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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-5826

[Filed: September 9, 2022]

WILLIAM F. NORED and LAWANDA JEAN NORED, as conservators, parents, and next friends of WILLIAM F. NORED, JR. (BILL), individually	)
Plaintiffs-Appellants,	)
v.	)
TENNESSEE DEPARTMENT OF INTELLECTUAL & DEVELOPMENTAL DISABILITIES; COMMISSIONER BRAD TURNER, in his official capacity as the Commissioner of the Tennessee Department of Intellectual & Developmental Disabilities,	)
Defendants-Appellees.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

OPINION

Before: CLAY, GRIFFIN, and WHITE, Circuit Judges.

HELENE N. WHITE, Circuit Judge. Plaintiffs-Appellants William F. Nored ("Mr. Nored") and LaWanda Jean Nored ("Mrs. Nored"), collectively "the Noreds," are the parents, conservators, and next friends of their son, William F. Nored, Jr. ("Bill"). They appeal the district court's determination that Defendants-Appellees Tennessee Department of Intellectual and Developmental Disabilities, and its Commissioner, Brad Turner—collectively "DIDD"—did not violate the Americans with Disabilities Act, Rehabilitation Act, Medicaid Act, or 42 U.S.C. § 1983 by failing to find a willing home-care provider for Bill, who is entitled to that service under the Medicaid waiver program. We affirm.

I.

A.

The Noreds adopted Bill in 1970 when he was an infant. Bill is now in his fifties.

When Bill was still an infant, the Noreds began to notice that he suffered from chronic seizures. After Bill's first grand mal seizure at approximately eighteen months old, doctors performed a myelogram and determined that Bill had an extensive brain injury that likely resulted from a stroke or other traumatic

incident at birth. This brain injury caused a severe seizure disorder that could not be controlled with medications and resulted in significant weight loss, vomiting, and diarrhea. At fourteen years old, Bill underwent a partial hemispherectomy, which removed the entire right side of his brain. This surgery completely resolved Bill's severe seizure disorder but left him with other medical issues; he has partial paralysis on the left side of his body; a blind spot in his left eye; cannot do math; cannot understand the denominations of money or manage his finances; cannot enter into a contract; cannot drive; and cannot be relied on to understand the severity of emergencies or react appropriately to them. Bill also occasionally struggles with impulse control; telling the difference between reality and fiction; and has been diagnosed with intermittent explosive disorder, which may result in aggressive or violent behavior if he feels stressed or "backed into a corner." R. 134, PID 969–70. However, Bill is a functional reader, communicates clearly, dresses himself, and largely manages his own personal hygiene.

Bill lived with his parents until he was about twenty, when his younger brother went to college and Bill told his parents that he, too, wanted to be more independent. Bill's parents found a house in downtown Sevierville, Tennessee, which is a town Bill knew well and liked because of the numerous attractions. Bill lived in the Sevierville house without assistance for about three years, but then began confusing reality with an American Western soap opera and believed that he was part of the show. The Noreds brought Bill back to their home in Knoxville and had him evaluated

by medical professionals, who diagnosed him with intermittent explosive disorder and committed him to the Clover Bottom Middle Tennessee Mental Health Institute in Nashville, Tennessee, where he remained for twelve years. Clover Bottom employees determined that Bill could not have a roommate because he touched his roommate's things, became agitated when other people touched his things, and "just could not function in a room with another person." *Id.* at 972.

Bill moved into home and community-based care in approximately 2013, after Clover Bottom was ordered to close. He enrolled in the 1915(c) Medicaid Home and Community-Based Services ("HCBS") Waiver program, a federally funded program that pays for medical services for individuals who prefer to remain in their homes and communities, rather than in institutionalized care. DIDD administers the 1915(c) waiver program in Tennessee, and Bill's particular waiver— the "comprehensive aggregated cap waiver"— has no limit on the amount of care or services he is entitled to receive. *Id.* As part of the 1915(c) program, DIDD contracted Engstrom Services, Inc. ("Engstrom") to be Bill's Independent Support Coordinator, or "ISC."[1]

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[1] As the Tennessee agency that oversees the provision of care for disabled Tennesseans, DIDD provides two types of services: direct care through state-run intermediate care facilities ("ICFs"), and indirect care by funding providers who support individuals in their homes through the Medicaid waiver program.

To provide indirect care to patients such as Bill, DIDD "contract[s] with providers that will actually perform [] the direct care or provide services in the person's home or in the community" across the state. R. 135, PID 1101. DIDD also contracts with ISCs that help patients identify DIDD-authorized provider agencies by

After Bill was released from Clover Bottom, Engstrom helped Bill locate an apartment in Nashville, where he was able to live alone and receive assisted-living services paid for by DIDD and provided by a DIDD-approved agency called Benchmark. Bill received "Level 6" services at this time, which meant that he was provided two staff for twenty-four hours a day, seven days a week.

After about eighteen months in Nashville, Bill became unhappy so far away from his parents. The Noreds moved Bill back to his previous home in Sevierville but had to switch providers because Benchmark did not service East Tennessee. Engstrom

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providing them with a list of potential providers. After the patient selects from this pre-authorized list of qualified and willing providers, DIDD contracts with and pays the provider, and then provides oversight of the quality of care. If the patient requires a new provider or additional staff, the ISC will search for DIDD-approved providers and will pass along a list of interested providers to the patient. The patient and/or conservators have the final say over which authorized provider is selected for services.

ISCs also create annual Individual Support Plans ("ISPs") for the patient, which "provide a comprehensive description of the person supported and the services required to meet his or her needs." ECF No. 21, PID 37. As a representative from Bill's ISC testified, the ISP is designed to "capture what's important to Bill, what's important for Bill, what kind of help, supports he needs, risks and things of that nature, [and] goals." R. 134, PID 1079. The ISC drafts a patient's ISP after consulting with the patient, the patient's family, and the patient's current providers and staff (collectively, the patient's "Circle of Support"). The Circle of Support then reviews the ISP and makes any necessary changes. Once the Circle of Support approves the ISP, the ISC submits it to DIDD for final approval.

helped the Noreds find New Haven, LLC ("New Haven"), which became Bill's new, DIDD-approved provider in Sevierville.

Bill was happy in his Sevierville home. He enjoyed interacting with the community and spent the majority of his days wandering around town, seeing the Sevierville attractions, eating at favorite restaurants, and making purchases with an allowance provided by his parents. He also greatly enjoyed his independence.

While Bill lived in Sevierville, New Haven provided a variety of services: attendants fixed his meals, ensured that he took his medications, helped him with cleaning the home and remembering certain hygienic tasks, drove him and escorted him wherever he wanted to go around town, and were generally available in case of an emergency.[2] Additionally, the Noreds maintained surveillance cameras in Bill's Sevierville home, which allowed them to look in on him whenever they wished.

In late 2015, the Noreds began to notice that Bill was exhibiting strange behaviors. He would occasionally call his parents in tears "saying that his staff was hurting him, that they were being mean to him, that they wouldn't let him go out, they wouldn't fix him his food, all sorts of just really unusual things." R. 134, PID 995. The Noreds began to review the camera footage in Bill's house, and Mrs. Nored believed

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[2] These services are collectively referred to as "support-living services," which involve staff coming to a patient's home to assist with personal care, and "community-based day services," which involve staff taking the patient into the community to engage in activities that the patient enjoys. R. 135, PID 1126.

from the footage that Bill "was being verbally abused, talked down to, called names, just all kinds of little things that made him extremely uncomfortable." *Id.* at 996. The Noreds complained multiple times to New Haven's owner and director, Gary Hooks, but kept New Haven as a provider. The Noreds continued to experience issues with New Haven through 2016 and 2017, and DIDD ultimately conducted two investigations of New Haven's services in response to the Noreds' complaints—substantiating several of the allegations against certain male caretakers for neglect, emotional abuse, and physical abuse.[3]

Meanwhile, in approximately December 2016, New Haven submitted an intent-to-discharge letter to the Noreds requesting to discontinue services to Bill due to

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[3] Specifically, on December 12, 2016, DIDD conducted a review of complaints against five New Haven employees and substantiated allegations of supervision neglect against three of them (who were "less than alert or sleeping while on duty while working with Bill on multiple different dates and times") and one allegation of emotional abuse against one of them (who had "not le[ft] Bill alone when he was visibly upset, which caused [him] to attack" a staff member). ECF No. 17, PID 97–98. The December 2016 review also concluded that one allegation of physical abuse could not be substantiated.

On July 19, 2017, DIDD conducted a review of complaints against three New Haven Employees and substantiated that all three had committed supervision neglect (by either "leaving [Bill] alone or unattended in his home for excessive amounts of time" or by "being less than alert or sleeping while on duty on unknown dates and at unknown times"). *Id.* at 135. Additionally, DIDD found that one employee had physically abused Bill by "pushing him down two times during a behavioral episode which occurred on" June 20, 2017. *Id.*

a "breakdown" in communication.[4] R. 135, PID 1255–56. After submitting the intent-to-discharge, New Haven continued to provide services through October 2017 while Engstrom searched for a new provider for Bill.

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[4] A review of the DIDD investigative reports suggests that many New Haven caretakers found their work for the Noreds to be difficult and their responsibilities unclear. For example, several of the caretakers who were found to have neglected Bill by falling asleep admitted that they did so, but explained that it was because there was often "nothing to do but clean the house." ECF No. 17, PID 86; *see also id.* at 107 ("Browning said the reason he has dozed off is because Bill's parents have requested that staff not interfere with Bill or ask Bill to do things. Browning stated, 'The Nored's have made it to where staff cannot do their job and instead just sit in a recliner until Bill request[s] something.'"). Additionally, several staff found to have neglected Bill by being absent from the house stated that the reason they were not in the house was because Bill would often chase them out or refuse to let them in. *See id.* at 107 ("Browning said that when he gets to the home Bill is usually waiting at the door with a weapon for night staff and doesn't put it down until day staff enters the home. Browning said he goes out to his car when Bill becomes aggressive," and that "Bill had yelled at him numerous times to 'Get the fuck out of my house.'"); *id.* at 119 ("Berry said she will ask staff why they are outside and they tell her that Bill tells them to get the 'fuck out of his house and tries to hit them'").

Bill also appeared to be particularly afraid of, and often hostile toward, Black staff. *See, e.g.*, *id.* at 104 ("Bill said he did not want [a certain] staff . . . in his home . . . because he was black (African American). Bill said he was afraid of black people and that they '[s]care the living daylights out of [him]"); *id.* at 110 ("Ms. Jean reports Bill is scared of black staff and has a difficult time sleeping while they are present"); *id.* at 134 ("[Staff] said that Bill cursed (called him a 'dick sucker' and a 'n*gger') him out and asked him to leave his home").

Engstrom had not found Bill a new provider by May 2017, when Bill's ISP was renewed. Alhough New Haven was listed as Bill's provider on his 2017–18 ISP, New Haven did not attend the annual Circle of Support meeting or sign the ISP. Mrs. Nored explained in a handwritten note on the ISP that she had "requested New Haven staff not be present at this meeting because it was in Bill's home" and their presence "made Bill very upset." R. 17, PID 46–47.

In July 2017, after DIDD substantiated an allegation of abuse and several allegations of neglect by New Haven employees, *see supra* fn 4, the caretaker who had been found to have physically abused Bill sent the Noreds a letter stating:

> Mr and Mrs Nored,
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> I want you to know that you have accused the wrong person, I am not a person to be messed with. I am letting you know that I have contacted the EEOC, Labor Board, and the Office of Discrimination. Expect a law suit lady, how dare you teach your son to be so racist, the developmentally challenged field is one that I love but now you have jeopardized that for me and I am not handling it well. Understand that I know your address if things do not happen as I wish I will be visiting you. And no that is not a threat it is a promise.

Id. at 138. After receiving this letter, and in part due to a caretaking incident at Clover Bottom, prior to New Haven's contract, "where [Bill] was attacked by two or three black men and physically, sexually abused" by

them, Bill requested that "he not have any more black men be on his staff." R. 134, PID 1026. Bill also had a strong preference for female staff because he was more comfortable with them. *Id.* at 1027. Mrs. Nored communicated Bill's racial and gender preferences to New Haven in the summer of 2017. *See id.* at 1027–28.

After two additional incidents with New Haven staff in fall 2017—one in which staff allegedly abandoned Bill in a restaurant for a significant amount of time and one in which staff got into a physical altercation with Bill after he refused to take his medication—the Noreds removed Bill from the Sevierville home and took him to their own home in Knoxville in October 2017. The Noreds also filed a lawsuit in state court against New Haven.[5] *Id.* at 1063.

After the Noreds moved Bill to their Knoxville home, New Haven initially attempted to continue services by picking Bill up from Knoxville and taking him to Sevierville—the only location where it was authorized by DIDD to bill for its time—but, according to Hooks, New Haven stopped attempting to service Bill because the Noreds "berated" the staff that arrived, including threatening to call the police if the staff arrived to provide services and actually doing so one occasion, and staff "were literally starting to refuse to go, threatening to quit." R. 13, PID 1260–61. The Noreds also requested that New Haven service Bill

[5] This lawsuit was ultimately dismissed on July 5, 2018, because it was deemed to be a medical malpractice case and the Noreds had failed to meet certain procedural requirements for filing such claims.

with primarily female, non-African American staff, and Hooks testified that these requests "create[d] a problem for . . . staffing the home." *Id.* at 1262. Additionally, the Noreds were directed by their attorney in the state lawsuit not to have any communication with New Haven or their staff during the pendency of the legal proceedings. At some point after October 2017, the Noreds contacted DIDD's Regional Director for East Tennessee and requested that someone facilitate a meeting between DIDD, the Noreds, and New Haven to maintain a provider through this difficult time. *Id.* at 1004–05. But for reasons that are unclear from the record, a meeting involving the Noreds never took place.[6] New Haven ceased providing services to Bill in October 2017.

Although New Haven did not provide Bill services after October 2017, it remained listed on Bill's ISP as his "official" provider until May 2018, when it came time to renew the ISP. At the Noreds' request, New Haven did not attend the May 2018 ISP meeting. Nor did a New Haven representative sign the 2018 ISP. Accordingly, New Haven was not carried over from the 2017–18 ISP as Bill's official provider, and DIDD was the only "provider" listed on Bill's 2018–19 ISP because

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[6] However, Hooks testified that New Haven did participate in a resolution process with a DIDD representative who "emphatically" told New Haven that "there has to be a continuity of service," and that New Haven would be "fined daily" and that the state "would step in and pull [its] license" if New Haven refused to provide services. R. 135, PID 1263. It is unclear from the record whether New Haven was ever fined for failing to provide service to the Noreds, although Hooks testified that New Haven continued to be a licensed provider as of the date of trial.

no other provider had been found for Bill. No type of home care was listed on the ISP. Mrs. Nored handwrote into the 2018–19 ISP an objection stating that she disagreed with the lack of a provider listed, "which should by law be New Haven." *Id.* at 78.

In August 2018, the Noreds submitted an amended ISP to DIDD requesting supported-living and community-based day services. DIDD denied the request because the ISP failed to "identif[y] a willing provider contracted with DIDD." ECF No. 21, PID 41. DIDD also denied the Noreds' similar requests in 2019 and 2020 for the same reason.

B.

DIDD has not provided Bill with supported-living or community-based medical care or funding since October 2017. However, DIDD has continued to pay Engstrom to serve as Bill's ISC, and Engstrom has continued to search for a provider. From 2017 to 2018, Enstrom sent approximately monthly emails soliciting potential providers and contacted a total of fifty-one providers about providing direct services to Bill in the Sevierville and/or Knoxville areas. Some providers showed initial interest and progressed to the "meet and greet" stage, but none progressed beyond that point. An Engstrom representative testified that providers refused to service Bill for a variety of reasons: the desired locations were out of range or otherwise too difficult to staff, the providers could not provide individual or 1:1 care, and/or the providers were unwilling to service Bill's home given the Noreds' "nonnegotiables," such as the maintenance of 24/7

surveillance cameras.[7] The Engstrom representative testified, however, that several potential providers showed an interest in caring for Bill in communal homes and/or at locations outside of Sevier county. Engstrom contacted an additional thirty-five providers from January 2019 through June 2019, most of whom responded that they did not have the staff, could not service the Sevierville area, or could not support a patient with needs as severe as Bill's.

In 2019, DIDD took the unusual step of contacting approximately forty-two providers directly (bypassing Engstrom), but none would provide services to Bill. *See id.* at 1140–42; 1143 (noting that contacting providers directly is not something DIDD usually does). Five of these forty-two "did not respond at all," twenty-one "said no," and sixteen responded that they could provide services under certain circumstances, such as Bill's willingness to relocate and/or live in a communal home. R. 135, PID 1142.

Since October 2017, Bill has been living in his parents' home in Knoxville and is under their care. Bill's parents are in their seventies and are themselves in poor health: Mrs. Nored is confined to a wheelchair and has had multiple mini strokes, and Mr. Nored

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[7] An Engstrom representative testified that one of the Noreds' "nonnegotiables" was an expressed desire for female staff and for "no African American males in the house." R. 135, PID 1217. However, Mrs. Nored testified that she only expressed Bill's racial/gender preferences to "one" potential provider during a meet-and-greet, and the provider indicated that it could not serve Bill for reasons unrelated to the gender/racial preference. *See* R. 134, PID 1026–27.

suffers from two types of cancer and is undergoing cancer treatment. Bill is unhappy and feels confined in his parents' home. It is not safe for him to walk around due to the rural location close to the road, and Bill's parents cannot provide the degree of care and attention that Bill was receiving in Sevierville. DIDD has refused to send its own employees to Sevierville or Knoxville because it does not provide direct care to individual homes; it only provides direct care in its established intermediate care facilities.[8] And although the Noreds looked into creating their own care agency so that they could become DIDD-approved, funded-care providers, they had to abandon that application due to their health issues.

Since October 2017, the Noreds have occasionally paid individual caregivers to take Bill out during the day, but they do not have consistent or DIDD-funded care. At the time of the trial in November 2020, Engstrom was still contacting providers monthly and still without result. In its appellee brief, DIDD confirmed that Bill is still enrolled in the Medicaid waiver program and is thus entitled to services.

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[8] According to TennCare, which is the state entity that administers Tennessee's Medicaid waiver program, the ICFs are available to Bill because he is a 1915(c) home-and community-based-services waiver recipient, but Bill has no obligation to accept an ICF placement. TN Division of TennCare, 1915(c) HCBS Waivers, https://www.tn.gov/tenncare/long-term-services-supports/persons-with-intellectual-disabilities-receiving-services-in-the-1915-c-hcbs-waivers.html.

C.

In August 2019, the Noreds brought this action against DIDD and its Commissioner, Brad Turner, alleging that DIDD's failure to provide Bill with medical care or funding from October 2017 onward violates the ADA, Rehabilitation Act, Medicaid Act, and 42 U.S.C. § 1983. After the district court dismissed several claims for procedural reasons, the case proceeded to a bench trial on the Noreds' remaining claims. The district court determined that DIDD had not violated the Medicaid Act, ADA, or Rehabilitation Act.

Relevant to this appeal, the district court determined that DIDD satisfied its obligations to provide medical assistance to Bill under 42 U.S.C. § 1396d(a) of the Medicaid Act by being "willing and able" to pay for Bill's services if the Noreds would agree to a provider, and that the providers' unwillingness to serve Bill in his Sevierville or Knoxville homes was "not the fault of DIDD," but was instead due to "the various restrictions that [the Noreds] have placed on who can provide care and where the care is provided." R. 143, PID 1455.

The Noreds appealed.

II.

In an appeal from a district court's judgment after a bench trial, this panel reviews "the district court's findings of fact for clear error and its conclusions of law *de novo*." *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 547 (6th Cir. 2010) (quoting *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005)).

The panel may reverse a factual finding for clear error "when the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Chesnut v. United States*, 15 F.4th 436, 441 (6th Cir. 2021) (quoting *Max Trucking, LLC v. Lib. Mut. Ins. Corp.*, 802 F.3d 793, 808 (6th Cir. 2015)).

III.

The Noreds allege that DIDD's failure to provide funding or direct medical services to Bill after October 2017 violated § 1396a(a)(8) and (10) of the Medicaid Act, 42 U.S.C. § 1396a.[9] Congress passed Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* ("the Medicaid Act") in part to provide "medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. States that receive Medicaid funds must administer medical-assistance programs in compliance with federal requirements. *Id.* § 1396a(a). Under § 1396a(a)(8), a state plan for medical assistance must "provide that all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." *Id.* § 1396a(a)(8). Under § 1396a(a)(10), a state plan for medical assistance must "provide . . . for making medical assistance available." § 1396a(a)(10). "Medical

[9] Section 1983 creates a private right of action to sue for a violation of 42 U.S.C. § 1396a(a)(8) and (10). *Waskul v. Washtenaw County Community Mental Health*, 979 F.3d 426, 448 (6th Cir. 2020).

assistance" means, in relevant part, "payment of part or all of the cost of [eligible] care and services or the care and services themselves, or both."[10] *Id.* § 1396d(a).

We have decided two significant cases interpreting the definition of "medical assistance": *Westside Mothers v. Olszewski ("Westside Mothers II")*, 454 F.3d 532 (6th Cir. 2006) and *Brown v. Tennessee Department of Finance and Administration*, 561 F.3d 542 (6th Cir. 2009).

Westside Mothers II involved a suit by several advocacy groups seeking to compel the state of Michigan to provide, under § 1396a(a)(8) and (10), direct medical screening, diagnostic, and treatment services to eligible children. 454 F.3d at 535–36. At the time, "medical assistance" was defined in the Act to mean "payment of part or all of the cost of the [enumerated] services . . . for individuals." *Id.* at 540 (quoting 42 U.S.C. § 1396d(a)). Accordingly, the court rejected the plaintiffs' arguments that the Act required states to provide direct services, and instead held that "what is required is a prompt determination of eligibility and a prompt *payment* to eligible individuals to enable them to obtain the necessary medical services." *Id.* (citing 42 C.F.R. §§435.911, 435.930) (emphasis added) (holding that the plaintiffs had failed to state a claim under the Act because they sought to compel the state to provide services rather than payment).

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[10] DIDD does not dispute that Bill's requested services are eligible services under § 1396d(a).

Brown expounded on *Westside Mothers II* by holding that Tennessee did not violate the Medicaid Act by putting a class of disabled Tennessee residents, who were eligible for Medicaid services, on a waiting list to receive those services. 561 F.3d at 545–47 ("[A]bsent more, a waiting list for waiver services does not violate federal law because the state's duty is to pay for services, not ensure they are provided. . . .).

In 2009, shortly after *Brown*, Congress revised the definition of "medical assistance" to encompass payment for services, the services themselves, or both. An accompanying House Report explained:

> Section 1905(a) of the Social Security Act [codified at what is now the Medicaid Act, 42 U.S.C. § 1396d(a)] defines the term "medical assistance." The term is expressly defined to refer to payment but has generally been understood to refer to both the funds provided to pay for care and services and to the care and services themselves. The Committee, which has legislative jurisdiction over Title XIX of the Social Security Act, has always understood the term to have this combined meaning. Four decades of regulations and guidance from the program's administering agency, the Department of Health and Human Services, have presumed such an understanding and [] Congress has never given contrary indications.
>
> Some recent court opinions have, however, questioned the longstanding practice of using the term "medical assistance" to refer to both the payment for services and the provision of the

> services themselves. These opinions have read the term to refer only to payment; this reading makes some aspects of the rest of Title XIX difficult and, in at least one case, absurd. If the term meant only payments, the statutory requirement that medical assistance be furnished with reasonable promptness "to all eligible individuals" in a system in which virtually no beneficiaries receive direct payments from the state or federal governments would be nearly incomprehensible.
>
> Other courts have held the term to be payment as well as the actual provision of the care and services, as it has long been understood. The Circuit Courts are split on this issue and the Supreme Court has declined to review the question. To correct any misunderstandings as to the meaning of the term, and to avoid additional litigation, the bill would revise section 1905(a) to read in relevant part: "The term 'medical assistance' means payment of part or all of the cost of the following care and services, or the care and services themselves, or both." This technical correction is made to conform this definition to the longstanding administrative use and understanding of the term. It is effective on enactment.

H.R. Rep. No. 299, 111th Cong., 1st Sess. 2009, at 645–50 (Oct. 14, 2009), also available at 2009 WL 3321420, at *694–*95.

Our circuit has commented on this change only once. In 2010, we addressed a suit in which Tennessee

state officials sought to vacate a consent decree that required Tennessee to provide a class of minors direct health benefits under the Medicaid Act. *John B. v. Goetz*, 626 F.3d 356, 358 (6th Cir. 2010). In providing background on our Medicaid caselaw, we summarized *Westside Mothers II* and *Brown*'s holdings regarding the definition of "medical assistance" under 42 U.S.C. § 1396d(a), *id.* at 360–61, and noted in dictum that "[t]he definition of 'medical assistance' has changed since we decided *Westside Mothers II*, but the new definition does not affect this holding because a state may still fulfill its Medicaid obligations by paying for services."[11] *Id.* at 360 n.2.

We have not issued an authoritative opinion determining whether *Westside Mothers II* controls the definition of "medical assistance" under § 1396d(a) after Congress amended the statute, and district courts in our circuit have split on the issue. *Compare K.B. by Next Friend T.B. v. Mich. Dep't of Health & Human Servs.*, 367 F. Supp. 3d 647, 657 (E.D. Mich. 2019) ("As referenced by the court [in *Goetz*], the current definition of 'medical services' gives a state three different options: provide services directly, pay for services, or both provide and pay for services. As such, the 2010 amendment to the definition does not disturb the holding in *Westside Mothers*. . . . [A] state may choose to only pay for services."), *with John B. v.*

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[11] Despite the speculation in *Goetz* regarding the definition of "medical assistance," our ultimate holding in that case had nothing to do with 42 U.S.C. § 1396d(a); we vacated only the portion of the consent decree relying on an unrelated section of the Act that had been found to have no private right of action. 626 F.3d at 362–63.

Emkes, No. 98-cv-0168, 2011 WL 795019, at *5 (M.D. Tenn. Mar. 1, 2011) ("Under this amendment, whether a particular provision of the Medicaid Act requires payment for services or the provision of the services themselves is not controlled by the old definition of 'medical assistance' as referring only to financial assistance. Indeed, the legislative history behind this amendment clearly shows that Congress intended to clarify that where the Medicaid Act refers to provision of services, a participating State is required to provide (or ensure the provision of) services, not merely to pay for them.").

A.

The district court, in holding that DIDD did not violate § 1396a(a)(8) and (10) of the Medicaid Act by being willing to pay for medical providers, observed that "[t]here is no case at this time that holds that if the state is not actively paying for medical services then instead it *must* provide the services themselves." R. 143, PID 1451–52. The court then held that § 1396d(a) "gives a state three different options: provide services directly, pay for services, or both provide and pay for services." *Id.* (quoting *K.B.*, 367 F. Supp. 3d at 657). The court noted that "both DIDD and the ISC have made extensive efforts to find a provider for Bill, to no avail, due to the various restrictions the Noreds have established," including the racial/gendered preferences and the Noreds' refusal to relocate Bill out of Sevierville or Knoxville, and concluded that DIDD satisfied its § 1396a(a)(8) and (10) obligations by "maintain[ing] that it was willing and able to pay for the requested services if the Noreds were able to

specify a provider." *Id.* at 1455. Citing 42 C.F.R. § 431.51(b)(1),[12] the district court concluded that "DIDD may not force the Noreds to choose a provider for their son . . . [b]ut if the criteria the Noreds have imposed eliminate any available providers, then that is a decision that rests on the Noreds—not DIDD." R. 143, PID 1452–53.

B.

On appeal, the Noreds agree that "there is no case at this time that holds that if the state is not actively paying for medical services then instead it must provide the services themselves." Appellants' Br. at 31, 33. But, citing the House Report explanation for Congress's 2010 amendment to the Medicaid Act, they maintain that "to find otherwise would contradict the legislative intent behind the change in definition of the term medical assistance." *Id.* at 33. The Noreds also argue that they did not place "non-negotiable race and gender restrictions on all prospective providers;" that even if they had, those preferences were not included in his 2017–18 ISPs or circulated by DIDD in July 2019; and that the "overarching reason[s]" that providers turned Bill down were that "they didn't service the Sevierville area, did not have enough staff, or could not

[12] This regulation states that beneficiaries "may obtain Medicaid services from any institution, agency, pharmacy person, or organization that is (i) qualified to furnish services; and (ii) willing to furnish them to that particular beneficiary." 42 C.F.R. § 431.51(b)(1).

support Level 6 care on an individual basis."[13] *Id.* at 34–36. Finally, the Noreds argue that Bill "is not seeking to remain in a nursing home or other care facility that has been decertified or to have a decertified provider continue providing him with care," but "simply wishes to remain part of the Sevierville community, where he had friends, interacted with the community, and was able [to] live a relatively independent lifestyle despite his disabilities." *Id.* at 39.

1.

We need not decide the legal issue whether a state agency responsible for administering the Medicaid waiver program may satisfy its obligations merely by being willing to pay for "medical assistance" even when none is available, because we conclude that, on this record, the district court did not err in finding that DIDD did not violate § 1396a(a)(8) and (10)'s requirements that it furnish "medical assistance" "with reasonable promptness" and "provide for making medical assistance available" by failing to provide direct services to Bill when a willing, qualified provider could not be found and paid due primarily to the Noreds' "nonnegotiable" requirements.

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[13] The Noreds explain that Bill's racial and gender preferences were not due to prejudice, but to his "physical[] and sexual[] abuse by three African American men" while institutionalized at Clover Bottom. Appellant's Br. at 34. "Given this experience and his disabilities, Bill became afraid of all African American men and could not understand that the race and gender of his three assailants were unrelated to the abuse that he suffered." *Id.* at 34–35.

After a bench trial, the district court made the following findings of fact, which we may only reverse for clear error: that DIDD, by itself and through its agent Engstrom, expended significant effort attempting to secure a qualified, willing provider for Bill; that Engstrom began searching for a new provider as soon as New Haven submitted its intent-to-discharge in 2017; that the Noreds prevented New Haven from servicing Bill in either Sevierville or Knoxville while DIDD searched for a new provider; that through approximately monthly emails, Engstrom inquired of numerous qualified providers over the course of 2017 to 2019, including DIDD taking the unusual step of contacting providers directly in 2019; and that while many of the potential providers indicated initial interest in servicing Bill and progressed to the meet-and-greet stage of becoming a provider, none of them were ultimately willing to take him on as a client due to the Noreds' "non-negotiable conditions," including "only consider[ing] providers who could service Bill's home in Sevierville," and that these providers declined service under the Noreds' conditions "despite these efforts by Engstrom and DIDD."[14] *See id.* at 1446–47.

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[14] The district court focused heavily on the racial/gendered staffing requests. *See, e.g.*, R. 143, PID 1452 ("Obviously, if the Noreds place unreasonable and unfortunate restrictions based on sex and race of the person who can provide their son the needed services, then the Noreds should not complain when DIDD cannot find any willing provider. And, it is no surprise that the Noreds cannot find one either.").

This issue is quite complicated and the district court did not engage with the Noreds' argument that Bill did not have the

Of these factual findings, the Noreds dispute only that Bill's racial/gendered preferences were part of their "nonnegotiables." And although they are correct that the majority of providers rejected them because of their remote location and/or staffing issues, the fact remains that multiple providers were willing to accommodate Bill if the Noreds would agree to certain concessions, such as moving Bill out of Sevierville/ Knoxville or removing the 24/7 security cameras. An Engstrom agent testified that the Noreds' "conditions and nonnegotiables . . . affect [Engstrom's] ability to locate a willing provider." *Id.* at 1219. The Noreds' repeated refusal to make non-medical concessions to otherwise qualified, willing providers—coupled with their refusal to allow New Haven to service Bill at Knoxvilee or Sevierville and DIDD and Engstrom's consistent efforts on their behalf for years—supports the district court's finding that DIDD was not responsible for failing to locate a willing, qualified provider for Bill.

In affirming, we do not decide the correctness of the district court's view that a state may satisfy its obligations under 42 U.S.C. § 1396a(a)(8) and (10) by merely being willing to pay for medical assistance. We

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capacity to separate his past trauma from the physical description of the people who hurt him. In any event, despite the district court's focus on this issue, the record does not demonstrate that potential providers, other than New Haven, refused to work with Bill *because* of his racial/gender preferences. However, there is considerable evidence that the Noreds' refusal to compromise on other nonnegotiables—such as location and the security cameras—was a significant obstacle for new providers and that flexibility on these nonnegotiables could have resulted in direct care.

simply hold that, on this record, the district court did not err in concluding that DIDD did not fail to "provide for making medical assistance available" to Bill or to furnish it "with reasonable promptness." § 1396a(a)(8) and (10); *see Waskul*, 979 F.3d at 450 (stating that a Medicaid beneficiary may "not show a violation of §§ 1396a(a)(8) and (10) simply because they did not get to choose their own providers, as nothing in these provisions evidently requires Plaintiffs to be provided services by the providers of their choice").

2.

The Noreds next argue that the district court erred in finding that DIDD did not violate § 1396a(a)(8) and (10) by allowing New Haven to be removed from the 2018 ISP as Bill's "official" provider.[15] They argue that, "by allowing the removal of the provider agency hired to provide Bill with the care and services that he is qualified to receive with no other provider in place and by refusing to provide Bill with care directly, [DIDD] prevent[ed] Bill from receiving medical assistance with reasonable promptness." Appellants' Br. at 42.

We discern no error. The district court found that "[t]he Noreds placed conditions on the type of [New Haven] staff who were allowed to provide services: no men and no African Americans. New Haven was unwilling and unable to comply with those conditions. New Haven did not have the available employees to

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[15] The Noreds do not argue that the removal of New Haven from the 2018 ISP violated any implementing regulations, internal DIDD policies/procedures, or other laws aside from 42 U.S.C. § 1396a(a)(8) and (10).

staff the home as the Noreds requested. The Noreds refused to allow New Haven to provide any services in their Knoxville home, even threatening to call the police if New Haven employees came to the house." R. 143, PID 1446.

The Noreds do not challenge these factual findings on appeal. Additionally, there is no evidence that DIDD caused New Haven to be excluded from the ISP or was otherwise responsible for the exclusion of supported-living and community-based day services. To the contrary, Hooks testified that DIDD "emphatically" informed New Haven that it had to provide continuity of service until a willing provider could be found and that there would be consequences for New Haven failing to provide services to Bill. R. 135, PID 1272. On this record, and coupled with the district court's factual finding that the Noreds functionally prevented New Haven from providing services to Bill at either the Sevierville or Knoxville locations, we affirm the district court's determination that DIDD did not violate 42 U.S.C. § 1396a(a)(8) and (10)'s mandates to "make medical assistance available" and "furnish [it] with reasonable promptness" by failing to prevent the removal of New Haven from Bill's 2018–19 ISP.

C.

Finally, the Noreds appeal the district court's determination that, were DIDD to provide direct services to Bill in his Sevierville or Knoxville homes, such services would constitute an impermissible "fundamental alteration" of DIDD's program. The "fundamental alteration" defense is an exception to ADA and Rehabilitation Act claims that an entity

failed to make reasonable modifications for, and thereby discriminated against, a disabled individual. *See* ADA, 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 41.53. This defense is not available to claims under the Medicaid Act, which is the only Act at issue on appeal.

Although the district court properly analyzed the "fundamental alteration" defense only in the context of the ADA and Rehabilitation Act, the Noreds appear to contend that the district court also analyzed this defense in considering the Medicaid Act claim (which they also refer to as the "42 U.S.C. § 1983 claim"). They request that the panel find that the "'fundamental alteration' defense [] fail[s] in relation to" the Medicaid Act claim. *Id.* at 46.

We agree with the statement of law. However, the district court did not analyze the "fundamental alteration" defense with respect to the Medicaid Act claim. And even if it had, the court also independently found that DIDD did not violate the Medicaid Act because DIDD did not violate its duty to provide "medical assistance" under §§ 1396d(a) and 1396a(a)(8) and (10). The Noreds did not appeal the determination that DIDD did not violate the Medicaid Act, so the "fundamental alteration" defense does not apply in any event.

IV.

For the reasons discussed, we AFFIRM.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 21-5826

[Filed: September 9, 2022]

WILLIAM F. NORED and LAWANDA JEAN NORED, as conservators, parents, and next friends of William F. Nored, Jr. (Bill),	)
Plaintiffs - Appellants,	)
v.	)
TENNESSEE DEPARTMENT OF INTELLECTUAL & DEVELOPMENTAL DISABILITIES; BRAD TURNER, in his official capacity as the Commissioner of the Tennessee Department of Intellectual & Developmental Disabilities,	)
Defendants - Appellees.	)

Before: CLAY, GRIFFIN, and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

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Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

3:19-CV-00214-DCLC

[Filed: August 23, 2021]

WILLIAM F. NORED and LAWANDA JEAN NORED,	)
Plaintiffs,	)
vs.	)
TENNESSEE DEPARTMENT OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES and BRAD TURNER,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

This matter is before the Court following a bench trial on November 3 and 4, 2020. The parties filed post-trial briefs [Docs. 138, 141, 142]. Plaintiffs, William and LaWanda Jean Nored (together, "the Noreds"), as conservators, parents, and next friends of their son, William Nored, Jr. ("the Nored's son"), sued Defendants, Tennessee Department of Intellectual

& Developmental Disabilities ("DIDD") and Commissioner Brad Turner, for failure to provide adequate medical care and services to their son, who is disabled. In accordance with Federal Rule of Civil Procedure 52(a)(1), the Court makes the following findings of fact and conclusions of law.

I. Findings of Fact

DIDD is a Tennessee state agency that administers services and support to qualified individuals with intellectual and developmental disabilities. As part of its responsibilities, DIDD administers the Medicaid Home and Community-Based Services Waiver Program ("HCBS Waiver Program") through its contract with TennCare. The funding for the HCBS Waiver Program is 2/3 federal funds with the balance being paid by the State of Tennessee. This program pays for services in the home setting for qualified disabled individuals. DIDD does not provide direct services in the HCBS Waiver Program, but manages a provider network, develops policies and procedures, provides quality assurance, ensures compliance with state and federal guidelines, reviews Individual Support Plans, preauthorizes services, and processes billing. DIDD authorizes and contracts with qualified third-party providers to provide the services to those qualified individuals to receive in home care.

DIDD also operates sixteen Residential Community Intermediate Care Facilities, which are community homes in East Tennessee that house four individuals each. DIDD employs direct care workers to provide the care, including nursing and therapy services, that these individuals might need within the community

home. For these community homes, unlike under the Waiver Program, DIDD provides direct care and bills TennCare directly for the services its employees provide in the home.

A conservator, such as the Noreds, may work with an independent support agency and coordinator ("ISC") to find a willing provider to provide the needed services for the disabled ward. The ISC develops an Individual Support Plan ("ISP"), which identifies what services an individual needs and any risks and establishes goals for treatment. The ISC then would forward that plan to potential providers who might be able to meet the individual's needs. The provider must be certified by the state and willing to provide care to the specific individual. Ultimately, the individual and/or their conservators choose the provider. The ISC also submits the ISP to DIDD annually, noting any updates in providers or services for the individual. The ISP must be signed by the individual and/or their conservator and any of the third-party providers who will be rendering care to the qualified individual.

Nored's son is 50 years old and suffers from multiple and significant developmental disabilities. He has been disabled since he was a child. While he is able to read and take care of his own personal hygiene, he is unable to drive and cannot handle his own finances. He does not understand the severity of emergencies or how to properly interact within many social settings. He has also been diagnosed with intermittent explosive disorder, which affects his ability to control his behavior when he feels stressed or threatened. The Nored's son has been enrolled with DIDD since 2013.

Because of his disabilities, he qualifies for the Medicaid Home and Community-Based Services Waiver Program, with no cap on the services that he can receive.

The Noreds purchased a home in Sevierville, Tennessee where they believed their son could receive in home services. Located near the heart of Sevierville, it was within a walking distance to shops, restaurants and attractions that they knew their son would enjoy. Prior to moving their son to Sevierville, he lived at Clover Bottom Developmental Center in Nashville. However, when that closed, it forced their move. In 2014, they moved their son into the Sevierville home. Engstrom Services, Inc. served as their ISC, both while he resided in Nashville and when he moved back to East Tennessee. The Noreds selected New Haven, LLC to provide care for their son in his Sevierville home and was included as his provider for community-based day and supported living services on his ISP in 2015, 2016, and 2017 [Exs. 2, 4, 5]. During the time that New Haven provided service, the Nored's son needed either Level Four or Level Six care, which required one or two staff members with him at all times to help manage his daily activities and accompany him on any trips into the community.

In 2016, the Noreds began to experience problems with the service that New Haven was providing. Upon reviewing footage from cameras inside the house, the Noreds observed New Haven employees being aggressive and inattentive to their son's needs. They attempted to resolve these problems with New Haven's owner and director, Gary Hooks, but the issues

continued. DIDD investigated the Noreds' allegations on two occasions and substantiated different incidents of emotional and physical abuse and supervision neglect by various New Haven employees [Exs. 13, 14]. New Haven terminated the employee who physically abused the Nored's son and counseled the other employees who were found to be neglectful. Despite the actions taken by DIDD and New Haven, the relationship between New Haven and the Noreds continued to deteriorate. Finally, New Haven submitted a letter of intent to discharge to DIDD in December 2016. However, because a provider is unable to withdraw from providing services without another provider in place to take over care, it continued to provide care for the Nored's son in his home until October 2017. At that point, the Noreds moved their son back to their home in Knoxville.

New Haven continued to work with Engstrom and the Noreds to resume services for their son in his Sevierville home. It offered to provide different staff. It also offered to drive him from his parents' house in Knoxville to his Sevierville home to provide services there. The Noreds demurred. The Noreds placed conditions on the type of staff who were allowed to provide services: no men and no African Americans. New Haven was unwilling and unable to comply with those conditions. New Haven did not have the available employees to staff the home as the Noreds requested. The Noreds refused to allow New Haven to provide any services in their Knoxville home, even threatening to call the police if New Haven employees came to the house.

New Haven remained as the Nored's son's provider on his ISP throughout 2017. On July 3, 2017, Engstrom Services and the Independent Support Coordinator held the annual ISP meeting. Typically, the individual's ISC, the Noreds, their son, and a representative from the support providers would attend this meeting. However, the Noreds specifically noted on the ISP form that they objected to the New Haven staff being present at ISP meeting [Ex. 4]. Even though New Haven was included as the provider on the 2017 ISP, it did not sign the ISP [Ex. 4]. In November 2017, the Noreds filed a civil lawsuit against New Haven.

In July 2018, the Noreds and Engstrom submitted an ISP to DIDD requesting approval for the ISC and Adult Dental benefits [Ex. 5]. These services were approved by DIDD. There was no request for community-based day or supported living services because the Noreds had been unable to find a willing provider for these services. The Noreds noted that they participated in the ISP planning meeting but "disagree with the Level 4 services and Section C provider which should by law be New Haven." [Ex. 5]. Shortly after, the Noreds submitted an amendment to the 2018 ISP, which requested Level 6 community-based day and supported living services, with no provider listed [Exs. 6, 44]. These new requests were denied by DIDD because they did not identify a willing provider [Ex. 44]. The Noreds filed an appeal of this denial, and DIDD affirmed that it was unable to review these requests because they had not identified a willing provider. However, DIDD stated that it could pay for the services if a provider is found. The Noreds also requested these services without a specified provider

in 2019 and 2020, which were similarly denied by DIDD.

From October 2017 until now, the Nored's son has resided with his parents in their home in Knoxville. During this time, Engstrom searched for a replacement provider by sending out monthly emails to 51 DIDD-certified providers but has been unable to find one willing to provide service at the Sevierville home. Again, the Noreds placed non-negotiable conditions on the type of staff who may work with their son: no men and no African Americans. They would also only consider providers who could service Bill's home in Sevierville. DIDD also made an effort to find a provider to provide services in Sevierville. In July 2019, DIDD created a one-page summary of the Nored's son's support needs and sent that summary to 42 providers in the area. Five did not respond, twenty-one declined, and sixteen providers responded positively, under the circumstance that the son would move into a home that they were already providing support to or if he was willing to relocate [Ex. 56]. So far, despite these efforts by Engstrom and DIDD, they have been unable to find a provider willing to provide services to the Nored's son in his Sevierville home.

II. Conclusions of Law

The Noreds, as conservators for their son (collectively, "Plaintiffs"), allege that Defendants are in violation of the Medicaid Act, 42 U.S.C. § 1983, Title II of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973 by refusing to provide care and services to Bill.

A. 42 U.S.C. § 1983 as to DIDD

i. Duty to Provide "Medical Assistance"

The Medicaid Act, 42 U.S.C. § 1396, *et seq*., "authorizes the Federal Government to provide funds to participating States to administer medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services." *Harris v. Olszewski*, 442 F.3d 456, 460 (6th Cir. 2006). Participating states must "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." § 1396a(a)(8).[1] "Medical assistance" is now defined as "payment of part or all of the cost of the following care and services or the care and services themselves, or both…[to individuals] who will receive home and community-based services pursuant to a State plan amendment under such subsection." § 1396d(a)(xvii) (effective Mar. 23, 2010).

Plaintiffs argue that this definition requires DIDD to either pay someone to provide the necessary services to their son or to provide the services themselves. Since the Noreds have been unable to find a third-party provider willing to provide services, they allege that DIDD must provide the services directly instead.

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[1] 42 U.S.C. § 1396a(a)(10) generally provides that the state shall "provide for making medical assistance available" to various qualified individuals. The parties do not specify which subsection applies in this case, but no one disputes that their son qualifies under this section.

As background, in 2006, the Sixth Circuit decided a seminal case in the interpretation of "medical assistance" as defined by the Medicaid Act. *See Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006). The plaintiffs argued that the Medicaid Act mandated "the actual provision of, or arrangement for, certain medical services, including care, medicine, and equipment." *Id*. at 539. At that time, "medical assistance" was defined in the Act as "'payment of part or all of the cost of the [enumerated] services' to eligible individuals 'who are under the age of 21.'" *Westside Mothers*, 454 F.3d at 540 (quoting 42 U.S.C. § 1396d(a) (version effective Feb. 8, 2006)). The Court found

> Plaintiffs nevertheless contend that the language of §§ 1396a(a)(8), 1396a(a)(10) expands the definition of "medical assistance" beyond simply payment for services to include actual provision of services. After examining the text and the structure of the statute, *we do not believe §§ 1396a(a)(8), 1396a(a)(10) require the State to provide medical services directly*. The most reasonable interpretation of § 1396a(a)(8) is that all eligible individuals should have the opportunity to apply for medical assistance, i.e., financial assistance, and that such medical assistance, i.e., financial assistance, shall be provided to the individual with reasonable promptness.

Id. (emphasis added)

After the definition of "medical assistance" was changed to include the option of providing direct care and services and not just payment for those services,

the Sixth Circuit still confirmed that "the new definition does not affect this holding [in *Westside Mothers*] because a state may still fulfill its Medicaid obligations by paying for services" under §§ 1396a(a)(8) and (10). *John B. v. Goetz*, 626 F.3d 356, 360 n.2 (6th Cir. 2010).

Plaintiffs rely on two more recent cases in support of their argument. *See* § 1396d(a) (emphasis added). In *John B. v. Emkes*, 852 F. Supp. 2d 944 (M.D. Tenn. 2012), the plaintiffs challenged TennCare, as implemented by the defendant as Commissioner of the Tennessee Department of Finance and Administration, for failing to provide early and periodic screening, diagnosis and treatment services to Tennessee children under § 1396a(a)(43). *Id.* at 945.[2] In direct response to the change in the definition of "medical assistance," the district court found "that where, as in § 1396a(a)(43)(B) and (C), the language of a provision clearly requires that the state 'provide or arrange for the provision' of screening services and corrective treatment, that language cannot reasonably be construed to mean only payment for services…." *Id.* at 951. However, it also noted

> to be clear, these provisions do not require the State to become a 'direct medical provider,' as the State asserts. Rather, these provisions require the State to ensure that Medicaid-

[2] *See* 42 U.S.C. § 1396a(a)(43)(B) and (C) ("A State plan for medical assistance must provide for providing or arranging for the provision of such screening services in all cases where they are requested and arranging for…corrective treatment the need for which is disclosed by such child health screening services…").

> eligible children receive 'screening services' and 'corrective' treatment under certain circumstance. To satisfy its obligations, the State may either provide services directly or hire others to do so.

Id. at 951-52.

However, courts have distinguished the state's financial requirements based on a claim under §§ 1396a(a)(8) and (10) and § 1396a(a)(43). Section 1396a(a)(43) requires the state to "'provide for' informing Medicaid-eligible children about available EPSDT benefits, providing or arranging for screening services where requested, and then arranging for treatment of problems disclosed by such screening." *Troupe v. Barbour*, No. 3:10-CV-153-HTW-MTP, 2013 WL 12303126, at *3 (S.D. Miss. Aug. 23, 2013), *report and recommendation adopted by Troupe v. Bryant*, No. 3:10-CV-153-HTW-LRA, 2016 WL 6585299 (S.D. Miss. Nov. 7, 2016); *see also Emkes*, 852 F. Supp. 2d at 951. However, § 1396a(a)(8) and (10) only requires the state to provide that all individuals who qualify and wish to make an application for medical assistance can do so and that such medical assistance is subsequently furnished with reasonable promptness. In fact, in *Emkes*, the district court specifically acknowledged that the holding in *Westside Mothers* "turned entirely on the particular language of the statutory provisions at issue in that decision," namely, §§ 1396a(a)(8) and (10). That is how the *Emkes* court distinguished itself from the holding in *Westside Mothers* and *Goetz*, as it dealt with § 1396a(a)(43). While courts have found that Section 43

itself requires action beyond the payment of services, the same is not true for Sections 8 and 10.

In *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, the Sixth Circuit addressed the plaintiffs' claim that the defendants "failed to ensure that the individual Plaintiffs were able to obtain medically necessary services with reasonable promptness, in violation of §§ 1396a(a)(8) and (10)(A)." 979 F.3d 426, 449 (6th Cir. 2020). Specifically, the plaintiffs claimed that because the state changed its budget methodology for paying for community living services, "the funding they receive no longer suffices to cover the services required by their" individuals plans of service. *Id*. at 438-39. In relevant part, the Court found that "the CLS services that Plaintiffs seek clearly fall within the 'medical assistance' that must be paid for or provided by the State with relative promptness pursuant to §§ 1396a(a)(8) and (10)(A)." *Id*. This holding only states that the community living services fall within the definition of "medical assistance."

Plaintiffs interpret these cases to mean that if DIDD does not pay for services then it *must* provide the services itself. DIDD disagrees, arguing that the updated definition of "medical assistance" still allows for the state to fulfill its Medicaid obligation by paying for services and does not mandate DIDD to provide the services itself. *See John B. v. Goetz*, 626 F.3d 356, 360 n.2 (6th Cir. 2010). As it is willing and able to pay for the Nored's son's needed services, Defendants argue they have then satisfied their duty under the Medicaid Act. There is no case at this time that holds that if the state is not actively paying for medical services then

instead it *must* provide the services themselves. Instead, courts have interpreted "medical assistance" directly contrary to Plaintiffs' argument. In *K.B. by Next Friend T.B. v. Michigan Dept. of Health and Human Servs.*, the court noted that the current definition of "medical assistance" "gives a state three different options: provide services directly, pay for services, or both provide and pay for service....Contrary to Plaintiffs' argument, a state may choose to only pay for services." 367 F. Supp. 3d 647, 657 (E.D. Mich. 2019). DIDD maintains that it has meet this requirement by being willing to pay for services, *if* the Noreds are able to identify a willing provider. Obviously, if the Noreds place unreasonable and unfortunate restrictions based on sex and race of the person who can provide their son the needed services, then the Noreds should not complain when DIDD cannot find any willing provider. And, it is no surprise that the Noreds cannot find one either.

In accordance with 42 C.F.R. § 431.51(b)(1), "[a] beneficiary may obtain Medicaid services from any institution, agency, pharmacy, person, or organization that is (i) qualified to furnish services; and (ii) willing to furnish them to that particular beneficiary." This gives the beneficiary the freedom to choose their desired provider, as long as it is qualified and willing to provide services. *See O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 785 (1980) (finding that the Medicaid Act "gives recipients the right to choose among a range of qualified providers, without government interference") (emphasis omitted). The Supreme Court in *O'Bannan* also clarified that the right to choose

> confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified. But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified.

Id. DIDD may not force the Noreds to choose a provider for their son. It cannot make the Noreds chose a particular provider they object to. But if the criteria the Noreds have imposed eliminate any available providers, then that is a decision that rests on the Noreds – not DIDD. Moreover, to the extent that the Noreds argue that because there are no providers, DIDD should provide the service directly, that still does not address the unreasonable restrictions imposed by the Noreds. DIDD might still not be able to meet the demands of the Noreds to have only white females take care of their son.

The Noreds originally chose New Haven to provide supported living and community-based day services at the Sevierville home, and New Haven provided these services for a time. DIDD approved and paid New Haven. However, after the Noreds filed allegations of abuse against New Haven employees in 2016, the relationship broke down. New Haven submitted a letter of discharge in December 2016 but continued to provide care, as required until another provider was in place to ensure continuity of service. During that time, the Noreds made various staffing and training requests

that New Haven was unable to provide. Most significantly, Ms. Nored requested that New Haven only send female staff to care for her son. She also stated that her son had issues with African Americans and that he did not want them in the home. New Haven was unable to accommodate these requirements due to a lack of available staff. Gary Hooks, owner of New Haven, specifically noted that one staff member that was liked by the Noreds was working seven days a week, 12 to 16 hours a day, which resulted in excessive overtime.

When they moved their son into their house in Knoxville, New Haven attempted to continue providing care to them. In addition to providing some services to him at the home in Knoxville, New Haven offered to take the Nored's son to his Sevierville home during the day and provide services at his home. Because the funding for supported living and community-based day services were billed through his Sevierville home, New Haven could only get paid for providing services at that location. However, when New Haven attempted to continue service, the staff complained about how they were treated when they attempted to provide care at the Noreds' Knoxville home, to the point that staff refused to return to the home. This included the Noreds turning staff away from the home and threatening to call the police.

At the 2017 ISP meeting, the Noreds requested that New Haven not participate in the meeting, which meant they were unable to sign the support plan. New Haven was still included as the Nored's son's care provider at that time. In 2018, the ISP did not include

a request for community-based day or supported living services, which meant that New Haven was also naturally not included on the ISP. This meant that New Haven could not get paid even if it did provide services. While the Noreds signed and approved the 2018 ISP, Ms. Nored noted that "by law" New Haven should still be included as her son's provider. However, the plan was submitted this way because the Noreds could not find another willing provider for supported living or community-based day services, despite the efforts of Engstrom and the designated independent support coordinator ("ISC"). Stephanie Hernandez, the Nored's son's ISC at the time, testified that this is due to the restrictions placed upon the providers by the Noreds: specifically, the location of the home in Sevierville, the cameras installed inside the home, and the restriction of only white, female staff.

In July 2019, DIDD also attempted to find a provider. It sent out a profile to 42 providers. Twenty-one providers responded that they could not provide services to Bill, five did not respond at all, and sixteen responded that they would be willing to provide services under certain circumstances. Some providers had vacancies in other homes that they were already providing support in and others would be willing to provide support if he was willing to relocate out of Sevierville. However, there were no providers willing to provide services in the Sevierville home, which was a requirement of the Noreds.

Throughout this process, DIDD has maintained that it was willing and able to pay for the requested services if the Noreds were able to specify a provider. *See* [Exs.

46, 48]. This includes the level 6 support living and community participation services that the Noreds have maintained their son requires. In the June 21, 2019, letter denying the Noreds' service request, DIDD additionally noted that the level 6 services are "covered under the CAC waiver program. We think this care is medically necessary." [Ex. 46, pg. 1].

This is not the same case as in *Waskul* where the plaintiffs claim that the state can no longer pay for services due to a budgetary change. DIDD has demonstrated that it will pay for the required services. It has paid in the past and maintains that it is willing and able to pay for whatever qualified provider that the Noreds choose. The problem is not that DIDD refuses to pay. The problem is that the Noreds are unable to find a provider due to the various restrictions that they have placed on who can provide care and where that care is provided. This is not the fault of DIDD. In fact, both DIDD and the ISC have made extensive efforts to find a provider for Bill, to no avail, due to the various restrictions the Noreds have established. Because of that, it is no wonder that DIDD and the Noreds have found no willing providers. Nor can they. But that is not the fault of DIDD. Accordingly, the Court finds DIDD has satisfied its duty to provide medical assistance to the Nored's son under 42 U.S.C. § 1396a.

ii. Fundamental Alteration

DIDD argues that requiring it to render medical services directly to Nored's son would "fundamentally alter the administration of the HCBS Waiver Program." [Doc. 141, pg. 35].

> Under the Americans with Disabilities Act ("ADA"),
>
> > discrimination includes a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii); *see also* 28 C.F.R. § 35.130(b)(7)(i). This exception is also implemented under the Rehabilitation Act. *See* 28 C.F.R. § 41.53 ("A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.").

The Supreme Court interpreted this exception to find that "[s]ensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 604 (1999). In other words, "an accommodation is reasonable unless it requires 'a fundamental alteration in the nature of a program' or

imposes 'undue financial and administrative burdens.'" *Smith & Lee Assoc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996) (quoting *Southeastern Cmty. College v. Davis*, 442 U.S. 397, 410, 412 (1979)). In each case, the Court must "conduct an individualized inquiry and make appropriate findings of fact." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987).

Here, Plaintiffs argue that as DIDD already provides services within the Intermediate Care Facilities, then it would not be a fundamental alteration to also provide care to individuals in their own homes under the HCBS Waiver Program [Doc. 138, pg. 35]. In opposition, DIDD argues that the two programs, the Intermediate Care Facilities and the HCBS Waiver Program, are two entirely different programs which are operated in different manners and funded in different ways under the Medicaid Act. Therefore, it is not analogous to assume that because DIDD provides direct care in the state-run care facilities that it would be able to provide care to individuals in their own homes without "fundamental alteration" of the waiver program itself.

For the Intermediate Care Facilities, DIDD operates 16 community homes, with four people in each home, where 24-hour care is provided by state employees, nurses, and direct care support staff. DIDD bills TennCare directly for services rendered within these homes. DIDD does not approve or render payment for the Intermediate Care Facilities. In contrast, for the HCBS Waiver Program, DIDD preauthorizes services presented through an individual's support plan and then processes the billing

from the care provider for services rendered. DIDD approves the billing of services, and TennCare ultimately pays the provider. For the Intermediate Care Facilities, "DIDD does not authorize or approve payment of services because it would essentially authorize and approve payment to itself." [Doc. 141, pg. 37]. Therefore, if DIDD provided services itself through the waiver program, it would have to adjust how the funding is authorized and billed, so that it would not be authorizing payment to itself. While Plaintiffs allege that "[m]ost clients in [their son's] predicament would likely agree to waive this 'conflict'" of DIDD authorizing payments to itself, the conflict is not with the client but between DIDD and TennCare. [Doc. 138, pg. 46].

Plaintiffs also assume that "DIDD would not have to provide direct services to the 2400 people it serves in the East Tennessee region." [Doc. 138, pg. 46]; [Doc. 142, pg. 29] ("Defendants would only be required to provide direct services in the rare instances where a willing provider could not be located."). However, this does not defeat the fact that DIDD would have to hire and train individuals to fill these roles and find a new way to bill for these services, even for just one individual. DIDD is not a licensed service provider who would be approved to provide services within an individual's home. Notwithstanding, as DIDD avers, "[e]ven then, DIDD cannot be expected to treat Bill Nored differently than other enrollees if they, in turn, then demand that direct care be given in their preferred home or within their preferred conditions." [Doc. 141, pg. 37, n. 20]. Therefore, to provide direct care in his home would be a fundamental alteration of the HCBS Waiver Program.

B. 42 U.S.C. § 1983 against Commissioner Turner

Under 42 U.S.C. § 1983, "[e]very person, who under color of any statute, ordinance, regulation, custom, or usage, of any State…subjects, or causes to be subjected, any citizen of the United States…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." As is applicable in this case, the Sixth Circuit has found that §§ 1396a(a)(8) and (10) create a private right of action. *Waskul*, 979 F.3d at 448.

Plaintiffs claim that Commissioner Turner has violated § 1983 and the Medicaid Act by failing to provide medical assistance to their son as required.[3] Plaintiffs allege that "if Defendants cannot pay someone to provide [their son] with the services and care he requires in his Sevierville home because there are allegedly no other caregivers in the area capable of providing those types of services to [their son] on Defendants' terms, then DIDD *must* provide the care and services directly to him." [Doc. 138, pg. 34] (emphasis in original). However, as explained above, DIDD did not have a duty to provide direct support in this situation. Therefore, Commissioner Turner has not violated § 1983 and the Medicaid Act.

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[3] The parties "agree that Commissioner Turner is a person for purposes of § 1983 and that the Eleventh Amendment does not bar suits against state officials in their official capacity for prospective injunctive or declaratory relief." [Doc. 138, pg. 14, n. 13].

C. Americans with Disabilities Act and the Rehabilitation Act of 1973

Title II of the Americans with Disabilities Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by a public entity." 42 U.S.C. § 12132. "To establish a claim of discrimination under Title II, a plaintiff must prove that: (1) [he] has a disability; (2) [he] is otherwise qualified; and (3) [he] is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of [his] disability." *Everson v. Leis*, 412 F. App'x 771, 774 (6th Cir. 2011) (citations omitted).

The Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual in the United States…shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C.§ 794(a). The elements to prove a claim under the Rehabilitation Act "are largely similar to those of an ADA claim, with the additional requirement that the defendant be shown to receive federal financial assistance." *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 463 (6th Cir. 1997). Therefore, the Court shall analyze Plaintiffs' claims under the two statutes together. Plaintiffs give three ways that Defendants have violated the ADA and the Rehabilitation Act.

i. Whether because of his disabilities, the Nored's son is being denied the benefits of DIDD's programs and services.

First, Plaintiffs argue that "if not for [their son's] multiple and significant developmental challenges... Defendants could have found a willing provider to provide [him] with care and services in his Sevier County home or even in his parents' home in Knox County." [Doc 138, pgs. 41-42]. As previously stated, the Noreds have the sole right to choose a provider for their son, so it is impossible for Defendants to fail at finding a willing provider. *See* 42 U.S.C. § 1396a(a)(23); 42 C.F.R. § 431.51(b)(1). Even so, the Court has also described above DIDD's efforts to help the Noreds find a provider, including the profile sent out to DIDD's qualified providers in July 2019. The majority of providers indicated that they could not provide services in Sevier County, which is the location requested by the Noreds at the time. Other providers noted a general lack of staffing that would prevent them from providing the required care in any location. One provider specifically noted that they previously met with the Noreds and were uncomfortable with the Noreds' requirement of no black male staff in the home. [Ex. 56, pg. 2]. This further indicates that the inability to find a provider is not due to Defendants, but instead due to the unreasonable restrictions placed on the providers by the Noreds.

ii. Whether the Nored's son is at serious risk of institutionalization and is unjustly isolated in his home.

Plaintiffs allege "because no provider has been identified and Defendants refuse to provide care to [their son] directly in his Sevierville home, [he] is at serious risk for institutionalization...." [Doc. 138, pg. 42]. "In addition, [he] is unjustly isolated at home because no provider can be found to provide him with the care and services that he is entitled to by law and Defendants refuse to provide him with any care directly." [Doc. 138, pg. 44]. These claims and the evidence cited by Plaintiffs for each are similar, so the Court shall address them together.

Both the ADA and the Rehabilitation Act require that services are administered "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (for the ADA); 28 C.F.R. § 41.51(d) (for the Rehabilitation Act). This means a setting "that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." *Olmstead*, 527 U.S. at 592 (quoting 28 C.F.R. pt. 35, App. A, p. 450 (1998)). "[C]ourts have widely accepted that plaintiffs can state a claim for violation of the integration mandate by showing that they have been placed at serious risk of institutionalization or segregation." *Waskul*, 979 F.3d at 460 (aggregating cases). "Plaintiffs may show a sufficient risk of institutionalization if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual

placement in an institution." *Id*. at 461 (quoting U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (last updated Feb. 25, 2020), https://www.ada.gov/olmstead/q&a_olstead.htm) (internal quotation marks omitted). "[T]he isolation of individuals with disabilities in a home environment can also violate the integration mandate." *Id*. at 462.

However, "[a]s the *Olmstead* Court clarified, the integration mandate does not impose a 'standard of care' or require 'a certain level of benefits to individuals with disabilities.'" *Id*. at 463 (quoting *Olmstead*, 527 U.S. at 603 n.14). "Instead, the question is whether Plaintiffs are provided services in the setting that enables them to interact with non-disabled persons to the fullest extent possible." *Id*. (quoting *Olmstead*, 527 U.S. at 592) (internal quotation marks omitted).

Plaintiffs allege that because DIDD does not provide direct care to the Nored's son, he had to move into his parent's home for them to take care of him. Plaintiffs state that when the Noreds are no longer around, "[he] will likely be forced to submit to institutionalization, given that there is no plan in place for his care." [Doc. 138, pg. 43]. The Noreds are elderly and in poor health. This is undisputed. Because of the location of the Noreds' Knoxville home, their son is less independent than he was in his Sevierville home, where he was able to participate in the local community. This, Plaintiffs argue, isolates their son within the Knoxville home. Throughout the time that he has been at his parent's Knoxville home, the Noreds have brought in various

individuals to take him into the community, such as Marlissah Hayes, Heather Canonico, and Teresa Hill, as they are unable to do so regularly themselves.

Defendants respond that "Plaintiffs presented no evidence that Defendant[s] engaged in any action that placed Bill Nored at a serious risk of institutionalization" or that they "caused Bill Nored to be isolated within his home." [Doc. 141, pgs. 25, 27]. Specifically, they argue that they were not the impetus that caused him to lose his care provider and be removed from his home. DIDD had been paying for New Haven's services in their son's Sevierville home until the Noreds took him to their home in Knoxville in 2017. In 2018, the supported living and community-day services were removed from the ISP. Therefore, there was no one for DIDD to pay. This chain of events was not started by any action of DIDD but instead stemmed from the fallout between New Haven and the Noreds and the removal of the Nored's son from his Sevierville home.

As previously discussed, the burden is now on the Noreds to choose a new provider for their son, which has been hindered by the conditions placed on a potential provider. DIDD continues to pay for some services, including respite and independent support coordinator services. Both DIDD and the ISC have continued to search for a willing provider for Bill. However, the ultimate decision is left to the Noreds, and since they are unwilling to relocate their son out of Sevier County and have imposed certain racial and gender specific restrictions for staff, they have been unable to find a willing provider.

Defendants also argue that even if the Noreds were unable to continue caring for him, their son's brother, Andrew Nored, is the backup conservator. If this were to happen, they argue, he may be able to find a willing provider for Bill. *See* [Doc. 141, pg. 27] ("There was no evidence that Andrew would continue to impose Plaintiffs' conditions on staff and location should he become Bill Nored's primary conservator.").

While the right to choose falls to Plaintiffs, that right does not necessarily "confer a right to continued residence in the home of one's choice." *O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 785 (1980). There are limits to the Plaintiffs' right to choose. For example, in *O'Bannon*, the state decertified a nursing home, requiring the residents on state assistance to move to another, certified facility. *Id*. at 776. The Court found that even though the residents had the right to choose the facility, they did not have the right to a hearing with the state before it decertified that facility. *Id*. at 775. Similarly, the Second Circuit has addressed a similar issue, finding that the plaintiffs did not have a right to choose a provider who had been decertified by the state. *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 178 (2d Cir. 1991). "The *O'Bannon* Court distinguished between direct Medicaid benefits—financial assistance—and indirect ones—e.g., freedom of choice. The Court held that state action that incidentally burdens an indirect governmental benefit does not rise to the level of a deprivation of a liberty interest." *Id*.

Similarly here, while New Haven was not decertified by the state, it did become unwilling to provide services under very difficult circumstances.

While it continued to provide, or attempted to provide, services until the 2018 ISP meeting, as required, its obligation ended due to the actions of the Noreds when they refused its presence at the meeting. DIDD remains able and willing to pay for services. Therefore, DIDD did not put the Nored's son at risk of institutionalization. As to the allegation of isolation within the Noreds' Knoxville home, there is evidence that he is still able to go out into the community and interact with non-disabled individuals. Thus, DIDD has not caused the Nored's son to be isolated within his Knoxville home.

The evidence in this case is directly contrary to Plaintiffs' assertions that Defendants have discriminated against their son because of his disabilities. Therefore, Plaintiffs claims under the ADA and the Rehabilitation Act must fail.[4]

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[4] Defendants also argues that they are immune from suit under the ADA pursuant the Eleventh Amendment. Under the ADA, "[a] State shall not be immune under the eleventh amdnemtn to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. 42 U.S.C. § 12202. However, the Supreme Court has held that "Title II of the ADA validly abrogates state sovereign immunity for conduct that actually violated the Fourteenth Amendment." *Williams v. McLemore*, 247 F. App'x 1, 8 n. 4 (6th Cir. 2007) (citing *United States v. Georgia*, 546 U.S. 151, 159 (2006)). The courts must determine, "on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*, 546 U.S. at 159. As the Court has

III. Conclusion

Given the above findings of fact and conclusions of law, the Court finds that Plaintiffs are not entitled to declaratory or injunctive relief. The case shall be **DISMISSED WITH PREJUDICE**. A separate judgment shall enter.

SO ORDERED:

s/ Clifton L. Corker
United States District Judge

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found that Defendants did not violate the ADA, the Court shall not address sovereign immunity any further.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

3:19-CV-00214-DCLC

[Filed: August 23, 2021]

WILLIAM F. NORED and LAWANDA JEAN NORED,	)
Plaintiffs,	)
vs.	)
TENNESSEE DEPARTMENT OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES and BRAD TURNER,	)
Defendants.	)

JUDGMENT

For the reasons stated in the memorandum opinion and order filed contemporaneous with this judgment, all Plaintiffs claims against Defendants are DISMISSED WITH PREJUDICE. Plaintiffs shall recover nothing from these Defendants. The Clerk is DIRECTED to close the case.

SO ORDERED:

s/Clifton L. Corker
United States District Judge

ENTERED AS JUDGMENT:

s/LeAnna Wilson
Clerk of Court