IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ERIC STEWARD, *et al.*, *Plaintiffs,* v. COURTNEY N. PHILLIPS, in her official capacity as the Executive Commissioner of Texas's Health and Human Services Commission, *et al.*, *Defendants.*	§	Case No. 5:10-CV-1025-OLG
THE UNITED STATES OF AMERICA, *Plaintiff-Intervenor,* v. THE STATE OF TEXAS *Defendant.*	§	

PLAINTIFFS' AND UNITED STATES' RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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I. Introduction[1]

Defendants' Post-Trial Brief begins and ends with the unsupported and erroneous assertion that Plaintiffs and the United States have failed to prove their case. Defs.' Br. in Supp. of Am. Findings of Fact and Conclusions of Law, ECF No. 650 at 1, 28 (Defs.' Br.). Defendants attack Plaintiffs' and the United States' experts, and then superficially describe how the State's processes *should* work without any evidence of how they *actually* work. In fact, the evidence demonstrates pervasive systemic deficiencies and practices that constitute ongoing violations of the NHRA, the Medicaid Act, the ADA, and Section 504.[2]

With regard to the ADA and Section 504 claims, it is undisputed that thousands of people with IDD are admitted to Texas nursing facilities without any pre-admission evaluation of whether they can be appropriately served in the community, and without being offered a choice to live in an integrated setting that meets their needs, although most are appropriate for the community. Pls.' & U.S.' Post-Trial Joint Findings of Fact, ECF No. 651 (FOF) ¶¶ 214, 250-252, 298-300. Further, both the 2016 Quality Service Review (QSR) and the client review found that approximately *half* of the people with IDD in nursing facilities in the sample were interested in moving to the community. FOF ¶¶ 219, 621-622. Additionally, 85% of people in the client review had not made an informed choice to remain in the nursing facility. FOF ¶ 215. Yet,

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[1] Plaintiffs submit this Brief in support of their claim that Defendants are violating the Nursing Home Reform Amendments (NHRA) and its implementing regulations, 42 U.S.C. § 1396r(e) & 42 C.F.R. § 483.100, *et seq.*, and other provisions of the Medicaid Act (Medicaid), 42 U.S.C. § 1396a(a)(8) (reasonable promptness) & § 1396n(2) (freedom of choice). Plaintiffs and the United States submit this Brief in support of their claims under the Americans with Disabilities Act (ADA) and its implementing regulations, 42 U.S.C. § 12101, *et seq.* & 28 C.F.R. § 130(b) & (d), and the Rehabilitation Act, 29 U.S.C. § 504 (Section 504).

[2] Defendants' Amended Findings of Fact and Conclusions of Law, ECF No. 649 (Defs.' FOF/COL), like their lead PASRR and community services experts, only discuss HHSC policies, and disregard the agency's actual performance, practices, data, or outcomes. *See, e.g., id.* at ¶¶ 4, 15.

Defendants' own data demonstrates that the number of people with IDD in Texas nursing facilities—approximately 3,600 people—has not declined in at least the past four years. FOF ¶¶ 551-552, 818-820. These facts demonstrate that Defendants are violating the ADA and Section 504.

With regard to the NHRA and Medicaid claims, Texas's own data indicates that only about one-third of all people with intellectual or developmental disabilities (IDD) in nursing facilities are even *recommended* for nursing facility specialized services, and that less than one-quarter are recommended for Local Intellectual and Developmental Disability Authority (LIDDA) specialized services. FOF ¶ 424. The State's 2016 QSR report concludes that fewer than 19% receive needed specialized services. FOF ¶ 440. The Plaintiffs' client review found that virtually no one received all needed specialized services with the frequency, intensity, and duration to constitute active treatment. FOF ¶¶ 211-212. These facts alone constitute compelling evidence of a violation of the NHRA. Pls.' & U.S.' Post-Trial Joint Proposed Conclusions of Law, ECF No. 652 (COL) ¶¶ 35-45.

Defendants ignore this evidence, and instead focus on procedural arguments that this Court has already considered and rejected regarding standing, class certification, and exclusion of expert testimony. The Court's previous rulings on each of these matters were correct, and Defendants raise no new grounds for reconsideration.

II. Plaintiffs and the United States Have Proven that Defendants Are Violating the Integration Mandate of the ADA and Section 504.

A. Thousands of People with IDD Are Qualified and Appropriate for Community Services, and Do Not Oppose Community Based Services.

Substantial evidence shows that people with IDD in or at serious risk of entering Texas's nursing facilities are qualified individuals with disabilities, are appropriate for community

services, and do not oppose services in the community. Defendants failed to rebut this evidence.[3] First, Defendants do not dispute that such people are qualified for community-based services in Texas. Second, Defendants recognize that people with IDD in or at serious risk of entering Texas's nursing facilities, including those with complex needs, are appropriate for community-based services, given their repeated assertion that people with IDD in nursing facilities who want to live in the community can do so. *See, e.g.*, Defs.' FOF/COL at ¶¶ 13, 90 ("HHSC is able to serve all individuals with IDD who request a waiver slot in order to transition from a nursing facility under the HCS waiver program."); *see also* FOF § III.C; FOF ¶ 574; Defs.' Br. § III. This proposition is buttressed by evidence from the State's own professionals: just 5 of 121 nursing facility residents reviewed in the QSR had teams that had determined they needed to remain in the nursing facility. FOF ¶ 94.[4] Thus, Plaintiffs and the United States have established that nearly all people with IDD who are in or at serious risk of entering nursing facilities are qualified and appropriate to receive services in community settings in Texas.

Plaintiffs and the United States also have demonstrated that most people with IDD who are in nursing facilities do not oppose services in the community. For instance, Plaintiffs and the United States have proven, and Defendants have not rebutted, that about half of people with IDD in nursing facilities have expressed interest in community services,[5] and that the vast majority

[3] Defendants propose a few conclusory findings of fact asserting that people with IDD are served in the most integrated setting, but as evidence offer only forms, instructions, policies, and other general explanations of how Texas's IDD service system is intended to function. *See, e.g.*, Defs.' FOF/COL ¶ 2.

[4] Further, a state official acknowledged that people with barriers to transition would be able to transition to the community if those barriers were addressed, but nonetheless the QSR, the client review, and an array of other evidence showed that the State's service planning teams consistently fail to identify or address barriers to transition. FOF ¶ 791; FOF § IV.C.10.

[5] While Defendants make sweeping claims that the Court should disregard the State's QSR results, Defendants have not challenged the validity of the QSR's finding that 46% of people

have not made an informed choice to enter or remain in nursing facilities.[6]

Further, although Defendants assert that each person who wants to transition can do so, their only evidence on this point is that no one who both met the requirements, and submitted *a formal request* for an HCS waiver slot had that request denied. *See, e.g.*, Defs.' FOF/COL ¶¶ 73-75; Defs.' Br. at 15. But a state must do more than wait for a person to request community placement; it is incumbent on the state instead to ensure people have sufficient information and opportunities to allow them to make an informed choice whether to remain in a segregated nursing facility and to assist them in obtaining necessary community supports. COL ¶¶ 99-104. For example, Jacob Adkins testified that he could not move to the community, although he very much wanted to, due to the State's failures to provide him with a wheelchair or information about needed services. FOF at ¶¶ 525, 722, 733, 780, 782; Adkins Dep. 39:20-40:10, Oct. 30, 2018. Defendants put forward no persuasive evidence to support their contentions that their processes enable people to make an informed choice about living in integrated settings, or to rebut the evidence of the Plaintiffs and United States that these processes do not work.[7] As a

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reviewed were interested in moving to the community. *See* FOF ¶ 621. And these results comport with the client review conducted by Plaintiffs' and the United States' experts, who found that 52% of the people sampled were interested in moving. FOF ¶ 219.

[6] Defendants claim that Plaintiffs and the United States offered no testimony from a person who was denied community placement when they requested it and when their treatment officials deemed it appropriate. *See* Defs.' Br. at 15. But this assertion is at odds with both the law and the facts. It is well established that appropriateness need not be determined by the state's treatment officials, COL ¶ 91, and that it is insufficient to rely only on requests for placement, COL ¶ 100. In any event, the sole evidence about the State's treatment teams indicates that they have concluded that nearly all people with IDD in Texas's nursing facilities are appropriate for the community, FOF ¶ 94, and the Court heard from and about several individuals who could not move to the community although they wished to do so, *e.g.*, FOF ¶¶ 525, 630 (Adkins, Meisel).

[7] In fact, the only evidence Defendants rely on for their assertion that "HHSC provides continuing education and opportunities to explore community living options," is the Community Living Options ("CLO") form and booklets. *See* Defs.' FOF/COL ¶ 15. In other words, Defendants rely solely on their CLO documents, likely because the evidence is clear that

result of the way Defendants have structured their system, many people are not even aware of community options available to them, like Lenwood Krause, whose son Richard had to live in nursing facilities for years before anyone told him that he had community options. FOF ¶ 626.

B. Plaintiffs and the United States Have Articulated Reasonable Modifications that Would Enable People with IDD in Texas to Avoid Unnecessary Institutionalization in Nursing Facilities.

Plaintiffs and the United States also have established that Defendants can reasonably accommodate placement in the community. Pls.' & U.S.' Post-Trial Brief, ECF No. 653 (Pls.' & U.S.' Br.) at § VII, pp. 25-29; COL ¶¶ 112-124; FOF § VII; *Frederick L. v. Dep't of Pub. Welfare of Pa. (Frederick L. II)*, 364 F.3d 487, 492 n.4 (3d Cir. 2004) (plaintiff's burden is to "articulat[e] a reasonable accommodation"). More particularly, Plaintiffs and the United States have proposed – and set out extensive evidence at trial detailing – reasonable modifications to the State's long-term service system for people with IDD to prevent their unnecessary admission into nursing facilities; provide them with an informed choice of their options in the community; ensure their access to an appropriate array of services; and provide appropriate monitoring, oversight, and training to achieve the preceding objectives. Pls.' & U.S.' Br. at § VII, pp. 25-29;

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participation in other educational opportunities like tours, peer-to-peer discussions, and LIDDA specialized services is strikingly low, *see* FOF § IV.C.6 (citing, *inter alia*, HHSC's own LIDDA Quarterly Reports), and do not provide any evidence that this process is actually implemented or actually works.

COL ¶¶ 115-124; FOF § VII.[8] No further showing is required.[9]

C. Defendants Did Not Prove that the State Has a Comprehensive, Effectively Working Plan for Placing People with IDD in Nursing Facilities into Community Settings and Have Not Proven that the Proposed Modifications Would Fundamentally Alter the State's Long-Term Service System for People with IDD.

"comprehensive, effectively working plan for placing qualified persons with . . . disabilities in less restrictive settings." COL ¶¶ 128-134; *see also Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 381 (3rd Cir. 2005) ("[T]he only sensible reading of the integration mandate consistent with the Court's *Olmstead* opinion allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA . . . ."). Defendants point to no evidence of a comprehensive, effectively working plan for moving qualified persons with IDD from nursing facilities to less restrictive settings. *See* Defs.' Br. at 15. In particular, they provide no evidence of "reasonably specific and measurable commitment[s]," and "verifiable benchmarks or timelines," *Frederick L. v. Dep't of Pub. Welfare of Pa. (Frederick L. III)*, 422 F.3d 151, 156 (3d Cir. 2005), by which people with IDD in nursing facilities will move to the community. In fact, no such evidence is before this court. *See* FOF ¶¶ 1135-1137.

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[8] Contrary to Defendants' contention that Plaintiffs and the United States never disclosed their proposed modifications, Defs.' Br. at 15, the Court already found that "Plaintiffs and the United States have described with specificity the modifications they are seeking." *See* ECF No. 509 at 13; *see also* FOF ¶¶ 1093-1118 (expert testimony regarding modifications). Further, by design, the ADA gives states latitude and flexibility in enacting reasonable modifications. *Tennessee v. Lane*, 541 U.S. 509, 532 (2004) ("As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways.").

[9] Contrary to Defendants' implication, Defs.' Br. at 15, Plaintiffs and the United States need not set out a prescriptive remedial order. Further, the contours of the remedies cannot be determined until the Court determines the scope of liability, and federalism principles instruct that the parties be given the opportunity to propose remedies after liability is established. COL ¶ 161. Thus, the shape and specifics of any remedy must be developed at a later stage.

Rather, Defendants claim, without more, that the State "has been a leader in moving people with IDD out of institutions and into the community." Defs.' Br. at 15.[10] Yet, courts have rejected even substantiated examples of past progress as insufficient evidence of an *Olmstead* Plan. *Frederick L. II*, 364 F.3d at 500 (it is "unrealistic (or unduly optimistic) [to] assum[e] past progress is a reliable prediction of future programs."); *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 383-84 (past success discharging individuals "does not amount to a sufficient deinstitutionalization plan"). Further, the case law cited by Defendants instructs that to demonstrate that a state has a comprehensive, effectively working *Olmstead* Plan, it must show a significant decrease in the relevant institutionalized population and evidence that it is "genuinely and effectively in the process of deinstitutionalizing disabled persons 'with an even hand.'" *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 620-22 (9th Cir. 2005) (citation omitted); *see* Defs.' Br. at 14 (citing *Braddock*, 427 F.3d 615); *see also* COL ¶ 132. But Defendants have proven none of those things here. Nor could they: the census of people with IDD in Texas nursing facilities indisputably has barely changed for the last four years. *See* FOF ¶ 1151. And this population otherwise has not been "deinstitutionalized" with an "even hand." *See* FOF ¶¶ 842-846, 854-856, 1123 (showing that people with IDD in Texas nursing facilities have been disadvantaged in transitioning to community settings as compared to similar people in Texas's State Supported Living Centers).[11] These facts are fatal to any contention that the State has an effectively working *Olmstead* plan.

Because Defendants have not demonstrated that they have a comprehensive, effectively

[10] Defendants fail to acknowledge that this statement is about State Supported Living Centers, not nursing facilities. Trial Tr. 4126:4-22, Nov. 14, 2018 (Piccola); *see also* FOF ¶ 1123.
[11] Further, Texas ranks "near the bottom" nationally in serving people with IDD in community settings. Trial Tr. 4170:24-4171:10, Nov. 14, 2018 (Piccola).

working *Olmstead* Plan, they cannot establish a fundamental alteration defense. *See* COL ¶¶ 128-134. Moreover, Defendants admittedly did not prove – nor attempt to prove – that the modifications proposed by Plaintiffs and the United States would "fundamentally alter" the State's services, programs, or activities as required to avoid liability under the ADA and Section 504. Instead, Defendants claim that the "failure to suggest a remedy wholly deprived Defendants of the ability to evaluate a fundamental alteration defense." Defs.' Br. at 15. But Plaintiffs and the United States extensively detailed the modifications they seek, *see supra* § II.B, and this Court has already rejected Defendants' argument, ECF No. 509 at 13.

Moreover, although Defendants possess information about the cost of serving people with IDD in nursing facilities and in the community, they provided none of this information to their fundamental alteration expert. Nor did they give her data about the specific needs of individuals with IDD, what community settings would be appropriate for them, or how many people they expected to transition to the community. FOF ¶¶ 1090-1092. Defendants failed to present evidence of a fundamental alteration, not because this evidence rests solely with Plaintiffs and the United States – it does not – but because they have no such evidence or decided not to present it if they do. Independent of the foregoing, Defendants cannot make a fundamental alteration defense while simultaneously claiming, as they do, that they are able to serve all qualified individuals with IDD who request waiver slots to live in the community, and "[t]he HCS waiver program serves the needs of every eligible class member." *See, e.g.*, Defs.' Br. at 15. Accordingly, liability under the ADA and Section 504 should be imposed.

D. Texas Fails to Comply with the Methods of Administration Provision of the ADA.

Defendants offer no citation to cases, the trial transcript, or exhibits, nor any legal analysis in support of the conclusory contention that Plaintiffs' ADA methods of administration

claim should be dismissed. Defs.' Br. at 28. Given Texas's administration of its PASRR program in a manner that fails to identify, evaluate, or even consider community alternatives to nursing facility placement for the vast majority of people with IDD, contrary to the ADA's integration mandate, and its failure to administer its long-term service system in a manner that allows people with IDD to make an informed choice of whether to enter or remain in a nursing facility, Plaintiffs have proven their methods of administration claim. COL ¶¶ 135-142.

III. The Plaintiffs Have Proven that the Defendants Are Violating the Medicaid Act.[12]

A. Texas Fails to Conduct Appropriate PASRR Screenings and Evaluations, as Required by the NHRA.

As Defendants' acknowledge, the overarching purpose of PASRR is to prevent the unnecessary institutionalization of people with IDD in nursing facilities. Defs.' Br. at 16. To accomplish this purpose, the statute and its implementing regulations dictate that states must ensure that alternatives to nursing facility placement are identified *prior to* admission. Texas's PASRR program fails to achieve this purpose through either the Level I (PL1) screening or Level II (PE) process.[13] Section E of Texas's PL1 screening form solicits the information needed to identify alternative placements. Overwhelming and unrebutted evidence at trial, including Texas's own data, demonstrates that for people with IDD who have been admitted to nursing

[12] Section III of this Brief reflects the position of the Plaintiffs, as the United States did not assert a claim under the Medicaid Act.

[13] The screening process includes a determination of whether the individual meets a nursing facility level of care. 42 C.F.R. § 112(a). This same level of care standard is an eligibility requirement for Texas's HCS waiver program. Thus, satisfying the level of care allows a person to be served in either an institutional or community setting, which makes identification of alternatives to institutions particularly important and relevant to the Level I process.

facilities for greater than 90 days, Section E, the alternative placement section on the PL1, has been left blank over 99% of the time. FOF ¶¶ 246-252.[14]

The PE process clearly requires that the PASRR reviewer determine whether the individual's needs could be met in a range of alternative placements specified in the regulations. 42 C.F.R. § 132(a); *see* COL ¶¶ 9, 10, 11, 16, 35, 36; FOF ¶¶ 239, 243 (CMS Guidance); *see also* FOF ¶ 467. This plainly does not happen. Whether PASRR requires that states actually place individuals in available community alternatives in no way minimizes Texas's regulatory obligation to identify such alternatives to nursing facility admission, and then to determine if placement in available alternatives can avoid institutionalization in a nursing facility.

Defendants focus on a narrow and inapposite contention that there is no requirement in federal law that a PL1 screen "seeks information about alternative placement preferences," while totally ignoring their obligations under the PE process or the larger purpose of PASRR. Defs.' Br. at 17-18. Both levels of the PASRR process and the related Texas forms are supposed to solicit information necessary to meet PASRR's alternative placement determination and make reliable placement decisions. *See* Exs. P/PI 160; 1208 at 12 (Texas does not obtain complete responses to alternative placement options); FOF ¶ 274. Texas fails to do so at either level. Therefore, Texas's failure to ensure completion of the alternative placement options portion of the PL1 and PE, and its wholesale failure in the PE process to determine if an alternative placement would be appropriate and could avoid unnecessary admission to a nursing facility,

[14] Here, and throughout their filings, Defendants rely on policies and other evidence of how Texas's system is intended to function, without showing that these policies are implemented in practice. Compare, for example, Defs.' FOF/COL ¶ 27 (touting Section E of the PL1 form as an opportunity to ask where people want to live, but not addressing evidence that this section is rarely completed in practice) with FOF ¶¶ 250-252 (Section E is rarely completed in practice). *See also, e.g.*, Defs.' FOF/COL ¶ 47 (describing alternate placement assistance provided by service coordinators, but offering no evidence that this actually occurs).

proves a violation of PASRR's screening and evaluation requirements.

PASRR also requires that, as part of the PE process, the PASRR reviewer initially determine if the nursing facility can meet the individual's needs, including their need for specialized services. 42 C.F.R. § 132(a)(3) (citing 42 C.F.R. § 126); *see also* COL ¶¶ 12, 13, 15, 38. This plainly is a federal obligation, not one, as Defendants' claim, that is created under state law. Defs.' Br. at 18 n.5. Texas does not and could not claim that its PASRR reviewers make this determination. FOF ¶ 258. Texas also does not ensure that its nursing facilities make this determination, as demonstrated at trial.[15] FOF ¶¶ 253-257. Texas's failure to enforce its nursing facility certification requirement for a majority of people with IDD admitted to nursing facilities – the exclusive means in Texas's PASRR system for even arguably complying with the appropriate placement obligation of 42 C.F.R. § 126 – further demonstrates Texas's violation of the NHRA.

Finally, in Texas's PASRR program, 97% of all admissions of people with IDD to nursing facilities occur as exempt or expedited admissions (categorical exceptions) and without a pre-admission PE to determine whether nursing facility placement could be avoided. FOF ¶¶ 298-299. The State's redesign of its PASRR program further demonstrates that Texas has failed to determine for the overwhelming majority of admissions whether community alternatives were available, and whether nursing facilities can deliver all needed specialized services.[16] FOF ¶¶ 305-310. In addition, after the limited time periods for these categorical exceptions have

[15] Texas responds to this overwhelming proof with the erroneous contention that there is no requirement in federal law that nursing facilities certify "that they are willing and able to care for an individual." Defs.' Br. at 17.

[16] The State even refers to pre-admission evaluations as a "residual category," thereby conceding that this core process is at most a secondary element of Texas's PASRR program. Defs.' FOF/COL ¶ 20.

expired, Texas's PASRR system does not ensure either that community alternatives are provided, *e.g.*, FOF ¶ 467, or that the nursing facilities can deliver all needed specialized services.[17] FOF ¶¶ 303-305; *see generally* FOF ¶¶ 398-476.

B. Texas Fails to Provide All Needed Specialized Services Necessary to Constitute a Program of Active Treatment, as Required by the NHRA.

1. Texas Fails to Provide All Necessary Specialized Services.

As more fully described in Plaintiffs' and the United States' Post-Trial Brief and related Findings of Fact, there is extensive evidence that the State does not provide people with IDD in nursing facilities with all needed specialized services. *See* FOF ¶¶ 398-476; Pls.' & U.S.' Br. at 9-10, 14-15. Despite the plethora of evidence from the State's own QSR, the State's own data, and Plaintiffs' client review, Texas offers no proof or even a scintilla of rebuttal evidence that it provides necessary specialized services.[18] Defs.' Br. at 22. This glaring omission speaks volumes, and, when taken together with the evidence presented to the Court, demonstrates conclusively that Plaintiffs have proven a violation of the NHRA.

2. Texas Fails to Provide a Program of Active Treatment, as Required by 42 C.F.R. § 483.440(a)-(f).

It is undisputed that the NHRA requires that States provide a program of active treatment to people with IDD in nursing facilities. 42 C.F.R. § 483.120(a)(2). It is similarly not disputed that a program of active treatment in nursing facilities must, at a minimum, meet the definition

[17] CMS's approval of categorical exceptions to pre-admission evaluation requirements did not constitute permission to use exempt and expedited admission to defeat PASRR's fundamental purpose – and the ADA's mandate – of avoiding unnecessary institutionalization. *See Legacy Cmty. Health Servs., Inc., v. Janek*, 184 F. Supp. 3d 407, 425-26 (S.D. Tex. 2016) (CMS's approval of a Texas Medicaid state plan amendment was not entitled to *Chevron* deference precluding its enforcement).

[18] In fact, Defendants' brief does not even allege that Texas is providing needed specialized services, let alone any evidence of this fact. Similarly, there is no evidence of the actual provision of specialized services anywhere in Defendants' filings. *See* Defs.' FOF/COL ¶¶ 47-52.

and standard for active treatment that applies to Intermediate Care Facilities for Individuals with IDD (ICF/IID), as defined by 42 C.F.R. § 483.440(a). *Id.*; *see also* Defs.' Br. at 19. The only disputed issue is whether the core components of active treatment that are necessary to meet the standard of active treatment, as set forth in 42 C.F.R. § 483.440(c)-(f), also apply in nursing facilities.

The court in *Rolland v. Cellucci*, 138 F. Supp. 2d 110 (D. Mass. 2001) directly addressed this issue and concluded that they did. First, it noted that the Secretary herself answered this question in the affirmative when she promulgated the PASRR regulations. *Id.* at 116-17; s*ee* Pls.' & U.S.' Br. at 16-17. Second, it pointed to the fact that CMS had consistently required compliance with these components in its active treatment evaluation process, including its long-established active treatment tags and probes.[19] *Rolland v. Patrick*, 483 F. Supp. 2d 107, 113 (D. Mass. 2007); s*ee* Pls.' & U.S.' Br. at 17-18; FOF ¶¶ 481-482. Third, it cited professional standards that have long described active treatment as both a standard and a process that must include service planning, service coordination, service plans that set forth goals and objectives, and ongoing data collection and monitoring. *Rolland,* 138 F. Supp. 2d at 116; *see also* FOF ¶¶ 477-478, 100 (Ms. du Pree stated: "From all of my experience having to implement active treatment and respond to federal concerns about how that is implemented, I would say no, [active treatment] is not possible without service coordination." Trial Tr. 136:6-11, Oct. 15, 2018 (du

[19] CMS's standards, procedures, and bulletins to States consistently include *both* the definition of "active treatment" and the "components of active treatment" necessary to satisfy the definition. According to CMS, these components include a comprehensive functional assessment, an individual program plan, program implementation, program documentation, and program monitoring. CMS makes clear that the active treatment standard cannot be met without providing each of the components of active treatment. *See* https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/ICFMR_Glossary.pdf at 4-5.

Pree)). Finally, it acknowledged the common sense reality that, in order to meet a standard like active treatment, practical steps and actions are necessary, like conducting comprehensive assessments of habilitative needs, and then identifying services to meet these needs. *Rolland,* 483 F. Supp. 2d at 114; FOF ¶ 479. As a result, the federal court ordered that the State provide a program of active treatment which complied with all CMS standards and the regulatory requirements set forth in 42 C.F.R. § 483.440(a) and (c)-(f).[20]

In so doing, the district court also rejected the State's argument here, *see* Defs.' Br. at 19, that the First Circuit had determined that nursing facilities did not have to comply with all subsections of the active treatment section of the regulations.[21] *Rolland*, 138 F. Supp. 2d at 117 (describing the holding in *Rolland v. Romney*, 318 F.3d 42, 57 (1st Cir. 2003)). The district court noted that the First Circuit simply determined that not each and every ICF requirement set forth in 42 C.F.R. § 483.100 *et seq.*, including prohibitions on restraint, set forth in 42 C.F.R. § 483.450, and environmental standards, set forth in 42 C.F.R. § 483.470, applied to nursing facilities. On the other hand, as explained by the district court, the First Circuit affirmed the specific applicability of all provisions of the active treatment subsection – 42 C.F.R. § 483.440(a)-(f) – to people with IDD in nursing facilities.[22] *Rolland*, 483 F. Supp. 2d at 113.

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[20] Although the *Rolland* court held that all subparagraphs of § 483.440 applied to people with IDD in nursing facilities, *see Rolland*, 483 F. Supp. 2d at 113-14, it omitted subparagraph (b) from its court-ordered evaluation instrument. It did so for the simple and common sense reason that the subparagraph, which addresses in general terms the admission and discharge process from an ICF, was superseded by the more specific and highly detailed PASRR screening, evaluation, and discharge procedures set forth in 42 C.F.R. § 483.100 *et seq*. FOF ¶ 482; Ex. P/PI 580.

[21] Throughout their entire PASRR argument, Defendants fail to cite any other PASRR cases, or even address the multiple opinions from the district court in *Rolland.* Defs.' Br. 16-22.

[22] Since Defendants concede that Texas's Medicaid State Plan does contain assurances that it will comply with all PASRR requirements, and since these PASRR regulatory requirements cross-reference and include compliance with active treatment, as described in the ICF

Finally, and rather inconsistently, Defendants argue that although they do not have to provide active treatment, comprehensive functional assessments, service planning, and service coordination, they do so anyway.[23] Defs.' Br. at 21. Of course, as Defendants repeatedly note, simply saying so does not make it so. And Defendants offer no evidence, no data, no testimony, no expert opinion, and no statement from any state official – through deposition testimony or at trial – that they actually provide active treatment as defined by CMS and as required by federal law, 42 C.F.R. § 483.440(a)-(f). *See* Trial Tr. 2520:17-19, Oct. 31, 2018 (Dionne-Vahalik); Trial Tr. 3790:6-17, Nov. 12, 2018 (Turner). Nor do they challenge the clinical findings (as opposed to the methodology) of the client review, which found that none of the fifty-four individuals were receiving active treatment, or of the QSR, which found that less than 20% of individuals in nursing facilities were even receiving needed specialized services. FOF ¶¶ 210-215, 380, 440.

C. Texas Fails to Comply with the Reasonable Promptness and Freedom of Choice Provisions of the Medicaid Act.

Other than a conclusory sentence on the last page of their Brief, Defendants make no substantive argument, cite no cases, point to no facts, nor even seriously dispute that Plaintiffs have proven violations of other provisions of the Medicaid Act. Specifically, Plaintiffs have demonstrated a violation of the reasonable promptness provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(8), based upon voluminous evidence, including the QSR, the client review, and the State's own data, that the State fails to provide all needed specialized services and active treatment. COL ¶¶ 49-54; FOF ¶¶ 423-435, 440-461. And, based upon the same evidence,

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regulations, the State's failure to list each subparagraph or sub-subparagraph of the active treatment regulations cannot conceivably relieve it of its obligation to provide active treatment, as required by federal law. Defs.' Br. at 19-20.

[23] Defendants argue on the one hand that they provide a comprehensive functional assessment to every person in a nursing facility, but that they do not need to provide a comprehensive functional assessment to anyone. *Compare* Defs.' FOF/COL ¶ 42 *with* Defs.' Br. at 21.

Plaintiffs have demonstrated a violation of the freedom of choice provision of the Medicaid Act, 42 U.S.C. § 1396n(2), in that the State fails to provide people with IDD an informed choice whether to enter or remain in a nursing facility. COL ¶¶ 59-61; FOF ¶¶ 719-732, 805-813.

IV. Plaintiffs and the United States Presented Reliable Evidence of Violations of Federal Law.

A. The QSR and Client Review Prove Violations of Federal Law.

1. The QSR Reflects Federal Law Requirements and Its Findings Demonstrate Federal Law Violations.

Because of the Interim Agreement, this case presents the Court with a unique and powerful source of evidence: the State's QSR, which was expressly designed, approved, and used by the State to measure compliance with the precise PASRR and ADA federal requirements that are at issue in this case. Kathryn du Pree, the author of the QSR, testified that the outcomes, outcome measures, and indicators were designed to measure compliance with federal requirements under PASRR and the ADA.[24] *E.g.*, FOF ¶¶ 63-69, 74-76, 84-86, 89-94, 96-103. The consistent findings of the 2015, 2016, and 2017 QSRs demonstrated significant, ongoing, and often dramatic violations of federal requirements concerning PASRR evaluations, assessments, specialized services, informed choice, service coordination, and service and transition planning. *See* FOF ¶¶ 139-146. Thus, the QSR *alone* provides a basis for the Court to find that Defendants are in violation of PASRR, the ADA, and Section 504. *See* Pls.' & U.S.' Br. at 6-10.

[24] That the outcome measures also assess performance on each outcome, as Ms. du Pree acknowledged in her deposition, does not alter her conclusion that their purpose was to assess compliance with federal law. FOF ¶¶ 73-74, 76, 85-86, 92-93, 96, 99, 107.

2. The Client Review Reflects Federal Law Requirements and Its Findings Demonstrate Federal Law Violations.

Four of the core criteria used in the client review were directly drawn from federal regulatory requirements and CMS standards concerning comprehensive assessments, specialized services, active treatment, and service and transition planning. The other two criteria reflected federal and professional standards, including the ADA's integration mandate, concerning appropriateness for community living and informed choice.[25] FOF ¶¶ 193, 206. The review was based upon a random sample of people with IDD in nursing facilities, drawn by a nationally-recognized research expert pursuant to established professional standards on human subject research.[26] FOF ¶¶ 162-164, 170, 173-174, 176. The client review process mirrored that of the QSR and others relied upon by federal courts in other cases.[27] *See* Pls.' & U.S.' Br. at 12-13;

[25] Once again, that these criteria also reflected professional standards or that some Texas administrative requirements mirrored federal law does not undermine the controlling fact that each of these criteria – like whether the individual received all needed specialized services and a program of active treatment as required by the NHRA – measured compliance with federal law. And like the QSR, the client reviewers exercised their own professional judgment, based upon years of experience and professional standards, rather than automatically deferring to the treatment team, when they determined whether each of the six criteria were met.

[26] Although at the time expert disclosures were exchanged Defendants were provided the list of individuals from which the sample was drawn, along with the methodology, they did not challenge its accuracy in their rebuttal reports, their *Daubert* motion, or at trial. And since the list was based upon the State's own data and introduced as an exhibit at trial, they waived any argument that the list was inaccurate or unreliable.

[27] In their criticisms of the client review methodology, Defendants grossly misrepresent the facts. For example, Defendants claim that "all the reviewers ignored the MDS . . . ." Defs.' FOF/COL ¶ 129. In fact, each reviewer considered the MDS in making their findings. Trial Tr. 647:9-13, Oct. 17, 2018 (Pilarcik) ("[W]e did look at the MDSs in all of the individuals and I believe all of the individuals had them."); *see, e.g.*, Ex. P/PI 1280 at 26, 29, 32, 36, 39, 42, 53, 55-56, 58, 64, 66, 70, 75, 78 (Pilarcik Report). Defendants also claim the reviewers based their findings on "nothing more than a few hours of document review and, only sometimes, an interview." Defs.' Br. at 27. In fact, Ms. Pilarcik spent about 25 hours per person on her review. Trial Tr. 463:24-464:4, Oct. 17, 2018 (Pilarcik). Moreover, each reviewer conducted an in-person interview with each individual. Trial Tr. 462:14-23, 627:4-5, Oct. 17, 2018 (Pilarcik); Ex. P/PI 1280 at 7-8 (Pilarick Report); Ex. P/PI 1400 at 6-7 (Russo Report); Ex. P/PI 802 at 8 (Coleman Report); Ex. P/PI 777 at 7-8 (Charlot Report).

FOF ¶ 165. The findings of the client review were strong, highly consistent, and reliable. FOF ¶¶ 210-215, 220. They demonstrated persistent and ongoing violations of PASRR, the ADA, and Section 504. *See* Pls.' & U.S.' Br. at 14-15.

B. The Court Properly Admitted the Testimony and Evidence from Plaintiffs' and the United States' Experts.

1. The Court Properly Determined That the Plaintiffs' and the United States' Expert Testimony Was Admissible.

This Court previously concluded that Plaintiffs' and the United States' experts are qualified, after reviewing, prior to trial, their expert reports that fully disclosed their qualifications, methodology, and opinions. The Court determined that these experts "have specialized knowledge as a result of their background, training, education, experience, and personal observation that qualify them to render opinions on the issues in this case." ECF No. 513 at 5. With respect to relevance and reliability, this Court further found:

> Their testimony is relevant to the issues in this case and the facts/data upon which the experts rely is the type of evidence reasonably relied upon by experts in their particular field. The experts' testimony may assist the Court, as the trier of fact, in reaching its decision even if their opinions are not "scientific or technical" in nature.

Id.

After trial, in which the Court permitted Defendants extensive opportunities for cross-examination and to present contrary evidence, Defendants asked this Court to change its ruling that Plaintiffs' and the United States' expert testimony is admissible under Fed. R. Evid. 702. Defs.' Br. at 22-27. Defendants fail to provide any legal or factual basis to support their request for reversal.

Plaintiffs and the United States presented expert evidence at trial that conformed precisely to the experts' reports, yielding no new factual basis for the Court to revisit the decision to admit the testimony. Despite extensive cross-examination, these experts reinforced this Court's stated basis for finding their testimony admissible:

> The issues in this case arise under federal law, which applies to all states, and testimony about similar programs and reforms in other states is relevant and helpful to the trier of fact. With regard to reliability, the expert's testimony may not fit all the *Daubert* factors but it does not need to fit those specific factors to be reliable and therefore admissible.

ECF No. 513 at 3 (internal citations omitted). Notably, none of the cases cited by Defendants, *see* Defs.' Br. at 22-24, pertain to any court's decision to revisit or change an original decision to admit expert testimony. In addition, the Fifth Circuit has affirmed the standards that this Court applied in its original decision to admit Plaintiffs' expert testimony. *Atl. Specialty Ins. Co. v. Porter, Inc.*, 742 F. App'x 850, 852 & n.4 (5th Cir. 2018) (reaffirming that "[a] district court has considerable discretion to admit or exclude expert testimony under Federal Rule of Evidence 702," and that "[m]ost of the safeguards provided for in *Daubert* are not as essential" in the context of a bench trial) (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)).

2. The Court Properly Determined That Each of Plaintiffs' and the United States' Experts' Testimony Was Helpful to the Court and Should Be Admitted.

As anticipated by the Court's pretrial Order, ECF No. 513, Plaintiffs' and the United States' testifying experts all provided relevant and reliable evidence to assist the Court,[28] as summarized here:

Kathy Sawyer has more than forty years of experience leading and overseeing statewide systems that serve people with IDD. *See* FOF ¶¶ 106, 1116, 1117. Ms. Sawyer testified that Texas has not implemented critical components of an IDD system to prevent unnecessary segregation of people with IDD in nursing facilities, though it would be feasible for Texas to do so. *See, e.g.*, FOF ¶¶ 632, 756, 832-835, 857, 944-948, 954, 1086-1088, 1093, 1095-1097, 1111. She testified about necessary components of an *Olmstead* Plan and why Texas's *Olmstead* Plan

[28] Defendants insinuate that counsel for Plaintiffs and the United States have influenced or tainted the opinions of their experts. Defs.' Br. at 24. These insinuations have no substance or evidentiary support and should be disregarded by the Court.

was insufficient. *See, e.g.*, FOF ¶¶ 1132, 1137. Ms. Sawyer's testimony assists the Court in understanding what is required by the ADA and how Texas is violating the ADA.

Dr. Michael Wehmeyer is a nationally recognized expert on self-determination and choice for people with intellectual disabilities. FOF ¶ 613. Dr. Wehmeyer's testimony materially assists the Court in assessing the impact of IDD on choosing where to live, *see* FOF ¶¶ 649, 651, 659, the supports that people with IDD in nursing facilities need to make this choice, *see* FOF ¶¶ 668, 721, and whether people with IDD in Texas nursing facilities have made an informed choice to continue living there, *see* FOF ¶ 805.[29]

Randall Webster and Nancy Weston applied decades of experience in the field of IDD services in order to evaluate LIDDA practices in seven areas that are critical to compliance with PASRR and the ADA. FOF ¶¶ 227-237. Using the same methods they use as managers to oversee and evaluate such programs, *see* FOF ¶¶ 228, 230, 236, 346, they concluded that Texas failed to ensure compliance with PASRR and the ADA as indicated in each of the seven areas reviewed.[30] Their explanation of necessary practices in a compliant IDD service system, and their opinions that Texas failed to implement these necessary practices in each of the seven areas reviewed, assist the Court in understanding the root of Defendants' PASRR and ADA violations,

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[29] In summary fashion, Defendants challenge Dr. Weymeyer's reliance on the client review. Defs.' Br. at 25. Dr. Weymeyer, as well as other experts, may permissibly rely on information from another expert. *Janopoulos v. Harvey L. Walner & Assocs.*, 866 F. Supp. 1086, 1095-96 (N.D. Ill. 1994) (an expert may rely on information supplied by another expert) (cited in *Nat'l Union Fire Ins. Co. v. Smith Tank & Steel, Inc.*, No. 3:11-CV-00830, 2014 WL 12690177, at *5 (M.D. La. Nov. 6, 2014)).

[30] *See, e.g.*, FOF ¶¶ 307-308, 315-317, 320, 322-323, 826 (diversion strategies); FOF ¶¶ 346-348, 350-351 (comprehensive functional assessments); FOF ¶¶ 365, 368, 370, 380, 392, 395 (service planning and service coordination); FOF ¶¶ 425, 429-432, 435, 438, 485-489, 491, 505-507 (specialized services and active treatment); FOF ¶¶ 688, 697, 707, 719-720, 723, 725, 765-767, 771-772, 775-776, 822, 828 (transition planning and informed choice); FOF ¶¶ 847-848 (the provider network).

and how those violations could be avoided.[31]

Dr. Darlene O'Connor, Ph.D., has approximately thirty-five years of experience in the long-term supports and services field, including work at the local level, for state agencies, for the federal government, and at universities. FOF ¶ 248. Her reliance on her team of researchers and programmers, who have extensive experience analyzing the types of long-term care data used in this case, FOF ¶ 248, is common and well established. *See, e.g.*, *McReynolds v. Sodexho Marriott Servs.*, 349 F. Supp. 2d 30, 36-38 (D.D.C. 2004) (admitting expert's opinions based on statistical analyses run by assistants who wrote and understood the computer programming); *see also Astra Aktiebolag v. Andrx Pharms., Inc.*, 222 F. Supp. 2d 423, 491-92 (S.D.N.Y. 2002) (no requirement that an expert must run his own tests). And the Court has already rejected this argument by Defendants during trial. Trial Tr. 1019:9-23, 1025:3-5, Oct. 19, 2018. Dr. O'Connor's testimony materially assists the Court by explaining how Texas's own data provides evidence of the State's failure to comply with PASRR and the ADA. *See* FOF ¶¶ 250, 254, 274, 367, 423-424, 550-552, 818-821, 1154.

Elin Howe has over thirty-three years of experience as an IDD professional, including serving as the commissioner of both New York's and Massachusetts' statewide IDD agencies, as well as her experience in successfully complying with federal court orders on transition and active treatment in *Rolland v. Patrick*. Ms. Howe concluded that the QSR outcomes and outcome measures are basic standards for determining if a state's IDD program complies with PASRR and the ADA. FOF ¶¶ 82-83, 85, 89, 92-93, 95, 99-102. Ms. Howe's testimony materially assists the Court in understanding how the QSR incorporates the requirements of

[31] Separate and apart from the program review, Ms. Weston also conducted a PASRR system review. FOF ¶ 229. Defendants make no argument that this Court should revisit its decision to admit Ms. Weston's system review findings.

federal law, as well as how its methodology is almost identical to the CMS process for evaluating active treatment. *See* FOF ¶¶ 117, 481.

Kyle Piccola is an expert on services for people with IDD and on the State's IDD system. FOF ¶ 1133. Mr. Piccola's testimony materially assists the Court in assessing whether the State is implementing a comprehensive, effectively working *Olmstead* Plan, *see* FOF ¶¶ 835, 840, 876-879, 1123, 1134, 1136, 1138, 1140-1141, 1143-1145, 1151, 1154, 1161, 1165-1168, 1216-1218, 1222, 1244, and whether people with IDD in nursing facilities have been treated with an even hand, *see* FOF ¶¶ 842, 844-845, 856, 1123.

Dr. Sally Rogers, Ph.D., is an expert with almost forty years of experience designing and conducting research involving human subjects, particularly individuals with disabilities. FOF ¶¶ 162-163. Dr. Rogers' methodology and credentials have been approved by federal courts in cases involving similar clinical reviews. FOF ¶ 164. Dr. Rogers selected the random sample for the second client review and testified that the methods and procedures used to select that sample comported with professional standards for human-subjects research. FOF ¶¶ 170-174, 178. Dr. Rogers testified that the client review findings can be generalized to the population of Medicaid-eligible individuals with IDD, ages twenty-two and older, who live in Texas nursing facilities. FOF ¶ 179. Her testimony is helpful to the Court, because she explained the importance of the client review findings, which in her words were "very strong" and "very consistent." FOF ¶ 220. She explained that her confidence in the findings is further increased because multiple independent reviewers came to similar conclusions. *Id*.

Each of the client reviewers, Barbara Pilarcik, RN, Dr. Vickey Coleman, Natalie Russo, RN, and Dr. Lauren Charlot, have extensive experience conducting client reviews of individuals with IDD throughout the country, including reviews that have been accepted by federal courts.

FOF ¶¶ 185-191. Their client review proved there is a systemic pattern of noncompliance with federal law because: (1) Texas fails to provide comprehensive functional assessments, necessary specialized services, active treatment, and service and transition planning for nearly all of the people in the client review; (2) the vast majority of these people are appropriate for community living and have not made an informed choice to remain in a nursing facility; and (3) the majority of these people are interested in transitioning to the community. *See* FOF ¶¶ 210-219.[32]

V. The United States' Claims in Intervention Should Not Be Dismissed.

The State for the third time challenges the United States' statutory authority to bring claims under the ADA and Section 504. The State fails to cite a single new authority or even address the grounds upon which this Court relied – that the United States intervened – and simply recycles arguments that this Court has already considered and rejected.[33] The State's argument is no more meritorious than it was previously, and there is no new fact or change in controlling law that would necessitate reconsideration.[34]

The Court has already repeatedly and thoroughly addressed why the United States' claims can proceed. In rejecting the State's motion to dismiss, the Court determined that the United States' complaint sought injunctive and declaratory relief that was substantially the same

[32] Although Defendants include a proposed finding that Michael Neupert's testimony be disregarded, Defs.' FOF/COL ¶ 149, in their brief, Defendants do not suggest that the Court should revisit the decision at trial to admit Mr. Neupert's testimony, Trial Tr. 302:12-303:8, Oct. 16, 2018. Mr. Neupert's testimony was not the subject of Defendants' pretrial *Daubert* motions or the Court's pretrial order, ECF No. 513. Defendants have thus waived such arguments.

[33] The State's brief adopts verbatim much of the language in its earlier summary judgment motion, which this Court denied, ECF No. 534. *Compare* Defs.' Br. §§ I.A, I.B, *with* ECF No. 477 §§ II.A, II.B.

[34] In fact, the State itself previously admitted that the United States has the authority to seek injunctive and declaratory relief against the State as a means of enforcing Title II and Section 504. *See* ECF No. 56 at 5, *discussed in* ECF No. 534 at 2.

as the relief sought by Plaintiffs. *Steward v. Abbott*, 189 F. Supp. 3d 620, 625 (W.D. Tex. 2016). Accordingly, the Court held that "the United States, as an intervenor who seeks no relief beyond that sought by the Plaintiffs in this case, need not possess Article III standing to proceed." *Id*. Three years later, the State sought summary judgment on the same grounds. ECF No. 477.[35] The Court again ruled that the United States was permitted to intervene and that intervenors are not required to independently possess standing in a subsisting Article III case or controversy where the intervenor seeks the same relief as an existing party. ECF No. 534 at 5 (citations omitted). The Court also rejected the State's argument regarding "prudential" or statutory standing, noting that "[a] government agency's capacity to intervene – and to raise claims that are within the scope of the original plaintiffs' complaint – is not limited to the agency's capacity to institute an independent action on its own behalf." *Id*. at 5-6. Finally, the Court disposed of the State's argument that the United States named "a new defendant – the State of Texas," finding that the United States' Title II and Section 504 claims, which named the State of Texas rather than the Governor or Commissioner in their official capacities, were not meaningfully different from Plaintiffs' claims. *Id*. at 6. As the Court held: "The claims and relief being sought by the United States, as an intervenor, are congruent to the claims and relief being sought by Plaintiffs, who have standing to pursue the claims herein. No further showing is required." *Id*.

[35] The State presented just one additional authority in its summary judgment motion than in its motion to dismiss: *C.V. v. Dudek*, 209 F. Supp. 3d 1279 (S.D. Fla. 2016), *appeal docketed*, No. 17-13595-BB (11th Cir. Aug. 8, 2017). In denying summary judgment, the Court correctly distinguished *Dudek*. ECF No. 534 at 4-5. Defendants fail to cite any additional cases in their current brief, and ignore the opinion of another district court within the Fifth Circuit that came to the opposite conclusion as *Dudek*. *See United States v. Harris Cty.*, No. 4:16-CV-2331, 2017 WL 7692396, at *1 (S.D. Tex. Apr. 26, 2017) (holding that United States has authority to enforce Title II).

The same remains true now, and the Court should reject the State's renewed invitation to dismiss the United States' claims.[36]

VI. The Court's Certification of the Plaintiff Class Should Not Be Reversed.

The Court correctly certified the class in this case, and its Certification Order should not be reversed. *Steward v. Janek*, 315 F.R.D. 472 (W.D. Tex. 2016), *discretionary review denied*, No. 16-90019 (5th Cir. Aug. 5, 2016). Nothing has changed that requires the Court to revisit that decision or revise its definition of the plaintiff class. The evidence presented at trial and recent decisions in similar cases has served to strengthen the basis for class certification.[37] Defendants' contrary arguments should be rejected.[38] *See* COL ¶¶ 67-69.

A. The Plaintiffs Continue to Satisfy the Commonality Requirements of 23(a)(2).

Defendants once again argue that Plaintiffs fail to satisfy the commonality requirements of Rule Fed. R. Civ. P. 23(a)(2) because the treatment decisions regarding each class member are different and "highly individualized," and thus not susceptible to resolution by a single injunction. Defs.' Br. at 7-9. However, as this Court has already found, class certification is not

[36] The Court need not reach the question of whether the United States has authority to bring suit under Title II of the ADA and Section 504 had it not intervened. However, the United States does have that authority. *See* ECF No. 501, § IV.b (incorporated by reference herein).

[37] Since the class was certified, a number of other courts in similar cases have certified classes. *See e.g.*, *Willburn v. Nelson*, No. 3:17 cv 331-PPS-MGG, 2018 WL 5961724 (N.D. Ind. Nov. 13, 2018) (class of juvenile detainees with disabilities certified in ADA case); *A.T. ex rel. Tillman v. Harder*, 298 F. Supp. 3d 391, 404-11 (N.D.N.Y. 2018) (same); *Ball v. Kasich*, 307 F. Supp. 3d 701, 714-16 (D. Ohio 2018) (certifying a class in an ADA case involving individuals with IDD seeking community services); *Lewis v. Cain*, 324 F.R.D. 159, 166-76 (M.D. La. 2018) (class of inmates with disabilities certified in ADA case against prison officials); *Murphy v. Piper*, No. 16-2623 (DWF/BRT), 2017 WL 4355970 (D. Minn. Sept. 9, 2017) (certifying a class of individuals with disabilities in ADA case seeking timely Medicaid waiver services); *Dunn v. Dunn*, 318 F.R.D. 652 (M.D. Ala. 2016) (class certified of prisoners with disabilities in ADA lawsuit against prison officials).

[38] Defendants erroneously contend that the Court "provisionally" certified the class. Defs.' Br. at 9. Nothing in the Court's May 20, 2016 Order suggests that the certification was "provisional."

precluded where class members experience different injuries, provided there are common questions of fact or law that give rise to such injuries, as there are here. *See* Pls.' Suppl. Mem. in Supp. of 2d Am. Mot. for Class Cert. (Pls.' Suppl. Mem.) ECF No. 249 at 36-45; Pls.' Reply to Defs.' Resp. to Supp. Mem. on Class Cert., ECF No. 276; *see also D.L. v. District of Columbia*, 860 F.3d 713, 723-26 (D.C. Cir. 2017) (affirming grant of class certification).

Although members of the class may have different conditions and treatment needs, these differences do not undermine commonality since all class members suffer from Defendants' policies, procedures, and practices that result in inadequate PASRR screening and evaluation, a lack of needed specialized services, the wholesale absence of active treatment, and a failure to provide services in integrated community settings to all people with IDD who have not made an informed choice to live in nursing facilities. *See* FOF ¶¶ 139-146, 210-219. As the Court previously found, and as Plaintiffs proved at trial, these systemic practices constitute violations of law and are capable of a class-wide resolution. *Steward*, 315 F.R.D. at 480-81, 489 ("The State may fail individual class members in unique ways, but the harm that the class members allege is the same: denial of specialized services, violation of their right to reasonably prompt care, and unnecessary institutionalization in violation of the ADA and Rehabilitation Act."); *see also* Pls.' Suppl. Mem. at 33-35.

In reviewing Plaintiffs' "ample evidence" in support of class certification, the Court identified several common questions of law and fact that would "resolve an issue that is central to the validity of each one of the claims in one stroke." *See Steward*, 315 F.R.D. at 481-88 (citation and internal quotation marks omitted).[39] The evidence presented at trial serves to

[39] For example, the Court found that the resolution of Plaintiffs' claims depended on several common questions of law, such as whether Plaintiffs' "Specialized Services" claim requires that

bolster these findings. For example, evidence of the recent QSR results for 2016 and 2017 demonstrate Texas's declining performance for all class members with respect to several important areas measuring Texas's compliance with the NHRA, Medicaid, the ADA, and Section 504.[40] *See* FOF ¶¶ 139-146. Similarly, Plaintiffs' client review proved ongoing class-wide deficiencies in assessments, specialized services, transition planning, the provision of informed choice, and related violations of the federal law.[41] The State's own data show similar, class-wide deficiencies.[42] This, and other evidence, including expert and fact witness testimony, further demonstrates Texas's system-wide violations of the Medicaid Act, the ADA and Section 504 common to the class that can be remedied with a single injunction.[43]

B. The Plaintiffs Continue to Satisfy the Typicality Requirement of 23(a)(3).

Defendants also incorrectly assert that Plaintiffs failed to present any "affirmative evidence" regarding seven of the ten Named Plaintiffs and thus, failed to satisfy the typicality

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class members be provided active treatment consistent with the more exacting standards of 42 C.F.R. § 483.440(a)-(f) or the far less stringent and more general description set forth in subsection (a). *Id.* at 481. This common question equally impacts all class members in nursing facilities and will determine the scope, intensity, frequency, and duration of specialized services that Defendants must provide to all of them. The Court held that the resolution of this issue will drive the resolution of Plaintiffs' specialized services claims. *Id.* It made similar findings with respect to Plaintiffs' other claims. *See id*.

[40] The Court found that QSR reports "of great value" in its initial certification decision because they provided the Court with "an independent expert assessment of the very questions at the heart of the class certification analysis: particularly, whether the purportedly unlawful characteristics of Defendants' PASRR process impact large numbers of Texans." *Steward*, 315 F.R.D. at 477-78.

[41] *See, e.g.*, FOF ¶¶ 168, 210-224, 275-276, 304, 309, 324-325, 355-361, 371, 378, 384-389, 427-428, 443-455, 457, 459-467, 496-504, 509-523, 560-561, 565, 590-594, 604-607, 625, 691-695, 698-701, 711-714, 716, 729-730, 752-755, 773-774, 777, 783.

[42] FOF ¶¶ 250-254, 256-257, 274, 298-301, 319, 367, 424, 429, 471-476, 506, 551, 728.

[43] *See, e.g.*, FOF ¶¶ 260, 266, 270, 302, 305, 307-308, 315-316, 320-323, 342, 345-351, 365-366, 368, 379, 392-397, 402-408, 411-422, 425-426, 430-439, 456, 458, 468-469, 485-492, 507, 524-527, 554-564, 566, 608-612, 617, 619-624, 626-631, 686-690, 697, 702, 705-708, 715, 721-726, 750-751, 756-772, 775-776, 778-782.

requirement under Fed. R. Civ. P. 23(a)(3).[44] Defs.' Br. at 10. In fact, through their expert Barbara Pilarcik, as well as the testimony of individual Named Plaintiffs, their family members, and their caretakers, the Plaintiffs provided extensive competent evidence on each and every Named Plaintiff, much of which mirrored the class-wide findings of the client review.[45] *See* FOF ¶¶ 303, 524, 566-567, 595-596, 609-612, 617, 619-620, 624, 626-629, 702, 1247-1413. As with commonality, the existence of individual differences among the Named Plaintiffs and the class does not defeat typicality. *M.D. v. Perry*, 294 F.R.D. 7, 61 (S.D. Tex. 2013); *see also* FOF ¶¶ 1256, 1265, 1267-1269, 1271; Pls.' Suppl. Mem. at 45-48. And Defendants make no argument, and presented no evidence at trial, that the needs and preferences of the Named Plaintiffs are materially different than those of the class. Since Plaintiffs proved that the Named Plaintiffs possess the same interest as all class members in adequate PASRR evaluations, needed specialized services, active treatment, prompt access to appropriate community services, and an opportunity to make an informed choice whether to enter or remain in a nursing facility, they continue to meet the typicality requirement of Rule 23(a)(3).[46] *Steward*, 315 F.R.D. at 490.

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[44] Under Rule 23(a)(3), the test for "typicality" asks whether the class representatives "possess the same interest and suffer the same injury" as other class members, but it does not require that the claims of the named plaintiffs be identical to the claims of the other class members. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation marks omitted).

[45] That some of this evidence was contained in a rebuttal report is irrelevant. Defendants cite no case or other support that Ms. Pilarcik's rebuttal report is not competent evidence. Nor could they, since Ms. Pilarcik's report directly responded to the opinions of Defendants' experts Kathy Bruni and Eleanor Shea-Delaney concerning the needs and services of all Named Plaintiffs, and then opined on the class-wide impact of Texas's PASRR and community service system. *See* FOF ¶¶ 1248-1255, 1413.

[46] The Named Plaintiffs also have a personal interest in this litigation that is reasonably related to the harm experienced by all class members. *See Risinger ex rel. Risinger v. Concannon*, 201 F.R.D. 16, 22 (D. Me. 2001) (finding typicality where plaintiffs invoking same Medicaid Act provisions, alleging same systemic deficiencies, and seeking same relief as the proposed class members). Thus, the Named Plaintiffs continue to satisfy the typicality requirement of Rule 23(a)(3). COL ¶ 68.

C. The Plaintiffs Continue to Satisfy the Adequacy of Representation Requirement of Rule 23(a)(4).

The Named Plaintiffs and Plaintiffs' Counsel continue to fairly and adequately represent the class as required by Rule 23(a)(4). *Steward*, 315 F.R.D. at 491-92. As discussed above, Plaintiffs presented evidence of all Named Plaintiffs that demonstrated both their interests and their capacity – either individually or through their articulate guardians – to represent the class.[47] Plaintiffs' Counsel continues to vigorously and appropriately represent the entire class. *Steward*, 315 F.R.D. at 491-92. They consistently have provided information and opportunities about community living, but always respected the wishes of individuals to enter or remain in nursing facilities, if that is their informed choice.[48] Similarly, Defendants' assertions that the Named Plaintiffs received "more favorable treatment" than the class, simply because Counsel zealously performed its duty as class counsel to assist these individuals, should be rejected.[49]

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[47] Defendants ignore the testimony from the guardians of three Named Plaintiffs – Sharon Barker, Vira Phetsavong, and Lenwood Krause. Defs.' Br. at 11; *see* FOF ¶¶ 1311-1312, 1314-1316, 1335-1336, 1350-1353, 1355, 1358-1360. Defendants also argue that Mr. Morrell, a Named Plaintiff who testified at trial, is incapable of having sufficient knowledge and understanding of the case to serve as a class representative. Defs.' Br. at 10-11. But the Court explicitly rejected this argument in its Order certifying the class. *Steward*, 315 F.R.D. at 490-92 (quoting *Hamilton v. First Am. Title Ins. Co.*, 266 F.R.D. 153, 164 (N. D. Tex. 2010); *see also Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 483 (5th Cir. 2001) (class representative is entitled to rely upon class counsel). Here, Mr. Morrell actively participated as a class representative to protect the interests of the class by testifying at trial. FOF ¶¶ 1408, 1410. His role as a class representative is further supported by the knowledge of Coalition for Texans with Disabilities and the Arc of Texas. *Steward*, 315 F.R.D. at 491-92 (participation of knowledgeable organizational plaintiffs supports the Named Plaintiffs' ability to serve as adequate representatives of the class).

[48] There is no evidence in the record to support Defendants' false and inflammatory claim that Plaintiffs' Counsel imposed their will on the Named Plaintiffs who do not have guardians to try to force them to move, or offered gifts using a class member's own money to convince him to move to the community. Defs.' Br. at 11.

[49] Fed. R. Civ. P. Rule 23(a)(4) requires class counsel to be responsible for fairly and adequately protecting the interests of the class. *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 282 (W.D. Tex. 2007). The Rule does not preclude DRTx from providing individual advocacy to the Named Plaintiffs, or any other class member, so long as such representation does not create a conflict of interest within the class or with class counsel, which it has never done. Conversely, the

D. The Claims of the Class Can Be Remedied Through a Single Injunction.

The class also continues to satisfy Fed. R. Civ. P. 23(b)(2). COL ¶ 69; Pls.' Suppl. Mem. at 51-56. Defendants' claim that Plaintiffs have not met 23(b)(2)'s requirements because they have never "attempt[ed] to prove a remedy," Defs.' Br. at 11 (emphasis omitted), has been expressly rejected by this Court,[50] *see* Order, ECF No. 509, Aug. 8, 2018. Until the Court determines the nature and scope of any federal law violations, it is impossible to determine – beyond what has already been described – what remedial relief is appropriate and tailored to cure those violations. *See id.* at 13.

VII. Conclusion

In light of the foregoing, Plaintiffs' and the United States' proposed Findings of Fact and Conclusions of Law and brief in support, the extensive evidence in the trial record, and this Court's prior rulings, Plaintiffs urge the Court to enter a declaratory judgment that Defendants are violating the NHRA, and Plaintiffs and the United States urge the Court to enter a declaratory judgment that Defendants are violating the ADA and Section 504. The Court should direct the parties to meet and confer for up to thirty days about the process for developing a proposed remedial order, and to submit their proposal for that process to the Court at the end of the thirty-day period. Taking into account the Parties' submissions, the Court should enter appropriate injunctive relief.

DATED: February 8, 2019

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responsibility for protecting class interests does not mean DRTx must provide individual advocacy for the more than 3,000 unknown class members.

[50] Plaintiffs' answers contained more than 93 specific actions that Defendants should take to cure their systemic deficiencies that violated federal law. ECF No. 434-1. The United States' answers mirrored these detailed remedial actions. ECF No. 434-2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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