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

ERIC STEWARD, *et al.*, *Plaintiffs*	§	
v.	§	Case No. 5:10-CV-1025-OG
RICK PERRY, Governor of the State of Texas, THOMAS SUEHS, Executive Commissioner of the Texas Health and Human Services Commission, CHRIS TRAYLOR, Commissioner of the Texas Department of Aging and Disability Services, *Defendants*	§	

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

DAVID MATTAX
Director of Defense Litigation

ROBERT B. O'KEEFE
Chief, General Litigation Division

NANCY K. JUREN
Assistant Attorney General
Attorney in Charge
Texas Bar No. 11059300
DARREN G. GIBSON
Assistant Attorney General
Texas Bar No. 24068846
AMANDA J. COCHRAN-MCCALL
Assistant Attorney General
Texas Bar No. 24069526
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Phone No.: (512) 463-2120
Fax No.: (512) 320-0667

Attorneys for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

FEDERAL STATUTES

FEDERAL REGULATIONS

TEXAS STATUTES:

TEXAS REGULATIONS:

CONSTITUTIONAL PROVISIONS

PUBLICATIONS:

OTHER AUTHORITIES:

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

ERIC STEWARD, *et al*.,	§	
Plaintiffs	§	
	§	
v.	§	Case No. 5:10-CV-1025-OG
	§	
RICK PERRY, Governor of the State of Texas, et al.,	§	
	§	
Defendants	§	

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

TO THE HONORABLE JUDGE ORLANDO L. GARCIA:

Defendants reply as follows to Plaintiffs Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint ("Response") [Doc. 40], filed in response to Defendants' Motion to Dismiss Plaintiffs' Complaint ("Motion") [Docs. 30, 32]:

INTRODUCTION

This Court should grant Defendants' Motion to Dismiss under rule 12(b)(1) on jurisdictional grounds for the following reasons and those set out in Defendants' Motion. ***First***, this Court lacks subject matter jurisdiction over Plaintiffs' claims under 42 U.S.C. § 1396n(c)(2)(B) and (C) ("Freedom of Choice") because none of the Plaintiffs' has standing to assert this claim. The Freedom of Choice provision affords a right of information only for waiver applicants. Five of the six Plaintiffs have never applied for waiver services and the sixth Plaintiff was informed of the community-based options available. ***Second***, there is no subject matter jurisdiction to consider Plaintiffs' claims against the Governor of Texas because Plaintiffs lack standing to assert these claims where there are no allegations that the Governor caused

Plaintiffs' injuries nor that he could redress those injuries. Further, the Governor of Texas is entitled to Eleventh Amendment immunity. Plaintiffs' claims do not fit into the *Ex parte Young* exception to sovereign immunity because the Governor lacks the requisite "connection" to the Texas Medicaid Program. Plaintiffs also fail to state a viable claim against the Governor, since he did not cause any deprivation of Plaintiffs' rights and cannot provide the relief Plaintiffs seek.

Plaintiffs' claims should be dismissed under Rule 12(b)(6) for the following reasons and those set out in Defendants' Motion. ***First***, all of Plaintiffs' Medicaid Act claims, including their NHRA claim, should be dismissed for failure to state a claim for which relief can be granted because section 1983 is not available to enforce a federal law where there is no violation of that law. Specifically, the Medicaid Act, as a Spending Clause statute, does not require state officials to do *anything*. ***Second***, even under a traditional section-by-section analysis, most of Plaintiffs' Medicaid Act claims also fail because these statutes create no individual "rights" that can be vindicated under 42 U.S.C. § 1983. ***Third***, even if this Court finds that Plaintiffs—through their Medicaid Act claims—have alleged a violation of federal law and that those statutes confer federal rights enforceable through section 1983, this Court should still dismiss these claims for failure to state a claim for which relief can be granted. Specifically, Plaintiffs have failed to state a claim under the NHRA and 42 U.S.C. § 1396a(a)(8) ("Reasonable Promptness") to the extent they seek redress for anything but an alleged failure to provide the specialized services required by 42 C.F.R. § 483.120(a)(2) and 42 C.F.R. § 483.440(a)(1). Next, Plaintiffs' section 1396a(a)(8) claim regarding "community placement" fails to state a viable claim because "reasonable Promptness" does not apply to community placement when the community-based waiver is full. Moreover, this claim fails because a state may properly limit a waiver program's size and scope, Plaintiffs have not applied for and been determined to be eligible for a waiver,

and Defendants' eligibility criteria for HCS are valid. Plaintiffs' claims under 42 U.S.C. § 1396a(a)(10)(B) ("Comparability") fare no better and should be dismissed for failure to state a claim to the extent Plaintiffs seek to have the comparability requirement enforced in relation to a waiver program; and to the extent that they seek to impose on Defendants a duty to provide specialized services, active treatment, or other services to individuals in a NF that exceed the requirements of the NHRA. Lastly, Plaintiffs fail to state a claim under 42 U.S.C. §§ 1396n(c)(2)(B) and (C) ("Freedom of Choice") because the statutory text contains none of the requirements that Plaintiffs create from whole cloth and then claim Defendants fail to satisfy. Instead, these statutory provisions afford a right of information only for waiver applicants, and Plaintiffs admittedly are not waiver applicants. Defendants hereby withdraw the statute of limitations argument made in their Motion. *See* Motion pp.13-15.

Finally, it has become plainly apparent from Plaintiffs' Response that they have failed to plead any Medicaid Act claim. To make up for their failure to plead facts amounting to Medicaid Act violations under the particular causes of action they assert, Plaintiffs have mischaracterized their Complaint to cover their pleading deficiencies, made new assertions, and stated new, unsupported facts. Moreover, their Response makes clear what their Complaint did not—that Plaintiffs are attempting to blur the distinctions between the requirements of the Medicaid Act and those of the ADA or Rehabilitation Act, and are muddling the distinctions between the various separate provisions of the Medicaid Act claims, in an effort to bolster their legally-insufficient Medicaid Act[1] Accordingly, for all of the reasons set forth in their Motion and this Reply, this Court should grant Defendants' Motion to Dismiss.

[1] To be clear, Defendants have not challenged Plaintiffs' ADA or Rehabilitation Act claims and these claims would remain in this suit even assuming Defendants' Motion to Dismiss is granted in its entirety. Defendants have, however, challenged each and every Medicaid Act claim on grounds that this Court lacks jurisdiction over such claims and/or Plaintiffs' Complaint fails to state a cognizable Medicaid Act claim.

ARGUMENT AND AUTHORITY

I. The Court May Disregard Much of Plaintiffs' "Background."

Many of the "facts" relied upon by Plaintiff to defeat Defendants' motion must not be considered by this Court, either because they are not supported by the referenced text of the Complaint or because they are not supported at all.

Throughout their Response, and in particular in the "Background" portion, Plaintiffs frequently rely on "facts" in support of which they reference their original Complaint [Doc. 1]. *See, e.g.*, Response at pp. 1-9. In the context of both a Rule 12(b)(1) motion and a Rule 12(b)(6) motion, reliance on the Complaint is appropriate where, as here, Defendants' challenge is based upon the wording of the complaint. *See Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981) (in considering a facial attack under Rule 12(b)(1), the court must consider the allegations in the plaintiff's complaint as true); *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004) (when considering a motion to dismiss under Rule 12(b)(6), the Court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff). However, "facts" which do not appear in the text of the Complaint at all may not be considered by the Court in deciding a Rule 12(b) motion. *Coates v. Heartland Wireless Commc's, Inc.*, 55 F. Supp. 2d 628, 644 n. 26 (N. D. Tex. 1999) (plaintiffs may not rely on allegations that are in their brief, but not in their complaint); *Herrman Holdings, Ltd. v. Lucent Techs., Inc.*, No. Civ. A. 301-CV-0625G, 2001 WL 1295496, at *6 (N.D. Tex. Oct. 5, 2001) (a district court errs when it considers allegations introduced in a plaintiff's response to a motion to dismiss when those allegations are not in the plaintiff's complaint), *rev'd on other grounds*, 302 F.3d 552 (5th Cir. 2002). Plaintiffs' Response mischaracterizes the facts set out in their Complaint, and inserts in the Response "facts" outside the Complaint for which

they cite no authority. These "facts" may not be considered by this Court in opposition to Defendants' Rule 12(b) motion. Specific examples of mischaracterized claims and unsupported "facts" are further discussed below.

A. The Nursing Home Reform Act

In their Response, Plaintiffs make multiple factual assertions related to their claims under The Nursing Home Reform Amendments to the Medicaid Act, 42 U.S.C. § 1396r, which facts are either not made in their Complaint and/or unsupported by any authority. *See, e.g.*, Response pp. 1-8. Nevertheless, Plaintiffs postulate regarding various facts about the history of the NHRA including, but not limited to, the existence of care for persons with developmental disabilities before the mid-1970s, Response p. 2, the supposed ill motivations behind States' placing individuals into NF instead of ICFs/MR, *id*. p. 3, and the supposed transformation of NF into "warehouses" for persons with DD, *id*. p. 3. None of these "facts" are alleged in Plaintiffs' Complaint, nor are they supported by any authority in their Response. Similarly, Plaintiffs expand on the allegation in their Complaint that Texas institutionalizes more than four thousand persons with DD in NFs, Complaint ¶ 26, and opine for the first time in their Response that "thousands more are admitted" each year. Response p. 7. This newly asserted "fact" is not supported by any authority. Accordingly, all of these "facts" which are not alleged in Plaintiffs' Complaint and not supported by any authority should not be considered in evaluating Defendants' Motion.

B. Texas's Community Service Programs

At various places throughout their Response, Plaintiffs make factual assertions and arguments concerning various waiver programs offered by the State of Texas as they relate to Plaintiffs' claims. *See, e.g.*, Response pp. 8-9, 13, 14-15 fn. 23, 17, 18-19, 37 fn. 47. However,

with one exception, Plaintiffs cite no authority for these purported "facts"—not even their own Complaint. Moreover, the Complaint's only waiver reference is to the HCS waiver. Complaint ¶¶ 57, 100, 177-98. [2] Nevertheless, without pleading facts in support, and without citing any authority in their Response, Plaintiffs opine as to the nature of the various waivers (*e.g.*, the type of services provided), their relative size, the length of interest lists for each, and the availability of Money Follows the Person ("MFP"). *See, e.g.*, Response pp. 8-9, 13, 17, 18, 19. Plaintiffs' assertions regarding Defendants' waiver programs cannot be considered at this stage of the litigation.

Furthermore, Plaintiffs even mischaracterize the information contained in the one source they cite—DADS's Reference Guide FY2011. Response pp. 8-9. If the Court would consider extrinsic facts at all, it should note what the DADS Reference Guide actually says. First, although Plaintiffs acknowledge that under section 1396n(c) the Secretary "waives" certain other provisions of the Medicaid Act in order to allow the states to define programs for certain limited populations, they nowhere acknowledge what the Guide reveals: that only one of Texas's statewide waivers for persons age 21 and over—CBA—is a waiver program created as a community-based alternative to providing NF services to eligible individuals as an entitlement. HCS and CLASS, on the other hand, are waivers providing a community-based alternative to ICF-MR services.[3] This is an important distinction as relates to Plaintiffs' section 1396n(c)

[2] The Complaint says nothing more about waivers than to acknowledge that the HCS waiver has an interest list of 45,756 individuals (as of July 31, 2010), indicate that Plaintiffs could live in the community if they were informed of and provided support services such as the habilitative services and residential assistance provided through the state's HCS waiver (or ICF-MR program), admit that Benny Holmes was "provided with a HCS-waiver slot which enabled him to transfer from the nursing facility to a three bedroom home in the community where he lived for approximately nine years," and discuss Mr. Holmes's success at securing a community residential placement through the HCS waiver. *Id*.

[3] DADS's Reference Guide, cited in Plaintiffs' Response at p. 9, illustrates that CBA is the only statewide NF waiver for persons age 21 and over, except for the counties where STAR+PLUS is available, whereas HCS and CLASS are ICF-MR waivers. *Compare* http://cfoweb.dads.state.tx.us/ReferenceGuide/guides/FY11ReferenceGuide.pdf p. 32 (CBA is alternative to NF) *to*

argument because Plaintiffs and the proposed class say they are or may become *nursing facility* residents—not ICF-MR residents—and therefore it is the NF waiver that is the relevant waiver for purposes of construing the state's informational obligation under section 1396n(c). But Plaintiffs gloss over those distinctions and simply characterize waiver programs (and MFP) as alternatives to "institutionalization."[4] *See, e.g.*, Response p. 9.[5]

II. This Court Lacks Jurisdiction Over Plaintiffs' Claims Under 42 U.S.C. § 1396n(c)(2)(B) and (C) (Freedom of Choice) Because Plaintiffs Have No Standing To Assert These Claims.

Defendants moved to dismiss Plaintiffs' "freedom of choice" claim under 42 U.S.C. § 1396n(c)(2)(B) and (C) because Plaintiffs (except for one) never applied for waiver services. Motion pp. 11-12. As the Fifth Circuit made clear in *Grant v. Gilbert*, 324 F.3d 383 (5th Cir. 2003), "at most, the plain language of 42 U.S.C. § 1396n(c)(2)(C) affords a right of information only for waiver applicants." *Id.* at 388. The court went on to state, "[Grant] has not alleged that he applied for waiver services when he was admitted to the nursing care facility or at any time before the pendency of this appeal. This deprives him of standing." *Id.* The same is true here with respect to five out of the six Plaintiffs who have never applied for waiver services. Complaint ¶¶ 136-176, 199-209.

---

p. 34 (HCS is alternative to ICF-MR) *and* 36 (CLASS is alternative to ICF-MR) (last visited 5/22/2011); *see* http://www.dads.state.tx.us/providers/CBA/CBAWaiver.pdf (CBA waiver application) pp. 3 (showing waiver as alternative to care in a NF as described in 42 CFR §440.40 and 42 CFR §440.155), 4 (describing waiver as alternative to NF care) (last visited 5/23/2011). The managed care equivalent to CBA, the "STAR+PLUS" waiver, is also an alternative to NF care but is available in only certain defined service areas. *See* 1 TEX. ADMIN. CODE §353.601 – 603 (showing STAR+PLUS as alternative to NF care. Together, these two waivers offer a community-based alternative for persons with a nursing facility level of care across the entire state.

[4] Money Follows the Person is a funding mechanism, not a service program. *See* TEX. GOV'T CODE § 531.092; *see, e.g.*, 40 TEX. ADMIN. CODE § 48.6003(c)(3) (for CBA).

[5] Plaintiffs also say that the HCS waiver program is the largest, but the DADS Reference Guide they cite shows that during FY 2010, the CBA waiver served an average of 26,108 per month, the HCS waiver served an average of 17,255 per month, and the CLASS waiver served an average of 4,210 per month. *See* http://cfoweb.dads.state.tx.us/ReferenceGuide/guides/FY11ReferenceGuide.pdf pp. 33 (CBA), 34 (HCS), 36 (CLASS) (last visited 5/22/2011).

Plaintiffs' primary argument in response is that this Court should ignore the Fifth Circuit's holding in *Grant*, which Plaintiffs assert is *dicta*, because the *Grant* court found the plaintiff's claims were moot. Response pp. 40-42. Plaintiffs are incorrect and misrepresent the holding in *Grant*. In that case, Grant asserted claims under both 42 U.S.C. § 1396r(e)(7)(C)(i)(I) and 42 U.S.C. § 1396n(c)(2)(C), seeking information on behalf of himself and a purported class regarding community-based placements, a declaration of eligibility for waiver services, and an injunction requiring the state to provide waiver services. *Grant*, 324 F.3d at 385-86. The lower court found that Grant had no standing to assert any of those claims and dismissed his claims; the court also denied Grant's motion for class certification. *Id*. at 386. Grant then appealed the court's decision that he lacked standing. After filing the appeal, but before oral argument, "Grant applied for, and began receiving, waiver services." *Id.* at 386. On appeal, Grant conceded "that his claims are moot as to his own asserted injury, but contend[ed] he still may pursue the claims on behalf of the purported class." *Id*. Thus, the issue before the Fifth Circuit on appeal was first, whether the lower court erred in holding that Grant lacked standing and if so, whether Grant had standing to assert claims on behalf of a purported class under *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), which, according to Grant, permits a named plaintiff whose claims have expired to continue litigating class certification issues if he had standing at the time the motion for class certification is presented. *Id*. at 386, 388-390. Accordingly, the Fifth Circuit was required to determine whether Grant had standing to assert his claims *at the time he filed his lawsuit* (and thus, whether the District Court's ruling on standing was correct) so that it could assess whether Grant was a proper class representative under *Geraghty*. The court's analysis hinged on whether Grant maintained a "personal stake" in a "live controversy" such that there would be "sharply presented issues" and "self-interested parties vigorously advocating

opposing positions," making Grant an appropriate class representative—*notwithstanding* that his claims were moot. *Id*. at 389-90. In the end, the court determined that, given that Grant had standing to bring only the § 1396r(e)(7)(C)(i)(I) informational claim, he lacked a "personal stake" in certifying a class seeking to force the state to provide waiver services, and was not "self-interested" or "capable of presenting the [class] claims as 'sharply presented issues.'" *Id*. at 390. Given that the Fifth Circuit was required to review the lower court's holding on standing both as a separate appeal issue, and as a preliminary question integral to the broader certification issue, the holding in *Grant* is in no way *dicta*, as Plaintiffs suggest.

For these same reasons, Plaintiffs are simply wrong and misleading when they say that the Fifth Circuit acted *ultra vires* by "pronouncing upon the meaning…of § 1396n(c)(2)(C) when it had determined that the underlying controversy was moot." Instead, the *Grant* court was called upon to squarely decide Grant's standing to assert his own § 1396n(c)(2)(C) claim, just as Defendants ask this Court to determine that Plaintiffs lack standing under that provision of the Medicaid Act.

Plaintiffs also argue that the Fifth Circuit simply got it wrong in holding that "at most, the plain language of 42 U.S.C. § 1396n(c)(2)(C) affords a right of information only for waiver applicants." *Grant*, 324 F.3d at 388. What Plaintiffs fail to acknowledge is that, at most, section 1396n(c)(2)(C) places an obligation on the state to inform waiver applicants of alternatives to NF services available under the NF waiver. 42 U.S.C. § 1396n(c)(2) ("A waiver shall not be granted under this subsection unless the State provides assurances…that…such individuals…are informed of the feasible alternatives, if available under the waiver,…to the provision of…nursing facility services[.]"). It does not place an obligation on the state with regard to the state Medicaid program as a whole. Therefore, only applicants to the NF waiver

have standing to assert claims that they were not fully informed under section 1396n(c)(2)(C).[6] As to Plaintiffs' reliance on *Rolland v. Cellucci*, that case did not address the issue of standing to assert a claim under § 1396n(c)(2) and, moreover, it is not binding on this Court in any event. 52 F.Supp.2d 231 (D.Mass. 1999).

As to Plaintiff Holmes, he admits that he was "informed of the community-based options that were available." Complaint ¶ 194. Thus, to the extent he was a waiver applicant, he was afforded his right to information. *See Grant*, 324 F.3d at 388. Thus, he has not alleged any injury-in-fact under § 1396n(c)(2) and likewise lacks standing to assert such a claim.

III. The Governor Is Not A Proper Party.

A. Plaintiffs Lack Standing To Sue The Governor.

As made clear in Defendants' opening brief, Governor Perry lacks the requisite connection to this case for Plaintiffs to establish standing to assert claims against him. Motion pp. 9-10. To establish standing under Fifth Circuit law, Plaintiffs must allege how the Governor "has caused, will cause, or could possibly cause any injury to them." *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc). In addition, if the Governor does not have the power "to redress the injuries alleged, [Plaintiffs] have no case or controversy with [the Governor] that will permit them to maintain this action in federal court." *See id.* at 427. Here, Plaintiffs have established neither.

First, Plaintiffs recognize that the powers of the Governor with respect to HHSC and DADS are limited to appointing the HHSC Executive Commissioner and approving the DADS agency director, Response p. 43, yet Plaintiffs do not allege that any of the Governor's acts in connection with those powers have caused Plaintiffs' injuries. Nor do Plaintiffs allege that the

[6] The state would also have an obligation to a person applying for an ICF-MR waiver to inform that person about services available in the ICF-MR waiver as an alternative to care in an ICF-MR facility.

Governor caused them injury by exercising his more general powers of presiding over budget hearings and compiling the biennial appropriations budget, or by using his line-item veto. *Id*. pp. 43-44. Indeed, Plaintiffs make no allegation that the Governor has any direct control over how the State administers Medicaid "services, programs and activities," such that he would have any responsibility for satisfying the integration mandate of the ADA or the Rehabilitation Act. *See* Complaint ¶¶ 211, 220. Similarly, Plaintiffs make no allegation that the Governor has any involvement in developing policies and procedures to ensure that the various statutory and regulatory requirements of the Medicaid Act and the Nursing Home Reform Amendments are satisfied. In short, Plaintiffs do not allege that the Governor has done anything (or failed to do anything) that is within his constitutional power to do that has caused the injuries that Plaintiffs allege.

Second, under the powers described in Plaintiffs' Response, the Governor cannot grant Plaintiffs any of the relief they seek regarding the provision of community-based Medicaid services, supports and programs. Complaint at ¶¶ 54-56. Plaintiffs are not requesting injunctive relief requiring the Governor to appoint an HHSC Executive Commissioner, approve an agency director for DADS, compile the biennial appropriations budget, or use the line-item veto. As Plaintiffs admit through their description of the Governor's powers, Response pp. 43-44, the Governor does not adopt policies or procedures regarding the provision of Medicaid services, nor does he have any direct control over such services.[7] Consequently, the relief Plaintiffs seek

[7] Plaintiffs also make a passing reference to two executive orders that the Governor issued in 1999 and 2002 regarding community-based services for people with disabilities. Response p. 59. Under Article IV section 10 of the Texas Constitution, the Governor has power to give direction in all branches of the executive department in the form of executive orders. But the Governor's power to enforce those orders is limited and is based primarily on his constitutional appointment power. Concomitant with his authority to appoint, the Governor has the power to refuse to reappoint the person as agency head. However, unlike the federal President, he has no power to force the removal of the agency head prior to the termination of the agency head's appointed term, nor does he have absolute power to force an appointed agency head to carry out his orders. *See* Ron Beal, *Power of the Governor: Did the Court Unconstitutionally Tell the Governor to Shut Up?*, 62 BAYLOR L. REV. 72, 81-88 (2010). Undoubtedly, the

cannot be obtained by enjoining the Governor. *See Okpalobi*, 244 F.3d at 427 ("a state official cannot be enjoined to act in any way that is beyond his authority to act in the first place.").

All that Plaintiffs have left is their conclusory assertion that the Governor has "the duty to ensure that his budget requests are adequate to ensure compliance with federal law and to protect the rights of Texas citizens under those laws." Response p. 43. Such allegations of generalized executive enforcement powers are insufficient to establish standing over a governor or other state officer. *See Women's Emergency Network v. Bush*, 323 F3d 937, 949 (11th Cir. 2003) ("Where the enforcement of a statute is the responsibility of parties other than the governor … the governor's general executive power is insufficient to confer jurisdiction.") (affirming dismissal of governor); *1st Westo Corp. v. School Dist. of Philadelphia*, 6 F.3d 108, 113 (3d Cir. 1993) (dismissing claims against Secretary of Education and Attorney General; "General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law."); *see also Okpalobi*, 244 F.3d at 416 (plurality op.) ("it is not merely the general duty to see that the laws of the state are implemented that substantiates the required 'connection,' but the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.").

Finally, Plaintiffs' citation to *K.P. v. LeBlanc*, 627 F.3d 115 (5th Cir. 2010), is unavailing.[8] Response p. 45. In *K.P.*, the Fifth Circuit held that the plaintiff physicians had

---

Governor has the power to issue executive orders and may exert his influence to see that they are carried out, but he has no constitutional or statutory (that is, no judicially-enforceable) duty to do either. The limitations on his ability to enforce executive orders preclude the Governor from providing the relief that Plaintiffs seek in this case. The Governor can refuse to reappoint the HHSC Executive Commissioner or refuse to approve the reappointment of the Commissioner of DADS in the event an executive order is not followed. But Plaintiffs are not seeking an injunction requiring the Governor to refuse to reappoint the HHSC Executive Commissioner or the DADS Commissioner due to failure to follow executive orders. Rather, they are seeking an injunction requiring actions that only HHSC and DADS (or, in the case of appropriations, the Legislature) can perform. Complaint at ¶¶ 54-56.

[8] Plaintiffs also cite to *Rolland v. Cellucci*, 42 F.Supp.2d 231 (D. Mass. 1999). However, that opinion is an outlier and does not cite a single circuit court case supporting its finding that the governor was a proper party. *Id.* at 243.

standing to bring claims against the members of the Patient Compensation Oversight Board based on the Board's "definite responsibilities relating to the application" of a state statute precluding malpractice insurance coverage for physicians who performed abortions. *Id.* at 124. Thus, it was the specific Board members who had caused plaintiffs' injuries by denying coverage, and it was the Board who could redress those injuries with a "favorable decision." *Id.* at 123-24. That is certainly not the case here. There are no allegations that the Governor has taken any specific action or made any decision within his constitutional power that caused the individual Plaintiffs any injury. Nor are there any allegations that the Governor could take any specific action that would redress the alleged harms.

In short, Plaintiffs have failed to establish Article III standing for their claims against the Governor.

B. The Governor Is Immune From Suit Under The Eleventh Amendment

Plaintiffs' claims against the Governor fail for the additional reason that he is immune from suit. As the Supreme Court made clear in *Ex parte Young*, a state officer named in suit seeking injunctive relief "must have some connection with the enforcement of the act" for sovereign immunity to be waived. 209 U.S. 123, 153 (1908); *see also Fitts v. McGhee*, 172 U. S. 516, 530 (1899) ("neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional."). The precise contours of this requirement have been subject to some debate, including whether a "special charge" of enforcement must be found in the statute. *See Okpalobi*, 244 F.3d at 416-21 (plurality op.).[9] However, what is clear is that to

---

Moreover, unlike the Defendants in this case, the defendants in *Rolland* did not even challenge that the governor was an appropriate defendant with regard to ADA claims (which is not the case here). *Id.* In any event, it certainly is not controlling in this jurisdiction, nor does it override the holding of *Okpalobi*.

[9] The sovereign immunity holding in *Okpalobi* failed to garner sufficient votes to be a majority opinion not because the majority disagreed with its holding, but rather because two judges who joined in the holding on standing

establish the connection required by *Young*, there must be more than a general duty upon the state officer to enforce the laws of the state. *See Women's Emergency Network*, 323 F.3d at 949 ("A governor's 'general executive power' is not a basis for jurisdiction in most instances."); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (dismissing governor); *Confederated Tribes & Bands of the Yakama Indian Nation v. Locke*, 176 F.3d 467, 469-70 (9th Cir. 1999) (dismissing governor); *Children's Healthcare Is A Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416-18 (6th Cir. 1996) (dismissing attorney general); *Okpalobi*, 244 F.3d at 419 (plurality opinion); *Day v. Sebelius*, 376 F.Supp.2d 1022, 1031 (D. Kan. 2005) (dismissing governor).

The rulings in *Women's Emergency Network* and *Confederated Tribes* are particularly instructive. In *Women's Emergency Network*, the plaintiffs challenged the constitutionality of Florida's "Choose Life" specialty license plate program and distribution of funds therefrom. 323 F.3d at 940. The Eleventh Circuit held that the governor's connection to the enforcement of the law and the relevant acts in question was "too attenuated," even where the governor, along with the members of his cabinet, were identified by statute as the "head" of the Florida Department of Highway Safety and Motor Vehicles. *Id.* at 949. "Where the enforcement of a statute is the responsibility of parties other than the governor (the cabinet in this case), the governor's general executive power is insufficient to confer jurisdiction." *Id.* at 949-950.

Similarly, in *Confederated Tribes*, the Ninth Circuit determined that Washington's governor was not a proper party in a case challenging the operation of a state lottery on an Indian Reservation where there was a separate state agency in charge of the lottery. 176 F.3d at 469-70. "Nowhere in [the state statutes governing the lottery] is there any indication that the governor

---

determined that the immunity issue need not have been addressed since the standing issue was determinative in any event. *See Okpalobi*, 244 F.3d at 429 (Higginbotham, J., concurring, joined by King, J.).

has the responsibility of operating the state lottery or determining where tickets may be sold." *Id.* at 470. Thus, the Ninth Circuit held that the Washington governor lacked the "requisite connection to the activity to be enjoined" to establish a waiver of sovereign immunity. *Id.*

Much like the governors in *Women's Emergency Network* and *Confederated Tribes*, the Governor of Texas lacks the requisite connection to the provision of Medicaid services to individuals with developmental disabilities to be a proper party in this case. Rather, the Governor appoints the HHSC Executive Commissioner, approves the DADS agency director, and submits the state budget. *See* Complaint ¶ 22; Response p. 44. Those separate state agencies (and their commissioners, for purposes of *Young*) are responsible for the direction and oversight of the Texas Medicaid Program and ensuring that program complies with federal law. Complaint ¶¶ 23-24. Furthermore, the Legislature appropriates funds, and the Governor enjoys legislative immunity for his actions in connection with the budgeting process and the use of line-item veto powers. *See Bagley v. Blagojevich*, No. 10-1389, 2011 WL 1632045, at *15 (7th Cir. May 2, 2011) (applying legislative immunity to claims against governor related to line-item veto); *Abbey v. Rowland*, 359 F.Supp.2d 94, 100 (D. Conn. 2005) (applying legislative immunity to claims against governor related to budget process).[10]

Plaintiffs again cite to *K.P. v. LeBlanc* in an attempt to argue the Governor is a proper party here under *Young*. Response p. 46. As an initial matter, the Fifth Circuit in *K.P.* recognized that it "need not resolve whether *Ex Parte Young* requires only 'some connection' or a 'special relationship' between the state actor and the challenged statute." 627 F.3d at 125. Rather, the *K.P.* court held that the defendants in that case, who were members of the Patient Compensation Oversight Board, had "definite responsibilities relating to the application" of the

[10] This is true even for claims seeking prospective injunctive relief. *See State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 88 (2d Cir. 2007) (applying legislative immunity to claims for injunctive relief against state officials sued in their official capacity); *Scott v. Taylor*, 405 F.3d 1251, 1257 (11th Cir. 2005) (same).

statute in question and had been directly responsible for deciding to deny coverage to the plaintiff physicians. *Id.* at 119-120, 124. That is certainly not the case here. There are no allegations that the Texas Governor has taken any specific action with respect to the provision of Medicaid services in question, much less with respect to these individual Plaintiffs.

As shown above, the Governor does not have the requisite "connection" to the Texas Medicaid Program to be a proper party under *Young* and therefore is protected by sovereign immunity from Plaintiffs' claims.

C. Plaintiffs Have Failed To State A Claim Against The Governor.

For the same reasons that Plaintiffs fail to establish standing to bring claims against the Governor, Plaintiffs have failed to state a plausible claim against the Governor, since he did not cause any deprivation of Plaintiffs' rights and cannot provide the relief Plaintiffs seek. In response, Plaintiffs rely almost exclusively on *Rolland v. Cellucci*, which held that the governor of Massachusetts was an appropriate defendant in a similar case. 52 F.Supp.2d at 243.[11] The *Rolland* court reached this conclusion despite recognizing that federal law mandates that a single state agency (not the governor) be responsible for "exercis[ing] administrative discretion in the administration or supervision of the [Medicaid state] plan" and for "issu[ing] policies, rules, and

[11] Plaintiffs also cite to unpublished district court opinions outside this circuit. Response p. 51-52. These cases are certainly not controlling, nor do they offer any justification for denying dismissal in this case. In *Boudreau ex rel. Boudreau v. Ryan*, the court relied on *Rolland* in denying dismissal, even where "the plaintiffs failed to plead any connection between [the governor] and the enforcement of the Medicaid Act." No. 00-C-5392, 2001 WL 840583, at *6 (N.D. Ill. May 2, 2001). The *Boudreau* court's holding was admittedly based on a pleading standard that "at this stage, the plaintiff receives the benefit of imagination." *Id.* Such a holding is unsound and carries no weight following the Supreme Court's more rigorous plausibility pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The court in *Gueli v. United States* merely held that claims for injunctive relief against a governor in his official capacity related to plaintiff's employment could be brought under *Young*. No. 806CV1080T27MSS, 2006 WL 3219272, at *4 (M.D. Fla. Nov. 6, 2006). The *Gueli* court went on to dismiss the claims against the Florida governor for failure of service. *Id.* at *5. The *Gueli* case has no relevance or bearing on the issues in this case. Finally, the court in *Bragg v. Chavez* held that legislative immunity did not bar the plaintiff's claims against the governor for prospective injunctive relief, where the plaintiff had alleged injuries resulting from the governor's "orders to his staff to carry out his policies and procedures." No. Civ 07-0343 JB/WDS, 2007 WL 6367133, at *13 (D.N.M. Nov. 13, 2007). There are no such particularized allegations of specific action by the Governor here.

regulations on program matters." 42 C.F.R. § 431.10(e)(1)(ii); *see also* 42 U.S.C. § 1396a(a)(5) (establishing single agency mandate for Medicaid). As stated above, the *Rolland* decision is an outlier regarding whether governors are proper defendants in *Young* claims and is not controlling in this circuit. Rather, the Court should look to relevant Fifth Circuit opinions, including *Okpalobi*, as well as the substantial weight of authority from other circuit courts, and dismiss the Governor as a defendant in this case. *See, e.g., Women's Emergency Network,* 323 F.3d at 940; *Confederated Tribes*, 176 F.3d at 469-70.

IV. Plaintiffs Have Failed to State Cognizable Claims Under the Medicaid Act.

A. Plaintiffs Have Failed to State a Claim Under the NHRA.

1. Plaintiffs' Response grossly misrepresents Defendants' Motion.

Contrary to Plaintiffs' misrepresentation in their Response, Defendants concede nothing regarding Plaintiffs' putative claims under the NHRA. Response p. 10. Instead, Defendants' Motion expressly seeks dismissal of *all* of Plaintiffs' NHRA claims for failure to state a claim because section 1983 is not available to enforce a federal law where there is no violation of that law and the NHRA confers no federal right to Plaintiffs. Motion pp. 18-29; *see* Reply, *infra* p. 37.

Plaintiffs' contention that "[D]efendants only object to one narrow aspect of one [NHRA] claim" is also a misrepresentation. Response p. 10. It is only if this Court determines that Plaintiffs have alleged a violation of the NHRA and that the NHRA does in fact provide Plaintiffs a federal right that Defendants seek, in the alternative, dismissal of a significant portion of Plaintiffs' NHRA claim that Defendants do not provide specialized services in a manner that

meets the federal active treatment standard in an ICF-MR as measured by 42 C.F.R. § 483.440(a)-(f) ("Plaintiffs' NHRA Active Treatment Claim"). *See* Motion pp. 34-36.

2. Partial dismissal of Plaintiffs' NHRA Active Treatment Claim is properly considered under Rule 12(b)(6).

Plaintiffs contend that Defendants' "concession that plaintiffs have stated a cognizable claim regarding the failure to provide specialized services sufficient to constitute active treatment as required by 42 C.F.R. § 483.440(a)(1) should end the inquiry at this state of the proceeding." Response pp. 10-11. Their argument posits that the determination of the "reach" of active treatment or its "uncertain meaning" should be had on the merits of the case as it is not properly considered in a motion to dismiss. Response pp. 10-11. If Defendants' motion actually depended on any "uncertain meaning" of active treatment, Plaintiffs' argument might be on point. It does not so depend.

Defendants' motion seeking partial dismissal of Plaintiffs' NHRA Active Treatment Claim presents a straightforward instance of statutory construction where the obligation is clearly and unambiguously set forth by both the statute and its implementing regulations' language.[12] *See* Motion pp. 34-36. For this reason, Plaintiffs' reliance on cases in which the court determined that certain claims were better resolved on the merits where the statutory language was ambiguous is misplaced. *See* Response p. 11. The NHRA and relevant implementing regulations in our case do not present such an ambiguous situation. Therefore, this Court can properly consider Defendants' motion.

[12] *See, e.g., Russell v. Choicepoint Servs. Inc.*, 302 F.Supp.2d 654, 663-69 (E.D. La. 2004) (granting a 12(b)(6) motion and dismissing a claim under the Driver's Privacy Protection Act, 18 U.S.C. § 2721 *et seq.*, for alleged disclosure of private information to an improper user when the plain language of the statute did not permit an action based on improper "users," but instead permitted an action based on improper "uses").

When a court interprets a statute, its inquiry "begins and ends" with the clear and unambiguous language of the statute. *United States v. Osborne*, 262 F.3d 486, 490 (5th Cir. 2001). Only when a statute lacks such clear and unambiguous language will a court look to legislative history to determine congressional intent. *Free v. Abbott Labs.*, 51 F.3d 524, 528 (5th Cir. 1995). A court reads the statute as a whole mindful of Congress' linguistic choices because statutory language reflects the intention of Congress. *Blue Cross & Blue Shield v. Shalala*, 995 F.2d 70, 73 (5th Cir. 1993). "Congress' intention is the law and must be followed." *Id.*

Congress' intention on this issue is expressed with clear and unambiguous language. Specifically, the NHRA provides that "[t]he term 'specialized services' has the meaning given such term by the Secretary in regulations. . . ." 42 U.S.C. § 1396r(e)(7)(G)(iii). The Secretary defines specialized services for NF residents with mental retardation as "the services specified by the State which, combined with services provided by the NF or other service providers, results in treatment which meets the requirements of §483.440(a)(1)." 42 C.F.R. § 483.120(a)(2). Therefore, because Congress' intent is reflected in the law and must be followed, the obligation with regard to specialized services in a NF is determined *only* by §483.440(a)(1). Despite Plaintiffs' claim alleging Defendants must provide specialized services which comport with § 483.440(a)-(f), in total, the Secretary does not so define specialized services in a NF setting. *See* 42 C.F.R. § 483.120(a)(2). Quite simply, there can be no violation of an obligation that does not exist.

Contrary to Plaintiffs' assertion in their Response, the First Circuit decision in *Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003), supports Defendants' position that the scope of active treatment set out in § 483.440(a)(1) does not encompass the other standards in § 483.440. The defendants in that case questioned whether they were required to provide specialized services

constituting "active treatment." *Id*. at 57. In answering the question in the affirmative, the appellate court affirmed the district court's ruling that the defendants had to comply with active treatment standard set out at § 483.440(a)(1). *Id*. at 57. The First Circuit did not rule that the state's obligation went further than that. *Id.*[13] Importantly, the First Circuit noted that

> [th]e regulations require states to provide specialized services in such a manner as to constitute active treatment to mentally retarded individuals when combined with the services provided by others. . . . [H]owever, they do not impose on states, when serving mentally retarded nursing home residents, the considerable onus of complying with every obligation placed on them in their broader role in ICF/MRs.

Rolland, 318 F.3d. at 57.[14]

For all of these reasons, as well as those set forth in their Motion, Defendants seek dismissal of Plaintiffs' NHRA Active Treatment Claim to the extent Plaintiffs attempt to allege violations that, as a matter of law, are beyond the obligation set out in § 483.440(a)(1).

B. Plaintiffs Have Failed to State a Claim Under 42 U.S.C. § 1396a(a)(8) ("Reasonable Promptness").

Plaintiffs' section 1396a(a)(8) claims are set out in two paragraphs of their Complaint. *See* Complaint ¶¶ 225, 226. There, Plaintiffs assert two claims: (1) Defendants "limit the provision of medically necessary community-based services and supports…result[ing] in extended delays and the outright denial of medically necessary care;" and (2) Defendants

---

[13] On remand, the district court then determined, cursorily, that all of § 483.440's obligations constitute active treatment in a nursing facility. *Rolland v. Patrick*, 483 F.Supp.2d 107, 113-14 (D. Mass. 2007). However, the district court's statutory interpretation ignores the plain and unambiguous language used in the Secretary's regulation defining active treatment. *See* 42 C.F.R. § 483.120(a)(2). Moreover, it ignores the language of § 483.440 itself. *Compare* 42 C.F.R. § 483.440(a) (entitled "Standard: Active treatment") *to* (b) (entitled "Standard: Admissions, transfers, and discharge"), (c) (entitled "Standard: Individual program plan"), (d) (entitled "Standard: Program implementation"), (e) (entitled "Standard: Program documentation"), and (f) (entitled "Standard: Program monitoring and change").

[14] While the Massachusetts District Court nonetheless held subsection (b) through (f) were included in the active treatment definition in a NF—a holding that is not binding precedent on this Court—it is hardly clear that those subsections, are part of what the Secretary intended to constitute "active treatment" in a NF. Subsections (b) through (f) relate to everything from protocol for admissions to ICFs/MR, transfers and discharges in ICFs/MR, to various requirements related to program documentation within the ICFs/MR. *See* 42 C.F.R. §§ 483.440(b)-(f).

"limit…medically necessary specialized services, result[ing] in extended delays and the outright denial of medically necessary care. *Id*. ¶ 226. Plaintiffs' Response asserts that Defendants violate section 1396a(a)(8) because they do not provide the range of specialized services that Plaintiffs claim they should be receiving. Plaintiffs then make two "community-placement" arguments: first, that only the HCS waiver is full, so Defendants are required to provide all other services with reasonable promptness; and second, that Defendants must even provide HCS services with reasonable promptness—even though the waiver is full—because Defendants apply "restrictive criteria" to the HCS waiver that effectively excludes individuals with DD from accessing the HCS and other waiver programs. Response pp. 11-15. None of these arguments saves Plaintiffs' section 1396a(a)(8) claim, and the claim must be dismissed, for the reasons stated in Defendants' Motion and as further explained below.

1. Plaintiffs have failed to state a cognizable § 1396a(a)(8) "specialized services" claim for alleged delay in providing services not required under the NHRA.

The "specialized services" prong of Plaintiffs' "reasonable promptness" claim is that Defendants "limit…medically necessary specialized services, result[ing] in extended delays and the outright denial of medically necessary care." Complaint ¶ 226. Plaintiffs embellish that claim in their Response by adding that their reasonable promptness claim extends not only to the provision of specialized services in a NF, but to the provision of the "full scope" of specialized services to which they claim they are entitled. Response p. 13.

Plaintiffs incorrectly state that Defendants do not dispute that these allegations state a cognizable claim, even under the pre-2010 change to the definition of "medical assistance." *Id*. First, to the extent "medical assistance" is considered to be limited to financial assistance—as under the former definition—Plaintiffs have stated no section 1396a(a)(8) claim at all because

they have not claimed failure to provide financial assistance with reasonable promptness. Motion pp. 36-38. Furthermore, Defendants have steadfastly refuted Plaintiffs' exaggeration of the NHRA requirement to provide specialized services. *See* Reply, *supra* pp. 17-20. To the extent Plaintiffs now purport to assert delay or denial of specialized services that are not required to be provided as part of NF care, they fail to state a cognizable claim under section 1396a(a)(8). Thus, Plaintiffs' section 1396a(a)(8) claims relating to anything but the failure to provide the specialized services required by 42 C.F.R. § 483.120(a)(2) and 42 C.F.R. § 483.440(a)(1) must be dismissed for failure to state a claim.

2. Plaintiffs have failed to state a cognizable § 1396a(a)(8) "community placement" claim.

a. Plaintiffs mischaracterize the § 1396a(a)(8) "community placement" issue and their unsupported facts must be disregarded.

Plaintiffs' "community placement" claim under section 1396a(a)(8) also mischaracterizes both their own claims and Defendants' attack on those claims. Plaintiffs are correct that Defendants argued that section 1396a(a)(8) does not apply with respect to community placement—and Plaintiffs have no enforceable right—where the community-based waiver is full. *See* Motion pp. 30-32. But Plaintiffs wrongly assert that Defendants' section 1396a(a)(8) argument was made only with respect to the HCS waiver. Nowhere do Defendants so limit their section 1396a(a)(8) attack. But even had Defendants so limited their argument, such a limited argument would have nevertheless addressed Plaintiffs' entire "community placement" claim under section 1396a(a)(8), since Plaintiffs' Complaint mentions *only* the HCS waiver. *See* Complaint ¶¶ 57, 100, 177-98 (discussing that the HCS waiver is full and has an interest list, Plaintiffs would like to get into the HCS waiver, and Benny Holmes was placed in the HCS waiver). The additional "facts" Plaintiffs include in their Response—*e.g.*, that only the HCS

waiver has an interest list, that Plaintiffs are willing to accept community services under any of Texas's community support programs, and that those programs include MFP, the CLASS waiver, the CBA waiver, and "other Medicaid-covered state plan services, such as personal care assistance" for which there is no waiting list—are nowhere to be found in the Complaint. Accordingly, these extrinsic facts cannot be considered as part of Plaintiffs' section 1396a(a)(8) claim. Nor can the additional paragraphs from the Complaint that Plaintiffs reference in the Response as embodying their "reasonable promptness" claim be considered because not one of those referenced paragraphs includes a "reasonable promptness" claim. *See* Response p. 13 (referencing Complaint ¶¶ 128, 135, 212-217, 222-24, 228). Conspicuously, Plaintiffs do not even cite to the "reasonable promptness" paragraphs of their Medicaid Act claim (Complaint ¶¶ 225, 226), because Plaintiffs failed to plead these additional "facts" and arguments there.

b. The reasonable promptness requirement does not apply where, as here, Plaintiffs have not applied for and been determined to be eligible for a waiver.

The "community placement" prong of Plaintiffs' "reasonable promptness" claim is that Defendants "limit the provision of medically necessary community-based services and supports,…result[ing] in extended delays and the outright denial of medically necessary care." Complaint ¶ 226. This claim fails for several reasons.

First, to the extent that, by "community-based services and supports," Plaintiffs mean community-based waiver programs (as compared to state plan entitlement programs), this claim is untenable because the very nature of a Medicaid waiver program is that the state may limit its scope and size. *See* 42 U.S.C. § 1396n; *Skandalis v. Rowe*, 14 F.3d 173, 181 (2nd Cir. 1994); *Beckwith v. Kizer*, 912 F.2d 1139, 1143-44 (9th Cir. 1990). The "reasonable promptness"

section of the Medicaid Act is not a tool for forcing a state to expand its waiver program. *See Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 619 (9th Cir. 2005).

Second, the "reasonable promptness" portion of section 1396a(a)(8) specifically says that medical assistance "shall be furnished with reasonable promptness to all *eligible* individuals." 42 U.S.C. § 1396a(a)(8) (emphasis added). Each Medicaid waiver has its own eligibility criteria.[15] Plaintiffs' Complaint nowhere alleges that Plaintiffs have either bypassed the waiver interest lists and accessed a waiver through MFP or have risen to the top of a waiver interest list and then been assessed for, and found eligible for, a waiver program. To the contrary, to the extent Plaintiffs say anything about their eligibility for a waiver program, they say that they have *not* been assessed for their eligibility for a waiver. *See* Complaint ¶ 152 (Ms. Arizpe). Moreover, Plaintiffs admit outright that "almost no members of the class have applied for community-based services and supports or for admission to a small ICF/MR." Complaint ¶ 98. Certainly, no named plaintiff (other than, presumably, Benny Holmes) has alleged that he or she has applied for any waiver. Thus, Plaintiffs have pled themselves right out of their "reasonable promptness" claim. Section 1396a(a)(8) applies only to *eligible* persons, and since eligibility is not determined until a slot becomes available for the individual (or the individual already residing in a NF facility takes advantage of the MFP program to bypass the waiver interest list), Plaintiffs have failed to state a "reasonable promptness" claim. To the extent Plaintiffs allege that section 1396a(a)(8) requires that they be provided Medicaid waiver services with "reasonable promptness" through the MFP program, they have failed to state a claim because they have not alleged in their Complaint that they applied for the waiver programs that are available through MFP and that they were determined eligible for such programs. Regardless of

[15] *See* 42CFR § 441.301(b)(3) (waiver request must describe groups to be served); 40 TEX. ADMIN. CODE §§ 9.155 (eligibility requirements for HCS), 45.201 (eligibility requirements for CLASS), and 48.6003 (eligibility requirements for CBA).

the reason *why* Plaintiffs have not been determined to be eligible, and regardless of whether they may have some *other* claim, they have stated no section 1396a(a)(8) "reasonable promptness" claim.

Plaintiffs' argument that they have stated a section 1396a(a)(8) claim with regard to the HCS waiver because the eligibility criteria for HCS are too restrictive and therefore are "illegal," is absurd. *See* Response p. 14. It ignores the entire structure and purpose of Medicaid waivers. Under the Medicaid Act, states are specifically allowed to set their own eligibility requirements for waiver services. *See* 42 U.S.C. § 1396n(c); *Skandalis*, 14 F.3d at 181; *Beckwith*, 912 F.2d at 1143-44; 42 C.F.R. § 441.301(b)(3). The state has the option to provide waiver services to "any group or groups of individuals" who qualify for medical assistance under 42 U.S.C. §1396d(a). 42 U.S.C. §§ 1396a(a)(10)(A)(ii)(VI), 1396n(c). *Skandalis*, 14 F.3d at 179-81. "Congress intended for states to have maximum flexibility in operating their waiver programs." *Skandalis*, 14 F.3d at 180 (quoting the Department of Health and Human Services at 50 Fed. Reg. 10,013, 10,021 (Mar. 13, 1985)). States are permitted to make seemingly harsh distinctions when offering waiver services, even if those distinctions appear to result in disparate treatment. *Id.* at 181. Section 1396n(c) does not expressly guarantee waiver slots or the availability of a waiver at all to any group of individuals. *Id.* ("Certainly no broad or categorical entitlement can be deemed secured under a program that allows a state to impose a limit of as few as 200 people on the total number of participants."). Consequently, Plaintiffs' argument that the state violates section 1396a(a)(8) when it creates waivers with specific eligibility criteria fails to state a cognizable claim under that section of the Medicaid Act.

The cases Plaintiffs cite do *not* support this argument. In each of them, states narrowed an eligibility requirement under the Aid to Families With Dependent Children program

("AFDC") that was expressly set by Congress.[16] But these cases are not controlling with regard to the waiver provisions under the Medicaid Act because, unlike the AFDC statute, Congress has set no specific eligibility requirement for waiver services, and states have wide latitude in designing their waiver programs.

Plaintiffs further assert that the HCS waiver has "restrictive eligibility criteria which effectively excludes individuals with developmental disabilities in nursing facilities from accessing the HCS and other waiver programs," supposedly in violation of section 1396a(a)(8), because Texas does not give such individuals preferential treatment ("a priority") in accessing the HCS waiver or permit such individuals to "access the HCS waiver through the MFP program." Response p. 14 and fn. 21. But again, this argument presupposes a completely different Medicaid Act, one in which the eligibility criteria and scope of services of waiver programs are dictated by Congress. For the reasons stated above, that is simply not the case. States are allowed to provide waiver services to some, but not all, Medicaid recipients, and such "exclusions," even if offered on a limited basis, are not "unreasonable" under the waiver provisions of the Act. The "reasonable promptness" section of the Act is not a vehicle for compelling the State to redesign its Medicaid waiver programs.[17] "Unreasonable exclusions" do not state a "community placement" section 1396a(a)(8) claim, where the alleged basis for the claim is a state's exercise of the discretion Congress allowed the states in crafting their own

[16] In those cases, courts found that because Congress set a specific eligibility requirement, states were not free to use a more restrictive requirement absent evidence of Congressional intent otherwise. *Quern v. Mandley*, 436 U.S 725, 740 (1978); *Carleson v. Remillard*, 406 U.S. 598, 600 (1972); *Townsend v. Swank*, 404 U.S. 282, 286 (1971); *King v. Smith*, 392 U.S. 309, 332-33 (1968). If a state did set an impermissible eligibility requirement, the reasonable promptness provision of the AFDC statute was violated because the state's requirement was invalid. *Quern*, 436 U.S. at 740; *Carleson*, 406 U.S. at 603-04; *Townsend*, 404 U.S. at 291; *King*, 392 U.S. at 332-33.

[17] Notwithstanding Plaintiffs' disingenuous assertion that their section 1396a(a)(8) claim "does not insist that defendants must increase the size of the HCS waiver," that is exactly the effect their insistence on giving themselves "priority" in accessing the HCS waiver would have; otherwise, those persons now accessing HCS through the interest lists would expect further delay in accessing the waiver. This view is blatantly antithetical to the Medicaid Act, and is in no way even suggested by section 1396a(a)(8)'s reasonable promptness provision.

waiver programs. It is clear that this "reasonable promptness" argument is simply Plaintiffs' ADA argument, masquerading as a Medicaid Act claim. *See* Complaint ¶¶ 41, 213-217 (Plaintiffs' ADA claims).

Finally, it is not even correct that individuals with developmental disabilities in nursing facilities are "discriminated" against with regard to access to the HCS waiver. As Plaintiffs well know, as required by state regulation, persons with developmental disabilities in nursing facilities may be eligible for HCS services, and may access HCS is the same manner as other persons on the HCS interest list. *See* 40 TEX. ADMIN. CODE § 9.158 (HCS interest list).

c. The reasonable promptness requirement does not apply where all of the waivers are full.

The overwhelming body of case law addressing the "reasonable promptness" provision has held that where a waiver is full, there can be no section 1396a(a)(8) claim. Texas is permitted under federal law to place a limitation on the number of waiver slots that are available and to set additional eligibility requirements. 42 U.S.C. § 1396n(c)(10); 44 C.F.R. § 441.303(b); *see also Skandalis*, 14 F.3d at 181-82; *Beckwith*, 912 F.2d at 1143-44; 42 C.F.R. § 441.301(b)(3) (permits states to define groups or subgroups who can receive waiver services). The cap on the number of individuals who may receive a waiver slot is also considered a constraint on eligibility for waiver services. *Boulet v. Cellucci*, 107 F. Supp. 2d 61, 76-77 (D. Mass. 2000). The cap is essentially an additional eligibility requirement to fully qualify for waiver services because it establishes an additional subclassification and thus limits the number of individuals who are eligible for waiver services. *Id.* at 77; *Susan J. v. Riley*, 254 F.R.D.439, 454 (M.D. Ala. 2008). Only those individuals who are eligible for waiver services have a section 1396a(a)(8) claim, and one is not eligible for waiver services until all requirements for the waiver program are met and an open spot in a waiver program is available. *Id. See also Lewis v. N.M. Dept. of Health*, 275

F. Supp. 2d 1319, 1340 (D.N.M. 2003); *McCarthy ex rel. Travis v. Hawkins*, Civ. No. 03-CA-231-SS, 15-16(W.D. Tex. May 23, 2003) (unpublished) [Doc. 30-1]. Use of a waiting list is entirely permissible when there are more individuals who would otherwise qualify for a waiver slot than there are slots available. *Susan J.*, 616 F. Supp. at 1241. "Plaintiffs who are not either actually in a Waiver slot or entitled to one have no legal basis to support their claim for the provision of assistance with reasonable promptness." *Id.* No court has held that reasonable promptness applies to waiver slots when all the waiver slots are filled.[18]

Plaintiffs cite to two cases, *Doe v. Chiles*, 136 F.3d 709, 711 (11th Cir. 1998) and *Benjamin H. v. Ohl*, No. Civ. A. 3:99-0338, 1999 WL 34783552, at *15 (S.D. W. Va. July 15, 1999), that they claim apply section 1396a(a)(8) to individuals on waiting lists for waiver services when waiver slots are full. *See* Response p. 14. But these cases are inapposite because the Plaintiffs in *Doe* and *Ohl* were both already eligible for ICF/MR level services, and both of those courts applied section 1396a(a)(8) to waiting lists for ICF/MR level services, not to interest lists for waiver services. *Doe*, 136 F.3d at 711, 714; *Ohl*, 1999 WL 34783552, at *15.

Here, Plaintiffs have pled no facts establishing that Texas's community-based waivers have no interest lists and that there are waiver slots available right now for individuals seeking community-based waiver services, such that a delay in providing those services might amount to a failure to provide such "medical assistance" with reasonable promptness. In their Response, Plaintiffs state that there are "other" programs (other than HCS, which Plaintiffs admit is full and has an interest list) they are willing to accept and they further vaguely state—without support—

[18] A claim under section 1396a(a)(8) has only been recognized in a waiver context with individuals on waiting lists when there are remaining waiver slots that are unfilled. *See Bryson v. Shumway*, 308 F.3d 79, 88-89 (1st Cir. 2002); *Boudreau ex rel. Boudreau v. Ryan*, No. 00-C-5392, 2001 WL 840583, at *10 (N.D. Ill. May 2, 2001), *vacated in part on other grounds sub nom. Bruggerman ex rel. Bruggerman*, 324 F.3d 906 (7th Cir. 2003).

that "[t]here is no waiting list for many of these programs and services."[19] Response p. 13. To the extent that Plaintiffs' referenced "other programs" are the Texas Medicaid waiver programs, they fail to state a cognizable claim with respect to any one of those waivers that is full and has an interest list.[20]

For these reasons, and those set out in Defendants' Motion, Plaintiffs' section 1396a(a)(8) claims should be dismissed for failure to state a cognizable claim.

C. Plaintiffs Have Failed to State a Claim Under 42 U.S.C. § 1396a(a)(10)(B) ("Comparability").

Defendants assert that Plaintiffs have failed to state a section 1396a(a)(10)(B) "comparability" claim in two respects: (1) to the extent they seek to have the comparability requirement enforced in relation to a waiver program;[21] and (2) to the extent that they seek to have this Court impose on Defendants a duty to provide specialized services, active treatment, or other services to individuals in a NF that exceed the requirements of the NHRA. It appears from Plaintiffs' Response that they are, in fact, seeking the latter relief under the comparability statute. *See* Response pp. 15-16; Motion pp. 40-42.

Again, as with their "reasonable promptness" claim, Plaintiffs state no cognizable claim where they assert that "[f]ederal law mandates that defendants make available to [residents of both NFs and ICFs/MR] those services sufficient to achieve active treatment," which they incorrectly define with references to regulations on active treatment that do not apply to NFs.

---

[19] Plaintiffs list these "other" programs as "the MFP program, the CLASS waiver, the CBA waiver, and other Medicaid-covered state plan services, such as personal care assistance." *Id*.

[20] If, by saying that "many" of the "other" programs have no interest lists, Plaintiffs mean that such programs may be accessed through "Money Follows the Person," Plaintiffs mislead the court because MFP is not a service delivery program; it is a funding mechanism that allows persons *already residing in NFs* to bypass a waiver interest list. TEX. GOV'T CODE § 531.092; *see, e.g.*, 40 TEX. ADMIN. CODE § 48.6003(c)(3) (for CBA). MFP does not affect the interest lists.

[21] The comparability claim in Plaintiffs' complaint does not appear to assert a section 1396a(a)(10)(B) claim with regard to community placement, or waiver services. *See* Complaint ¶¶ 228-29.

Thus, to the extent Plaintiffs assert differential treatment with regard to specialized services that are not required to be provided to NF residents, they fail to state a cognizable claim under section 1396a(a)(10)(B). For all of the same reasons that Defendants seek partial dismissal of Plaintiffs' Active Treatment Claim, Plaintiffs' section 1396a(a)(10)(B) claims relating to anything but the failure to provide the specialized services required by 42 C.F.R. § 483.120(a)(2) and 42 C.F.R. § 483.440(a)(1) must be dismissed for failure to state a cognizable claim. *See* Motion pp. 34-36; Reply, *supra* pp. 17-20.

D. Plaintiffs Have Failed to State a Claim Under 42 U.S.C. §§ 1396n(c)(2)(B) and (C) ("Freedom of Choice").

Paragraph 227 of the Complaint sets out Plaintiffs' claims under 42 U.S.C. §§ 1396n(c)(2)(B) and (C), which Plaintiffs mischaracterize collectively as the "freedom of choice" provision of the Act.[22] Specifically, Plaintiffs assert that Defendants have violated these provisions of the Medicaid Act by failing to provide residents of nursing facilities with—

(1) notice of and equal opportunities to apply for and access medically necessary community-based services;

(2) an assessment of their eligibility for such services; and

(3) meaningful choice between institutional and community-based services.

Complaint ¶ 227.[23] Plaintiffs' Response further embellishes upon both section 1396n(c)(2)(C) and the allegations made in their Complaint by asserting that Medicaid recipients must be informed of "*all*" feasible alternatives, including all waiver programs, "regardless of a particular waiver's status or capacity," that is, even if the waiver is already full. Response pp. 8-9, 17-18. Not stopping there, Plaintiffs go further afield from both the Complaint and the Medicaid Act by

[22] Section 1396n(c)(2)(B) has nothing to do with "choice." Moreover, 42 U.S.C. § 1396a(23) is a "freedom of choice" provision, but it is unrelated to any of Plaintiffs' claims.
[23] Plaintiffs' Response also cites to paragraph 216 of the Complaint for these same allegations, but paragraph 216 asserts only ADA claims.

asserting that, not only must Medicaid recipients be informed of waiver alternatives, but they must also be informed of "all community-based services, supports, and programs available under the Texas Medicaid program, including…MFP programs, as well as individual state plan services." *Id.* p. 19.[24]

As an initial matter, section 1396n(c)(2)(B) has nothing to do with any of those assertions. The requirement of section 1396n(c)(2)(B) is for a state to give assurances that certain persons be given an evaluation of the need *for in-patient hospital services, NF services, or services in an* ICF-MR. 42 U.S.C. § 1396n(c)(2)(B). Plaintiffs have not even tried to argue this point or provide authority to the contrary. Response pp. 16-19. Plaintiffs' section 1396n(c)(2)(B) claim must be dismissed because the text of section 1396n(c)(2)(B) is straightforward and contains none of the requirements Plaintiffs claim Defendants have failed to satisfy.

Plaintiffs' section 1396n(c)(2)(C) claims may also be dismissed summarily. First, the plain language of that section simply does not include the following sweeping requirements Plaintiffs attribute to it, specifically—

- *equal opportunities* to *apply fo*r and *access* medically necessary community-based services;
- an *assessment of their eligibility* for such services; or
- *meaningful choice* between
- *all* institutional and community-based services.

See Complaint ¶ 227; Response p. 17 (emphasis added). Section 1396n(c)(2)(C) says nothing about equal opportunity, applying for waivers, assessments of eligibility for waiver services,[25]

[24] Plaintiffs list the following as alternatives to NF care: HCS, CBA, CLASS, Money Follows the Person ("MFP"), personal care attendant services, home health care services, and private duty nursing services. *Id.*, p. 17.

[25] Although Plaintiffs assert in their Response—without authority and without explanation as to what exactly they mean—that they are "eligible" for the HCS waiver, eligibility for any waiver is not even determined until a person

the need to make a choice "meaningful," or informing of *all* alternatives to NF care, or actual placement into community-based services.[26]

To the contrary, the focus of section 1396n(c)(2)(C) is narrow and specific. First, "[t]he plain language of § 1396n(c)(2)(C) affords a right of information only for *waiver applicants*." *Grant v. Gilbert*, 324 F.3d 383, 388 (5th Cir. 2003) (emphasis added). This is the commonly-understood meaning of section 1396n(c)(2)(C). According to CMS—which provides the criteria for evaluating states' waiver applications—the informational requirement for which the state must give section 1396n(c)(2)(C) assurances arises at the time the individual is actually being offered a waiver slot and being assessed for the waiver program. CMS Instructions, Technical Guide and Review Criteria p. 106.[27] Specifically, CMS requires that the "individual's choice must be documented during entrance into the waiver program." *Id*. The "feasible alternatives" under the waiver mean the services within a waiver program that could meet the needs of the individual, and are determined during consideration for entrance into the waiver program. *Id*. Accordingly, CMS's State Medicaid Manual reflects that "Feasible alternatives may only be determined after the assessment of an individual's care needs and an evaluation of level of care. Thus, it is not expected that a client will be offered waiver services if the assessment indicates he

---

makes her way to the top of the waiver's interest list and is offered an available waiver slot. Response p. 18. *See* 40 TEX. ADMIN. CODE § 9.158 (HCS), § 48.1301 (CBA and CLASS).

[26] Section 1396n(c)(2)(C) "does not *make* any particular option 'available' to anyone. It just requires the provision of information about options that are *available*." *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 459 (7th Cir. 2007) (emphasis in original). Other courts agree that § 1396n(c)(2)(C) is an informational requirement. *See Doe v. Kidd*, 501 F.3d 348, 350, 355-57 (4th Cir. 2007) ("Section 1396n of the Act merely requires states to inform participants in the waiver program of "the *feasible* alternatives, *if available* under the waiver, at the choice of individuals, to the provision of ... services in an intermediate care facility for the mentally retarded.") (emphasis in original); *Grant v. Gilbert*, 324 F.3d 383, 388 (5th Cir. 2003) (discussing § 1396n(c)(2)(C) as affording a right of information).

[27] *See* http://www.dads.state.tx.us/providers/waiver_instructions/index.html, Version 3.5 Instructions-Final 2.1.2008 (last visited 6/1/2011).

or she cannot be adequately served in the community."[28] In this case, Plaintiffs (except Benny Holmes) have admittedly not applied for any waiver and thus they cannot state a section 1396n(c)(2)(C) claim. *See* Reply *supra* pp. 23-27.

Furthermore, even if, as Plaintiffs allege, section 1396n(c)(2)(C) requires nursing facility residents to be informed of feasible alternatives under the waiver, the focus of section 1396n(c)(2)(C) is still much narrower than Plaintiffs claim. To begin with, section 1396n(c) falls within the portion of the Act that sets out the requirements for applying for and obtaining approval for home and community-based waivers. In particular, section 1396n(c)(2)(C) "prescribes what states must include in their waiver applications to receive approval by the Secretary of Health and Human Services." *McCarthy*, slip op. at 13 [Doc. 30-1]. Specifically, it says that the Secretary may not grant a waiver—that is, the particular waiver for which the state is applying—unless the state assures that individuals who are determined to be likely to require the level of care provided in a nursing facility are informed of the *feasible alternatives* to such services, *if available under the waiver*. 42 U.S.C. § 1396n(c)(2)(C). In this context, "*the waiver*" means the specific waiver program for which the state is submitting an application seeking approval from the Secretary. In the case of a person "determined to be likely to require the level of care provided in a…nursing facility," the referenced "waiver" would be the state's waiver program providing a community-based alternative to services and care in a NF.[29] Section 1396n(c)(2)(C) says nothing about informing Medicaid recipients of *all* waivers, nor does it even

[28] *See* http://www.cms.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=-99&sortByDID=1&sortOrder=ascending&itemID=CMS021927&intNumPerPage=10, Ch. 4, § 4442.7 (last visited 5/25/2011). The State Medicaid Manual "makes available to all State Medicaid agencies, in a form suitable for ready reference, informational and procedural material needed by the States to administer the Medicaid program. It is an official medium by which the Health Care Financing Administration (HCFA) (now CMS) issues mandatory, advisory, and optional Medicaid policies and procedures to the Medicaid State agencies." *Id*. Ch. 1 (Forward) (last visited 5/25/2011).

[29] Nursing facility services are described in 42 U.S.C. §§ 1396d(f) and 1396r, are required by §§ 1396a(a)(10)(A) and 1396a(a)(28), and are listed as a covered service in 42 USC § 1396d(a)(4)(A). The applicable regulations are found at 42 C.F.R §§440.40 and 440.155.

suggest a requirement to inform of other alternatives, *e.g.*, regular state plan services. It would not even make sense in the context of section 1396n(c)(2)(C) to impose a requirement to inform of *all* waivers or *all* "alternatives," because section 1396n(c)(2)(C) relates only to assurances a state must give on an application for the particular waiver for which a state is seeking the Secretary's approval. Thus, although there may be other sources of a requirement to inform a NF resident of alternatives to NF services, and although Texas may in fact so inform NF residents,[30] there is no such requirement *under section 1396n(c)(2)(C)*. Consequently, Plaintiffs have stated no cognizable section 1396n(c)(2)(C) claim.

Because the section 1396n(c)(2)(C) informational requirement only kicks in when a person is being admitted to a waiver, there can be no such requirement when the waiver is full. Plaintiffs have failed to state a section 1396n(c)(2)(C) claim because they have not pled facts satisfying the section 1396n(c)(2)(C) requirement that waiver slots be *available under the waiver* in order to trigger the informational requirement. Section 1396n(c)(2)(C)'s requirement to inform of the NF waiver is only triggered if feasible and if slots are available (that is, if the mandatory cap has not been reached). Plaintiffs are simply wrong that the requirements of section 1396n(c)(2)(C) apply even where waivers are full and therefore are not "feasible," as discussed in Defendants' Motion.[31] *See* Motion pp. 39-40 and cases cited therein. Plaintiffs' Complaint does not assert that there is no interest list for the NF waiver (or any other waiver) and

[30] *See,e.g.*, TEX. GOV'T CODE § 531.042; 1 TEX. ADMIN. CODE § 351.15(b) (Texas law and regulation requiring that information regarding long-term care and supports be given to persons before entering a NF);

[31] Plaintiffs also mischaracterize the requirement of 42 C.F.R. § 441.302(d) in an attempt to bolster their argument. Response p. 17, fn. 24. Again, the cited regulation neither imposes a direct obligation on the State nor confers a direct right on any Medicaid recipient; rather that portion of the federal regulations falls within Subpart G to Chapter 441, which "describes what the Medicaid agency must do to obtain a [home and community-based] waiver." 42 C.F.R. § 441.300. Specifically, it falls within a list of "assurances" a state must give in order for CMS to grant the waiver. 42 C.F.R. § 441.302 ("Unless the Medicaid agency provides the following satisfactory assurances to CMS, CMS will not grant a waiver under this subpart and may terminate a waiver already granted:….). Again, as in 42 U.S.C. § 1396n(c)(2)(C), states need only give assurances that they will provide information of "feasible alternatives available under the waiver." *Id*. Accordingly, the text of 42 C.F.R. § 441.302(d) does nothing to fortify Plaintiffs' argument. Furthermore, Plaintiffs did not sue to enforce 42 C.F.R. § 441.302(d).

that there are NF waiver slots available right now for persons who wish to receive NF waiver services. Nor does their Response make that assertion about Texas's NF waiver.. For that reason alone, Plaintiffs failed to state a section 1396n(c)(2)(C) claim.

The Response does assert that there are several HCBS waivers offered in Texas, including HCS, CBA, CLASS, CWP, TxHmL, and DBMD, "some or all of which have capacity."[32] Response p. 18. But again, Plaintiffs plead no such allegation in the Complaint, and cite no supporting authority in their Response. Plaintiffs' only reference to a waiver in their Complaint is to the HCS waiver, as to which they acknowledge that the waiver is full and has an interest list of 45,756 individuals. Complaint ¶ 57. Accordingly, even if section 1396n(c)(2)(C) requires disclosure of *all* available waiver alternatives to NF care—which it does not—and even were vacancies in non-NF waiver programs relevant to purported class members who are not NF waiver applicants—which they are not—Plaintiffs have failed to state a section 1396n(c)(2)(C) claim because they have not pled facts satisfying the section 1396n(c)(2)(C) requirement that alternatives be *feasible* and *available under the waiver* in order to trigger the informational requirement. As a matter of law, section 1396n(c)(2)(C) cannot apply or impose a requirement on Defendants with regard to any waiver that is full. To the extent Plaintiffs so claim, their claims must be dismissed.

Plaintiffs mention "Money Follows the Person" a number of times in their Response as if MFP were in and of itself a service delivery program and as if MFP somehow made waiver slots immediately available (thus triggering a section 1396n(c)(2)(C) informational requirement). *See, e.g.*, Response pp. 9 fn. 15, 17, 26 fn. 26, 19. But Plaintiffs' Complaint did not allege a failure to inform of MFP. Moreover, MFP is not a service delivery program and it has no effect on the

[32] HCS, CLASS, TxHmL, and DBMD are waiver programs that provide an alternative to care in an ICF/MR, not a NF. *See* http://cfoweb.dads.state.tx.us/ReferenceGuide/guides/FY11ReferenceGuide.pdf pp. 34 (HCS), 36 (CLASS), 38 (DBMD), and 43 (TxHmL) (last visited 6/1/2011).

interest lists; rather, it is a funding mechanism that allows eligible nursing facility residents to bypass the interest list altogether to enroll in the CBA or CLASS waiver. TEX. GOV'T CODE § 531.092; *see, e.g.*, 40 TEX. ADMIN. CODE § 48.6003(c)(3) (for CBA). Accordingly, MFP is not relevant to the Plaintiffs' § 1396n(c)(2)(C) argument.

In summary, section 1396n(c)(2)(C)'s informational requirement, as relates to this case, is (1) to inform a Medicaid recipient of the services within the NF waiver (CBA) (2) at the time he is offered and assessed for a waiver slot (3) if slots in the NF waiver are feasible and available.

Plaintiffs' citation to *Rolland v. Cellucci* is unavailing because in that case—unlike here—the *Rolland* plaintiffs actually pled facts in their complaint sufficient for the court to find that they had stated a claim under section 1396n(c)(2)(C). For example, the *Rolland* plaintiffs alleged that there were "a number of feasible alternatives to nursing facility care available in Massachusetts, namely, 'residential habilitation, day services, family support, respite services and transportation,'" and that defendants' administration of the Medicaid program failed to inform recipients of the feasible alternatives to Medicaid-funded nursing facilities, "including ICF/MR, PCA and HCBW programs." *Rolland v. Cellucci*, 52 F.Supp. 2d 231, 241 (D. Mass. 1999). In contrast, the Plaintiffs here made no such factual assertions in their Complaint. Whereas Plaintiffs' Response purports to list "feasible alternatives" available in Texas and invites the court to rely on their unsupported assertions, nowhere does their Complaint even mention Texas waivers or other programs that might be available to Plaintiffs, other than to mention that the HCS waiver is full and has an interest list, Plaintiffs would like to get into the HCS waiver, and Benny Holmes was placed in the HCS waiver. Complaint ¶¶ 57, 100, 177-98.

Accordingly, this Court is not in the same position as the *Rolland* court and has no basis to look to the *Rolland* decision as authority to find that Plaintiffs here have stated a cognizable claim under section 1396n(c)(2)(C). But even had Plaintiffs included factual allegations in their Complaint mirroring those in their Response, they have nevertheless stretched section 1396n(c)(2)(C) beyond recognition.[33]

Plaintiffs' claims under 42 U.S.C. § 1396n(c)(2) should be dismissed in their entirety for failure to state a cognizable claim.

V. Plaintiffs Fail To State Any Claims Under The Medicaid Act Because Defendants Cannot Violate This Spending Clause Legislation And It Confers No Privately Enforceable Right.

A. Plaintiffs Can Have No Private Right of Action to Enforce the Medicaid Act Because Texas Officials Cannot Violate the Medicaid Act.

Litigants may sue under section 1983 if state officials *violate* a federal statute, and then only if the statute confers "rights, privileges, or immunities" on individuals. *See Maine v. Thiboutot*, 448 U.S. 1 (1980). But a section 1983 lawsuit cannot get off the ground unless a litigant first shows that a state officer has violated a federal legal obligation. *See Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 423 (1987) ("*Maine v. Thiboutot*, 448 U.S. 1 (1980), held that § 1983 was available to enforce *violations of federal statutes* by agents of the State.") (emphasis added). Only after such a showing can one proceed to the next steps of the *Thiboutot* inquiry, and consider whether the federal statute creates individual "rights" that can be vindicated under section 1983, *see Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106

[33] Likewise, Plaintiffs' citation to Texas's own regulations does nothing to shore up their wobbly section 1396n(c)(2)(C) argument. Response p. 18 fn. 25 (citing 1 TEX. ADMIN. CODE § 351.15(b)). First, Plaintiffs did not sue to enforce state regulations and if they had, such claims to enforce state law are barred by Eleventh Amendment immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (no waiver of Eleventh Amendment immunity for suit against state official to enforce state law). Second, the fact that Texas has imposed upon itself a requirement to inform individuals who are about to enter a NF about all long-term care and support options does not mean that section 1396n(c)(2)(C) of the Medicaid Act requires that disclosure; it does not. Accordingly, the cited HHSC regulation has no bearing on—and shows no "flaw" in—Defendants' argument that section 1396n(c)(2)(C) applies only when there are waiver slots available.

(1989) ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law."); and whether Congress nevertheless intended to preclude private litigants from using section 1983 to enforce these federally protected "rights," *see, Middlesex County Sewerage Auth. v. National Sea Clammers Assoc*., 453 U.S. 1, 19 (1981).

State officials cannot "violate" the federal Medicaid statute because this statute does not require state officials to do *anything*. It permits States to administer their Medicaid programs as they please, and requires the Secretary of Health and Human Services to reimburse States whose Medicaid programs satisfy the criteria specified in section 1396a. A State that departs from section 1396a's reimbursement criteria does not even violate federal law, let alone deprive any person of federally protected "rights." And the statute imposes no legal obligation on States that accept federal reimbursement money to preserve their Medicaid programs in a manner consistent with section 1396a. On the contrary, a State retains the lawful prerogative to establish a Medicaid program that deviates from section 1396a *at any time*, and wait to see if the Secretary will turn off the spigot of federal funding. There is *nothing* unlawful about state officers undertaking actions that might goad the Secretary into halting reimbursement payments.

All of this is evident to anyone who reads 42 U.S.C. § 1396c, a statute that Plaintiffs ignore in their response to the motion to dismiss. The text of this statute bears repeating:

> If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds—
>
> (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
>
> (2) that in the administration of the plan there is a failure to comply substantially with any such provision;
>
> the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of

> the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

Nothing in this statute, or any other provision of the Medicaid Act, obligates a State to establish *any* Medicaid program, let alone one that complies with the standards of section 1396a. Nothing in this statute, or any other provision of the Medicaid Act, imposes forward-looking obligations on States that accept federal Medicaid reimbursements. The Religious Land Use and Institutionalized Persons Act, by contrast, requires any "program or activity that receives federal financial assistance" to accommodate religious liberties; this statute implies that entities must renounce or return federal aid *before* deviating from the conditions specified in RLUIPA. 42 U.S.C. § 2000cc. But the Medicaid Act does not reflect the approach of RLUIPA; nowhere does the Medicaid Act say anything akin to: "No State that receives federal funds shall . . . ." The Medicaid Act does nothing more than dangle a carrot in front of the States: If you administer a Medicaid program that satisfies the criteria of section 1396a, then the federal government will reward you by reimbursing some of your expenditures.

It defies reason to assert that this offer of reimbursement vests a State's Medicaid recipients with federally protected "rights." Medicaid recipients cannot hold federal "rights" when federal law imposes no requirement on the States to establish or maintain any type of Medicaid program in the first place, even after the State has accepted federal Medicaid reimbursements. The conduct of which Plaintiffs complain is no different from a State deciding to lower its drinking age to 20 and wait for the Secretary of Transportation to reduce its share of federal highway funds, or a State failing to enact education reforms necessary to qualify for "Race to the Top" money. Do Plaintiffs believe that state officials violate federal law in these situations? (Or that a contrary conclusion cannot "survive even the most elemental scrutiny"?

See Response p. 22.) If not, then they cannot simultaneously maintain that Texas has violated federal law, or their federally protected rights, by administering a Medicaid program that departs from the reimbursement criteria specified in section 1396a. No one thinks that a federal court could enjoin a State from lowering its drinking age to 21 or order a State to implement educational reforms needed to qualify for "Race to the Top" money, because States have a legal right to implement policies that may disqualify themselves from receiving federal grants. Neither can a court order Texas to establish a Medicaid program that will qualify for federal reimbursement under section 1396c.

Plaintiffs do not deny that the Medicaid Act does nothing more than establish criteria for federal reimbursement, and they do not (and cannot) point to any provision of the Medicaid Act that obligates the States to comply with section 1396a once they accept federal funds. Instead, Plaintiffs think they can sidestep this problem by ignoring the text of the Medicaid Act and claiming that Supreme Court and Fifth Circuit precedent forbid this Court to treat the Medicaid Act for what it is.

Plaintiffs rely on three Supreme Court rulings, but only one of them involves the federal Medicaid Act. The plaintiffs in *Wright*, 479 U.S. at 424–29, were using section 1983 to enforce the Federal Housing Act, not the Medicaid Act. Plaintiffs think that *Wright* helps their case only because they mischaracterize our argument. We do not maintain that the federal government's authority to cut off federal funds automatically precludes a section 1983 action. Quite the contrary, we acknowledge that spending legislation such as RLUIPA may create judicially enforceable rights if it imposes forward-looking contractual obligations on state entities that receive federal funds. Our contention is more narrow than the proposition that the *Wright* Court rejected. We claim only that federal statutes *that do nothing more than supply conditions for*

federal reimbursement cannot establish federal "rights" under section 1983, because it is impossible for a State or its officials to "violate" these federal statutes.

Wright never considers this claim because the parties did not make it, and all the Justices assumed that the state officers had "violated" the Federal Housing Act. See Brief for the Respondent, 479 U.S. 418, 1986 WL 728393 (arguing that the "rights" established in the Federal Housing Act were insufficiently specific to be enforceable under section 1983, and that Congress intended to preclude section 1983 suits by giving HUD broad and discretionary enforcement powers). The outcome in *Wright* turned solely on whether the alleged statutory violations of the Federal Housing Act also reflected violations of individual "rights" protected by section 1983. Indeed, *Wright* reiterates that section 1983 is available to enforce federal statutes only when state officials *violate* a federal legal obligation, and disapproves any use of section 1983 in cases, such as this one, where state officials have not violated any federal law. *See Wright*, 479 U.S. at 423 (1987) ("*Maine v. Thiboutot*, 448 U.S. 1 (1980), held that § 1983 was available to enforce *violations of federal statutes* by agents of the State.") (emphasis added).

Although *Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498 (1990), allowed litigants to use section 1983 to enforce one provision of the Medicaid Act (the "Boren Amendment"), the *Wilder* opinion never reaches, let alone refutes, the argument we make. Like *Wright*, the *Wilder* Court assumed that state officials had "violated" the Boren Amendment. It then proceeded to consider whether the Boren Amendment established federal "rights" that litigants could vindicate under section 1983, *see* 496 U.S. at 508–512, and whether Congress intended to foreclose section 1983 as a remedy for Boren Amendment violations, *see id.* at 520–23. What's more, the defendants in *Wilder conceded* that "that the Boren Amendment requires a State to provide some level of reimbursement to health care providers and that a cause of action would lie under § 1983 if a

State failed to adopt any reimbursement provision whatsoever." *Id.* at 512. Our objection to this lawsuit is more fundamental: It is impossible for state officials to "violate" federal statutes that do nothing more than establish conditions for federal reimbursement, as these statutes do not require the States to do anything. *Wilder* did not consider this argument because the litigants in that case did not present it. See Brief of Petitioners, *Wilder*, 496 U.S. 498, 1989 WL 434722.

In all events, to the extent that the Supreme Court's holding in *Wilder* binds this Court, it can extend no further than the now-repealed Boren Amendment at issue in that case. Plaintiffs are not suing to enforce the Boren Amendment, so there is no conflict between *Wilder*'s holding and a ruling from this Court rejecting Plaintiffs' lawsuit on the ground that the Defendants cannot "violate" the provisions of the Medicaid Act that they invoke. Indeed, a resolution that limits *Wilder* to its facts is most faithful to the Supreme Court's recent pronouncement in *Gonzaga University v. Doe*, where the Court noted that "[o]ur more recent decisions . . . have rejected attempts to infer enforceable rights from Spending Clause statutes," and reiterated that:

> In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions in *not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State*.

536 U.S. 273, 280-81 (2002) (emphasis added) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)). *See also id.* at 280 ("Since *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights.").

Plaintiffs do not deny that the *Gonzaga* opinion frowns on the notion of using section 1983 to enforce spending legislation, but try to downplay its significance by ignoring the above-quoted language and noting that *Gonzaga* "cited *Blessing* with approval" and "engaged in [a] detailed analysis of the specific statutory provision in FERPA to determine if it contained 'rights creating' language." Response at page 25. That *Gonzaga* cited *Blessing* with approval

undermines rather than supports Plaintiffs' case; the *Blessing* Court, after all, *rejected* efforts to enforce Title IV-D of the Social Security Act in section 1983 proceedings. *Blessing v. Freestone*, 520 U.S. 329, 343 (1997). And the "detailed analysis of the specific statutory provision in FERPA" that Plaintiffs cite occurs at the very beginning of the Court's opinion, before the Court even begins to analyze the legal issues in the case. In the section of the opinion where the Court rejects the judicial enforceability of FERPA, its analysis of the statute is cursory, and the Court rests its conclusion on its observation that "FERPA's provisions speak only to the Secretary of Education, directing that '[n]o funds shall be made available' to any 'educational agency or institution' which has a prohibited 'policy or practice.'" *Gonzaga*, 536 U.S. at 287. The Court held that this provision demonstrates that FERPA "entirely lack[s] the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights," because it does nothing more than establish criteria for receiving federal money. *Id.* at 287

Plaintiffs want this Court to construe *Gonzaga*'s holding narrowly and *Wilder*'s holding broadly. But this Court is *obligated* to construe *Wilder*'s holding narrowly, limiting it to its facts and foreclosing the judicial enforceability of the Medicaid statutory provisions on which Plaintiffs rely, because state officials are incapable of violating federal statutes that do nothing more than establish reimbursement criteria (and Plaintiffs do not endeavor to explain how this can be otherwise).

Third and finally, Plaintiffs insist that *Blessing v. Freestone* forecloses this Court from holding that the Medicaid statute is not judicially enforceable. They note that the *Blessing* opinion refuses to hold that the Secretary's "limited powers to audit and cut federal funding" were "sufficiently comprehensive to supplant § 1983" as remedy in the event that the provisions

in Title IV-D of Social Security Act give rise to individual rights. 520 U.S. at 347-48. But Plaintiffs are confusing the *Sea Clammers* inquiry—whether a statute establishes a remedial scheme sufficiently comprehensive to supplant section 1983 remedies—with the question whether state officials have violated any federal law in the first place, and as a result they misrepresents Defendants' argument. 453 U.S. at 20.

To reiterate once again: We are *not* relying on *Sea Clammers* to argue that the Secretary's enforcement powers under section 1396c "foreclose" a section 1983 remedy that would otherwise be available to vindicate federally protected "rights" under the Medicaid Act. Our argument is that state officials are incapable of "violating" a federal statute that does nothing more than specify criteria for federal reimbursement. The state officials that Plaintiffs are suing *have not violated any federal law*; they are no different from state officials who lower their drinking age below 21 or fail to enact educational reforms necessary to qualify for Race to the Top money.

Plaintiffs are likewise mistaken to assert that the Fifth Circuit's precedents foreclose this Court from denying the judicial enforceability of the Medicaid statute. *Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356 (2006), was a case involving the United States Housing Act, not the Medicaid Act. And the rulings in *S.D. v. Hood*, 391 F.3d 581, 586 (5th Cir. 2004), and *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), each relied on the now-overruled decision in *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908 (5th Cir. 2000), which had construed *Wilder* broadly to allow Medicaid beneficiaries to sue under other provisions of the Medicaid Act. *See Evergreen*, 235 F.3d at 927 (allowing Medicaid beneficiaries to use section 1983 to "enforce" the equal-access provision, codified at 42 U.S.C. § 1396a(a)(30)(A)). The Fifth Circuit expressly overruled *Evergreen* in *Equal Access for El Paso, Inc. v. Hawkins*, 509

F.3d 697 (5th Cir. 2007), undercutting the precedential foundation on which *S.D.* and *Frazar* relied. Plaintiffs seem to be in denial over this fact, as they nowhere mention *Equal Access for El Paso* or *Evergreen* in their discussion of the section 1983 issues, even though these cases figured prominently in our motion to dismiss. But a litigant cannot establish a cause of action by ignoring *Equal Access for El Paso*, while breezily asserting that the *Evergreen*-based rulings in *S.D.* and *Frazar* control the Court's analysis here. Finally, the decisions from other circuits that Plaintiffs cite do not constitute law in this Court, and they most assuredly cannot authorize this Court to allow a section 1983 action to proceed against state officials who have not violated any federal legal obligation.

Plaintiffs' last effort is to assert that our argument conflicts with "the clearly expressed intent of Congress." The first piece of evidence of "congressional intent" that Plaintiffs offer is 42 U.S.C. § 1302a-2, which we quote in full:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, [503 U.S. 347] (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of this title is not enforceable in a private right of action.

Plaintiffs quote only the first sentence of this statute. Yet they omit the all-important second sentence, a sentence that qualifies as "supreme Law of the Land" binding on this Court, and quote instead from the House Conference Report, which does not represent any kind of law and never received the bicameral approval and Presidential signature necessary to qualify as law under Article I, § 7.

Any court filing that trundles out legislative history while omitting relevant provisions of enacted statutory language should raise judicial eyebrows. That is especially true here, where the excerpt from the House Conference Report differs significantly from the text that actually received the approval of the House, Senate, and President. The first sentence in section 1302a-2 says only that provisions of the Social Security Act cannot be deemed unenforceable in private actions because of their "inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." Yet our argument does not rest on the inclusion of any statutory provision in sections that require State plans or specify the required contents of such plans. Instead, it rests on the proposition that the Medicaid Act does nothing more than establish criteria for federal reimbursement, and fails to impose any legal obligations on States that accept federal funds. The second sentence makes clear that section 1302a-2 serves no function except to reject the novel reasoning that the Supreme Court deployed in *Suter*, while still preserving (paradoxically) the result that the Court reached in that case. But nothing in the *Suter* opinion invokes the argument that we make here; the Court focused instead on the open-ended nature of the statutory requirement of "reasonable efforts" to prevent removal of children from their homes and facilitate reunification of families where removal has occurred. 503 U.S. at 359-61. The House Conference Report, by contrast, sounds as though it wants to freeze into place every decision, from any court, recognizing private causes of action for any provision of the Medicaid Act—a reach that extends far beyond the statutory language that surmounted the bicameralism-and-presentment hurdles. This Court must follow the statute rather than a document that reflects at most the aspirations of a small number of conferees, and in all likelihood represents a paraphrase written in haste by a congressional staffer. Unenacted congressional thoughts do not provide rules of decision for federal courts.

Plaintiffs want this Court to distill from the cases that they cite a general principle that federal spending legislation can be "enforced" under section 1983, and then use that abstract principle to support a cause of action for their Medicaid claims in this case. This analysis is backward. The *first* question for this court to resolve is whether the Defendants have violated any provision of federal law. If the answer is no, then this Court cannot allow a section 1983 lawsuit to proceed against the Defendants—unless some binding ruling of the Supreme Court or the Fifth Circuit *compels* this Court to allow the Plaintiffs' section 1983 claims notwithstanding the absence of a legal violation. One cannot construe a Supreme Court or Fifth Circuit ruling more broadly than necessary when the result forces the Defendants in this case—*who have not violated any federal legal obligation*—to defend themselves in an unauthorized section 1983 action. It is Plaintiffs' responsibility to explain exactly how a state's officers become federal lawbreakers simply by failing to meet a statutory criterion for federal reimbursement, and they have not done so.

In the end, Plaintiffs are seeking to transform the federal Medicaid statute into a regime that *requires* the States to establish and maintain Medicaid programs that mirror the plans described in section 1396a. This vision of Medicaid not only flouts the text and structure of 42 U.S.C. § 1396c, it also runs afoul of the constitutional prohibitions on commandeering a State's legislative and executive branches. See *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997). Plaintiffs appear to believe, as best we can tell, that States are unable to opt out of the ostensibly "voluntary" Medicaid program, because as Plaintiffs see matters, beneficiaries can sue under section 1983 to require conformity to section 1396a. How a State could exercise its opt-out option without facing a section 1983 lawsuit Plaintiffs do not endeavor to explain. This vision of Medicaid cannot be reconciled with the constitutional

limitations on Congress's power, even if one were to accept Plaintiffs' contentions that the Medicaid statute provides a private cause of action under section 1983.

The Medicaid statute *permits* States to establish Medicaid programs that depart from section 1396a, regardless whether those States have accepted federal reimbursement money in the past. Plaintiffs do not deny this fact and they cannot escape it, and as a consequence this Court is compelled to dismiss their Medicaid Act claims under Rule 12(b)(6).

B. The Medicaid Act Does Not Confer Any Privately Enforceable Rights.

In addition to the fact that Texas officials do not violate the Medicaid Act by any of Plaintiffs' complained-of acts and/or inactions—because this statute does not require state officials to do *anything*—Plaintiffs' Medicaid Act claims also fail because the Medicaid Act does not create individual "rights" that can be vindicated under section 1983. *See Golden State Transit Corp.*, 493 U.S. at 106 ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law."). Defendants respond as follows to Plaintiffs' arguments to the contrary.

1. The Nursing Home Reform Amendments to the Medicaid Act Are Not Privately Enforceable.

Plaintiffs do not dispute that the NHRA does not provide an express private right of action. *See generally* Response pp. 27-34. Therefore, in order for their NHRA claims brought under 42 U.S.C. § 1983 to survive Defendants' Motion, this Court must find that the NHRA confers a federal right to Plaintiffs. *See Gonzaga*, 536 U.S. at 274. However, in each instance in which the Plaintiffs point to specific sections of the NHRA, claiming that section creates a federal right intended to benefit Plaintiffs, they fail to consider the text and structure of each of those sections and the statute as a whole. They also forget *Gonzaga*'s strong limitations on finding privately enforceable rights under Spending Clause statutes. 536 U.S. at 281 ("Our more

recent decisions . . . have rejected attempts to infer enforceable rights from Spending Clause statutes").

a. The NHRA is focused on regulated entities and does not evidence any intent to confer a federal right.

Plaintiffs' contention that the NHRA Sections 1396r(e)(7)(A), (B), and (C) "explicitly identifies the intended beneficiaries . . . as 'mentally ill and mentally retarded individuals'" or NF residents with developmental disabilities is wrongheaded because it ignores the surrounding text and structure of that section. Response pp. 27-29. As set forth in Defendants' Motion, the NHRA provisions are focused on the regulated agencies and are not intended to confer rights on Plaintiffs. Motion pp. 25-26. Plaintiffs cite no cases that controvert controlling Fifth Circuit precedent that establishes that when conditions in a statute are imposed on a regulated entity for its receipt of federal funds, those conditions are focused on the entity being regulated, and do not evidence congressional intent to confer rights on individuals. *Anderson v. Jackson*, 556 F.3d 351, (5th Cir. 2009) (applying *Gonzaga* to find that The United States Housing Act, 42 U.S.C. § 1437p does not unambiguously confer a federal right); *Banks v. Dallas Hous. Auth.*, 271 F.3d 605, 609-10 (5th Cir. 2001) (finding that the United States Housing Act, 42 U.S.C § 1437f(e), requiring owners to keep and maintain their properties "decent, safe, and sanitary" as a condition of receipt of federal funds was not intended to benefit residents).[34]

[34] *See also, Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (finding no private right of action to enjoin enforcement of disparate-impact regulations promulgated under Title VI of Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1, because statute focuses on entity regulated and does not contain intent to confer right to individuals); *Duncan v. Johnson Mathers Health Care, Inc.*, Civ. A. No. 5:09-CV-00417-KKC, 2010 WL 3000718 (E.D. Ky. July 28, 2010) (holding NHRA does not confer any privately-enforceable rights); *Baum v. Northern Dutchess Hosp.*, No. 1:10-CV-424(RFT), 2011 WL 240196 (N.D. N.Y. January 24, 2011)(declining to adopt the Third Circuit's *Grammer* opinion, but relying on *Gonzaga*, holds that the NHRA does not evidence intent to confer rights to nursing home residents); *Grammer v. John J. Kane Reg'l Ctrs-Glen Hazel.*, 570 F.3d 520, 532 (3rd Cir. 2009) (Stafford, J., Dissent) (the NHRA does not evidence any intent of Congress to confer federal right on nursing home residents). Plaintiffs' citation to Second Circuit authority finding that the intended beneficiaries of the NHRA are the Medicaid beneficiaries is not controlling and this issue has not been decided in the Fifth Circuit. Response p. 29.

Section 1396r(e) obligates—with its mandatory language—the state to *develop* a plan which must include certain specifications related to preadmission screening and resident reviews. Motion p. 27. This is the duty created by the language in this section. Response p. 27; 42 U.S.C § 1396r(e); *see Grammer v. Johnson J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 533 (3rd Cir. 2009) (Stafford, J., dissenting) (the NHRA's mandatory language is directed at what the entity must do to receive federal funds). Benefits under the NHRA that flow to the individual nursing home residents are secondary because they flow only "as the result of the regulation of the States and [recipient] agencies." *Grammer*, 570 F.3d at 533 (*citing Newark Parents Ass'n. v. Newark Pub. Schs.*, 547 F.3d 199, 213 (3rd Cir. 2008)). While Section 1396r(e) does contain references to the nursing home residents, those references are "in the context of describing the type of 'policy or practice' that triggers a funding prohibition." *Gonzaga*, 536 U.S. at 288; *see* 42 U.S.C. § 1396r(e)(7)(D) (providing that no payment may be made to a nursing facility that fails to conduct the preadmission screening or review). The NHRA's text and structure, as a whole, evidence congressional intent to establish institutional policy and practice and not an unambiguous intent to confer any rights on Plaintiffs. *See* Motion pp. 25-26.

b. Plaintiffs' Response concedes that the NHRA's Sections 1396r(b) and 1396r(f) impose no binding obligations on Defendants.

Plaintiffs' Response concedes that the NHRA's sections 1396r(b) and 1396r(f) do not contain the requisite "rights-and-duty-creating language" needed to infer an enforceable right. *See generally* Response pp. 27-29 (only citing Section 1396r(e) to support their proposition that the NHRA's language demonstrates that it is privately enforceable); Motion pp. 26-28. And while their Response maintains that section 1396r(e) does contain such language, Plaintiffs'

analysis regarding the obligations set forth in Section 1396r(e) misses the mark, as set forth above. Response pp. 27-29.

c. The NHRA's implementing regulations do not confer federal rights to Plaintiffs.

Plaintiffs assert that the Secretary's regulations demonstrate that the NHRA is privately enforceable. Response p. 30. However, none of the NHRA implementing regulations confers any federal rights to Plaintiffs. "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). If the NHRA provided the general authorization for private enforcement of the NHRA's implementing regulations, it is possible that each regulation evidencing the requisite intent could be privately enforced. *See id*. Because the NHRA does not confer any privately enforceable right, for all of the reasons set out in Defendants' Motion and this Reply, the NHRA's implementing regulations cannot create any rights.

Plaintiffs' cited NHRA regulations also fail to support their argument that the NHRA itself confers privately-enforceable rights in nursing facility residents with DD to preadmission screening, resident review, and specialized services. Response p. 30. Regardless of the language in any given regulation, where the statute itself does not create a privately enforceable right, there is no such right no matter how creatively Plaintiffs attempt to use various regulations to "conjure up a private cause of action that has not been authorized by Congress." *Sandoval*, 532 U.S. at 291. As set forth above, section 1396r(e)'s requirements—including the requirement regarding "criteria developed under subsection f(8)"—relate to the state's obligation to *develop* a plan which must include certain specifications related to preadmission screening and resident reviews. Specifically, as a condition to the approval of that plan, it must include any minimum

criteria related to preadmission screening and resident review established by the Secretary. 42 U.S.C. § 1396r(f)(8). Therefore, the regulations demonstrate that the NHRA is not privately enforceable.

Contrary to Plaintiffs' assertion, the NHRA's delegation to the Secretary to define "specialized services," 42 U.S.C. § 1396r(e)(7)(G)(iii), and the regulation which defines that term, 42 C.F.R. § 483.120(a), also fail to confer any right. Response pp. 30-31. In order to consider whether that regulation was intended to create any rights, we must first look to the cited portion of the statute to see whether it provides the general authorization for private enforcement of the regulation. *See Sandoval*, 532 U.S. at 291. Nothing in Section 1396r(e)(7)(G)(iii) so much as suggests that Congress intended to do anything other than delegate to the Secretary the power to define "specialized services." Only where Congress "intends the statute to be enforced through a private cause of action" does Congress "intend[] the authoritative interpretation of the statute to be so enforced as well." *Id*. at 284. Meaning that only if this Court finds that the NHRA confers a privately-enforceable right can it consider "a separate cause of action to enforce the regulations apart from the statute." *See id*. at 284. None of the regulations cited by Plaintiffs can support such a cause of action because the NHRA itself does not confer a privately enforceable right.

d. Opinions properly applying *Gonzaga* find that the NHRA is not privately enforceable.

Whether or not the NHRA confers any federal right remains undetermined in the Fifth Circuit and this Court should answer this question in the negative. *See Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 387 n. 5 (5th Cir. 2003) (assuming without deciding that the plaintiff alleging a claim under Section 1396r(e) states a claim and noting that the issue is undisputed by defendants). While Plaintiffs correctly point out that the First and Third Circuits

have come to the opposite conclusion, those decisions are not binding precedent on this Court. *See Delancey v. City of Austin*, 570 F.3d 590, 595 n.7 (5th Cir. 2009) (noting that the Fifth Circuit is not persuaded by other circuit's precedent finding private rights of action when that precedent conflicts with or predates *Gonzaga*); *see Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356, 360 (5th Cir. 2006) ("[T]he Supreme Court's approach to § 1983 enforcement of federal statutes has been increasingly restrictive; in the end, very few statutes are held to confer rights enforceable under § 1983.")

Instead, this Court should adopt the reasoning set forth in the *Grammer* opinion's dissent because it better comports with binding Supreme Court and Fifth Circuit precedent. 570 F.3d 520 (3rd Cir. 2009); *Gonzaga*, 536 U.S. at 274; *see, e.g.*, *Anderson*, 556 F.3d 351, 356-58 (5th Cir. 2009) (applying *Gonzaga* to find that The United States Housing Act, 42 U.S.C. § 1437p does not unambiguously confer a federal right); *see Baum v. Northern Dutchess Hosp.*, No 1:10-CV-424(RFT), 2011 WL 240196 (N.D.N.Y. January 24, 2011) (declining to adopt the Third Circuit's *Grammer* opinion, but relying on the Supreme Court's *Gonzaga* opinion and holding that the NHRA does not evidence intent to confer rights to nursing home residents). In *Grammer*'s dissent, Judge Stafford disagrees with the majority's finding that the NHRA allows for private enforcement under Section 1983 by nursing home residents. 570 F.3d at 532 (Stafford, J., dissenting). Adhering to *Gonzaga*'s admonition that a statute must unambiguously confer a right to allow private enforcement under Section 1983, Judge Stafford first notes that the NHRA is Spending Clause legislation which, the Supreme Court cautions, rarely "confers upon funding beneficiaries the right to bring private actions. . . ." *Id*; *see also Duncan v. Johnson-Mathers Health Care, Inc.*, No 5:09-CV-00417-KKC, 2010 WL 3000718, at *10 (E.D. Ky. July 28, 2010). Judge Stafford then emphasizes the ways in which the NHRA focuses on the

regulated entities—what nursing facilities must do to receive funding and the detailed state plan requirements needed before plan approval—rather than the persons protected in discerning there is no congressional intent to confer any private rights. *Id*. at 533 (Stafford, J., dissenting); *see also Duncan*, 2010 WL 3000718, at *8 (declining to adopt the Third Circuit's *Grammer* holding recognizing a private right of action under the NHRA because that holding is inconsistent with *Gonzaga*). Accordingly, this Court, through its similar application of *Gonzaga*, should find Plaintiffs' NHRA claims fail because the NHRA does not confer any right to Plaintiffs.

2. Section 1396a(a)(8) of the Medicaid Act (Reasonable Promptness) is Not Privately Enforceable When the Waiver is Full.

Plaintiffs incorrectly state that Defendants assert only one argument regarding the non-enforceability of section 1396a(a)(8).[35] Response p. 35. First, Defendants have shown that *no* provision of the Medicaid Act under which Plaintiffs have sued is privately enforceable by a Medicaid recipient. *See, e.g.*, Motion pp. 18-22; Reply, *supra* pp. 37-47. In addition, Defendants have correctly argued that at the very least, Plaintiffs have no enforceable right under section 1396a(a)(8) with regard to a waiver that is full (and therefore, for which they are not eligible). *See* Motion pp. 30-32. As discussed above, the caps on Texas's waivers constitute an eligibility requirement, and Plaintiffs are not eligible where the caps have been met. *See* Reply, *supra* pp. 23-29; Motion pp. 30-32; *M.A.C. v. Betit*, 284 F. Supp. 1298, 1308 (D. Utah 2003). Additionally, Plaintiffs are not eligible where, as here, they admittedly have not even applied for a waiver and, after assessment, been determined to be eligible for that waiver. *See Reply, supra* pp. 23-27. Consequently, because Plaintiffs are not "eligible individuals," they are not included in the persons that section 1396a(a)(8) is intended to benefit, and thus fail the first prong of the

[35] Section 1396a(a)(8) provides that medical assistance "shall be furnished with reasonable promptness to all *eligible* individuals." 42 U.S.C. § 1396a(a)(8) (emphasis added).

Blessing test. *See Blessing*, 520 U.S. at 340 ("Congress must have intended the provision in question to benefit the plaintiff."); *McCarthy*, slip op. at 15-16 (persons on Texas's interest list have not been determined "eligible" and therefore were not among the class of individuals Congress intended to benefit); *M.A.C.*, 284 F. Supp. 2d at 1308 ("Therefore, because [section 1396a(a)(8) does not contain] the unambiguous rights-creating language required by *Gonzaga*, this court finds that Plaintiffs do not have a private right of action to enforce the Medicaid Act").

Plaintiffs assert that § 1396a(a)(8) is privately enforceable because "every circuit that has considered the question has concluded that it is." Response p. 35. But courts from other circuits that have held that section 1396a(a)(8) creates a private right of action have only done so in very limited circumstances when the individuals in question had already been determined to be eligible for the particular services demanded and were waiting for those services.[36] These cases do not support the proposition that section 1396a(a)(8) creates a private right of action in all circumstances, and no court has extended section 1396a(a)(8) to create a privately enforceable right for individuals who are ineligible for a particular Medicaid service. Accordingly, at the very least, Plaintiffs have no enforceable right under section 1396a(a)(8) to the extent a Texas waiver is full.

[36] *See Doe v. Kidd*, 501 F.3d 348, 354-56 (4th Cir. 2007) (holding that section 1396a(a)(8) was privately enforceable when plaintiff had already been given a waiver slot and was eligible for community care facility but was still waiting to be placed in that facility); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 182-83 (3rd Cir. 2004) (holding that section 1396a(a)(8) was privately enforceable with respect to the provision of ICF/MR services to individuals eligible for those services); *Bryson*, 308 F.3d at 88-89 (holding that section 1396a(a)(8) was privately enforceable when plaintiffs were kept on waiting list while there were still *unfilled* waiver slots); *Doe v. Chiles*, 136 F.3d at 711 (holding that section 1396a(a)(8) was privately enforceable when plaintiffs were eligible for placement in ICF/MR facilities but were kept on a waiting list); *Westside Mothers v. Haveman*, 289 F.3d 852, 863 (6th Cir. 2002) (recognizing private right of action under section 1396a(a)(8) for alleged failure to comply with mandatory screening and treatment requirements for Medicaid-eligible children); *Lewis v. New Mexico Dep't of Health*, 261 F.3d at 976-77 (Tenth Circuit declined to determine whether section 1396a(a)(8) was privately enforceable); *Lewis v. New Mexico Dep't of Health*, 275 F. Supp. 1319 at 1344 (recognizing private right of action under section 1396a(a)(8) only for those individuals who had been allocated a waiver slot after Tenth Circuit's refusal to decide that issue).

3. Section 1396a(a)(10)(B) (Comparability) Creates No Enforceable Rights.

Plaintiffs are wrong when they say that Defendants do not challenge the private enforceability of section 1396a(a)(10)(B). We most certainly do. *See* Response p. 35; Motion p. 32. The Medicaid Act could not be more clear that section 1396a(a)(10)(B) does not apply to section 1396n(c) waivers. *See* 42 U.S.C. § 1396n(c)(3) ("A waiver granted under this subsection may include a waiver of the requirements of section 1396a(1) of this title (relating to statewideness), section 1396a(a)(10)(B) of this title (relating to comparability), and section 1396a(a)(10)(C)(i)(III) of this title (relating to income and resource rules applicable in the community.")). Thus, to the extent Plaintiffs purport to assert a comparability claim for any waiver service, they have no right to do so and those claims must be dismissed on the pleadings, as a matter of law. This determination by the Court requires no further development in the case, as Plaintiffs suggest with their reference to *Lewis v. New Mexico Dep't of Health*, 261 F.3d 970 (10th Cir. 2001).

4. Section 1396n(c)(2) of the Medicaid Act (Freedom of Choice) is Not Privately Enforceable.

Notwithstanding Plaintiffs' arguments to the contrary, the straightforward language of section 1396n(c)(2) is directed squarely at the states, advising them to provide assurances to the Secretary of Health and Human Services in order to obtain approval for a waiver, and conferring on the Secretary the obligation to deny the waiver application if the specified assurances are not provided. 42 U.S.C. § 1396n(c)(2). Yes, section 1396n(c)(2) uses the word "individuals" twice, but in context, the mere use of the word "individuals" does not confer a direct benefit on Medicaid recipients or supply the unambiguous rights-creating language of *Gonzaga*. As Judge Sparks concluded regarding section 1396n(c)(2)(C) in the *McCarthy* decision, "[t]his subsection

is not written in terms of 'individual entitlement and is 'not concerned with 'whether the needs of any particular person have been satisfied.'…Instead, it prescribes what states must include in their waiver applications to receive approval by the Secretary of Health and Human Services." *McCarthy*, slip op. at 13 (quoting *Gonzaga*, 536 U.S. at 286-87).[37]

Plaintiffs rely heavily on *Wilder* for the proposition that the requirement for assurances can create a private right of action.[38] Response pp. 37-38. But, as discussed above, in 2002, the Supreme Court in *Gonzaga* moved away from the *Wilder* approach, requiring instead that nothing short of an "unambiguously conferred right" would support a cause of action brought under § 1983. *Gonzaga*, 536 U.S. at 281 (noting that its more recent decisions clearly "rejected attempts to infer enforceable rights from Spending Clause statutes."); *see* Reply *supra* at pp. 38-48. Section 1396n(c)(2)(C) confers no such unambiguous right to Plaintiffs. The Fifth Circuit's *S.D.* decision, cited by Plaintiffs, does not require a contrary ruling.[39]

Judge Sparks, in finding no enforceable rights for the *McCarthy* plaintiffs under section 1396n(c)(2),[40] analyzed this issue as follows:

> To hold Congress intended this provision to benefit the plaintiff would mean Congress intended every provision of § 1396n(c), which sets forth the requirement for granting waivers to states, to benefit every potential recipient of Medicaid waiver services simply because the Medicaid program is generally intended to benefit qualifying recipients.…The real issue is whether a particular

[37] In so deciding, Judge Sparks rejected two of the cases cited by Plaintiffs in their Response (at pp. 2638)—*Wood v. Tompkins* and *Cramer v. Chiles*. *Id*. The Ninth Circuit case Plaintiffs cite also discounts *Wood v. Tompkins* as being both pre-*Blessing* and pre-*Gonzaga*, and for failing to follow the "methodical inquiries" required by *Blessing*. *Ball v. Rodgers*, 492 F.3d 1094, 1106 n.18 (9th Cir. 2007).

[38] In *Wilder*, the court found that a requirement in the Medicaid Act (the Boren Amendment) imposing a binding obligation on states to adopt reasonable and adequate provider rates was enforceable by health care providers under section 1983. *Wilder*, 496 U.S. at 512.

[39] *S.D. v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004). *S.D.* involved a different section of the Medicaid Act (42 U.S.C. § 1396a(a)(10)(A)), and the court determined that because of the wording of that section of the Act—requiring EPSDT to be provided to all eligible individuals under the age of twenty-one—that provision was not to be deemed unenforceable simply "because of its inclusion in a section…requiring a State plan or specifying the required contents of a State plan." *Id.* The ruling in *S.D.* relied on the now-overruled decision in *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908, and its precedential value is undercut. *See* Reply, *supra* p. 48.

[40] Judge Sparks did *not* find that section 1396n(c)(2) creates enforceable rights under section 1983 "for individuals at risk of institutionalization when waiver slots are available," as Plaintiffs wrongly state. Response p. 37.

> subsection of section 1396n(c) is phrased in terms' [sic] benefitting recipients in that it directly focuses on their rights or if it does not focus directly on recipients but merely gives them "an indirect benefit."

McCarthy, slip op. at 13. This Court should adopt the same view.

The *McCarthy* court also found that "Congress did not intend to create an individual right enforceable under section 1983 for individuals who apply for Medicaid waiver services after the ceiling of recipients identified in the waiver application and approved by the federal government has been met or surpassed." *Id.*; *see also M.A.C.*, 284 F. Supp. 2d at 1307-08 (holding that individuals on the waiting list for waiver services are not eligible for services at the time they apply for Medicaid; they thus do not have a private cause of action to enforce 42 U.S.C. § 1396n(c)(2)(C)). Therefore, to the extent there are no waiver slots available under Texas's NF waiver—or any other waiver the Court deems applicable to the purported class of plaintiffs residing in or about to enter a NF—Plaintiffs can have no enforceable right and their section 1396n(c)(2) claims must be dismissed.

At page 38 of their Response, Plaintiffs assert that section 1396n(c)(2)(*B*) imposes the same mandatory and enforceable obligation on Defendants as they elsewhere say that section 1396n(c)(2)(*C*) imposes on Defendants, as if the two sections were worded exactly the same. They are not, and the cases cited in support do not discuss section 1396n(c)(2)(*B*). Accordingly, Plaintiffs have failed to show that section 1396n(c)(2)(*B*) confers a right enforceable by Plaintiffs and those claims should be dismissed as well. To the extent Plaintiffs intended to say that section 1396n(c)(2)(*C*) imposes a mandatory obligation to both inform of alternatives to institutionalization and to provide a choice between care in a NF or alternative setting, Defendants have already shown that Plaintiffs have overstated section 1396n(c)(2)(C). *See*

Reply *supra/infra*, pp. 18-21. Accordingly, since section 1396n(c)(2)(C) imposes no such duty, Plaintiffs have no right to enforce section 1396n(c)(2)(C) as reinvented by Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims as against Governor Perry should be dismissed in their entirety on the basis of standing, sovereign immunity, and failure to state a claim. Furthermore, all of Plaintiffs' claims under the Medicaid Act and the NHRA should be dismissed on numerous grounds, including standing, no private right of action, and failure to state a claim. Defendants, therefore, respectfully request that this Court grant this motion, dismiss these claims, and grant such further relief as is just and proper.

June 1, 2011

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

DAVID MATTAX
Director of Defense Litigation
ROBERT B. O'KEEFE
Chief, General Litigation Division

/s/ Nancy K. Juren
NANCY K. JUREN
Assistant Attorney General
Attorney in Charge
Texas Bar No. 11059300
DARREN G. GIBSON
Assistant Attorney General
Texas Bar No. 24068846
AMANDA J. COCHRAN-MCCALL
Assistant Attorney General
Texas Bar No. 24069526
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Phone No.: (512) 463-2120
Fax No.: (512) 320-0667

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that a true and correct copy of *Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss Plaintiffs' Complaint* was served by CM/ECF system on June 1, 2011, upon the following individuals at the listed addresses:

Garth A. Corbett
Sean A. Jackson
Advocacy Inc.
7800 Shoal Creek Blvd., #171-E
Austin, Texas 78757

Yvette Ostolaza
Robert Velevis
Casey A. Burton
Weil, Gotshal & Manges
200 Crescent Court- Suite 300
Dallas, Texas 75201

Steven J. Schwartz
J. Paterson Rae
Center for Public Representation
22 Green Street
Northampton, Massachusetts 01060

/s/ Nancy K. Juren
NANCY K. JUREN