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

STANLEY LIGAS, et al.,	)	
	)	
Plaintiffs,	)	No. 05 C 4331
	)	
v.	)	Judge Sharon Johnson Coleman
	)	
FELICIA NORWOOD, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' AND INTERVENORS' REPLY IN SUPPORT OF THEIR JOINT MOTION TO ENFORCE THE CONSENT DECREE

A. The Motion to Enforce Seeks Only to Maintain the Service System Established by the Consent Decree

Defendants' Response asks the Court to assess Plaintiffs' and Intervenors' Motion as if it were seeking an expansion of services beyond what Defendants committed to do through the Consent Decree. (Def. Resp. at 8). In so doing, Defendants minimize their obligations under the Decree and distort the nature of this Motion. This is an enforcement motion to maintain the delivery of services required by the Consent Decree. Plaintiffs and Intervenors do not seek any new or different services; they seek what was promised to them.

While detailing their own goals and efforts in the negotiations, Defendants ignore the fact that Plaintiffs bargained for—and, more importantly, obtained—an express commitment that Class Members would not simply be moved out of institutions, but would receive the person-centered services necessary for true community integration. That promise of community integration can be found in the commitment to Community Based Settings required by Paragraph 4 (as defined in Paragraph 3(e) to require the "most integrated residential setting appropriate for an Individual where the setting is designed to promote independence in daily living, community

integration, and economic self-sufficiency") and in the detailed requirements for service plans in Paragraphs 13 and 14. Similarly, Intervenors bargained for—and obtained—an explicit commitment from Defendants to provide the resources necessary to meet the needs of those living in ICF-DDs. As the Supreme Court has explained:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus, the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

Focusing on Defendants' service obligations, Paragraph 4 states:

> The choices of Individuals with Developmental Disabilities, including Class Members, to receive Community-Based Services or placement in a Community-Based Setting or to receive ICF/MR services in an ICF-DD will be honored; … Defendants shall implement sufficient measures to ensure the availability of services, supports and other resources of sufficient quality, scope and variety to meet their obligations to such Individuals under the Decree and the Implementation Plan consistent with such choices.

Nothing in Defendants' description of the negotiation alters the fact that Defendants agreed to provide the services, supports, and resources necessary to comply with the Decree, including service plans and Community Based Services and Settings for Class Members and resources necessary to meet the needs of those living in ICF-DDs.

Defendants make much of the fact that Paragraph 4 does not explicitly provide for court-ordered rate increases. But consent decrees need not contain or limit the remedies that a court can order upon their violation. Paragraph 4 sets forth the obligations to which the State agreed.

As evidenced by the last two reports by the Independent Monitor and the evidence set forth in the Motion to Enforce, Defendants are no longer meeting those requirements and the Decree must be enforced. *Williams v. Quinn*, 748 F. Supp. 2d 892, 901 (N.D. Ill. 2010) ("The Decree does require that adequate resources will be provided and, if the state fails to meet this requirement, that is an enforceable provision of the Decree.") *citing Frew v. Hawkins,* 540 U.S. 431, 440 (2004); *Wis. Hosp. Ass'n v. Reivitz,* 820 F.2d 863, 868 (7th Cir. 1987).

By agreeing to maintain the services provided under the Consent Decree, Defendants took on the obligation of paying the cost of those services, knowing that, like all costs, they would not remain stagnant over time. By refusing to pay the actual cost of the services, Defendants are pushing those costs onto private providers, most of which are non-profit organizations with little capacity to absorb the costs that the State refuses to pay. That shifting of the financial burden has caused a reduction of the services required by the Decree.[1]

Defendants argue that that they have complied with the service obligations of the Decree because funding has remained level. The false premise here is that level funding equates to level services. Plaintiffs have submitted substantial evidence—largely through Defendants' own contracted service providers—that providers are no longer able to provide the services required by the Decree. The fact that the State has maintained level funding cannot demonstrate compliance with the Decree's requirements; in fact it shows just the opposite. The State has effectively reduced funding because of the impact of inflation over the last decade.

[1] Moreover, failing to adequately reimburse providers creates a substantial loss for the system as a whole because it means Illinois misses out on the federal match for those dollars. For example, some of the providers are able to raise funds through donations to off-set their deficits in operating these services, but that money gets no federal match. When the State allocates money to meet its obligations, there is a 50% match. Thus, while passing the burden on to providers may reduce the costs for the State, it actually increases the total costs of the program.

B. Defendants Have Not Refuted the Violations of the Consent Decree's Requirements under Paragraphs 4, 13 and 14.

As set forth above, the real issue raised by this motion is not what the Consent Decree means – the meaning is clear from the language of the Decree. Nor is there an issue of the Court's power to enforce the Decree – the case law makes clear the Court indeed has that power. *See infra* pp. 12-13. Rather, the only issues are factual ones. The primary of those factual issues is whether the State is providing the services required by the Decree or whether its failure to maintain its system—through the contracted providers—has deprived Class Members and Intervenors of the services to which they are entitled under the Decree and as are required by federal law (Motion at 29-33, citing *Olmstead* and *Steimel*).

The Joint Motion provides extensive evidence of systemic failures in the provision of services in Community Based Settings and ICF-DDs required by the Decree:

- Detailed declarations from 13 of the State's own providers of services to 1800 Class Members and Beneficiaries, all of which aver that the mandated *Ligas* Service Plans are being disrupted or not fully implemented.
- Multiple statewide surveys covering more than 5000 Class Members and Beneficiaries, showing increased segregation and isolation.
- Declarations of three experts regarding the systematic impact of inadequate funding on CILA and ICF-DD services.
- The findings of the current and past *Ligas* court monitors.
- Declarations from seven family members illustrating the systemic issues in the provision of care resulting in the harm and isolation of people with developmental disabilities in this system.

The only mention by Defendants of this evidence—specifically regarding the insufficient services to thousands of Class Members and Beneficiaries—is to call it "small" and "anecdotal." (Def. Resp. at 20.) They fail to address the substance of this evidence and instead ask the Court to credit their own survey of 180 Waiver recipients. (Def. Resp. at 20 citing Hoskin Decl. at 12.)

Defendants contend that 170 Waiver recipients responded that they received the services in their service plans. That survey, however, included recipients of Home-Based Services, for whom the issues raised here do not apply.[2] Defendants are unable even to report how many of the 170 survey responses related to the CILA services, which are the subject of the Motion to Enforce.[3] Further, the spreadsheets attached in Defendants' exhibits fail to provide any explanation of how the Court should determine their validity.

Even assuming that all 170 surveys were from CILA residents (out of more than 11,000 in the state), this would not negate the systemic evidence that Plaintiffs and Intervenors have proffered showing that Class Members and Beneficiaries are not receiving the services required by the Decree and are suffering devastating harms as a result. Plaintiffs and Intervenors have presented extensive evidence of noncompliance and resulting harms. Indeed, the Motion and supporting documents far exceed the evidence needed to show noncompliance in a civil rights case. *See Fortin v. Comm'r of Massachusetts Dep't of Pub. Welfare*, 692 F.2d 790, 795 (1st Cir. 1982) (finding a high degree of compliance was required with a consent decree where the "consequences of failure to comply [with eligibility requirements for subsistence level benefits were] quite serious" and emphasizing the important considerations of the "nature of the interest at stake and the degree to which noncompliance affects that interest").

Defendants attempt to reinforce their "evidence" with the disingenuous claim that providers and recipients have not complained to DHS about the issues raised in the Motion. (Def. Resp. at 20.) Given that there have been several legislative hearings about these very issues in recent years—and both the Secretary of DHS and the Governor have spoken about the need to

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[2] Home-Based Support Services participants receive a monthly allotment to spend on services. Because they have discretion and flexibility as to how to use that allotment, they are not directly impacted by the noncompliance issues raised by Movants.

[3] None of the survey responses relied on by the Defendants relate to individuals living in ICF-DDs.

address DSP wages in order to provide these important services—that claim should be given little credence. Indeed, Defendants' own current Waiver approval application states that 97 public comments (out of a total of 127) were that rates are too low, specifically citing to DSP wages. (Waiver Application at pgs. 12-14).[4]

1. Select Programs to Address Behavioral Problems Do Not Meet the Service Requirements of the Decree

Defendants claim that the "services available to class members and beneficiaries have increased." (Resp. at 17.) In support, they describe three programs for individuals with severe behavioral problems. First, they point to the 2016 increase in compensable hours for professional intervention, which has resulted in CILA residents receiving up to two hours of behavior therapy per week, an increase of one hour. These 0-2 hours a week of behavioral therapy are not a substitute for the diminished services provided by DSPs 24 hours a day, seven days a week. Similarly, the service and support teams cited by the State are very helpful for problem solving in select difficult cases of behavioral problems. But, if CILAs and ICF-DDs close their doors because of inadequate funding, these teams will serve no purpose. Likewise, the short-term stabilization homes are helpful in certain crisis situations. But, to be clear, these homes offer a total of 16 beds in a system that provides services for more than 16,000 people with developmental disabilities.

These three programs are to be applauded for what they are. But they do not rebut the Motion's significant evidence of widespread non-compliance, the documented harm being suffered by large numbers of individuals, or the Monitor's findings for two consecutive years that the State is in violation of the Decree.

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[4] The State's Waiver application can be found at:
https://www.illinois.gov/hfs/SiteCollectionDocuments/Adult0350Draft.pdf

2. *Illinois Wages and Turnover Cannot Be Compared with States that Fund the Same Services at Substantially Higher Levels Overall*

Defendants contend that Illinois's DSP wages and turnover are similar to those in other states. However, it is the *denial of services* that results from the low wages and high turnover in Illinois—not the low wages and high turnover rates themselves—that is the violation of the Decree. Defendants do not contest that Illinois funds its CILA and ICF services at total amounts far less than other Midwestern states. *See* Motion at 7. Indeed, Defendants argue just the opposite: that Illinois is so far below neighboring states in its funding of these services that it would be too burdensome to catch up now. In essence, Defendants are asking that they be rewarded for the many years in which they have neglected the funding of services for people with developmental disabilities.

Illinois is the wealthiest of the Midwest states,[5] yet only contributes a third of the average Midwest per person rate for developmental disability services. (Motion at 7.) As documented by the declarations by 13 different *Ligas* providers, the lower overall funding of these services in Illinois—at rates substantially less than the actual operation costs—places Illinois's CILAs and ICF-DDs in a precarious existence.

Moreover, Defendants put forth weak and unreliable evidence to argue that Illinois's DSP wage and turnover rates are comparable to other neighboring states. The first survey that Defendants rely upon involved only nine states and the District of Columbia. Only three of the states had the number of survey responses necessary to be considered representative of the conditions in the state. As a result, the survey report cautioned against making the very comparisons that Defendants attempt to make. Def. Ex. A at 4. The second survey relied on by

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[5] *See* Internal Revenue Service, Data Book 2008, T.5 at 12, *available at* http://www.irs.gov/pub/irs-soi/16databk.pdf.

Defendants suffers from the same defect. Eleven of the sixteen states had insufficient survey responses to make the results reliable. Def. Ex. B at 4. The third survey cited by Defendants actually supports Plaintiffs' and Intervenors' Motion. It concludes: "Due to states setting low Medicaid rates that providers cannot negotiate, DSP wages are not competitive or commensurate to the level of responsibility required for the occupation. The resulting artificially low wages are the lead reason for turnover, affecting the quality of care and individuals' ability to customize services." Def. Ex. C at 11.

Whatever differences or similarities exist between Illinois and other states, the critical fact here is that the Defendants signed a Consent Decree. The deficiencies of other states do not establish Defendants' compliance with the Consent Decree's service obligations, especially given that those other states are miles ahead of Illinois in terms of both funding services and providing for community integration.

C. The Consent Decree is Not A Vehicle For Medicaid Compliance and This Court's Authority to Enforce Is Not Relinquished to CMS

Defendants suggest that the purpose of the Decree is to bring the State into compliance with Medicaid law. As explained above, this is not a Medicaid enforcement action and the Decree requires far more than compliance with Medicaid law. The services and resources at issue here are tied to the obligations of the Decree alone. Indeed, the Medicaid statute and regulations are not even referenced in the body of the Decree.

1. Paragraph 4 Ties the Service Obligations to the Decree's Requirements, Not to Medicaid Law

Defendants take a single undefined phrase ("federally approved objective criteria") out of context in an effort to argue that the service requirements of Paragraph 4 are nothing more than a parroting of the State's existing obligation to comply with its State Medicaid Plan. (Def. Resp. at

8). But the role of the Court is to enforce the Decree as it is written. Defendants' claimed limitation cannot be found in the language of the Decree.

The language of Paragraph 4 explicitly ties the required services and resources to the obligations under the Decree, including the preservation of ICF-DD services for Intervenors and the provision of Community Based Settings for Class Members:

> The choices of Individuals with Developmental Disabilities, including Class Members, to receive Community-Based Services or placement in a Community-Based Setting or to receive ICF/MR services in an ICF-DD will be honored; … Defendants shall implement sufficient measures to ensure the availability of services, supports and other resources of sufficient quality, scope and variety to meet their obligations to such Individuals under the Decree and the Implementation Plan consistent with such choices.

The final sentence of Paragraph 4, on which Defendants draw heavily (Resp. at 7-9), states:

> Funding for services for each Individual with Developmental Disabilities will be based on the Individual's needs using federally approved objective criteria regardless of whether the Individual chooses to receive services in an ICF-DD or in a Community-Based Setting; provided, however, nothing in this Decree shall require Defendants to change their current method for establishing funding or from adopting new methods based upon federally approved objective criteria.

The language of this clause ensures that Medicaid service eligibility determinations are not impacted by the Decree and it makes the individual's needs paramount.

The term "federally approved objective criteria" refers to the mechanism by which "Individual's needs" are assessed for determining eligibility for services. Under Medicaid, eligibility for long-term services for people with developmental disabilities is based upon a determination made using a standardized instrument (objective criteria) that has been approved by CMS. The second half of this sentence simply ensures that Defendants may modify their methodology without running afoul of the Decree. This was important because, in 2011, the State was applying for increased federal money through the Balancing Initiative Program to

increase access to non-institutional long-term services. As a part of that process, the State was required to update its objective criteria for eligibility and have it approved by CMS. The State's application for this program was approved in 2013.

By its terms, this sentence in Paragraph 4 is about methods for determining individual eligibility for services. It has nothing to do with the rates that the State pays to providers for the services required by the Decree. Defendants' baseless interpretation, which would render the service requirements set forth in Paragraphs 4, 13 and 14 meaningless, cannot be accepted. *See Kim v. Carter's Inc.*, 598 F.3d 362, 364 (7th Cir. 2010) ("An agreement is to be interpreted as a whole; we should give meaning and effect to every provision when possible, and we will not interpret the agreement in a way that would nullify provisions or would render them meaningless."); *Land of Lincoln Goodwill Indus., Inc. v. PNC Fin. Servs. Grp., Inc.*, 762 F.3d 673, 679 (7th Cir. 2014) (rejecting interpretation that would render one of the terms a nullity).

2. CMS's Approval of the State Medicaid Plan Has No Bearing On This Court's Authority to Enforce the Decree

To the extent that Defendants are suggesting that the Court's enforcement of the Decree should not address the insufficient rates at the heart of the violations because CMS has approved the Illinois State Plan, that argument must be rejected. In fact, the entire discussion about CMS's regulation of Medicaid requirements (Resp. at 8-10) is beside the point. The *Ligas* case was and is a challenge to the institutional segregation of Illinois residents with developmental disabilities. The present motion is to enforce the Decree, not Medicaid requirements.

Moreover, Defendants have not shown that CMS has in fact reviewed and approved the rates relevant to this Motion. Defendants argue that the Court should assume—without any explanation or evidence—that CMS reviewed Illinois's rates pursuant to § 1396a as part of the approval process. *See* Def. Resp. at 8-10. Federal court deference to agency determinations

requires much more than assumption; at a minimum, it requires an actual determination. *See Arc of California v. Douglas*, 757 F.3d 975, 984 (9th Cir. 2014) (reversing district court's finding that CMS approval of the Waiver application as a whole "that did not address, even implicitly, the questions raised" was sufficient to warrant deference as to the 42 U.S.C. § 1396a(a)(30)(A) requirements of rate sufficiency). Thus, even if this were a Medicaid enforcement action, which it is not, that argument would fail.[6]

Defendants suggest that CMS made findings regarding the sufficiency of the rates to provide for the required services when it approved the State's Medicaid Plan. But on the necessary particulars, Defendants are vague to the point of being obfuscatory.

First, Defendants reference the methodology set forth in the State Plan for rate reimbursement. The plan has existed for more than 40 years and is thousands of pages. It is amended regularly, but no recent amendments relate to the rate methodology for these providers. In fact, it is Movants' understanding that the rate methodology currently used for CILAs was developed in 2002, and was updated only once (prior to the Consent Decree) to give a slight increase in hourly wages.

Next, Defendants set forth the public process required by § 1396a(a)(13)(A), but fail to point to any actual public process whatsoever relating to the reimbursement rates for CILA and

[6] While CMS is delegated the authority to review and approve the State Medicaid plans, that does not mean that it is able to investigate and reach conclusions regarding the compliance of each Plan with every provision of Medicaid law (much less other laws). Thus, much litigation has arisen challenging state compliance with particular provisions of Section 1396a. Where CMS has made findings regarding compliance with those particular provisions at issue, the courts must assess the degree of deference to give those findings. That is not the posture of this case. That said, *Arc of California v. Douglas*, 757 F.3d 975 (9th Cir. 2014) gives a very thorough overview of the Medicaid state plan and waiver processes in the context of one such case. In *Arc,* as here, *CMS* had not made any such findings.

ICF-DD providers.[7] This public process requirement, which may or may not have been met in Illinois (Defendants do not say), has no bearing on the Consent Decree. In fact, that process—even if it did occur—would have last occurred in 2008 (at best) when rates last changed. Moreover, that process would not have addressed whether the Decree's service requirements were met, or whether the ADA's community integration requirements were met.

Finally, Defendants cite to § 1396a(a)(2), claiming that it covers the sufficiency of rates. But that provision concerns the appropriate distribution of State and Federal funds to provide the services in the State plan, not the sufficiency of rates to achieve compliance with the requirements of the Consent Decree. Another section, not cited by Defendants, does contain requirements relating to rates, 42 USC § 1396a(a)(30)(A), but, again, does not address the sufficiency of rates to meet the requirements of either the Decree or the ADA.[8]

In short, there is no CMS finding regarding the sufficiency of current reimbursement rates in Illinois to which deference can even be considered. More importantly, CMS is not the arbiter of compliance with the Americans with Disabilities Act or this Consent Decree. The review by CMS for compliance with Medicaid law and the consideration by this Court in enforcing the Decree are separate issues that should not be conflated.

[7] Note that the public feedback on the Waiver Application, cited above, is not the § 1396a(a)(13)(A) process. The rate requirements for the Waiver differ from those for the State Plan and focus on the efficiency relative to the cost of institutionalization.

[8]Section 1396a(a)(30)(A) requires States to "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan … as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area."

D. The Remedy: The Court Can and Should Enforce the Consent Decree

Defendants' arguments that the Court cannot order relief necessary to compel compliance with the Decree fail to recognize the procedural posture of this case. It is well-established that the Court has the authority to enforce consent decrees. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 439 (2004) (the "motion to enforce, however, sought enforcement of a remedy consistent with *Ex parte Young* and *Firefighters*, a remedy the state officials themselves had accepted when they asked the District Court to approve the decree"); *O'Sullivan v. City of Chicago*, 396 F.3d 843, 867 (7th Cir. 2005) ("The problem with the City's present position is that it ignores the procedural posture of this case. The present plaintiffs brought an action to *enforce* the 1983 Consent Decree, and the district court had the power to enforce that decree.").

1. The State Should Be Ordered to Produce a Plan to Remedy Its Non-Compliance with the Decree's Service Requirements

The State has now passed a budget that contains what should be a first step toward addressing the issues in the Motion to Enforce. The budget includes $57 million for a wage increase to frontline workers in CILAs and ICF-DDs. It is estimated that this could provide a wage increase of approximately $0.75 per hour. By comparison, the legislation passed by the General Assembly and vetoed by the Governor last year would have required wages of $15.00 per hour (an average increase of $4-$5 per hour). That would have been in line with the 30% increase that Dr. Powers stated in her Declaration would be necessary to significantly reduce the turnover.

The Motion's request for relief asks that Defendants be ordered to submit a detailed plan for how the State will bring itself into compliance with the Decree. That plan should include an explanation of how the FY2018 budget's allocated increase will be utilized and whether any other funding will be utilized to address these issues. Defendants should also address whether

they will commit to increasing those rates over a specific timeframe in order to reach sufficient levels. Additionally, along with any rate increase, the plan should include what other steps the State will take to stabilize and maintain the service delivery system, such as ways that the State could use its vast resources to help the providers with recruitment and retention.

2. *The Rate Increase Should Be Ordered As Part of Defendants' Plan to Remedy the Violations*

Defendants argue that the full rate increase of the size described by Dr. Powers (a 30% increase), or to rates comparable to how other Midwestern states fund these services, would be a fundamental alteration to the State's programming. Fundamental alteration is a defense to an ADA claim in litigation. *See* 28 C.F.R. § 35.130(b)(7). The State cannot enter into a consent decree agreeing to provide certain services and then excuse itself from compliance by claiming that providing the very services it agreed to would be too expensive. *See Armour,* 402 U.S. at 681-82 (when entering a consent decree, the "parties waive their right to litigate the issues involved in the case"). Moreover, as explained above, the Motion does not seek to change the program under which Class Members and Beneficiaries are receiving services, but to preserve that program through reimbursement rates that are adequate to maintain necessary services.

Even if applied here, the resource considerations set forth in *Olmstead v. L.C.* would not require otherwise. Defendants take a single consideration out of the Supreme Court's complex analysis of the cost-related defense to suggest that the Illinois budget situation (the result of a more than two-year long political standoff) should be the sole consideration of this Court in enforcing the Consent Decree.

In *Olmstead,* the Supreme Court emphasized the importance of balancing resources and the need for services for people with developmental disabilities as a whole, relative to the

individual relief sought in that case. The Seventh Circuit in *Steimel* described the *Olmstead* analysis as follows:

> By specifying that both the "resources available to the State" and "the needs of others with mental disabilities" must be taken into account, the plurality's test allows for a sensitive balance between the interests of the state and the interests of the developmentally disabled persons. The test also prevents a state from describing a program at such a specific level of detail that literally any change would result in a "fundamental" alteration. In the end, the question under the ADA is a simple one: what effect will changing the state's practices have on the provision of care to the developmentally disabled, taking into account the resources available to the state and the need to avoid discrimination?

Steimel v. Wernert, 823 F.3d 902, 915 (7th Cir. 2016). Importantly, not only is the procedural posture of this case different than both *Olmstead* and *Steimel* (neither of which involved consent decrees), but *Ligas* is a class action providing systemic relief, whereas those cases sought relief for individuals. The systemic nature of *Ligas* afforded Defendants the precise opportunity that *Olmstead* and *Steimel* say states should have – the ability to consider the state's resources and obligations in a systemic fashion, as a whole. Moreover, the vast majority of people with developmental disabilities in Illinois are either Class Members or Beneficiaries, making it disingenuous for Defendants to suggest that adequately funding the services that they need will dramatically alter the system.

The weight of the State's cost arguments here is further reduced by the fact that Defendants have failed to provide any support for these arguments. No evidence has been cited and no analysis has been provided. *Steimel*, 823 F.3d at 915 ("Here, the state has produced no evidence that anything approaching a fundamental change would occur if the programs available to these plaintiffs were handled differently. We thus do not regard it as a close case."); *Radaszewski*, 383 F.3d at 611 ("It is the state's burden to prove that the proposed changes would fundamentally alter their programs."). *See also Bontrager v. Indiana Family & Soc. Servs.*

Admin., 697 F.3d 604, 611–12 (7th Cir. 2012) ("Although we are mindful of potential budgetary concerns, these interests do not outweigh Medicaid recipients' interests in access to medically necessary health care.").

Defendants entered into the Consent Decree agreeing to provide these services, giving this Court the authority to enforce the Decree. In *Reivitz*, the Wisconsin legislature passed a law to change Medicaid reimbursement rates in a way that was inconsistent with the prior Medicaid Plan and the consent decree. *Wisconsin Hosp. Ass'n v. Reivitz*, 820 F.2d 863, 865 (7th Cir. 1987). The district court found that the state had indeed violated its obligations under the consent decree, but refused to order any relief. *Id.*

In reversing, the Seventh Circuit explained that, "[a]gainst a state that violates a valid federal court decree the court has the power to issue any order necessary to enforce the decree, including an order to pay ... Whether one calls such an order one of civil contempt or, as we would prefer out of comity to characterize it, an equitable supplement to the consent decree, it is within the power of the federal court to make." *Id.* at 868 (citations omitted). So long as the consent decree is valid, any order—even one ordering the state to pay fines—is proper to coerce compliance with the decree. *Id.* at 868. The same is true here. The Court has authority to enforce the Decree including by requiring Defendants to increase rates necessary to achieve compliance. *See also Geller v. Branic Intern Reality Corp.* 212 F3d 734, 373 (2d Cir. 2000) (the court's "duty is to enforce the stipulation that it has approved").

Similarly, Defendants' reliance on a single sentence from *O.B. v Norwood*, 838 F.3d 837, 842 (7th Cir. 2016) misses the point. That case involved plaintiffs seeking injunctive relief for violations of Medicaid's regulations relating to the privately enforceable provision of EPSDT medical assistance to children. The state had argued that the regulations required it to pay for

those Medicaid services, but did not require the provision of services, and that the regulations relating to those payments were not subject to private enforcement (per *Armstrong).*[9] But the Court found to the contrary that the State was obligated to ensure that the services were provided, not only to pay the bills. *Id.* In the midst of this discussion is the *dicta* Defendants rely upon: "And if the shortage is of nurses willing to work at the reimbursement rates set by HFS, we could not order the agency to eliminate the shortage by raising those rates." *Id. citing Armstrong v. Exceptional Child Center*, 135 S.Ct. 1378, 1385 (2015).

This statement relates to the availability of injunctive relief under the Medicaid statutes, not to enforcement of a consent decree. In *Armstrong*, the Supreme Court overturned a Ninth Circuit decision finding that the Supremacy Clause created an implied right of action. The Court rejected that holding and went on to find that the particular provision of the Medicaid statute under which the *Armstrong* plaintiffs challenged rates, §1396a(a)(30)(A), precluded private enforcement. In other words, the *Armstrong* decision was jurisdictional. The dicta in *O.B.* merely reflects the *Armstrong* holding that §1396a(a)(30)(A) is not privately enforceable.

In any event, *O.B.* and *Armstrong* did not involve enforceable obligations of a consent decree. A more relevant case is *Memisovski v. Maram*, which was originally filed under 42 U.S.C. § 1396a(a)(30)(A) and EPSDT, and resulted in a Consent Decree which, *inter alia*, established requirements for reimbursing physicians for required services. In enforcing the decree, the District Court recently ordered Defendants to make monthly payments of $586 million to Medicaid providers, as well as pay an additional $2 billion toward a backlog of bills. *Memisovski v. Maram*, No. 92 C 1982, Order, Doc. No. 533 (N.D. Ill. June 30, 2017). The Court's order requires funding to enforce the provisions of the consent decree, as Movants have

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[9] *See* Def-Appellant's brief in *OB v. Norwood*, No 16-2049 filed on July 13, 2016, available at 2016 WL 3913037 (C.A.7), at *9, 23.

requested here. *See also Local No. 93, Intern. Ass'n of Firefighters, AFL–CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986) ("the parties' consent animates the legal force of a consent decree.").

RESPECTFULLY SUBMITTED,

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