Council 31 AFSCME

13-058

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Kathryn J. Olson
Chair
Illinois Health Facilities and Services Review Board
c/o Courtney R. Avery, Administrator
525 West Jefferson Street, 2nd Floor
Springfield, Illinois 62761

Written Comments regarding DHS request for
Murray Developmental Center Discontinuation Permit

Dear Chair Olson:

Our union strongly objects to the closure of Murray Developmental Center, a state facility for individuals with developmental disabilities whose conditions present severe challenges [see Attachment 1, DHS Demographic and Acuity Data]. The closure of Murray would prevent access to necessary, life-sustaining care for some 230 current residents still residing on campus for whom no appropriate alternative placement has been found. Moreover, as Murray and other congregate care state centers provide a broader array of services than group homes or even private ICF-DDs, the closure would leave a large swath of Central and Western Illinois residents with developmental disabilities who in the future may experience extreme behavioral and medical challenges without a safety net. Finally, there is a temporary restraining order put in place by a federal court which prevents the closure of Murray Center at least until an injunction hearing January 6, 2014 or until the parties reach a settlement. To issue a closure permit now would be premature and may prevent the state from capturing Medicaid reimbursement for the continued operation of the Center.

1. DHS has not met the requirement that the applicant document no adverse effect upon access to care for residents of the facility's market area.

In the application DHS says the discontinuation of services at Murray will have no adverse impact, but provides no documentation. In contrast, family members of Murray residents have provided eloquent and often heartrending testimony about how much their loved ones need the intensive services provided at Murray and will have no alternative for appropriate care. [See audio transcript of closure hearings conducted by the Commission on Government Forecasting and Accountability in April 20, 2012 at

American Federation of State, County and Municipal Employees, Council 31
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WEB www.afscme31.org

http://cgfa.ilga.gov/upload/04202012meetingAudio.mp3 as well as the HFSRB public hearing transcript.]

Individuals with significant health care needs require access to healthcare professionals on a round-the-clock basis. Individuals with significant behavioral issues benefit from the significant number of highly trained staff available on a campus setting, especially staff with years of experiences who have developed a bond with the individuals, can easily communicate with them, and can anticipate behavior triggers. Many families whose loved ones received services in smaller community settings before coming to Murray experienced both high numbers of health problems and hospitalizations in lieu of good medical care, as well as chemical restraints (overmedication), and even police involvement in lieu of adequate staff and behavior interventions.

During the Jacksonville Developmental Center closure, early outcome data from the first JDC residents to be moved to the community demonstrated the difficulty those residents had without access to JDC. DHS published a monthly "JDC Monitoring Tracker". The August, 2012 Tracker showed that, with only 41 residents discharged to or visiting community placements, there were 3 incidents of police involvement, 5 hospitalizations and 1 psychiatric hospitalization. [see attachment 2]

DHS has refused to provide similar information or publish such a "tracker" during the Murray closure. However, anecdotal evidence provided by our union members at other state centers as well as an affidavit by a neutral observer underscores the severe impact upon access to care for these vulnerable individuals if Murray were to close.

- A female individual was discharged from Murray Center to a community group home placement with the consent of her parent-guardians several weeks ago. This month she was admitted to Shapiro Developmental Center, another state developmental center in Kankakee. According to reports of family members, the individual had experienced behavioral episodes at the group home, including punching a hole in a wall and injuring staff. The group home responded by prescribing two sedative drugs, reportedly without guardian knowledge or consent.

- Clinton County Public Defender Stewart Freeman was appointed Guardian Ad Litem for state wards at Murray Center. In August and September of this year he inspected several community group homes to which Office of State Guardian wards have been moved and spoke to group home workers. GAL Freeman filed an affidavit in a pending federal court case [see attachment 3] detailing his observations, including health and safety code violations, prescription medication and nutrition not being provided, poorly paid workers with very little experience logging outrageous overtime hours (one worked 6 12-hour days in a row, another worked 38 hours straight and had paystubs showing 140, 150 and even over 180 hours worked in two weeks).

Furthermore, some of the undocumented statements made in the DHS application to support the conclusion of "no adverse impact" are not accurate:

- "[Murray] does not have a large admission rate (4 individuals were admitted during calendar year 2012)" – The facility was targeted for closure in February, 2012, and DHS stopped taking admissions to the facility.

- "Community-based providers are able to increase the number of individuals served..." This statement is in direct contrast to what DHS has experienced in trying to place individuals out of Murray Center. DHS not only has had Murray professional staff and the department's own central office staff working to discharge residents, they have spent millions of dollars on contractual placement consultants to expedite this effort since the closure was announced some 19 months ago. Yet there have been only some 30 residents discharged in all that time, with another 16 who have not lived at Murray Center for weeks but were never formally discharged, presumably because their guardians or their providers are still not comfortable with their care in the community.

- "Individuals being served at Murray have a hometown connection to more than 160 communities, thus the market area is defined as the entire state." DHS does not define what it means by "hometown connection". This could mean the individual's birthplace, which may be totally unrelated to more important factors, such as where guardians, family and friends currently live. Nor does DHS acknowledge that almost all of these 160 communities are outside of west and central Illinois. Given that the small number of Murray residents who DHS has moved to other settings are disproportionately relocated outside of the 45 mile radius around Murray Center it is likely that this list of "hometown connections" is no more than a justification for uprooting individuals from the communities they know best.

2. DHS has not met the requirement that the applicant document requests for impact statements or share copies of statements indicating the extent to which the applicant's service delivery will be absorbed by area providers.

DHS admits in it application that the nearest state centers are 1 hour 44 minutes (Choate DC) and 3 hours 30 minutes (Shapiro DC) away, well outside the 45 minutes travel time standard of the Board.

In its application DHS has not met the Board requirement of requesting or submitting letters from area providers stating they will replace the services provided at Murray Center. DHS has only attested to a process still underway by which it hopes to provide alternative services either in private ICF-DDs, in group homes or other smaller

placements, or in other State Centers. As noted above, DHS fails to note that it has had difficulty identifying placements in the Centralia area that are currently open and available to provide services at the level that Murray residents require. While the application speaks of 50 providers indicating an intent to provide services, the individuals who have moved have gone to the same handful of providers. This includes CAIL, which took a large number of the Office of State Guardian wards who were moved out early and is also the provider about which the GAL raised such strong quality of care objections. [see again attachment 3]

There are still some 230 residents living at Murray Center, less than seven weeks from DHS's requested closure date of November 30. These individuals have no alternative placement. DHS states, unsupported by documentation, that 50 providers intend to support Murray's residents. However, DHS identifies not a single provider willing to support 230 residents with the same level of care as they are currently supported at Murray Center.

3. If DHS is allowed to discontinue services at Murray, it will negatively impact safety net services in western and central Illinois.

State centers are safety net facilities, providing care to individuals who have extreme medical and behavioral needs who are not easily supported in community placements [see Attachment 4 – Comparison of SODC Services]. The guardians and Murray residents fighting to keep the facility open continually reference this need for safety net services. Early outcome results from the first Murray residents to be moved to the community show the difficulty they have operating without the Murray safety net. [see section 1 above]

In support of its application, DHS provides a letter from its deputy director for state center operations which acknowledges all other state centers are more than 45 minutes away. It fails to note there is not another state center in western or central Illinois, which means individuals in this area who need the higher level of care available at state centers will have no area safety net. [see attachment 5]

DHS includes in its application Appendices 6, the mileage and travel time for Choate and Shapiro Centers, the next closest state center. However the application fails to note that DHS has already announced its intention to close two more state centers after the Murray Center. There have long been rumors about the closure of Choate Center in particular. There is no guarantee it will remain open when two more centers are slated for closure. DHS's Attachment 43, Safety Net Impact Statement states that DHS will continue operating 6 state centers. That is directly contrary to Governor Quinn's 2011 Rebalancing Plan which is frequently referenced in the Department's application. [see attachment 6]

The letter from DHS Deputy Director for SODC Operations is not reassuring on the question of safety net services. The letter does not say Murray residents who have a qualifying condition are guaranteed a state center placement. Rather, it states they "have the right to request placement in an SODC" [emphasis added]. Similarly, those needing state center services may access them "dependent on the needs and SODC capacity". So residents in need and guardians requesting state center services may or may not be granted those services, depending on whether DHS agrees to make them available and whether there is any available capacity.

DHS goes farther in its attachment 43- Safety Net Impact Statement. While the department states that it will continue to operate state centers that will accommodate safety net admissions, it makes clear that it will not increase census at the remaining centers to accommodate the needs of those in Central Illinois seeking these services. "the goal is that a state operated developmental center that admits any new residents from the Murray Center would transition a proportional number of current residents ...rendering transitions census neutral...". Thus safety net access will only be available farther away, and only to the degree that other state centers can reduce their census to create available beds.

4. DHS cannot verify its reason for discontinuation under the Act, which seems to be economic feasibility.

The applicant indicates the Governor has decided to cease funding for Murray Center. The Governor has made this decision despite the decision of the Illinois General Assembly to lump sum funding for state developmental centers which enables the Department to operate Murray Center in FY 14. [see Attachment 7 – relevant page of PA 98-27]

The decision of the General Assembly to fund Murray in FY 14 follows from the legislative Commission on Government Forecasting and Accountability's vote to reject the closure of Murray on November 10, 2011 and to confirm that rejection at a subsequent meeting May 1, 2012. [see Attachment 8 – COGFA vote to reject the closure of Murray, and related documents on the COGFA website: http://cgfa.ilga.gov/Resource.aspx?id=1421]

Furthermore, DHS has not provided evidence that community services will be cheaper. Its COGFA filings noted a cost of community care of $84,000 which it then compared to an annual cost of $150,000 per resident to operate Murray Center. [see attachment 9] The application now speaks of the reality DHS is facing. The cost of community care for very hard to serve residents turns out to be $120,000 annually. It therefore comes up with a new, inflated cost for Murray Center, far different from the number used in the COGFA filing only last year.

The Board would not consider a private hospital CEO's decision that he wants to spend his money elsewhere sufficient proof that the hospital is not economically feasible. The application makes clear that Medicaid pays for nearly all services provided at Murray. The legislature felt the facility deserved an appropriation in a very difficult budget year. The applicant must show some evidence that the facility isn't economically feasible if that is the reason for discontinuation.

5. DHS cannot close Murray Center Nov. 30. To do so would be in violation of a US Court imposed temporary restraining order.

You will note in attachment 10 that Judge Aspen of the US District Court of Northern Illinois has in place a TRO, with the next hearing – on the plaintiff's request for an injunction – scheduled for January 6, 2014. The Board should not place this filing on the November 5 hearing. The Board agreed to do so –outside of the Board's normal schedule – because DHS insisted it had a Nov. 30 hearing date. <u>The Board should not hear this application until the court has issued a final ruling in the case. To do so invites further litigation.</u>

If the Board does proceed with a vote on the application at this time, we strongly urge the Board to reject this application for discontinuation. DHS cannot verify its reason for discontinuation of Murray under the Act, the center's services are in demand and as DHS has provided no specifics on how those services would be replaced for the more than 230 residents still living at Murray Center, as well as for those west and central Illinois residents who will need the facility's safety net services in the future. The application must be rejected.

Sincerely,

Henry Bayer

Henry Bayer
Executive Director

Illinois Department of Human Services
Michelle R.B. Saddler, Secretary

Attachment 2
Page 1

Murray Developmental Center Profile

See SODC Tier Report for latest census information

Individual Profile

Number	Data
47	average age of persons served (21 - 77 age range)
84%	Severe or Profound M.R. range
68%	have a behavior intervention program, often requiring higher levels of staff supervision
50%	receive psychotropic medications

Location: Centralia - Clinton County

Murray Center is located on the West side of Centralia, IL in Clinton County on Highway 161. Murray's campus is 120 acres with 16 buildings. Murray Center serves a broad spectrum of individuals with moderate to high behavioral & moderate to high medical needs.

Murray Center operates five residential buildings that are all certified for up to 60 individuals each. Individuals from Murray Center attend two on-campus workshops, and one off-campus workshop.

Illinois Department of Human Services
Michelle R.B. Saddler, Secretary

SODC Census and Tier Report

Tier Report as of 8-30-13

- Tier 1 - Individuals and guardians involved in actively pursuing transition to a community provider
- Tier 2 - Individuals with medical and/or behavioral needs preventing transition to the community at this time.
- Tier 3- Individuals and/or guardians saying "No" to community placement at this time.

SODC Center	Tier 1	Tier 2	Tier 3	SODC Census as of this date
Choate	37	68	67	172
Fox	7	9	102	118
Kiley	16	18	177	211
Ludeman	57	143	219	419
Mabley	18	31	50	99
Murray	38	33	178	249
Shapiro	90	214	242	546
TOTALS	263	516	1,035	1,814

attachment 2

JDC Monitoring Tracker
Transitions Effective April 1, 2012 - September 14, 2012

Monitoring Issues	April 2012	May 2012	June 2012	July 2012	August 2012	September 2012	October 2012	November 2012	December 2012	January 2013	February 2013	March 2013	Total Per Category
Police involvement [with or without court action]	0	0	0	0	3	1							4
OIG involvement	0	0	1	0	0	1							2
Elopements or attempts	0	0	0	0	0	3							3
* Behavior management [with or without CART/SST; See definition below	0	0	0	0	3	2							5
Hospital (admissions or ER visits)	0	0	3	3	5	3							14
Psychiatric hospitalizations	0	1	0	2	1	0							4
Agency [or family/guardian] specific issues	0	0	0	0	0	0							0
Subsequent admission to a Nursing Home post discharge from JDC	0	0	0	0	0	0							0
Temporary re-admission to SODC	0	0	0	0	1	1							2
Deaths	0	0	0	0	0	0							0
Total Issues Identified Per Month Per Setting	0	1	4	5	13	11							34
Unduplicated Count of Individuals Per Month	0	1	2	4	6	4							
Number Transitioned Per Month	1	10	3	10	17	6							47
Total Cumulative Number Transitioned	1	11	14	24	41	47							

* Behavior Management Events identified in this category include injury to self or others, restraint at an SODC, missing medical prescription, technical assistance provided, request for permanent support add-on, and or referred to CART/SST

Attachment 3

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

ILLINOIS LEAGUE OF ADVOCATES FOR THE DEVELOPMENTALLY DISABLED, *et al.*, ***Plaintiffs,*** vs. **ILLINOIS DEPARTMENT OF HUMAN SERVICES,** *et al.*, ***Defendants.***	Case No. 13 C 01300 Hon. Marvin E. Aspen Magistrate Judge Daniel G. Martin

SUMMARY OF STEWART FREEMAN AFFIDAVIT

Stewart is currently the Public Defender for Clinton County, Ill., and has been appointed by a state court judge as the guardian *ad litem* for the OSG wards. He has authority with respect to whether the OSG wards should be transferred. He documents the difficulty in receiving records of his clients from DHS/Defendants who have tried to limit his access. He has ascertained that several of the wards are on "pre-transitional visits," which are in actuality, complete moves from Murray without the full transfer paperwork.

Mr. Freeman testifies that at least two of his clients should be returned to Murray. He made unannounced visits of the group homes, and does not have a high opinion of the care for the residents. He documents problems at the homes, including: inadequate security, inadequate staffing (long day and hour shifts), lack of staffing experience, lack of supplies and home supports (fireproofing, padding, bedding, *etc.*), unsafe conditions (exposed hazards), lack of knowledge as to client care, low pay, little training and little to no decoration or personalization for the residents. He believes that some of his clients never should have been placed in a community placement. He documents his interviews with three former group home employees (whose provider had received Murray residents), who discussed all of the problems associated with the group home placements. Mr. Freeman fears the consequences that could happen if these conditions continue, especially after scrutiny of the facilities has passed.

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

ILLINOIS LEAGUE OF ADVOCATES FOR THE DEVELOPMENTALLY DISABLED, *et al.*

Plaintiffs,

vs.

ILLINOIS DEPARTMENT OF HUMAN SERVICES, MICHELLE R.B. SADDLER, *in her official capacity as Secretary of the Illinois Department of Human Services,* **KEVIN CASEY,** *in his official capacity as Director of Developmental Disabilities of the Illinois Department of Human Resources,* and **COMMUNITY RESOURCE ALLIANCE, D**

Defendants.

Case No. 13 C 01300

Hon. Marvin E. Aspen

DECLARATION OF STEWART FREEMAN

1. I have personal knowledge of the facts of this declaration and could competently testify under oath to those facts if called upon to do so.

Background

2. I received my B.A. in History and Political Science from the University of Illinois. I received my J.D. from Creighton University in 1993.

3. I served as an Assistant State's Attorney for the Marion County State's Attorney's Office from 1993 through 2004. I went into private practice for a year in 2004 , and then became the Assistant State's Attorney of Clinton County in 2005. I became full time Public Defender for Clinton County, Illinois in 2008, in which I have served since then.

4. I have no personal or family connections with the Murray Developmental Center ("MDC"), any of its current residents, or any of the named Plaintiffs.

Appointment as Guardian ad Litem

5. On July 29, 2013, I was appointed to act as Guardian ad Litem on behalf of 24 wards of the Office of the State Guardian. I was not given full authority to supplant the OSG's role, but only with respect to decisions of whether my clients should be transferred to homes and/or institutions other than MDC.

6. Shortly after my appointment on July 29, 2013, I requested a list of my clients from the Illinois Attorney General's Office. I only received the list of my clients on August 14, 2013, eighteen days after my appointment. The Attorney General's office took the position that 14 of my wards were not my wards because they no longer were residents of the Murray Center since they were on pre-transitional visits. The State Court judge disagreed on August 8, 2013 and after repeated requests the Attorney General's office gave me a list of my clients late on August 13, 2013. I have requested medical information about my clients in a subpoena duces tecum, however, the Attorney General's Office has tried to limit my access to my clients records and who I speak to about my clients by demanding a protective order. They have refused to provide any information from their office unless this protective order is entered.

7. Currently I have received reports directly from social workers at the MDC called Individual Support Plans (ISP) and addendums to a number of the ISPs and one CRA report. The CRA report is a report from the organization hired by DHS to help with the movement of wards from the MDC. ISPs are reports provided by workers at the MDC regarding all aspects of my wards lives and most are dated to earlier this year and late last year.

8. Currently, ten of my clients reside at MDC. Fourteen of my clients are on pre-transitional visits to other 2 to 4 bed homes called CILA (Community Integrated Living Arrangements). Some of my clients have been on "pre-transitional" visits since early May and others for several months now, even though such visits usually last a short period of time. These

pre-transitional visits therefore are, in actuality, moves from the MDC without the full transfer paperwork. Murray Center workers and myself have been told that once discharges form the MDC are finalized the discharges are to be "back dated" to the original pre-transitional date for payment purposes.

9. Based on my review of their files, I have determined that at least two to three of my clients who are currently living in group homes in the community should be returned immediately to MDC, based upon their needs and the conditions in CILAs. I have spoken to the PAS agent in charge of these moves on September 17, 2013 and she has asked me to hold off on filing any motions to return clients until she can provide me with more information.

Inspection of the CILAs

10. As it is my responsibility to inspect the conditions under which my clients are living to determine whether it is an appropriate fit, I have conducted several unannounced visits of CILAs in the Centralia and Mt. Vernon, Illinois area where my clients are currently residing.

11. Based upon what I have discovered to date, I do not have a high opinion of the CILAs and their ability to care for my medically fragile clients and clients with behavioral issues.

Rescare/CAIL CILA at ___ 3rd in Mt. Vernon, Illinois

12. I inspected this CILA on August 27, 2013. My inspection revealed the following concerns: (1) the front door was not locked, even though one of my clients was an elopement risk, and a major road is only a half a block away from the CILA, (2) one of the employees admitted she was working her sixth 12 hour day in a row, (3) one of the employees had 2 and ½ months of experience at the CILA, but the other only had 3 weeks experience, (4) one of my clients who had PICA had denim bed sheets rather than the appropriate tear resistant sheets, (5)

one client who had a history of self-injurious behavior ("SIB") did not have adequate padding in his bed and in other common areas of the home, (6) the staff did not know where the fire extinguisher was when asked, (7) the cleaning materials were in open access to the residents, (8) the staff had no idea what a medication log was, and did not provide me with one (9), there was not an appropriate biohazard disposal receptacle, (10) the staff seemed ignorant of my client's dietary concerns stating whoever is on duty decides what we eat , (11) the CILA had been opened in May 2013 and the rate of pay of the employees was less than ($9.00 / hr.), (12) the staff working that day appeared to have little or no training in that one of the workers could not turn on the light in my clients bedroom, (13) all bedrooms and the facility in general had little or no decoration or personalization.

Rescare/CAIL CILA at __ Ridge St., in Centralia, Illinois

13. I inspected this CILA on August 27, 2013. My inspection revealed the following concerns: (1) a workman was working with power tools outside the residence and had left timbers with exposed nails in a vacant room in the CILA during my visit, (2) there was not an appropriate biohazard disposal receptacle, (3) the medications were kept in an unlocked location accessible to one of my clients, (4) again the staff consisted of a person with months of experience and the other person stated she worked there for 3 weeks, and (5) the staff did not know right away where the fire extinguisher was when asked, (6) there was little to no decoration or personalization of the facility.

14. One of my clients at this home has a history of SIB. She wheel chair bound and is required to wear mittens on her hands at all times because she will try to induce vomiting. She is also in need of a feeding tube and specialized prescribed nutrition through this tube. I am deeply concerned with placing clients like this client in a CILA, because they could easily be abused

and no one would know. I also believe that she will never be integrated in the community and should not have even been placed in a community placement.

Support Systems ____ 4th St. , Centralia, Illinois

15. I inspected this CILA on September 9, 2013. My inspection revealed the following concerns: (1) I spoke to a female worker who confirmed that my client at this CILA was not given the proper medications for seizures for three days. After the medication ran out, and as a consequence, my client had a seizure which resulted in a hospitalization (the client had not had a seizure for three years while housed at the MDC according to his ISP report) The worker stated that there was a problem getting the prescribed medication because of problems with a Medicaid/ Medicare card ; (2) again three workers were present at the facility making around $9.00 per hour and with a combined experience level of 4 months experience for the three workers combined, (3) there was not an appropriate biohazard disposal receptacle, (4) the refrigerator was stocked with high sodium food that was not appropriate for one of my client's low sodium diets.

16. I have inspected a total of 6 different CILAs in the Mt. Vernon and Centralia areas and I tried to inspect one other CILA in the Centralia area, but no one was present during that occasion.

CILA Employees

17. Two Rescare/CAIL ex-employees came to my office to discuss their working conditions on August 22, 2013: Rhonda Gibson and Dylan Altom. Rhonda Gibson was familiar to me in that she was prosecuted for Burglary in Marion County case #89-CF-219. Dylan Altom, since I interviewed him, has been charged with physically abusing a disabled person housed in a

prior facility to his work at the CAIL CILAs. He has a class 3 felony now pending in Marion County case # 2013-CF-235.

18. Ms. Gibson informed me that she has spent her own money to purchase personal and household items for residents because it was so difficult to obtain these items from her boss Ronda Harris. She provided me with receipts of items she said were for residents. She stated that on a number of occasions one of the CAIL CILAS would transfer their residents to other facilities for 6- 12 hours because the facility did not have appropriate staffing. She went on to state that the scheduling of workers was left to the last minute and she would have to work double shifts to cover working two 12 hour shifts. She stated that at one point she worked 38 days straight and was "literally delirious" while working shifts at the end and had an emotional breakdown. She then showed me paystubs indicating that she had worked 140, 150 and even over 180 hours over a two week period. She continued that the only way they stopped scheduling her for work was to cry and breakdown in front of Ms. Harris to get a day off. Ms. Gibson went on to state that the client that needed a feeding tube at the Ridge Street CAIL facility ran out of the prescribed feeding tube nutrition required at one point and she went to a store and fed my client Ensure for a few days rather than the doctor prescribed nutrition.

19. Mr. Alton indicated that he worked at one point for 36 days straight. Mr. Alton had been terminated from a prior care facility for individuals with developmental disabilities amid allegations that he had abused, as his charges as the felony charges attest.

20. Both ex-employees describe working at the facilities as chaotic .

21. I spoke to Rhonda Harris the person in charge of all of the CAIL facilities in the Centralia and Mt. Vernon area and she states that the ex-employees are just disgruntled workers

who are being put up to making allegations by bigger facility competitors who she stated had hired Ms. Gibson.

22. Based on what I have seen during the course of my inspections, I have concerns about the placement and welfare of my wards that are unable to communicate and have such severe disabilities that they are vulnerable to abuse or neglect. If the conditions I have seen and heard about exist now, what will happen to my wards 2, 3, 5 years from now after the scrutiny of the facilities has passed. I fear that severe abuse and maybe even a possible premature death could occur in the future if inadequate oversight is not maintained.

23. I swear under penalty of perjury that the statements in this declaration are true and correct.

DATED: 9-23-13

Stewart Freeman

Sworn to and signed before me on 9-23-13

Notary

"OFFICIAL SEAL"
JEANNA R. SPITLER
Notary Public, State of Illinois
My commission expires 6/11/2015

Comparison of SODC Services vs. Small Community Settings

The Quinn scheme to close Murray Center and two other state centers calls for transitioning state center residents into apartments or homes with 4 or fewer individuals. But what will that mean for the services to those individuals, who live at state centers precisely because they have greater medical and behavioral needs that until now community care has not been able to meet?

	SODC	4 Bed Group Home	Individual Apartment
Experienced and stable workforce	yes	no*	no*
Doctors and nurses available on site 24/7	yes	no	no
Specialists readily available (i.e. dentists)	yes	?	?
Behavioral programs developed by professionals on-site (Behavioral Analysts and Psychologists)	yes	no**	no**
Sufficient staff to initiate behavioral programs	yes	no***	no***
Crisis services available	yes	no****	no*****
Quality oversight by both DHS and IDPH	yes	no	no
Oversight by federal quality inspectors	yes	no	no
Annual surprise inspections for both quality of care and physical plant safety	yes	no*****	no*****
Campus setting that provides safe place for recreation, easy access to friends, café to purchase drinks and snacks	yes	no	no
Off-site work programs available	yes	yes	yes
Trips to the movies, bowling, shopping	yes	yes	yes

*Community agencies have high staff turnover rates due to very low wages and few benefits.

**One common experience families share is that their individual is taken off restraining drugs after admission to an SODC, because there is clinical staff available to develop less restrictive behavior plans

*** Because so few staff are available in a small home, if a resident does act out violently the standard procedure is to call the police, risking traumatic and dangerous incarceration for the individual.

****If an individual experiences a medical crisis which less trained staff can't support they will be sent to a hospital and/or nursing home. If an individual experiences a period of violent behaviors they may be sent to a psychiatric hospital. SODCs are staffed to handle most medical issues and all behavioral issues on site, without traumatizing the individual by sending him/her to another setting.

*****If a provider sets up an individual in an apartment and puts the individual's name on the lease, DHS does not inspect that setting.

Attachments

Attachment 6

Governor Quinn's Rebalancing Initiative-November 2011

Summary

Developmental Disabilities
The Department of Human Services will reduce the number of residents served by State-Operated Developmental Centers (SODCs) by at least 600 by the end of FY 14. This will permit DHS to close up to four facilities in the next 2.5 years.

Mental Health
The Department of Human Services will close at least two state psychiatric hospitals by the end of FY 14.

Implementation Plan

FY 12 Developmental Disabilities
The Division of Developmental Disabilities will initiate closures of SODCs during FY 12. To accomplish this, the department will:

1. Halt new admissions at first facility.
2. Assess and develop transition care plans for all current residents beginning December 1, 2011.
3. Initiate transfers to community based settings beginning January 1, 2012.
4. Transfer residents at the rate of 20 per month beginning in January until the facility is closed in the first quarter FY 13.

FY 12 Mental Health
The Division of Mental Health will:

1. Halt new admissions at Tinley Park (based on current appropriations).
2. Continue to treat current patients until discharge, within 14-21 days.
3. Develop care plans for patients who will have challenges discharging to community services after the treatment of their acute disorder.
4. Discharge remaining residents to the community providers or hospitals selected.
5. Develop and implement plan to maintain on-campus food and pharmaceutical services that serve other SODCs and state psychiatric hospitals in the area.

FY 13 and FY 14 Developmental Disabilities

DHS will continue to assess and transition residents from other SODCs throughout FYs 13 and 14 so that up to four centers will be closed by the end of FY 14.

The Department will work collaboratively with the General Assembly during the Spring session to determine the additional facilities that will be closed over the next two and a half years. The factors for facility closure should include:

1. Quality assurance issues
2. Assessment of residents

3. Current census, including average length of time residing in Center, special needs of residents
4. Physical plants (both anticipated future costs for maintenance as well as design of each Center and the design's impact on staffing costs, living experience, etc.)
5. Current staffing levels and overtime usage.

Governor Quinn's FY 13 and FY 14 budget requests will include funding for community placements for all residents of SODCs who are scheduled for transition. For budgeting purposes we estimate that the average cost of care in the community will be $7,000 per month in FY 12. Subsequent years will include adequate reimbursements for community-based providers to deliver quality care. Their support is essential to assure the successful transition of residents and to achieve the rebalancing of spending objectives shared by Governor Quinn and the General Assembly.

The out-years' budget requests will reflect substantial savings from institutional operations. Specifically, the Department will:

- Reduce staffing levels through management of attrition and targeted layoffs as necessary. Labor relation plans will be negotiated as closures begin.
- Reduce other operating costs as census declines permit.
- Reduce all remaining operating costs once all residents have left the facility and it can be permanently closed.

Fiscal Year	Census Reduction	Center Closure
FY12	120 persons	
FY13	240 persons	1 SODC by 12/31/12 1 SODC by 6/30/13
FY14	240 persons	1 SODC by 12/31/13 1 SODC by 6/30/14

Results of the Closure Plan:

- 600 individuals currently residing in the eight SODCs will transition to community-based services.
- Illinois will reduce the number of Developmental Centers in the State from eight to four by the end of FY14.

FY 13 and 14 Mental Health

The state psychiatric hospital closures will occur in phases throughout FYs 13 and 14. The Affordable Care Act will reduce the need for state psychiatric beds as more

individuals who would currently seek care from state hospitals are covered under private insurance or Medicaid and are attractive to private hospitals.

At the end of the period, at least one psychiatric hospital in addition to Tinley Park will have closed. To reach this goal the Department will:

1. Expand community based alternatives for state civil psychiatric care and treatment by negotiating rates with community providers and hospitals that assure quality care.
2. Identify a facility to care for people detained under the Sexually Violent Persons Act.

Attachment 7

Purposes" among the various purposes therein enumerated.

Section 10. The sum of $989,786,100, or so much thereof as may be necessary, is appropriated from the General Revenue Fund to the Department of Human Services for the ordinary and contingent operational expenditures of the fiscal year ending June 30, 2014, including refunds, permanent improvements and costs associated with services for the transition of residents of State Operated Mental Health Facilities or State Operated Developmental Centers to alternative community settings.

Section 15. The following named sums, or so much thereof as may be necessary, respectively, for the objects and purposes hereinafter named, are appropriated to meet the ordinary and contingent expenditures of the Department of Human Services:

Payable from Vocational Rehabilitation Fund:

For Personal Services 6,333,700

For Retirement Contributions 2,553,000

For State Contributions to Social Security 484,500

For Group Insurance 2,300,000

For Contractual Services 1,331,000

For Contractual Services:

For Leased Property Management 5,076,200

Attachment 8

SENATE
Jeffrey M. Schoenberg
Co-Chair

Michael Frerichs
Matt Murphy
Suzi Schmidt
Dave Syverson
Donne Trotter

EXECUTIVE DIRECTOR
Dan R. Long

State of Illinois
COMMISSION ON GOVERNMENT
FORECASTING AND ACCOUNTABILITY
703 Stratton Ofc. Bldg., Springfield, IL 62706
217/782-5320 Fax: 217/782-3513
http://www.ilga.gov/commission/cgfa2006/home.aspx

HOUSE
Patricia R. Bellock
Co-Chair

Elaine Nekritz
Raymond Poe
Al Riley
Mike Tryon

DEPUTY DIRECTOR
Trevor J. Clatfelter

May 2, 2012

MEMORANDUM

TO: The Honorable Patrick Quinn, Governor, State of Illinois
The Honorable John Cullerton, President of the Senate
The Honorable Michael Madigan, Speaker of the House of Representatives
The Honorable Christine Radogno, Minority Leader of the Senate
The Honorable Tom Cross, Minority Leader of the House of Representatives
The Honorable Jesse White, Secretary of State
Michelle R. B. Saddler, Secretary, Illinois Department of Human Services

RE: Advisory Opinion of the Commission on Government Forecasting and Accountability Regarding the Closure of the Warren G. Murray Developmental Center

The Commission met on Tuesday, May 1, 2012 at 10:30 am to take final action on the proposed closure of the Warren G. Murray Developmental Center (Murray) and to accept or reject the recommendation for closure submitted by the Department of Human Services for that facility. The Commission, on a vote of 3-7, rejected the recommendation by the Department of Human Services to close the Warren G. Murray Developmental Center in Centralia, Illinois. A copy of the motion to accept the recommendation for closure and the vote tally is attached.

INTRODUCTION AND BACKGROUND

The Department of Human Services officially notified the Commission on Government Forecasting and Accountability (the Commission) of the intent to close the Warren G. Murray Developmental Center (Murray) on February 22, 2012. According to the State Facilities Closure Act (30 ILCS 608/5-10): "In the case of a proposed closure of: (i) a prison, youth center, work camp or work release center operated by the Department of Corrections; (ii) a school, mental health center, or center for the developmentally disabled operated by the Department of Human Services; or (iii) a residential facility operated by the Department of Veterans' Affairs, the Commission must require the executive branch officers to file a recommendation for closure. The recommendation must be filed within 30 days after the Commission delivers the request for recommendation to the State executive branch officer."

The Commission requested the required recommendation on March 1, 2012. The Department of Human Services submitted the recommendation for closure to the Commission on March 30, 2012. Following the State Facility Closure Act requirements for conducting a public hearing within 35 days after the filing of the recommendation and no more than 25 miles from the facility, the Commission conducted a public hearing regarding the closure of the Murray Developmental Center on April 20, 2012 at 3:00 P.M. at Centralia High School in Centralia, Illinois.

The Warren G. Murray Developmental Center operates in Centralia, Illinois utilizing 119 acres and 18 buildings. Five of the 18 buildings are residential areas housing approximately 55 persons each. DHS has noted that significant capital expenditures would be needed to maintain operations and stay in compliance with federal regulations. The power and heat generation plant is inefficient and coal-powered, which has concerned the federal Environmental Protection Agency. Also, the boiler house is 49 years old and requires major repairs to maintain system operations. The kitchen equipment in the Center is dated and must be repaired by using custom fabricated parts. In addition, four of the 18 buildings at the Center have roofs in need of replacement.

The Murray Developmental Center serves 274 individuals with developmental disabilities according to the Department of Human Services (DHS). According to DHS, final disposition of the residents cannot be provided until meetings with the residents and guardians are completed. The Department has indicated that they "estimate that the vast majority of individuals residing at this Center (274) will transition to licensed or certified community-based settings."

Approximately 575 full-time employees currently work at the Murray Developmental Center. DHS has not stated in their communications with the Commission what the disposition of these staff members will be, claiming that such information is impossible to know until the final closure agreement is negotiated with AFSCME. DHS also notes that among other unions that will be impacted are the Illinois Nurses Association, the Teamsters and the Illinois Federation of Public Employees. The Department has estimated the cost of operating the Murray Developmental Center at $41.1 million annually.

The transition plan will incur significant costs. DHS has stated a plan to move approximately 180 residents out of the Murray Center during FY 2013. The transition cost is estimated to be approximately $84,000 per individual in addition to a one-time payment of $5,300 per individual for resident assessment and transition planning. The total cost of the transitions through FY 2013 is expected to be approximately $6.624 million. By FY 2015, DHS estimates a total cost reduction of $16.6 million by closing this center.

DHS has provided the Commission with an economic impact study conducted by the University of Illinois regarding the potential economic/financial impact of the Murray Center closing. According to this study, the Murray Center employs 643 individuals directly, but causes (either indirectly or through induction) an additional 184 jobs within the area for a total of 826 jobs. These additional positions are in many cases subsidiary positions and complementary positions that have grown to accommodate the needs of the Murray Center and their employees. Also of interest to the Commission is the information contained within the study regarding tax revenues to the State. The study estimates that the Murray Center is responsible for approximately

$638,113 in state sales tax revenues and $332,285 in state income tax revenues. According to the study, the closing of the Murray Center will have additional components that are not measured, including effects on school enrollment/property taxation/etc.

During the Commission meeting leading up to the final vote, members voiced a number of issues and concerns with the proposed closure of the Murray Center. Foremost among these concerns was a desire for a better plan for closure that ensures a long-term effort to ensure the safety and security of current Center residents. In addition, concerns were expressed regarding the options for private and local involvement in the Center for the purposes of reducing costs.

Taking these concerns and suggestions in mind and after hearing testimony from the Department of Human Services and numerous other individuals and organizations, the majority of the Commission (on a 3-7 vote) voted to reject the Department of Human Services recommendation to close the Warren G. Murray Developmental Center.

Senator Jeffrey M. Schoenberg

Representative Patricia R. Bellock

JMS/PRB
s333

MOTION:
TO ACCEPT THE RECOMMENDATION FOR CLOSURE OF WARREN G. MURRAY DEVELOPMENTAL CENTER

Pursuant to the State Facility Closure Act (30 ILCS 608), after hearing testimony regarding the proposed closure of **Warren G. Murray Developmental Center in Centralia, Illinois**, I move that the Commission on Government Forecasting and Accountability accept the recommendation for closure submitted by the Illinois Department of Human Services regarding Warren G. Murray Developmental Center.

MOTION / VOTE

Warren G. Murray Developmental Center

Date: May 1, 2012 – 10:30 a.m. in Room 212, State House

Commission Member	*YES*	*NO*
Representative Patricia Bellock (R)		✓
Senator Michael Frerichs (D)		✓
Representative Kevin McCarthy (D)	VACANT	
Senator Matt Murphy (R)		✓
Representative Elaine Nekritz (D)	✓	
Representative Raymond Poe (R)		
Representative Al Riley (D)	—	
Senator Suzi Schmidt (R)		✓
Senator Jeffrey Schoenberg (D)	✓	
Senator David Syverson (R)		✓
Senator Donne Trotter (D)		
Representative Michael Tryon (R)		✓
VOTE to Motion	7	7

MOTION: — 2nd MOTION: —

MOTION:
TO ACCEPT THE RECOMMENDATION FOR CLOSURE OF WARREN G. MURRAY DEVELOPMENTAL CENTER

Pursuant to the State Facility Closure Act (30 ILCS 608), after hearing testimony regarding the proposed closure of **Warren G. Murray Developmental Center in Centralia, Illinois**, I move that the Commission on Government Forecasting and Accountability accept the recommendation for closure submitted by the Illinois Department of Human Services regarding Warren G. Murray Developmental Center.

MOTION / VOTE

Warren G. Murray Developmental Center

Date: May 1, 2012 – 10:30 a.m. in Room 212, State House

Commission Member	*YES*	*NO*
Representative Patricia Bellock (R)		✓
Senator Michael Frerichs (D)		✓
Representative Kevin McCarthy (D)	VACANT	
Senator Matt Murphy (R)		✓
Representative Elaine Nekritz (D)	✓	
Representative Raymond Poe (R)		✓
Representative Al Riley (D)	✓	
Senator Suzi Schmidt (R)		✓
Senator Jeffrey Schoenberg (D)	✓	
Senator David Syverson (R)		✓
Senator Donne Trotter (D)		
Representative Michael Tryon (R)		✓
VOTE to Motion	9	7

MOTION: [illegible] 2ND MOTION: [illegible]

Attachment 4

Draft

Department of Human Services

Division of Developmental Disabilities

Jacksonville Developmental Center

($ in thousands)

Assumes closure end of October 2012 (power plant remains open for full year)

	Budgeted Staff	Residents	FY2012	FY2013	FY2014	FY2015
FY 13 Maintenance Appropriation	390.0	185		$29,091.3	$29,091.3	$29,091.3
FY13 Jacksonville Operations Cost				($8,254.9)	$0.0	$0.0
Cost to Maintain Power Plant until June 30, 2013				($1,377.7)	$0.0	$0.0
Other SODC Added Cost	24.0	12		($1,296.0)	($1,728.0)	($1,728.0)
Community Costs - For CILA's @ $84.0 per person		173	($1,498.0)	($13,702.5)	($14,532.0)	($14,532.0)
Phase of residents from Feb 2012 to Sept 2012						
Resident Assessment & Transition Planners (185 residents at $5.3 per resident			($487.6)	($492.9)	$0.0	$0.0
Total Cost Reductions from Closure	(366.0)	0	($1,985.6)	$3,967.3	$12,831.3	$12,831.3

Assumptions	Cost Moved to Community Transition Line			
Jacksonville Closure starts February 2012	173 CILA's For Jville	$13,702.5	$14,532.0	$14,532.0
FY12 - 92 residents move to CILA's in FY12	Trans. Planners for Jville	$492.9		
FY13 - 81 residents move to CILA's and 12 residents to other SODC's		$14,195.4	$14,532.0	$14,532.0
98 Staff Layoff on July 1 and 280 staff on Oct 31				
Facility Closed November 1, 2012				
Power Plant staff laid off on June 30 2013				

Murray Developmental Center

($ in thousands)

Assumes closure end of November 2013 (power plant remains open for full year FY14)

	Budgeted Staff	Residents	FY2012	FY2013	FY2014	FY2015
FY 13 Maintenance Appropriation	574.9	274		$41,054.3	$41,054.3	$41,054.3
FY13 Murray Operations Cost				($38,397.6)	($9,085.1)	$0.0
Cost to Maintain Power Plant until June 30, 2014					($1,236.3)	$0.0
Other SODC Added Cost	28.0	14			($1,306.4)	($1,959.6)
Community Costs - For CILA's @ $84.0 per person		260		($5,670.0)	($20,320.0)	($22,495.2)
Phase of residents from Oct 2012 to Oct 2013						
Resident Assessment & Transition Planners (274 residents at $5.3 per resident				($954.0)	($498.2)	$0.0
Total Cost Reductions from Closure	($46.9)	0		($3,967.3)	$8,208.3	$16,599.5

Assumptions	Cost Moved to Community Transition Line			
Murray Closure starts October 2012	260 CILA's For Murray	$5,670.0	$20,320.0	$22,495.2
FY13 - 246 residents move to CILA's	Trans. Planners for Murray	$954.0	$498.2	
FY14 - 30 residents move to CILA's and 14 residents to other SODC's	Total cost in Transition Line	$6,624.0	$21,218.2	$22,495.2
428 Staff Layoff on March 2013 and 204 on July 2013, 235.9 on November 2013				
Facility Closed December 1, 2013				
Power Plant staff laid off on June 30 2014				

Draft

Department of Human Services
Division of Developmental Disabilities
3 Year Budget Impact from Jacksonville and Murray Closures
($ in thousands)

	Budgeted Staff	Residents	FY12	FY2013	FY2014	FY2015
FY 13 Maintenance Appropriation	964.9	459		$70,145.6	$70,145.6	$70,145.6
SODC's Operations Cost				($46,652.5)	($9,085.1)	$0.0
Cost to Maintain Power Plant until Closure				($1,377.7)	($1,236.3)	$0.0
Other SODC Added Cost	52.0	26		($1,296.0)	($3,034.4)	($3,687.6)
Community Costs - For CILA's @ $84.0 per person		433	($1,498.0)	($19,372.5)	($35,252.0)	($37,027.2)
Resident Assessment & Transition Planners at $5.3 per resident			($487.6)	($1,446.9)	($498.2)	$0.0
Total to Community Transition Line			($1,985.6)	($20,819.4)	($35,750.2)	($37,027.2)
Total Cost Reductions from Closures	(912.9)	0	($1,985.6)	$0.0	$21,039.6	$29,430.8

NOTE:

In FY14 and beyond, cost reductions due to closures will be rolled back into the DD system to fund increasing SODC costs, to fund Community costs and to fund the costs for the Ligas consent decree. DHS anticipates that the State will invest more than the reflected cost reductions in funding the consent decree. The Governor's FY13 GRF budget includes a DHS request of $38.8 million to fund the decree.

Attachment 1c

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS LEAGUE OF ADVOCATES FOR THE DEVELOPMENTALLY, DISABLED, *et al.*	)	
Plaintiffs,	)	
	)	Case No. 13 C 1300
v.	)	Judge Marvin E. Aspen
PATRICK QUINN, *et al.*	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Court Judge:

Presently before us is Defendants'[1] motion to dismiss Plaintiffs' second amended complaint. (Dkt. No. 162.) As discussed below, the motion is granted in part and denied in part.

BACKGROUND[2]

In their five-count complaint, Plaintiffs seek to represent a class comprised of developmentally disabled individuals who, at any time since January 1, 2011, currently reside or formerly resided at one of two state operated development centers ("SODCs")— Jacksonville and

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[1] Defendants Illinois Department of Human Services ("DHS"), Kevin Casey, Michelle R.B. Saddler, and Patrick Quinn filed the motion to dismiss on August 9, 2013. Defendant Community Resource Associates, Inc. ("CRA"), named in the complaint as Community Resource Alliance, adopted the pending motion on August 13, 2013.

[2] We assume familiarity with the background of this case, previously recounted in other opinions, and will discuss specific allegations in more detail where necessary to our analysis.

Murray[3] – and who oppose transfer from their SODC home to a community integrated living arrangement ("CILA").[4] (Compl. ¶¶ 1–4, 42–50, 58.) Based on their profound disabilities, the putative class members are entitled to receive a level of care and treatment known as ICF/MR services (Intermediate Care Facility of the Mentally Retarded). These services are available at three types of facilities: (1) private facilities, known as ICF-DDs (Intermediate Care Facility for Persons with Developmental Disabilities); (2) SODCs; or (3) CILAs, under certain circumstances. (*Id.* ¶¶ 19–20, 74, 93–94, 98; *see* Pls.' Br. ISO Legal Theory (Dkt. No. 159) at 4–5.) Plaintiffs allege that the State of Illinois' decision to close the Murray and Jacksonville SODCs for budgetary reasons and force the disabled residents to move into CILAs violates federal law.

According to Plaintiffs, community-based placements are unsuitable for the needs of the profoundly disabled class members and pose serious threats to their physical safety and emotional well-being. (Compl. ¶¶ 3, 6–7, 25–27, 31–34, 57–61 & Ex. B (Winkeler & Kelly

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[3] Jacksonville closed on or about December 3, 2012. (Compl. ¶ 52, 56–57.) Murray had been slated to close on October 31, 2013, though this litigation has delayed that process. (*Id.* ¶ 52.) Pursuant to our temporary restraining order dated June 12, 2013, (Dkt. No. 90), Murray residents may not be transferred without the consent of their legal guardians. A preliminary injunction hearing is scheduled for January 6, 2014 with respect to the residents and closure of Murray.

[4] The complaint originally asserted class claims covering all Illinois SODC residents since January 1, 2011, consistent with Plaintiffs' allegation that the State intends to close all SODCs. (Compl. ¶¶ 2–4, 6–7, 42, 60, 62.) We previously dismissed Plaintiffs' claims on behalf of residents at SODCs other than Jacksonville and Murray. We concluded that we lacked jurisdiction over those claims because they were speculative and not yet ripe for judicial review. (6/20/13 Op., Dkt. No. 98.)

We also previously dismissed claims asserted on behalf of class members who are wards of the Office of the Special Guardian. (7/18/13 Op., Dkt. No. 135.) We lack jurisdiction over those claims, which are now pending in a lawsuit filed in the Circuit Court of Clinton County, Illinois (Case No. 2013 CH 49).

Affs.). As a result, Plaintiffs have refused to consent to CILA transfers. Plaintiffs further allege that Defendants have not offered spots at other SODCs or adequate replacement services equivalent to those offered at SODCs. Plaintiffs claim that, to the contrary, Defendants have undertaken a flawed assessment process that has predetermined class members' ability to succeed in a CILA. (*Id.* ¶¶ 60–62, 66–74). For example, Plaintiffs allege that they have received paperwork for their approval where their "choice" has been preselected to authorize community living for their wards. (*Id.* ¶ 74.) In addition, Plaintiffs allege that the class members are either unlikely or unable to obtain care at a private ICF-DD facility. (*Id.*) Accordingly, Plaintiffs and their wards have little choice but to move to a CILA. (*See id.* ¶ 73 (alleging that Defendants have indicated they will choose community placements for residents over guardian objections).) In addition, Plaintiffs have been informed that, if the CILA placements fail, former Murray and Jacksonville residents may need to seek services in other states. (*Id.* ¶ 74.)

Plaintiffs contend that Defendants' conduct—particularly implementation of the allegedly rigged assessment and transfer process—discriminates against the class members on the basis of their disabilities in violation of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, denies them equal protection, and deprives them of choice as required by the Medicaid Act. They seek injunctive relief preventing the assessment and transfer of Murray residents, the closure of Murray, and appointment of a monitor. Defendants raise a number of arguments in their motion to dismiss, which we address below.

STANDARD OF REVIEW

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is meant to test the sufficiency of the complaint, not to decide the merits of the case. *Gibson v. City of Chi.*, 910

F.2d 1510, 1520 (7th Cir. 1990). In evaluating a motion to dismiss, we must accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002). A court may grant a motion to dismiss under Rule 12(b)(6) only if a complaint lacks enough facts "to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949–50 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)); *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 618–19 (7th Cir. 2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949.

Although a facially plausible complaint need not give "detailed factual allegations," it must allege facts sufficient "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964–65. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949. These requirements ensure that the defendant receives "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964.

ANALYSIS

I. ISSUES PREVIOUSLY ADDRESSED

We begin our analysis by briefly mentioning two questions previously resolved. First, in their motion, Defendants reiterate their request for dismissal of Plaintiffs' claims for lack of subject matter jurisdiction. (Mem. at 5–6.) Defendants contend that Plaintiffs lack standing and that their claims are not ripe, because their alleged injuries are entirely speculative. (*Id.*; Reply

at 4–6.) As Defendants concede, we previously rejected these arguments in our June 20, 2013 opinion. (Dkt. No. 98 at 3–8; *see also* 6/28/13 Op. (Dkt. No. 112) at 5–7.) Although Defendants wish to preserve these arguments for appeal, we need not revisit them.

Second, our June 20, 2013 opinion also essentially disposed of Count III of the complaint, which alleged a violation of the principles established in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587, 597, 601–07, 119 S. Ct. 2276, 2181, 2185, 2187–90 (1999). In *Olmstead*, the Supreme Court held that Title II of the ADA requires states to provide community-based treatment for disabled persons, as opposed to institutionalization, under specified circumstances. In so holding, the Supreme Court explained that "[u]njustified isolation . . . is properly regarded as discrimination based on disability." *Id.* at 597, 119 S. Ct. at 2187. As explained in our opinion, however, the putative class members here do not fall within *Olmstead*'s purview. *Id.* at 602–07, 119 S. Ct. at 2187–90 (holding that a state's duty arises only where eligible disabled individuals "do not oppose such treatment"). As such, Count III is untenable.

II. GOVERNOR QUINN AND DHS AS PARTIES

We turn now to the more substantive arguments raised by Defendants' motion. Defendants claim that Governor Quinn is not a proper party to this lawsuit and that DHS cannot be sued with respect to Counts IV and V. (Mem. at 3–5; Reply at 3–4.) We agree.

Pursuant to the Eleventh Amendment, the Supreme Court "has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens." *Edelman v. Jordan*, 415 U.S. 651, 662–63, 94 S. Ct. 1347, 1355 (1974); *see Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 694–96 (7th Cir. 2007);

Ameritech Corp. v. McCann, 297 F.3d 582, 585–86 (7th Cir. 2002). "State agencies and officials sued in their official capacities are 'the state' for Eleventh Amendment purposes." *Olson v. Ryan*, No. 99 C 4384, 2000 WL 1263597, at *4 (N.D. Ill. Sept. 5, 2000) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989)); *see Heabler v. Madigan*, No. 12 C 6193, 2013 WL 5405679, at *3 (N.D. Ill. Sept. 24, 2013); *Spain v. Elgin Mental Health Ctr.*, No. 10 C 1065, 2011 WL 1485285, at *4 (N.D. Ill. Apr. 18, 2011). There are three exceptions to the Eleventh Amendment's bar, which arise where: (1) a state has waived its immunity and consented to suit in federal court; (2) Congress has abrogated state immunity through a valid exercise of its authority; or (3) a plaintiff seeks only prospective injunctive relief from appropriate state officials for allegedly ongoing violations of federal law, pursuant to *Ex Parte Young*, 209 U.S. 123, 157–60, 28 S. Ct. 441, 453–55 (1908). *Ind. Protection & Advocacy Servs. v. Ind. Family & Social Servs. Admin.*, 603 F.3d 365, 371 (7th Cir. 2010); *Cullen v. Ill. Dep't of Human Servs.*, No. 12 C 1032, 2012 WL 1965384, at *3 (C.D. Ill. May 31, 2012); *Spain*, 2011 WL 1485285, at *4.

As Plaintiffs concede,[5] DHS is thus immune from suit for Counts IV and V, both asserted via § 1983, because it is a state agency. It is well-recognized that state agencies may not be sued under § 1983 because of the Eleventh Amendment and because states cannot be considered "persons" subject to suit under § 1983. *Wynn v. Ill. Dep't of Human Servs.*, No. 11 C 3663, 2012 WL 2992132, at *2–3 (N.D. Ill. July 16, 2012); *Cullen*, 2012 WL 1965384, at *4; *Spain*, 2011 WL 1485285, at *4. We thus grant Defendants' motion with respect to Counts IV and V as

[5] In their response, Plaintiffs acknowledge that "[t]echnically, the DHS Defendants are correct." (Resp. at 2.)

against DHS. Pursuant to *Ex Parte Young*,[6] however, these claims remain pending against two individual state officials, Michelle R.B. Saddler and Kevin Casey, whom Plaintiffs named as defendants in their official capacities. 209 U.S. 123 at 157–60, 28 S. Ct. at 453–55; *Ind. Protection & Advocacy Servs.*, 603 F.3d at 371, 374; *Wynn*, 2012 WL 2992132, at *3; *Cullen*, 2012 WL 1965384, at *4.

Governor Quinn, on the other hand, is not a proper defendant for any of Plaintiffs' claims. As the Supreme Court explained in *Ex Parte Young*:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

209 U.S. 123 at 157, 28 S. Ct. at 453; *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 645 (7th Cir. 2006); *Weinstein v. Edgar*, 826 F. Supp. 1165, 1166 (N.D. Ill. 1993). Although the source of an official's authority is not material, a state official cannot be sued for prospective injunctive relief unless he or she has some connection to the enforcement or implementation of the particular law or conduct at issue. *Ex Parte Young*, 209 U.S. 123 at 157, 28 S. Ct. at 453; *Fitts v. McGhee*, 172 U.S. 516, 529–30, 19 S. Ct. 269, 274 (1899); *Entm't Software Ass'n*, 469 F.3d at 644–45; *Weinstein*, 826 F. Supp. at 1166–67.

Here, Plaintiffs allege that Governor Quinn, as the chief executive of the State, is "responsible for directing, supervising and controlling the executive departments of state government." (Compl. ¶ 37.) He is "ultimately responsible for ensuring that Illinois operates its long-term care system for people with disabilities in conformance with federal and state laws." (*Id.*) They further allege that Governor Quinn signed legislation that included a $1.6 billion cut

[6] Neither of the other Eleventh Amendment exceptions apply here.

to Medicaid, "endangering . . . the State's residents, and in particular, individuals with severe and profound developmental disabilities." (*Id.* ¶ 53.) Plaintiffs argue that Governor Quinn is a proper party because the actions at issue in the lawsuit "are taken at the behest of the Governor's office." (Resp. at 4.)

Consistent with precedent in this circuit, we hold that these allegations are insufficient to maintain an action against Governor Quinn. *Hearne v. Bd. of Educ. of City of Chi.*, 185 F.3d 770, 776–77 (7th Cir. 1999); *Union Benefica Mexicana v. Indiana*, No. 11 C 482, 2013 WL 4088690, at *6 (N.D. Ind. Aug. 13, 2013); *Sweeney v. Daniels*, No. 12 C 81, 2013 WL 209047, at *3 (N.D. Ind. Jan. 17, 2013); *Crosby v. Blagojevich*, No.07 C 6235, 2008 WL 5111172, at *2 (N.D. Ill. Dec. 4, 2008); *Deida v. City of Milwaukee*, 192 F. Supp. 2d 899, 916–17 (E.D. Wis. Mar. 25, 2002); *Olison*, 2000 WL 1263597, at *4; *Weinstein*, 826 F. Supp. at 1167. A theory of liability predicated on a governor's general obligations as the executive of the State cannot avoid the consequences of the Eleventh Amendment. *Deida*, 192 F. Supp. 2d at 917 (holding that the governor's "general duty to enforce the laws" was not a sufficient connection); *Olison*, 2000 WL 1263597, at *4 (same); *see also Crosby*, 2008 WL 5111172, at *2 (dismissing governor who had no role in implementation or enforcement of a bill, nor the authority to nullify or amend it). Plaintiffs do not allege that Governor Quinn has any actual authority to enforce, curtail, or otherwise alter the assessment and transfer process at the SODCs. To the contrary, that process is coordinated by DHS, per its statutory mandate. (Mem. at 4; *see* Compl. ¶ 36 (alleging that DHS is the agency organized by law to provide services to the disabled and is implementing the planned SODC closures.) As the Seventh Circuit noted in *Hearne*, "the plaintiffs have not and

could not ask anything of the governor that could conceivably help their cause."[7] 185 F.3d at 777. Accordingly, Governor Quinn is dismissed from this action because he lacks the requisite connection to the allegedly unlawful conduct.

III. EQUAL PROTECTION CLAIM

In Count IV, Plaintiffs allege that Defendants' implementation of the Murray and Jacksonville closures violates the Equal Protection Clause of the Fourteenth Amendment in violation of 42 U.S.C. § 1983. (Compl. ¶ 86.) To state an equal protection claim, Plaintiffs must allege that Defendants: (1) "treated [them] differently from others who were similarly situated, (2) intentionally treated [them] differently because of [their] membership in the class to which [they] belonged (i.e., [developmentally disabled]), and (3) because [the disabled] do not enjoy any heightened protection under the Constitution, . . . that the discriminatory intent was not rationally related to a legitimate state interest." *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950–51 (7th Cir. 2002); *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 442, 105 S. Ct. 3249, 3255–56 (1985); *Anderson v. Cornejo*, 284 F. Supp. 2d 1008, 1037–38 (N.D. Ill. 2003); *see also Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367–68, 121 S. Ct. 955, 964 (2001) (confirming that the holding in *Cleburne* applies to the disabled such that state action is subject to rational basis review only); *Doe v. Bd. of Trustees of Univ. of Ill.*, 429 F. Supp. 2d 930, 943 (N.D. Ill. 2006). Here, Plaintiffs claim that Defendants' forced transfer of the class members to CILAs, without ensuring that medically necessary services will be available, deprives disabled residents of their right to receive equal medical services. (*Id.* ¶¶ 86–89.) They

[7] The Seventh Circuit added that "it is not the Eleventh Amendment that bars the plaintiffs' action for prospective injunctive relief against the governor; it is their inability to show that he bears any legal responsibility for the flaws they perceive in the system." 185 F.3d at 777.

allege that Defendants are deliberately treating them differently than others who receive medical services from and through the State. (*Id.* ¶ 87.)

Defendants argue that the equal protection claim must fail, however, because they have articulated a rational basis for their decisions to close the SODCs at issue and to transfer residents to CILAs. (Mem. at 19-20; Reply at 13-15.) As Defendants point out, "the rational-basis test is a lenient standard" such that "the government's action simply cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and *some* legitimate governmental purpose." *Smith v. City of Chi.*, 457 F.3d 643, 652 (7th Cir. 2006); *D.B. ex rel. Kurtis B. v. Kopp*, 725 F.3d 681, 686 (7th Cir. 2013); *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 546–47 (7th Cir. 2008). Nonetheless, "the rational basis standard . . . cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard." *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1999); *Flying J Inc.*, 549 F.3d at 546 (also acknowledging this "perplexing situation" that arises when considering government rationales at the 12(b)(6) stage). To reconcile these standards, "the solution is to 'take as true all of the complaint's allegations and reasonable inferences that follow, [and then] apply the resulting 'facts' in light of the deferential rational basis standard." *Flying J Inc.*, 549 F.3d at 546 (quoting *Wroblewski*, 965 F.2d at 460). A plaintiff must foresee this dilemma and must "allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *Wroblewski*, 965 F.2d at 460; *D.B. ex rel. Kurtis B.*, 725 F.3d at 686.

With these principles in mind, we conclude that Plaintiffs' equal protection claim withstands the present motion. Although Defendants identify two reasons underlying their decisions concerning the SODCs, those explanations do not yet entitle them to a presumption of

rationality, particularly with respect to the transfer decisions. First, Defendants contend that the decisions to close Murray and Jacksonville and to transfer their residents elsewhere are based solely on budgetary concerns. Plaintiffs readily admit that "cuts in the State's budget may require fiscal austerity" and that the decision to close SODCs represents "a means to contend with the State's $13 billion deficit."[8] (Compl. ¶¶ 7, 52.) We cannot draw from the complaint, however, any reasonable inference supporting Defendants' further claim that moving residents to CILAs is less costly than some other alternative. Plaintiffs do not concede this discrete point, and Defendants have not explained how requiring all of the class member residents to transfer to group homes will save money. In reaching this conclusion we do not comment on the merits of this argument. At this stage, without factual support in the complaint or otherwise before us, we simply decline to hold that Defendants have established cost as the legitimate governmental rationale for mandating the transfer of Murray and Jacksonville residents to CILAs.

Defendants' second explanation for their decision to move the developmentally disabled class members out of SODCs rests on the Supreme Court's decision in *Olmstead*. 527 U.S. at 587, 597, 601–07, 119 S. Ct. at 2181, 2185, 2187–90. The *Olmstead* court held that Title II of the ADA requires states to provide community-based treatment for disabled persons, where the following three elements are met:

> the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id. at 587, 119 S. Ct. at 2181. In its opinion, however, the court also emphasized that "nothing in

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[8] Plaintiffs have also acknowledged generally that they cannot require the State to maintain any particular facility.

the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.* at 601–02, 119 S. Ct. at 2187. "Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it." *Id.* at 602, 119 S. Ct. at 2188. The court acknowledged that integrated placement might never be appropriate for some individuals and, moreover, that the ADA should not be read to require "States to phase out institutions, placing patients in need of close care at risk." *Id.* at 605, 119 S. Ct. at 2189.

In light of the Supreme Court's admonitions, Defendants' reliance on *Olmstead* here is misplaced. Surely *Olmstead* requires Defendants to provide community-based treatment when the three prerequisites, including patient consent, are satisfied. But Defendants' efforts to comply with *Olmstead* do not justify the alleged forcing of CILA placements on class members and their guardians who vigorously oppose such placements. While Defendants may wish to encourage community-based treatment for all who qualify and consent pursuant to *Olmstead*, Plaintiffs' complaint alleges far more draconian conduct. Plaintiffs claim that Defendants have predetermined group placements for the class members regardless of their needs, preselected guardian "choice" on authorization forms, threatened to evaluate and transfer class members over guardian objections, and denied guardian attempts to secure alternate SODC placements in lieu of community placements. (Compl. ¶¶ 70–74.) Certain individual Plaintiffs also allege that Defendants have informed them that, if they persist with their opposition to CILA placements, their wards will be evicted and, if other arrangements are not found by the guardians, Defendants will select housing for their wards regardless of consent. (*Id.* ¶¶ 25–27; *see also id.* ¶¶ 31–34.) Although *Olmstead* does not entitle Plaintiffs to any affirmative relief, it does not require—and

in fact explicitly discourages—Defendants' alleged conduct. As a result, Defendants cannot claim that their duty to comply with *Olmstead* is a rational basis for the alleged decision to force all of the class members into CILAs despite individual needs and guardian objections.

We thus deny the motion as to the equal protection claim. In addition, we will consider this claim when evaluating the merits of the preliminary injunction motion.

IV. TITLE II AND REHABILITATION ACT CLAIMS

Counts I and II of the complaint assert discrimination claims under Title II of the ADA and § 504 of the Rehabilitation Act. (Compl. ¶¶ 63–78.) As we have previously indicated, these claims are construed identically. *Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004); *Washington v. Indiana High Sch. Ass'n, Inc.*, 181 F.3d 840, 846 (7th Cir. 1999) (noting that the two statutes are coextensive). To state a claim of discrimination under these statutes,[9] Plaintiffs must allege that: (1) they are qualified individuals with disabilities; (2) they have been denied "the benefits of the services, programs, or activities of a public entity;" and (3) that denial or exclusion was "by reason of such disability."[10] 42 U.S.C. § 12132; *see also* 29 U.S.C. § 794(a); *Brad K. v. Bd. of Educ. of City of Chi.*, 787 F. Supp. 2d 734, 746–47 (N.D. Ill. 2011); *Phipps v. Sheriff of Cook Cty.*, 681 F. Supp. 2d 899, 913 (N.D. Ill. 2009).

Defendants contend that Plaintiffs have failed to state a discrimination claim, in part because they failed to identify a theory of relief. In their argument, Defendants state that we

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[9] The parties do not dispute that Defendants are a public entity, as necessary for an ADA claim, or that they received federal funding assistance, as necessary for a Rehabilitation Act claim.

[10] The third element—the "by reason of disability" language—ultimately requires a showing of "but for" causation. *Wisconsin Comm. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006); *Washington*, 181 F.3d at 849.

previously dismissed Plaintiffs' discrimination claims and instructed them to limit their claims to three theories. (Mem. at 6–7.) Defendants blatantly mischaracterize our June 20, 2013 opinion, which did not dismiss Plaintiffs' ADA or Rehabilitation Act claims. (*See* 6/20/13 Op. at 9–10.) In that opinion we explained that, although Plaintiffs could not advance an *Olmstead* claim, their discrimination claims could rest on any one or more of three evidentiary approaches. (*Id.*) As discussed, "discrimination under both acts may be established by evidence that (1) the defendant intentionally discriminated on the basis of disability, (2) the defendant refused to provide a reasonable accommodation, or (3) the defendant's rule disproportionally impacts disabled people." *Washington*, 181 F.3d at 847; *Wisconsin Comm'r Servs.*, 465 F.3d at 753; *see Culvahouse v. City of LaPorte*, 679 F. Supp. 2d 931, 937 (N.D. Ind. 2009). We thus instructed the parties to tailor their presentations to these available theories for purposes of the preliminary injunction hearing, which will require us to assess Plaintiffs' likelihood of success on the merits.[11] Contrary to Defendants' position, however, these three evidentiary approaches are not pleading requirements, but methods of proof. Plaintiffs could have explicitly detailed their evidentiary theories in their complaint, but Rule 8 does not require them to do so. Fed. R. Civ. P.8(a) (requiring plaintiff to include a "short and plain statement of the claim" showing a right to relief); *see also Carothers v. Office of the Transitional Adm'r*, No. 12 C 6620, 2013 WL 3388876, at *1 (N.D. Ill. July 8, 2013) (noting that a "plaintiff need not plead legal theories" because "it is the facts that count").

We turn then to evaluate the sufficiency of Plaintiffs' allegations. The complaint includes allegations about the severity of the developmental disabilities suffered by the putative

[11] According to their brief filed August 7, 2013, (Dkt. No. 159), Plaintiffs will be pursuing all three evidentiary approaches.

class members. (*See, e.g.*, Compl. ¶¶ 25–27, 68, 70–71 & Ex. B.) Plaintiffs allege that many of the class members are non-verbal, immobile, and lack the cognitive skills to live semi-independently. (*Id.* ¶¶ 68, 71.) Plaintiffs describe how they and their wards are being deprived of any meaningful choice for future placements with adequate safety-net services when Murray closes. (*Id.* ¶¶ 65–66, 72–74.) In a nutshell, Plaintiffs allege that Defendants are eliminating current SODC services due to the budget cut but, in lieu thereof, are offering only CILA placement for SODC residents who must relocate, who cannot secure treatment at a private ICF-DD,[12] and who will not receive the same level of services at CILAs that they currently receive. (*Id.* ¶¶ 66–74.) To effectuate these forced transfers out of SODCs, Defendants have implemented an assessment process that predetermines the appropriateness of community settings for SODC residents and overrides guardian wishes. (*Id.* ¶¶ 60–62, 66–74.) Plaintiffs further complain that, underlying this situation, Defendants have intentionally targeted developmentally disabled class members for greater cuts in funding and in effective, necessary services than those cuts imposed on individuals with other types of disabilities. (*Id.* ¶¶ 58, 65; *see also id.* ¶¶ 86–89.) The complaint also alleges in detail how CILAs are woefully inadequate for class members' needs, threatening their health and safety. (*Id.* ¶¶ 3, 6–7, 25–27, 31–34, 57–61.)

We conclude that these allegations plausibly state discrimination claims under Title II and the Rehabilitation Act. The complaint alleges that the class members at issue here are disabled and that Defendants' conduct has denied them (or if not enjoined will deny them) the level of services they have received at SODCs. Plaintiffs claim that these decisions to close

[12] Plaintiffs relatedly allege that Defendants are not helping them obtain ICF-DD placements. (Compl. ¶ 74.)

Murray and Jacksonville and to force the class members to relocate to CILAs are discriminatory because other disabled individuals who receive services from or through the State have not been subjected to such severe cuts in funding or benefits. These allegations "give enough details about the subject-matter of the case to present a story that holds together." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010); *McCauley v. City of Chi.*, 671 F.3d 611, 616–17 (7th Cir. 2011); *Bissessur v. Ind. Univ. Bd. of Trustees*, 581 F.3d 599, 602–03 (7th Cir. 2009); *see Mehta v. Beaconridge Improvement Ass'n*, 432 F. App'x 614, 616 (7th Cir. 2011) ("At the pleading stage, the test is not whether the plaintiff will ultimately prevail, but rather whether the pleading is sufficient to cross this minimal threshold.").

Before moving on, we briefly address Defendants' challenge to Plaintiffs' allegations of intra-class discrimination. (Mem. at 7, 12, 14; Reply at 6–7.) Defendants contend that Plaintiffs cannot make out such a claim because the class alleged in the complaint includes all SODC residents. Plaintiffs thus have not alleged that they are being treated differently than another group on the basis of their disability, as all members of the class have the same disabilities. This argument fails, however, because Plaintiffs' definition of the putative class is wholly unrelated to the intra-class discrimination claim. Plaintiffs' intra-class claim seeks to compare Defendants' treatment of the class members to Defendants' treatment of individuals with other types or levels of disabilities. (Compl. ¶ 65.)

The Seventh Circuit recently confirmed that discrimination claims are cognizable under Title II even when comparing members of the same protected class, as alleged here. *Amundson ex rel. Amundson v. Wisconsin Dep't of Health Servs.*, 721 F.3d 871, 874–75 (7th Cir. 2013). The plaintiffs in *Amundson*—a group of developmentally disabled individuals—argued that

Wisconsin's cut to their subsidies would require them to move from their group homes to institutions. Although the *Olmstead* argument was not ripe, the court in *Amundson* entertained plaintiffs' contention that the state was treating them worse than other types of disabled people because of the steep funding cut. *Id.* The Seventh Circuit explained that "[i]f Wisconsin buys the best available care for persons with visual impairments, but pays only for mediocre care for the developmentally disabled, then plaintiffs have a theory of discrimination even though all of them remain in group homes." *Id.* at 874; *see also Nelson v. Milwaukee Cty.*, No. 04 C 193, 2006 WL 290510, at *5 (E.D. Wis. Feb. 7, 2006) ("[T]o the extent that plaintiffs allege that defendants are treating them worse than persons with less severe disabilities, they may proceed as such claims allege differential treatment by reason of disability."). Although Plaintiffs have yet to identify another subset of disabled individuals for comparison purposes, we cannot rule out the possibility that they can and will do so as described in *Amundson*.[13] At this stage, "we give the plaintiff the benefit of the imagination, so long as the hypotheses are consistent with the complaint." *Bissessur v. Ind. Univ. Bd. of Trustees*, 581 F.3d 599, 602–03 (7th Cir. 2009) (internal quotation omitted); *Mehta*, 432 F. App'x at 616. We conclude that Plaintiffs are "entitled to take the next step in this litigation" and deny the motion as to Counts I and II. *Swanson*, 614 F.3d at 407; *Mehta*, 432 F. App'x at 616 ("We ask whether the story could have happened, not whether it did.").

V. MEDICAID ACT CLAIM

[13] In rejecting the discrimination claim asserted in *Amundson*, the Seventh Circuit pointed out that, despite the significant cut in the subsidy, plaintiffs did "not contend that they are now treated *worse* than some other set of disabled persons." 721 F.3d at 875. To prove this particular theory under *Amundson*, Plaintiffs must establish facts about a comparison group or "any standard by which 'worse treatment' could be identified." *Id.* at 874–75.

Finally, we consider a threshold legal question essential to Plaintiffs' Medicaid claim, alleged in Count V. Under the Medicaid "HCBS waiver program," Congress authorizes funding for "states to give individuals who would otherwise be eligible to receive Medicaid benefits in a more traditional, long-term institution the option of receiving care in their home or in community-based residences." *Ball v. Rodgers*, 492 F.3d 1094, 1098 (9th Cir. 2007). To qualify for the waiver program, states must provide "certain 'assurances' to the Secretary of Health and Human Services." *Id.* (citing §§ 1396n(c)(2), (d)(2)). Section 1396n(c)(2)©, known as the free choice provision, requires one such assurance:

> [S]uch individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded.

42 U.S.C. § 1396n(c)(2)©. Plaintiffs allege that the class members qualify for and are currently receiving services covered by this provision. (Compl. ¶¶ 1, 59–62, 98.) As such, where options for treatment are available in Illinois under the HCBS waiver program, Plaintiffs and their wards are entitled to be "informed of the feasible alternatives" and to choose the type of facility where they receive services. 42 U.S.C. § 1396n(c)(2)©. As the Seventh Circuit has stated, this subsection does not mandate that Defendants offer a particular option or operate a particular facility but "just requires the provision of information about options that *are* available." *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 459 (7th Cir. 2007).

Defendants contend, however, that Count V must be dismissed because Plaintiffs have no private right of action to sue for any alleged violation of § 1396n(c)(2)©. The parties agree that the Medicaid Act itself does not authorize individual actions under § 1396n(c)(2)©. (Resp. at

15; Reply at 11.) They vigorously dispute, however, whether 42 U.S.C. § 1983 arms Plaintiffs with an implied enforcement mechanism. Defendants argue that § 1396n(c)(2)(C) is not redressable via § 1983 because Congress did not intend to create a personal federal right. (Mem. at 16–19; Reply at 11–13.)

Both parties recognize that two Supreme Court decisions guide the analysis of this question: *Gonzaga University v. Doe*, 536 U.S. 273, 122 S. Ct. 2268 (2002) and *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353 (1997). *Blessing* set out three factors to consider when evaluating "whether a particular statutory provision gives rise to a federal right." 520 U.S. at 340, 117 S. Ct. at 1359. A plaintiff must show that: (1) "Congress . . . intended that the provision in question benefit the plaintiff;" (2) "the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence;" and (3) the statute "unambiguously impose[s] a binding obligation on the States." *Id.* at 340–41, 117 S. Ct. at 1359 (internal quotation omitted). In *Gonzaga University*, the Supreme Court clarified the first element of the *Blessing* test, holding that "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced" under § 1983. 536 U.S. at 283, 112 S. Ct. at 2275.

Although there are older cases coming down on both sides of this question, the leading post-*Gonzaga University* authority holds that § 1396n(c)(2)(C) is enforceable via § 1983. In *Ball v. Rodgers*, the Ninth Circuit addressed this precise issue in detail. The opinion includes a careful, extensive analysis and application of the *Blessing* and *Gonzaga University* tests. 492 F.3d at 1103–17. The Ninth Circuit ultimately concluded that "Medicaid beneficiaries enjoy 'unambiguously conferred' individual rights under §§ 1396n(c)(2)(C) and (d)(2)(C) and that those rights can be properly enforced through a § 1983 cause of action." *Id.* at 1117 (remanding to the

district court for further consideration of the free choice claims and injunction terms). Although Defendants ask us to reject *Ball*, we see no reason to do so.[14] To the contrary, and to avoid gilding the lily, we hereby adopt the Ninth Circuit's persuasive reasoning and well-supported holding in *Ball*.

Having concluded that Plaintiffs have a private right of action under § 1983 for their § 1396n(e)(2)(C) claim, we evaluate the sufficiency of those allegations.[15] Plaintiffs allege that Defendants have not informed them of feasible alternatives that remain available in Illinois under the waiver. For example, Plaintiffs allege that Defendants have told them "that they cannot choose another SODC in lieu of transition to the community setting." (Compl. ¶ 74.) Defendants also have not been forthcoming with information or assistance about private ICF-DD housing alternatives. (*Id.*) Plaintiffs allege that Defendants have deprived them of information and of choice, despite § 1396n(e)(2)(C)'s mandate. (*Id.* ¶¶ 62, 74, 97–98.) Count V thus adequately sets forth a claim for violations of Medicaid's free choice provision.

VI. OUTSTANDING ISSUES

In preparation for the preliminary injunction hearing, and given our rulings today, we

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[14] There are few cases on this question, and no Seventh Circuit authority on point. To date, no other federal court to take up the matter has rejected the holding in *Ball*. *See Dykes v. Dudek*, No. 11 C 116, 2011 WL 3860022, at *3 (N.D. Fla. Aug. 30, 2011); *Zatuchni v. Richman*, No. 07 C 4600, 2008 WL 3408554, at *10–11 (E.D. Pa. Aug.12, 2008); *see also Wood v. Tompkins*, 33 F.3d 600, 612 (6th Cir. 1994) (finding a § 1983 private right of action under § 1396n(e)(2)(C), though prior to the *Gonzaga University* decision).

[15] Defendants argue that Plaintiffs cannot sue for violations of state regulatory laws relating to Medicaid, as alleged in Count V. (Mem. at 18; Reply at 13; *see* Compl. ¶¶ 96–98.) Plaintiffs did not respond to this argument. In addition, Plaintiffs have previously stated that the lawsuit involves only vindication of federal rights. (Reply ISO Prel. Inj. Mot. (Dkt. No. 43) at 14.) Accordingly, we find that Plaintiffs have abandoned this claim as it concerns alleged violations of state law.

order the parties to address several issues by written submission to be filed no later than November 15, 2013. First, the parties shall address whether the upcoming preliminary injunction should also constitute a hearing for permanent injunctive relief. Second, the parties shall inform us of any specific objections to our consideration of the equal protection claim at the hearing. Third, the parties shall submit proposed language for the terms of a preliminary injunction, should Plaintiffs prevail at the hearing on the Medicaid Act claim.

CONCLUSION

For the reasons set forth above, Defendants' motion (Dkt. No. 162) is granted in part and denied in part. We dismiss Counts IV and V as to Defendant DHS, and we dismiss all claims against Governor Quinn. Count III is dismissed entirely, and Count V is dismissed to the extent it alleged violations of state regulatory laws relating to Medicaid. The motion is denied in all other respects.

The parties shall file the information requested above no later than November 15, 2013.

We also advise the parties that we will allow each side thirty minutes for summation at the conclusion of the hearing. It is so ordered.

Marvin E. Aspen

Honorable Marvin E. Aspen
U.S. District Court Judge

Dated: October 8, 2013