s mother, HSD App V.1 at 206, ¶¶ 8-9. Both the MPI and the Garcia Declaration acknowledge that M.G. has been receiving her full authorized allotment of 84 PDN hours per week since before the filing of the MPI. MPI, HSD App V.1 at 177-178, ¶ 15; and HSD App V.1 at 206, ¶ 10. Because M.G. acknowledged she is already receiving all of the relief she sought in the MPI, she could not satisfy the irreparable-injury requirement

and the District Court rightfully decided she was not entitled to a preliminary injunction at that time.

While the Garcia Declaration contends that M.G. received insufficient PDN hours in the past. HSD App V.1 at 206, ¶ 11, those allegations of past harm did not establish entitlement to a preliminary injunction. Instead, the analysis depends upon her current circumstances, which literally can change daily. *See, e.g.*, *Salba Corp., N.A. v. X Factor Holdings, LLC*, No. 12-cv-1306, 2014 WL 4458690, at *5-6 (D. Colo. Sept. 10, 2014) (denying preliminary injunction where plaintiff had shown past harm but had not established likelihood of future injury, noting that a "preliminary injunction cannot prevent harm that occurred in the past").

M.G. failed to provide any evidence that she is likely to sustain irreparable injury in the future. To obtain a preliminary injunction based on anticipated future injuries, it is not enough that future irreparable injury be *possible*. "[I]rreparable injury [must be] *likely* in the absence of an injunction." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008). A plaintiff "must demonstrate a significant risk that he or she will experience" irreparable harm. *Fish v. Kobach*, 840 F.3d 710, 751 (10th Cir. 2016) (*quotation omitted*). "[A] plaintiff's continued susceptibility to injury must be reasonably certain; a court will not entertain a claim for injunctive relief where the allegations take it into the area of speculation and conjecture."

Jordan v. Sosa, 654 F.3d 1012, 1024 (10th Cir. 2011) (*quotation and brackets omitted*). There is no evidence that the entered injunction will ameliorate any future harm to her or C.V. in the future.

M.G. provided no evidence suggesting that her PDN hours might be reduced in the future based on the actions of HSD. She certainly did not establish a "significant risk" that her hours will be reduced. *Fish*, 840 F.3d at 751. While speculation does not suffice to establish irreparable injury, *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009), M.G. did not provide any reason, even a speculative one, to establish that HSD might cause her to lose the PDN services she is currently receiving. "The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a likelihood of substantial and immediate irreparable injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Because M.G. did not satisfy the irreparable-injury requirement, she is not entitled to injunctive relief.

Plaintiffs claim that M.G. and C.V. will suffer irreparable harm unless more PDN services are provided to them immediately. This is a harm exceeding any prejudice that the HSD would incur in arranging for PDN services. MPI, HSD App V.1 at 186-189. Even if Plaintiffs had established the elements of a preliminary

injunction as to M.G. and C.V., such a showing would still not suffice to justify the injunction on behalf of a contemplated putative class of all New Mexican children who are eligible for PDN services that the Court has since been asked to certify ad is the subject of the cross appeal.[4]

Injunctive relief "cannot be granted to a class before an order has been entered determining that class treatment is proper."[5] *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974); *see also Everhart v. Bowen*, 853 F.2d 1532, 1539 (10th Cir. 1998) (reversing a district court order because "absent a class certification, the district court

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[4] As previously stated, currently pending before the District Court is Plaintiffs' motion to certify a class and recognize DRNM's associational standing. HSD moved to stay the proceedings in the District Court. No decision has been entered on the requested stay, which is currently being briefed.

[5] The unavailability of injunctive relief prior to class certification is not merely one of timing. The question of whether a class will *ever* be certified in this case is seriously in doubt. Even if the Court is eventually persuaded that the prerequisites of Rule 23(a) have been satisfied, Plaintiffs would still need to demonstrate conformity with Rule 23(b)'s requirement that "injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Certification under "Rule 23(b)(2) demands a certain cohesiveness among class members with respect to their injuries," *Shook v. Bd. of Cnty. Comm'rs*, 543 F.3d 597, 604 (10th Cir. 2008) (Gorsuch, J.), such that the conduct complained of "can be enjoined . . . only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). Here, the requisite alignment of class interests is demonstrably absent, as the class members all present unique needs, live in different areas of the state, are serviced by different providers, and can elect to forego approved PDN hours by choice.

should not have treated the suit as a class action by granting statewide injunctive relief"), *rev'd on other grounds sub nom. Sullivan v. Everhart*, 494 U.S. 83 (1990). Unless and until class certification occurs, a preliminary injunction "may properly cover only the named plaintiffs." *Nat'l Ctr. for Immigrant Rights, Inc. v. INS*, 743 F.2d 1365, 1371 (9th Cir. 1984) (*citing Tape Head Co. v. RCA Corp.*, 452 F.2d 816, 819 (10th Cir. 1971) (per curiam)); *accord, e.g.*, *Brown v. Tr. of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (Ordinarily, class wide relief, such as an injunction is appropriate only where there is a properly certified class.); *see also Cunningham v. Lyft, Inc.*, 17 F.4th 244, 246, 253–54 (1st Cir. 2021) (upholding the denial of a class injunction where "plaintiffs have not even moved to certify a class").[6]

The rule that injunctive relief cannot be granted to a class before a class has been certified is a logical extension of the rule that injunctions must be narrowly tailored to correct the harm shown. The same rule applies in mass actions as well. In *Adams v. Freedom Forge Corp.*, 204 F.3d 475 (3d Cir. 2000), the court overturned the grant of a preliminary injunction to 136 individually named plaintiffs, only

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[6] By contrast, in *O.B. v. Norwood*, 838 F.3d 837 (7th Cir. 2016) - a case that Plaintiffs characterize as "nearly identical to the case presently before this Court," MPI, HSD App V.1 at 193 - the district court granted a class-wide preliminary injunction only after certifying the class, *see* 838 F.3d at 840. *But cf. Cooper v. TWA Airlines, LLC*, 274 F. Supp. 2d 231, 242 (E.D.N.Y. 2003) (*citing Freedom Forge*, 204 F.3d at 487, and declining to award preliminary injunctive relief to a certified class).

eleven of whom had presented evidence that they faced irreparable harm absent equitable relief. *Id.* at 479–80, 485–88. Declaring that "the demanding requirements for a preliminary injunction do not yield to numbers," *id.* at 480, that Court held that "in the absence of a foundation from which one could infer that all (or virtually all) members of a group are irreparably harmed, … a court can[not] enter a mass preliminary injunction," *id.* at 487. "[P]roof by association in a law suit," the court added, "or proof by 'common sense,' will not suffice." *Id.* at 488.

Plaintiffs did not present evidence "from which one could infer that all (or virtually all) members of a group are irreparably harmed." *Adams*, 204 F.3d at 487. The named Plaintiffs' mothers' declarations in support of the MPI focus exclusively on the particulars of M.G.'s and C.V's medical conditions and their own need for nursing services. *See* HSD App V.1 at 205, 211, 218. Another declarant, a retired nurse, offered purely anecdotal testimony, from an indefinite point in time, based largely on hearsay. *See, e.g.*, HSD App V.1 at 200, ¶¶ 28–30 ("I have witnessed families struggle …."; "I have had families tell me …."; "I have seen a foster parent refuse to accept their foster child's discharge from a hospital …."). *See* Agard Deposition, HSD App V.1 at 258-260, 129:14-23; 136:23-137:3; and 138:21-139:5.

None of Plaintiffs' "evidence" comes close to demonstrating that all the members of the putative class in question - "[a]ll Centennial Care 2.0 beneficiaries

under the age of 21 in New Mexico who have been approved for private duty nursing services by HSD, but are not receiving the nursing services at the level approved by HSD", HSD App V.1 at 48, ¶ 32, - are all suffering irreparable harm in the absence of an injunction. Indeed, Plaintiffs did not provide the Court with any evidence regarding specifics related to any child other than M.G. and C.V. and even that evidence is deficient. Indeed, Plaintiffs did not meet their burden as M.G. and C.V. or any speculative and uncertified class. Plaintiff Christina Garcia, for example, acknowledges that M.G. was receiving all the PDN services for which she is eligible. *See* HSD App V.1 at 205, ¶ 10; HSD App V.1 at 209. Other evidence, whether competent or not, placed in the record by Plaintiffs establishes that some children receive fewer PDN hours because their parents chose not to use the services, not because HSD failed to provide them. *See* HSD App V.1 at 146-147; HSD App V.1 at 137; and Agard Deposition, HSD App V.1 at 257, 107:5-108:10. Under such circumstances, no inference of group-wide irreparable harm caused by HSD can possibly arise and an injunction based on that inference is improper.

D. The Balance of Potential Harm to Plaintiffs did not Outweigh the Harm to Others.

Because Plaintiffs have not shown irreparable harm, the Court need not engage in a balancing test to determine whether the cost and disruption to HSD of trying to comply with an impermissibly vague injunction, *see infra*, that does not

guarantee any actual services for Plaintiffs, since HSD cannot create nurses and paying nurses more to serve the named Plaintiffs takes away nursing services from others is outweighed by the harm to Plaintiffs. The injunction puts HSD in the position of considering rationing care to New Mexicans, reducing eligibility hours by regulation systemwide or pulling PDN services from other patients who are not subject to the requirements of the injunction. HSD does not want to do any of these things but cannot allow itself to be in contempt of the injunction.

E. Plaintiffs Failed to Show a Substantial Likelihood of Success on the Merits.

The legal standard for proving the substantial likelihood of success prong is an exacting one:

> The proper standard applicable to the substantial-likelihood-of-success prong is that the movant must (i) carry the burden of production, i.e., he or she must present a prima facie case; and (ii) make it reasonably likely -- beyond just being "not unreasonable" -- that the factfinder would actually find for the movant, i.e., that the movant would satisfy the burden of persuasion. *See supra note 6*. The Court will always require the full first showing -- the plaintiff must present a quantum of evidence sufficient to survive a motion for directed verdict if it were presented at trial.

Diné Citizens Against Ruining Our Env't v. Jewell, 2015 U.S. Dist. LEXIS 109986, at *116 (*citation omitted*). Plaintiffs did not make a factual showing sufficient to demonstrate that they were likely to satisfy all of the elements of each count of the Complaint.

1. Plaintiffs Did Not Demonstrate a Likelihood of Success under the Medicaid Act.

Under New Mexico law, EPSDT PDN services "***must*** be": (i) "ordered by the MAP eligible recipient's PCP"; (ii) "included in his or her approved treatment plan"; (iii) "medically necessary" and (iv) "within the scope of the nursing profession." NMAC § 8.320.2.19(B)(2); *see also* 42 U.S.C. § 1396d(r)(5). All of these elements must be satisfied at the time PDN services are rendered and they are not answered by a single document. The District Court was not clear on whether the ISP or the EPSDT budget control and Plaintiffs presented no evidence to settle this critical evidentiary issue. Plaintiffs put much emphasis on the EPSDT "Budget" but that document is not actually a budget, is not controlling and does not, standing along, contain all of the information needed to satisfy the requirements of NMAC § 8.320.2.19(B)(2).

Before the Court evaluated whether there is irreparable harm, the Court had to determine whether Plaintiffs have carried their burden to show that they are each currently entitled to the specific number of PDN hours that they contend HSD is failing to provide, by providing evidence establishing all four of the NMAC § 8.320.2.19(B)(2) elements as to that number of hours.

First, a level of care assessment (the "LOC") is conducted by a care manager at UNM to determine whether, and if so at what level, a child qualifies for skilled

homecare assistance. *See* Transcript of November 4, 2022 Hearing, HSD App V.2 at 352-353, 19:22-20:1 and at 355, 22:9-23. The LOC places children in one of three general levels, which determine whether the child will be eligible for 20, 30, or 40 hours per week of aggregate skilled in-home care. *Id.* at 355, 22:9-23 and at 459, 126:6-16. In-home skilled caregiving hours include both PDN ***and*** Home Health Aide ("HHA") services. *Id.* at 378-379, 45:24-46:1. As Plaintiffs' own witness, Ms. Agard, explained, the LOC yields a total number of "in-home skilled caregiving hours," but it does not determine the number of PDN, as opposed to HHA or various other therapy hours that a child requires. *Id.* at 355, 22:9-23.

Once the LOC is complete, UNM RN Care Managers prepare the ISP. *Id.* at 354, 21:2-20. The ISP expressly "documents goals" and "[s]erves as a guideline for care." HSD App V.2 at 280; HSD App V.2 at 300. Thus, to the extent PDN services, as opposed to HHA or other therapy services, are required to address specific needs and in any particular quantity, that information should appear in the ISP description of "nursing" responsibilities and plan. Here, Plaintiffs do not argue that their ISPs, or any other physician orders, mandated a specific number of PDN hours. In fact, the ISP specifically states it is not a guarantee of services.

Finally, an EPSDT Budget is prepared by UNM RN case managers. That document identifies the specific home health provider eligible to render services and

allocates the total number of in-home skilled caregiving hours for which a child is eligible under the LOC between the PDN services, if any, and HHA providers or therapists that have agreed to provide services. The EPSDT Budget is sent to the MCO, whose approval of the document serves as the authorization for the providers to bill the MCOs for services provided, up to the authorized number of total hours. The Medically Fragile waiver standards also govern Plaintiffs' eligibility.

Plaintiffs insist without authority that the breakdown of PDN and HHA hours in their EPSDT Budgets, which look forward for a year, nevertheless conclusively determines the number of PDN hours that are "medically necessary." It does not. As an initial matter, Plaintiffs did not provide any evidence indicating that the hour breakdown authorized in their EPSDT budgets were dictated by physician's orders or reflect the minimum number of "medically necessary" PDN hours. To the contrary, Ms. Agard, who prepared EPSDT budgets before she retired, explained that the actual breakdown between the number of HHA and PDN hours is often determined not by an assessment of medical necessity, but by "the family, the case manager, and the nursing service agency." *See* Transcript of November 4, 2022 Hearing, HSD App V.2 at 380, 47:5-16. In fact, in the process of creating that "budget," if the care manager, such as Ms. Agard, believes that services could be safely provided by an HHA or therapist, but the family disagrees, the family, not a

physician or care manager, can say "No, I want a nurse" and "can override" the care manager by allocating all of the skilled-care services in their EPSDT Budget to PDN because they "want a nurse to provide the[] services." *See* Agard Deposition, HSD App V.1 at 253, 69:18-25. The fact that a family prefers PDN services to HHA services does not mean that a PDN is "required to meet the physical and behavioral health needs of the eligible recipient," a necessary element of demonstrating any specific number of PDN hours are medically necessary.[7] Moreover, while the ESPDT budgets pre-authorize home health agencies to bill MCOs for a specific number of PDN and HHA hours, under New Mexico law, EPSDT prior authorization expressly "does not guarantee that an individual is eligible for a MAD service." NMAC § 8.320.2.14(D); NMAC § 8.320.2.19(E) (confirming PDN services are subject to the limitations and coverage restrictions which exist for other MAD services which are enumerated in Section 14 of that rule).[8]

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[7] Indeed, the only ***medical evidence*** before the Court at this juncture is the uncontroverted testimony of Dr. Scrase, who reviewed Plaintiffs' ISPs and specific needs and explained that HHA and Respite Care providers can provide support for over 80% of Plaintiffs' needs and that Plaintiffs would not be irreparably harmed by receiving these services from a HHA instead of a PDN. *See* Dr. Scrase Affidavit, HSD App V.1 at 230-234, ¶¶ 46-57 and 59.

[8] These include, *inter alia*, services: (i) "furnished to an individual who is not eligible"; (ii) "furnished without prior authorization of the MAP eligible recipient's primary care provider"; (iii) "provided by a practitioner who is not in compliance with the statutes regulations, rules or who renders services outside of the scope of

In order to justify the issuance of the injunction, Plaintiffs had the burden of proving how many PDN hours M.G. and C.V. require per week and how many hours they are currently receiving per week. This they did not do.

HSD has taken steps to address the shortage of PDN services in the in-home setting. While the COVID-19 emergency exacerbated the shortage, the evidence presented in this case has shown the shortage predated the pandemic and will continue now the pandemic has subsided.

Plaintiffs' primary cause of action asserts that HSD violated the Medicaid Act and, in particular, 42 U.S.C. § 1396a(a)(43)(C). *See* RMPI, HSD App V.3 at 571-575. But Plaintiffs' citation to (a)(43) is a misnomer. While Plaintiffs are correct that (a)(43) provides a general requirement that the state arrange for medically necessary, EPSDT-mandated services, that requirement is not unlimited, and necessarily assumes that such services are available. Thus, for example, a Medicaid plaintiff requiring a heart transplant cannot bring a claim under §(a)(43) to require a state to procure a heart where no viable transplants are available or as a tool to order

practice as defined by his or her practice board"; (iv) "that are not considered medically necessary by MAD or its designee; (v) that are primary educational or vocational; (vi) related to activities for the general good and welfare as well as services not provided "within the scope of the practice and licensure for each agency, each rendering provider within that agency or each individual provider." NMAC § 8.320.2.14(B), (C).

that Medicaid beneficiaries get priority over non-Medicaid beneficiaries, to whom §(a)(43) does not apply, when a heart becomes available.

M.G. and C.V.do not identify or present evidence of any administrative issue, such as a failure to approve their eligibility, failure to pre-authorize services, or failure to contact nursing agencies in an attempt to procure nurses. Instead, the only act or omission by HSD that Plaintiffs point to, based on speculation, is HSD's supposed failure to ensure that rates for PDN services are sufficiently high to assure that a PDN will be available to every EPSDT beneficiary who needs one. There was no evidence to support this theory. Regardless, the issue of whether HSD has set a reimbursement rate sufficient to procure the required number of nurses is controlled by §1396a(a)(30), not (a)(43). *See infra* at III (c).

Separate from 42 U.S.C. §1396a(a)(43), the RMPI made reference to §1396a (a)(8)'s so called "reasonable promptness" requirement. RMPI, HSD App V.3 at 573. The Complaint does not allege a violation of §1396a(a)(8) and neither the Complaint nor the RMPI undertook any analysis of what (a)(8) requires or cite to any regulations illuminating the requirements of (a)(8). Even if Plaintiffs' claims under §1396a(a)(8) were at issue, they fail for the same reason as their §1396a(a)(43) theory, as their challenge to provider rates is, once again, governed by §1396a(a)(30)(A) of the Medicaid Act.

Plaintiffs' arguments under §1396a(a)(8) also fail for several separate and independent reasons. First, §1396a(a)(8) requires the provision of services with "reasonable promptness." 42 U.S.C. § 1396a(a)(8). Plaintiffs' claim relates to the *amount* of services they receive, not the *promptness* with which they receive services. The essence of their claim is that they are entitled to receive *more* PDN hours than they are receiving. In *Nasello v. Eagleson*, the Seventh Circuit confronted a similar theory brought under §1396a(a)(8) by a class of Medicaid beneficiaries. 977 F.3d 599 (7th Cir. 2020). The *Nasello* Court explained that the plaintiffs' "grievance concerns not the *time* at which these ongoing benefits are paid but the *amount* of those benefits." *Id.* at 602. The Court rejected the notion that this grievance could support a claim under (a)(8) and also rejected the plaintiffs' attempt to reframe their claim to contend that, if certain portions of services aren't being provided at all, then those portions are not being provided with reasonable promptness. *Id.* Because Plaintiffs' claim relate to the level of benefits that they are receiving rather than the promptness with which HSD furnished benefits, their claim does not fit within the scope of §1396a(a)(8) and will fail.

Second, courts that have found §1396a(a)(8) sufficiently definite to permit private enforcement have generally looked to the implementing regulations to give content to the statute's requirements. *See, e.g.*, *Romano v. Greenstein*, 721 F.3d 373,

379 (5th Cir. 2013). Implementing regulations emphasize that States must "[f]urnish Medicaid promptly to beneficiaries without any delay *caused by the agency's administrative procedures*." 42 C.F.R. § 435.930(a) (emphasis added). Plaintiffs presented no evidence that any delay in receiving their claimed full allotment of in-home skilled service hours resulted from any administrative procedures created by HSD. The only evidence in the record makes clear that any delays have resulted from a systemwide shortage of PDNs, wholly apart from any HSD administrative procedures. Reasonable promptness is about administrative process, not supply and demand economics. Thus, HSD did not violate §1396a(a)(8) and Plaintiffs will not succeed on that claim.

Third, §(a)(8) requires the provision of services with "*reasonable* promptness." 42 U.S.C. § 1396a(a)(8) (emphasis added). Any standard of reasonableness necessarily takes into account context and the specific facts of the situation. To the extent that "reasonable promptness" provides a judicially administrable standard at all, what is "reasonable" must necessarily take into account the systemwide shortage of PDN nurses that makes it impossible to provide all of the hours that Plaintiffs contend they are entitled to with the resources currently available in the market. *Cf.* U.S. Dep't of Health & Human Servs., Health Care Fin. Admin., *Olmstead Update No. 4* (Jan. 10, 2001) ("We appreciate that a state's ability

to provide timely access to particular services within the waiver may be constrained by supply of providers, or similar factors. Therefore, the promptness with which a State must provide a needed and covered waiver service must be governed by a test of reasonableness.”). In light of the systemwide limitations recognized by the Court and all parties, Plaintiffs did not show that any delay in the provision of PDN services is unreasonable. *Cf. Webb v. Clyde L. Choate Mental Health & Development Ctr.*, 230 F.3d 991, 1000 (7th Cir. 2000) (in an Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. (the “ADA”) case, finding that a proposed accommodation that the district court characterized as “impossible” would not be reasonable).

2. Plaintiffs Do not Demonstrate a Likelihood of Success under the ADA, the Rehabilitation Act or § 1983.

A prima facie claim under both these Acts requires a plaintiff to establish that HSD discriminated against them on the basis of their disability. *Sullivan v. Univ. of Kansas Hosp. Auth.*, 844 F. App’x 43, 48 (10th Cir. 2021). Plaintiffs provided no evidence or argument suggesting that HSD discriminated against them based on their disabilities.

As the Seventh Circuit pointed out in *Nasello*, Plaintiffs’ theory here does not fit within any ordinary understanding of discrimination. “It is [Plaintiffs’] disabilities that have made them ‘medically needy’ and qualified them for Medicaid

benefits. That the benefits are not as high as they want is not a form of discrimination. Plaintiffs receive more governmental aid than nondisabled persons." 977 F.3d 599, 602 (7th Cir. 2020). Receiving fewer PDN hours than Plaintiffs believe they are entitled, but more than the nondisabled population receives, does not constitute discrimination within the meaning of the ADA or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 et. seq. ("the Rehabilitation Act").

Plaintiffs claim that HSD violated both Acts by failing to administer EPSDT in the "most integrated setting appropriate to the needs of qualified handicapped persons." RMPI, HSD App V.3 at 575. Plaintiffs have not provided any evidence suggesting that: (a) M.G. and C.V. are at an imminent risk of institutionalization; or (b) there is a more integrated setting that PDN services would allow M.G. and C.V. to be integrated into. While Plaintiffs cite cases for the propositions that discrimination occurs when certain services are found only at nursing homes, and not provided at home, they provided no evidence to demonstrate that is the case here. To the contrary, the record evidence is that M.G. and C.V. are, and have been, in non-institutionalized settings for the duration of this litigation. RMPI, HSD App V.3 at 560, ¶ 14. The risk of institutionalization is purely speculative and cannot be used to support the injunction.

In *Cohon ex rel Bass v. New Mexico Dep't of Health*, 646 F.3d 717, 729 (10th Cir. 2011), the court found that the challenged practice of applying different review standards to budget requests above a specific annual total did not violate the ADA or the Rehabilitation Act. *Id.* at 729. This Court clarified that "unjustified isolation claims" under *Olmstead v. Zimring*, 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999) arise only where 'the issue is the location of services, not whether services will be provided.'" *Id.* Plaintiffs provided no evidence that HSD has attempted to force them into an institution as a precondition to receiving PDN services. *Cohon* defeats, rather than supports, Plaintiffs' claim.

In *Fischer v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003). a plaintiff, who had been receiving coverage for prescriptions in a non-institutional setting, was faced with a choice between institutionalization and having their prescription benefits reduced. The court held that the mere existence of this binary choice between institutionalization and having prescription coverage reduced allowed that plaintiff to challenge Oklahoma's decision to condition payment for prescriptions on institutionalization because they were already "imperiled with segregation" by virtue of "a change in state policy." *Id.* at 1182. Here, by contrast, Plaintiffs did not identify any change in HSD policy and they did not introduce

evidence or facts demonstrating that M.G. or C.V. stand imperiled with an imminent risk of institutionalization.

Plaintiffs argue that the unavailability of sufficient levels of PDN services violates the ADA and Rehabilitation Act because PDN services would allow Plaintiffs to receive services in settings they currently cannot access Plaintiffs, who receive services in both their homes and schools, do not identify any setting "more integrated" than their homes or schools. While Plaintiffs never identify the supposedly "more integrated" setting M.G. and C.V. have been denied, the RMPI suggests that Plaintiffs' theory is that M.G. and C.V. have been deprived of the ability to go out into the community beyond their school. RMPI, HSD App V.3 at 576.

This theory fails for three reasons. First, by law, EPSDT PDN "services must be furnished by a RN or an LPN **in the MAP eligible recipient's home or in his or her school setting**" only. NMAC § 8.320.2.19(B) (emphasis added). Even if M.G. and C.V. receive all of the PDN services they believe they are entitled to, those services would still only be available in their homes or schools, areas that they already access. Second, Plaintiffs provided no evidence that the absence of PDN services has limited M.G.'s or C.V.'s ability to interact with their community outside of their homes and schools. Third, none of the cases Plaintiffs cite hold that a

plaintiff who does not face a risk of institutionalization can state a claim under *Olmstead* merely by arguing they could interact with the public more frequently if an injunction issued. Plaintiffs' success on the claim is unlikely.

3. Plaintiffs' Failure to Demonstrate it is Possible to Cure the Nursing Shortage is Fatal to all of their Arguments.

HSD's "impossibility" argument refers to the failure of Plaintiffs to carry their burden of proof that their alleged "injury" is due to HSD's failure to take some action required by the Medicaid Act that would, if taken, actually remedy their injury.

The record is uncontroverted that there simply are not enough PDN hours available in New Mexico. *See, e.g.*, Dr. Scrase Affidavit, HSD App V.1 at 226-230, ¶¶ 19, 20, 24, 31, 38, 40-44; Agard Deposition, HSD App V.1 at 261, 159:9-13; and Holguin Deposition, HSD App V.1 at 263, 38:4-16. Plaintiffs offered no evidence to the contrary. Plaintiffs only offered inadmissible speculation as to why this is. Plaintiffs declined to offer any specific actions that could be lawfully required of HSD that would remedy the problem and provide M.G. and C.V. with more PDN services. Likewise, Plaintiffs offered no evidence that there is even one nurse licensed, qualified and available to provide PDN services to either M.G. or C.V. but is not doing so because of rates. There is no evidence that the vague injunction requiring HSD to take "additional steps" to secure more PDN hours for M.G. and

C.V. is likely to result in more PDN services for them, without redirecting services away from other Medicaid beneficiaries.

Plaintiffs' arguments based on theoretical economics regarding nursing salaries provided in Plaintiffs' exhibits do not include a single hourly wage rate for a single PDN or any other type of nurse, including traveler nurses. The traveler nurse market is almost exclusively focused on inpatient hospital services. *See* Dr. Scrase Affidavit, HSD App V.1 at 230, ¶41. Traveling nurses generally contract for only 13 weeks. *Id*. In the case of a medically fragile child, having four new PDNs each year would not provide the benefits of a long- term relationship with a family that provides the sense of security that each mother expressed in their Declarations. *Id*. at ¶42. Out of state traveler nurses would require association with home healthcare agencies and licensure in New Mexico before providing services, unless a specific exception was made by the New Mexico Nursing Board. *Id*. at ¶43. Because of the strong preference for each PDN to have experience with medically fragile children, HSD cannot speculate if any traveler nurses would meet this requirement. *Id*. at ¶44. Even if traveler nurses were willing and able to provide PDN services, the law does not allow families, HSD, or MCOs to contract directly with traveling nurses for EPSDT services. N.M.A.C. 8.320.2.19(A) requires EPSDT nurses to work through nursing agencies or federally qualified health center.

N.M.A.C. 8.320.2.19(A). Plaintiffs failed to prove that the relief they requested is available in New Mexico, can be controlled by HSD or will address their claimed injury. This failure is fatal to their arguments and to the injunction.

ISSUE NO. 2: Plaintiffs' Requested Injunction is Impermissibly Vague.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of (those) freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (f*ootnotes, internal quotation mark omitted*) (*quoting Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961) and *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). Every order granting an injunction must state its terms specifically and describe in reasonable detail and not by referring to the complaint or other document – the act or acts required. Fed. R. Civ. P. 65(d)(1)(B)–(C). Generally, injunctions requiring the defendant to simply obey the

law are too vague. *Keyes v. Sch. Dist. No. 1*, Denver, Colo., 895 F.2d 659, 668 (10th Cir. 1990). The entered injunction does that and does not adequately inform HSD of its obligations. *Swift & Co. v. United States*, 196 U.S. 375, 401 (1905). To satisfy Rule 65, the language of a preliminary injunction must be specific enough for the Court to determine whether there is compliance. *Shook v. Bd. of Cnty. Commissioners of Cnty. of El Paso*, 543 F.3d 597, 606 (10th Cir. 2008).

The injunction imposed in this case lacks the specificity required under Rule 65(d) and the case law. The District Court did not suggest how HSD can produce or acquire more suitably skilled nurses, acceptable to the specific needs of M.G. and C.V. Instead, the injunction orders HSD to provide services as required by the Medicaid Act. *See* MOO, HSD App V. 3, at 637, ¶ A. But "broad, non-specific language that merely enjoins a party to obey the law or comply with an agreement does not give the restrained party fair notice of what conduct will risk contempt," is "too vague to satisfy Rule 65." *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996); *Shook* at 605–06; *see also Swift & Co. v. United States*, at 401 (explaining it is this Court's duty to avoid issuing a sweeping injunction to obey the law). As a result, the injunction fails to afford both the guidance HSD needs to comply, and a reviewing court the standards it needs to judge compliance.

The injunction entered is impermissibly vague because it essentially orders HSD to solve a complex problem of labor supply and demand, and medical economics, without providing any concrete instructions for accomplishing the task. The injunction focuses on an end result, the provision of PDN hours for M.G. and C.V., without considering the impact of such a mandate on HSD's other obligations under the Medicaid Act to other beneficiaries or other financial requirements or whether compliance with the injunction is even possible. *Hughey* considered and rejected an injunction specific in form but amorphous in substance. The *Hughey* injunction forbade that defendant from discharging stormwater, a directive that the court observed, was incapable of enforcement as an operative command, because it required discharges to be stopped but failed to specify how the enjoined party could comply. *Id.* The injunction at issue here requires HSD to achieve a persistently elusive outcome of conjuring up more nurses but provides no guidance on how to do it. *Id.* at 1531. The District Court has, in effect, ordered HSD to raise PDN wages, a measure Plaintiffs have not proven would be effective at redressing their claimed injury and which they know the Court cannot order under *Armstrong*.

Plaintiffs have suggested, without evidence, that HSD might be able to obtain additional PDN hours from nurses who are not affiliated with licensed home health

agencies. Plaintiffs provided no evidence to support this argument. *See Colo. Outfitters*, 823 F.3d at 544. Existing New Mexico law requires that all PDN hours be provided through a licensed home health agency. N.M.A.C. § 7.28.2.9. Plaintiffs have not asked nor has the Court enjoined that regulation.

ISSUE NO. 3: Plaintiffs Lack Article III Standing.

This Court reviews de novo a district court's finding of standing. *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1215 (10th Cir. 2017). "The constitutional requirements for standing are (1) an injury in fact, (2) a causal connection between the injury and the challenged act, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.* at 1214–15 (quoting *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1228–29 (10th Cir. 2001)); *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1215 (10th Cir. 2018). Standing is jurisdictional, and can be raised at any point in the proceedings. *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 492 (10th Cir. 1998). If a party lacks standing to bring a particular legal challenge, courts lack jurisdiction to resolve the claim's merits. *See id.* at 493. "[T]he plaintiffs bear the burden of establishing standing." *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016).

Plaintiffs have not proven that the injunction entered would actually redress M.G.'s and C.V.'s claimed injuries or result in them receiving an increase in PDN

hours. Plaintiffs lack Article III standing and should not have been granted an injunction. *Spokeo, Inc. v. Robins,* 578 U.S. 330, 338; *Am. Historical Ass'n v. Nat'l Archives and Records Admin.*, 310 F. Supp. 2d 216, 228-29 (D.D.C. 2004) (holding that plaintiff had not established redressability prong where it was impossible to remedy the injury complained of); *Overton v. Uber Techs., Inc.*, No. 18-cv-02166-EMC, at *3 (N.D. Cal. Apr. 26, 2018); *Women for Am. First v. de Blasio*, 520 F. Supp. 3d 532, 540 (S.D.N.Y. 2021), *aff'd sub nom. Women for Am. First v. Adams*, No. 21-485-CV, 2022 WL 1714896 (2d Cir. May 27, 2022).

Plaintiffs cannot solve their redressability problem by speculating that if the reimbursement rates for home health agencies were higher, then more PDNs would *eventually* enter the market in New Mexico and some of them *eventually* would be willing to provide PDN services to M.G. and C.V. Plaintiffs introduced no evidence that increasing reimbursement rates would induce additional PDNs to enter the market or evidence of an amount of the necessary reimbursement rates to accomplish this goal. Plaintiffs bore the burden of introducing evidence to establish these issues, *Colo. Outfitters*, 823 F.3d at 544. Plaintiffs' evidentiary failing is especially problematic with regard to their theory about reimbursement rates, because that theory relies on the independent decisions of multiple layers of non-parties.

Where the Plaintiffs' theory of redressability "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," the Plaintiffs bear the burden "to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotation omitted). In the proceedings below, Plaintiffs' reimbursement theory rested of the independent decisions of two layers of non-parties: Plaintiffs failed to first show that the increased reimbursement rates paid to home health agencies would induce those home health agencies to raise their wages paid to PDNs.[9] Plaintiffs failed to then show that the home health agencies' hypothetical rate increases would be sufficient to induce more nurses to provide PDN services in New Mexico, including the cost to relocate from other states. Plaintiffs did not introduce any evidence on either of those issues, and failed to establish redressability.

Without even addressing the first two requirements to prove standing, Plaintiffs' failure to demonstrate that their claimed injuries will be redressed by the entered injunction is fatal to their claim that they have standing. The injunction should not have been entered.

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[9] HSD does not control the wages that home health agencies pay the PDNs.

ISSUE NO. 4: The Injunction is Foreclosed by *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015).

"We review de novo the district court's legal determinations." *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1299 (10th Cir. 2006). Clear Supreme Court precedent foreclosed Plaintiffs' ability to satisfy the prerequisites for a preliminary injunction here and prohibited the District Court from entering any injunction predicated on, or designed to interfere with, the process by which rates are established in connection with the New Mexico Medicaid program. *See Armstrong*. In *Armstrong*, the Supreme Court specifically considered, and rejected, the propriety of an injunction designed to do exactly what Plaintiffs asked: increase reimbursement rates in order to induce more PDNs to provide in-home shift nursing services to a subset of Medicaid beneficiaries. 575 U.S. at 328. Plaintiffs offer three flawed responses to the Supreme Court holding.

First, Plaintiffs argued that *Armstrong* did not apply because "Plaintiffs now submit a proposed preliminary injunction that tracks the preliminary injunction in *Norwood*." RMPI, HSD App V.3 at 579, referencing *O.B. v. Norwood*, 838 F.3d 837 (7th Cir. 2016). *Norwood* does not trump Supreme Court precedent and the injunction in *Norwood* was based on a different factual record and was designed to address different problems. Virtually none of the relief Plaintiffs sought in this action was sought in *Norwood*. *Compare* HSD App V.3 at 592 (*Norwood*) *with*

RMPI, HSD App V.3 at 566, ¶¶ b-d (none of which appear in *Norwood*). The only portion of the injunction that arguably tracks *Norwood* is the order that HSD "take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to Plaintiffs." HSD App V.3 at 589, ¶ A. Plaintiffs' attempt to track the language of *Norwood* is labored, misleading, and pointless and led the District Court astray.

In *Norwood,* Illinois took the position that its sole obligation was to pay for nursing services and it refused to "lift a finger to find nurses" because it affirmatively "denie[d] having any obligation" to help patients find nurses. *Norwood*, 838 F.3d at 842 (Illinois simply "left the search to parents"). The Court rejected Illinois' position that Illinois could merely serve as the bank paying for services patients' families procured that resulted in an order requiring Illinois to either directly arrange for agencies or other organizations to provide services, or refer families to those agencies or organizations, rather than leaving families to search on their own. Here, by contrast, Plaintiffs do not dispute that HSD, through the MCOs, already contracts directly with home health agencies, has processes in place to secure PDN services for Plaintiffs and does, in part, succeed in placing PDNs. Unlike *Norwood*, the

injunction does not take into account either market factors or the steps HSD has already taken to fulfill its legal obligations. MPI, HSD App V.1 at 199.

Second, Plaintiffs argued, without evidence, that the injunction does not violate *Armstrong* because "the rates paid to PDN nurses could be raised without touching the reimbursement rates to the MCOs." RMPI, HSD App V.3 at 579. This argument fails for two reasons. First, home health agencies set and pay PDN wages; those are not set by HSD or the MCOs. Additionally, the MCOs have been dismissed from this lawsuit. Second, the rationale of *Armstrong* has nothing to do with whether rates for Medicaid services are paid by a state directly, as in fee for service, or indirectly through capitated payments to MCOs. *Armstrong* makes clear that the question of a state's obligation "to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available" is the governed by 42 U.S.C. §1396a(a)(30): According to *Norwood*, 838 F.3d at 84, relying on *Armstrong,* 575 U.S. at 328-29, "judges cannot change reimbursement rates in private suits." (Easterbrook, J., concurring); *Walgreen Co. v. Hood*, 275 F. 3d 475, 478 (5th Cir. 2001). As Justice Breyer noted in his concurrence in *Armstrong*: "§30(A) applies its broad standards to the setting of rates. The history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges." Further, "§30(A) underscores

the complexity and nonjudicial nature of the rate setting task." *Armstrong*, 575 U.S. at 334-35. As Justice Breyer warned, finding "a basis for courts to engage in such direct rate setting could set a precedent . . . potentially resulting in rates set by federal judges (of whom there are several hundred) outside the ordinary channel of federal judicial review of agency decision making" resulting in "increased litigation, inconsistent results, and disorderly administration of highly complex federal programs that demand public consultation, administrative guidance, and coherence for their success." *Id.* at 335.

The third flawed reason argued by Plaintiffs, is that *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) and *Planned Parenthood of Kansas v. Andersen*, 882 F.3d 1205 (10th Cir. 2018) "rejected the notion" that under *Armstrong*, "no section of the Medicaid Act conferred a privately enforceable right." RMPI, HSD App V.3 at 581. The question of whether *Armstrong* prohibits all private lawsuits under every provision of the Medicaid Act is not before the Court. The question before this Court is whether private plaintiffs can enjoin HSD to redress an alleged failure to set, directly or indirectly, Medicaid reimbursement rates at a level that would ensure that the supply of PDNs equals the demand in the New Mexico marketplace. *Armstrong* has specifically held that they cannot. *Armstrong*, 575 U.S. at 330–31.

Plaintiffs cannot avoid the reach of *Armstrong* by repackaging HSD's obligations under 42 U.S.C. §1396a(a)(30) as obligations under §(a)(10), (a)(4), or (a)(43) of the Medicaid Act, as well as under general provisions of the ADA and the Rehabilitation Act. *See* HSD App V.1 at 79-81, 81-82, 84-85. Where "Congress has enacted a comprehensive scheme," it "is a commonplace of statutory construction that the specific governs the general." *RadLAC Gateway Hotel, LLC v. Amalgamated Bank*, 565 U.S. 639, 649 (2012); *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 304 (2017). The Court reads the statute as a whole. *U.S. v. Atl. Research Corp.*, 551 U.S. 128, 135 (2007). The only State *inaction* that Plaintiffs point to in the RMPI, is HSD's alleged failure to assure that PDN reimbursement rates are high enough to entice enough PDNs so that PDN services are available to meet every EPSDT beneficiary's needs. HSD's obligation to meet beneficiaries' needs is not unbounded and is the specific focus of §1396a(a)(30)(A). Under that provision, HSD must "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan…. to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area**."** 42 U.S.C. § 1396a(a)(30)(A). The statutory

provisions Plaintiffs cited, by contrast, do not address provider reimbursement rates or the number of enlisted service providers and must be read in connection with the more specific and applicable requirements of (a)(30)(A), the exact provision that *Armstrong* held lacked a private right of action. The Supreme Court has already explained that a plaintiff cannot "circumvent Congress's exclusion of private enforcement" of §30(A) by invoking alternative legal theories. *Armstrong*, 575 U.S. at 328. Accordingly, Plaintiffs attempt to plead around *Armstrong* by restyling their §30(A) rate challenge under other statutory provisions fails.

Neither of the other cases cited by Plaintiffs below require a different result. Plaintiffs identify *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, as an example of a private suit concerning a different portion of the Medicaid Act that was allowed to proceed; Plaintiffs do not bring suit under that portion of the Act and, importantly, the test articulated in *Wilder* is no longer good law. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("rejecting" *Wilder*'s "notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under §1983" and holding that only rights, not the broader or vaguer benefits or interests may be enforced under §1983). *Armstrong* expressly considered, and rejected the argument that *Wilder* permitted private plaintiffs to bring suit to compel a State to increase reimbursement rates to increase the supply of available providers and, in

doing so, limited *Wilder* to the narrow question of whether the Boren Amendment could be privately enforced. *Armstrong*, 575 U.S. at 330–31.

The Tenth Circuit's application of *Armstrong* in Plaintiffs' second cited case, *Planned Parenthood of Kansas v. Anderson,* underscores the deficiencies in Plaintiffs' argument and the issuance of the injunction. 882 F.3d 1205, 1226 (10th Cir. 2018). *Planned Parenthood* does not involve a challenge to §30(A). The Tenth Circuit expressly reconciled its decision in *Planned Parenthood* with *Armstrong* by noting, in part, that "unlike in *Armstrong*, [plaintiffs] are not merely contesting reimbursement rates…" *Id.* at 1229. By contrast, Plaintiffs here expressly argued that provider reimbursement rates must be increased.[10] Plaintiffs concede that they are not receiving the PDN hours they contend they are entitled to because there are not enough nurses, not because of any clerical or administrative failure by HSD. Plaintiffs did not identify any failure on the part of HSD to meet its alleged obligations with respect to furnishing PDN services, other than an alleged failure to ensure payment rates high enough to attract more PDNs to serve the EPSDT

[10] Any attempt by Plaintiffs to save their claim by focusing on whether they can pursue a *cause of action* under § 1983 should be rejected because a claim would do nothing to change the fact that the injunctive relief they sought and obtained is a judicially mandated increase in reimbursement rates and that relief is prohibited by *Armstrong*. *See Norwood*, 838 F.3d at 844 (under *Armstrong* "judges cannot change reimbursement rates in private suits") (Easterbrook, J., concurring).

population in New Mexico. Putting this critical point aside, the *Planned Parenthood* court made clear that plaintiffs must carry the burden to specifically show that Congress intended that they, rather than the federal or state government, be responsible for enforcing the Medicaid Act provisions upon which their claim is based. *Id.* at 1225. Plaintiffs have not attempted to carry this burden. In *Planned Parenthood*, the Court found, after detailed statutory analysis of the kind expressly required by *Armstrong,* that Congress intended § 1396a(a)(23) of the Medicaid Act to confer a private right of action on Medicaid beneficiaries because that provision is both "phrased in individual terms that are specific and judicially administrable" and clearly contemplates individual choice rather than systemic policy decisions. Plaintiffs offered the District Court no such analysis here. *Planned Parenthood* stands, at most, for the proposition that some Spending Clause statutes are privately enforceable via § 1983. That is not the question before this Court. The question in this case is whether the district Court could enjoin HSD, via §30(a) of the Medicaid Act, through a private enforcement action. *Armstrong* holds it cannot. *Armstrong*, 575 U.S. at 330–31. Plaintiffs do not challenge any rule, policy, practice, or other administrative barrier created by HSD that prevents M.G. or C.V. from receiving any PDN services for which they are eligible. Plaintiffs acknowledge that the nursing shortage in New Mexico is real, lasting, and not easily solved. With no

evidence it would actually address the shortage, the only plan Plaintiffs suggested to address that shortage is for HSD to be ordered to raise the rates paid for PDN services, relief expressly foreclosed by *Armstrong*. Because Plaintiffs offer no other solution, no order of this Court can remedy the inability to secure PDN services for the Plaintiffs and the injunction must be dissolved pursuant to *Armstrong*.

CONCLUSION

For the foregoing reasons, the injunction should be dissolved because the evidence did not support its entry, it grants affirmative relief, not maintenance of the status quo, Plaintiffs did not show irreparable harm cause by any action of HSD, Plaintiffs did not demonstrate prejudice, the balance of the interests of the public versus M.G. and C.V. mitigated in favor of denying the injunction, and the District Court engaged in improper burden shifting to justify the entry of the injunction.

Respectfully submitted,

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I filed the foregoing electronically through the CM/ECF system,
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/s/ Patricia G. Williams
Patricia G. Williams

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In accordance with the court's CM/ECF User's Manual, I hereby certify that all required privacy redactions have been made. In addition, I certify that the ECF submission has been scanned for viruses with the most recent version of a commercial virus scanning program (Bitdefender Endpoint Security Tools, Product version: 7.9.5.324, Engines version: 7.95305, updated September 22, 2023) and, according to the program, is free of viruses.

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/s/ Patricia G. Williams
/s/ Patricia G. Williams
Patricia G. Williams
Attorney for Defendants/Appellants/
Cross-Appellees

Attachment 1

District Court's Memorandum Opinion and Order Granting in Part
Plaintiffs' Motion for Preliminary Injunction, filed 05/26/2023
[Doc. 217] HSD App V.3 at 594

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

M.G., a minor and through
her mother, Christina Garcia, et al.,

Plaintiffs,

v. No. 1:22-cv-00325 MIS/DLM

DAVID SCRASE,[1] in his official capacity
as Secretary for the Human Services
Department of New Mexico, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER is before the Court on Plaintiffs' Second Motion for Preliminary Injunction ("Motion"), ECF No. 150. Defendants responded, and Plaintiffs replied. ECF Nos. 176, 192. Both parties have also incorporated by reference parts of their prior briefing on Plaintiffs' First Motion for Preliminary Injunction, ECF No. 59. ECF Nos. 150 at 2, n.1 (incorporating by reference the declarations attached to ECF No. 59); 176 at 1 (incorporating by reference ECF No. 85). The Court issued an Order Directing Briefing on the current Motion, ECF No. 151, and the parties submitted a Joint Notice addressing the Court's Order, ECF No. 178, which included certain responsive documents. Plaintiffs have also submitted a Supplemental Response, ECF No. 195, and a Second Response, ECF No. 202, addressing changed circumstances. The Court held a hearing on Plaintiffs' First Motion for Preliminary Injunction, ECF No. 59, on November 4, 2022, and another hearing on the instant Motion on May 18, 2023. Having considered the parties'

[1] Since the filing of the Complaint, David Scrase has been replaced in his role at New Mexico Human Services Department by Acting Secretary Kari Armijo. *See* ECF No. 176 at 1 n.1.

submissions, the evidence presented, the arguments made by counsel, and the relevant law, the Court will **GRANT** the Motion **IN PART**.

BACKGROUND

Plaintiffs are profoundly ill minor children who are classified as "medically fragile" under New Mexico's Medicaid program. *See generally* ECF No. 1. Plaintiffs' designation as "medically fragile" refers to the fact that each child has "a life threatening condition characterized by reasonably frequent periods of acute exacerbation, which require frequent medical supervision or physician consultation and which, in the absence of such supervision or consultation, would require hospitalization." Medically Fragile Home and Community-Based Services Waiver,[2] N.M. Human Servs. Dep't, 8.314.3.12(B)(1) NMAC. Plaintiffs' severe disabilities include—among others—difficulty breathing, frequent seizures, and the inability to feed themselves or go to the bathroom unassisted. ECF No. 1 at 24, 26–27, 29.

Plaintiffs' claims arise out of Defendants' alleged failure to provide them with adequate hours of private duty nursing ("PDN") services, despite Plaintiffs' each having already been approved for a certain number of hours by New Mexico's Medicaid program. ECF Nos. 1 at 2, 8; 48 at 2. The two surviving Plaintiffs remain at home with their families, who understandably refuse to have them institutionalized, as they do not wish to be separated from their children. *See generally* ECF Nos. 1, 150.

Plaintiff M.G. is a three-year-old girl who suffers from seizures and is dependent on a ventilator and a feeding tube. ECF No. 1 at 29. Her mother, Christina Garcia, works as a service

[2] Certain Medicaid home care programs are referred to as a "waiver" because, with express authorization by the relevant federal agency, the state is exempted from certain statutory requirements. *Fisher v. Oklahoma Health Care Auth*., 335 F.3d 1175, 1178 (10th Cir. 2003).

coordinator for New Mexico's Developmental Disabilities Waiver program and has worked in that field for twenty-two years. ECF No. 59-2 at 1. She adopted M.G. in 2020, after fostering her in 2019. *Id.* Many of M.G.'s disabilities result from illegal drug use during pregnancy by her biological mother, who is not involved in the case. *Id.* Ms. Garcia's full-time employment in public service is at constant risk due to M.G.'s lack of adequate PDN hours and the corresponding need for Ms. Garcia to care for her during normal working hours. *Id.* at 3.

Plaintiff C.V. is a three-year-old boy who suffers from medication-resistant seizures and is dependent on a feeding tube. ECF No. 1 at 26–27. C.V. can have over 50 seizures in a single day. ECF No. 59-7 at 2. C.V.'s parents, both law enforcement personnel, have submitted repeated requests for PDN services to the managed care organization with whom Defendants have contracted to provide these services, to no avail. ECF No. 1 at 27. C.V.'s parents allege that, due to the lack of PDN hours, they have been unable to earn income with which to better support C.V., stating that, for example, "C.V.'s mother had to give up a high-level position [as a federal agent] to take a lower paying position that provides more flexibility for leave, and has since used up all her earned leave." *Id.* at 28.

Due to the deficits in C.V.'s PDN hours, C.V.'s father, in turn, had initially planned to retire early from his position as a state police officer so he could be home with C.V. while his wife worked. ECF No. 59-7 at 5. However, in February 2022, he was shot in the line of duty and now suffers "[p]ain in his back, neck and shoulders," which has made it "extreme[ly] difficult[]" to pick up his child or attend to his needs, leaving the family in ongoing financial and caretaking need. *Id.*

Plaintiff A.C. was a ten-year-old girl who required "maximum assistance in basic living functions such as feeding, walking, toileting and bathing," and required "regular breathing assessments." ECF No. 1 at 24. She recently passed away after being hospitalized for a medical

emergency. *See* ECF Nos. 200, 203 (Suggestion of Death). Plaintiffs alleged that she had experienced "an average shortfall of 23.8 hours [of PDN] per week." ECF No. 1 at 25.

Plaintiffs assert that, in the absence of adequate PDN hours, they are at constant risk of life-threatening medical complications. ECF No. 1 at 26, 29, 31. For example, in the winter of 2022, C.V. lacked staff coverage for some of his approved nursing shifts. ECF No. 109 at 74. At that time, C.V.'s mother states that she was bottle feeding him and noticed "a runny nose, coughing, and some congestion," *id*., which to most parents would indicate a common cold. However, it continued for months, until finally in the summer, a nurse was able to observe C.V.'s condition and recommended a swallow study, which revealed that C.V. is unable to safely take food by bottle at all due to the risk of aspiration (fluid entering the lungs). *Id*. at 73 –74.

Plaintiffs filed their Complaint on April 28, 2022, alleging that Defendants' failure to provide medically necessary PDN hours exposes Plaintiffs to "the risk of institutionalization or hospitalization," in violation of the Americans with Disabilities Act, the Rehabilitation Act, and the Patient Protection and Affordable Care Act, as well as "unnecessary isolation" as their families are not able to take them outside the home without assistance. *Id.* at 5.

On October 7, 2022, Plaintiffs filed their first Motion for Preliminary Injunction, asking that the Court enter an injunction requiring Defendants to provide them with adequate PDN hours. ECF No. 59 at 1. The Court denied Plaintiffs' first Motion for Preliminary Injunction, finding that the original language proposed did "not take into account either market factors or the steps Defendants have already taken to fulfill their legal obligations." ECF No. 136 at 6. The Court also found that the language of Plaintiffs' proposed injunction ran afoul of Rule 56 in that it was overly vague. *Id.*

After the close of the evidentiary presentations at the November 4, 2022 motion hearing, Plaintiffs provided the Court and Defendants with an alternative phrasing of the preliminary injunction. ECF Nos. 109 at 185–86; 135-2. The Court declined to consider this at that time on due process grounds but allowed Plaintiffs to file a renewed motion for preliminary injunction upon appropriate notice to Defendants. ECF No. 136 at 7.

Plaintiffs have since filed their renewed Motion, ECF No. 150, which asks that, among other things, the Court order Defendants to "take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to Plaintiffs . . . at the level already approved by Defendants, as required by the Medicaid Act . . . ." ECF No. 150-3 at 2.

LEGAL STANDARDS

I. Medicaid Regulatory Scheme

Medicaid directs federal funding to states, including New Mexico, to provide medical assistance to individuals who would not otherwise be able to afford healthcare. *See generally* 42 U.S.C. § 1396. States participating in Medicaid must designate a single state agency to administer and supervise the program and ensure compliance with the law. 42 U.S.C. § 1396a(a)(5). The chosen state agency may not delegate to others its "authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters." 42 C.F.R. § 431.10(e).

In New Mexico the New Mexico Human Services Department ("HSD") is the designated agency. *See* ECF Nos. 1 at 33; 18 at 3. HSD does not provide health services or monies directly to enrollees, but instead contracts with managed care organizations ("MCOs") to provide services. *See* ECF No. 1 at 2, 9; *see also* ECF No. 21. The Medicaid Act requires that a state Medicaid plan furnish healthcare services "with reasonable promptness to all eligible individuals," including

"private duty nursing services" to those living in their home communities, as opposed to uniformly requiring institutionalization for high-need patients. 42 U.S.C. §§ 1396a(a)(8), 1396d(a)(8). Indeed, one of the goals of the Medicaid program is to help people with disabilities to "retain [the] capability for independence . . . ." 42 U.S.C. § 1396-1.

II. Preliminary Injunction Standard

A party seeking preliminary injunctive relief pursuant to Federal Rule of Civil Procedure ("Rule") 65(a) must establish (1) a substantial likelihood of success on the merits; (2) irreparable injury to the movant if the injunction is denied; (3) the threatened injury to the movant outweighs the injury to the party opposing the preliminary injunction; and (4) the injunction would not be adverse to the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The issuance of preliminary injunctive relief is within the sound discretion of the district court. *See Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 354 (10th Cir. 1986). Every order granting a preliminary injunction must "state its terms specifically" and "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)–(C).

DISCUSSION

Before addressing the four requirements for granting a preliminary injunction, the Court will analyze several initial matters raised by the parties.

I. Initial Matters

A. Whether the Requested Injunction Is Mandatory or Prohibitory

An injunction is mandatory, as opposed to prohibitory, if the requested relief affirmatively requires the nonmovant to act in a particular way and, as a result, places the issuing court in the position of ongoing supervision to ensure compliance. *Schrier v. Univ. Of Co.*, 427 F.3d 1253,

1261 (10th Cir. 2005). Mandatory preliminary injunctions are disfavored, as the general purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held, not to afford the movant all the relief they could recover at the conclusion of a full trial on the merits. *Id.* at 1258–59. In addition, mandatory preliminary injunctions are generally more difficult for courts to administer, as they require ongoing oversight.

"[A]ny preliminary injunction fitting within one of the disfavored categories must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). "When seeking a disfavored injunction, the movant 'must make a strong showing' both on the likelihood of success on the merits and on the balance of the harms." *State v. U.S. Env't Prot. Agency*, 989 F.3d 874, 884 (10th Cir. 2021) (quoting *O Centro*, 389 F.3d at 976).

Plaintiffs' updated proposed preliminary injunction asks that the Court order Defendants to "take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to Plaintiffs . . . at the level already approved by Defendants, as required by the Medicaid Act . . . ." ECF No. 150-3 at 2. It also includes language directing Defendants to affirmatively provide notice to the MCOs of breach, to ensure the provision of PDN hours, and to provide certain class-related discovery to Plaintiffs. *Id.* at 2–3. The proposed language even includes a mechanism for ongoing Court monitoring. *Id.* at 3–4 ("Plaintiffs may file a written request for a status hearing before this Court, in order to clarify, provide comment regarding, or challenge the effectiveness of the steps Defendants have taken to arrange for in-home shift nursing services to Plaintiffs."). The Court thus

finds that Plaintiffs' proposed preliminary injunction is clearly mandatory. Therefore, Plaintiffs must meet a heightened burden to show their entitlement to relief.

B. Whether the Motion is a Motion to Reconsider

Defendants argue the instant Motion is a motion to reconsider and that the Court should deny it as there has been no intervening change in the controlling law, there is no new evidence, and there is no need to correct clear error or prevent manifest injustice. ECF No. 176 at 1, 7–8.

The Rules do not specifically contemplate motions to reconsider, but a court may vacate a final ruling under Rule 59 due to (1) an intervening change in the controlling law, (2) new evidence previously unavailable, or (3) the need to correct clear error or prevent manifest injustice. *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995); *see BNSF Ry. Co. v. Lafarge Sw., Inc.*, 1:06-cv-1076 MCA/LFG, 2009 WL 10665755, at *3 (D.N.M. Feb. 21, 2009). However, orders "short of a final decree" may be reopened at the district judge's discretion. *Price v. Philpot*, 420 F.3d 1158, 1167 n.9 (10th Cir. 2005) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983)). This is because "district courts generally remain free to reconsider their earlier interlocutory orders." *Been v. O.K. Indus.*, 495 F.3d 1217, 1225 (10th Cir. 2007). The Rules provide in relevant part that

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b). This power is not subject to any particular standard or framework. *See XTO Energy, Inc. v. ATD, LLC*, 189 F. Supp. 3d 1174, 1190 (D.N.M. 2016) (reviewing case law).

Here, as noted by Plaintiffs, the Court has specifically permitted a renewed motion after denying Plaintiffs' First Motion for Preliminary Injunction on narrow grounds, including vagueness and due process concerns regarding the new proposed language. ECF Nos. 192 at 4–5; 136 at 6–7. Plaintiff's Motion, therefore, implicates the Court's power to reconsider interlocutory—rather than final—orders. The Court finds Defendants' arguments unavailing and will thus analyze Plaintiffs' entitlement to relief de novo and on the merits, and will not consider the Motion as one to reconsider.

To the extent that Plaintiffs' Motion could be construed as a motion to reconsider the issue of vagueness, the Court has reconsidered as discussed in Section VII below. *See also Been*, 495 F.3d at 1225; *Price*, 420 F.3d at 1167 n.9.

C. Admissibility of Evidence Produced

Next, Defendants object to Plaintiffs' alleged failure to produce admissible evidence. ECF No. 176 at 4, 8. However, as the Tenth Circuit has said, "[a] hearing for preliminary injunction is generally a restricted proceeding, often conducted under pressured time constraints, on limited evidence and expedited briefing schedules," and therefore, "[t]he Federal Rules of Evidence do not apply to preliminary injunction hearings." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). Defendants' arguments regarding the admissibility of Plaintiffs' evidence are thus unavailing. The Court will proceed to consider issues of standing.

D. Standing Issues

Defendants allege that Plaintiffs lack standing under Article III of the United States Constitution because their injury lacks true redressability, as "the record is uncontroverted that there simply are not enough PDN hours available in New Mexico." ECF No. 176 at 28.

To establish standing, Article III requires a plaintiff to show that she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). In order to establish redressability, plaintiffs must allege clear and specific facts showing that it is likely that the relief sought will remedy plaintiffs' injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs, however, "need not show that a favorable decision will relieve [their] every injury." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (quoting *Larson v. Valente*, 456 U.S. 228, 244, n. 15 (1982)).

Here, Defendants do not dispute that Plaintiffs have alleged an injury in fact. *See generally* ECF No. 176. Instead, Defendants argue the complaint fails to allege facts plausibly suggesting that a favorable ruling would redress Plaintiffs' injuries. *Id.* at 27–31. This is because Defendants argue that the insufficient hours are solely due to the actions or inactions of independent third parties rather than Defendants. *Id.* at 29.

In fact, however, Plaintiffs suggest myriad ways in which Defendants could attempt to meet their obligations and redress Plaintiffs' alleged injuries. ECF Nos. 150 at 10–11; 192 at 7–8. Defendants also admit they have taken various steps to attempt compliance, even in the face of the nursing shortage. ECF No. 176 at 35–36. Additionally, as set forth more fully below, a shortage in and of itself is inadequate to show impossibility.

Indeed, M.G.'s mother was recently successful in finding her child additional nurses when Defendants were unable (or unwilling) to do so. ECF No. 150-2 at 2–3. The Court therefore finds Defendants' arguments regarding redressability to be unavailing. As set forth more fully below, determining what precise steps may be effective in complying with Defendants' legal obligations is a burden most equitably laid at the feet of Defendants.

Plaintiffs also ask that the Court recognize the associational standing of Plaintiff Disability Rights New Mexico, Inc. ("DRNM"). ECF No. 150 at 12–13. Defendants, without truly addressing this argument, allege that Plaintiffs attempt to circumvent class certification requirements. ECF No. 176 at 6. Because the updated injunction would not require that the Court recognize DRNM's associational standing, the Court declines to rule on this issue at this time.[3] *See United States v. Muhtorov*, 20 F.4th 558, 607 (10th Cir. 2021), *cert. denied*, 214 L. Ed. 2d 105, 143 S. Ct. 246 (2022) ("One limitation on the judicial power is the prohibition of advisory opinions . . . .").

The Court will now consider whether Plaintiffs have made the four-part showing that they are entitled to a preliminary injunction.

II. Whether Plaintiffs Have Demonstrated Irreparable Injury

Here, Plaintiffs argue that as Medicaid recipients they have no alternative to relying on Defendants for their medical needs, and that they live on the edge of medical crises. ECF No. 150 at 13. Plaintiffs further argue that their lack of PDN hours leaves them at risk of institutionalization, and subject to ongoing isolation in the home. *Id*. at 13–15.

Defendants argue that Ms. Garcia's allegations that M.G. received insufficient PDN hours in the past do not establish entitlement to a preliminary injunction, as the analysis depends instead on "her current and future circumstances." ECF Nos. 176 at 20; 85 at 15–17. Defendants also incorporate by reference several arguments from their prior briefing. ECF No. 176 at 20.

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[3] The Court notes, however, that the District of New Mexico (Herrera, J.) has previously held in favor of DRNM on this exact issue. *See Waldrop v. New Mexico Hum. Servs. Dep't*, No. 1:14-cv-047 JH/KBM, 2015 WL 13665460, at *5 (D.N.M. Mar. 10, 2015).

Furthermore, to the extent that the Court has declined to order class certification-related discovery in the instant Order, the Court finds that Plaintiffs are likely already entitled to such discovery, unrelated to any alleged associational standing, and they are free to pursue it well in advance of timely filing their motion for class certification pursuant to the Court's May 19, 2023 Order. *See* ECF No. 216. The Court encourages the parties to reach out to the Magistrate Judge as early as possible regarding any discovery disputes related to class certification.

In particular, Defendants argue that there is no harm to Plaintiffs in missing PDN hours, as "[m]any services addressed in the [Individual Service Plans ("ISP")] can be and are being provided by an HHA." ECF No. 85 at 17–18. They maintain that the children's true medical needs are a moving target and cannot be shown by any evidence provided. *Id*. at 18 ("[T]he record contains no evidence on which the Court could find that a specific number of private duty nursing hours are medically necessary, as opposed to beneficial, desirable or eligible," for Plaintiffs.). They further contend that Plaintiffs are not denied access to the community, *id*. at 18, and indeed, they have no right to any more integrated setting than the family home, ECF No. 176 at 25. The Court will examine the evidence of each alleged type of irreparable harm in turn.

A. The Risk of Immediate Medical Harm

As noted above, Plaintiffs' uncontested designation as "medically fragile" refers to the fact that each child has "*a life threatening condition* characterized by reasonably frequent periods of acute exacerbation, which require frequent medical supervision or physician consultation and which, *in the absence of such supervision or consultation, would require hospitalization*." Medically Fragile Home and Community-Based Services Waiver, N.M. Human Servs. Dep't, 8.314.3.12(B)(1) NMAC (emphasis added). The Court, therefore, concludes there is no true dispute that the absence of required medical supervision results, per se, in a showing of a likelihood of irreparable injury on the basis of immediate medical harm. *See*, *e.g*., *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) ("Plaintiffs have shown a risk of irreparable injury, since enforcement of the [] rule may deny them needed medical care. That is a sufficient showing."). Plaintiffs have also produced voluminous credible evidence in the form of affidavits, testimony, and documentation from Defendants' own MCO partners that they are consistently not receiving their required hours. *See*, *e.g*., ECF Nos. 59-2, 59-3, 59-4, 59-6, 59-7, 59-9; 109 at 68–69; 150-2.

In addition, in this case *in particular*, Plaintiffs have consistently demonstrated a high likelihood of irreparable injury in the absence of appropriate medical care. ECF Nos. 59-2 at 1 ("M.G. has a tracheostomy to maintain a clear airway, gastrostomy port in her stomach to receive fluids and nutrition, and is dependent on the use of a ventilator at home."); 59-7 at 2 (describing C.V.'s need for a gastronomy tube and how an average day includes "over 50 seizures a day" and he "needs a skilled person available to provide emergency services and rescue medications"); 109 at 26 (describing nurses' services as "vastly different" from those of HHAs, as they can provide medical interventions); 151 (HHAs cannot perform gastrostomy tube problem solving or home ventilator maintenance).

Plaintiffs are medically complex, to the point where even the most well-meaning parent would be unable to provide appropriate care on their own. *Id.* Plaintiffs have, for example, provided testimony regarding one of the Plaintiffs, C.V., showing what appeared to be cold symptoms because of what was later revealed by a nurse to be aspiration of milk from bottle feeding. ECF No. 109 at 74. Additionally, former Plaintiff A.C., who alleged "an average shortfall of 23.8 hours [of PDN] per week," ECF No. 1 at 25, passed away in early May, ECF No. 203.

Given the above, as well as the testimony at the May 18, 2023 hearing, the Court finds the Plaintiffs have made an incredibly strong showing of irreparable harm in the absence of their requested relief. Nevertheless, given the extraordinary nature of the relief requested, the Court will continue to analyze Plaintiffs' showing of the other types of alleged irreparable harm.

B. The Risk of Institutionalization

Notwithstanding the above, Defendants argue that Plaintiffs are not at imminent risk of institutionalization. ECF No. 176 at 25. Defendants contend that because Plaintiffs are not

currently institutionalized, the theoretical risk of institutionalization does not represent irreparable harm. *Id*.

As the Tenth Circuit has explained, however,

> [t]he integration regulation [] states that public entities are to provide "services, programs, and activities in the most integrated setting appropriate" for a qualified person with disabilities. Those protections would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation.

Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003) (citation omitted). Institutionalization may be considered a type of irreparable harm. *See*, *e.g.*, *M.R. v. Dreyfus*, 697 F.3d 706, 720 (9th Cir. 2012) ("We conclude that Plaintiffs have demonstrated a likelihood of irreparable injury because they have shown that reduced access to personal care services will place them at serious risk of institutionalization.")

Here, as mentioned above, Plaintiffs' uncontested designation as "medically fragile" refers to the fact that each child has "a life threatening condition characterized by reasonably frequent periods of acute exacerbation, which require frequent medical supervision or physician consultation and which, *in the absence of such supervision or consultation, would require hospitalization*." Medically Fragile Home and Community-Based Services Waiver, N.M. Human Servs. Dep't, 8.314.3.12(B)(1) NMAC (emphasis added); *see also* ECF Nos. 59-2 at 1 ("M.G. has a tracheostomy to maintain a clear airway, gastrostomy port in her stomach to receive fluids and nutrition, and is dependent on the use of a ventilator at home."); 59-7 at 2 (describing C.V.'s need for a gastronomy tube and how an average day includes "over 50 seizures a day" and he "needs a skilled person available to provide emergency services and rescue medications"). In fact, multiple Plaintiffs *have* been hospitalized during the pendency of this case, including former Plaintiff A.C.,

who has since passed. ECF Nos. 59 at 6, 59-2 at 2, 200 at 1. The Court therefore finds that Plaintiffs have made an adequate showing of irreparable harm via risk of institutionalization.

C. Ongoing Isolation Within the Home

Plaintiffs also argue that in addition to the obvious consequences of denial of proper medical services—such as medical crises, institutionalization, and possible death—the denial of PDN hours results in isolation *in the home*. ECF No. 150 at 21.

Defendants argue that the PDN services are not available outside of Plaintiffs' homes or schools as a matter of law, that Plaintiffs have not shown a "more integrated" setting than their homes or schools, and that "Plaintiffs have not even attempted to show that the absence of PDN services has limited their ability to interact with the community outside of their homes and schools." ECF No. 176 at 26–27.

As set forth more fully below at Section V(B)(4), the Court believes that PDN services may be provided wherever Plaintiffs may happen to be. Additionally, contrary to Defendants' assertions, there is, in fact, ample testimony explaining what more integrated settings Plaintiffs desire and showing how the lack of PDN hours has limited Plaintiffs' ability to interact with the community.

For example, M.G.'s mother stated in her declaration that M.G. "has been prevented from attending school, where she accesses necessary educational supports and therapies, and has missed opportunities to engage in activities in her community because of her inability to access private duty nursing hours allocated to her in her [ISP]." ECF No. 59-2 at 2. Additionally, C.V.'s mother explained that:

> Without help, our family is isolated because we need someone available to monitor C.V. We frequently plan any family outing or errand around when a nurse is available so we can ensure C.V.'s safety. For example, a few months ago a nurse

> helped monitor and clear C.V.'s airway during a routine car trip, which otherwise would have necessitated an unsafe vehicle maneuver to pull over and attend to him.
>
> It is very difficult for us to go out and be part of the community which is a big detriment to C.V. Without a medically trained professional to attend to C.V., we are stuck in the home which isn't good for us or our children.
>
> In addition, the community does not get to experience C.V. It is incredibly difficult to participate in an outing as a family without a nurse, even more so if I want my other child and C.V. to experience something together. With a nurse, I was able to visit the aquarium with both my children. I was able to help my other child use the restroom while our nurse attended to C.V. during a seizure. C.V. was able to be fed, taken out of his wheelchair and touch the glass. [C]hildren were able to see C.V., ask questions about his feeding tube, and experience something they had never seen before.

ECF No. 59-7 at 5 (paragraph numbers omitted). C.V.'s family's experience at the aquarium goes to the heart of the purpose of the integration mandate, which is not just to provide community involvement and enrichment to people with disabilities, but to reinforce their status as full and equal members of the community. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600–01 (1999) (Confinement in institutions is discrimination in part *because* it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."). The Court therefore finds that Plaintiffs have adequately demonstrated irreparable harm due to ongoing isolation within the family home.

D. Developmental Harms

Plaintiffs have testified they risk developmental harms in the absence of timely care. ECF Nos. 59-4 at 4; 59-2 at 2 (M.G. "requires regular engagement of family, skilled therapists, and nurses to maintain her range of motion and encourage skill acquisition and to meet developmental goals."); 59-7 at 4 ("C.V.'s developmental progress is inhibited without focused attention because we cannot always build in enough time to help him practice swallowing and walking, or to provide sensory activation, or ensure he has quality social interactions. Practicing clapping or learning how

to hold a spoon are huge milestones for C.V., and he progresses more slowly or not at all without individual care from a nurse.").

The Court shares Plaintiffs' concerns regarding development and quality of life, especially in view of the age of the minor Plaintiffs. *See Blackman v. D.C.*, 185 F.R.D. 4, 7 (D.D.C. 1999) (quoting *Foster v. District of Columbia,* Civil Action No. 82–0095, Memorandum Opinion and Order of February 22, 1982, at 4 (D.D.C.) (J.H. Green, J.)) ("Any agency whose appointed mission is to provide for the . . . welfare of children fails that mission when it loses sight of the fact that, to a young, growing person, time is critical. While a few months in the life of an adult may be insignificant, at the rate at which a child develops and changes . . . a few months can make a world of difference in the life of that child.").

Additionally, it is notable that one of the Plaintiffs has actually passed away during the pendency of this case. ECF No. 203. The risk of shortened life expectancy of Plaintiffs exemplifies the urgency of the surviving Plaintiffs' quality of life concerns. The Court finds Plaintiffs have met their burden to show irreparable harm in terms of lost quality of life and developmental progress.

III. Whether the Threatened Injury to Plaintiffs Outweighs the Injury to Defendants

Plaintiffs argue that the above injury greatly outweighs any possible injury to Defendants, stating "the adverse consequences to the State are minimal" as "Plaintiffs are requesting services to which they are entitled." ECF No. 150 at 15. Defendants incorporate their earlier briefing by reference. ECF No. 176 at 20. Defendants' earlier arguments on this point, however, consist only of the following paragraph:

> Because Plaintiffs have not shown irreparable harm, the Court need not engage in a balancing test to determine whether the cost and disruption to HSD of trying to comply with an impermissibly vague injunction, see infra, that does not guarantee

> any actual services for Plaintiffs (since HSD cannot create nurses and paying nurses more to serve the named Plaintiffs takes away nursing services from someone else) is outweighed by the harm to Plaintiffs.

ECF No. 85 at 19. Defendants therefore waive argument on this prong. *See Adler v. Wal-Mart Stores, Inc*., 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived . . . .").

As the Seventh Circuit stated in enforcing a different federal regulatory scheme, the Food Stamp Act, "[b]ecause the defendants are required to comply with the [] Act under the terms of the Act, 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) (emphasis added). The Court finds the same logic applies here, and that this factor thus supports Plaintiffs' plea for relief.

Home care is expensive, and New Mexico is far from the richest state in the union. However, there is no federal mandate for Medicaid participation. *See Valdez v. New Mexico Hum. Servs. Dep't*, 6:05-cv-451 MV/ACT, 2006 WL 8444441, at *2 (D.N.M. Mar. 14, 2006) ("States are not required to participate in the Medicaid program, but once a state elects to participate, it must do so in accordance with federal statutes and regulations."). Furthermore, as mentioned at the May 18, 2023 hearing, the state receives three federal dollars for every one dollar it spends on Medicaid. As set forth more fully below at Section V(B), participation in the Medicaid program necessarily gives rise to the obligation to provide early and periodic screening, diagnostic and treatment ("EPSDT") services, including provision of PDN hours—not merely to offer to pay for them. Because the state has opted into the federal Medicaid program, it is required to comply with this obligation—in other words, providing these services is no additional burden on top of what

Defendants have already promised to do. Therefore, in light of Defendants' preexisting obligation to provide these services, the Court finds that the threatened injury to Plaintiffs greatly outweighs any possible injury to Defendants.

IV. Whether the Injunction Would Be Adverse to the Public Interest

Plaintiffs argue that enforcement of the Medicaid Act is in the public interest, as is providing "affordable access to competent health care." ECF No. 150 at 15 (quoting *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 707 (4th Cir. 2019)). Defendants' Response also incorporates by reference its Response to Plaintiffs' First Motion for Preliminary Injunction. ECF No. 176 at 20.

Defendants argue that judicial interference with the administration of the New Mexico Medicaid program is counter to the public interest as the planning and commitment of healthcare resources is "peculiarly within the province" of HSD. ECF No. 85 at 19–20. Defendants also contend that granting an injunction as to these Plaintiffs may negatively impact their other constituents, as "[t]here are only not many nurses in the State. HSD cannot magically conjure a nurse when one is needed. Yet, HSD is responsible for ensuring the provision of a wide array of medically necessary services to 976,955 Medicaid clients in New Mexico." *Id*. at 20.

Defendants have not presented a cost study showing that providing nurses for two children would bankrupt the state of New Mexico or even that it would be a substantial burden on the budget of HSD, thus potentially threatening the care of other equally needy patients. Indeed, at the recent hearing, counsel for Defendants appeared to admit that hiring traveling nurses to staff state hospitals may free up EPSDT-qualified nurses for home care positions, suggesting that there may already be mechanisms in place to provide relief.

As discussed below at Section V(B), Defendants are required by law to provide EPSDT services. Additionally, the Court believes that the tailored preliminary injunctive relief below will address Defendants' concerns regarding its autonomy and expertise in the state healthcare sector. For much the same reasons explained above under the injury prong, the Court finds that the requested relief would not be adverse to the public interest.

V. Whether Plaintiffs Have Demonstrated a Substantial Likelihood of Success on the Merits

A. Americans with Disabilities Act and Rehabilitation Act Claims

Title II of the Americans with Disability Act ("ADA") states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The Rehabilitation Act similarly prohibits discrimination against qualified individuals "solely by reason of her or his disability." 29 U.S.C. § 794(a).

Defendants argue that Plaintiffs' theory of the case "does not fit within any ordinary understanding of 'discrimination.'" ECF No. 176 at 25. Defendants indicate that under their view, because "Plaintiffs receive more governmental aid than nondisabled persons," they are not subject to discrimination, as "[r]eceiving fewer hours than Plaintiffs believe they are entitled to does not constitute discrimination within the meaning of the ADA or the Rehabilitation Act." ECF No. 176 at 25 (quoting *Nasello v. Eagleson*, 977 F.3d 599 (7th Cir. 2020)).

This interpretation is belied by not only the history of disability discrimination law in this country, but the very history of discrimination law itself. *See Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.,* 347 U.S. 483, 495 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of*

Topeka, Kan., 349 U.S. 294 (1955) ("Separate [] facilities are inherently unequal."). In fact, the Supreme Court in *Olmstead* provided for a much more expansive definition of disability discrimination under the ADA, explaining:

> Ultimately, in the ADA, enacted in 1990, Congress not only required all public entities to refrain from discrimination; additionally, in findings applicable to the entire statute, Congress explicitly identified unjustified "segregation" of persons with disabilities as a "for[m] of discrimination."
>
> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

Olmstead, 527 U.S. at 600–01 (1999) (citations omitted). The Court, therefore, held that "[u]njustified isolation . . . is properly regarded as discrimination based on disability." *Id.* at 597. The requirement that public entities must therefore administer services in the "most integrated setting appropriate to the needs of qualified individuals with disabilities" is known as the "integration mandate." *See Fisher*, 335 F.3d at 1180. The Seventh Circuit in *Nasello*, cited by Defendants, did not substantively address the integration mandate. *See generally* 977 F.3d at 599.

Compliance with the ADA may well include the obligation to provide not just the *same* services to people with disabilities, but potentially *additional* services, to ensure that they can fully participate in society. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("[T]he Act specifies, namely, that preferen[tial treatment] will sometimes prove necessary to achieve the Act's basic equal opportunity goal. . . . By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e., preferentially.").

Defendants argue that unjustified isolation claims under *Olmstead* arise only where the issue is the location of services, not whether services will be provided. ECF No. 176 at 26. Here, notwithstanding Defendants' claims to the contrary, ECF No. 176 at 26, as discussed above, Plaintiffs have, in fact, repeatedly expressed the extreme difficulty faced when attempting to obtain care in their desired locations—both the family home and other community settings, *see*, *e.g*., ECF Nos. 59-2 at 2; 59-7 at 5. As discussed above, the Court finds that both surviving Plaintiffs face a very real risk of institutionalization.

Although public entities are required to "make reasonable modifications in policies, practices, or procedures" in order to avoid the discrimination inherent in the unjustified segregation of the disabled, the "fundamental alteration regulation," relieves a public entity of its duties under the ADA's integration mandate if "the public entity can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity." *Fisher*, 335 F.3d at 1181 (emphasis in original) (quoting 28 C.F.R. § 35.130(b)(7)).

Defendants have failed to present a fundamental alteration defense, and the Court does not immediately see how one would even be formulated, given that Plaintiffs have been approved for the hours they are demanding. *See generally* ECF No. 1. In any event, such defense has been waived for the purpose of this Motion. *See Adler*, 144 F.3d at 679; ECF Nos. 175, 176. Because Defendants' failure to provide Plaintiffs with PDN hours for which they have been approved presents an immediate risk that Plaintiffs be institutionalized, rather than remain at home with their families or retain access to the community, Plaintiffs have shown an adequate likelihood of success on their claim that Defendants have violated Title II of the ADA.

B. Medicaid Act Claims

Defendants make various arguments regarding the "reasonable promptness" requirement in response to Plaintiffs' Motion. ECF Nos. 150 at 18–19; 176 at 22–24. Defendants are correct that "Plaintiffs' Complaint does not allege a violation of § 1396(a)(8) . . . ." ECF No. 176 at 22. The Court will therefore not address Plaintiffs' likelihood of success under that Section of the Medicaid Act.

Defendants also allege that the Eleventh Amendment provides immunity for suits alleging breach of contract under state law, and contend that Plaintiffs do not have standing to compel them to place their managed care organization partners with notice of a breach. ECF No. 176 at 18–19. However, Plaintiffs are not currently seeking a preliminary injunction on their breach of contract claims, so this concern is inapposite. ECF No. 150-3. In suggesting language requiring Defendants to alert MCOs of their breach, Plaintiffs appear to merely be suggesting ways other than raising reimbursement rates for Defendants to meet their obligations under the Medicaid Act to the two surviving Plaintiffs[4] in response to Defendants' arguments regarding *Armstrong*, which the Court will address separately below. *Id.* at 2.

(1) Whether *Armstrong* Bars Plaintiffs' Medicaid Act Claims

Defendants argue that Plaintiffs' citation to 42 U.S.C. § 1396a(a)(43)(C) is a "misnomer" or red herring. ECF No. 176 at 21. Defendants argue that what Plaintiffs are truly seeking is for the Court to order Defendants to increase reimbursement rates under 42 U.S.C. §1396a(a)(30), which it claims is barred under *Armstrong*. *Id.* at 11–19.

[4] Plaintiffs do not, for example, suggest forcing Defendants to sue; it is perfectly possible, as Plaintiffs point out, that Defendants' managed care organization partners will choose to cure once they are made aware of a breach. *See* ECF No. 150-3; *see also* ECF No. 192 at 21. This possibility also augurs against Defendants' argument regarding timeliness of any redress. *See* ECF No. 176 at 19.

While the Court need not be fooled by a plaintiff's artful pleading, a plaintiff remains the master of his complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). The Court agrees with Plaintiffs that "Defendants cannot hypothesize what *they* may have to do in order to ensure that Plaintiffs receive their allotted hours, and then bootstrap their hypothesis into an argument that this is what *Plaintiffs* 'really' want." ECF No. 192 at 9. Here, Plaintiffs are patients, not providers, and clearly seek the provision of needed medical services by any means required. *See generally* ECF No. 1. The Complaint makes no reference to Section (30)(a). *Id.*

Furthermore, the holding of *Armstrong* is significantly more cabined than Defendants indicate. Defendants state that *Armstrong* stands for the proposition that a private plaintiff cannot "bring a private claim to redress an alleged failure of HSD to set, whether directly or indirectly, sufficient reimbursement rates to ensure that the supply of private duty nurses equals the demand in the New Mexico marketplace." ECF No. 176 at 14 (citing *Armstrong v. Exceptional Child Ctr., Inc*., 575 U.S. 320, 330–31 (2015)).

In short, it does not.

Section 30(A) of the Medicaid Act requires participating states to:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . .

42 U.S.C. § 1396a(a)(30)(A). In *Armstrong*, the Supreme Court considered the rights of providers of habilitation services to sue Idaho's Department of Health and Welfare on the basis that reimbursements *to providers* were lower than permitted by § 30(A). *Armstrong*, 575 U.S. at 323–24. The Supreme Court held that the Medicaid Act "implicitly preclude[d] private enforcement of

§ 30(A) . . . ." (1) because Congress had provided for enforcement of § 30(A) by way of the Secretary of Health and Human Services withholding Medicaid funds, and (2) because of the "judicially unadministrable nature of § 30(a)'s text." *Id.* at 328. The *Armstrong* Court explained that

> [e]xplicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that Congress "wanted to make the agency remedy that it provided exclusive," thereby achieving "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking," and avoiding "the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." The sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts.

Id. at 328–29 (citations omitted).

Plaintiffs, however, are patients seeking care—not providers looking to pocket higher reimbursement amounts—and are suing under different sections of the Act. ECF No. 1 at 47(citing §§ 1396a(a)(10)(A), 1396d(a)(4)(B), and 1396a(a)(43)(C)). Defendants do not even begin to argue either that these sections of the Medicaid Act are judicially unenforceable or that Congress implicitly precluded private enforcement of these sections, and these potential arguments are thus waived. *See Adler*, 144 F.3d at 679. Defendants argue only that Plaintiffs have failed to meet their burden to show that they have the right to enforce the Medicaid Act provisions on which their claim is based. ECF No. 176 at 17.

Defendants argue that the Tenth Circuit's decision in *Planned Parenthood of Kansas v. Andersen* is distinguishable because there, the plaintiffs were "not merely contesting reimbursement rates" while here, as in *Armstrong*, Plaintiffs are "expressly arguing that provider reimbursement rates must be increased." ECF No. 176 at 16 (citing *Planned Parenthood of Kansas*

v. Andersen, 882 F.3d 1205, 1229 (10th Cir. 2018)). The Court disagrees; Plaintiffs' "primary claim" as beneficiaries is clearly for the life-saving healthcare for which they have been approved. *See generally* ECF No. 1. Indeed, Plaintiffs' proposed preliminary injunction includes absolutely no language regarding reimbursement rates. ECF No. 150-3.

Additionally, the briefing of both sides includes numerous other options to attempt in good faith to meet Defendants' obligations under the Medicaid Act. ECF Nos. 150 at 10–11; 176 at 35–36; 192 at 7–8. This belies Defendants' argument that "Plaintiffs have not identified any way HSD has failed to meet its alleged obligations with respect to furnishing PDN services," other than failing to increase reimbursement rates, ECF No. 176 at 16. As the Tenth Circuit explained in *Planned Parenthood*,

> . . . in *Armstrong*, the Supreme Court analyzed an entirely different section of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), concluding that this specific section did not create a private right of action. Section 1396a(a)(30)(A) provides that "[a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for" Medicaid services to ensure that Medicaid pays for only necessary, efficient, economic, and high-quality care while still setting reimbursement rates high enough to encourage providers to continue serving Medicaid patients. In his opinion, the last portion of which Justice Breyer declined to join, thus making that portion a plurality, Justice Scalia stated that "Section 30(A) lacks the sort of rights-creating language needed to imply a private right of action." *But the plaintiffs there did not sue under § 1983 to enforce a right established by the Medicaid Act*. . . . Justice Scalia also noted [in the nonbinding plurality section of] *Armstrong* that the plaintiffs were providers, as opposed to the providers' patients, who are the Medicaid Act's intended beneficiaries. As such, he doubted "that providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement." Indeed, the majority speculated that the provider-plaintiffs in *Armstrong* likely chose not to sue under § 1983 *because they had no unambiguously conferred right* under *Gonzaga*.

Planned Parenthood of Kansas, 882 F.3d at 1226 (emphasis added) (citations omitted). *Armstrong* is therefore inapposite.

(2) Whether EPSDT Patients Have a Private Right of Action

Finally, Defendants argued at the hearing held on May 18, 2023, and in their brief, that the sections of the Medicaid Act under which Plaintiffs sued do not state a private right of action. *See* ECF No. 176 at 17. As discussed above, the logic of the Supreme Court in *Armstrong* does not apply to the instant case. *See supra* at V(B)(1). Instead, whether there exists a private right of action is determined by the *Blessing*/*Gonzaga* test.

Section 1983 imposes liability on anyone who under color of state law deprives a person of "rights, privileges, or immunities" secured by the laws or the Constitution of the United States. 42 U.S.C. § 1983. In *Blessing v. Freestone,* the Court set forth three criteria to determine whether a statutory provision gives rise to a federal right under 42 U.S.C. § 1983:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. 329, 340–41 (1997) (citations omitted). In *Gonzaga Univ. v. Doe,* the Supreme Court further held that an enforceable private right exists only if the statute contains nothing "short of an unambiguously conferred right" and not merely a vague benefit or interest. 536 U.S. 273, 283 (2002). No enforceable right exists "where a statute by its terms grants no private rights to any identifiable class." *Id.* at 283–84. A statute unambiguously demonstrates congressional intent to confer individual or personal rights by using "rights-creating language," *id.* at 287, which must clearly impart an "individual entitlement," and have an "unmistakable focus on the benefited class," *id.* at 284. "Once a plaintiff demonstrates that a statute creates a federal right, the right is presumptively enforceable under § 1983 unless Congress specifically foreclosed such a remedy."

Mandy R., Mandy R. v. Owens, 464 F.3d 1139, 1147 (10th Cir. 2006), *cert. denied*, 549 U.S. 1305 (2007) (citing *Gonzaga,* 536 U.S. at 284); *see also JL v. New Mexico Dep't of Health*, 165 F. Supp. 3d 1048, 1061–63 (D.N.M. 2016).

Generally, under the EPSDT program, a state must provide all forms of medical assistance to Medicaid patients under the age of 21. *See* 42 U.S.C. § 1396d(r)(5) (defining services). "The EPSDT obligation is thus extremely broad." *Katie A., ex rel. Ludin v. L.A. Cty*., 481 F.3d 1150, 1154 (9th Cir. 2007). States must provide all of the services listed in 42 U.S.C. § 1396d(a) to eligible children when such services are found to be medically necessary, including "private duty nursing services." *See* 42 U.S.C. § 1396d(a)(8). As noted by Judge Vazquez, "[s]tates are not required to participate in the Medicaid program, but once a state elects to participate, it must do so in accordance with federal statutes and regulations." *Valdez*, WL 8444441, at *2 (citing 42 U.S.C. § 1396a(a)(10)).

Here, there is no credible dispute that HSD has determined that Plaintiffs are eligible for Medicaid benefits and PDN services, and the Court finds Plaintiffs have shown a strong likelihood that there are shortfalls in the provision thereof. *See*, *e.g*., ECF Nos. 59-2, 59-3, 59-4, 59-6, 59-7, 59-9, 109 at 68–69, 150-2. The only question is whether such failure by Defendants to provide full EPSDT services gives rise to a private cause of action.

Various courts have already recognized a private right of action to enforce a Medicaid patient's right to EPSDT services. *See*, *e.g*., *Salazar v. D.C.*, 729 F.Supp.2d 257, 268 (D.D.C. 2010); *S.D. ex rel. Dickson v. Hood,* 391 F.3d 581, 607 (5th Cir. 2004); *Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services,* 293 F.3d 472, 479 (8th Cir. 2002); *Westside Mothers v. Haveman,* 289 F.3d 852, 863 (6th Cir. 2002); *S.R. by & through Rosenbauer v. Pennsylvania Dep't of Hum. Servs*., 309 F. Supp. 3d 250, 262 (M.D. Pa. 2018); *William v. Horton*, 2016 WL 6582682,

*6 (N. D. Ga. Nov. 7, 2016); *J.E. v. Wong*, 125 F. Supp. 3d 1099, 1108 (D. Haw. 2015); *John B. v. Emkes*, 852 F.Supp.2d 944, 948 (M.D. Tenn. 2012), *aff'd* 710 F.3d 394 (6th Cir. 2013); *see also O.B. v. Norwood*, 838 F.3d 837, 843 (7th Cir. 2016) (upholding patients' preliminary injunction).[5] This Court now joins them.

First, EPSDT services include screening services—which must include a comprehensive health and development history, a comprehensive unclothed physical exam, appropriate immunizations, laboratory tests, and health education—vision services, dental services, hearing services, and "such other necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." 42 U.S.C. § 1396d(r). These services were clearly intended to benefit minor patients such as Plaintiffs. Plaintiffs do not merely fall within the general zone of interest that the statute is designed to protect, but instead comprise a specific class of individuals intended to receive services under this provision. *See Gonzaga*, 536 U.S. at 283.

Second, the Court finds this obligation is not so ambiguous or amorphous that its enforcement strains judicial competence, as the mandated services are described in detail. Third, the relevant statutory language is mandatory; Section 1396a(a)(10)(A) states that EPSDT services "must" be included, as does Section 1396a(a)(43). The Court therefore holds that the EPSDT mandate satisfies the three-part *Blessing* test, as clarified by *Gonzaga*, and thus confers upon

[5] *See also Watson v. Weeks*, 436 F.3d 1152, 1162 (9th Cir. 2006) (finding a similar private right of action under the Medicaid Act); *Sabree ex rel. Sabree v. Richman,* 367 F.3d 180, 183 (3d Cir. 2004) (same); *Miller by Miller v. Whitburn,* 10 F.3d 1315, 1319–20 (7th Cir. 1993) (applying the pre-*Blessing*/*Gonzaga* test under *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990) to find the same private right of action).

Plaintiffs and other EPSDT patients a private right of action. *Blessing*, 520 U.S. at 340–341; *Gonzaga*, 536 U.S. at 283.

(3) Whether Defendants Are Required Merely to Pay For Services Instead of Ensuring the Provision of Services

At the May 18, 2023 hearing, Defendants also argued that their obligations under the Medicaid Act are fulfilled by payment alone. In arguing that all the Act requires of HSD is financial contribution, Defendants relied on *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003), which—as noted by Plaintiffs' counsel—has since been superseded by statute. The *Bruggeman* court called "Medicaid . . . a payment scheme, not a scheme for state-provided medical assistance." 324 F.3d at 910. At the time of *Bruggeman*, the statute defined "medical assistance" only as "payment of part or all of the costs of" enumerated care. 42 U.S.C. § 1396d(a) (2009).

As noted by Plaintiffs in their Motion and at the May 18, 2023 hearing, however, Congress has long since amended this definition. *See* ECF No. 150 at 18. As part of the Patient Protection and Affordable Care Act, Congress amended the definition of "medical assistance" under 42 U.S.C. § 1396d(a) to clarify that the term "medical assistance" means "payment of part or all of the cost of the following care and services *or the care and services themselves, or both* . . . ." 42 U.S.C. § 1386d(a) (emphasis added). As other courts have found, it appears that Congress intended "to clarify that where the Medicaid Act refers to the provision of services, a participating State is required to provide (or ensure the provision of) services, not merely to pay for them . . . ." *A. H. R. v. Washington State Health Care Auth.*, 469 F. Supp. 3d 1018, 1040 (W.D. Wash. 2016) (quoting *John B.*, 852 F. Supp. 2d at 951); *see also C.A. through P.A. v. Garcia*, No. 4:23-CV-00009 SHL/HCA, 2023 WL 3479153, at *6 (S.D. Iowa May 15, 2023); *Norwood*, 838 F.3d at 843;

Murphy by Murphy v. Minnesota Dep't of Hum. Servs., 260 F. Supp. 3d 1084, 1108 (D. Minn. 2017); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1321 (W.D. Wash. 2015); *Leonard v. Mackereth*, No. CIV.A. 11-7418, 2014 WL 512456, at *6 (E.D. Pa. Feb. 10, 2014). For these reasons, the Court finds Defendants' arguments unavailing.

(4) Whether Plaintiffs Were Required to Administratively Exhaust

Defendants imply that Plaintiffs were required by the Medicaid Act to exhaust their administrative options prior to filing in federal court. ECF No. 176 at 6. "Under the Medicaid statutes and regulations, Medicaid recipients may request a fair hearing, request a continuation of their benefits pending the outcome of the fair hearing, and appeal the final agency decision to the state district court." *Valdez*, 2006 WL 8444441, at *5. A plaintiff, however, is not required to exhaust administrative remedies prior to filing under § 1983. *Porter v. Nussle*, 534 U.S. 516, 523 (2002); *see also J. G. through Grimes v. Bimestefer,* No. 21-1194, 2022 WL 2965794, at *7 (10th Cir. July 27, 2022); *see* ECF No. 1 at 48. Therefore, Defendants' arguments regarding the fair hearing are unavailing.

(5) Which Document Determines Defendants' Right to PDN Hours

The Court's Order Directing Briefing instructed the parties to state which document determines individual Plaintiffs' rights to a specific number of PDN hours under the Medicaid Act and to provide certain documents. ECF No. 151 at 3. The Court has reviewed the documentation submitted. Plaintiffs argue that the ISP reflects Plaintiffs' rights to PDN services under the Medicaid Act as medically fragile children, as the need for skilled nursing services must be included in the ISP under New Mexico regulations. ECF No. 192 at 26–27. Plaintiffs state that the EPSDT budgets "do not necessarily reflect what rights EPSDT beneficiaries have," instead only

documenting the approved level of care and what services have been approved for payment by Defendants. ECF No. 192 at 26.

Defendants agree that "the PDN services must be specified in the EPSDT beneficiary's treatment plan, or ISP in this case." ECF No. 176 at 31. Defendants point out that the EPSDT Budget is the document that "identifies the specific home health provider eligible to render services and allocates the total number of in-home skilled caregiving hours for which a child is eligible . . . between the PDN services, if any, and HHA providers or therapists that have agreed to provide services." ECF No. 176 at 33. Defendants allege that these numbers do not necessarily represent true medical necessity, however, stating that family preferences can "override" the care manager and allocate all of the skilled care services in their EPSDT budget to PDN. ECF No. 176 at 34.

The Court observes that PDN hours are only clearly disaggregated in the EPSDT budgets. *Compare* 202-1 at 1 *with* 202-3.

Given the above, and based on the Court's own examination of the documents submitted, for purposes of judicial clarity and enforcement of the below injunction, the Court provisionally holds that there will be a rebuttable presumption of entitlement to the PDN hours specified in the EPSDT budget. Such presumption may be rebutted by good cause shown, including, for example, an affidavit by the care manager that PDN services are not medically necessary for a given child at the level represented by the EPSDT budget, an affidavit showing increased need in between regular periodic assessments, or other changed circumstances. In the event that one side seeks to rebut this presumptive entitlement, the other side will have the right to submit evidence in their favor in reply, including, for example, provider testimony. The Court reserves the right to update this determination at any time as the case proceeds.

(6) Whether Medicaid-funded PDN Hours Must Be Provided in the Home

Finally, Defendants argue that a New Mexico regulation does not allow Plaintiffs to receive PDN services in locations other than Plaintiffs' homes or schools. ECF No. 176 at 27 (citing NMAC § 8.320.2.19(B)). Plaintiffs, meanwhile, contend that this represents a misinterpretation of New Mexico regulatory framework, maintaining that these two locations for services are non-exclusive, but are instead merely examples of different locations services may be provided. ECF No. 192 at 13.

The state statute does indeed state that "PDN services must be furnished by a [Registered Nurse] or a [Licensed Practical Nurse] in the [New Mexico medical assistance program] eligible recipient's home or in his or her school setting if it is medically necessary for school attendance."[6] NMAC § 8.320.2.19(B). Even prior to *Olmstead*, courts interpreted similar *federal* regulations on private duty nursing as setting-independent. As explained by the Second Circuit,

> Two and a half decades ago it may have been widely accepted that a person needing the services of a private duty nurse would be confined to a hospital, a skilled nursing facility, or the four corners of her home, but fortunately these assumptions no longer hold true today. . . . private duty nursing is now commonly understood to be "setting independent"; that is, it refers to a level of care rather than to specific locations where the care can be provided. . . . Because the secretary's explanation for his narrow interpretation of [the regulation] depends on a static and obsolete view of the relevant facts, we do not accept it as reasonable.

Detsel by Detsel v. Sullivan, 895 F.2d 58, 64 (2d Cir. 1990) (construing a statute which clearly identified the home, a hospital, or a skilled nursing facility as acceptable locations for provision of

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[6] Defendants cite *Shook v. Bd. of Cnty. Commissioners of Cnty. of El Paso*, 543 F.3d 597, 606 (10th Cir. 2008), in their argument regarding vagueness, stating that Plaintiffs fail to define "appropriate" providers of PDN. ECF No. 176 at 11. Elsewhere in their briefing, however, they indicate their awareness of the qualifications required, stating that "EPSDT PDN 'services must be furnished by a RN or a LPN . . . .'" ECF No. 176 at 27. The Court will not address this argument further as it appears the parties are in agreement. *See* ECF No. 192 at 9 (Qualifications for "appropriate providers of PDN" are "pre-set by regulation").

PDN services). Modernly, the National Center for Medicaid and State Operations "specifically instructs that a homebound requirement is an improper restriction for the provision of any home health care service." *Lankford v. Sherman*, 451 F.3d 496, 512 (8th Cir. 2006); *see also* Medicaid Program; Face-to-Face Requirements for Home Health Services; Policy Changes and Clarifications Related to Home Health, 81 FR 5530-01 and 76 FR 41032-01; *Skubel v. Fuoroli*, 113 F.3d 330, 337 (2d Cir. 1997) ("[W]e find no logical basis to support restricting Medicaid funding to home nursing services provided exclusively at the recipient's place of residence."); *Hatten-Gonzales v. Earnest*, 1:88-cv-00385 KG/CG, 2016 WL 9781212, at *3 (D.N.M. July 15, 2016), *report and recommendation adopted*, 2016 WL 9779421 (D.N.M. Sept. 27, 2016), *quashed*, 2018 WL 6573455 (D.N.M. Dec. 13, 2018) (noting prior agreement by HSD to revise the New Mexico Administrative Code "in order to bring it into compliance with federal regulations governing [] Medicaid").

For the foregoing reasons, the Court finds that Plaintiffs' interpretation of the controlling regulatory framework is more likely to prevail.

VI. Defendants' Impossibility Argument

While Defendants now frame their "impossibility" argument as challenging Plaintiffs' standing for lack of redressability, *see supra at (I)(D)*, the Court will also separately address their argument that it is impossible to comply with their obligations under the Medicaid Act, given the current market conditions. ECF No. 176 at 27–31. Defendants contend they should be excused from compliance because there are simply not enough qualified nurses working in New Mexico. *Id*. at 28. As the Court indicated at the first motion hearing, however, there are obvious factors that may cause a person to change jobs, even across state lines. Additionally, the below injunction does not require perfect compliance with the EPSDT mandate; it requires good faith efforts. *See* ECF

No. 85 at 8 ("The gulf between an injunction mandating that services actually be delivered . . . and an injunction requiring the state to 'take steps' to locate and arrange for nursing services . . . is massive.").

As Defendants urge, the Court will take judicial notice of a nursing shortage. The Court will *not* agree that a nursing shortage ends the inquiry into Defendants' clear obligation under federal law to provide services. Defendants' laudable efforts to ameliorate the shortage, unfortunately, undercut Defendants' own argument that there exist no steps that *may* be taken to combat a shortage. Additionally—and fatally—Defendants have not shown evidence *connecting* the nursing shortage with their own resources. For example, there was no expert testimony at either hearing regarding how broad the nursing shortage is, what it means for this small number of Plaintiffs, or whether hiring traveling nurses would bankrupt Defendants—or even substantially impact them.

Defendants concede that the Medicaid act "provides a general requirement that the state arrange for medically necessary, EPSDT-mandated services," but argue "that requirement is not unlimited, and necessarily assumes that such services are available." ECF No. 176 at 21. Defendants give the example that "a Medicaid plaintiff requiring a heart transplant cannot bring a claim under §(a)(43) to require the State to procure a heart where no [] transplants are available . . . ." *Id.*

While a seemingly common-sense statement, Defendants do not provide any authority for this assertion, and the Court wonders at the implicit comparison of nurses to human hearts. As an example, while the organ trade remains illegal despite the best efforts of certain civil libertarians, nurses are likely to accept jobs in exchange for higher wages or better working conditions, or in response to greater outreach. The comparison is thus not well-taken. Additionally, even if the two

shortages were comparable, the Court notes that governments in fact commonly take steps to encourage organ donation, such as outreach, education, and affirmatively asking residents whether they consent to donate organs during driver's license registration.

There are a limited number of families in the state of New Mexico alleged to be lacking in PDN hours—around fifty. ECF No. 1 at 12; *see also* ECF No. 85 at 15. At issue currently are only two. The Court doubts that it would bankrupt HSD to hire traveling nurses sufficient to displace otherwise qualified home care nurses from hospital positions, resulting in the sufficient staffing of the two surviving Plaintiffs' households. Though the question is not currently before the Court, the Court suspects the same would be true for even fifty similarly situated New Mexican children.

A nursing shortage, alone, is not an impossibility. As Plaintiffs indicate, economic shortages can vary regionally, including the nationwide post-covid nursing shortage. *See* ECF No. 192 at 15. Such shortages can be combatted. For example, if there were a local nursing shortage but a neighboring state had a surfeit of trained nurses, Defendants would likely be lax in their duties under the Medicaid Act not to try and attract some of these available and appropriately trained nurses to the state of New Mexico.

While Defendants may not possess a solution to the nationwide shortage, Defendants bear no such burden; Defendants have a duty, instead, to provide certain basic services to New Mexico Medicaid recipients. Whether this entails increased out-of-state advertising, creative problem-solving in collaboration with its MCO partners, or other affirmative steps is the province of Defendants' sound judgment as healthcare administrators. *See* ECF No. 85 at 23 ("Wages are only part of a bigger economic equation."). Defendants' difficulty in finding and retaining qualified nurses is just that—a difficulty, not an impossibility. Indeed, M.G.'s mother has recently shown

that applying increased effort to the problem can result in relatively immediate positive results. ECF No. 150-2 at 2–3.

As Plaintiffs note in the Complaint, New Mexico's Medicaid program works via "capitated payments," as opposed to fee-for-service, meaning that when care is more expensive, the MCOs lose money, and when care is less expensive, the MCOs profit. ECF No. 1 at 2. The nature of this type of risk-based contract means that, in theory, if providing care were to become more expensive due to an unexpected mid-contract shortage, the MCOs would simply lose money—not be allowed to provide fewer services. In the longer term, it might result in the MCOs renegotiating their renewal contracts. It does not, on its own, result in the responsible state agency being legally excused from providing required services.

As Defendants note, the ability to provide services is impacted by market conditions. ECF No. 176 at 27. However, Defendants are also market participants, and are not without the power to take steps to enforce their own contracts. Here, there is no evidence they have taken even first step to do so. The Court does not doubt that many of Defendants' employees are doing their very best to find nurses. *See*, *e.g.*, ECF Nos. 59-3; 59-6 at 2; 59-9; 85-1 at 2–3; 109 at 37–38. But without greater support from higher levels of HSD, there may be only so much frontline care coordinators are able to achieve for the individual patients and families they serve.

To be sure, the purpose of the Medicaid program is to furnish medical assistance "as far as practicable" to eligible individuals. 42 U.S.C. § 1396-1. Indeed, courts may consider the practicality of compliance even when a defendant's flouting of its legal obligations is obvious. *See*, *e.g.*, *Blackman v. D.C.,* 185 F.R.D. 4, 5 (D.D.C. 1999) ("The Court has not issued a broad, class-wide preliminary injunction . . . [because] the District simply does not have the resources to come into immediate compliance."); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 614 (7th

Cir. 2004) ("A court must therefore take care to consider the cost of a plaintiff's care not in isolation, but in the context of the care it must provide to all individuals with disabilities comparable to those of the plaintiff."); *Olmstead*, 527 U.S. at 597 ("In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably."). For these reasons, if it were a question of a *permanent* injunction as to *all* eligible children in New Mexico, the Court's analysis might differ.

Here, however, the injunction requested is preliminary, not permanent, and the surviving Plaintiffs constitute two disabled children in a state of nearly a million Medicaid beneficiaries. ECF No. 85 at 20; *see also* ECF Nos. 85 at 12 (alleging 195 children in New Mexico's Medically Fragile waiver program); 1 at 12 (alleging "at least fifty three" children in New Mexico eligible for PDN hours but not receiving all of them). The Court therefore finds Defendants' "impossibility" argument unavailing.

Under Rule 65(a), Plaintiffs normally must show a "substantial" likelihood of success on the merits. *Winter*, 555 U.S. at 20. Even under the heightened standard for a disfavored mandatory injunction, Plaintiffs need not show a *perfect* likelihood of success on the merits, merely a strong one. *State v. U.S. Env't Prot. Agency*, 989 F.3d at 884; *O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d at 976. The Court finds that Plaintiffs have made the requisite showing.

VII. Whether the Injunction Is Impermissibly Vague

In their First Motion for a Preliminary Injunction, Plaintiffs asked that the Court grant a preliminary injunction "[o]rder[ing] State Defendants to return the administration of the EPSDT Program to the *status quo* that existed prior to the failure by HSD to provide the services mandated

by the Individual Services Plans for Plaintiffs and the Plaintiff class" and "[o]rder[ing] State Defendants to furnish and fulfill authorized private-duty nursing hours, directly or through referral to appropriate agencies, organizations, or individuals, to Plaintiffs and Class members . . . ." ECF No. 59 at 27.

Defendants argued, among other things, that

> Court[-]ordered provision of nursing services will necessitate the medical providers to try to pull nursing staff from other patients in hospital, clinic and other in home care settings to provide [plaintiffs] with the maximum numbers of hours of in home care for which they claim they are eligible at the expense of other New Mexicans. A court is not in the position to make the medical decisions regarding the allocation of nurses, a scarce resource, among sick New Mexicans.

ECF No. 85 at 21.

"[G]enerally, injunctions simply requiring the defendant to obey the law are too vague." *Keyes v. Sch. Dist. No. 1*, Denver, Colo., 895 F.2d 659, 668 (10th Cir. 1990). This is because, at least in part, a "sweeping injunction to obey the law" does not adequately inform a defendant of her obligations. *Swift & Co. v. United States*, 196 U.S. 375, 401 (1905). In order to satisfy Rule 65, the language of a preliminary injunction must be specific enough for the Court to determine whether there is compliance. *Shook v. Bd. of Cnty. Commissioners of Cnty. of El Paso*, 543 F.3d 597, 606 (10th Cir. 2008).

In response to the First Motion for Preliminary Injunction, ECF No. 59, Defendants argued that Plaintiffs' original proposed injunction lacked the specificity required by Rule 65, and that the method of providing adequate private-duty nursing hours to Plaintiffs "in the face of a widely acknowledged shortage of suitably skilled nurses" is not at all obvious. ECF No. 85 at 5. Defendants contended that, as written, the original proposed injunction

> essentially order[ed] [] HSD to solve a complex problem of labor supply and demand, and medical economics, without providing any concrete instructions for

> accomplishing the task . . . [and] without considering the impact of such a mandate on [] [their] other obligations . . . or whether compliance with the injunction is even possible.

Id. at 6. At that time, the Court agreed. ECF No. 136 at 4. Despite the passage of months, however, the answers to various essential questions in this case remain mysterious—whether traveling nurses could solve Plaintiffs' shortfalls or not, the feasibility of attracting nurses from out of state, and why Plaintiffs' parents are periodically able to solve the staffing problem themselves while Defendants are not. *See*, *e.g*., ECF No. 150-2 at 2–3.

Plaintiffs maintain that the new proposed injunction is not too vague under Rule 65. ECF No. 150 at 22. They argue that in prior cases, including the desegregation case discussed in the prior order, courts have given significant leeway where the information needed to make the order specific in form is known only to the party to be enjoined. *Id.* at 22 –23 (citing *Keyes*, 895 F.2d at 669–70). Upon reflection, the Court agrees.

Given the information asymmetry involved in the current case, as well as Defendants' expertise in administration of the New Mexico Medicaid program, the Court finds a flexible preliminary injunction to be both permissible and appropriate in this case. *See also A. H. R. v. Washington State Health Care Auth*., 469 F. Supp. 3d 1018, 1050 (W.D. Wash. 2016) (ordering defendants to "take all actions within their power necessary for Plaintiffs to receive" their authorized PDN hours); *Norwood,* 838 F.3d at 843 (affirming injunction ordering defendants to "take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to Plaintiffs[.]"); *Indep. Living Res. v. Ore . Arena Corp*., 1 F. Supp. 2d 1159, 1173 n. 16 (D. Or. 1998) (leaving "logistical matters" concerning the implementation "in the capable hands of the

[defendants]"); ECF No. 85 at 21. The Tenth Circuit has found vague language permissible in the injunctive context permissible before, stating in the very same desegregation case:

> [The injunction] is a commendable attempt to give the board more freedom to act within the confines of the law. We recognize the difficulty in drafting an injunction that will allow the district maximum latitude in formulating policies, while at the same time making the injunction sufficiently specific. *The degree of specificity necessary may be determined in light of the difficult subject matter*.

Keyes, 895 F.2d at 669 (emphasis added).

Additionally, here, the Court has modified the proposed language to include examples of steps that may show compliance (negotiation with MCO partners, attempts to attract nurses from out of state, increased monitoring of shortfalls), as well as results that may show compliance (increased average number of monthly PDN hours actually provided to Plaintiffs). The Court believes that its modified injunction, as written, does not fall amiss under the Rule, as it "give[s] notice to the defendant of what is prohibited, and [can] guide an appellate court in reviewing the defendant's compliance or noncompliance with the injunction." *Keyes*, 895 F.2d at 668; *see also* Fed. R. Civ. P. 65(d)(1)(C)(requiring that a preliminary injunction "describe in *reasonable* detail—and not by referring to the complaint or other document—the act or acts restrained or required.") (emphasis added); *Shook*, 543 F.3d at 606.

The Court is unwilling to craft relief which may mandate removal of nurses from other equally urgent duty stations, such as other New Mexico children requiring PDN hours, nursing homes or intensive care units. To do so would be to pit equally situated New Mexican patients against each other on the basis of who filed first. The Court is also uneager to usurp Defendants' roles in determining the best use of their limited resources. The Court does not presume to tell Defendants how to perform the day-to-day administration of the state Medicaid program; the Court is merely in the position of being obligated to enforce compliance with the federal Medicaid Act

to ensure provision of services to the neediest beneficiaries of Defendants' programs. The Court has therefore tailored Plaintiffs' proposed preliminary injunction to allow Defendants maximum discretion.

Because the Court's tailoring has made the requested relief narrower, clearer, and thus less burdensome upon Defendants, the Court finds the modifications do not run afoul of Rule 65. *See* Fed. R. Civ. P. 65(a)(1) ("The court may issue a preliminary injunction only on notice *to the adverse party*.") (emphasis added); *see also*, *e.g.*, *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1230 (10th Cir. 2009) (finding defendant "fairly apprised of the likelihood of equitable relief" generally even where it was explicitly requested for the first time in supplemental briefing); *compare Waldrop, et al. v. New Mexico Human Services Dep't et al.*, 1:14-cv-00047 JCH/KBM, ECF No. 11 at 33 (plaintiffs requesting equitable relief in general terms) *with* ECF No. 113 (court sua sponte adding specific steps for compliance).

The Court cautions Defendants, however, that such discretion assumes continued good faith and *additional* efforts to comply with their obligations under the Medicaid Act on top of the laudable steps already taken, ECF No. 176 at 35–36. In the absence of immediate good faith attempts to comply with their obligations, the Court may appoint a special master to monitor the proceeding on an ongoing basis. Fed. R. Civ. P. 53(a)(1)(C) (The Court may appoint a special master to "address pretrial [] matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.").

VIII. Fees

Plaintiffs ask for fees and costs for the first time in their Reply. ECF No. 192 at 27. Rule 65 does not mandate the awarding of fees, and the Court does not find such an award compelling in this case. The Court will therefore decline to award fees to Plaintiffs for the instant Motion. *See*

In re: Motor Fuel Temperature Sales Pracs. Litig., 872 F.3d 1094, 1113, n.5 (10th Cir. 2017) ("[A]rguments raised for the first time in a reply brief are waived.").

CONCLUSION

For the foregoing reasons, Plaintiffs' Second Motion for Preliminary Injunction, ECF No. 150, is hereby **GRANTED IN PART**.

The Court therefore **FINDS** that:

1. Plaintiffs have demonstrated a likelihood of success on the merits of their Ninth Cause of Action, which alleges that Defendants violated the Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT") provisions, 42 U.S.C. §§ 1396a(A)(10)(A), 1396d(a)(4)(B), and 1396a(a)(43)(C).
2. Plaintiffs have demonstrated a likelihood of success on the merits of their Sixth and Seventh Causes of Action, which allege that Defendants violated the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.
3. Plaintiffs are likely to prevail on their claim that Defendants approved each Plaintiff for EPSDT in-home shift nursing services based on medical necessity and that Plaintiffs are regularly not receiving all such approved services.
4. Without injunctive relief, Plaintiffs lack an adequate remedy at law and face irreparable injury by not receiving medically necessary in-home shift nursing services. The balance of equities and public interest favor Plaintiffs, as the public has an interest in seeing that Defendants provide the care and treatment that Defendants have already determined to be medically necessary.

IT IS THEREFORE ORDERED THAT:

A. Defendants shall, in good faith, take additional immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to Plaintiffs at the level already approved by Defendants, as required by the Medicaid Act, pending final judgment in this action or until further order of the Court.

   1. Such steps may include, but are not limited to, negotiation with Managed Care Organization partners regarding possible solutions, making good faith attempts to attract qualified nurses from other states, increased monitoring of Plaintiffs' weekly shortfalls, or any other administrative or other action which tends to and does actually increase the average number of private duty nursing hours provided to Plaintiffs each month without seriously compromising other programmatic goals.

B. In the case of Plaintiffs who face Private Duty Nursing hours shortages for the duration of this case, Defendants shall take immediate steps to provide notice to the Managed Care Organization for each Plaintiff.

C. In the case of Plaintiffs not facing Private Duty Nursing hours shortages, Defendants shall restore, ensure and not unilaterally withdraw the in-home shift nursing services as of the date of the hearing on Plaintiffs' Motion for Preliminary Injunction on May 18, 2023, in accordance with their Individual Service Plan and their EPSDT Private Duty Nursing budgets.

D. Defendants shall inform the Court and Plaintiffs of the steps taken by Defendants to arrange for in-home shift nursing services to Plaintiffs within 30 days of the entry of this Order.

E. Within five days of receipt of Defendants' providing the above-described information, Plaintiffs may request a meeting with Defendants to confer regarding the information provided by Defendants; Defendants must offer times to Plaintiffs for the meeting, to occur within ten days of Plaintiffs' request.

F. Within five days of the meet and confer, Plaintiffs may file a written request for a status hearing before this Court, in order to clarify, provide comment regarding, or challenge the effectiveness of the steps Defendants have taken to arrange for in-home shift nursing services to Plaintiffs.

G. This Court waives or excuses the filing of any security or bond by Plaintiffs.

H. This Order shall remain in effect until final judgment in this action or until further order of Court.

IT IS SO ORDERED.

MARGARET STRICKLAND
UNITED STATES DISTRICT JUDGE