IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PHYLLIS BALL, et al., Plaintiffs, and GUARDIANS OF HENRY LAHRMANN, et al., Plaintiff-Intervenors, v. JOHN KASICH, et al., Defendants, and OHIO ASSOCIATION OF COUNTY BOARDS, Defendant-Intervenor.	:	Case No. 2:16-cv-282 Chief Judge Edmund A. Sargus, Jr. Magistrate Judge Elizabeth P. Deavers

INTERVENOR-GUARDIANS' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTIONS TO DISMISS

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Intervenor-Guardians – who are the mothers, fathers, brothers, sisters, and friends for their disabled loved ones – respond to the motions to dismiss filed by Defendants: (1) John Martin, Director of the Ohio Department of Developmental Disabilities ("DODD") and Barbara Sears, Director of the Ohio Department of Medicaid ("ODM") (ECF No. 354); (2) Governor John Kasich (ECF No. 355) (DODD, ODM, and Kasich, together, the "State Defendants"); and (3) Ohio Association of County Boards Serving People with Developmental Disabilities ("OACB" or "County Boards") (ECF No. 353) (OACB and the State Defendants, together, the "Defendants" and their "Motions to Dismiss").[1]

I. INTRODUCTION

Although Guardians detail their claims in their 84 page pleading, the gist of Guardians' claims is simple: Defendants have systematically thwarted and denied the ICF entitlement to eligible residents. (ECF No. 326, the "Claims"). As a result today, thousands of eligible Ohioans sit on "wait lists" for "waiver" services not knowing they have an immediate entitlement to an ICF bed. This happens by design – the Defendants' design – not by accident. And it is illegal, meaning it violates federal law.

The Defendants have actually been brazenly open and clear in their desire to eliminate ICF beds, violating their acknowledged duties to provide the ICF entitlement. The issue raises factual questions *not* ripe for review on their merits, let alone dismissal, at this initial stage: namely, whether Defendants have systematically thwarted or failed to provide the ICF entitlement to thousands of eligible Ohioans.

[1] For efficiency and economy, and because many of the Defendants' arguments are overlapping, Guardians file this combined response. Guardians note that Plaintiffs did the same in 2016 when responding to Defendants' separate motions to dismiss Plaintiffs' claims, when they filed a combined response that spanned 80 pages. (ECF No. 34).

To be clear at the outset, Guardians are all for expanding choice. But the ICF choice – the *entitlement* from which people can then "waive" – must actually remain a viable choice. Unfortunately, based on Defendants' policies and practices, the ICF benefit is thwarted, if not effectively hidden, from eligible recipients. Whether this is a conscious practice of Defendants' own design or a reaction to DRO's relentless attacks on ICF care, the effect is the same: tens of thousands of eligible Ohioans do not know of their ICF entitlement. Likewise hundreds, if not thousands, of ICF beds have been eliminated in Ohio *not* because they are unneeded or unwanted, but instead because they are effectively hidden from the disabled beneficiaries who are entitled to them. The result is that for too many Ohioans the ICF *entitlement* is – by design – an illusory, unknown benefit. That in turn affects not only those who may want an ICF bed – if only they knew of it – but also the roughly 5,000 existing ICF residents whose facilities are closing due to Defendants' policies and practices and inadequate funding, all of which is purposeful as Guardians' claims detail.[2]

All the Guardians want is what the law requires: namely, the provision of the ICF benefit to all whom are eligible. Guardians' claims – same as Plaintiffs' claims – simply seek to require Defendants to perform their acknowledged duties. Just as the Court has already held that the Plaintiffs' claims are sufficient to proceed, so too are those of the Guardians. In this respect, the Court's prior rulings – and the Defendants' own admissions – require denial of the Motions to Dismiss.

[2] Without the benefit of discovery, Guardians have alleged this through the detailed stories of 20 Medicaid-eligible Ohioans, most now living in ICFs, but some who are not. With the benefit of discovery, Guardians intend to show that Defendants have thwarted and denied the ICF benefit quite consciously, meaning that Guardians' detailed allegations are anything but anecdotal.

A. The Court's Prior Rulings on Intervention and Dismissal

Last year, in a detailed, well-reasoned, 26 page decision, the Court granted the Guardians' motion for intervention. (ECF No. 261). In so doing, the Court examined and held "that the rights of those individuals who do not wish to move from their residence in an ICF, or those who are at serious risk of institutionalization who wish to obtain residence in an ICF, are directly impacted in this lawsuit." *Id.* at 16-17. The Court also held that "Plaintiffs and the Guardians seek to protect the same personal interest in receiving appropriate care in the state and federal programs set up for that purpose." *Id*. at 17. And finally, the Court concluded by "find[ing] that the Guardians have shown that there are claims and/or defenses that share with the main action common questions of law and fact." *Id*. at 23.

As such, the Court already considered – and rejected – the very arguments Defendants now make in their Motions. Said differently, in ruling that the Guardians' rights "are directly impacted in this lawsuit," the Court already recognized that the Guardians have the same right and ability to bring claims as do Plaintiffs. It would make little sense to recognize the Guardians' substantial interests at stake in this litigation, yet deny them the ability to protect those interests by bringing claims while Plaintiffs are allowed to bring the same claims. The fact that Guardians' claims are premised on the exact same statutes as Plaintiffs' claims only reinforces the propriety of Guardians' claims. The Court's prior ruling on intervention addressed many of the arguments now raised by the Defendants, which of course forms the law of the case.

Also last year, before ruling on intervention, the Court separately ruled on the Defendants' motions to dismiss the Plaintiffs' complaint. When it did so, the Court considered – and rejected – many of the same arguments Defendants now raise against the Guardians. *See Opinion and Order* (ECF No. 90). The Court's reasoning then in allowing Plaintiffs' claims to proceed past the

pleadings' stage is equally applicable now to the Guardians' claims. As such, the Court has already done much of its work and can summarily reject the recycled arguments Defendants raise once again.

B. Defendants Acknowledge the ICF Right and their Duties

The Motions are actually most telling for what they acknowledge, not what they argue. The Defendants acknowledge, as they must, that (1) ICF services are an entitlement under Ohio's approved state Medicaid Plan; *OACB Motion* at 7 (ECF 353); and (2) that they are required to disclose the ICF option to eligible residents. *Id.* at 8, 10-11, 17.

The Motions also accurately define the crux of the issue: namely, whether Defendants "have adopted policies or practices which have the effect of excluding anyone from exercising their ICF choice based on their disability." *Id.* at 19. In short, as the Guardians allege in detail, the Defendants *have* – both through overt acts and conscious omissions – "adopted policies or practices which have the effect of excluding anyone from exercising their ICF choice based on their disability." *Id*. Axiomatic, this is a *factual* question not ripe for determination in ruling upon a motion to dismiss. In essence, the Defendants are saying: "yes, we have duties that affect current or potential ICF residents, but we are complying with all our duties, so just dismiss this case." Such is not the province of a Rule 12(b)(6) motion; such is the province of *answering* the complaint and commencing discovery.[3]

[3] The State Defendants try to avoid this through clever tautology, suggesting that because Plaintiffs, on the one hand, claim that Defendants discriminate against waivers while Guardians, on the other hand, claim they discriminate against ICFs, the Defendants must therefore – as a matter of law – not be in violation of any laws. *State Defendants' Motion* at 1; *Governor's Motion* at 2. That is, they suggest that because one party claims the proverbial porridge is too hot, while another claims it is too cold, it must mean the porridge is just right. Of course, as a matter of law (and common sense), such is not necessarily true. Instead, given that this aspect of the case is at the pleadings' stage with no discovery, we simply do not know whether the Defendants' porridge

As their Motions reveal, Defendants find themselves in a difficult position. On the one hand, they acknowledge the threshold, determinative issue that the ICF benefit is an entitlement that they must communicate (not hide or actively thwart), yet on the other hand they still seek to dismiss Guardians' claims at the pleading stage. Defendants seek to do so making two types of arguments: (1) a vague, but repeated, *de facto* "defense" that because they are allegedly already complying with all their duties, Guardians cannot state a claim for relief; and (2) some claimed procedural infirmities – i.e., no case or controversy – asserted only by OACB. But as detailed below, a defendant cannot escape liability at the pleading stage simply by claiming it is in compliance with its duties. That is what discovery is for: to determine if, in fact, Defendants are complying with their duties. Otherwise, a defendant could dispense with every case by just denying all allegations or claiming it is in compliance. As for the claimed procedural infirmities, they either do not exist, or if they do, they are easily remedied and do not warrant dismissal.

In sum, given that Defendants (rightly) acknowledge they have duties as relates to ICF services, their Motions should be denied so we can determine – through discovery and trial if necessary – whether they have, in *fact*, complied with their duties.

II. STANDARD OF REVIEW

In considering a motion to dismiss under Rule 12(b)(6), the Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."). "A claim

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is: (a) too hot, (b) too cold, or (c) neither. That is what discovery is for. As this "argument" of Defendants is more gimmick than substance, it requires scant attention.

has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. In construing a motion to dismiss, if an allegation is capable of more than one inference, the court must construe it in the plaintiff's favor. *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) (*citing Allard v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993)). Finally, the Court may not grant a Rule 12(b)(6) motion merely because it may not believe the plaintiff's factual allegations. *Id*.

III. BACKGROUND FACTS

The relevant facts, taken directly from Guardians' claims and the Court's prior rulings, all of which are to be accepted as true, establish the following:

A. Guardians' Intervention as *Plaintiffs*

1. On April 19, 2017, Guardians – then *pro se* – moved to intervene, which Plaintiffs vigorously opposed. In filing their motion for intervention, Guardians styled it as "Motion to Intervene as Plaintiffs," yet also attached to their motion a putative answer to Plaintiffs' complaint. (ECF No. 107). Likewise, in their reply in support of their motion to intervene, the *pro se* Guardians referred to themselves as "Intervenor-Plaintiffs" and stated:

> Plaintiffs' counsel makes much ado about whether Intervenors should be classified as "Intervenor Plaintiffs" or "Intervenor Defendants." They fail to apprehend that labels do not matter when you stand to lose your home. What matters, and should be dispositive, is that both Plaintiffs and Defendants acknowledge that neither does or can adequately represent Intervenors' interests. The Intervenors take exception to both Plaintiffs' and Defendants' policies, which negatively affect the rights of Intervenors. Specifically, the Defendants and the Plaintiffs share a "common goal" of downsizing the ICF program, both in terms of the size of settings and the number of facilities which will remain. They have worked together to achieve this goal, the only argument being, the degree to which the ICF program will be reduced.

Reply in Support of Motion to Intervene at 8-9 (ECF No. 163).[4]

2. 99 other individuals – who also serve as guardians for their loved ones who live in ICF's – joined in Guardians' motion to intervene.

3. The State Defendants actually supported Guardians' intervention. (ECF No. 131). At the time they said: "Plaintiffs also gloss over the changes that their requested relief in this case would require. The Intervenor ICF Residents now require this Court to reckon with that question. The Plaintiffs explicitly seek to stop the State from funding and maintaining the ICF system as it currently exists." *Id*. at 12.

4. So, back when it suited their purpose to help defeat the Plaintiffs' claims, the State Defendants supported the Guardians participation, but now that the Guardians have the audacity to bring claims against them, the Defendants now pivot and argue the Guardians should have no further role in this case.

5. On July 25, 2017, the Court, in its detailed opinion, granted Guardians' motion and ordered their intervention. *See Opinion and Order* (ECF No. 261). In so doing, the Court found and held as follows:

- "First, the parties' briefing makes clear that there are common facts and legal claims/defenses between Plaintiffs, Defendants, and the Guardians." *Id*. at 13.
- "that the rights of those individuals who do not wish to move from their residence in an ICF, or those who are at serious risk of institutionalization who wish to obtain residence in an ICF, are directly impacted in this lawsuit." *Id.* at 16-17.

[4] In so doing, the *pro se* Guardians' instincts – led by parent Caroline Lahrmann – were actually spot on. That is, they implicitly recognized that, just like Plaintiffs, their claims (and reason for participation in this case) are against the Defendants, not against the individual Plaintiffs. To be sure, the Guardians take exception to Plaintiffs' claims because Plaintiffs' complaint characterizes ICFs as "segregated" "institutions" – and because Plaintiffs' counsel (Disability Rights Ohio) has openly voiced opposition to ICFs – but Guardians have no "claims" against the individual Plaintiffs. Guardians and the individual Plaintiffs are effectively in the same position in that both require the Defendants to perform their acknowledged duties, and both claim Defendants are failing to do so.

- "without the Guardians' presence in this case, there are potentially other putative class members who may wish to stay in an ICF or be placed in an ICF whose interests would not have a voice." *Id*. at 17.

- "in addition to the common facts shared by the Guardians and the main action before this Court, there are common questions of law. Both Plaintiffs and the Guardians agree that this case involves the interpretation and application of Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et* seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which interprets these statutes." *Id*.

- "Plaintiffs and the Guardians seek to protect the same personal interest in receiving appropriate care in the state and federal programs set up for that purpose." *Id*.

- "Here, the common question of law argued by Plaintiffs, Defendants, and the Guardians is: What does *Olmstead* require of Defendants to comply with the ADA?" *Id*. at 18.

- "This litigation is complex and important. Excluding individuals with disabilities who will be directly impacted is not the appropriate way to make this case less complex." *Id*. at 22.

- "the Court finds that the Guardians have shown that there are claims and/or defenses that share with the main action common questions of law and fact." *Id*. at 23.

6. In its Opinion and Order, the Court also granted OACB's motion for intervention, and ordered the Clerk to file OACB's answer. *Id*. at 26. But tellingly, the Court did not order the Clerk to file Guardians' answer that was attached to its original motion. In this respect, the Court (to its credit) recognized that the Guardians were situated as Intervenor-*Plaintiffs*, not Intervenor-Defendants.

7. Even so, the first pleading with a new caption after the Court entered its intervention order was an agreed order (for a revised briefing schedule for class certification) that listed the Guardians and OACB both as "Defendant-Intervenors." (ECF No. 265).[5] Regardless of its origin,

[5] Guardians believe the agreed order was submitted by Plaintiffs and Defendants (and not prepared by the Court).

the caption subsequently remained intact with OACB and Guardians thereafter listed as "Intervenor-Defendants." In effect, though it reflects form over substance, captioning Guardians as *Defendants* was a clerical error that was subsequently (blindly) perpetuated. But it is a (minor) mistake insofar as from inception Guardians sought to intervene as *Plaintiffs*, and the Court subsequently granted their intervention as *Plaintiffs* (as reflected by the Court *not* directing that Guardians' *answer* be filed). Moreover, both in Guardians' subsequent pleadings and at the parties' numerous settlement conferences, Guardians have openly discussed filing claims against the Defendants, a reality all have understood throughout.[6]

B. <u>The Court Rejected the Same Arguments in 2016</u>

8. In 2016, the Defendants moved to dismiss Plaintiffs' complaint. (ECF Nos. 16, 27, 28). In March 2017, the Court denied all but one of Defendants' arguments, meaning all of Plaintiffs' claims – except two claims against Governor Kasich – remained intact. *See Opinion and Order* (ECF No. 90). In its ruling, the Court considered – and rejected – some of the same arguments now raised by OACB against the Guardians, including holding that:

- Plaintiffs have a private right of action and standing to enforce their Social Security Act Claim. *Id*. at 29-33.
- As regards Governor Kasich, he has sovereign immunity against Plaintiffs' ADA and Social Security Act claims, but does *not* have a sovereign immunity defense against their Rehabilitation Act Claim. *Id*. at 10-15.

C. <u>Guardians File their Claims</u>

9. On September 14, 2018, in conformance with prior orders issued by the Court, Guardians' filed their *Crossclaims and Third-Party Complaint*, which includes three identical

[6] Guardians style this pleading with the caption correctly displayed.

claims against the Defendants (the "Claims") (ECF No. 326).[7] Specifically, Guardians brought claims under the Americans with Disabilities Act ("ADA") (Claims I & IV), Section 504 of the Rehabilitation Act of 1973 (Claims II & V), and violation of the Social Security Act (Claims III & VI). *Id*. at ¶¶ 346-391. These three claims are identical to the three claims Plaintiffs assert in this lawsuit against the State Defendants.[8]

10. Guardians' claims span 84 pages. They are detailed. They go far-beyond normal "notice pleading" standards.

11. The claims detail how the Guardians "desire the continued provision of ICF services for their loved ones, which entitlement has been systematically delayed, denied, or impeded by Defendants and DRO. Insofar as they have received ICF services, it is largely in spite of – not because of – the efforts and services provided by Defendants and DRO." *Id*. at ¶ 25.

12. The claims then detail the stories of the Guardians search for (and in some cases initial denial of) ICF services for their loved ones, which for economy purposes are incorporated by reference and not restated herein. *Id*. at ¶¶ 26-108.

13. The Guardians also included in their claims the stories of Noah Goldberg, Zoe Edler, and Maya Edler, whom the Guardians moved to join as parties. (ECF No. 325). Noah, Zoe, and Maya currently do *not* receive ICF services, may someday want or need ICF services, but were never informed of their ICF entitlement by their respective County Boards. Specifically, the claims allege:

- As regards Noah Goldberg, "[d]espite interacting with the DD Board for almost two decades, [his mother] has never been told about – let alone offered – the ICF

[7] To focus on their claims against the Defendants, Guardians voluntarily dismissed, without prejudice, third-party defendant Disability Rights Ohio ("DRO") (ECF No. 352).

[8] Plaintiffs sued what are dubbed the "State Defendants." They did not sue the County Boards, which were added as Defendant-Intervenors because of their duties in administering DD programs.

option. Whether she would select it or not, she would like to know of all her (and Noah's) options." *Claims* at ¶ 111.

- As regards Zoe and Maya Edler, their parents report that despite numerous meetings with their local County Board, "[a]t no time was an ICF mentioned in the discussion – either as an option or alternative. Additionally, it was never explained that a waiver meant 'waiving our rights' to an alternative option. Both children have been placed on the DD Board waiting list for approximately four years running" without ever being informed of their ICF entitlement. *Id*. at ¶ 112.

14. The claims also detail the story of one of the 99 families who joined in Guardians' original intervention: Robert "Bobby" Hotze. *Id*. at ¶¶ 120-131. Bobby, who functions at the level of a small child, lived a wonderful life in his ICF – Mt. Aloysius – for more than 40 years. *Id*. His parents even left a large portion of their estate to Mt. Aloysius when they died in 2009. *Id*. After they died, a third-party, non-family guardian – APSI – was appointed the guardian of Bobby. *Id*. Despite Bobby living peacefully at Mt. Aloysius for over 40 years, in 2017 APSI sought to move Bobby from his home to a small waiver setting. *Id*. Bobby's sister Linda – a retired nurse living in Florida – was so appalled she obtained guardianship over Bobby so he could remain in his home of almost 50 years, the home his parents chose for him long ago that serves him well. *Id*.

15. The other 98 joining guardians share unique, but similar, stories.

16. In their claims, Guardians also detail the stories of four other families who have either been denied their ICF entitlement or have been thwarted in receiving it, and whom Defendants have failed to provide them information regarding their ICF benefit: (a) Kevin Fox (*Id*. at ¶¶ 132-146); (b) Amy Axmacher (*Id*. at ¶¶ 147-157); (c) Samantha Miller (*Id*. at ¶¶ 158-168); and (d) Sean Dickinson (*Id*. at ¶¶ 169-174).

17. The claims further detail the statutory structure as relates to the provision of DD services in Ohio, including that:

- "Medicaid law requires that eligible individuals be 'informed of the feasible alternatives if

available under the waiver.' 42 U.S.C. § 1396n(c)(2)(C). As such, Medicaid law presupposes that all eligible individuals will have been informed of their ICF entitlement before being informed of their (optional) waiver. But in Ohio, this premise – that Medicaid eligible individuals are first informed of their ICF entitlement – is false. Because of the State's laws, rules, policies, and practices, Medicaid eligible DD individuals are routinely denied information about their ICF entitlement." *Id*. at ¶ 270.

- "[I]n Ohio, those eligible for ICF services are routinely not informed of their ICF entitlement. Defendants often refrain from formally determining a person's eligibility for services until the person has been selected for a 'waiver,' at which time the state or DD Board first 'informs' the person of the ICF entitlement as part of a paperwork formality. In effect, Defendants shield the ICF entitlement from Medicaid eligible participants while promoting and offering the optional 'waiver' benefit. As a result, Medicaid eligible residents often sit on waiver waiting lists for years, ignorant of their ICF entitlement." *Id*. at ¶ 269.

- In less than 40 years in Ohio, ICF services have been "rebalanced" from 100% to less than 15% of residents today receive ICF services. *Id*. at ¶¶ 258-262.

- DD Boards are required to "offer the ICF entitlement as an alternative service to Medicaid eligible residents, but DD Boards rarely d[o] so." *Id*. at ¶ 313.

- That DD Boards, in implementing recently passed rules requiring them to share the ICF benefit, still are not doing so. *Id*. at ¶¶ 314-315.

- As for how the system really works, DD Boards – either through conscious policy, neglect, or ignorance – fail to inform eligible residents of their ICF benefit. *Id*. at ¶¶ 316-331. As a result, "in just the past five years, more than 20 private ICFs have closed, eliminating or downsizing more than 600 private ICF beds, with another 600 or more planned for elimination." *Id*. at ¶ 330.

- "The cumulative effect of these efforts is: (i) tens of thousands of Medicaid eligible DD residents and their guardians are unaware the ICF entitlement exists, (ii) for those living in ICFs, their homes face closure due to inadequate rates, forced downsizing of ICF beds, and operating limitations that make it financially challenging for ICF providers to continue to offer their residents the necessary services and supports." *Id*. at ¶ 331.

18. As regards OACB, the claims detail OACB's duties, role, policies, and practices, including that:

- "DD Boards claim to serve approximately 90,000 Ohioans with DD." *Id*. at ¶ 197.

- "DD Boards are the effective gatekeepers for DD individuals seeking services in the DD system in Ohio, meaning DD Boards normally: (a) determine and process eligibility for Medicaid services, (b) once a DD individual is determined eligible for Medicaid services,

counsel the individual (or guardian) about available service options, (c) maintain "waiting lists" for those seeking waiver services, and (d) administer and process waiver selections, and once the individual receives waiver services, then at least annually thereafter review the person's Individual Service Plan ("ISP")." *Id*. at ¶ 213.

- "But DD Boards do not routinely provide information about ICF services to eligible individuals." *Id*. at ¶ 215.

- "Few, if any, of the 88 DD Boards provide information about ICF services on their websites (other than on how to leave an ICF or be diverted from an ICF)." *Id*. at ¶ 216.

- "OCB publishes a detailed guide called "Life Map," which is a guide for DD services from birth through retirement." http://www.oacbdd.org/clientuploads/publications/OACB-LifeMap-ThirdEdition.pdf (visited Sept. 7, 2018)." *Id*. at ¶ 217. "Though the Life Map references nursing homes, it makes no reference to ICFs." *Id*. at ¶ 218.

- "When DD Boards annually send wait-listed individuals letters regarding their status on the waiver wait list, they do not mention that the recipient has the right – the entitlement – to an immediate ICF placement, let alone provide information on the ICF entitlement." *Id*. at ¶ 220.

- "the vast majority of DD Medicaid eligible residents receive information about DD services only from, or principally from, their DD Boards, but their DD Boards do not provide them information about ICF services, leaving the vast majority of eligible residents ignorant of their ICF entitlement." *Id*. at ¶ 221.

IV. LAW AND ARGUMENT

Guardians begin by stating their case as clearly as possible: the ICF benefit is an entitlement, yet Defendants are effectively hiding or outright denying it from thousands of eligible Ohioans. Tellingly, the Defendants do *not* contest their duty to provide (or communicate) the ICF benefit. As such, Guardians' basic allegation – whether the Defendants are, or are not, complying with their acknowledged duties – requires discovery. Just as the Court ruled last year when denying Defendants' motions to dismiss Plaintiffs' claims, these questions are not subject to dismissal based on the pleadings: "the Court finds that **at this point**, Plaintiffs have sufficiently alleged that they have been denied a meaningful choice of participation in feasible alternatives." *Opinion and Order* at 33 (ECF No. 90) (emphasis added).

In seeking to dismiss Guardians' claims, Defendants *mis*state Guardians' allegations and intent. For instance, they argue that there is no *right* to a particular ICF or facility. *State Defendants' Motion* at 13 (ECF No. 354). But that is *not* what Guardians allege or seek. Instead Guardians allege that Defendants are effectively denying thousands of eligible Ohioans the benefit of *any* ICF. All would agree that if that is true – a factual question – it is actionable.

Likewise, the Defendants make much ado that Guardians "do not identify any person who has applied for ICF services but been unable to receive them." *Id.* at 12. But that again misses the point: thousands of Ohioans are not *applying* for ICF services *because* Defendants hide the benefit from them. An eligible Ohioan cannot *apply* for that which she does not know exists (and does not know it exists because those with a duty to serve her choose not to tell her).

Similarly, Defendants cite a slew of cases for the proposition that there is no right "to remain in institutions that the State has determined should be closed." *Sciarrilo v. Christie*, 2014 WL 2047726 at * __ (3d Cir. 2014). This is the so-called *obverse Olmstead* claim Defendants ridicule. But this whole line of "dispositive" cases is irrelevant, as Guardians are not contesting the closure of any particular facility. Rather, Guardians are contesting Defendants' failure to notify or provide eligible Ohioans of *any* ICF benefit. Guardians' ADA and Rehabilitation Act claims are as *direct* – not *obverse* – as Plaintiffs' claims are.

Defendants are also wrong when they write that "Guardians do not allege that anyone in Ohio has been denied the ability to apply for ICF services." *State Defendants' Motion* at 20 (ECF No. 354). That is exactly what Guardians allege: namely, that because of Defendants' policies and practices, thousands of otherwise eligible Ohioans have been effectively denied the ICF benefit. Guardians' claims detail how they only learned of the ICF benefit in spite of Defendants' failure to comply with their duties, not because they complied with their duties. Guardians even

included allegations about individuals not yet living in ICFs – but otherwise eligible for ICFs – whom Defendants have failed to inform, let alone offer, the ICF benefit. That is the gist of this case: Defendants' failure to provide eligible Ohioans their ICF entitlement.

Finally, the Defendants argue that states "retain discretion in deciding how to comply with Medicaid law." *Id*. at 17. Guardians agree, but Guardians' claims are *not* centered on *how* Ohio complies with Medicaid law, but rather *that it does not comply* with Medicaid law. By systematically denying thousands of Ohioans the ICF benefit, and threatening the continued benefit for thousands more, Defendants are denying the benefit, which if true, is a violation of federal law. Again, these are ultimately *factual* questions not ripe for determination or adjudication at this stage of these proceedings.

A. Guardians State Claims for Relief Against the Defendants

The Defendants make similar arguments as relate to Guardians' three claims, which are addressed in turn.

1. Social Security Act Claim: 42 U.S.C. § 1396 (Claims III & VI)

All agree that the State of Ohio, under its approved state plan, is required to provide eligible Ohioans the ICF benefit. All also agree that the state is required to operate its Medicaid program in compliance with the Social Security Act and its implementing regulations. *Claims* at ¶ 234. Accordingly, under the Social Security Act, Guardians bring two related, but separate, claims: (a) that Defendants have failed to provide "assurance" that beneficiaries will be informed of the ICF choice and "[g]iven the choice of either institutional or home and community-based services," as required, 42 C.F.R. § 441.302(c), (d), and (b) that Defendants have failed to provide the ICF entitlement with reasonable promptness. 42 U.S.C. § 1396(a)(8).

Put most simply, the gist of Guardians' Social Security Act claims is that eligible Ohioans

are neither adequately informed of their ICF choice *nor* provided it with reasonable promptness. Of course, these claims are related because if one is not informed of her ICF entitlement, then she obviously cannot be provided it with reasonable promptness. In considering these claims, Guardians stress two simple points at the outset: (1) whether or not Defendants have complied with their acknowledged duties under the Social Security Act is a *factual* question, and (2) as regards any relevant, threshold *legal* questions, the Court already considered them in the context of Defendants' (similar) motions to dismiss Plaintiffs' claims.

Specifically, the Court has already addressed – and rejected – Defendants' main argument that Guardians lack an individual right to enforce the Social Security Act, holding: "The Court is persuaded by those cases finding sufficient rights-creating language in the statutory provisions [of the Socials Security Act]." *Opinion and Order* at 30-31 (ECF No. 90). *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002); *Wood v. Tompkins*, 33 F.3d 600 (6th Cir. 1994); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006) (holding individuals have private right of action to enforce similar Medicaid requirements); *Westside Mothers v. Olszewski*, 454 F.3d 532, 543-44 (6th Cir. 2006) (affirming district court's decision that persons have private right of action against state for Medicaid claims).

As the law of the case, the Court's analysis is not just equally applicable to the Guardians' claims, it is arguably more applicable to their claims. *United States v. Graham*, 327 F.3d 460, 464 (6th Cir. 2003) ("The law of the case doctrine generally discourages courts from reconsidering determinations that the court made in an earlier stage of the proceedings."). That is, unlike Guardians' claims, Plaintiffs' claims deal with providing *alternatives* to ICF services. *Opinion and Order* at 29-30 (ECF No. 90). The Court found Plaintiffs have a private right requiring the state to provide them information on *alternatives* to ICF services. *Id*. at 32 ("Here, Plaintiffs allege

that Defendants . . . have failed to meaningfully inform individuals who are determined to be likely to require ICF level of care of the feasible alternatives to institutional placement . . .").

Simply stated, because Plaintiffs have an individual right to receive information about *alternatives* to ICF services, it then follows – *a fortiori* – that eligible Ohioans also must have a right to receive information about their ICF *entitlement*. It would make no sense to have a right to learn of *alternatives* to something, but no right to learn of the threshold *entitlement*. But that is exactly what Guardians allege is going on in Ohio: namely, that Defendants are, at best, not providing information about the ICF entitlement, and at worst, they are thwarting, if not hiding, the ICF option. *Claims* at ¶¶ 9-19.

All should wonder and ask: why have ICF services decreased from 100% to less than 15% today as the *choice* for beneficiaries? Is it because the vast majority of eligible Ohioans reject the ICF option, or instead because they are kept ignorant of it? The answer to that question requires discovery, not dismissal at the infancy of the case.[9] *Disability Rights N.J., Inc. v. Velez*, Civil No. 05-4723, 2010 WL 5055820 at * 4 (D. N.J. Dec. 2, 2010) (denying dismissal because questions of fact remain to determine a state's compliance with the Social Security Act).

Though Plaintiffs try to insist (and Defendants agree) that only their "right" to a waiver is somehow protected by Medicaid law, they wholly ignore that the Social Security Act separately requires that developmentally disabled individuals be provided with "medical assistance" which, in turn, is expressly defined to include, if necessary, "services in an intermediate care facility for the mentally retarded." 42 U.S.C. § 1396a(a)(10) & 42 U.S.C. § 1396d(a)(15). This is why, just as this Court has already held, the ICF benefit is a *de facto* entitlement: once "individuals are

[9] To be clear, Guardians welcome choice and people voting with their feet, but doing so requires actual choices, including the ICF entitlement, which the "freedom of choice" provisions of the Social Security Act require.

determined to be eligible for ICF services, they can then seek to 'waive' from an ICF placement into a 'community' placement; hence the phrase, 'waiver services.' Waiver recipients are, by definition waiving from ***their ICF entitlement***." *Ball v. Kasich*, 307 F. Supp. 3d 701, 706 n.1 (S.D. Ohio 2017) (emphasis added). Other courts have held likewise. *Sabree ex rel. v. Richman*, 367 F.3d 180, 189 (3d Cir. 2004) ("we can hardly imagine anyone disputing that a state must provide the assistance necessary to obtain ICF/MR services, and that it must do so with 'reasonable promptness'"); *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) (holding plaintiffs had legally enforceable right to ICF services under Social Security Act); *Makin ex rel. Russell v. Hawaii*, 114 F. Supp. 2d 1017, 1028 (D. Haw. 1999) (noting that claims for ICF–DD care "are entitlements once a State offers them."); *Benjamin H. v. Ohl,* No. CIV.A. 3:99-0338, 1999 WL 34783552, at *14 (S.D.W.Va. July 15, 1999) (referring to ICF care as a "Medicaid entitlement[]").

The federal government itself acknowledges the ICF entitlement, as the Centers for Medicare and Medicaid Services ("CMS") states on its website that:

> States may not limit access to ICF/ID service, or make it subject to waiting lists, as they may for Home and Community Based Services (HCBS). Therefore, in some cases ICF/ID services may be more immediately available than other long-term care options. Many individuals who require this level of service have already established disability status and Medicaid eligibility.

https://www.medicaid.gov/medicaid/ltss/institutional/icfid/index.html (last visited September 4, 2018). *Claims* at ¶ 7. The Sixth Circuit has expressly held that states have a duty to provide eligible beneficiaries information about their Medicaid choices, and their failure to do so is actionable. *Boatman v. Hammons*, 164 F.3d 286, 289 (6th Cir. 1998).

As such, the only thing "obverse" or "reverse" is Defendants' suggestion that eligible Ohioans somehow have a legally protectable right to waiver services, but not the *entitlement* from

which they are waiving.[10] Guardians' Social Security Act claims are well pled and should not be dismissed at any stage, let alone the pleadings' stage.

2. ADA & Rehabilitation Act Claims (Claims I, II, IV & V)[11]

As discussed earlier, in trying to defeat Guardians' ADA and Rehabilitation Act claims, Defendants mischaracterize the claims. *See supra* 13-15. Specifically, Defendants (incorrectly) argue that Guardians seek a *right* to a particular ICF or facility. *State Defendants' Motion* at 13 (ECF No. 354). But Guardians make no such claim. Likewise, Defendants (incorrectly) state that Guardians claim a right under the statutes to keep their specific "institution" open. *Id*. at 10. But that too is false.

In so doing, Defendants argue – and cite cases – stating that there is no "obverse *Olmstead*" right. *Id*. But Guardians bring no such claims. Instead, Guardians bring "direct" – not "obverse" – claims under the ADA and Rehabilitation Act. Again, the gist of Guardians' claims is straightforward: by effectively hiding and denying the ICF entitlement to thousands of eligible Ohioans, Defendants are *directly* violating the ADA and Rehabilitation Act.

In making our claims, Guardians agree with the standards cited by Defendants: namely, that a plaintiff must establish that (1) she has a disability, (2) she is otherwise qualified, and (3) she is being excluded from participation in, being denied the benefits of, ***or*** being subjected to discrimination under the program because of her disability. *Dillery v. City of Sandusky*, 398 F.3d

[10] Tellingly, Plaintiffs do not address or question Guardians' ability to bring claims under the Social Security Act. (ECF No. 363)

[11] Guardians agree with Defendants (and the cases cited) that the ADA and Rehabilitation Act claims go hand-in-hand, meaning they rise or fall together and should be considered in tandem. *Qui v. Univ. of Cincinnati*, No. 1:18-cv-634, 2018 U.S. Dist. LEXIS 160246, at *12-13 (S.D. Ohio Sept. 19, 2018) (stating that claims under the two statutes "are generally reviewed under the same standards").

562, 567 (6th Cir. 2005) (citing *Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003)) (emphasis added); *Taylor v. City of Mason*, 970 F. Supp. 2d 776, 779 (S.D. Ohio 2013) (Barrett, J.) (denying defendants' motion to dismiss plaintiffs' ADA and Rehabilitation Act claims under Rule 12(b)(6)).

Nobody questions whether Guardians satisfy the first two elements, meaning that they have disabilities and are otherwise qualified to receive services (i.e., Medicaid benefits). The only element left is whether they are "being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program because of their disability." *Id*. As Guardians allege through 84 pages of claims, they are being excluded from participation in, being denied the benefits of, ***and*** being subjected to discrimination under the program because of their disabilities. Specifically, they – and thousands more eligible Ohioans now receiving no services – were denied the ICF benefit (sometimes for years), and their continued benefit is threatened. This is because Defendants' policies and practices effectively deny or conceal the ICF entitlement. *Claims* at ¶¶ 9-19, 39-40.

Some Guardians only learned of their ICF entitlement through . . . the phonebook. *Id*. at ¶¶ 39-40 (Henry & Elizabeth Lahrmann). Others were never informed by Defendants of their ICF entitlement. ¶ 52 (Elizabeth Colombo), ¶ 74 (Shawna Klein), ¶ 79 (Barbara Jean Meola & Mary Anne Meola), ¶ 101 (Kelly Jones), ¶ 111 (Noah Goldberg), ¶ 116 (Zoe & Maya Edler). And some are (falsely) told their ICF entitlement is being phased out. *Id*. at ¶ 41.

As if Guardians' claims required any additional evidentiary support at this stage, one of the Guardians – Kathy Wojciak – worked at a large (Cuyahoga) County Board for more than 35 years, "serving as the Manager of the Early Childhood Department, where she supervised approximately 30 intervention specialists." *Id*. at ¶ 92. "In Kathy's experience with DD Boards,

families of eligible individuals are not told that their family member is entitled to an ICF placement or that a waiver 'waives' this entitlement." *Id*. at ¶ 93. That allegation alone is sufficient proof at the pleadings' stage to state a *direct* claim of violation of the ADA and Rehabilitation Act.

In short, Defendants are hiding or denying eligible Ohioans their ICF benefit because of their disability. There is nothing *reverse, obverse,* or *obtuse* about Guardians' ADA and Rehabilitation Act claims. They are direct claims that are well pled, containing sufficient factual matter, plausible on their face.

Put it this way: Guardians' ADA and Rehabilitation claims are no more *obverse* than Plaintiffs' ADA and Rehabilitation Act claims. Let's examine. First, in both instances, the claims – as is normal with such claims – are derivative, meaning they derive from claimed violations of Medicaid law. Specifically, Plaintiffs claim the state is violating Medicaid law by depriving them of an *optional* benefit – their waiver (community) services – because of their disability.

Put aside that waiver services – unlike the ICF benefit – are not an entitlement, Plaintiffs claim they are being denied a benefit on account of their disability. Implicitly, Plaintiffs claim they are being denied the benefit because their disabilities and abilities are such that, on average, they are able to handle and benefit from community services more than most people who want and obtain ICF services, so Plaintiffs want what they claim are less restrictive, more integrated, waiver services. Guardians similarly claim the state is denying (or hindering) them (and thousands of others) from their ICF entitlement on account of their disability. In both instances the claims are *direct* – not *obverse* – meaning the parties claim the state is denying them benefits based on their respective disabilities.

Olmstead, of course, was simply one application of the ADA.[12] It did not speak directly to Guardians' claims, although Justice Kennedy forewarned against the perverse result that has resulted in subsequent years from the *mis*interpretation of the holding:

> It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision. . . . In light of these concerns, if the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition.

Olmstead, 527 U.S. at 610. Fast forward twenty years and Justice Kennedy's prescient analysis leads us, sadly, to Guardians' claims today.

Moreover, Defendants cite no cases from this district – let alone governing Sixth Circuit law – to support their *obverse* analysis, which the local rules discourage. S.D. Ohio Civ. R. 7.2(b)(2) ("In citing authorities, the Court prefers that counsel rely primarily upon cases decided by the Supreme Court of the United States, the United States Court of Appeals for the Sixth Circuit (or, in appropriate cases, the Federal Circuit), the Supreme Court of Ohio, and this Court."). There is no controlling law in this circuit. Bottom line, Guardians' ADA and Rehabilitation claims are as *direct* as Plaintiffs' claims, and any suggestion to the contrary is more *perverse* than *obverse.*

Finally, of course, is the procedural posture of this case. Defendants seek dismissal of Guardians' claims not at trial, or even the summary judgment phase, but instead at the pleadings' stage. That is improper, meaning premature. As this Court held not long ago in considering identical claims:

> Although Plaintiffs' allegations may ultimately be disproven or other facts may

[12] *Olmstead* dealt with the continued, involuntary hospitalization of two mentally disabled women, a much different population than those affected in this case. *Olmstead v. L.C.*, 527 U.S. 581 (1999).

> come to light that alter the analysis, the Court finds that at this stage of the litigation Plaintiffs' allegations, when accepted as true, are sufficient to withstand a motion to dismiss Taylor's ADA and the Rehabilitation Act claims. Accordingly, Defendants' Motion to Dismiss is denied on this ground.

Taylor, 970 F. Supp. 2d at 782.

3. **The Governor's Motion to Dismiss**

The Governor rehashes the same arguments he made in seeking dismissal of Plaintiffs' claims against him, which this Court already considered.[13] As regards the Governor, Guardians' allegations are more detailed than Plaintiffs' allegations. *Claims* at ¶¶ 175-180, 271-275, 342-344.

a. Rehabilitation Act Claim

The Governor acknowledges that the Court already considered – and rejected – his sovereign immunity argument as relates to Rehabilitation Act claims. *Governor's Motion* at 7 (ECF No. 355); *Opinion and Order* at 11 (ECF No. 90) ("accepting all factual allegations as true, the Court finds that the Governor has waived his Eleventh Amendment immunity with respect to Plaintiffs' Rehabilitation Act claims by agreeing to accept federal funds."). As such, Guardians' claim is appropriate and dismissal unsupported.

b. ADA & Social Security Act Claims

The Court, however, dismissed Plaintiffs' ADA and Social Security Act claims against the Governor, holding that Plaintiffs did not satisfy the *Ex Parte Young* exception to sovereign immunity. *Id*. at 15. As this is the law of the case, Guardians are bound by this reasoning, which disposes of Guardians' Social Security Act claim against the Governor.

However, as the Governor notes, Guardians make an argument that Plaintiffs failed to make: namely, that as regards their ADA claim against the Governor, the ADA expressly provides

[13] The Governor literally cuts and pastes large swaths of his 2016 motion to dismiss Plaintiffs' claims to his current motion. *Compare* Governor's two motions: ECF No. 28 *versus* ECF No. 355.

that a "State shall not be immune under the eleventh amendment 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. The ADA also includes "the power to enforce the fourteenth amendment." Id. at § 12201(b)(4).

The Governor tries to evade Congress' express waiver of immunity by citing two cases. First he cites *Bd. Of Trustees v. Garrett*, 531 U.S. 356 (2001). But *Garrett* was limited to Title I – not Title II – claims under the ADA, and it also did not preclude private individuals from bringing non-monetary claims under Title I. *Id*. As such, it does not bar Guardians' Title II ADA claim against the Governor. The second case the Governor cites is a prisoner rights case, *United States v. Georgia*, 546 U.S. 151 (2006). But in *Georgia*, the Supreme Court allowed claims under Title II to proceed. *Id*. at 159 ("[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.").

The Sixth Circuit has adopted a three part test for determining whether sovereign immunity applies to Title II claims against the Governor. *Mingus v. Butler*, 591 F.3d 474, 482-483 (6th Cir. 2010) (*citing Zibbell v. Mich. Dep't of Human Servs*., 313 Fed. Appx. 843, 847 (6th Cir. 2009) (mandated procedure for lower courts to follow when confronted with a state's claim of immunity under the Eleventh Amendment in cases involving ADA Title II). The three part test includes showing, (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. *Id*. *Mingus* was decided on summary judgment, not a motion to dismiss on Rule 12(b)(6) grounds, and even then, on summary judgment, the court upheld the plaintiff's ability to bring his Title II ADA claim.

Applied here, Guardians expressly invoked jurisdiction under the Fourteenth Amendment to the United States Constitution. *Claims* at ¶ 21. Guardians have detailed the ADA violations. Defendants' violations also violate the Fourteenth Amendment, which states that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Here, Defendants are *enforcing* the ADA in a manner that abridges Guardians' (and others') ICF benefit.

In sum, applying the Court's prior ruling, the Court should only dismiss the Social Security Act claim against the Governor.

B. OACB's Procedural Arguments[14]

OACB raises three related, threshold, procedural arguments in support of dismissal: namely, that (1) Guardians' "crossclaims" are improper; (2) Guardians have no case or controversy; and (3) Guardians lack standing.

1. Whether Styled as "Claims" or "Crossclaims," Defendants Must Respond

Elevating form over substance, OACB tries to make much ado about Guardians styling their Claims as "crossclaims," which OACB contends is improper. Fed.R.Civ.P. 13(g). Putting aside that the Claims could be brought as crossclaims, there is a simpler solution: they are direct claims brought by Guardians as Intervenor-*Plaintiffs*. OACB even recognizes that Guardians intervened as *Plaintiffs*. *OACB Motion* at 12. As such, Guardians are required to file their Claims because intervention requires the filing of "a pleading that sets out the claim or defense for which intervention is sought." Fed.R.Civ.P. 24(c). *Piedmont Paper Prods., Inc., et al., v. American Fin.*

[14] Somewhat telling, OACB is the only defendant that raises these procedural issues. Neither the State Defendants nor Plaintiffs make these arguments. Also, OACB raises an argument that Guardians cannot sue it in federal court to enforce its violations of state law, but Guardians assert only federal, not state law, claims. *OACB Motion* at 17-18.

Corp., 89 F.R.D. 41, 42-43 (S.D. Ohio 1980). Procedural requirements aside, the parties and the Court have always understood that Guardians may be filing claims.[15]

Insofar as the "issue" requires further discussion, OACB (correctly) notes that crossclaims must arise out of the transaction or occurrence that is the subject matter of the original action, meaning the crossclaims must bear a "logical relationship" to the main case. *Progressive Cas. Ins. Co. v. Belmont Bancorp*, 199 F.R.D. 219, 223 (S.D. Ohio 2001). But OACB is then (grossly) incorrect in trying to argue that "[t]here is no logical relationship between the opposing set of claims." *OACB Motion* at 12. We know this because in granting intervention, the Court already found and held that:

- "First, the parties' briefing makes clear that there are common facts and legal claims/defenses between Plaintiffs, Defendants, and the Guardians." *Opinion and Order* at 13 (ECF No. 261).

- "that the rights of those individuals who do not wish to move from their residence in an ICF, or those who are at serious risk of institutionalization who wish to obtain residence in an ICF, are directly impacted in this lawsuit." *Id.* at 16-17.

- "without the Guardians' presence in this case, there are potentially other putative class members who may wish to stay in an ICF or be placed in an ICF whose interests would not have a voice." *Id*. at 17.

- "in addition to the common facts shared by the Guardians and the main action before this Court, there are common questions of law. Both Plaintiffs and the Guardians agree that this case involves the interpretation and application of Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et* seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which interprets these statutes." *Id*.

- "Plaintiffs and the Guardians seek to protect the same personal interest in receiving appropriate care in the state and federal programs set up for that purpose." *Id*.

[15] The Guardians waited to file their claims because upon intervention, they immediately engaged in numerous settlement conferences with the parties and Court. The hope was that their claims would be unnecessary. The Guardians referenced their potential claims in their confidential settlement memorandum, and the subject was oft discussed. In short, the parties always understood Guardians would be filing claims if the case was not settled. To the parties' credit, nobody now suggests otherwise.

- "Here, the common question of law argued by Plaintiffs, Defendants, and the Guardians is: What does *Olmstead* require of Defendants to comply with the ADA?" *Id*. at 18.

- "the Court finds that the Guardians have shown that there are claims and/or defenses that share with the main action common questions of law and fact." *Id*. at 23.

As such, even assuming *arguendo* that the Claims need be formally classified as "crossclaims" – which they do not – the Court has already ruled that Guardians satisfy the test because the claims do bear a logical relation to main case.

2. <u>As the Court Already Recognized, There is a Case and Controversy</u>

Next, OACB half-heartedly tries to argue that "there is no case or controversy." *OACB Motion* at 12. Again, this argument can be summarily rejected based on the Court's findings and holding in its intervention ruling cited above. In short, the Court has already ruled that as regards the Guardians' interests and claims, there is very much a live case or controversy.[16] *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 429 (6th Cir. 2013) (holding that only because underlying injunction expired, there is no case or controversy).

3. <u>The Guardians have Standing</u>

Finally, OACB argues the Guardians lack standing. Again, this argument is most easily dismissed by reference to the Court's prior thorough findings "that the Guardians have shown that there are claims and/or defenses that share with the main action common questions of law and fact." *Opinion and Order* at 23 (ECF No. 261). Guardians' allegations far exceed notice pleading

[16] In making their argument, OACB also incorrectly states that "[e]very person named as a party or seeking party status in the Crossclaim against OACB has already received the relief sought in the Crossclaim." *Id*. Moreover, if such were the standard, then arguably Plaintiffs' case should be dismissed since the named Plaintiffs have already obtained the relief sought.

standards and detail how Defendants' practices – including OACB's practices – affect and impede the Guardians' rights and interests.

In essence, OACB argues, "who cares, you eventually found your way to an ICF, so what's the harm?" Besides being callous, OACB is wrong for four separate reasons:

First, Guardians were not harmed just once or in the past, they remain harmed now. By Defendants not properly offering the ICF entitlement – and County Boards not properly communicating it – Guardians existing ICF entitlement is threatened because their facilities face closure when empty beds are not filled. This is not a hypothetical. In just the past five years, more than 600 private ICF beds have been eliminated not from lack of demand, but because of Defendants' failure to comply with their duties. *Claims* at ¶¶ 10, 12, 16-17, 193-221, 269-271, 278, 316, 319, 325, 330.

Second, not all of the Guardians' loved ones are currently in an ICF. *Id*. at ¶¶ 109-119. Specifically, Noah Goldberg, Zoe Edler, and Maya Edler are not living in an ICF, and their guardians allege that they not only have not been offered ICF placement, they were never informed about it. *Id*.

Third, even OACB acknowledges that an injury need not be *current* to satisfy standing requirements, but instead that future injury satisfies the requirement. *Susan B. Anthony List v. Dreihaus*, 134 S.Ct. 2334, 2341 (2014). Applied here, even assuming *arguendo* that Guardians have no present or continuing injury – which they do – then at a minimum they have a "threatened injury." *Id*. The threatened injury is the closure of their ICF homes, and as relates to Noah Goldberg, Zoe Edler, and Maya Edler, they are also threatened in not even being offered an ICF

placement.[17]

Fourth, even if OACB was correct that Guardians lack "a current injury or an injury which is impending," Guardians still satisfy the standing requirement where, as here, the issue raised is "capable of repetition yet evading review." *Kingdomware Techs., Inc. v. United States*, 579 U.S. ___, 136 S.Ct. 1969, 1976 (2016), citing *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). Guardians alleged just such facts: namely, that because "thousands of Medicaid eligible Ohioans are entitled to a service – the ICF setting – but not informed of it, [t]hey are effectively denied 'the most comprehensive benefit in Medicaid.'" *Claims* at ¶ 10. This failure occurs every day – during annual evaluations, when wait list letters are sent, when families visit County Boards seeking services – yet evades review because families literally do not know what they are missing.

But again, the simpler answer – and analysis – for standing is that the Court has already ruled that the Guardians have, or risk, an injury, stating: "that the rights of those individuals who do not wish to move from their residence in an ICF, **or those who are at serious risk of institutionalization who wish to obtain residence in an ICF**, are directly impacted in this lawsuit." ECF No. 261 at 16-17 (emphasis added). That is, early on the Court wisely recognized that there are thousands – maybe tens of thousands – of Medicaid-eligible Ohioans living at home who might want or need an ICF, but who may lack knowledge of their entitlement due to Defendants' practices and policies. In granting the Guardians' intervention, the Court also recognized the Guardians represent not just their dozen loved ones, but effectively a subclass:

The individuals for whom the Guardians and the [99] Additional Guardians speak

[17] The Court addressed – and rejected – Defendants' similar standing argument raised against Plaintiff Hamilton. *Opinion and Order* at 22-26 (ECF No. 90). Though Hamilton only suffered a potential, future injury, the Court nonetheless found he has standing. *Id*. In contrast to Hamilton, Guardians – due to delay and denial of ICF services – have already suffered injury. Likewise the Court noted that a state's administration, operation, and funding of services can constitute state action, thereby triggering standing. *Id*. at 25.

> are part of the 27,800 individuals with developmental and/or intellectual disabilities Plaintiffs' Complaint identifies as the class of individuals for whose benefit this lawsuit was filed. Specifically, they are some of the 5,800 individuals named in Plaintiffs' Complaint who are currently institutionalized in Ohio ICFs of eight or more beds. . . . [Guardians want to] protect their choice for their wards to remain in an ICF and for ICF placement to be provided as an option for the 22,000 people who live in the community, but have immediate, unmet service needs, such as inadequate residential supports and/or aging primary caregivers.

Id. at 4. For them – and the Guardians – they surely have a present or threatened future injury. In sum, the Guardians have standing.

All said, whether one employs a legal standard or common sense standard, little can be more *injurious* to one's personhood than the elimination of already limited housing options for this vulnerable population. The Guardians whose loved ones currently live in ICF's suffer a very real threat of future injury by way of closure of their facilities, while other Guardians – like the Edler's and Goldberg's whose children are not yet in ICF's – suffer the present *de facto* denial of services and options.

V. CONCLUSION

Just as this Court held when it denied Defendants' motions to dismiss Plaintiffs' claims (ECF No. 90), it should deny Defendants' attempts to now dismiss Guardians' *identical* claims. Guardians' three claims – (1) ADA, (2) Rehabilitation Act, and (3) Social Security Act – are sufficiently pled and state claims for relief plausible on their face. For all the foregoing reasons, the Defendants' Motions to Dismiss should be denied in their entirety (other than the Guardians' Social Security Act claim against the Governor).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of December, 2018, the foregoing *Intervenor-Guardians' Memorandum in Opposition to Defendants' Motions to Dismiss* was filed via the Court's authorized CM/ECF system, which will send notification of such filing to all other parties to this action.

/s/ *Roger P. Sugarman*
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