UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Stanley Ligas, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No. 05 C 4331
v.	)	
	)	Judge Sharon Johnson Coleman
Felicia Norwood, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' AND INTERVENORS' JOINT MOTION TO ENFORCE CONSENT DECREE

Defendants Felicia Norwood, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, and James Dimas, in his official capacity as Secretary of the Illinois Department of Human Services, through their attorney, Lisa Madigan, Illinois Attorney General, hereby respond to Plaintiffs' and Intervenors' Joint Motion to Enforce Consent Decree ("Motion") (Doc. No. 663) and state as follows:

I. INTRODUCTION

Although presented as a motion to enforce the Consent Decree ("Decree") (Doc. No. 549), Plaintiffs and Intervenors ("Movants") seek, among other things, very specific relief – an order forcing the State to increase the rates paid to providers that operate Community Integrated Living Arrangements ("CILAs") and Intermediate Care Facilities for the Developmentally Disabled ("ICF-DDs"). That request, however, is relief that the Decree does not require, that the law does not permit, and that would cost the State between $200 million and $1.4 billion annually, depending on the scope of the Court's order.

As to the Decree, Defendants and Movants drafted the Decree to address two overriding issues: (1) Plaintiffs' allegation that the State was not providing certain groups of developmentally disabled adults with the opportunity to obtain community-based services; and (2) Intervenors' demand that the State not accomplish the goal of providing community-based services to Class Members by shifting resources from Intervenors, who are developmentally disabled adults who reside in and wish to remain in ICF-DDs.[1] Defendants, through their implementation of the Decree over the past six years, have satisfied the two intended outcomes of the Decree by (1) providing expanded opportunities to Class Members who sought community-based services, and (2) continuing to provide the same level of resources to Intervenors as were provided before the Decree was entered and comparable to the resources provided to Class Members.

Although the Decree obligates Defendants to ensure the availability of sufficient resources to meet the needs of both Class Members and Intervenors, that mandate was not intended to and does not expand Defendants' existing obligation to comply with the Federal and state requirements for providing Medicaid services. And, the Decree's obligation to provide sufficient resources does not provide this Court with a basis to order relief – an increase in rates – that the law otherwise does not allow. In *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 604, 607 (1999), a plurality of the Court made clear that a state's obligation to provide community-based services under the ADA is limited by "the resources available to the State" and by the state's responsibility for "the care and treatment of a large and diverse population of persons with … disabilities."

[1] Defendants' references to ICF-DDs are to privately operated ICF-DDs only, which were covered by the *Ligas* complaint and Decree, and are where Intervenors reside. State Operated Developmental Centers ("SODCs"), although classified as ICF-DDs, were not a part of the litigation or covered by the Decree.

More specifically, just last year the Seventh Circuit stated unequivocally that a court cannot order a state to raise the Medicaid reimbursement rates paid to healthcare providers, even if such increases are needed to ensure the provision of unquestionably approved and necessary services. *See O.B. v Norwood*, 838 F.3d 837, 842 (7th Cir. 2016) (*citing Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378, 1385 (2015)). Considered in light of the state's available resources, its responsibility to others with disabilities, the cost of the requested relief, and Defendants' continued compliance with the core obligations of the Decree and with Federal and state law, this Court should find that Defendants remain in substantial compliance with the Decree and deny the Motion.

II. BACKGROUND FACTS

Plaintiffs filed their initial complaint on July 28, 2005 (Doc. No. 1). After several years of litigation, Plaintiffs and Defendants agreed to a proposed Consent Decree, which the Court preliminarily approved on March 31, 2009 (Doc. No. 326). The Court held a fairness hearing on July 1, 2009 (Doc. No. 416), at which Intervenors and others objected to the proposed Consent Decree. After the fairness hearing, the Court vacated the class certification and denied final approval of the proposed Consent Decree (Doc. No. 420).

Plaintiffs and Defendants then agreed to a revised Consent Decree and moved for preliminary approval. In a series of orders entered on April 7-8, 2010, the Court denied preliminary approval and granted Intervenors limited intervention (Doc. Nos. 478-80). Following extensive negotiations and the involvement of the assigned Magistrate Judge, Plaintiffs, Defendants and Intervenors agreed to a newly revised Consent Decree. The parties filed a joint motion for preliminary approval (Doc. No. 521), the Court granted preliminary approval (Doc.

No. 524), and the Court held another fairness hearing (Doc. No. 547). On June 15, 2011, the Court gave final approval and entered the Decree (Doc. No. 549).

III. ARGUMENT

A. Based on the history of the *Ligas* litigation and negotiation of the Consent Decree, the Decree does not support Movants' request for increased rates.

Movants primarily rely on an excerpt of Paragraph 4 of the Decree to support their argument that the Decree requires and this Court can order Defendants to increase rates.[2] However, Movants do not provide the full context for the obligations contained in Paragraph 4. Viewed in the proper context – the history of this litigation, the negotiation of the Decree, and applicable law – Paragraph 4 does not obligate the State or empower this Court to increase rates based on the facts Movants allege.

1. History of *Ligas* litigation

The history of this litigation is relevant to the Motion because it provides important context for the parties' intent in negotiating the Decree, which in turn provides important context for understanding what the Decree does and does not require of Defendants. Plaintiffs' initial complaint centered on their principal allegations that Defendants were (1) denying putative class members living in private ICF-DDs the opportunity to move to community-based settings, *i.e.*, CILAs, and (2) denying putative class members living at home and at risk of institutionalization, *i.e.*, moving into an ICF-DD, the opportunity to receive community-based services, including moving into a CILA. *See, e.g.*, Final Pretrial Order (Doc. No. 266) at 11, 126-29 ("Individuals in

[2] Movants also rely on Paragraphs 13 and 14 to identify the type and level of services Defendants must provide, but Movants' contention that Defendants are failing to provide the services required under Paragraphs 13 and 14 is based on their argument that Defendants have failed to provide adequate resources – *i.e.*, funding – as they allege is required by Paragraph 4. Defendants will discuss how Paragraphs 13 and 14 are properly understood in the context of the Motion, but will focus on Movants' arguments regarding Paragraph 4.

category 7 [of the State's prioritization of individuals who would be considered for community-based services, who are individuals who reside in private ICFs/MR (ICF-DDs)] are almost never provided with an opportunity to receive waiver services and, as a result, irrespective of their eligibility and wishes, they have virtually no chance of moving out of the ICF-DDs and into Community Settings.").

Thus, the principal goal of the Decree was to remove the obstacles faced by residents of private ICF-DDs and those at home at risk of institutionalization and to expand their opportunities to obtain community-based services, including moving into CILAs. The Decree accomplished this goal by establishing benchmarks over a six year period that obligated Defendants to provide community-based services to specific numbers of Class Members and, after the sixth year, to continue to provide at a reasonable pace community-based services to Class Members who are then on a waiting list. Decree at ¶¶ 17-23.

The Decree of course contains numerous other provisions and imposes numerous other obligations on Defendants that are not strictly numeric benchmarks. For example, the Decree: requires that Defendants create and maintain a Class Member database (¶¶ 8-9); sets out requirements for the content, preparation and use of Transition Service Plans for Class Members who are to receive community-based services (¶¶ 10-16); and includes provisions for engaging in outreach to known and potential Class Members (¶ 25). But, these other components of the Decree, along with Paragraph 4, were intended to support the achievement of the principal goal of the Decree – to expand opportunities for Class Members to obtain community-based services. These other provisions, including Paragraph 4, were not included to address allegations that Defendants were providing an inadequate level of services or were insufficiently funding those services. Plaintiffs made no such allegations in their initial or amended complaints.

2. Negotiation of the Decree

As originally negotiated and included in the first proposed Consent Decree in 2008, Paragraph 4 of the Decree provided:

> Defendants shall ensure the availability of services, supports and other resources of sufficient quality, scope and variety to meet their obligations under the Decree and the Implementation Plan. Defendants shall implement sufficient measures, consistent with the choices of Individuals with Developmental Disabilities, to provide Community Based Settings and Community Based Services pursuant to the Decree.

Doc. No. 298 at 9-10. Not surprisingly, Paragraph 4 was the product of significant negotiation and compromise between Plaintiffs and Defendants, with Plaintiffs pushing for a stronger and more specific obligation to ensure sufficient resources and Defendants arguing for a more general obligation limited to ensuring compliance with the Decree.

After the Court declined to approve the 2008 proposed Consent Decree and granted intervention to Intervenors, Defendants and Movants negotiated the Decree that was approved in 2011. Again, not surprisingly, the new version of Paragraph 4 was the product of significant negotiation and compromise among the parties. In full, Paragraph 4 provides:

> 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; provided, however, that this commitment to honoring choice does not alter Defendants' current obligations under existing law regarding licensed ICF-DD capacity system-wide or at any specific ICF-DD, and provided that, under current applicable law, this commitment does not entitle an Individual with Developmental Disabilities to receive ICF/MR services in a specific ICF-DD. 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. While the Decree remains in effect, any amendment to the State Plan submitted by the State pursuant to 42 U.S.C. § 1396, et seq.

> will continue to include ICF-DD services as an alternative choice for long-term care services for eligible Individuals with Developmental Disabilities. Nothing in this Decree shall impair Defendants' ability to make changes in their provision of supports and services to Individuals with Developmental Disabilities, including Class Members, regardless of setting, provided that Defendants continue to honor Individuals' choices and fulfill Defendants' obligations under the Decree and Implementation Plan. Resources necessary to meet the needs of Individuals with Developmental Disabilities who choose to receive services in ICFs-DD shall be made available and such resources will not be affected by Defendants' fulfillment of their obligations under the Decree, including the obligations under Paragraphs 17 through 19 and 21 through 23. 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.

As its language demonstrates, Paragraph 4 evolved from a general obligation to a very specific description of Defendants' obligation to provide adequate resources, which is qualified particularly by Defendants' obligation to Intervenors. As explained below, however, the additional detail in Paragraph 4 was not intended to and did not expand Defendants' obligation to ensure resources beyond the requirement to comply with the Decree and existing federal law.

In Defendants' view, which we believe is consistent with the parties' negotiations and the explicit language of the Decree, Paragraph 4 is intended to accomplish three goals: (1) set out Defendants' obligation to make available the resources necessary to meet the needs of Individuals with Developmental Disabilities (*i.e.*, both Class Members and Intervenors); (2) set out Defendants' obligation to not lessen their commitment to Intervenors residing in ICF-DDs and not divert resources devoted to serving Intervenors to meeting Defendants' new obligation to expand opportunities for Class Members to obtain community-based services; and (3) make

obligations (1) and (2) explicitly linked to and consonant with Defendants' obligation to comply with the Decree and existing Federal law.[3] Put another way, during the negotiations of the Decree, Defendants insisted that the Decree would not obligate them to provide new or a higher level of services than are required to comply with federal law. That is why Paragraph 4 contains the last sentence:

> 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.

And that is also why the Decree contains Paragraph 15:

> The Transition Service Plan shall not be limited by the current availability of services, provided, however, that nothing in this paragraph obligates Defendants to provide the types of services beyond those included in the Waiver[4] and/or the State Plan.

Both provisions make it clear that Defendants will be in compliance with the Decree – as to both the types of services and the funding for those services – so long as Defendants remain in compliance with Federal law.

It makes sense that Defendants' obligation to comply with the Decree is consonant with their obligation to comply with Federal law. This case has been about whether Defendants violated Federal law, and the Class is limited to individuals who are eligible to receive Medicaid-funded services. Federal law requires that the state meet the needs of those who receive services,

[3] Obligation (2) is not at issue here: Intervenors do not argue that Defendants have violated the Decree by diverting resources from serving Intervenors to providing additional community-based services to Class Members.

[4] The Waiver is the state's Home and Community-Based Services Waiver Program for adults with developmental disabilities.

and Federal approval of the state's Medicaid plan and Waiver necessarily includes approval of what the state proposes to pay for ICF-DD and community-based services.

The Federal requirements regarding a state's Medicaid plan, including requirements regarding reimbursement rates, are found primarily in 42 U.S.C. §1396a. Subsection (a)(2) provides in relevant part that the state must ensure funding sufficient to avoid reducing "the amount, duration, scope, or quality of care and services available under the plan."[5] Subsection (a)(13)(A) requires that the state plan provide

> for a public process for determination of rates of payment under the plan for hospital services, nursing facility services, and services of intermediate care facilities for the mentally retarded under which—
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> (i) proposed rates, the methodologies underlying the establishment of such rates, and justifications for the proposed rates are published,
>
> (ii) providers, beneficiaries and their representatives, and other concerned State residents are given a reasonable opportunity for review and comment on the proposed rates, methodologies, and justifications,
>
> (iii) final rates, the methodologies underlying the establishment of such rates, and justifications for such final rates are published….

By twice referring to "federally approved objective criteria," Paragraph 4 specifically ties Defendants' obligations to the relevant provisions of Section 1396a and other applicable Federal law. As part of its participation in the Federal Medicaid program, the state must submit its state plan to the Centers for Medicare and Medicaid Services ("CMS"). The state plan includes the state's service rate methodology, which initially includes the reimbursement rates the state proposes to pay for all covered services. As part of its approval of the state plan, CMS

[5] Thus, Paragraph 4's requirement that Defendants "ensure the availability of services, supports and other resources of sufficient quality, scope and variety" is not a uniquely created obligation but merely tracks Defendants' existing obligation under federal Medicaid law.

necessarily approves the proposed reimbursement rates. And, as is set out in subsection (a)(13)(A), the law requires a public process for the determination of rates. In that process, the state must publish its "proposed rates, the methodologies underlying the establishment of such rates, and justifications for the proposed rates." The process specifically gives "providers, beneficiaries and their representatives, and other concerned State residents … a reasonable opportunity [to] review and comment on the proposed rates, methodologies, and justifications." Thus, because Illinois' state plan and its rate methodology comply with Federal law, and the Decree imposes no specific funding obligation beyond Federal law, Defendants consequently are in compliance with the Decree.

B. *Olmstead* does not support Movants' request for increased rates.

As noted above, the Supreme Court in *Olmstead* recognized that a court determining a state's obligation to provide Medicaid services in compliance with the ADA must take into account the state's available resources and its responsibility to care for all residents with disabilities. In *Olmstead*, the discussion of the state's resources was in the context of deciding whether requiring the state to provide services in a community-based setting instead of in an institutional setting would be a reasonable modification or a fundamental alteration of the state's services and programs: "The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of 'reasonable modifications' to avoid discrimination, and allows States to resist modifications that entail a 'fundamenta[l] alter[ation]' of the States' services and programs." 527 U.S. at 603-04 (citing 28 C.F.R. § 35.130 (b)(7) (textual changes in original).

In *Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016), the Seventh Circuit endorsed and elaborated on these *Olmstead* principles. Although Movants assert that *Steimel* supports their

request for increased rates, the opposite is true. In *Steimel*, the Seventh Circuit confirmed that a court must take into account the state's available resources and suggested that a significant increase in the state's cost of providing services could be a fundamental alteration of the state's programs. 823 F.3d at 915-17. Quoting *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 614 (7th Cir. 2004), the court noted that "a 'substantial [ ] increase' in the cost of a few of plaintiffs' services should not defeat [a] Title II claim," 823 F.3d at 915, but *Radaszewski* involved only one plaintiff. Here, the Decree covers more than 26,000 individuals who receive DD services, plus approximately 19,000 individuals who are on the State's PUNS list (the "waiting list" for DD services), and all of those individuals would be affected by Movants' request for increased rates. As explained below, granting Movants' relief would cost the state between $200 million to $1.4 billion annually, which could more than double the state's total spending for private ICF-DD and Waiver services. That is exactly the magnitude of cost increase that the *Steimel* court suggested could amount to a fundamental alteration of the state's services and programs, especially given Illinois' current fiscal crisis.

The state of Illinois has a finite amount of money from which it currently pays its obligations and from which it would be paying any increase in reimbursement rates. The state has been funding its operations for the past two years through deficit spending. The aggregate spending required under numerous court orders and other statutory mandates exceeds total revenue by hundreds of millions of dollars each month. The backlog of unpaid bills has increased from about $5 billion at the end of June 2015 to more than $15 billion as of June 22, 2017.[6] Most state vendors and providers are being paid months late, if at all. Notably, providers of DD services under the *Ligas* Decree are being paid both in full and more promptly than when the

[6] *See* http://ledger.illinoiscomptroller.gov/fiscal-condition/ (last visited June 22, 2017).

state's budget impasse began in July 2015. *See* Declaration of Reta Hoskin at ¶ 4, attached hereto as Exhibit 1.[7]

Because the scope and cost of relief, if granted, is not known, it is difficult if not impossible for Defendants to describe how their programs would be fundamentally altered. But, if forced to significantly increase reimbursement rates, Defendants might be required to modify, reduce, or eliminate existing services, including services to other individuals with disabilities, and/or greatly slow the provision of services to newly-eligible individuals. And, such changes to existing services and programs might put the State at risk of violating in some other respects this or other consent decrees or state or federal mandates. Movants have cited to nothing in *Olmstead* or its progeny that would authorize the Court to order such a fundamental alteration as would result from Movants' requested relief.

C. The law does not give this Court the authority to order increased rates.

Movants cite several cases that they claim give this Court the authority to order Defendants to increase rates. Upon closer examination, however, those decisions fail to support Movants or are otherwise distinguishable. First, as discussed above, *Steimel* supports Defendants' position more than Movants' and is distinguishable on the facts. *Steimel* involved a unique change in Indiana's community-based services program. Indiana operates three waiver programs that serve individuals with developmental disabilities, and the three programs each have different eligibility criteria and provide different levels of funding per individual. 823 F.3d at 906. Because of policy changes the state made, certain individual plaintiffs (class certification

[7] Because the state is paying DD providers both promptly and in full at current reimbursement rates, many other state services, including services provided to other individuals with disabilities, are being paid only in part and after much delay. Increasing the DD providers' reimbursement rates by 25% or more would delay other payments even more and almost certainly place the state in violation of other court orders or state mandates.

having been denied) were moved from one waiver program to another, which in turn resulted in them receiving reduced funding and reduced services. *Id*. The district court held that the state had not violated the integration mandate by moving individuals from one community-based waiver program to another, but the Seventh Circuit disagreed.

The Seventh Circuit focused its analysis on the dimensions of the integration mandate, not on whether the state's level of payment violated the integration mandate. The court found that the integration mandate is broad enough to encompass a claim of segregation even within a community-based setting. *Id*. at 910-12. And, the court specifically relied on the fact that plaintiffs were not demanding a

> significant increase in total services, but rather a different apportionment of the two kinds of services they already receive…. Allowing the plaintiffs to change their "mix" of … services would allow them to participate more fully in the community. According to their affidavits, a relatively slight increase in total services would prevent them from being unsupervised. The state has provided no evidence that the plaintiffs' desired distribution of services would significantly increase their cost, let alone fundamentally alter any programs.

Id. at 916-17. Unlike *Steimel*, Movants are not being moved from one program to another, so the applicability of *Steimel* is limited.

Even if a similar analysis were applied, however, Defendants have presented evidence that the requested relief would result in a significant increase in the cost of the state's programs, enough to fundamentally alter them. And, unlike in *Steimel*, where the plaintiffs were moved to different programs that on their face provided reduced funding, here the approved services for both ICF-DDs and community-based programs have not been changed since the Decree was approved. Although rates generally have not been increased since the Decree was approved, there has been no decrease in actual funding like in the *Steimel* case. With respect to approved

services and the rate methodology, Class Members and Intervenors are being treated the same as before the approval of the Decree. And, as required by Paragraph 4, the resources devoted to ICF-DD services for Intervenors have not been reduced so as to free up resources for Class Members.

Movants quote the *Steimel* court as saying that, "so long as any additional services do not cause a fundamental alteration in the state program, the state may be required to provide them; budget cuts can violate the integration mandate." Motion at 31, quoting *Steimel*, 823 F.3d at 911. That language does not help Movants for two reasons. First, that language is dicta. Budget cuts were not at issue in *Steimel*, and they are not at issue here because there have been no reductions in funding for ICD-DD or community-based services. Second, the "additional services" in *Steimel* were just the services plaintiffs already had been receiving in a different waiver program; plaintiffs just wanted to have those services restored. Here, there is no issue of additional services, because in this case the service array has not been reduced. Movants ask this Court for a substantial increase in state funding, which, again, was not at issue in *Steimel*. To the extent *Steimel* applies here, it supports Defendants because the court recognized that a significant increase in the cost of services could be a fundamental alteration of the state's programs. Unlike the few plaintiffs in *Steimel* and the one in *Radaszewski,* the relief sought here would affect the funding for services for tens of thousands of individuals.

Movants also cite the *Reivitz* case for the proposition 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." *Wisconsin Hosp. Ass'n v. Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987). *Reivitz,* however, is factually distinguishable. In *Reivitz*, the State of Wisconsin, relying on a state statute enacted in April, 1982, was seeking to pay less in reimbursement rates than it

had agreed to pay under a consent decree entered between the State and the hospital association in July, 1982. *Id*. at 864-65. The Seventh Circuit held only that a court can order the state, as a party to a decree, to pay the amount the state already had agreed to pay under the decree. Here, the issue is not whether Defendants will continue to pay providers according to the rate methodology currently in place, but whether this Court can order an increase in rates.

Neither does the *O.B*. case help Movants. Despite their lengthy discussion of the *O.B*. decision, Movants did not quote the sentence in the Court's opinion that is most relevant to their Motion: "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***." *O.B. v. Norwood*, 838 F.3d 837, 842 (7th Cir. 2016), *citing Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378, 1385 (2015) (emphasis added). The court refused to approve an increase in rates on those facts, despite having already found that plaintiffs were entitled to the nursing services under the Medicaid Act, that HFS had approved the nursing services, and that without those nurses, plaintiffs were at risk of institutionalization. *Id*. at 838-42.

The *Rolland* and *Juan F*. cases, on which Movants also rely, are distinguishable on the same basis as the *Reivitz* case, namely, that the courts ordered the states to do what they already specifically had agreed to do. In *Rolland v. Cellucci*, 198 F. Supp. 25, 46 (D. Mass. 2002), *aff'd sub nom. Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003), the court ordered the state to make five very specific changes in the delivery of services it had agreed to provide in a settlement agreement. Similarly, in *Juan F. by and through Lynch v. Weicker*, 37 F.3d 874, 876-877 (2nd Cir. 1994), the state had agreed in a consent decree to increase certain staffing levels, but the state legislature did not provide sufficient funding for the state to meet the agreed-upon schedule for increasing staffing levels. The district court ordered the state to satisfy that requirement of the

consent decree, although the court adjusted the hiring timetable to account for the decreased funding. Id. at 878-79. Nowhere in *Rolland* and *Juan F*. is there any suggestion that a court has the authority to impose a new and very costly obligation on the state, which is what Movants seek here.

D. Even if it is allowed under the Decree and controlling law for the Court to review hourly rates, the relevant data demonstrate that Illinois wages, turnover rates and vacancy rates are comparable to both the national average and states surrounding Illinois, and thus do not support the requested relief.

Even if the Court finds that the Decree and the law allow it to order increased rates, the facts alleged by Movants do not support their contention that Defendants have failed to comply with the Decree. The Consent Decree's core mandate was to increase the State's capacity to serve those residents in ICF-DDs who wished to transition and live in the community and those individuals living at home who were at risk of entering an ICF-DD. The State has complied with that mandate. Over the last six years, the State has consistently achieved the targeted goal of serving more than 3,000 Class Members (1,000 within the first two years and 500 each of the next four years) with home-based supports and services or in community-based residential settings. Hoskin Decl. at ¶ 5.

From 2011, when the Consent Decree was entered into, until the present, the capacity of the State's Home and Community-Based Services Waiver Program for adults with developmental disabilities ("Waiver") increased from 17,600 to 20,840, an increase of 15%. *Id*. at ¶ 6. The number of individuals living in CILAs increased from 9,741 in 2011 to 11,846 in 2016, an increase of 20%. *Id*.[8] In 2017 alone, 24 new CILA sites have been approved throughout

[8] Over the same period of time, there has been a significant decline in the number of individuals living in the State Operated Developmental Centers ("SODCs"), which are public, not private, ICF-DDs, and are not covered by the Decree. *See* http://www.dhs.state.il.us/page.aspx?item=61088 (last visited on June 23, 2017). Between 2005, when the *Ligas* lawsuit was filed, and 2016, the SODC census has declined by more than 40%. Just between 2011, when the Decree was entered, and 2016, the decrease has been almost

the state. *Id*. Thus, the facts do not support Movants' contention that the failure to increase rates has negatively affected Defendants' ability to provide community-based placements or will do so in the future.

In addition, the services available to class members and beneficiaries have increased since the Decree was entered. In 2016, the maximum compensable hours for behavior therapy increased from 66 to 104, providing almost double the professional intervention aimed at reducing behavioral issues of CILA residents, and thereby allowing the direct service providers ("DSPs") to concentrate on providing care to the residents they serve. *Id*. at ¶ 7. Further, service and support teams were made available to both CILAs and ICF-DDs in order to further help stabilize and reduce behavioral problems. *Id*. Finally, short term stabilization homes, which are offsite facilities used to help families and providers stabilize a resident with the goal to return the resident to her previous residential setting, were added as a covered service under the Waiver, and were made available to ICF-DD residents. *Id*.

Nonetheless, despite Defendants' compliance with the mandated transition of Class Members to the community, and the increase of services for those Class Members, Movants assert that the State's hourly rate of pay for DSPs in CILAs and ICF-DDs is too low, causing increased DSP turnover rates and increased DSP staffing vacancies. In turn, Movants argue that, without adequate numbers of DSPs to provide day-to-day care, Class Members in CILAs and Intervenors in ICF-DDs are not receiving the care and services they are entitled to from DSPs under the Decree, and therefore Defendants are out of compliance with the Decree.[9] Defendants

19%. *Id*. Thus, the facts do not support Movants' assertion that Illinois continues to heavily invest in SODCs at the expense of the community system. Motion at 24.

[9] Movants contend that, because rates have not been increased, providers cannot serve individuals with higher needs. Motion at 22. That assertion is not supported by the facts. Despite the lack of an increase in the basic, overall CILA rate, the State has continued its longstanding policy of approving enhanced CILA

have demonstrated above that, based on the controlling law, as well as both the letter and spirit of the Decree, the Court should not review the State's current rate structure relating to services under the Decree. However, even if it is proper for the Court to review the sufficiency of DSP hourly rates, the relevant data shows that Illinois wages, turnover rates and vacancy rates are comparable to the national average as well as the averages for states close to Illinois. Accordingly, Movants' requested relief of "increase[d] rates for CILA and ICF-DD services" (Motion at 39) is not supported by the facts, and should be denied.

The average hourly rate for DSPs in Illinois is comparable to DSP rates both across the nation and in states near Illinois. The average Illinois wage for DSPs in 2014 was $10.71, and remains at that rate today.[10] Hoskin Decl. at ¶ 8. During that same time period, the national DSP hourly rate average for residential supports was in fact lower than in Illinois -- $9.86 in 2014, and $10.07 in 2015. *Id*. (citing NCI Staff Stability Survey Reports of 2014, 2015). In 2016, the national DSP hourly rate average was $10.72. *Id.* (citing NCI Staff Stability Survey Reports of 2016). Illinois DSP rates are also comparable to those in nearby states. For example, in Indiana, the DSP hourly rate for residential supports in 2015 was $10.15, and in 2016, it was $10.36. *Id*. at ¶ 9. In Ohio, DSP average hourly rates were $10.96 in 2014, $10.49 in 2015, and $11.14 in 2016. *Id*. In Missouri, the average DSP hourly rate was $10.16 in 2015, and $10.56 in 2016. *Id*.

Because the average hourly DSP rates are comparable, it is not surprising that the Illinois turnover rates for DSPs also are comparable to the national average and the turnover rates for states near Illinois. Movants proffer two separate DSP turnover rates for 2015 in their motion –

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rates for higher need individuals. Thus, for example, several hundred CILA residents who have higher needs have rates between $70,000 and more than $150,000 annually. Hoskin Decl. at ¶ 7, citing Exhibit F.

[10] Movants do not acknowledge the $10.71 average hourly rate for DSPs. Instead, using their own survey, Movants assert that the average hourly DSP rate in 2014 was $9.36/hour. *See* Motion at 10; Carmody Decl. at Par. 15.

36%, from their own internal survey (Motion at 11), and 30.3%, based on a survey from the Institute of Public Policy ("Institute") (Motion at 11-12; Carmody Decl. at ¶ 19). These Illinois rates are lower than the DSP turnover rates throughout the United States, which were 44.6% in 2014 and 44.8% in 2015. Hoskin Decl. at ¶ 10. In nearby states, turnover rates were similar to or higher than Illinois. *Id.* (Ohio – 40.9% in 2014; 45% for HBS and 66.8% for ICF-DD in 2015; Missouri, 49.1% in 2015).

Movants' expert claims Illinois DSP turnover rates from 2001 through 2016 increased by 43% in ICF-DDs and 31% in CILAs. Powers Decl. at ¶ 74. These numbers are red herrings, because the relevant time period for whether Defendants are complying with the Consent Decree is what is going on presently; at the very least, the only relevant time period is 2011 through the present. In any event, the turnover rates cited by Movants' expert are in line with, and in fact lower than, national averages.

Movants also attempt to show that Illinois DSP vacancy rates are too high, leading to decreased services to class members. In fact, however, Illinois DSP vacancy rates are in line with both the national average and the average of nearby states. Movants cite to the Institute's survey to show Illinois DSP vacancy rates at 13.7%. Carmody Decl. at ¶ 19. According to the NCI Staff Stability Survey, nationwide DSP vacancy rates were comparable: in 2014 were 12.9% for part time DSPs, and 7.1% for full time DSPs, and in 2015 were 14.6% for part time DSPs, and 9.4% for full time. Hoskin Decl. at ¶ 11.

The independent DSP data demonstrates that Movants' attempt to show that Class Members and ICF-DD residents are not getting the services and care required under the Decree because of unreasonably low DSP wages, turnover and vacancies does not hold up when viewed against the national averages as well as states neighboring Illinois. That DSP turnover and

vacancy rates appear to be increasing nationally, despite variations in state programs, rates and services, illustrates how the turnover and vacancy issues are not solely attributable to rates but are larger issues that the Decree was not intended to address.

E. State data demonstrates that Movants' individualized service plans are being properly implemented.

Movants, through a small number of selective declarations, claim that the current reimbursement rates have caused "enormous hardships, including social isolation, a dearth of meaningful activities, a lack of progress towards their goals, loss of independence and adaptive skills, and in many instances, anxiety and depression." Motion at 1. Movants' limited, anecdotal evidence is directly refuted, however, by Defendants' yearly survey of the Class Members themselves (or their guardians or legal representatives), which shows that that Movants are in fact receiving the services set forth in their individualized service plans.

Each year, the Illinois Department of Human Services conducts a satisfaction survey of a statistically valid sample of Waiver participants, through their guardians, family members and legal representatives, about the services provided. Hoskin Decl. at ¶ 12. Section D of the survey is entitled "Service Plan Development." In 2016, 97.22% of all responses to the satisfaction survey (175 out of 180) reported they received all of the services listed in their individualized service plans. *Id*. And 96.11% (173 of 180) reported that they receive services to address their needs. Although Movants claim that the low reimbursement rate is causing a failure to provide services required under individualized service plans, Class Members themselves, through their guardians, family members and legal representatives, have not reported the failure to Defendants. In addition, the DHS Division of Developmental Disabilities' own quality reviews for FY16 showed that 96.25% (385 out of 400) of Waiver participants received services in the "scope, amount, duration and frequency as specified in their individual service plan." *Id*.

F. If the Court grants the Motion and orders Defendants to increase rates, the increased cost to the State will amount to up to one billion dollars.

One of Movants' experts, Kathy Carmody, asserts that Illinois fails to spend adequate funds on DD home-based and CILA services, and ICF-DDs as well, when compared with the Great Lakes states (Carmody Decl. at ¶¶ 8, 9), and with the national average spending (Carmody Decl. at ¶ 11). However, if Illinois increased its total ICF-DD and Waiver spending to equal the national average (according to Carmody, going from $2.70/$1,000 of personal income to $4.40), the cost to the State would be over one billion dollars per year. Hoskin Decl. at ¶ 13. Similarly, the cost to the State of increasing total spending to the Great Lakes states' average (going from $49/per capita to $143) would result in an increase of more than $1.4 billion. *Id*. As a comparator, total FY 16 spending for DD community services amounted to $1.3 Billion. *Id*.

Using a different comparison, if the State is required to change its reimbursement methodology so that providers are reimbursed for DSPs at an hourly rate of $15.00 (Stover Decl. at ¶ 20) instead of the current average rate of $10.71, that change alone would cost the State more than $318 million annually, which amounts to a 24.8% increase in the state's total spending for DD services. Hoskin Decl. at ¶ 14. If the State instead is required to increase the DSP hourly rate by 25% (Powers Decl. at ¶ 7), that alone would cost the State more than $207.2 million annually, which amounts to a 16.2% increase in the state's total spending for DD services. *Id*.

As set out above, imposing on the State cost increases of this magnitude would fundamentally alter the State's services and programs. As such, controlling law does not permit the requested relief. And, given Defendants' overall substantial compliance with the Decree and a proper understanding of their obligations to ensure sufficient resources, the Decree also does not provide a basis for granting the Motion.

IV. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' and Intervenors' Joint Motion to Enforce Consent Decree.

Dated: June 23, 2017

Respectfully submitted,

By: /s/ Brent D. Stratton

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that, on June 23, 2017, he caused to be filed through the Court's CM/ECF system a copy of **Defendants' Response to Plaintiffs' and Intervenors' Joint Motion to Enforce the Consent Decree**. Parties of record may obtain a copy of this filing through the Court's CM/ECF system.

/s/ Brent D. Stratton
Brent D. Stratton