IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM R. HAMPE, by and through his mother / guardian Jill Hampe, **RICHARD L. WINFREY, III,** and **ADAM CALE, OLIVIA WELTER** by and through her parents/guardians John Welter and Tamara Welter, **PHILLIP BARON,** by and through his mother/guardian Barbara Baron, **JESSICA L. LYTLE,** by and through her mother/guardian Judith A. Lytle, **JACOB STRACKA,** by and through his parents/ guardians, David Stracka and Nicole Stracka, and **CHARLES STOUT**, individually and on behalf of a class,	)	
Plaintiffs,	)	
	)	No. 10 C 3121
vs.	)	
	)	Judge Ruben Castillo
JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	Magistrate Judge Arlander Keys
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant, JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, by and through her attorney, LISA MADIGAN, Attorney General of Illinois, and submits her Response to Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support of her Motion for Summary Judgment, as follows:

I. STATEMENT OF FACTS.

Defendant adopts and incorporates by reference all the facts set forth in Defendant's Local Rule 56.1(b)(3)(C) Statement of Additional Material Facts and Defendant's Local Rule 56.1(a)(3) Statement of Material Facts as the Statement of Facts.

II. STANDARD OF REVIEW.

Summary judgment may be an appropriate means by which to resolve issues of law. *Flath v. Garrison Public School Dist*, 82 F.3d 244, 246 (8th Cir. 1996) (where unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate). As this case is presently postured, it presents issues of law. Under the Third Amended Complaint filed October 28, 2010, the named Plaintiffs and class (hereafter collectively referred to as "Plaintiffs") claimed that Defendant violated the Americans with Disabilities Act ("ADA") and its implementing regulation by the "planned reduced funding or actual reduced funding of the home nursing and other services" that they allegedly need in order to avoid institutionalization upon their reaching the age of twenty-one. *Hampe v. Hamos*, 10 C 3121, U.S. Civil Docket at 54, Paragraphs 210-18 (hereafter "*Hampe* Civil Docket at ___"). The Plaintiffs claimed that Defendant violated the Rehabilitation Act and its implementing regulation by the "planned reduced funding or actual reduced funding of the home nursing" that they allegedly need in order to avoid institutionalization upon their reaching the age of twenty-one. *Hampe* Civil Docket at 54, Paragraphs 219-227. The Third Amended Complaint prayed for a declaratory judgment that Defendant's reduction in funding when aging out of the MF/TD Waiver violates the ADA, Rehabilitation Act and regulations. *Hampe* Civil Docket at 54, page 54. Plaintiffs prayed for a permanent injunction "to restore the funding to maintain the existing medical services for the Plaintiffs and the putative class prior to aging out of the … [MF/TD] program …" *Hampe* Civil

Docket at 54, page 55. The Plaintiffs claim that they are entitled to "funding for services" and services that are only available to children under the age of twenty-one. At bottom, all Plaintiffs want in-home private duty nursing services to continue, at a minimum, at the level they had prior to reaching age twenty-one. Regardless of how Plaintiffs cast their claims, a declaratory judgment and permanent injunction to require Defendant to 1) modify the Medicaid program by removing the EPSDT age limit for Plaintiffs, or 2) modify the Home Services Program to allow Plaintiffs to receive the services at the level they received as children is not a reasonable modification under the ADA and Rehabilitation Act. Plaintiffs have not established that they are entitled to judgment in their favor for all the reasons set forth below.

III. ARGUMENT.

DEFENDANT DOES NOT VIOLATE THE ADA, THE REHABILITATION ACT OR THE REGULATIONS BY ENDING PRIVATE DUTY NURSING SERVICES TO THE PLAINTIFFS AND THE CLASS UPON ATTAINING THE TWENTY-FIRST BIRTHDAY.

A. The Plaintiffs Are Not Qualified Individuals With A Disability.

The relevant portion of the ADA states:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (Westlaw 2012).

The ADA defines a "qualified individual with a disability" as one who "with or without reasonable modifications to rules, policies, or practices … meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (Westlaw 2012). In order to determine whether Plaintiffs are a "qualified individual with a disability," for ADA purposes, the court must first determine

whether the age limit in EPSDT is an essential eligibility requirement of the Medicaid program. *See Aughe v. Shalala*, 885 F. Supp. 1428, 1432-33 (W.D. Wash. 1995). If the age requirement is essential, only then should the court determine whether Plaintiffs meet the requirement with or without modification. *Id.*

An eligibility requirement may be deemed "essential" only if the program's purposes could not be achieved without the requirement. *Alexander v. Choate*, 469 U.S. 287, 300-01 (1985) (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 413-14 (1979)). The analysis of whether an individual is "otherwise qualified" and whether an individual has been discriminated against on the basis of disability, is really two sides of the same coin. *Choate*, 469 U.S. at 299, n.19. The ultimate question will always be whether the relief the plaintiff is seeking is a reasonable modification to the program. *Id.* Requiring modification is unreasonable when it would necessitate modification of the essential nature of the program, *Choate*, 469 U.S. at 302-06; *Davis*, 442 U.S. at 410, 413 (1979), or entail unreasonable expense. *Choate*, *Id.* at 306-09; a*ccord: Olmstead v. L.C.*, 527 U.S. 581, 603-07 (1999) (under the ADA the State may resist modifications that entail fundamental alterations of the State's services and programs). Under these authorities, extending the benefit of EPSDT services to any Medicaid-eligible individual who has passed the twenty-first birthday is not a reasonable modification.

The Medicaid Act, 42 U.S.C. § 1396 *et seq.* (Westlaw 2012), was established to allow states to provide medical assistance to eligible individuals and families with insufficient income or resources to pay for certain medical services. *Id.*; *Harris v. McRae*, 448 U.S. 297, 301 (1980). A state's participation in the Medicaid program is voluntary, but once a state elects to participate, it must abide by all federal requirements and standards as set forth in the Medicaid Act. *Wilder v. Virginia Hospital Ass'n,* 496 U.S. 498, 502 (1990). Illinois participates in Medicaid.

One such requirement of the Medicaid Act is EPSDT. Congress directed the single state Medicaid agency to ensure that certain health services are available to children. The EPSDT provisions of the Medicaid program obligate the Medicaid agency to make certain routine healthcare like screening services and immunizations available to children. 42 U.S.C. §§ 1396a(a)(43); 1396d(r). Title XIX requires a State participating in the Medicaid program, as a condition of its participation, to include EPSDT as part of its Title XIX State Medicaid Plan. 42 U.S.C. §§ 1396a(a)(43); 1396a(a)(10) (Westlaw 2012); *Collins v. Hamilton*, 349 F.3d 371, 374 (7th Cir. 2003). EPSDT is not a program; it is a service. *Collins*, *Id*.

The Act of Congress defines "screening services" at 42 U.S.C. § 1396d(r)(1)-(4). Screening services include a comprehensive health and developmental history that includes an assessment of physical and mental health development, Section 1396d(r)(1)(B)(i), a comprehensive unclothed physical exam, Section 1396d(r)(1)(B)(ii), immunizations, laboratory tests, health education, vision services, dental services and hearing services. Section 1396d(r)(1)(B); (2); (3); (4). Screening services are to be made available at intervals which meet reasonable professional practices, or as medically necessary. Section 1396d(r)(1)(A); (2)(A); (3)(A); (4)(A).

The Act of Congress imposes no general requirement on the single state Medicaid agency to provide screening services to all Medicaid-eligible children. 42 U.S.C. §§ 1396a(a)(43); d(r) (Westlaw 2012). At Section 1396a(a)(43)(A) (Westlaw 2012), the Act of Congress requires that the State Medicaid plan provide for "informing all persons in the State who are under the age of 21 … of the availability of … [EPSDT] services …" Section 1396a(a)(43) also states, in pertinent part, that with respect to EPSDT the single state Medicaid agency shall:

> (B) provid[e] or arrang[e] for the provision of such screening services *in all cases where they are requested*,
>
> (C) arrang[e] for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment *the need for which is disclosed by such child health screening services ...*

42 U.S.C. § 1396a(a)(43)(B); (C) (Westlaw 2012) (emphasis added). 42 U.S.C. § 1396a(a)(43)(D), obligates the single state Medicaid agency to report to the federal Secretary of HHS certain information respecting EPSDT services provided during each fiscal year, including: the number of children receiving child health screening services, the number of children referred for corrective treatment and the State's results in meeting the participation goals set for it by the Secretary of HHS. 42 U.S.C. § 1396a(a)(43)(D)(i), (ii), (iv) (Westlaw 2012).

The Act of Congress also defines the term EPSDT to include:

> (5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State [Medicaid] plan.

42 U.S.C. § 1396d(r)(5) (Westlaw 2012). Under EPSDT, a Medicaid-eligible child shall receive services and treatment allowable in 42 U.S.C. § 1396d(a) to correct or ease the conditions discovered through the periodic screenings, *whether the State includes the corrective services in its State Medicaid plan or not.* (Emphasis supplied). The Act of Congress directs the federal Secretary of HHS to set annual participation "goals" for each state in order to measure how many Medicaid-eligible children are participating in EPSDT services. Section 1396d(r)(5).

First, the language Congress used could not be plainer. EPSDT is a separate provision to have certain Medicaid services available to children under the age of 21. 42 U.S.C. §§ 1396d(a)(4); 1396a(a)(10) (Westlaw 2012). Congress did not create EPSDT to clothe the

Medicaid agency with the authority to operate home and community-based services programs. 42 U.S.C. §§ 1396a(a)(43); d(r) (Westlaw 2012). Rather, that authority lies in 42 U.S.C. § 1396n(c) (Westlaw 2012). Second, under the plain language of Title XIX, Congress clearly intended to confer the benefit of certain services, such as designated out-of-State plan corrective and ameliorative services, on children only. Sections 1396a(a)(43); d(r) (Westlaw 2012). There is no reason for EPSDT or 42 U.S.C. § 1396d(a) to exist if the State is obligated to make the entire basket of every conceivable medical service accessible to each Medicaid-eligible individual. Third, there is no general Medicaid counterpart to EPSDT's requirement that medical services, including out-of-State plan services, be provided whenever need for such services has been demonstrated. In fact, other Medicaid benefits are defined by age. *See e.g.*, 42 U.S.C. § 1396d(a)(B) (Westlaw 2012) (IMD exclusion; certain services not available to Medicaid recipients under the age of 65 who reside in IMDs). Fourth, the EPSDT statutes target the single state Medicaid agency's obligation to provide EPSDT services and treatment to physical and mental illnesses and conditions *discovered by the screening services*. 42 U.S.C. § 1396d(r)(5) (emphasis added); 42 U.S.C. § 1396a(a)(43)(C). In other words, EPSDT does not impose a wholesale, generic obligation on Defendant to uncover conditions in children that may require correction or amelioration. Rather, EPSDT obligates Defendant to act after the results of a healthcare professional's screening demonstrate a "need" for corrective treatment. 42 U.S.C. § 1396a(a)(43)(C) (Westlaw 2012). Fifth, Title XIX directs the federal Secretary of HHS to set annual participation goals in EPSDT services for Medicaid-eligible children in the State, *i.e.*, a yardstick, by which the federal government can measure the amount of EPSDT services provided. 42 U.S.C. §§ 1396a(a)(43); d(r)(5) (Westlaw 2012). The EPSDT statutes do not authorize the Secretary of HHS to order the single State Medicaid agency to provide services, or

to create a program for the provision of services. Lastly, Congress' intent in enacting in EPSDT was both to benefit Medicaid-eligible children and to preserve Medicaid funds. EPSDT is for children and any waiver of the age limit contained in the Medicaid Act is at odds with Congress' intent in devising a set of services available to children only.

Having concluded that the age limit is an essential eligibility requirement, the court must next determine, as part of the ADA analysis, whether the Plaintiffs meet the age requirement with or without modification. *Aughe v. Shalala,* 885 F. Supp. 1428, 1432 (W.D. Wash. 1995). Obviously, once each Plaintiff reaches his or her twenty-first birthday, they cannot meet the EPSDT age limit without modification. Neither waiving the age limit for Plaintiffs, nor requiring Defendant to cover private duty nursing for them beyond the twenty-first birthday, nor requiring Defendant to provide "funding" at a level they enjoyed as children, is a reasonable modification. First, the State of Illinois cannot waive the requirements of an Act of Congress. *Aughe*, 885 F. Supp. at 1431. Second, a modification that rewrites an Act of Congress is not reasonable as a matter of law. *Id*. at 1432. Third, a modification is not reasonable when it compels the State to cover an optional Medicaid service, *i.e.*, private duty nursing, that Congress permitted the State to cover or not. 42 U.S.C. §§ 1396a(a)(10)(A); 1396d(a)(8) (Westlaw 2012). *See* Defendant's Local Rule 56.1(b)(3)(C) SMF at Nos. 139, 142-43, 154-55; Defendant's Local Rule 56.1(a)(3) SMF at Nos. 13, 16-17, 27-28 (Illinois' Title XIX State Medicaid Plan and MF/TD Medicaid Waiver do not include private duty nursing as a covered Medicaid service). Fourth, modifications, as previously stated, are not reasonable if they impose undue financial and administrative burdens or if they require a fundamental alteration in the nature of the program. *Alexander v. Choate*, 469 U.S. 287 (1985); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Olmstead v. L.C.*, 527 U.S. 581 (1999). The relief Plaintiffs seek, if granted, would

fundamentally alter the structure of Title XIX. Title XIX is a program of cooperative federalism; a State cannot be compelled to fund services that Congress itself is unwilling to fund. *Harris v. McRae*, 448 U.S. 297, 308-310 (1980). General civil rights statutes, like the ADA and Rehabilitation Act, do not evidence Congress' intent to impose massive funding obligations on States that Congress itself has chosen not to fund. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 22-27 (1981) (citing *Harris v. McRae*, 448 U.S. 297, 309 (1980)); *Duquette by Duquette v. Dupuis*, 582 F. Supp. 1365, 1369-1372 (D.N.H. 1984).

Moreover, under *Choate*, 469 U.S. at 301-09 (1985), the State need not alter the benefits offered under its Medicaid program simply to meet the reality that disabled persons have greater medical needs because, to conclude otherwise, would be to find that the Rehabilitation Act requires that States view certain medical conditions as more important than others and more worthy of cure through government subsidization. *Choate*, 469 U.S. at 302-04. *Choate* found that Tennessee's limitation on hospital days covered by Medicaid does not offend the Rehabilitation Act because the denial of benefits, even when left unmodified, was not linked in any way to those plaintiffs' particular disabilities. *Choate*, *Id*. at 302-03, 309; a*ccord*: *Frances J. by Murphy v. Bradley*, 1992 WL 390875 *7 (N.D. Ill. December 15, 1992) *vacated on other grounds Frances J. v. Wright,* 19 F.3d 337 (7th Cir. 1994) (elderly disabled who claimed that they did not receive enough in benefits under certain home and community-based Medicaid waiver program because of the program caps linked to the assessment tool the State used to grant those benefits, failed to state a claim under Rehabilitation Act; plaintiffs were not deprived of meaningful access to the benefits because the Medicaid Act gives the states substantial discretion in defining the allocation of benefits).

Furthermore, once the court determines that the EPSDT age limit is an essential eligibility requirement that is mandatory and non-waivable, the court cannot give Plaintiffs the type and quantity of services they received as children, *i.e.*, private duty nursing, by calling it a "reasonable modification" to some other Medicaid-funded program. For all the reasons set forth above, if it is a not a reasonable modification to extend the benefits of EPSDT services to individuals simply because they passed the twenty-first birthday, it is not a reasonable modification to the Home Services Program to revive the benefits of EPSDT for some individuals so that they can continue the *status quo* they enjoyed as children. Like *Alexander v. Choate*, 469 U.S. 287 (1985), the funding caps in place in the Home Services Program, *see e.g.*, Plaintiffs' Local Rule 56.1(a)(3) SMF at Nos. 104-116, even when left unmodified, are not linked to the Plaintiffs' particular disabilities. Defendant has not denied Plaintiffs meaningful access to the Home Services Program.

Lastly, if the State of Illinois is required to continue funding out-of-State plan services for an individual simply because he or she is beyond the twenty-first birthday, the financial impact on the State of Illinois is far from minimal. The permanent injunctive relief sought here would require Defendant to maintain private duty nursing services for the Plaintiffs at the current level they enjoy as the minimum service level. *Hampe* Civil Docket at 54, pages 54-55. Presumably, a system must be in place by which Defendant can evaluate whether Plaintiffs have established a medical need for private duty nursing services, because private duty nursing is listed in 42 U.S.C. § 1396d(a). *See Bontrager v. Indiana Family and Social Services Administration*, ___ F.3d ___, 2012 WL 4372524 (C.A. 7th (Ind.) September 26, 2012). The Plaintiffs are or were participating in a federal Medicaid Waiver for Medically Fragile and Technology Dependent Children ("MF/TD") and, presumably, want the case management services they received

together with other MF/TD Waiver services to continue. Moreover, there is a putative class in *Harris v. Hamos*, 12 C 7105 (N.D. Ill.), seeking continuation of private duty nursing services after they attain age twenty-one. *See Harris* Civil Docket at Doc. No. 1. The relief sought in *Hampe* together with the relief sought in *Harris*, if granted, would impose massive funding obligations on Defendant that Congress declines to fund because of the EPSDT age limitation, as previously stated. As in *Choate*, the request to modify Tennessee's Medicaid program by removing the cap on the duration of hospital days covered "would be far from minimal" and well beyond the accommodations that were required under *Davis*. *Alexander v. Choate*, 469 U.S. 287, 308 (1985). Given the financial impact, the State can properly resist the broad-based distributive decision that would be required. *Id.*

B. Plaintiffs Are Not "Otherwise Qualified" Within The Rehabilitation Act.

The Rehabilitation Act, at 29 U.S.C. § 794(a) (Westlaw 2012), requires Plaintiffs to show 1) that they are disabled within the meaning of the Act, 2) that they are "otherwise qualified" for the services sought, 3) that they were excluded from the services "solely by reason of her or his disability," and 4) that the program in question receives federal funds. *Aughe v. Shalala*, 885 F. Supp. 1428, 1431 (W.D. Wash 1995). Defendant adopts all the factual matter, arguments and authorities contained in pages 3 through 11 of this combined Response and Memorandum of Law to demonstrate that Plaintiffs cannot satisfy the second requirement set forth above. Since the Rehabilitation Act requires the court to determine both whether an individual meets all the essential eligibility requirements and whether reasonable modifications exist, *Aughe*, *id.* at 1431, all the matters set forth above also establish that Plaintiffs are not "otherwise qualified" with the Rehabilitation Act.

C. Defendant Did Not Discriminate Against Plaintiffs On The Basis Of Disability.

Even if Plaintiffs were "qualified individuals with a disability" under the ADA or "otherwise qualified" individuals under the Rehabilitation Act, they cannot show that they been denied the benefits of EPSDT, or any Medicaid services because of disability. The ADA, at 42 U.S.C. § 12132 (Westlaw 2012), provides in pertinent part that " … no qualified individual with a disability shall, *by reason of such disability*, be denied the benefits of the … services … of a public entity." (Emphasis supplied). The Rehabilitation Act, at 29 U.S.C. § 794(a) (Westlaw 2012), provides in pertinent part that no otherwise qualified individual with a disability "shall, *solely by reason of her or his disability,* be excluded from the participation in … any program or activity receiving Federal financial assistance ..." (Emphasis supplied). When, as here, a neutral rule incidentally disqualifies a disabled individual from participation in services, then the neutral application of that rule, *i.e*., the EPSDT age limit, cannot be said to be a decision actuated "solely on the basis of disability." *Southeastern Community College v. Davis*, 442 U.S. 397, 400, 405 (1979); *Wimberly v. Labor and Industrial Relations Commission of Missouri*, 479 U.S. 511, 516-17 (1987); *Sandison v. Michigan High School Athletic Ass'n,* 64 F.3d 1026, 1030-34, 1036-37 (6th Cir. 1995). The phrase "by reason of" requires a showing of proximate causation that is lacking in this case. *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268 (1992).

D. Participation In The MF/TD Waiver Confers No Right to Receive EPSDT Services Beyond The Age Of Twenty-One.

Under 42 U.S.C. § 1396n(c), States may apply to the Secretary of HHS for a "waiver" to allow the State to make medical assistance payments for home or community-based services approved by the Secretary and provided pursuant to a written plan of care to Medicaid-eligible

individuals with respect to whom there has been a determination that, but for the provision of such services, the individuals would require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded ("ICF/MR") the cost of which would be reimbursed under the State's Title XIX plan. 42 U.S.C § 1396n(c)(1). Illinois has in effect a federally-approved Medicaid waiver to provide to allow eligible medically fragile, and technology dependent children *i.e*., persons up to age twenty-one to remain in their homes known as the Illinois Section 1915(c) Home and Community-based Services Waiver for Children that are Medically Fragile, Technology Dependent. The Defendant's proposed renewal to the MF/TD Waiver is under discussion with representatives from the federal Centers for Medicare and Medicaid Services.

Under the MF/TD Waiver, the services included: respite, specialized medical equipment and supplies, environmental modifications, family training, nurse training, placement maintenance counseling and medically supervised day care. *Hampe* Civil Docket at 173-5, Plaintiffs' Exhibit No. 29 at HFS 000003; Defendant's Local Rule 56.1(b)(3)(C) SMF at Nos. 154-55; Defendant's Local Rule 56.1(a)(3) SMF at Nos. 27-28. Nursing is the primary service received by waiver participants, but "*it is not a waiver service*." *Id*. (Emphasis supplied). The Plaintiffs are clearly seeking relief that is not available to them through the MF/TD Waiver. *Id*. Participation in the MF/TD Waiver is neither material nor relevant to the disposition of the Plaintiffs' claims. Moreover, to the extent Plaintiffs argue that Defendant "can" or "should" or "could" apply to CMS to amend various federal Medicaid Waivers to secure terms that Plaintiffs would like incorporated, *Hampe* Civil Docket at 176, pages 12-15, that is also neither relevant nor material to their claims. Indeed, once the Secretary of HHS approves the waiver pursuant to 42 U.S.C. 1396n(c), the federally-approved waiver document controls all the terms and

conditions for all home and community-based services offered. *Bertrand v. Maram*, 2006 WL 2735494 at *6 (N.D. Ill. September 25, 2006) (affirmed) *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452 (7th Cir. 2007). Once the federal government approves the home and community-based services waiver, courts will not second-guess or undo its provisions. *See Id.* Under the authorities above, Plaintiffs' arguments would appear to be a concession that the court cannot order Defendant to create, extend or amend a federal Medicaid Waiver in any particular manner.

E. *Olmstead v. L.C.*, 527 U.S. 581 (1999) Does Not Aid Plaintiffs.

Olmstead v. L.C., 527 U.S. 581 (1999) does not help Plaintiffs. In *Olmstead*, a group of mentally disabled individuals brought suit against State officials under the Americans with Disabilities Act. The Court characterized the issue as one concerning the proper construction of the anti-discrimination provision of 42 U.S.C. § 12132. *Olmstead*, 527 U.S. at 587. The Court stated that no constitutional issues were before it, *id.* at 588, and expressly stated that it was not ruling on the validity of the regulations issued by the Attorney General. *Id.* at 592. Under *Olmstead,* officials of the State of Georgia were found to have violated Title II of the ADA by failing to grant a reasonable modification to the State's Medicaid program in the form of placing institutionalized persons into existing and unfilled community-based services programs. *Id.* at 601-03. Nevertheless, the Supreme Court held that the State is permitted to resist modifications that entail fundamental alterations of the State's services and programs. *Id*. at 603-07. The Court held that "unjustified isolation … is properly regarded as discrimination based on disability." *Id.* at 597. *Olmstead* is not a mandate to furnish all services to Medicaid-eligible persons in a home or community-based setting. *Id.* at 605. The Court also ruled that the States are obligated to mete out existing services with an "even hand" and "equitably." *Olmstead*, 527 at 597, 605. The even handed treatment requirement of the ADA means that the State need not

create new programs for anyone, because federal court review of the State's judgment about establishing or declining to establish new programs raises grave constitutional concerns. *Id.* at 612-13 (Kennedy, J. concurring). The Court stated that the "States must adhere to the ADA's nondiscrimination requirement with regard to the *services they in fact provide*." *Id.* at 603, n.14 (emphasis supplied).

As previously stated, private duty nursing is not a Medicaid-covered service under Illinois' Title XIX State Plan. Nothing in *Olmstead* requires Defendant to provide optional Medicaid services the State of Illinois has chosen not to cover. Nothing in *Olmstead* obligates Defendant to create a program for individuals who age-out of EPSDT services. *Olmstead* does not stand for the proposition that creating a program for persons who are not eligible for any services is a reasonable modification; rather, the modification *Olmstead* found to be reasonable was the affirmative act of taking qualified individuals from an institution into existing community placements for which they were eligible. No such facts are present in this case. Moreover, the medical evidence Plaintiffs presented here, even if competent, is not material to whether Plaintiffs could qualify for any other Medicaid programs or services.

F. 28 C.F.R. §§ 35.10(d) and 41.51(d) Do Not Create Any Right To Integration.

The integration regulations, 28 C.F.R. §§ 35.10(d) and 41.51(d) (Westlaw 2012) do not impose any affirmative obligations on the Defendant independent of the ADA and Section 504. Regulations creating rights independent of any federal statute are not enforceable laws. *Mungiovi v. Chicago Housing Authority*, 98 F.3d 982, 983-84 (7th Cir. 1996). In *Alexander v. Sandoval*, 532 U.S. 275, 285-93 (2001), the Supreme Court held that federal agencies were authorized to "effectuate" Title VI by issuing regulations, but that they could only effectuate

rights already created by statute and could not themselves create new rights or rights of action. *See also Olmstead v. L.C.*, 527 U.S. 581, 592 (1999). Both 28 C.F.R. §§ 35.130(d) and 41.51(d) state that the "public entity" and "recipient" shall administer services, program and activities "in the most integrated setting appropriate to the needs" of qualified individuals with disabilities. These regulations, compared to the ADA and Rehabilitation Act, previously cited, impose new affirmative obligations that have no textual support in the statutes. *Compare* 42 U.S.C. § 12132 *and* 29 U.S.C. § 7949(a) *with* 28 C.F.R. §§ 35.130(d) and 41.51(d) Under these authorities, since the integration regulations create new rights and new causes of action that the ADA and Rehabilitation Act themselves do not recognize, they are not enforceable and do not authorize the relief Plaintiffs seek here.

G. *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004) Does Not Aid Plaintiffs.

The Seventh Circuit's decision in *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004) does not aid Plaintiffs. In *Radaszewski*, the Seventh Circuit reversed the lower court's dismissal of Plaintiff's ADA claim and reversed a judgment on the pleadings for Defendant under the Rehabilitation Act that the claim failed as a matter of law. The claims asserted in *Radaszewski* were claims for a reasonable modification for an individual and are not similar to the claims asserted here on behalf of the Plaintiff class.

In *Radaszewski*, the Seventh Circuit did not merely confine itself to a determination that the *Radaszewski* complaint stated a claim for relief and could proceed to trial. Instead, the court held as a matter of law, without an answer from the Defendant, and without the benefit of a fully developed record that, first, Eric Radaszewski is a "qualified individual with a disability" under the ADA and Rehabilitation Act. *Radaszewski*, 383 F.3d at 612-613 ("[f]or present purposes it appears undisputed that Eric is qualified for the receipt of home services through the HSP ...").

Second, the Seventh Circuit held as a matter of law, and without the benefit of a fully developed record that Eric Radaszewski was "qualified" *i.e.*, eligible for Defendant's Home Services Program. *Id.* at 613. Third, the Seventh Circuit found, as a matter of law, that an inference could be drawn from the pleadings that Eric Radaszewski satisfied the *Olmstead* criteria. *Id.* at 614-615. Fourth, the Seventh Circuit described the services Eric Radaszewski received before he turned twenty-one. The court stated that Eric was in the Medically Fragile and Technology Dependent Children's Waiver and received "private duty shift nursing" through that Medicaid Waiver. *Id.* at 602. It was not clear that private duty nursing was an MF/TD service at that time. In any event, since 2001 when Illinois' Title XIX State Medicaid plan was amended to remove optional private duty nursing services, private duty nursing is available only to children through the EPSDT requirements, whether a child is in the MF/TD Waiver or not. Defendant's Local Rule 56.1(b)(3)(C) SMF at Nos. 139, 142-43, 154-55; Defendant's Local Rule 56.1(a)(3) SMF at Nos. 13, 16-17, 27-28. Finally, *Radaszewski* and its progeny were claims for ADA and Rehabilitation Act modifications by individuals in individual cases. To the extent Plaintiffs argue these cases can be read for the proposition that the ADA and Rehabilitation Act authorize the court to rewrite an Act of Congress and modify Defendant's EPSDT obligations, or the Home Services Program, to extend the benefits of EPSDT and MF/TD to individuals who have passed the twenty-first birthday, *e.g.*, *Hampe* Civil Docket at 176, pages 3, 4, 6, 8, 9, 10 at n.5, 12, 13, 14, 15-18, all the arguments and authorities set forth in this combined Response and Memorandum of Law establish that such modifications are not reasonable.

IV. CONCLUSION.

WHEREFORE, for the foregoing reasons, Defendant prays that Plaintiffs' Motion for Summary Judgment be denied and that the Defendant's Motion for Summary Judgment be granted.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

By: /s/ *Karen Koniecazny*________
KAREN KONIECZNY #1506277
JOHN E. HUSTON #3128039
Assistant Attorneys General
160 N. LaSalle St. Suite N-1000
Chicago, IL 60601
(312) 793-2380

DATED: October 10, 2012