UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Stanley Ligas, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 05-cv-4331
	)	
Elizabeth M. Whitehorn, et al.,	)	Judge Sharon Johnson Coleman
	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TERMINATE THE CONSENT DECREE

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Introduction

"It is not possible to be in favor of justice for some people and not be in favor of justice for all people." Martin Luther King, Jr.

Plaintiffs are adults with developmental and intellectual disabilities (I/DD) who are institutionalized or at risk of being institutionalized. They filed this case to obtain from Defendants, the government agencies responsible for their care, the most basic human and legal rights: to live outside an institution; to be without fear of abuse and neglect; to live in a community of their choice; and to join others, both with and without disabilities, in enjoying the gifts of being human. Unlike many litigants, Plaintiffs do not seek money, property, or status. They simply seek freedom and dignity, so they can live, work, eat, play, and worship, unconstrained by the rigidity and segregation of institutional living.

Plaintiffs filed this case in 2005, buoyed by the Supreme Court's decision in *Olmstead v. L.C.,* 527 U.S. 581 (1999), which held that segregation and isolation of people with disabilities through institutionalization is a form of discrimination and a violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, *et seq.* Plaintiffs also alleged violations of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Medicaid provisions requiring recipients to have a choice between institutional and community living and to be served with reasonable promptness, 42 U.S.C. §§ 1396-1396v. Plaintiffs sought systemic changes that would ensure they had timely access to community services and were not improperly relegated to institutions due to the lack of such services. The reasonableness of Plaintiffs' goals was evident by the fact that most

similarly situated people with disabilities in most other states had *already achieved* those goals.[1] Rather than fight Plaintiffs on the merits, Defendants agreed to make the reforms required to cure Illinois' violations of federal disability rights law. This agreement took the form of the Consent Decree, which this Court approved as a fair, reasonable, and adequate means for protecting the rights of the Class.

Defendants, who bear the burden of proof, do not and cannot show that the Decree's obligations have been "satisfied, released, or discharged" under Rule 60 of the Federal Rules of Civil Procedure. Defendants have failed to offer proof that they are providing Class Members education about their right to live in the community, timely developing and implementing Transition Plans, serving Class Members at a reasonable pace, and providing Class Members with a choice between living in an institution and receiving community services. While Defendants claim they are in compliance with their obligations to develop community capacity, Defendants' treatment of Class Members demonstrates the opposite -- a system that has adequate community capacity does not allow people to languish in crisis, nor does it force people into State-Operated Developmental Centers (SODCs), segregated facilities with a horrific history of abuse. Defendants have not even developed a pathway for people to get out of Intermediate Care Facilities for People with Developmental Disabilities (ICF/DDs), which Defendants characterize as the paramount goal of the case. Defendants' noncompliance with the Decree is creating unnecessary and intense suffering for thousands of Class Members.

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[1] When the case was filed in 2005, Illinois ranked 49th among all states in use of small settings (1-6 people) for people with I/DD. On the flip side, it ranked 5th among all states – behind only Arkansas, Mississippi, Oklahoma, and Texas – in its use of large facilities. It ranked 9th on spending for institutions, while its spending for community settings was abysmal: 43rd in the country. https://www.researchgate.-net/publication/305905244The_State_of_the_States_in_Developmental_Disabilities_2005.

Defendants suggest that their failure to provide community services to hundreds of Class Members in violation of the Consent Decree should be regarded by this Court as insignificant, a slight deviation from Defendants' obligations, and certainly not an obstacle to termination of the Decree. This argument is yet another chapter in the State's long history of dehumanizing people with intellectual and developmental disabilities. The Court should soundly reject it and hold Defendants to their obligation to comply with the Decree and with federal law.

Argument

I. The Legal Standard for Defendants' Motion to Vacate.

Defendants seek relief under Rule 60(b)(5) of the Federal Rules of Civil Procedure, which allows termination of a judgment if it "has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Defendants move under the first clause and argue the Decree has been "satisfied."[2]

A. Defendants Must Prove Substantial Compliance and an Enduring Remedy.

The "satisfaction" clause of Rule 60(b)(5) requires a moving party to establish that they "achieved the objectives of that decree" or judgment by proving (i) "substantial compliance" with the judgment's terms, and (ii) that a durable remedy has been established, such that '"continued enforcement of the order is not only unnecessary, but improper.'" *Shakman v. Pritzker*, 43 F.4th 723, 728 (7th Cir. 2022) (internal citation omitted); s*ee also* Defendants' Memorandum in Support of Their Motion to Vacate the Consent Decree ("Def. Mem."), Dkt. 837, at 5. Though this clause of Rule 60(b)(5) is rarely invoked,[3] cases applying it establish that the court's inquiry must focus

[2] *See*, *e.g.*, Def. Mem. at 1, 3, 8, 9, 10, 12, 13, Dkt. 837.

[3] *See*, *e.g.*, *Frew v. Janek*, 780 F.3d 320, 327 (5th Cir. 2015) ("[t]he vast majority" of motions to terminate consent decrees in institutional reform cases invoke 60(b)(5)'s third clause).

on "whether the movant has satisfied each obligation set forth in the consent decree,"[4] and the record demonstrates the defendant is "unlikely . . . [t]o return to its former ways" absent court oversight. *Bd. of Educ. v. Dowell,* 498 U.S. 237, 247 (1991).

Defendants err when they go further and suggest that this Court could grant their motion based on a *different* showing – that there is no longer an ongoing violation of federal law and that they are unlikely to resume unlawful conduct. *See* Def. Mem. at 5-8. The cases Defendants cite for this point are applying Rule 60(b)(5)'s *third* clause, which allows termination of a judgment when continued enforcement would be inequitable.[5] That clause cannot apply here, however, because they have not shown "(a) that a significant change in factual circumstances or in law warrants revision of the decree, and (b) that the requested modification is suitably tailored to the changed circumstance." *Jackson*, 880 F.3d at 1201.[6] Defendants make passing references to claimed shortages of workers and affordable housing, but they provide no evidence of these "larger societal problems" or how they impede Defendants' ability to do what they promised under the Decree. *See* Def. Mem. at 11. Defendants' reference to "annual limitations in the State budget" is inadequate as well (s*ee id*.), because the Decree prohibits Defendants from seeking relief from its

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[4] *Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1201 (10th Cir. 2018).

[5] *See* Def. Mem. at 5-6, citing, *e.g.*, *Horne v. Flores*, 557 U.S. 433, 451 (2009); *John B. v. Emkes*, 710 F.3d 394, 411-12 (6th Cir. 2012); *Salazar v. Dist. of Columbia*, 896 F.3d 489, 498 (D.D.C. 2019); *see also Lewis v. Casey*, 518 U.S. 343, 357-58 (1996) (vacating system-wide injunction for lack of proper support where record only established that two individuals sustained injury).

[6] A change is significant for purposes of the rule if: "(i) the changed circumstances make compliance with the decree substantially more onerous, (ii) a decree proves to be unworkable because of unforeseen obstacles, or (iii) enforcement of the decree without modification would be detrimental to the public interest." *Jackson*, 880 F.3d at 1201 (internal quotations omitted); *see also Horne v. Flores*, 557 U.S. 443, 448 (2009) (changes sufficient under 60(b)(5)'s third clause are those "in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights – that warrant reexamination of the original judgment.").

terms due to budgetary woes. *See* Decree, ¶ 5. Cases addressing the "inequitable enforcement" clause of Rule 60(b)(5) are not pertinent when defining the test Defendants must satisfy here.[7]

In considering Defendants' Motion, this Court should have no hesitancy, then, in holding Defendants strictly to their burden under the substantial compliance/enduring remedy test, with full attention to whether Defendants have achieved the Decree's express terms and purpose. As the Supreme Court made clear in *Frew*, when a defendant claims satisfaction of a judgment, requiring proof of substantial compliance and an enduring remedy merely "vindicates an agreement that the state officials reached to comply with federal law" in a particular way,[8] and unless the government "establishes reason to modify the decree . . . the decree should be enforced according to its terms." *Frew*, 540 U.S. at 442. It is only "*when* the objects of the decree have been attained" that the government should be promptly released from its promise. *Id*. (emphasis supplied).

Finally, to the extent Defendants suggest that the age of the Decree or costs Defendants must bear for ongoing monitoring may present additional "equitable" concerns, neither is germane. As to costs, neither Class Counsel nor the non-profit agencies for which they work receive compensation from Defendants for their ongoing representation of the Class and enforcement of the Decree. Age of the case likewise is not relevant to the question of "satisfaction," as *Shakman* makes clear. The Seventh Circuit Court of Appeal's decision to vacate the fifty-plus-year-old decree in *Shakman* was not based on the decree's age. The court required *proof* that the decree was satisfied. *Shakman*, 43 F.4th at 728. The record showed that the defendant's "last significant violations of the decree seem to have occurred nearly a decade ago," and that the defendant had implemented a durable remedy in the form of extensive administrative processes to prevent illegal

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[7] *See* n. 4, *supra*; *see also* Jackson, 880 F.3d at 1194-95 (each clause of Rule 60(b)(5) has a different test, and the tests are not interchangeable); *Horne*, 557 U.S. at 454 (same).

[8] *Frew*, 540 U.S. at 439.

hiring based on patronage. *Id*. at 728-29. The court noted that judicial supervision of state agencies should end "*when* the objects of the decree have been attained,"[9] but made clear that until that satisfaction is shown, court supervision is merited:

> As we see the record, everyone involved in recent years – foremost Governor Pritzker, but also the special master, the district court and [plaintiffs] – has been *diligent in ensuring the state's substantial compliance with the 1972 decree. This is what is supposed to happen in institutional reform litigation*, even if it is coming many, many years too late.

Id. at 730 (emphasis added). A defendant thus cannot obtain relief under Rule 60(b)(5) simply by exhausting the patience of the court through persistent noncompliance,[10] particularly where, as here, the people protected by a consent decree are those with the greatest needs.[11]

B. Defendants Bear the Burden of Proof.

For all motions brought under Rule 60(b)(5), the moving party bears the burden to prove their entitlement to relief.[12] The movant's evidence on substantial compliance must demonstrate that any deviation from literal compliance with a decree's terms "is unintentional and so minor or trivial as not substantially to defeat" the decree's essential purpose. *Jeff D. v. Otter*, 643 F.3d 278,

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[9] *Id*. at 731 (emphasis supplied).

[10] *See* Def. Mem. at 10; *see also Horne*, 557 U.S. at 438-39 (decree in 19-year-old case must remain until defendant demonstrated enforcement would be inequitable"); *People Who Care v. Rockford Bd. Of Educ.*, 246 F.3d 1073, 1078 (7th Cir. 2001) (decree in case "realistically" spanning 30 years not vacated until defendant demonstrated goal of decree was achieved); *R.C. v. Walley*, 475 F. Supp. 2d 1118, 1122-23 (M.D. Ala. 2007) (16-year-old decree not vacated until substantial compliance shown).

[11] Cases involving systemic change for people with IDD may require particular care. See, e.g., *LaShawn A. ex rel. Moore v. Fenty*, 701 F. Supp 2d 84, 112–115 (D.D.C. 2010), *aff'd sub nom. LaShawn A. ex rel. Moore v. Gray*, 412 Fed. Appx. 315 (D.C. Circuit 2011) (declining to terminate the decree or set a timeline for doing so where defendant had neither achieved substantial compliance nor established a durable remedy); *Evans v. Fenty*, 701 F. Supp. 2d 126, 171–6 (D.D.C. 2010) (court denied motion to terminate consent decree to improve services for people with developmental disabilities where defendants had neither complied with the decree nor established a durable remedy); *Homeward Bound, Inc. v. Oklahoma Health Care Auth*., No. 91-5006, 196 F. App'x 628, 630 (10th Cir. 2006) (originally filed in 1985 and not closed until 2012); *Jackson v. Los Lunas Ctr. for Persons with Disabilities Mexico,* No. CV 87–839, 2022 WL 1240483, at *2 (D.N.M. April 27, 2022) (filed in 1987 and not closed until 2022).

[12] *See*, *e.g.*, *Horne*, 557 U.S. at 447 (applying "inequitable enforcement" clause); *Salazar v. Dist. of Columbia*, 896 F.3d 489, 492 (D.C. Cir. 2018) (applying "satisfaction clause).

284 (9th Cir. 2011) (internal quotations omitted). Establishing a durable remedy then requires evidence showing "*the actual impacts or outcomes experienced by the plaintiffs*." *Evans*, 701 F. Supp. 2d at 171 (emphasis supplied).

In an institutional reform case such as this one, defendants' proof generally entails submission of extensive material, such as performance and quality control data. For example, in *Shakman*, the record for the Rule 60(b)(5) motion included more than 51 exhibits.[13] In *John B.*, the record included live testimony from 31 witnesses and 260 exhibits. *John B.*, 710 F.3d at 399. Defendants' Memorandum, in contrast, is replete with unsupported statements, as shown below.

II. The Core Obligations Imposed by the Decree.

Because the Court's analysis of "substantial compliance" must begin with the terms of the Decree (and not the allegations of the Complaint, as Defendants wrongly suggest),[14] Plaintiffs briefly summarize the Decree's purpose and obligations.

A. The Decree's Purpose.

The Decree enforces Class Members' rights to live and receive services in the community under the "integration mandates" of Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, which require states to provide government services, programs, and activities in the most integrated setting appropriate to the needs of the person with a disability. It also enforces Class Members' rights under Medicaid to a meaningful choice between community and institutional care, the delivery of services with reasonable promptness, and a

[13] *See* Mot. by Def. Patrick Quinn, in his official capacity as Gov. of the State of Ill. to Vacate - Redacted Memo. in Support of Mot. to Vacate May 5, 1972 Consent Decree at Ex. Nos. 1-55, *Shakman v. Pritzker*, 2021 WL 1222898 (N.D. Ill. Mar. 31, 2021) (Docket No.7648).

[14] Though Defendants at times suggest the *complaint* is the touchstone here (*see* Def. Mem. at 2), it is the terms of the decree that control on a Rule 60(b)(5) motion. *See Frew*, 540 U.S. at 442.

service system that safeguards against unnecessary institutionalization.[15] The ultimate purpose of the Decree is simple, as reflected in Paragraph 4 of the Decree: "The choices of Individuals with Developmental Disabilities, including Class Members, to receive Community-Based Services or placement in a Community-Based Setting ... will be honored...." Decree, ¶ 4

To fulfill its purpose, the Decree mandates essential steps for moving Class Members into community services. This Court previously determined that the specific requirements of the Decree are fair, reasonable, and adequate to rectify the Defendants' violations of federal disability rights law. *See* Decree, ¶¶ 4, 8-16, 17, 21-23, and 25; *see also* Ex. E.[16] These provisions, taken together, set the following general framework for serving Class Members.

B. The Framework for Services Under the Decree.

Education and Outreach. Under the Decree, the State must educate people with disabilities and their families about service options under Illinois' developmental disability system and about any waitlists for services. *See* Decree, ¶¶ 8-9. The State also must engage in "outreach," to inform people living in ICF/DDs of their options to transition to the community. *Id*. at ¶ 25. The State must screen those who are interested in receiving community services. *Id*.

Assessment and PUNS Enrollment. People who express interest in community services must be placed on a waiting list—the Prioritization of Urgency of Need for Services ("PUNS") list —if they are not served immediately. *See id*. at ¶ 9. Most Class Members are enrolled on the PUNS

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[15] 42 U.S.C. 12132; 28 C.F.R. § 41.51(d) (ADA integration mandate) ; 28 C.F.R. § 35.130(d), 42 29 U.S.C. 794; 28 C.F.R. § 35.130(d); 28 C.F.R. § 41.51(d)) (§ 504); 42 U.S.C. § 1396n(c)(2)(C) (Medicaid meaningful choice); 42 U.S.C. § 1396a(a)(8) (Medicaid reasonable promptness); 42 U.S.C. §§ 1396a(a)(30)(A) and (B) (Medicaid preventing unnecessary institutionalization).

[16] Because Defendants have the burden of proof, the Class limits its argument to the Decree provisions Defendants claim to have satisfied. The Class does not concede that Decree provisions not specifically referenced here are satisfied.

list while living with family. *See* Consent Decree, ¶¶ 9, 22. Others are enrolled while living in an ICF/DD. *See* Decree, ¶ 22.

Priority for People in Crisis. People "at imminent risk of abuse, neglect or homelessness" are put on the PUNS list but are served before those already on the list. *See* Decree, ¶¶ 21, ¶ 22(a). People in crisis must be immediately assessed and, if eligible, be connected to community services "expeditiously." Decree, ¶ 21.

Community Services. Services that enable Class Members to live in the community after waiting on the PUNS (or deemed in crisis under Decree ¶ 21) are provided services through Illinois' Medicaid Waiver for Adults with Developmental Disabilities Waiver (DD Waiver). Those services, as of this filing, generally include:

- *Home-Based Support Services (HBSS)*: Class Members can elect to receive financial support with a $2,829 per month cap to reimburse a range of services, including such things as paying for day program or employment supports, behavioral supports, and physical therapy. This is a funding option typically used by Class Members living in the family home and does not require the State to offer a provider. Over half of those served in the State's DD Waiver receive Home-Based Services.

- *Community Integrated Living Arrangements (CILA)*: Individuals live in the community with supports ranging from a few hours a day to 24/7. Most services are provided in housing up to eight people.[17]

Transition Plans. To access community services, each Class Member must have a Transition Plan. *See* Decree, ¶¶ 10-16. Transition Plans (also known as Personal Plans) must be developed at a point in time that ensures the Class Member can smoothly move to the community within the "reasonable pace" Defendants must meet. Decree, ¶¶ 8-16, 22. A Transition Plan must reflect the person's preferences; support living in the most integrated setting; include opportunities

[17] *See* CMS waiver Application, 2024, https://hfs.illinois.gov/content/dam/soi/en/web/hfs/sitecollectiondocuments/adultswithdevelopmentaldisabilitiesapprovedwaiver.pdf.

for competitive work; and create opportunities to engage in community life, control personal resources, and receive community services to the same degree as people without disabilities.[18] The Plan must include all appropriate services that are part of the Illinois' State Plan and the DD Waiver even if any services are unavailable due to resource shortages. *Id.* The Plan also must set a timetable for the Class Member's transition to services. *Id.*

The State's Use of Contractors. The State utilizes seven private, non-profit Independent Service Coordination (ISC) agencies to conduct education and outreach, facilitate entry onto the PUNS list, submit crisis applications, develop Transition Plans, and locate the services identified in the Transition Plan. *See* https://www.dhs.state.il.us/page.aspx?item=68911.

Reasonable Pace and Entry into Services. It is permissible for there to be a waitlist like the PUNS list, but only if people are moved off the list at a reasonable pace. *See* discussion *infra* at 8. Medicaid requires the State to arrange *or provide* services in a Class Member's Transition Plan. *See infra footnote* 24. A Class Member's name – whether they were selected from the PUNS list or through crisis – should not be removed from the PUNS list until they begin receiving services through the DD Waiver. *See* Decree, ¶ 23. Those services must remain consistent with Transition Plans and facilitate a full life in the community. *Id.* at ¶¶ 10-16.

III. Defendants Have Not Demonstrated Substantial Compliance with the Decree.

Defendants boldly assert that "*for many years*" they have had in place "a comprehensive, effectively working system (not just a plan) that: (1) informs individuals . . . of the full range of available community-based services and settings; (2) assesses individuals to determine their clinical eligibility and appropriateness for such services and settings; (3) offers individuals the choice between community-based and institutional [settings]; (4) approves community-based

[18] *See* https://www.dhs.state.il.us/page.aspx?item=100040.

services without requiring the existence of an "emergency" or crisis. . .; (5) for those individuals who are not served quickly, places those individuals on a waiting list; and (6) moves individuals off the waiting list and into services . . . at a reasonable pace." *See* Def. Mem. at 8-9 (footnotes omitted).

The Class categorically disputes that the system operates as Defendants contend, as well as their further claim that they have achieved substantial compliance with their obligation "to ensure the availability of services, supports and other resources of sufficient quality, scope, and variety" to serve the Class as the Decree requires. *See* Decree, ¶ 4.

A. Defendants Have Not Demonstrated Reasonable Pace.

Under the Supreme Court's decision in *Olmstead v. L.C.,* 527 U.S. 581, 583 (1999), a state may have a waiting list to serve people with disabilities, but only if movement off that list occurs at a "reasonable pace." Defendants have not presented evidence remotely sufficient to establish that reasonable pace has been achieved or could be by the target date.

In 2019, Defendants agreed that for their "reasonable pace" obligation (*See* Decree, ¶ 23), "PUNS selections will be tailored such that by the FY2025 selection, no individual will wait . . .on PUNS for over 60 months." *See* Dkt. 719 at 29-30. This ensures that no Class Member will wait longer than five years from their *enrollment* on the PUNS list to the time they begin receiving services. *Id.* at14-15. Defendants' only admissible evidence is a procedure explaining how the PUNS list *should* work, but the procedure does not show the pace at which people are *in fact* being served.[19]

[19] *See* Def. Mem. at 9, nn.10-11. Defendants' sole additional citation is to their own prior briefing to the Court, which is unsupported as well, and in any event, it relates to PUNS selection, not the 60-month service requirement. *See* Def. Mem. at 15 (citing Dkt. 77, at p. 3).

Given Defendants' failure to present evidence with their Motion, the Class sought and received PUNS data from Defendants in discovery. That data appears directly and dramatically to contradict Defendants' factual claims and assertion of compliance. In pertinent part, the data show the Class Member name, time waiting on the PUNS list, date of PUNS selection, and date of removal from the PUNS List (which removal signals that the Class Member has begun receiving Waiver service). The data reveals that there are 2,252 Class Members who have been selected from the PUNS list and remain on the PUNS list, still waiting beyond 60 months, to enter services. Almost half of these people have been waiting on the PUNS list for *seven years or more*. *See* Ex. E. In addition, there are hundreds *more* individuals who have been enrolled on the PUNS list for more than five years, but whose names have not even been selected yet. *Id.*

A further reasonable pace problem raised by the data is that only 216 of the 1,342 people selected from the PUNS in July 2023 have initiated services since their selection. *Id.* If the system were working at the flow expected under the Decree, Class Members would be moving from PUNS selection to services far more rapidly. As noted above, the Decree provides for Class Members to have been pre-screened, assessed, and have a Transition Plan in place before their name is even selected. *See* discussion *supra* at 8; *see also* Decree, ¶¶ 8, 9, 10-16, and 22.

Class Members are being left in limbo, without services, after being selected from the PUNS list.[20] According to Defendants own documents, most PUNS selections from last fiscal year are still in the early phases of processing. *See* Ex. E. Other states, such as Michigan, determine eligibility promptly within 14 days. *Id.* Class Members who have waited for years on the PUNS list should not find themselves on a new "shadow" waiting list for their ISC to screen and assess them, develop their transition plan, and connect them to services. Whatever that experience may

[20] Class counsel have received numerous complaints regarding secondary waiting lists.

be, it certainly is not "reasonable pace" or "reasonable promptness." Defendants accordingly have not demonstrated substantial compliance with Paragraphs 4 and 23 of the Decree.

B. Defendants Have Not Demonstrated Offers of Choice

The Decree provides that people, including those in institutions, are entitled to receive full and timely information about community resources so that they can make an informed choice about their options for community living. Then, they are entitled to receive timely, person-centered Transition Plans. *See* Decree, ¶¶ 25 and 10-16. Defendants have not proved substantial compliance with these requirements.

1. *Education for People Enrolling on PUNS*

Though Defendants contend they have an "effectively working" system for providing education to people who may need services, their evidence consists of citations to a State-prepared manual, dated 2016, explaining the *procedures* Defendants have developed for ISC conversations with Class Members enrolling on the PUNS List. *See* Def. Mem. at 8 and nn. 6-8. Notably, the procedures are just that – cold words on paper. One cannot tell from reading them whether they are followed, whether information is being shared as the procedures envision, what is being said about service shortages, or whether Class Members are being dissuaded from options that the ISC cannot locate. That is exactly why proof of substantial compliance requires *more* than "paper reform" in the issuance of procedures, and guidelines. Instead, proof of *implementation* of the administrative process is required. *See*, *e.g.*, *Peery v. City of Miami*, 977 F.3d 1061, 1076 (11th Cir. 2020) (defendant entitled to vacatur where "ample evidence" established that new procedures and processes the defendant adopted were being *followed*).

In discovery, Defendants stated that there *is* a quality control process applied for ISCs, but they refused to produce those records.[21] We thus do not know why the quality controls are not preventing the agonizing experiences of Class Members and their loved ones. *See* Ex. A. For example, as one expressed, "there are no meaningful choices in Illinois . . . over the years Illinois has been dubbed – the Hall of Shame – in providing services to its most vulnerable citizens with disabilities." *See id*. PL -14. Another aging parent was told she must continue caring for her son or place him in an ICF/DD (*see id.* at PL-20); while still another Class Member had to obtain services in a Wisconsin group home because no provider would serve her in Illinois. *Id.* Other families report that people with higher needs are fast tracked to ICF/DDs and SODCs because providers will not serve them in CILA. *Id.* These accounts signal not only failures of education and the right to choices, but also serious resource shortages. *See infra* at 16.

2. *Outreach to People in Institutions*

A second feature of Defendants' obligations under Decree Paragraph 25 requires consideration of people who are housed in institutional settings (ICF/DDs). These individuals fall within the scope of people for whom Defendants must "maintain a fair and accessible process" for "affirmatively request[ing] in writing to receive Community-Based Services and/or placement in a Community-Based Setting." Decree, ¶ 25. Likewise, they are entitled to "have the opportunity to receive complete, accurate, and objective information regarding all alternative choices for long-term care services." *Id.* This requires "Outreach" by visiting facilities, engaging residents who express interest, and providing information about choices.

[21] *See* Ex. M at p. 8, No. 7; *see also* Ex. D. at pp. 17-18, Nos. 21 and 22.JRequest 7; *see also* Ex. pp. 17-18, Requests 21-22.

Prior to 2018, Defendants took the position that they were no longer required to conduct Outreach to people living in institutions.[22] Accordingly, it is not surprising that they do not even mention this obligation in their Motion, much less offer evidence to show substantial compliance or an enduring remedy as to these obligations or that the ISC procedural manuals Defendants cite make no mention of Outreach. *See* Def. Mem. at 8, nn.6-8.

Because Defendants finally resumed Outreach activities in FY 2023 to comply with the ADA (while still contending they had no Decree obligation to do so), the Class did not move for enforcement of Paragraph 25.[23] The Class, however, does not concede that Defendants' interpretation of Paragraph 25 is correct. Defendants have failed to satisfy their burden to demonstrate substantial compliance or an enduring remedy as to Paragraph 25 even as to the timeframe in which Defendants concede the requirement was in force. Defendants' ongoing failure has resulted in serious harm to Class Members. *See infra 22*.

3. *Transition Plans*

Defendants acknowledge the development of Transition Plans for Class Members who want to move into services as a "major provision" in the Decree. *See* Def. Mem. at 2; *see* also Decree, ¶¶ 10-16, 23. After that brief mention, however, Defendants are completely silent on the topic. There is no further discussion of those obligations, much less a showing that the Plans are timely developed, are prepared from a person-centered perspective, identify services integrated into the community to the maximum extent possible, or that the service choices they identify are

[22] *See* Dkt. 717 at 37 (noting the concerns of the Class regarding outreach had remained on the active agenda of Parties' meetings since 2016).

[23] "Effective July 1, 2022, DDD's Independent Service Coordination (ISC) Agencies will be providing annual outreach to individuals residing in those settings to satisfy the state's requirements under the Americans with Disabilities Act and Olmstead to ensure individuals with I/DD are aware of all options for their support needs." *See* https://www.dhs.state.il.us/page.aspx?item=144156.

not limited by shortages in available services. Defendants thus have not demonstrated substantial compliance as to Paragraphs 10-16 of the Decree. Medicaid requires the State to provide or arrange for services, and the State has not demonstrated it is meeting the needs of Class Members as required by Transition Plans or tracking their unmet needs. *See* Ex. F.[24]

C. Defendants Have Not Developed Essential Resources

Defendants spend most of their argument for vacatur on their obligation under Paragraph 4 of the Decree to "implement sufficient measures to ensure the availability of services, supports and other resources of sufficient quality, scope and variety to meet their obligations" to Class Members. Def. Mem. at 12-13. Defendants claim to have achieved substantial compliance with this obligation, but the evidence they offer is woefully inadequate to support that contention.

4. *Defendants' Partial Implementation of Necessary Rate Increases.*[25]

Defendants contend that their partial and still-in-progress implementation of rate increases recommended by a consultant, Guidehouse, "unquestionably constitutes substantial compliance" under their resource development obligations. Def. Mem. at 17. After this Court found Defendants out of compliance with Paragraph 4 in 2017, Defendants retained Guidehouse to develop recommendations for changing Illinois' rate methodology for I/DD services, as then-current rates resulted in underpaid direct care workers, shortages of services, and serious deficits in quality of care. Guidehouse ultimately recommended that Illinois implement a series of wage and rate increases over a five-year span. Its report validated public outcry, stating: "significant increase in

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[24] "Where the Medicaid Act refers to the provision of services, a participating State is required to provide (or ensure the provision of) services, not merely to pay for them." *O.B. v. Norwood*, 838 F.3d 837, 843 (7th Cir. 2016).

[25] Intervenors join this Section of Plaintiffs' Brief. Intervenors believe that the Consent Decree must remain in place until the Guidehouse recommendations are fully implemented. Absent the Decree there is no assurance of full implementation by the State.

expenditures reflects the challenge of addressing historical underfunding of existing services as well as the need for new funding to respond to rapid growth in wage requirements over the next five years."[26] While the State has further a sked the Court to find it back in compliance, there is insufficient evidence to support that request.

Guidehouse anticipated that if recommended changes were made *on schedule*, implementation would be completed in 2025 (FY 26) and, at that point, Illinois would be paying adequate rates for services.[27] Defendants have not increased DSP rates according to the Guidehouse recommendations. Defendants highlight that they increased DSP rates by $5.00 per hour between 2019-2024, but neglect to report that the statewide minimum wage by January 2025 will have gone up by $6.75.[28] Further, Defendants are proposing *no* DSP rate increase for FY 25.[29]

Similarly, Defendants have proceeded with other recommended Guidehouse increases, but not in the timeframe that Guidehouse recommended. Defendants chose to spread the recommended increases over a six-year period that, absent further delays, will not be complete until June of 2027. *See* Def. Mem. at p 17. The impact of this delay already has taken Illinois off the restorative path Guidehouse set. Moreover, there is no guarantee that Illinois will implement the increases they have deferred. Though Defendants claim to be "committed" to those changes, they have made

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[26] *See* Developmental Disability Services Rate Study, (Rate Study) 2020, dhs.state.il.us/page.aspx?item=136098#a_toc1, last visited April 23, 2024.

[27] Developmental Disability Services Rate Study, (Rate Study) 2020. Guidehouse recommendations for Direct Support Professional (DSP) workers is to bring their pay to 150% of minimum wage. These are frontline workers, and without them, thousands of Class Members would face re-institutionalization, and those currently living in institutions against their preference would have no hope of ever moving to the community. ICF residents will continue to suffer from deficient services due to high turnover of DSPs and numerous vacancies. Defendants do not dispute that this is the necessary pay level to attract and retain this critical component of the ID/DD system workforce.

[28] https://labor.illinois.gov/content/dam/soi/en/web/idol/lawsrules/fls/documents/minimumwagehistoricrates.pdf.

[29] *See* Illinois Senate Bill 3764, IL SB3764 | 2023-2024 | 103rd General Assembly | LegiScan.

abundantly clear that they cannot promise necessary funding for Guidehouse recommendations will be provided in future years.[30] And earlier this year, Defendants proposed *reducing* funded service hours for CILA residents statewide by 10%, equivalent to 3.5 million DSP hours. *See* Ex. G. Only an outcry from families and providers, and the threat of enforcement of Paragraph 4 of the Decree, forced Defendants to restore the service hours. *See* Ex. A.

Defendants have attempted to downplay the impact of their slow-walking of the Guidehouse recommended rate increases. *See* Def. Mem. at 15. The year-to-year comparisons between what spending *should* look like under full and timely Guidehouse implementation, and what Illinois is *actually* spending reveals just how seriously behind Defendants are. Guidehouse implementation called for an increase in funding to the DD system from FY 22 to FY 26 of $792,043,976 through various rate increases. *See* Ex. H. But the State's increase in annual expenditures between FY 22-24 so far has been $435,300,000, falling *45% short* of Guidehouse's recommendation. *Id.*

Vacatur of an order under Rule 60(b)(5) requires proof that defendants are currently in compliance and will maintain compliance, not mere promises of future good acts to come into compliance. Defendants' *partial* implementation of the Guidehouse rate recommendations, on a delayed schedule, and with no guarantee that future increases will be made in coming fiscal years, provides no basis for this Court to determine that Defendants have built the resources required under Paragraph 4 of the Decree.

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[30] "Please note there are **significant variables** that could impact the projected timeline including **appropriation from the Illinois General Assembly** based on state revenues and other budgetary demands, federal approvals, other DDD budgetary priorities." DD Communications, July 27, 2021: https://www.dhs.state.il.us/page.aspx?item=136870 (emphasis original) (last visited April 28, 2024).

5. *Proof of Spending and Waiver Expansion is Insufficient.*

Defendants tout overall State spending and expansion of DD Waiver service capacity as "powerful evidence" that their resource obligation under the Decree is satisfied. The spending increases and waiver expansions Defendants cite may indicate *improvement*, but are insufficient to establish substantial compliance given the extensive evidence that thousands of Class Members are *not* being timely and appropriately served. *See supra 20*; *see also infra 10*.

State Spending. Defendants claim that the State's annual "spending on community-based services has increased by 152%, from $728.8 million in Fiscal Year 2011 to an *estimated* $1.84 billion in Fiscal Year 2024 (ending June 30, 2024)." *See* Def. Mem. at 13. Even assuming these figures are accurate, they are meaningless without context. In 2005, when this case was filed, Illinois "ranked last in the percentage of I/DD resources dedicated to community services compared to institutional care and 47th amongst all states in percentage of total spending dedicated to community services."[31] How is one to know if a 152% increase from such a dismal starting point is *remotely* sufficient to bring Illinois' system for into compliance with the law, particularly when over the 13-year period from 2011 to today, the healthcare inflation rate amounts to 39%?[32]

Waiver Expansion. Defendants also claim, without admissible evidence,[33] that the number of people accessing waiver services has increased from 13,432 to 23,286 in the period from 2011 to 2023. *See* Def. Mem. at 13.[34] These numbers, however, appear to be inflated and inaccurate. In

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[31] Residential Services for Persons with Developmental Disabilities: Status and Trends Through 2005, University of Minnesota, July 2006. Pages ix 37; 77. https://ici-s.umn.edu/files/NdTdTmi-aC/risp2005. Last visited April 8, 2024.

[32] *See* https://www.in2013dollars.com/Medical-care/price-inflation/2011-to-2024?amount=1000.

[33] Defendants' purported support for this information is a brief Defendants filed (*see* Def. Mem. at 1, citing Dkt. 828 at 7-8), but the information in the cited brief is not supported by affidavit or other admissible evidence. The Class has filed a separate motion to exclude consideration of Dkt. 828.

[34] Similarly, Defendants celebrate that the *capacity* of the I/DD waiver has expanded by 69%, from 15,255 people to 25,859 people and wrongly assert the state is allowed to keep thousands of unused slots open. Def. Mem. at 13.

FY12, a month after the Decree was entered, the State had 17,607 individuals enrolled in its adult I/DD waiver that year; in FY23 it had 23,195. *See* Ex. I; *see also* Ex. H. This is an increase of only 5,588 people, yet Defendants claim Illinois has "doubled" its waiver enrollment. *See* Def. Mem. at 14. Concerned about this discrepancy, the Class sought data from Defendants, but Defendants refused production on the grounds of overbreadth and undue burden. *See* Ex. J at p. 25, No. 36. The unexplained discrepancy in the unsupported figures Defendants provide suggest at the very least that Defendants do not maintain reliable and readily accessible information regarding Waiver enrollment or removal of people from Waiver services.

6. *Resource Shortages for Class Members in Crisis are Unresolved.*

A Class Member in "crisis" is a person who is "at imminent risk of abuse, neglect or homelessness." *See* Decree, ¶ 21(a). Without support, Defendants contend they are in substantial compliance regarding provision of crisis services "because they provide prompt, interim care for the individuals in crisis and then engage in the process to assess the individuals' needs and preferences in accordance with the requirements for community-based services." *See* Def. Mem. at 21-22.[35] They claim they have provided community-based services to approximately 3,900 Class Members in crisis since entry of the Decree. *Id.* at 25.[36] However, the number of people served, taken alone, does not answer critical questions about timeliness of services, length of time in interim services or long-term placement in facilities.

Provision of Interim Services: The Decree requires that Medicaid waiver services be provided "expeditiously" to individuals in crisis. *See* Decree, ¶ 28. The original Monitor, Tony

[35] Defendants also contend that they have removed the cap on monthly crisis services. *See*, *e.g.*, Def. Mem. at 9, 21. Plaintiffs do not dispute a cap is no longer imposed.

[36] Defendants' cited support consists of a brief they previously filed with the same assertions made here, but without supporting evidence. *See* Def. Mem. at 25, citing Dkt. 787 at 5. The Class has filed a motion to exclude consideration of Dkt. 787 as evidence.

Records, a national expert in the field, defined "expeditiously" as 24-72 hours, though variance was permitted "depending on individual circumstances, or if temporary services [were] in place to address the immediate crisis."[37] This mutually-agreed-to definition was developed in direct response to the Monitor's determination that the State was leaving people in crisis for weeks and months without services. *See* Ex. B. at 22.

Defendants now contend that they must provide only *interim services* within 24-72 hours and only after an individual has been determined eligible. Def. Mem. at 21-25. Even under *this* standard, however, Defendants remain out of compliance. According to the Monitor's review, "ensuring adequate safety of the individual and the adequacy of safety until services have been authorized *remains significantly deficient*." *See* Dkt 808 at 9.

Wrongful Extension of Interim Placement in Institutions: Both the previous Monitor and the current Monitor have made clear that crisis services must ensure safety and be community-based. Institutions should not be used, even for interim services, except when the Decree allows limited use of ICF/DDs. *see also* Decree, ¶¶ 21(a) and (c). SODCs should *never* be used as interim services. *Id.*; *see also* Ex. B at 8, 3-5. Nonetheless, some Class Members in crisis are being institutionalized for months or even years not only in ICF/DDs, but also in SODCs. *See* Def. Mem. at 33; *see also* Ex. B. And Defendants are continuing to place Class Members in crisis in SODCs *today* in direct violation of the Decree.[38]

Defendants assert that only "a few Class Members" have suffered this fate. *See* Def. Mem. at 29. Due to Defendants' woeful record-keeping for those in crisis who could not find a provider,

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[37] *See* Dkt. 565, p. 22 ("The Monitor established the standard, with the agreement of the parties, that the timeframe to receive services for class members in crisis will be 24-72 hours, although this timeframe may vary, depending on individual circumstances, or if temporary services are in place to address the immediate crisis").

[38] *See* Def. Mem. at 23 n.21; *see also* Decree, ¶¶ 4, 14, 21.

it is unclear how many Class Members were placed in SODCs. *See* Dkt 819 at 23. It is certain, however, that the number of Class Members suffering this grievous harm is *increasing*.[39] The terrible impact on Class Members who go to SODCs on a supposedly "temporary" basis, with the assurance that these Class Members get top priority to move to a different setting, cannot be overstated.[40] The average length of stay for individuals who transition out of SODCs is 13.5 years.[41] As the previous Monitor explained, "the only reason a state has need for using SODCs is a lack of community capacity for people with higher needs and people in crisis. States with adequate community capacity do not need SODCs." *See* Ex. B at ¶ 6; *see also* Ex. C at ¶ 6.

Defendants assert that they must resort to using SODCs for people in crisis because they cannot force providers to serve Class Members. Def. Mem. at 22-23. But the Seventh Circuit Court of Appeals has explicitly rejected such excuses. *See O.B. v. Norwood*, 838 F.3d 837, 843 (7th Cir. 2016). In *O.B.* Illinois asserted that, because of a shortage of home nurses in Illinois who were willing to serve families with medically complex children, the District Court should not have ordered the State to provide that form of care and should have instead allowed the State to institutionalize the children. *Id.* The Seventh Circuit noted that it was the *state* that had "decided that home nursing was right for the plaintiffs' children," and held that the State could not subject the children to what essentially would be "indefinite confinement" in hospitals that were not

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[39] The number of Class Members Defendants reported in SODCs (*see* Def. Mem. at 30) has increased from when the Monitor reported on it (*see* Dkt. 819). The SODC population has decreased by just 3.5% in 10 years. *See* https://www.dhs.state.il.us/page.aspx?item=61088.

[40] Defendants contend that some Class Members do not "ask" to leave after they have been placed in an SODC on a "temporary" basis. *See* Def. Mem. at 30. That wrongly ignores that the Class Member *already asked* for a different setting when Defendants wrongfully placed them in an SODC.

[41] Inadequate community capacity to support people with IDD in the community limits transitions to the community from SODCs, particularly in Illinois. Caitlin Crabb, et al., *An analysis of movement from Illinois state-operated developmental centers: Transitions between July 1, 2016 – June 30, 2022*, at 7 Chicago: Institute on Disability and Human Development, University of Illinois Chicago (2017-2023). The report further identifies 13.5 years as the average length of stay for those who ultimately transition out.

adequate to meet their needs. *Id.* at 841. Here as well, Defendants cannot sidestep their resource development obligations by failing to act and then claiming that shortages leave them no choice but to institutionalize high needs Class Members.

This is a solvable problem. For example, Michigan routinely serves people with I/DD in crisis within 72 hours, even before eligibility is determined. *See* Ex. C. Michigan agencies use a clearly identified list of *community* services available to people in crisis, track compliance with timely implementation of crisis services, and immediately start working on identifying permanent services, all while the Waiver eligibility process is underway. *Id.* Michigan has no institutions and thus, unlike Illinois, does not warehouse people in crisis in institutions or leave them without services needed to alleviate the crisis. *Id*.

Failure to Track Service Delays: In 2023, Plaintiffs and the Monitor learned that, due to the way Defendants were processing paperwork for people in crisis, the Monitor could not accurately assess how long Class Members were waiting for community services.[42] The Class and Monitor likewise could not identify the people being sent to SODCs or ICF/DDs. The Monitor documented that Defendants' failure to report *actual* waiting time had caused her to "significantly underestimate[] the length of time people in crisis are waiting to get into services." *See* Dkt. 808 at 9.

The new, more transparent system that Defendants began using in 2023 after these issues were discovered confirms ongoing, systemic and severe resource shortages for people in crisis.

[42] Per the Monitor, Defendants were refusing to allow Class Members to apply for crisis funding until the ISC obtained a Waiver service provider. *See* Dkt. 808. Because this practice did not allow for people to move out of ICFs once placed there unless PUNS selected, the ISCs would have closed most — if not all — of the cases of individuals who they placed in ICF/DDs in crisis, depriving them of their right to live in the community. *See* Dkt. 799 at 3. The State did not have a process for tracking the people impacted by the State's practice, nor did it develop a protocol to share with the ISCs until after the problem was revealed. *See* Dkt 819.

See Ex. K. At present, there are at least 109 individuals living in their family home who have contacted their ISC in crisis and are in "pending" status. *Id*. Individuals waiting over four weeks have been waiting an average of over 150 days for placement for community services. *Id*. To put that number in context, in FY 2024, the State approved only 201 crisis applications, averaging around 20 per month. Having 109 people still waiting today (*see* Ex. K) not only violates the Decree, but also is a flashing indicator of dire resource shortages that Defendants cannot sidestep by suggesting, *without any evidence*, that Class Members and their guardians are simply too picky when browsing through the State's array of available services. *See* Def. Mem. at 24-25.

Failure to Prioritize Crisis Resource Development: Given the lack of crisis-focused resources demonstrated above, it is plain that Defendants have not expanded its community-based system to the degree the Decree requires. Defendants point to nine recent expansions as improvements focused on crisis, but in fact, only three would provide direct services to Class Members. *See* Def. Mem. at 29. In May 2023, Defendants received approval to develop two new 4-person short-term stabilization homes (Illinois currently only has 32 crisis beds statewide, with only four female beds). *See* Ex. L, No. 7. The two new homes *have yet to be planned or built*. *Id.* Similarly, Defendants were approved over a year ago to develop six long-term stabilization homes and four transition homes to help people move from SODCs to the community (an increase of 40 more beds statewide). *Id. None of these homes have been planned or built.* In 2022, the Monitor complained of waiting lists for these critical services.[43] The waiting list and delayed expansion has real consequences. *See* Ex A Defendants do not even have a timeline for when Class Members might actually be able to begin using these homes.

[43] *See* Dkt.786, p 2.

It simply is not true that Defendants have removed systemic barriers for people in crisis. *See* Def. Mem. at 30. A system that is truly responsive to crisis includes timely, targeted, and easily accessed services that keep people with I/DD, and the community, safe. *See* Ex. C. Class Members unable to receive the benefits promised under the Decree suffer without services. *See*, Ex. A PL - 23: ("People wait so long for crisis stabilization that they often end up in SODCs…").

7. *Resource Shortages for High Needs Class Members are Unresolved.*

As the prior Monitor has eloquently stated, "every person has a valued role in society, even if they may need extra support due to their disability and are entitled to timely transition back to the community." *See* Ex. B, ¶¶ 2-4. The Decree accordingly ensures that *every* Class Member has a right to live in the community, regardless of their type of intellectual or developmental disability; regardless of whether they have severe disabilities; and regardless of whether they have multiple disabilities. *See* Decree, ¶¶ 2, 3(e), 4.[44] The resource development obligation under Paragraph 4 applies to *all* of these Class members.

Defendants concede that not all Class Members with high needs are "receiving, at least promptly, all of the services they request and need" in the community. *See* Def. Mem. at 32. Defendants are violating the Decree by placing individuals "in SODCs on an interim basis while the identification of an appropriate community-based placement continues." *Id.*; *see also* Decree. ¶¶ 4,14,21. Defendants suggest this is of no moment, asserting that "a finding of non-compliance cannot be based on an alleged failure as to only one part of a defendant's obligations as a whole or

[44] The Class includes people with higher needs, including those who, as part of or in addition to their I/DD, have medical support needs, insulin-dependent diabetes, high behavioral support needs, autism spectrum disorder or other sensory support needs, are deaf or hard of hearing, are blind or have a visual impairment, or have physical accessibility support needs. *See* Dkt. 808 at 18.

failure to fully serve a small percentage of one subgroup within the class." *See id*. at 31 (citing *Salazar* 896 F.3d at 500 and *Walley*, 475 F. at 1144). They are wrong.

Discrimination Against High Needs Class Members: Neither the Decree nor federal law allow the State to serve people with higher needs in a different way from the rest of the class. States cannot treat people with more serious disabilities less favorably than people with less serious disabilities. *See Olmstead*, 527 U.S. at 598–603 (holding that the ADA prohibits discrimination among members of the same protected class); *Amundson ex rel. Amundson v. Wisconsin Dep't. of Health Servs.*, 721 F.3d 871, 874–75 (7th Cir. 2013) (class of people with I/DD could state a claim based on disparate treatment from people with other disabilities); *Iwata v. Intel Corp.*, 349 F. Supp. 2d 135, 149 (D. Mass. 2004) ("Title I of the ADA prohibits discrimination amongst classes of the disabled.").

Ignoring this controlling precedent, Defendants cite to *Salazar* and *Walley. See* Def. Mem. at 13. Neither is persuasive, and neither condones state agency defendants failing to do what is necessary to meet the needs of subgroups of class members with higher needs or support a court deeming such a failure to be trivial or *de minimis* for purposes of a Rule (60)(b)(5) substantial compliance determination.[45]

Serving Class Members with High Needs in the Community is Achievable: Defendants assert that "eight percent of CILA residents – about 980 out of 12,187 – have the highest" score for significant medical needs that include the need for such things as "a tracheotomy, ventilator,

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[45] In *Salazar* the D.C. Circuit held that it was error for the trial court to *expand* a consent decree beyond its original scope to add *new* obligations under the Affordable Care Act (ACA), which was not the law at the time the decree was entered. *Salazar*, 896 F.3d 492. In *Walley*, there was extensive evidence of the defendant child welfare agency's systemic reform efforts, and the defendant had achieved what the trial court viewed as the goal of the decree; the court accordingly granted termination despite serious, but *isolated* instances of noncompliance. *Walley*, 475 F. Supp. 2d at 1144.

nebulizer, or insulin injections." *See* Def. Mem. at 31. Further, they contend that "55% of CILA residents, or about 5,471," have assessment scores indicating "the need for a range of total personal care and intensive supervision up to extensive personal care and/or constant supervision." *Id.* If these unsupported contentions are taken as true,[46] they show that Class Members with higher or even intensive needs *can be served in the community*.

Original Class Members Remain Institutionalized Due to Insufficient Resources: Defendants acknowledge that helping people move from institutions (ICF/DDs) into community-based CILAs is *the most important* goal of the Decree. Def. Mem. at 1, 8. However, contrary to their claim, Defendants have not even transitioned all of the Class Members who were living in ICF/DDs *at the time the Decree was entered* and who expressed the desire to live in the Community. *See* Def. Mem. at 3. Thirty-two original Class Members are in ICF/DDs as of March 1, 2024, approximately *thirteen years* since they informed Defendants of their preference. *See* Ex. M. And the State has only transitioned a total of 10 Class Members out of ICF/DDs since 2019. *See* Ex. H.

Failure to Prioritize Resource Development for High Needs Class Members: The services and resources Defendants claim to have put in place to solve the extensive capacity problems Class Members currently face fall woefully short. Defendants have identified a handful of *opportunities* for potential expansion of services that were issued in late 2023. *See* Def. Mem. at 32. And Defendants have advised that the proposals are so new that they cannot measure effectiveness or provide data regarding usage.[47] Thus, the expansions are insufficient to establish substantial compliance.

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[46] This evidentiary issue is addressed in Plaintiffs' Motion to Exclude.

[47] *See* Ex. M, p. 10 at No. 8 (stating that the expansions "are too new for there yet to be accurate usage data").

8. *Inadequate Quality of Services Provided in CILAs.*

The Decree requires Defendants to provide services customized to individual Class Members' needs, including ample integration opportunities in the community. *See* Decree, ¶ 4. After Plaintiffs established that Class Members were receiving a reduction of services and "suffer[ing] substantially as a result" in 2018, this Court found Defendants out of compliance with the Decree. *See* Dkt. 717 at 2 (summarizing Court's order requiring Defendants to "develop a monitoring tool to assess adequacy of services, funding and administration" for CILA residents and ensure the tool included an independent review component.). Defendants acknowledge the Court's order created an obligation under Decree Paragraph 4, but now contend the tool has been implemented and their performance constitutes substantial compliance. *See* Def. Mem. at 18. *Id.* The evidence they rely on contradicts them.

A monitoring tool was developed in 2019 in consultation with Defendants, and the Court Monitor has reported outcomes of the independent review function twice.[48] The tool identifies 17 "domains," each of which is made up of a series of specific measures. *See* Dkt 737 at 20-44. Under the evaluation scale for the tool which was developed, a score of 85% must be met for Defendants to be in compliance. *Id.* at 19. The 2019 Review showed that services in all areas for those in CILA were still grossly substandard, without even one out of the 17 categories reaching the 85% level that the Monitor deemed to be appropriate to determine compliance. *Id*. at 22-44.

To their credit, Defendants implemented a series of reforms following the 2019 Review, and the Monitor undertook a second review in 2023 to assess Defendants' progress.[49] The 2023 Review shows some improvement, but performance results remain *well* below the 85% level

[48] *See* Dkt 737; *see also* Dkt 808.
[49] *See* 807.

required under the Monitor's evaluation scale. Some of the worst scores were in the domain addressing community integration and access — the core value of this case — where the score was a dismal 53%. *Id.* at 15-16. Access to occupational and physical therapy was at the same exceedingly low score as the last review — 29%. *Id.* at 24–25, 35. In all, scores in *nine* of the 17 domains were below 85%, with *six* of the nine lower than 75%. *See* Dkt. 807 at 34–35.

Despite scores that clearly do not satisfy the Monitor's scale, and despite the Monitor's express disagreement, Defendants now assert they are "in substantial compliance regarding the adequacy of services provided to Class Members in CILAs." *See* Def. Mem. at 19; *see also* Dkt. 842 at 3. According to Defendants, "[a]ny common understanding of the word 'adequate' suggests a compliance percentage well below 85%." *See* Def. Mem. at 19. They accordingly ask the Court either to disregard percentage scores *altogether,* or to apply a lower grade threshold because substantial compliance has been found in many cases without reference to percentages (*id*. at 19), and in others, performance levels below 85% purportedly have been accepted as "substantial compliance." *Id.* at 20 n.16.

The Court should not adopt Defendants' reasoning. There are cases like *Shakman*, where use of a percentage metric apparently was never contemplated. Using a percentage in that case would have been senseless because there had been no substantial decree violations in a decade. *See Shakman*, 43 F.4th at 748. In other cases, metrics have been considered.[50] Here, Defendants *agreed* to the metrics that the Monitor is applying as part of the requirement that they develop resources of "sufficient *quality*, scope and variety" to meet their Decree obligations to the Class,

[50] *See Burt v. County of Contra Costa*, No. 73-cv-00906-JCS, 2014 WL 253010 at *1, (N.D. Cal. Jan. 22, 2014) (ordering termination despite "miss" on compliance percentage where record showed there had been "no showing of any substantial ongoing violation of law"); *see also Glover v. Johnson*, 138 F.3d 229, 235-36, 242-43 (6th Cir. 1998) (noting parties had agreed to a percentage compliance measure, but the measure was never adopted by the court order and should not control).

and there is an overwhelming record *otherwise* indicating that Defendants have achieved anything near substantial compliance, unlike the proofs offered in their cited authorities.

Finally, this Court should not accept the unprincipled and truly dizzying set of mathematical calculations Defendants have offered to recalculate their compliance percentage to 79%. *See* Def. Mem. at 20. The Monitor is an expert, and it is her assessment of Defendants' performance level that should control. Even the previous Monitor agrees that 85% is a reasonable measure and a typical one. *See* Ex. B. In *Shakman*, termination of the decree at issue was granted because the defendants had reached a *zero* level of noncompliance for the past seven years. *See Shakman*, 43 F.4th at 728.

IV. Defendants Have Not Demonstrated a Durable Remedy.

Before a court can terminate a consent decree, it must conclude *both* that the decree's "objective … has been achieved" and that a "durable remedy has been implemented." *Horne*, 557 U.S. at 550. Establishing a durable remedy requires evidence showing "*the actual impacts or outcomes experienced by the plaintiffs*." *Evans*, 701 F. Supp. 2d at 171 (emphasis supplied). Defendants' failure to demonstrate substantial compliance with the terms and purpose of the Decree alone is fatal to their Motion. But even if that had not been the case, the absence of a durable remedy is palpable here. Defendants concede that their implementation of necessary rate increases is at least two years off, that they need time to build resources, and that time is needed before their quality improvement efforts for services in CILAs can be judged. *Id*. at 13 et seq.

It is extraordinary for Defendants to propose Decree termination when Class Members and their families continue to suffer intensely due to the lack of promised services and reforms. The following are a few examples of the plight of Class Members' stories, more of which are collected at Exhibit A, that only begin to express the full scope of ongoing problems:

> I live in fear that my 21-year-old daughter will be institutionalized if something happens to me. I struggled for 18 months to change her funding to reflect her high support needs and she remains underfunded. . . . It is mentally and morally exhausting to constantly fight for something she has a right to that I cannot achieve for her. Should we be in crisis, the system does not respond in a timely manner. *See* Ex. A PL – 29.

> Ta'Shika loves to go to the movies, play basketball, help her little brother, go swimming, go grocery shopping, buy new clothes at Walmart, go bowling, etc. She is SO very loved and cherished and she has been failed by the state of Illinois since her birth. She deserves life as much as anyone else does and she has been forgotten and discarded by every person who has ever promised to help her. I don't know how long she will be stuck at the SODC. It was not by choice, but the lack of meaningful supports in the community to support her needs. *Id.* PL – 23.

> It has been TWO YEARS trying to get my son into CILA and not one inquiry from a CILA provider wanting to even meet him. We desperately need CILAs for people with higher needs. We have extreme shortages of community services to keep my son in his home even within the Home Based program. *Id.* PL - 29.

The Class Members have presented extensive evidence of serious, pervasive, and systemic violations of their rights under the statutes undergirding the Decree and the Decree itself. On this record, the Class cannot be stripped of the protection provided under the Decree.

Conclusion

When the Decree was entered, all parties and the Court recognized that the path for Defendants' compliance would take a minimum of nine years. *See* Decree, ¶ 47. Defendants are in year 13, and though progress has been made, serious problems persist. This is not the time to vacate the Decree; rather, it is time for the State to redouble its efforts to achieve the parties' joint, ultimate goal: An I/DD service system which has sufficient resources to support people with I/DD in their chosen communities. The Class remains willing to work cooperatively with Defendants to achieve that goal.

April 29, 2024 Respectfully submitted,

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