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

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

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM

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I. INTRODUCTION

Three of the named Plaintiffs, Andrea Padron, Linda Arizpe, and Eric Steward,[1] by and through their next friends and guardians, respectfully move this Court for a preliminary injunction to prevent ongoing and irreparable harm resulting from the Defendants' failure to provide them necessary specialized services. As more fully described in the Declaration and Report of Karen Green McGowan, RN, CDDN, attached as Exhibit 1 (the "Report"), all three Plaintiffs have suffered physical injury and regression of basic life skills are a result of the lack of essential services required by federal law. Andrea Padron's condition is now life-threatening. Linda Arizpe's condition may soon be irreversible. Eric Steward's situation is clearly preventable. All three have suffered significant pain and physical regression while in their current nursing facilities. All three require specialized services that the Defendants currently provide in various community settings and should be, but are not, providing in nursing facilities. As determined by Ms. McGowan, all three would be better served in the community.

Pursuant to the Rule 65(a) of the Federal Rules of Civil Procedure, Andrea Padron, Linda Arizpe, and Eric Steward bring this Motion to enjoin the Defendants from continuing to fail to fulfill their obligations under the Nursing Home Reform Amendments (NHRA) of 1987 to the Medicaid Act, 42 U.S.C.§ 1396r(e) and 42 C.F.R. § 483.100 *et seq.*[2] to provide these Plaintiffs

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[1] This Motion is limited to these three named Plaintiffs. Upon initiation of discovery, however, the Plaintiffs may file another motion on behalf of other plaintiffs and putative class members in the event that it is determined, based upon such discovery, that their lives are in immediate jeopardy as is the case of Andrea Padron, Linda Arizpe, and Eric Steward.

[2] Although this Motion only seeks preliminary relief under the NHRA, these plaintiffs may file another motion seeking prompt community supports that would allow them to leave the segregated settings where they now reside. Thus, in filing this Motion, the Plaintiffs do not waive any of their other claims for relief as alleged in the Plaintiffs'Amended and Supplemented Complaint ("Amend. Comp.") (Doc. # 63).

with timely and comprehensive assessments of their habilitative needs and the specialized and nursing services required to meet such needs in the most appropriate setting.

Andrea Padron, Linda Arizpe, and Eric Steward are all individuals with intellectual and developmental disabilities who also have complex medical needs. They all reside in nursing facilities in the San Antonio area of Texas. All three Plaintiffs have been deprived of timely and adequate screens and assessments, required by the Pre-Admission Screening & Resident Review (PASARR)[3] provisions of the NHRA, including both a Level I screen and a Level II review[4] to identify their service needs while they are in these nursing facilities. Consequently, the specialized services that the Plaintiffs require to meet their basic habilitative needs have not been identified or provided. As a result of the Defendants' failures, Andrea Padron, Linda Arizpe, and Eric Steward have lost basic skills, have deteriorated in basic functioning and have acquired serious, sometimes life-threatening medical conditions. Absent preliminary relief to require the Defendants to immediately address the Plaintiffs' conditions, these urgent health and safety risks may be exacerbated and their deterioration that is not already permanent, may become irreversible.

Under applicable law: (a) there is a likelihood that the Plaintiffs will prevail on the merits; (b) the Plaintiffs will suffer immediate irreparable injury if the injunction is not granted; (c) the threatened harm to the Plaintiffs outweighs the threatened harm the injunction may cause the Defendants; and (d) granting the preliminary injunction will not disserve the public interest.

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[3] The PASARR program is now generally referred to as the "PASRR" program, although both terms are frequently used interchangeably. In Texas the program is still referred to as "PASARR" and therefore being referred to as such in this Motion.

[4] For a full description of these requirements, *see* discussion at Section IV(B)(2), *infra.*

This Motion is supported by the Memorandum of Points and Authorities *infra*, the Declaration and Report of Karen Green McGowan, RN, CDDN, and the Declaration of Deborah A. Dorfman (hereafter "Dorfman Decl.") attached as Exhibit 2, and Exhibit A, appended thereto.

The Plaintiffs are not able to post bond or other security interest because their only income is public assistance.

II. STATEMENT OF FACTS

A. Overview

Andrea Padron, Linda Arizpe, and Eric Steward all currently reside in nursing facilities in the San Antonio area of Texas. Report, at 3, 4, 7, 11; Amend. Comp. (Doc. #63) ¶¶ 10-12, 140, 150, 161. They are categorically eligible for Medicaid services and are eligible to receive developmental disability services from the Texas Division of Aging and Disability Services (DADS). Amend. Comp. (Doc. #63) ¶¶ 137, 248 ; *see also* ¶¶ 147, 164-167, As detailed more fully below in Section II(B), all three individuals have not been provided with timely and adequate PASARR Level I Screens or Level II Reviews. Report at 4. Therefore, the specialized services that they require in order to meet their basic habilitative needs and to prevent regression, including the appropriate setting for these services, have not been identified or provided. As a result, they have lost skills and developed serious medical conditions, some of which are irreversible and life- threatening. *See generally* Report. Additionally, they are regressing as a result of their inappropriate continued confinement to their nursing facilities. *Id.* at 5, 7, 10, 14, 15. The specialized services that these Plaintiffs desperately need are not being provided by Defendants in the nursing facilities, but are provided by the same Defendants in various community settings.

B. The Expert's Review

Based upon information concerning the condition of certain individual Plaintiffs, the Plaintiffs retained Karen Green McGowan, RN, CDDN, an internationally-renowned expert in the area of developmental disabilities, with a particular expertise in the identification and treatment of complex medical conditions and serious health problems. As more fully described in her curriculum *vitae,* attached to her Report, Ms. McGowan is a nurse with extensive experience in evaluating the health needs and services of persons with disabilities. She has served an Independent Expert in a similar case, *Rolland v. Cellucci,* 191 F.R.D. 3 (D. Mass. 2000) and currently assists several states and federal courts in monitoring the health status of persons with intellectual and developmental disabilities.[5] *Id.*

Ms. McGowan reviewed Andrea Padron, Linda Arizpe, and Eric Steward to determine: (1) whether they were timely and appropriately screened and evaluated at the time of their admission to a nursing facility; (2) whether each has received an accurate, comprehensive assessment of their service needs and the most appropriate setting in which to provide these services; (3) whether each is being provided the level of specialized and nursing services necessary to meet their basic habilitative needs and to prevent regression; (4) whether these specialized services are being provided in the most appropriate setting; and (5) whether placement in a nursing facility is the most appropriate setting to meet their habilitative needs. Report, at 1, 2, 5-16.

[5] Ms. McGowan has qualified as an expert in several other cases and has held several different positions that render her especially qualified to render an expert opinion in this case. Report at 1-2 and Attachment 1. She is currently serving as a member of the Quality Review Panel overseeing the implementation of the settlement in *People First of Tennessee v. Cloverbottom*, No. 3:95-1227, in the United States District Court for the Middle District of Tennessee, Nashville Division, a case involving the transition of people with intellectual disabilities from institutional care to the community.

As more fully described in her Report, Ms. McGowan's review included observations and assessments of Andrea Padron, Linda Arizpe, and Eric Steward in their nursing facilities, interviews with some of their family members and nursing facility staff, and a detailed review of relevant documents and records. *Id.* at 2-3. Based upon her extensive training and experience, Ms. McGowan is well qualified to assess the adequacy of the care and treatment provided to the Plaintiffs as well as their specialized service and nursing needs and the appropriateness of the settings where these services should be provided. *See id.* at 1.

C. The Expert's Findings and Conclusions

Ms. McGowan determined that the PASARR process for Andrea Padron, Linda Arizpe, and Eric Steward was "entirely inadequate for all three individuals." *Id.* at 15. She found that none of them had appropriately completed PASARR Level 1 Pre-Admission screens or PASARR Level II evaluations. *Id.* at 4, 8, 12, 15. Due to these failures, the specialized and nursing services that these individuals need, including the most appropriate setting to meet those needs, have not been identified or provided, even though they have been residing in their nursing facilities for many years. *Id.* at 5-15.

As detailed more fully below, the Defendants have failed to provide the Plaintiffs with the requisite timely and appropriate screens and assessments, as well as the specialized and nursing services in the most appropriate setting to meet their basic habilitative needs and to prevent deterioration. *Id.* Consequently, the Plaintiffs have significantly regressed to the point where they have not only lost skills that they previously had, but they have also developed serious medical conditions, some of which are irreversible and now may be life-threatening. *Id.*

1. Andrea Padron

Ms. McGowan has concluded that "Andrea will likely die of preventable conditions" that she has developed in the nursing facility and due to the Defendants' failure to provide her with the requisite specialized services. Ms. McGowan also found that the skills Andrea has lost since being at her nursing facility are the result of "lying in bed continuously for 164-166 hours per week" and being denied specialized services. *Id.* at 7. She also found that Andrea's placement at her nursing facility is inappropriate to meet her habilitative needs and that she isn"is in fact regressing" as a result of being there. *Id.* Ms. McGowan determined that "Andrea needs to move to a community-based setting such as small group home and to attend a day program in the community." *Id.*

Andrea Padron is a 27 year-old woman who was diagnosed with a closed head injury as a result of a car accident at the age of ten. *Id.* at 4. She also has been diagnosed with post-traumatic quadriplegia and a seizure disorder. *Id.* When she was 18 years old, Andrea was admitted to Meridian Nursing Facility ("Meridian"), where she has resided continuously, except for a brief period in 2007 during which she was hospitalized for pneumonia, "severe deconditioning" and gastro-esophageal reflux disease ("GERD"). *Id.* at 4, 6.

a. Failure to Provide an Adequate PASARR Level I Screen and PASARR Level II Assessment

Ms. McGowan found that there was no PASARR Level I screen in Andrea Padron's nursing facility record, and concluded that she had not received an adequate PASARR Level I screen. *Id.* at 4. She also found no indication in the nursing facility record that Andrea has received an adequate PASARR Level II review during the almost decade that she has been in the nursing facility. *Id.* at 5. Because Andrea has not been provided with an adequate PASARR Level I screen and Level II review, the specialized services to meet her habilitative needs,

including the most appropriate setting in which these services should be provided, have not been identified or provided. Instead, she has been lying idle in her bed virtually all of the time for at least the past five years, since her special education services from the local school district ended. *Id.* at 3-7.

b. Failure to Provide Necessary Specialized Services in the Most Appropriate Setting and Resulting Harm

Due to lack of activity, Andrea Padron has lost skills, such as standing upright and interacting with others, that she had when she was first admitted to the nursing facility. *Id.* at 3, 6. Additionally, Andrea has now developed a number of serious medical conditions that are irreversible and potentially life-threatening. *Id.* at 5-7.

1. Impairment of Breathing, Pneumonia and Related Medical Complications

One of the most dangerous conditions that Andrea has developed is "kyphoscoliosis" that impairs her ability to breathe. This condition causes her spine to increasingly bend forward and to one side and applies excessive weight on her diaphragm, which restricts her airway. *Id.* at 5-6. This condition places her at extremely high risk that secretions will enter her lungs and cause serious lung infections, which can be life-threatening. *Id.* at 5. Each day that Andrea continues to remain idle and go without the necessary specialized services, this risk increases. *Id.* at 6. In fact, she has already been hospitalized at least once due to respiratory failure resulting from pneumonia and other medical conditions due to lack of specialized and nursing services. *Id.*

2. Flexion Contractures

Since her admission to the nursing facility, Andrea has also developed "flexion contractures," so that she no longer can straighten her wrists, ankles, shoulders, legs, and hips. *Id.* This condition is the direct result of a having her joints bent for extended periods of time due

to lack of activity and a lack of specialized and nursing services, including physical therapy, to address this condition. *Id.*

3. "Foot Drop"

Due to lack the of other needed specialized services, Andrea has also developed a condition referred to "foot drop," which involves the severe deterioration of the ankles and feet. As a result, Andrea has lost the ability to stand upright on her feet with the assistance of a stander, as she once could when she was first admitted to the nursing facility. *Id.* Due to the lack of specialized and nursing services, she is unlikely to regain her ability to stand on her feet with the assistance of a stander and, instead, is relegated to "standing" on her knees. *Id.*

It is urgent that Andrea be afforded a comprehensive assessment of her needs, including the most appropriate setting to meet those needs, and promptly be provided with the necessary specialized services to address these needs, as required by federal law. Ms. McGowan concluded that "if these serious conditions continue to go unabated, there is a serious risk that she will die prematurely." *Id.* at 7.

2. Linda Arizpe

Ms. McGowan concluded that Linda Arizpe has suffered grave medical deterioration as a result of the Defendants' failure to timely and adequately assess even her basic habilitative needs and to provide her with the necessary specialized services in the most appropriate setting to meet those needs. *Id.* at 7-11. Ms. McGowan also found that Linda Arizpe is regressing at the nursing facility where she resides and that a nursing facility is not an appropriate placement to meet her habilitative needs. *Id.* at 7, 10, 11,

Linda Arizpe is a 43-year-old woman who was has resided in nursing facilities in Texas since 2005. She was first at the Rosewood nursing facility from 2005 until 2008, when she was

transferred to her current nursing facility, the Meridian. *Id.* at 7-8. She is diagnosed with anoxic brain damage, seizure disorder, anxiety, anemia associated with nutritional deficit, and asthma. *Id.* at 7. She was diagnosed with a developmental disability during her childhood. She acquired a brain injury in 2005. *Id.* at 8.

a. Failure to Provide an Adequate PASARR Level I Screen and PASARR Level II Assessment

Ms. McGowan determined that there is no indication that Linda Arizpe has been afforded a timely or adequate PASARR Level I screen.[6] *Id.* at 8. Additionally, Linda has not been provided an adequate PASARR Level II review, although she has been in a nursing facility for the past seven years. Therefore, the necessary specialized services that she requires and the most appropriate setting in which these services should be provided, have neither been identified nor provided. *Id.*

b. Failure to Provide Necessary Specialized Services in the Most Appropriate Setting and Resulting Harm

Ms. McGowan concluded that due to the Defendants' failure to provide Linda Arizpe with the necessary evaluations and specialized services to meet her habilitative needs and to prevent her regression, she has significantly deteriorated since her nursing facility admission. *Id.* at 8.

1. "Frog Leg" Deformity

As a result of spending virtually all of her time in her bed without the necessary specialized and nursing services for the past seven years, Linda Arizpe has developed a severe "frog-leg" deformity pattern, causing each thigh to extend dramatically outward. *Id.* at 9. Because of this deformity, Linda is now unable to sit in "a traditional sitting position," which

[6] The only PASARR Level I-related documents in Linda's records include: a blank PASARR Level I screen form, dated January 14, 2011; and a PASARR Level I screen, dated April 29, 2011, which was completed seven years following initial admission to nursing facility. *Id.*

prevents her from being able to use her wheelchair to get to the bathroom or to leave her bedroom. *Id.* This preventable condition could be remedied with the immediate provision of appropriate specialized services, such as a physical management plan. *Id.* If this condition is not immediately addressed, Linda's legs are will remain in this disfigured position and will require invasive surgical intervention. *Id.* at 9, 10.

2. Deterioration of Hips

Linda's hips have also extensively deteriorated due to lack necessary specialized and nursing services. *Id.* at 10. Specifically, Linda's hips have lost their range of motion as result of her continuous and extended confinement to her bed and deprivation of the necessary specialized services including, but not limited to, physical management techniques. *Id.* Linda requires a medical assessment of her hips in order to determine the full extent of the deterioration of her hips—particularly her left hip as it now has almost no mobility. *Id.* If Linda does not immediately receive the appropriate medical and other therapeutic interventions to address the degeneration of her hips, they are likely to harden, making it difficult, if not impossible, to reverse, absent major surgery. *Id.*

It is urgent that Linda receive a comprehensive assessment of her needs and then immediately be provided with the necessary specialized and nursing services in the most appropriate setting to meet her needs, in order to prevent her further physical deterioration and psychological regression. Ms. McGowan determined that Linda Arizpe should be transferred to a smaller community-based setting with staff support. *Id.*

3. Eric Steward

Ms. McGowan concluded that Eric Steward has physically regressed as a result of not having timely and appropriate evaluations of his basic habilitative needs and not being provided the

specialized services that he requires to address these needs. *Id.* at 12-13, 15. She also found that Eric Steward's nursing facility placement is "inappropriate and harmful to him" and has caused him to regress. Ms. McGowan determined that the most appropriate setting to meet Eric's needs is in an apartment in the community with staff support. *Id.* at 14.

Eric Steward is a 44-year-old man with cerebral palsy and a severe seizure disorder. *Id.* at 11. Eric has lived in a nursing facility since having surgery for his seizure disorder in 2002.

a. *Failure to Provide an Adequate PASSAR Level I Screen and PASSAR Level II Assessment*

Ms. McGowan determined that although Eric Steward has been at a nursing facility for almost ten years, he has not had an adequate PASARR Level I screen. *Id.* at 12,15. Although a PASARR Level I screen was completed for Eric in December of 2010, the form incorrectly stated that he did not have a developmental disability or intellectual disability, even though attached to that same form was one of the Defendants' own documents that explicitly stated that Eric was eligible for services from DADS because of his intellectual and developmental disabilities. Moreover, Eric's nursing facility records contained numerous references to his intellectual and developmental disabilities. *Id.*

Ms. McGowan also found that Eric Steward did not have an adequate PASARR Level II review. *Id.* Consequently, over time he has significantly regressed, has lost basic skills, and has developed other serious medical problems.

b. *Failure to Provide Necessary Specialized Services in the Most Appropriate Setting and Resulting Harm*

1. Inadequate Seizure Management

Ms. McGowan concluded that Eric Steward is not receiving necessary specialized services to prevent regression in his seizure disorder. *Id.* at 12. If Eric's seizure disorder is not

appropriately assessed and managed, it will continue to impede his mobility and his ability to participate in all activities and any therapeutic interventions.

2. Loss of Mobility

Ms. McGowan found that Eric Steward is provided with almost no specialized services and is idle most of the time. This has contributed significantly to Eric's regression, including the loss of his mobility skills since the time of his admission to the nursing facility. *Id.* at 13. When admitted, he could use a walker and a stander. *Id.* Now, he relies solely on his motorized wheelchair for mobility. *Id.* Eric needs a comprehensive assessment, an evaluation of his mobility, and the necessary specialized services to address his mobility problems. *Id.* If he is not afforded such services and continues to remain physically inactive, there is a serious likelihood that he will lose what limited mobility abilities he has, which will then further compromise his other bodily systems. *Id.* at 15.

3. Untreated Medical Conditions

Eric Steward has other medical conditions including, possible peptic ulcer, weight gain, GERD, and dementia, that have not been adequately assessed and for which he is not being provided specialized and nursing services. *Id.* at 13-14. Eric urgently requires a comprehensive assessment to determine the necessary treatment interventions for these medical conditions, and the appropriate specialized and nursing services to address these conditions, in order to meet his basic habilitative needs and prevent further regression. *Id.* at 13-14, 15. If he is not promptly provided such an assessment and services, he is at serious risk of continuing to lose skills as well as developing a myriad of serious medical complications, such as gastro-intestinal bleeding, and metabolic syndrome, which creates a high risk of diabetes, heart disease and stroke, and other serious medical problems. *Id.* at 15.

4. Vocational Programming

Ms. McGowan also found that Eric Steward requires vocational training and supported employment. *Id.* at 14. She determined that such programming was essential to help him to "regain some of independence and participate in the community." *Id.*

During the ten years that Eric Steward has been at his nursing facility, he has not received an adequate evaluation of habilitative needs for specialized services or received these services. It is crucial that he now be immediately provided with this assessment and these services in the most appropriate setting to meet his habilitative needs, which is, as Ms. McGowan has concluded, a community based living arrangement with support staff, in order to abate his regression and to provide him with the opportunity to regain lost skills and health.

III. THE STANDARD FOR GRANTING A PRELIMINARY INJUNCTION

To prevail on a motion for a preliminary injunction, the Plaintiffs must show: (1) a substantial likelihood that they will prevail on the merits; (2) a substantial threat that irreparable harm will result if the injunction is not granted; (3) that the threatened injury outweighs the threatened harm to the Defendants; and (4) that the granting of the preliminary injunction will not disserve the public interest. *Tex. Med. Providers Performing Abortion Servs v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012); *Bluefield Water Ass'n, Inc. v. City of Starkville*, 577 F.3d 250, 252-53 (5th Cir. 2009). Generally, the unavailability of a remedy at law, such as damages, constitutes irreparable harm. *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011); *Allied Home Mortg. Corp. v. Donovan*, 2011 WL 5553645 (W.D. Tex. Nov. 15, 2011); *Knowles v. Horn*, 2010 WL 517591, at *7 (N.D. Tex. Feb. 10, 2010). The decision whether or not to issue a preliminary injunction lies within the sound discretion of the trial court. *Charles H. Wesley Edu. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005). The "primary justification" for the

issuance of a preliminary injunction is to preserve the court's ability to render a meaningful decision on the merits. *Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573, 576 (5th Cir. 1974).

Here, preliminary injunctive relief is necessary to prevent further irreparable physical harm to the Plaintiffs caused by the Defendants' failure to assess their basic habilitative needs and to provide them with the specialized services to meet those needs and to which they are legally entitled. As more fully set forth in Sections IV-VIII, *infra,* the Plaintiffs have met all of the factors necessary for this court to issue the requested preliminary injunction.

IV. THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE PLAINTIFFS WILL PRAVAIL ON THEIR NHRA CLAIMS

A. Overview of Title XIX of the Social Security Act (Medicaid) and the Relevant Components of the Texas Medicaid Program

1. Federal Medicaid Requirements

Medicaid is a jointly funded state and federal program that provides medical services to low-income persons pursuant to Title XIX of the Social Security Act. 42 U.S.C. §§ 1396 *et seq*. State participation in the Medicaid program is optional. However, States choosing to receive federal matching funds for their Medicaid program must comply with the requirements of the federal Medicaid Act and with the federal regulations governing state Medicaid programs promulgated by the U.S. Department of Health and Human Services ("HHS"). 42 U.S.C. § 1396, 42 C.F.R.§§ 430 *et seq*. *See Harris v. McRae*, 448 U.S. 297, 301 (1980); *Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981); *Equal Justice for El Paso, Inc. v. Hawkins*, 562 F.3d 724, 726 (5th Cir. 2009); *Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 277 (5th Cir. 2008); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 585-86 (5th Cir. 2004); *Blanchard v. Forrest*, 71 F.3d 1163, 1166 (5th Cir. 1996).

As a condition of participating in the federal Medicaid program, States must submit to the HHS, a State Medicaid Plan that fulfills the requirements of the Medicaid Act. 42 U.S.C. § 1396a(a); *Equal Justice for El Paso, Inc. v. Hawkins*, 562 F.3d at 726; *Blanchard v. Forrest*, 71 F.3d at 1166 (*citing Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990)); *Massachusetts Ass'n of Older Americans v. Sharp*, 700 F.2d 749, 750 (1st Cir. 1983). A State Plan must comply with fifty-eight conditions set forth in 42 U.S.C. § 1396a(a) in order to be approved. *Frazer v. Gilbert*, 300 F.3d 530,539 (5th Cir. 2002), *rev'd on other grounds*, 540 U.S. 431 (2004); *Sobky v. Smoley*, 855 F.Supp. 1123, 1126 (E.D. Cal. 1994).

Title XIX enumerates eight broad categories of services that a state must provide to individuals who are "categorically needy."[7] 42 U.S.C. § 1396d(a). In addition to the mandatory services that a State must provide, there are an array of optional or elective services a State may choose to offer. "Once a State elects to provide an optional service that service becomes part of the State Medicaid Plan and is subject to the requirements of federal law." *Sobky*, 855 F. Supp. at 1127 (*citing Weaver v. Reagan*, 886 F.2d 194, 197 (8th Cir. 1989)); *Fred C. v. Tex. Health & Human Servs. Comm'n*, 924 F.Supp. 788 (W.D. Tex. 1996), *vacated and remanded per curium*, 117 F. 3d 1416 (5th Cir. 1997), *on remand*, 988 F. Supp. 1032, 1036 (W.D. Tex. 1997), *aff'd per curiam* 167 F. 3d 537 (5th Cir. 1998); *Elder v. Beal*, 609 F.2d 695, 701-02 (3d Cir. 1979); *see also King v. Smith*, 392 U.S. 309, 316 (1968).

Medicaid-funded services for persons with developmental disabilities include mandated and optional state plan services, PASARR program, the ICF/MR program, and various community programs funded through federal home and community-based waivers pursuant to 42 U.S.C. § 1396n.

[7] 42 U.S.C. § 1396a(a)(10) sets forth the criteria for determining whether an individual is "categorically needy."

2. The Texas Medicaid Program

Texas has chosen to participate in the Medicaid program. It has prepared a State Plan which HHS has reviewed and approved. That Plan, along with the relevant federal law and regulations, forms the foundation for Texas' Medicaid program and establishes Texas' obligations and responsibilities to Medicaid recipients.

As a mandatory service under the Medicaid Act, Texas's Medicaid program funds ICF/MR services, home and community based waiver services, and nursing and specialized services in nursing facilities. As required by the Act and its State Plan, Texas, through DADS, is required to administer a PASARR program and provide specialized services as part of that program, *See* Section IV(B), *infra.*

3. Nursing Facilities

A nursing facility is an institution that primarily provides: (1) skilled nursing care; (2) rehabilitation services for those who are sick, injured or disabled; and (3) health related care and services to individuals who, because of their mental or physical condition, require care and services which can only be provided in an institutional setting. 42 U.S.C. § 1396r(a)(1)(A-C).

Nursing facilities services are defined as "services which are . . . required to be given an individual who needs . . . on a daily basis nursing care (provided by or requiring the supervision of nursing personnel) or other rehabilitation services which as a practical matter *can only be provided in a nursing facility on an inpatient basis.*" 42 U.S.C. § 1396d(f) (emphasis added). A basic condition for State payment and federal reimbursement of nursing facilities is that available community or ICF/MR alternatives do not meet the person's needs and that the individual recipient is appropriately placed according to PASARR standards and DADS' nursing facility eligibility

criteria. 42 C.F.R. §§ 483.122, 483.132. Admission and discharge of persons with disabilities in nursing facilities is governed by the NHRA, 42 U.S.C. § 1396r(e).

DADS licenses nursing facilities in Texas. Because these facilities participate in the federal Medicaid program, DADS is required to review and certify these facilities pursuant to the federal requirements for nursing facilities under 42 C.F.R. §§ 483.1-483.75, as well as the PASARR requirements, 42 C.F.R. § 483.100 *et seq*. As part of its responsibility for surveying, inspecting and certifying nursing facilities, DADS is required to identify and/or correct any lack of compliance with the PASARR regulations. *Id.*

B. *The Requirements of the Nursing Home Reform Amendments and the PASARR Provisions of the Medicaid Act*

1. Overview of PASARR Provisions of the NHRA

The NHRA, 42 U.S.C.§ 1396r(e), is part of a comprehensive remedial statute designed to address the widespread problem of warehousing people with developmental disabilities in the Nation's nursing facilities. Congress noted in the legislative history to the Omnibus Budget Reconciliation Act of 1987 (OBRA 87), that several of the States use federal dollars to inappropriately "warehouse" individuals with mental illness and developmental disabilities in nursing homes that are ill-equipped to meet their special needs. *See Protection and Advocacy, Inc. v. Murphy*, 1992 WL 59100, *2 (N.D. Ill. March 16, 1992), *citing* H.R. Rep. No. 391(I), 100th Cong., 1st Sess. 459, reprinted in 1987 U.S.Code Cong. & Admin.News 2313-279. Texas, which has seen an 8% increase in the number of institutionalized persons with developmental disabilities in nursing facilities since 2006, is a prime example of the inappropriate use of nursing facilities, which concerned Congress.[8] To prevent further unnecessary institutionalization, Congress amended

[8] *See* Braddock, The State of The States In Developmental Disabilities at 57, 272 (AAID, 2011), excerpted pages attached as Ex. A to Dorfman Decl.

the Medicaid Act to require that States implement a PASARR for all individuals with intellectual and developmental disabilities.[9] *See Tex. Health Care Ass'n v. Sullivan*, 1992 WL 206271, *3 (W.D. Tex. April 1, 1992) (Congress adopted PASARR to prevent "warehousing" of patients with mental illness and mental retardation in nursing homes).[10]

In OBRA 87, codified as the NHRA, 42 U.S.C. § 1396r, Congress sought to enforce the long-standing Medicaid proscription against the costly and inhumane practice of institutionalizing individuals who do not require such confinement. *Rolland v. Romney,* 318 F.3d 42, 45-46 (1st Cir. 2003). It did so by mandating a professional review process designed to stem the inappropriate placement of individuals with intellectual or developmental disabilities into institutions that are

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[9] Mental retardation is defined broadly in the statute to include an individual with mental retardation or a related condition, as further described in 42 U.S.C. § 1396d(d). That statutory reference includes all persons with developmental disabilities other than mental retardation as well. The regulations further refine and cross-reference the definition of both mental retardation and related condition. *See* 42 C.F.R. § 483.102(b)(3).

[10] The District Court quoted at length the Congressional history of the Amendments:

> Congress determined that "[s]ubstantial numbers of mentally retarded and mentally ill residents are inappropriately placed, at Medicaid expense, in [nursing homes]. These residents often did not receive the active treatment or services that they need .... Testimony ... indicates that, in 1985, roughly 980,000 nursing home residents, about two-thirds of the nursing home population, had a primary or secondary diagnosis of mental disorder." H.R. Rep. No. 391(I), 100th Cong., 1st Sess. 459 (1987), reprinted in 1987 U.S.Code Cong. & Admin. News 2313-1, 2313- 279. The PASARR legislation is plainly a direct and reasonable way to attempt to eliminate the warehousing of mentally ill and mentally retarded patients in nursing homes. As another district court in this Circuit has put it:
>
> [T]here can be no doubt that Congress could decide that mentally ill and retarded patients were being inappropriately placed in nursing homes. It would be hard to imagine a more rational means of putting a stop to this than to prevent such individuals from entering nursing homes unless a determination is made that it would be appropriate.

Tex. Health Care Ass'n, 1992 WL 206271, at ** 8-9, *quoting from Rayford v. Bowen*, 715 F. Supp. 1347, 1356 (W.D. La. 1989).

unable to provide them with needed treatment. *Id.* at 46. *See also Idaho Health Care Ass'n v. Sullivan*, 716 F. Supp. 464, 472 (D. Idaho 1989) (court rejected challenge to constitutionality of the NHRA, finding that Congress properly acted to benefit "many individuals who are unable to look out for themselves in that they were being inappropriately placed in nursing homes where they were not receiving active treatment for their individual needs").

Under the NHRA, an individual cannot be admitted to a Medicaid nursing facility after January 1, 1989, unless the appropriate state agency[11] determines whether: (1) a person with mental retardation requires the level of services provided by a nursing facility; *and* (2) the person requires active treatment for mental retardation.[12] 42 U.S.C. § 1396r(b)(3)(F)(ii). In addition, by April 1, 1990, and annually thereafter, States are required to review all current facility residents who have mental illness or an intellectual or developmental disability to determine whether they require the level of services provided by a nursing facility *or* require the level of services of an intermediate care facility described under 42 U.S.C. § 1396d(d). 42 U.S.C. § 1396r(e)(7)(B)(ii)(I); 42 C.F.R. § 483.114(b).[13] The review must also determine "whether or not the resident requires specialized services for mental retardation." 42 U.S.C. § 1396r(e)(7)(B)(ii)(II). Failure to perform the

[11] Under the NHRA, 42 U.S.C. § 1396r(e)(7)(B)(iv) and state law, 40 Tex. Admin. Code Rule § 19.2500, the state agency responsible for conducting evaluations and reviews is DADS.

[12] In a 1990 amendment to the Medicaid statute, Congress substituted the term "specialized services" for "active treatment" but made it clear the two terms are synonymous in the context of PASARR requirements.

[13] In a 1996 amendment to the NHRA, the requirement to conduct annual reviews was deleted. Instead, reviews are mandated only when there is a substantial change in the resident's condition. 42 U.S.C. § 1396r(e)(7)(B). There have been no corresponding modifications to the regulatory requirements for annual reviews. 42 C.F.R. § 483.114.

preadmission screenings or annual reviews results in a denial of federal reimbursement.[14] 42 U.S.C. § 1396r(e)(7)(D).

Congress explicitly commanded the Secretary to promulgate regulations to implement several provisions of the statute.[15] Thus, unlike certain federal laws where the administrative agency, on its own initiative, issues interpretative rules, here Congress expressly left it to the administering agency to develop specific requirements with respect to the PASARR process and the funding conditions for serving individuals with intellectual and developmental disabilities in nursing facilities. *Rolland,* 318 F.3d at 48; *Rayford*, 715 F.Supp. 1347, 1352-53 (W.D. La. 1989). The Secretary followed Congress' command, albeit slowly.[16] The regulations both clarify the meaning of certain PASARR requirements and specify the States' duties to individuals with developmental disabilities.

The regulations also describe in detail the process and criteria for conducting PASARR screens and reviews. PASARR assessments must be adapted to the culture, language, ethnic origin, and method of communication of the individual. 42 C.F.R. § 483.128(b). They must include the individual, his/her legal representative, and family. *Id.* at § 483.128(c). Evaluations must be

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[14] The statute and implementing regulations concerning preadmission screenings and annual reviews create enforceable rights for the benefit of individuals with intellectual and other developmental disabilities. *See Rolland,* 318 F.3d at 56; *Martin v. Voinovich*, 840 F.Supp.1175, 1200 (S.D. Ohio 1993). *See also Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 294-304 (S.D.N.Y. 2008). Similarly, the other Medicaid claims discussed in this section are enforceable in federal court pursuant to 42 U.S.C. § 1983. For a detailed discussion of the enforceability of the PASARR provisions of the NHRA, as well as the comparability, reasonable promptness and freedom of choice provisions of Title XIX of the Social Security Act, *see* Plaintiffs' Opposition to the Defendants' Partial Motion to Dismiss, Section III (Doc. 70).

[15] For instance, the Secretary was ordered to issue regulations concerning client rights, 42 U.S.C. § 1396r(b)(7) and to develop minimum criteria for the preadmission screening as well as the annual resident review determinations. *See* 42 U.S.C. § 1396r(f)(8).

[16] Final regulations were published in November 1992. *See* 57 Fed. Reg. 56, 450-514 (1992).

coordinated, must be based upon detailed criteria set forth in the regulations, must review and fully consider available data,[17] must issue findings that correspond to the individual's "current functional status," and must disseminate a comprehensive report that describes, among other things, all specialized services needed by the individual. 42 C.F.R. § 483.126.

2. PASARR Requirements Concerning Level I Screens and Level II Reviews

The PASARR provisions of the NHRA described above require a careful screening of all individuals being considered for admission to a nursing facility to determine if they may have an intellectual or developmental disability. This is referred to as the Level I PASARR screen. 42 C.F.R. § 483.128(a).

All persons seeking admission to a nursing facility whose Level I PASARR screen indicates that they may have an intellectual or developmental disability must then be assessed and evaluated to determine if they do, in fact, have such a disability, whether they satisfy the nursing facility level of care criteria, whether their needs could be met in the community through the provision of appropriate services and supports, and whether they could benefit from the provision of specialized services designed to maximize their functioning or to prevent regression. This part of the PASARR process is referred to as the Level II PASARR review. 42 C.F.R. §§ 483.128(a), 483.132.

The Level II review must include a comprehensive assessment, which analyzes the individual's strengths and needs in fifteen different areas, including current living arrangements, medical, therapeutic, habilitative, and social domains. 42 C.F.R. § 483.136. The assessment must determine whether it would be possible to meet the individual's needs through the provision of services and supports in the community as an alternative to nursing facility placement. 42

[17] This is especially important with respect to the PASARR determination of whether the individual should be placed in "another appropriate setting." 42 C.F.R. § 483.128(f).

C.F.R. § 483.132. If the Level II PASARR review determines that a resident does not require nursing facility services, but instead requires specialized services in a non-institutional setting, the State has a duty to provide or arrange for the provision of these services to the resident in an appropriate community setting. 42 U.S.C. § 1396r(e)(7)C)(i); 42 U.S.C. § 1396r(e)(7)(C)(ii); 42 C.F.R. § 483.118(c); 42 C.F.R. § 483.120(b).[18]

If the individual is admitted to a nursing facility, periodic reviews must be conducted whenever there is a change in the person's condition to determine whether the individual continues to need a nursing level of care and to require confinement in a nursing facility. The initial and periodic PASARR Level II evaluations must also determine whether specialized services are necessary to provide habilitation and active treatment. 42 U.S.C. §§ 1396r(b)(3)(F)(i), 1396r(e)(7)(A)&(B); 42 C.F.R. §§ 483.128, 483.132, & 483.136.

3. PASARR Requirements Concerning the Provision of Specialized Services: Deceleration and Prevention of Regression

Specialized services consist of a continuous active treatment program that includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health and related services that are aimed at allowing the individual to function as independently and with as much self-determination as possible, and services designed to prevent or decelerate regression and loss of abilities. 42 C.F.R. §§ 483.120, 483.440(a). If the individual requires specialized services, under federal law the state must provide those services with the frequency, intensity, and duration that, taken together with needed nursing services, meet the federal standard for active treatment. 42 C.F.R. § 483.440(a).

[18] The PASARR reviewers are obligated to explain to the individual involved and, where applicable, his or her legal representative the results of the Level II PASARR evaluation, including information regarding the individual's ability to reside in a less restrictive community placement, and must provide the individual and legal representative with a copy of the PASARR report. 42 C.F.R. §§ 483.128(k), 483.130(l)(3).

If the PASARR review determines that an individual admitted to a nursing facility needs specialized services, it must then be determined if the nursing facility can provide all needed specialized services and active treatment. If the review concludes the facility cannot, the individual cannot be admitted to that nursing facility. 42 C.F.R. § 483.126. The regulations issued by the Secretary describing the State's basic obligations under NHRA to conduct PASARRs, 42 C.F.R. § 483.106, make clear that the State's developmental disability authority cannot delegate its ultimate responsibility to comply with the statute to another entity. *Id.* at § 483.106(e). If an individual is determined to need specialized services, "the State must provide or arrange for the provision of the specialized services needed by the individual...." *Id.* at § 483.116(b)(2). Significantly, "the State must provide or arrange for the provision of specialized services, in accordance with this subpart, to all NF[19] residents [with mental retardation] whose needs are such that *continuous supervision, treatment and training by a qualified ... mental retardation professional is necessary as identified by the [PASARR] screening.* 42 C.F.R. § 483.120(b)(emphasis added). Specialized services "means the services specified by the state, which combined with the services provided by the NF or other service providers results in the [active] treatment requirements of 42 C.F.R. § 483.440(a)(1)."[20]42 C.F.R. § 483.120(a)(2). Thus, there is an

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[19] Throughout the regulations the abbreviation "NF" refers to nursing facilities.

[20] Active treatment is defined as:

> (1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services, and related services described in this subpart, that is directed toward --
>
> > (i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and

unconditional mandate that the relevant state agency must ensure that recommended specialized services -- of sufficient intensity, along with the services provided by the NF, so as to constitute continuous active treatment and ongoing training by qualified staff -- are actually provided to each resident determined to need them.

If an individual who is determined to need specialized services by the PASARR process is admitted to, or retained in, a nursing facility, there must be firm assurances that the services can be and will be provided or arranged for by the State in a timely manner. 42 C.F.R. § 483.130(n). These assurances must be set forth in the State Medicaid Plan and confirmed on an individual basis by the PASARR process. The standards for making that determination are delineated in 42 C.F.R. § 483.136. The fundamental criteria is "whether the individual needs a *continuous* specialized services program which is analogous to active treatment defined in §§ 435.1009 and 483.440 of this chapter." *Id.* (emphasis added). The standards also require a determination of whether the individual's "training needs ... necessitate the availability of trained MR personnel, 24 hours per day, to teach the person functional skills." 42 C.F.R. § 483.136(c)(2)(iii). Failure to guarantee and comply with these assurances renders the placement inappropriate.

Thus, the PASARR regulations make clear that specialized services must be provided to persons who have been determined to need them by the PASARR process. 42 C.F.R. §§ 483.120(b); 483.136. Those services must be provided when they are needed, and without delay. 42 C.F.R. § 483.116. They must be provided by the States, not the nursing facilities, since the

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> (ii) The prevention or deceleration of regression or loss of current optimal functional status.
>
> (2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

42 C.F.R. § 483.440(a).

facilities are not permitted to claim federal financial participation for offering these services. 42 C.F.R. §§ 483.104, 483.108, 483.116(a), 483.124. *See* 57 Fed. Reg. 56,477 (nursing facility not accountable for specialized services). It is the State's responsibility to ensure that specialized services are provided, and to coordinate with nursing facilities so that continuous active treatment for all residents with disabilities who need it, actually receive it. 42 C.F.R. § 483.120(b) and (c). Congress' and CMS's plan for ensuring that residents of nursing facilities with mental disabilities receive the specialized services to which they are entitled is reasonable, clear, and unambiguous. *See* 57 Fed. Reg. 56,477.

C. The Defendants' Failure to Conduct PASARR Level I Screens and Level II Reviews and to Provide Specialized Services in the Most Appropriate Settings

The Governor, Defendant Perry, is responsible for ensuring that the State submits a State Medicaid Plan which conforms to federal law, and that Texas's Medicaid program is administered consistent with that Plan, relevant federal statutes, and federal regulations. Tex. Gov't Code §§531.005, 531.0055 & 531.021; *Cmty. Health Choice, Inc., v. Hawkins*, 328 S.W.3d 10, 15 (Tex. App.-Austin 2010, no pet.) (when Texas Medicaid appropriations are insufficient to meet expenditures required by state or federal law, the Governor and the Legislative Budget Board are authorized to direct the transfer of sufficient funds to HHSC from Medicaid appropriations made elsewhere).

HHSC and its Executive Commissioner, Defendant Suehs, are responsible for the overall administration of the Texas Medicaid program. They have delegated to DADS and its Commissioner, Defendant Traylor, responsibility for the delivery of Medicaid and other services and supports to elderly and disabled Medicaid recipients, including the Plaintiffs. Tex. Gov't Code §531.021 *et seq.*; *see also Jonathan C. v. Hawkins*, 2006 WL 3498494, at *7 (E.D. Tex. December 5, 2006). Pursuant to the PASARR provisions of the Medicaid Act, 42 U.S.C. §

1396r(e)(7) and their implementing regulations, 42 C.F.R. § 483.132, DADS and Defendant Traylor are responsible for accurately identifying, through the PASARR screening process, whether any individuals have an intellectual or developmental disability, whether a nursing facility is an appropriate placement, or whether the individual's needs could be met in a more integrated community setting. 42 C.F.R. §§ 483.106(e); 483.132. They are also responsible for ensuring that persons with intellectual and developmental disabilities are comprehensively assessed for specialized services, and that those who require specialized services are promptly provided these services at the appropriate level, intensity, and duration in the appropriate setting. 42 C.F.R. §§ 483.120(a), 483.440(a).

Defendants Perry, Suehs and Traylor have failed to ensure that the Plaintiffs, who are categorically eligible for Medicaid services, are provided those medically necessary services to which they are entitled under the Plan and pursuant to Title XIX of the Social Security Act. *See* Section II, *supra*. Specifically, these Defendants have failed to develop and implement a PASARR program that timely and appropriately screens nursing facility applicants for a developmental disability; that determines whether the needs of individuals with developmental disabilities could be met in an alternative, less restrictive setting; that assesses whether the individual needs specialized services; and, if so, that provides those services in a timely manner in the appropriate setting, consistent with federal standards *Id. See also* 42 C.F.R. § 483.120(b).

The problem in this case is not that the Defendants do not understand how to provide these services, but simply that they have chosen not to do so. The Defendants' failure to conduct PASARR reviews in a complete, comprehensive and professional manner and their failure to provide the necessary specialized services, including appropriate habilitation services, to persons with developmental disabilities has resulted in several of the Plaintiffs habilitation needs being

largely ignored in violation of the NHRA. *See* Section II, *supra*, and Report at 4-5, 8, 12. As Ms. McGowan's Report reveals, not one of the Plaintiffs reviewed had an adequate, timely Level I PASARR Screen and none had any of the required Level II evaluations or reviews. *Id.* at 4-5, 8, 12. Furthermore, rather than providing the full array of specialized services necessary to allow class members to function as independently and with as much self-determination as possible, the Defendants have, by regulation and in violation of federal law, arbitrarily restricted the scope of specialized services provided by the nursing facility to "physical, occupational, and speech therapy evaluations and services." 40 Tex. Admin. Code § 19.1303.[21] DADS has even constrained the scope of services that the local mental health and mental retardation authority (hereafter "MRA") is responsible for providing to eligible nursing facility residents.[22] According to the MRA OBRA Handbook (Revision 10-0, Oct. 26, 2009),[23] there are just two specialized services nursing facility residents with developmental disabilities are entitled to receive –vocational training and alternate placement services – even though similarly-situated persons with developmental disabilities are offered a wide range of habilitative services and supports by the same Defendant if they live in other Medicaid facilities or in the community. *See* DADS Information Letter dated January 25, 2011 regarding nursing facility specialized services. Available at http://www.dads.state.tx.us/providers/communications/2011/letters/IL2011-11.pdf

As a direct result of the Defendants' violation of federal law, the Plaintiffs are

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[21] *See also* DADS Information Letter dated January 25, 2011 regarding nursing facility specialized services. Available at http://www.dads.state.tx.us/providers/communications/2011/letters/IL2011-11.pdf

[22] All of the services that MRAs are responsible for providing occur outside the nursing facility and are related to community-based activities.

[23] *See also* n. 21 regarding MRA specialized services. Available at http://www.dads.state.tx.us/providers/communications/2011/letters/IL2011-11.pdf

inappropriately confined at their nursing facilities and needlessly experiencing, and will likely continue to experience, regression and deterioration in their current condition and functioning as further described in Section II, *supra*.

V. THERE IS A SUBSTANTIAL THREAT THAT THE PLAINTIFFS WILL SUFFER IRREPARABLE INJURY IF A PRELIMINARY INJUNCTION IS NOT GRANTED

The irreparable injury resulting from the Defendants ongoing refusal and failure to provide the Plaintiffs with the requisite evaluations of their habilitative needs, and provide the specialized services in the most appropriate settings to address these needs, will be severe. Andrea Padron, Linda Arizpe, and Eric Steward have had no adequate screens or assessments of their basic habilitative needs and have not received the necessary specialized and nursing services in the most appropriate setting required to meet these needs. Report, at 3-16. Thus, the Plaintiffs have been deprived of specialized services for many years and are actually being harmed, on an ongoing basis, as a result of their inappropriate confinement to their nursing facilities. Consequently, they have not only lost skills, but also developed severe medical conditions, some of which are life-threatening. *Id.* For example, because Andrea Padron has languished in her bed for at least the past five years with virtually no activity, save an hour or two each week, she is now unable to breathe easily, move her joints, or stand on her feet with the assistance of a stander. In fact, she is no longer responsive. *Id.* at 3-7. 15. For Andrea, if no preliminary injunction issues, she is almost certain to die from these preventable conditions. *See id.*

Similarly, Linda Arizpe, due to lying idle with virtually no active treatment for the past seven years while be inappropriately confined to her nursing facility, has developed a number of serious medical conditions, including a frog-leg deformity that prevents her from holding her

legs together and severe deterioration of her hips. *Id.* at 7-11, 15. Without immediate intervention, Linda's deformity pattern will worsen and likely become impossible to reverse. The deterioration of her hips will also continue and the chances of any intervention, short of invasive surgery, to mitigate the damage will be diminished and likely foreclosed. *Id.* She will remain confined to her bed with heightened vulnerability to developing other serious medical conditions, her ability to move increasingly comprised, and her isolation prolonged.

If the Defendants continue to deny Eric Steward an evaluation of his needs and the specialized services to meet these needs in the most appropriate setting, he will continue to regress irreparably. He will have no meaningful chance of regaining his ability to walk and engaging in vocational and other programming. His already existing serious medical conditions will go untreated and are likely to deteriorate. *Id.* at 11-15.

The deprivation of prompt specialized and nursing services covered under Medicaid and mandated by the Medicaid Act constitutes irreparable harm. *See Knowles v. Horn*, 2010 WL 517591 at *7 (N.D. Tex. Feb. 10, 2010) (plaintiff demonstrated irreparable injury where he was at substantial risk of death and had no adequate remedy at law if his Medicaid-funded community-based services were withdrawn); *Camacho v. Texas Workforce Com'n*, 326 F.Supp. 2d 794, 802 (W.D. Tex. 2004) (irreparable harm shown where state sought to enact rules restricting Medicaid eligibility, which if allowed to take effect, would cause plaintiffs to lose medical benefits and leaving them with no way to pay for medical care, care for their children and work, and cause financial loss); *Oak Park Health Care Center, LLC v. Johnson*, 2009 WL 331563, at *3 (W.D. La. Feb. 10, 2009) (finding irreparable harm to nursing home residents and their families where cessation of provider contract would result in residents having to suddenly move nursing home residents to a new facility).

Here, the Plaintiffs have clearly demonstrated that, absent immediate preliminary injunctive relief, they will be irreparably harmed as a result of their deterioration, their inadequately and untreated physical conditions, and the lack of specialized services provided in the most appropriate setting to meet their habilitative needs and prevent regression. Since they have no adequate remedy at law, equitable relief, in the form of a preliminary injunction, is necessary. *See* Section II, *supra* and Report.

VI. THE PLAINTIFFS' SUBSTANTIAL INJURIES OUTWEIGH ANY INJURY THE DEFENDANTS MIGHT SUFFER IF AN INJUNCTION ISSUES

The substantial injuries to the Plaintiffs sharply outweigh any injury to the Defendants. As described above, the severe harm to the Plaintiffs if no injunction issues will result in further physical deterioration, functional regression, and perhaps death. The Defendants' failure to provide the Plaintiffs with the necessary evaluations of their habilitative and medical needs and the specialized and nursing services to meet these needs has caused them to incur profound loss of their functional skills as well as extreme physical and medical deterioration. Report at 3-16; *see also* Section II, *supra*. The Defendants, by contrast, will suffer little or no harm, particularly because an injunction would only require the Defendants to do what they are already legally required to do. *See* Section IV, *supra*.

Furthermore, any claim that the Defendants may make with regard to hardship due to fiscal constraints cannot, as a matter of law, serve as a valid excuse for not fulfilling their obligations under Medicaid and the NHRA. *Alabama Nursing Home Ass'n v. Harris*, 617 F. 2d 388, 396 (5th Cir. 1980) ("A state is not obligated to participate in the Medicaid program. However, once it has voluntarily elected to participate in the program, the state must comply with federal statutes. Inadequate state appropriations do not excuse noncompliance) (citations omitted); *Camacho,* 326 F. Supp. 2d at 802, (In finding that the hardships to plaintiffs

outweighed any harm to defendant, court held that as a matter of law, " '[A] state's budget problems cannot serve as an excuse for altering federal eligibility requirements of federal funding; if they could, the federal requirements would become superfluous' ") *quoting Planned Parenthood v. Sanchez*, 280 F. Supp. 2d 590, 606 (W.D. Tex. 2003); *Camacho v. Texas Workforce Com'n*, 408 F.3d 229 (5th Cir. 2005) ("States electing to participate in the [Medicaid] program must comply with requirements imposed by the Act and regulations of the Secretary of Health and Human Resources"); *Lopez v. Heckler*, 713 F.3d 1437 (9th Cir. 1983); *Kansas Hosp. Ass'n v. Whiteman*, 835 F.Supp. 548, 1552-53 (D. Kan. 1993).

While an injunction has very minor resource implications for the Defendants, the failure to comply with federal law potentially has more serious resource implications. Under federal law, Texas is prohibited from claiming federal reimbursement for care or confinement that does not meet federal standards for active treatment. 42 U.S.C. § 1396r(e)(7)(D) and 42 CFR §§ 483.122 and 483.124. Moreover, under the conditions of participation in the Medicaid program, the Defendants simply cannot assert that resource constraints preclude their compliance with the mandates of Title XIX, the obligations of the NHRA, or the commitments set forth in the Texas Medicaid State Plan. Thus, the Defendants' continued refusal to comply with the requirements of Medicaid and the NHRA could have an enormous negative financial impact on the State.

When the Plaintiffs' loss of basic life skills is balanced against the very minor cost to the Defendants, and the potential loss of a huge amount of federal reimbursement, the balance of harm clearly tilts in favor of an injunction.

VII. AN INJUCTION WILL NOT DISSERVE THE PUBLIC INTEREST

Granting preliminary relief requiring the Defendants to comply with the law by providing Andrea, Linda and Eric with proper screens, assessments, and specialized services that they

require to meet their basic habilitative needs and prevent their further regression could have no appreciable negative impact on the public. To the contrary, such relief will service the public interest.

Courts have consistently held that the public interest is served where injunctions are issued to stop government officials and entities from violations of the law, particularly in regards to constitutional and statutory laws pertaining to civil rights, welfare and medical benefits and other rights, including Medicaid. *Camacho,* 326 F.Supp. 2d at 802, *quoting Finlan v. City of Dallas*, 888 F.Supp. 779, 791 (N.D. Tex. 1995) (*quoting Nobby Lobby, Inc. v. City of Dallas*, 767 F.Supp. 801 (N.D. Tex. 1991), *aff'd*, 970 F. 2d 82 (5th Cir. 1992)) ("[T]he public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve."); *Kansas Hosp. Ass'n*, 835 F.Supp. at 1552-53 (finding where the "effect of a temporary restraining order would be to enforce the federal law and regulations governing the Medicaid program," it is in the public interest).

In enacting the NHRA, Congress explicitly recognized the public interest in ensuring that individuals with intellectual and developmental disabilities in nursing facilities, such as the Plaintiffs, receive the necessary specialized habilitative services to prevent regression. H.R. Rep. No. 391(1), 100th Cong., 1st Sess. 459 (1987), reprinted in 1987 Code Cong. & Admin. News 2312-1 to 2313-279 (Congress found that "substantial numbers of mentally retarded and mentally ill residents are inappropriately placed, at Medicaid expense, in [nursing facilities]. These residents often do not receive the active treatment or services that they need.")

Courts have also recognized the importance and validity of the NHRA and the PASARR process. *See Tex. Health Care Ass'n* 1992 WL 206271 at * 8-9 ("The PASARR legislation is plainly a direct and reasonable way to attempt to eliminate the warehousing of mentally ill and

mentally retarded patients in nursing homes."); *see also Rayford*, 715 F.Supp. at 1356 ("There can be no doubt that Congress could decide that mentally ill and retarded patients were inappropriately placed in nursing homes. It would be hard to imagine a more rational means of putting a stop to this than to prevent such individuals from entering nursing homes unless a determination is made that it would be appropriate."); *Tex. Health Care Ass'n v. Bowen*, 710 F.Supp. 1109, 1110 (W.D. Tex. 1989) (Stating that in enacting of the OBRA, "it appears uncontested that the revisions were intended to end inappropriate placement of mentally ill and mentally retarded individuals in nursing homes not equipped to deal with such individuals' special needs").

Here, the Plaintiffs have clear federal statutory rights to such evaluations and specialized services. *See* Section IV, *supra*. They have been denied these rights for many years and have consequently lost skills and acquired serious medical conditions, some of which are life threatening. If no immediate relief is afforded, these already dangerous conditions will be exacerbated and they will further regress. *See* Sections II and IV, *supra*, and Report attached as Ex. A to McGowan Decl.. Remedying such violations is clearly in the public interest.

Finally, as discussed above in Section VII, the failure to comply with the requirements Title XIX and the NHRA, may cost the State money because federal reimbursement for Medicaid nursing facility services could be disallowed, due to its failure to provide the Plaintiffs with the requisite active treatment.

VIII. THE PLAINTIFFS SHOULD NOT BE REQUIRED TO POST A SECURITY BOND AS A CONDITION OF THE PRELIMINARY INJUNCTION

The Plaintiffs should not be required to post a security bond if a preliminary injunction is issued. Although Fed. R. Civ. P 65 (c) permits courts to order the posting of a bond, they are not required to do so. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996). Courts regularly

decline to require a plaintiff to post bond where the harm to the plaintiff significantly outweighs the harm to defendant and the plaintiff is indigent. *Temple Univ. v. White*, 941 F.2d 201, 220 (3rd Cir. 1991) (waiver of bond requirement in case where brought to enforce Medicaid Rights); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 385 (C.D. Cal. 1982) (Court declined to order indigent El Salvadorian plaintiffs to post security when a TRO was issued against plaintiffs).

Here, the Plaintiffs are all indigent. *See* Amend. Comp. (Doc. #63) ¶¶ 137,248; *see also* ¶¶ 147, 164-167. Moreover, as discussed above in Section VI, any harm to the Defendants resulting from the issuance of a preliminary injunction is sharply outweighed by the harm to the Plaintiffs if such an injunction does not issue. Thus, they should not be required to post a security.

IX. CONCLUSION

For the reasons set forth above, the Plaintiffs Andrea Pedron, Linda Arizpe and Eric Steward, respectfully request that this Court preliminarily enjoin the Defendants, their officers, agents, servants, employees, and attorneys, and any and all persons in active concert or participation with them, from denying the Plaintiffs' comprehensive assessments of their habilitative needs, and the identified specialized and nursing services to meet those needs in the most appropriate setting, as required by federal law.

Specifically, the Plaintiffs respectfully request that the Court order Defendants to:

(1) Conduct a comprehensive assessment by a qualified mental retardation professional of each Plaintiff's habilitative and nursing needs, including the most appropriate setting to meet those needs, in accordance with professional standards and federal regulations. The assessment should be conducted in consultation with Karen Green McGowan and completed within thirty (30) days of issuance of an injunction;

(2) Provide, or ensure the provision of, all necessary specialized and nursing services required to meet each the Plaintiffs' habilitative needs in the most appropriate setting, as determined by the comprehensive assessment and the consultation with Karen Green McGowan, within thirty (30) days of completion of the comprehensive assessment;

(3) Ensure that the combination of specialized and nursing services are provided in the most appropriate setting and with sufficient frequency, intensity and duration to prevent deceleration of their conditions or regression and to satisfy the federal standard for active treatment, as required by the PASARR provisions of the Medicaid Act and their implementing regulations; and

(4) Certify to the Court and the parties that they have fully complied with the Court's Order within 60 days of the date of the Order.

If either the Defendants fail to make the required certification or the services provided to each Plaintiff do not meet federal standards, the Defendants shall promptly transfer each Plaintiff to an appropriate community setting with necessary supports.

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF CONFERENCE

I, Garth A. Corbett, hereby certify that I have conferred with counsel for Defendants on the relief requested in this Motion for Preliminary Injunction, and certify that Defendants are opposed to the relief sought herein.

/s/ Garth A. Corbett
Garth A. Corbett

CERTIFICATE OF SERVICE

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

Dated: May 9, 2012

/s/ Garth A. Corbett
Garth A. Corbett