UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

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| STEVEN HILTIBRAN, et. al. | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| RONALD J. LEVY, et al. | ) | |
| | ) | Case No. 10-4185-CV-C-NKL |
| Defendants. | ) | |

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**


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As shown in Plaintiffs' opening brief, Defendants' arbitrary exclusion of Plaintiffs' incontinence supplies from Medicaid coverage is unreasonable and violates federal law. Defendants' *post-hoc* litigation position that they do not have to cover Plaintiffs' adult diapers because they are "single-use supplies" is contradicted by their written policies and, more importantly, is irrelevant to whether the exclusion violates federal requirements. Whether adult diapers are labeled as DME, supplies, or both, the State must cover them when they are medically necessary. Therefore, this Court should grant Plaintiffs' Motion for a Preliminary Injunction.

## I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

### A. Plaintiffs are Likely to Succeed on the Merits of their Medicaid Claims

#### 1. Defendants Cannot Avoid Coverage By Re-Labeling Adult Diapers As "Supplies" For Individuals 21 And Over.

In their opening brief, Plaintiffs showed this case is controlled by Lankford v. Sherman, 451 F.3d 496 (8th Cir. 2006), the Eighth Circuit's most recent discussion of the Medicaid reasonable standards requirement. In an attempt to distinguish Lankford, Defendants have abandoned their position that incontinence supplies become a personal hygiene item when an individual reaches the age of 21. They now acknowledge that adult diapers continue to be a medical item but assert that adult diapers are not covered under Missouri's DME regulation because they are "single-use supplies," not "equipment." Defendants' Suggestions in Opposition to Motion for Preliminary Injunction ("Defs' Opp.") at 4-5, 9. As shown below, the argument is foreclosed by the Agency's policies and, at any rate, cannot avoid the reasonable standards requirements articulated in Lankford.

Defendants have acknowledged that incontinence supplies fall within the "DME" category by including them in their DME Manual and regulation for individuals age 4 through 20.[1] Moreover, every State policy and provider bulletin categorizes adult diapers as "durable medical equipment." See, e.g., Ex. 5 (Mar. 6, 2009 Physician and Durable Medical Equipment Bulletin) (containing a long list of procedure codes for adult diapers under the heading "durable medical equipment"); Ex. 8 (Sep. 2, 2005 Durable Medical Equipment Bulletin); Ex. 9 (May 4, 2007 Durable Medical Equipment Bulletin); Ex. 10 (MO HealthNet Durable Medical Equipment Billing Book at 7.1) (describing documentation prescribing physician must provide to DME providers). Notably, after reinstating coverage of DME following the Lankford decision, the State established new prior authorization criteria **for adult diapers**, stating it was required to do so by Senate Bill 577, which mandated streamlined procedures for covering medically necessary **DME**. Ex. 7; Answer, ¶ 42. Defendants' *after-the-fact* argument that adult diapers are not DME is thus contradicted by their previous enactment of these criteria for adult diapers for the specific purpose of complying with Missouri's DME statute.[2]

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[1] As noted in Plaintiffs' opening brief, Defendants' Durable Medical Equipment regulation incorporates by reference the Defendants' Provider Manuals and Bulletins which set out the specific DME items covered under the regulation. See 13 C.S.R. § 70-60.010(1)(2)(6).

[2] Defendants' argument that adult diapers are not covered because they are supplies is raised *for the first time* in this litigation. When Defendants issued a hearing decision denying Steven Hiltibran's diapers, the legal rationale was that diapers were a "personal hygiene item, not a medical item." Ex. 4; Answer, ¶ 66. See also Ex. 29 (denying Steven Hiltibran's Exception Request on the basis that diapers were "personal hygiene products"). When Plaintiffs' counsel wrote to Director McCaslin about the Defendants' policy, Defendants took the position in two separate communications that adult diapers cannot be covered for individuals over 20 because they are "personal hygiene items." Ex. 2, 3; Answer, ¶¶ 48, 49. When Plaintiffs' counsel submitted a public records request to the Defendants for any and all documents related to coverage of adult diapers, *not a single document* produced by Defendants suggested that adult diapers

Defendants in fact cover a wide range of **supplies** for adults in their DME program, including but not limited to: ostomy supplies, oxygen supplies, cleaning solution and supplies for ventilators, Trach Care supplies, and parenteral nutrition supplies. Notably, this coverage includes "single-use" items, such as ostomy skin barrier liquid and powder, lubricant, waterproof tape, skin barrier wipes and swabs, total parenteral nutrition (TPN) solutions and additives, and one-day TPN supply kits. See Durable Medical Equipment Manual, § 13 – Benefits and Limitations, at p. 33-41, 50, available at: http://manuals.momed.com/collections/collection_dme/Durable_Medical_Equipment_Section13.pdf (Ex. 30); Durable Equipment Manual, § 19 – Procedure Codes, 69-73, 101-103, available at: http://manuals.momed.com/collections/collection_dme/Durable_Medical_Equipment_Section19.pdf (Ex. 31). Defendants also cover insulin and other diabetic supplies.[3] And prior to the filing of this litigation, Defendants' counsel noted that "**incontinence supplies, other than adult diapers,**" are covered under the State's DME program.[4] Ex. 1 (emphasis added); Answer, ¶ 53.[5]

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do not meet the definition of DME. Rather, as summarized by one of Defendants' attorneys, Defendants did not cover diapers because they consider them to be "personal hygiene" items rather than "essential medical item[s]." Ex. 1; Answer, ¶ 53.

[3] See Pharmacy Manual, § 13.19 – Diabetic Supplies, at p. 29, available at: http://manuals.momed.com/collections/collection_pha/Pharmacy_Section13.pdf (Ex. 32). Although Defendants *moved* these items from their DME Manual to the Pharmacy Manual, they are still "medical supplies." It is irrelevant for the purposes of federal Medicaid law that Defendants chose to put them in a different manual. Defendants must cover all "medically necessary supplies;" they cannot pick and choose which ones they cover.

[4] The Missouri State Medicaid Plan, filed with the Centers for Medicare and Medicaid Services, similarly indicates that "**ostomy supplies**, oxygen . . . Home Parenteral Nutrition and **related supplies**, and medically necessary items of miscellaneous durable medical equipment are covered and provided through the MO HealthNet Durable Medical Equipment Program." Missouri State Medicaid Plan TN# 07-20, at p.16 (emphasis added) (Ex. 33). See also Missouri State Medicaid Plan TN# 10-02, at p. 13, available at http://www.cms.gov/MedicaidGenInfo/downloads/MO-10-

Defendants' current position appears to have been fashioned solely for the purposes of this litigation and should be rejected by this Court. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988) (rejecting counsel's *post-hoc* rationalizations for agency action); Arrington v. Daniels, 516 F.3d 1106, 1113 (9th Cir. 2008) (same); S.D. v. Hood, 391 F.3d 581, 601 (5th Cir. 2004) ("[I]f an agency's decision is to be sustained in the courts," it "must be upheld on the rationale set forth **by the agency itself**." Post-hoc explanations of counsel are "simply an inadequate basis" for "substantive review of an administrative decision") (emphasis added) (quoting Fort Stewart Schools v. FLRA, 495 U.S. 641, 651-52 (1990)). Defendants have clearly admitted adult diapers fall within their DME program by placing them in their DME manual and regulation; thus, under Lankford, they must be covered for Plaintiffs if their use is not experimental and they are medically necessary. Counsel's *post-hoc* rationalizations for the Agency's failure to cover adult diapers should not be accorded any weight.

Defendants' reclassification of adult diapers as supplies has additional problems. Lankford clearly addressed *supplies*, noting that "ostomy supplies," diabetic supplies, and oxygen were covered under Missouri's DME regulation. 451 F.3d at 501. The court struck as per se unreasonable a regulation that "completely exclude[d] items like

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02-179.pdf ("Medically necessary supplies . . . are reimbursable to the agency. Examples include: Ostomy sets, and supplies, irrigation sets and supplies, tapes, catheters and supplies. Needed items of medical equipment prescribed by a physician are available to all recipients including recipients of home health, through the Durable Medical Equipment program") (Ex. 34).

[5] Defendants' litigation position is that they can exclude diapers because they are single use items that cannot "withstand repeated use" for individuals over age 20. Ironically, Defendants' illegal policy is forcing Plaintiff Hammond to *repeatedly use the same diapers*, thereby jeopardizing her health and exposing her to public humiliation. Hammond Decl. ¶¶ 8, 10.

augmentative communication devices, **catheters**, and **parenteral nutrition supplies" for adults.** Id. at 513 (emphasis added). [6] The complete exclusion of adult diapers for individuals 21 and over is similarly unreasonable here. See also Bell v. Agency for Health Care Admin., 768 So.2d 1203, 1204-05 (Fla. Ct. App. 2000). In Bell, the state defendants chose to cover diabetic supplies in its "DME Handbook" for individuals under 21, but not for those over 21. The court found that cutting-off coverage of the supplies at age 21 "violates federal law by arbitrarily and unreasonably excluding coverage of benefits that may be medically necessary." Id. at 1205. Here, Defendants similarly cannot arbitrarily and unreasonably cut-off coverage of medically necessary adult diapers at age 21 by relabeling them as "supplies" simply because of the recipient's age.

Thus, Defendants' argument that they need not cover Plaintiffs' incontinence briefs because they do not cover such "supplies" in their DME program is entirely unfounded. And even if supplies were *not* part of Missouri's DME program (which they clearly are), Defendants still *cover supplies*, which means they must cover **all** medically necessary supplies for adults (see Lankford, 451 F.3d at 511), including incontinence supplies. Thus, the labeling of incontinence briefs as DME or supplies is irrelevant—

[6] The federal regulation upon which the DME service category is based requires coverage of "medical equipment, supplies and appliances." See Plfs' Mem. at 8 (and cases cited therein). And the CMS policy relied on by the Eighth Circuit and the United States Supreme Court specifically references "medical equipment, *supplies*, appliances suitable for use in the home" as being the basis for its guidance on medical equipment coverage. See Ex. 12 (CMS, Dear State Medicaid Director Letter, available at http://www.cms.gov.hhs.gov/states/letters/smd90498.asp) (emphasis added); Slekis v. Thomas, 525 U.S. 1098, 1099 (1999) ("remanding based on the September 4, 1998, CMS letter to state Medicaid directors, which advised that DME is subject to the federal reasonable-standards requirements"); Lankford, 451 F.3d at 507, 511-13.

either way they must be covered if non-experimental and medically necessary.[7] As Defendants already acknowledge, "the reasonable standards provisions apply to **all** forms of medical assistance," not just DME. Defs' Opp. at 3 (quoting Lankford, 451 F.3d at 506) (emphasis added).

Clearly, Defendants want to re-litigate Lankford by arguing they have the discretion to choose which DME items they cover, without regard to medical necessity. See Defs' Opp. at 2 (Missouri is "permitted to select certain optional items to provide"); id. at 3 ("DME is one area where states are permitted to customize the individual state plans to provide coverage, through what items they choose to cover"); id. at 6 (state has "discretion" to "define the covered services in optional areas of care"). However, the Eighth Circuit has already rejected this argument. While Medicaid offers a great deal of flexibility and discretion to the State, such discretion *ends* when the State denies a non-experimental, medically necessary service, regardless of whether that service falls within an optional service category. See Weaver v. Reagen, 886 F.2d 194, 197 (8th Cir. 1989). In Lankford, these Defendants already argued, as here, they had the right to choose which specific items to provide within an "optional" Medicaid service category. The Eighth

[7] Medicaid services can be covered under more than one category. As noted by the Lankford court, Defendants have categorized DME and related supplies as "prosthetics"—an optional service. See 451 F.3d at 511; Brief of Appellee Sherman, Lankford v. Sherman, 2005 WL 3657918 at 9-15, 19 (8th Cir. Dec. 27, 2005) (Ex. 35). See also Ex. 33 and 34 (State Plan provisions covering DME under both prosthetics and home health). At one point, Defendants covered diabetic supplies within the DME program but subsequently re-labeled them to come within the pharmacy program. Thus, the Defendants themselves recognize that some services can fit within more than one Medicaid category. What is legally significant is that, **regardless of the labeling**, the failure to cover non-experimental, medically necessary incontinence supplies is per se unreasonable. See also Bristol v. R.I. Dep't of Human Servs., No. 95-6605, 1997 R.I. Super. LEXIS 14, at *11 (R.I. Super. Ct. Jan. 30, 1997) (striking state's exclusion of adult incontinence briefs from coverage as "preventive and rehabilitative services" because it violated "reasonable standards" requirement).

Circuit found that the "state's failure to provide Medicaid coverage for medically-necessary services **within a covered Medicaid category** is both **per se unreasonable** and inconsistent with the stated goals of Medicaid." 451 F.3d at 511 (emphasis added). See also Weaver, 886 F.2d 194 (8th Cir. 1989) (rejecting Missouri's attempt to impose additional criteria beyond medical necessity to choose whether to provide certain prescription drugs—an *optional* service—for individuals with HIV). Defendants do not have discretion to "customize" their DME coverage to exclude medically necessary items such as adult diapers. Their policy is per se unreasonable and violates the reasonable standards requirements of the Medicaid Act.

**2. Defendants' "Home Health" Argument Is Without Merit.**

Home health—including specifically equipment, supplies, and appliances—is a mandatory service for the categorically needy. See 42 U.S.C. 1396a(a)(10)(D); 42 C.F.R. § 440.70(b)(3); Letter from James G. Scott, Ctrs. for Medicare & Medicaid Servs., to Gary Sherman, Dir., Mo. Dep't Social Servs., at 2-3 (Nov. 21, 2005) ("CMS Letter") (Ex. 36) ("medical supplies, equipment, and appliances must be available to all persons who are categorically eligible under the Medicaid program"); Plfs' Mem. at 13. Because all Missouri Medicaid recipients are categorically needy, they are entitled to medical equipment and supplies. Plfs' Mem. at 12-14 (and citations therein). See also, e.g., Ex. 11; 75 Fed Reg. 10289-90 (Mar. 5, 2010) (post-Lankford notice informing Defendants that home health is a mandatory service); Defs' Opp. at 6 (stating home health services are mandatory in Missouri). Defendants are now attempting, as they did in Lankford, to place unlawful restrictions on the receipt of home health services. See 451 F.3d at 512-13.

Defendants wrongly suggest home health services are limited to "services for temporary recovery from specific, episodic health incidents," not "ongoing conditions requiring continuing care." See Defs' Opp. at 7. This position clearly contradicts federal law, which facilitates coverage of medical equipment and supplies for individuals with *chronic* conditions. In support of their argument, Defendants allege that the receipt of home health services in Missouri is conditioned on a physician's plan of care, which must be reviewed at least every 60 days. Defs' Opp. at 7. However, federal regulations specifically *exempt* medical equipment, supplies, and appliances from requiring a physician's written plan of care every 60 days. See 42 C.F.R. §§ 440.70(a)(2), (b)(3). Instead, "[a] recipient's need for [these services] must be reviewed by a physician **annually**."[8] 42 C.F.R. § 440.70(b)(3)(i) (emphasis added). Thus, federal law assumes those receiving DME will have chronic conditions, such that only annual physician review is necessary to ensure a recipient's continuing medical need.

Defendants also rely on a state regulation limiting *home health aide* services "to a maximum of 100 home visits per year." Defs' Opp. at 7 (citing 13 C.S.R. 70-90.010(6)). On its face, this limitation only applies to skilled nurse and home health aide visits and does not apply to medical equipment.[9]

Finally, Defendants rely on a state regulation limiting covered home health services to "intermittent skilled nursing care" and "non-routine supplies" identified as specific and necessary to the delivery of that nursing care. See Defs' Opp. at 7 (citing 13

[8] More frequent review is permitted "on a case-by-case basis, based on the nature of the item prescribed." 42 C.F.R. § 440.70(b)(3)(ii).

[9] Moreover, it only affects the number of times per year a person may be visited after they have qualified for services; it in no way authorizes the State to deny home health services *completely* to those who may require more than 100 visits.

C.S.R. § 70-90.010(4)). To the extent that coverage of incontinence products would be precluded by this definition, it violates federal law. Federal regulations do not predicate home health coverage on the need for intermittent skilled nursing care. See Lankford, 451 F.3d at 512; CMS Letter (Ex. 36), at 2-3 (informing Missouri it cannot condition home health aide services or medical equipment and supplies on a need for intermittent skilled nursing care, because "[t]his requirement is not specified in Medicaid law or regulations"); Letter from James G. Scott, Ctrs. for Medicare & Medicaid Servs., to Ronald Levy, Dir. Mo. Dep't Social Servs., at 1 (June 11, 2010) (Ex. 37) ("Medicaid requirements do not allow this type of arrangement"). Federal regulations also expressly require coverage of "medical supplies, equipment, and appliances *suitable for use in the home*;" not coverage of *non-routine* items necessary for a participant's *nursing care*. See 42 C.F.R. §§ 440.70(b)(3), 441.15(a)(3) (requiring home health services to "include, as a minimum . . . [m]edical supplies, equipment, and appliances").[10]

Defendants cannot impose additional, more restrictive conditions on the receipt of medical supplies and equipment beyond what is allowed under federal law. See, e.g., Lankford, 451 F.3d at 512-13; Ex. 11, at 1; 75 Fed Reg. 10289-90 (Mar. 5, 2010) (rejecting Defendants attempt to limit coverage of DME by adding "homebound" and "skilled nursing services" requirements not included in federal law); Comacho v. Texas Workforce Comm'n, 408 F.3d 229, 235 (5th Cir. 2005). Defendants' latest "home health restrictions" are not requirements for receiving medical supplies and equipment under federal regulations or other CMS guidance, and no court has required such. See Plfs'

[10] This interpretation also arbitrarily denies a required service to otherwise eligible recipients "solely because of the diagnosis, type of illness, or condition," and again violates federal law. See 42 C.F.R. § 440.230(c).

Mem. at 12-13 (and cases cited therein). "Medical equipment and supplies" are a distinct component of the home health benefits all Missouri Medicaid residents are entitled to as categorically needy individuals; they need not meet the additional conditions set out in Defendants' brief.

**B. Plaintiffs are Likely to Succeed on the Merits of their ADA Claim**

Defendants also fail to rebut Plaintiffs' claims that the failure to cover their medically necessary incontinence supplies in the community violates the ADA and Section 504. Plfs' Mem. at 14-23. Defendants merely allege that "Missouri has waiver programs designed to help prevent institutionalization" under which diapers could possibly be covered as "special medical supplies." Defs' Opp. at 8. Defendants offer no evidence that these programs, administered by other State agencies, are even available to Plaintiffs or adequate to meet their needs. In fact, these are limited programs with very specific diagnosis requirements and many of them have long waiting lists.[11]

[11] For example, the AIDS waiver requires individuals to have HIV, which none of Plaintiffs have. See AIDS Waiver Manual, § 13.2 – Recipient Conditions of Participation, at p. 4, available at: http://manuals.momed.com/collections/collection_aid/AIDS_Waiver_Section13.pdf. Plaintiffs are ineligible for the Physical Disabilities waiver, as it is only available to a limited number of participants who have participated in or been eligible for private duty nursing through the EPSDT/HCY program and are aging out of that program. See Physical Disabilities Waiver Manual, § 13.1 – Eligibility Criteria, at p. 2, available at http://manuals.momed.com/collections/collection_pdw/Physical_Disabilities_Waiver_Section13.pdf. The Independent Living Waiver requires participants to be capable of *directing their own care* which at least three Plaintiffs clearly cannot do, as evidenced by their declarations. See Home and Community Service Case Management Manual, § 1605.50 (Ex. 38). The new Prevention Waiver, which will only operate in a limited number of counties, is just being implemented, and to date, no written policies (let alone rules) have been issued. The waivers administered by the Missouri Department of Mental Health—the Comprehensive Waiver and the Community Support Waiver—require individuals to show they have mental retardation and/or developmental disability that would require care in an ICF/MR such as a habilitation center, and to either meet strict "emergency" criteria—such as homelessness or danger to one's self or others—or be placed on a waiting list, and no

And, despite seeking help from various State agencies and case managers, whose responsibility it is to seek waiver services for their clients, *none* of the Plaintiffs has been placed in a waiver program. Hilitibran Decl., ¶¶ 9-11, 15-16; Hammond Decl., ¶¶ 10-11 Tatum Decl, ¶¶ 7 ; Coontz Dec. ¶ 8. Instead, they were told to use their own funds or seek *private* sources to pay for their diapers. See , e.g., Tatum Decl., ¶ 7 (instructing Ms. Tatum to go to Catholic Charities for help); Ex. 29 (informing Plaintiff Hiltibran that "if this item is needed, it is the participant's responsibility to purchase"). The bare assertion that Missouri has waivers cannot cure a policy that is illegal on its face. Thus, the existence of waivers does not refute Plaintiffs' ADA and Section 504 claims.

## II. PLAINTIFFS MEET ALL OF THE REMAINING FACTORS FOR A PRELIMINARY INJUNCTION

Plaintiffs continue to suffer ongoing harm as a result of Defendants' illegal policy, which denies them Medicaid coverage of adult diapers. Plfs.' Br. at 23-26 (and declarations cited therein). As previously shown, the loss of *any* Medicaid services establishes irreparable harm as a matter of law. Id. Plaintiffs' irreparable harm is not diminished because that harm is the result of a "longstanding policy." Defs' Opp. at 9. In Lankford, this Court enjoined a policy already in effect for some 20 months because it caused irreparable harm to plaintiffs. U.S. Dist. LEXIS 14950 at *13.

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new persons may be enrolled after the maximum has been reached. See 9 C.S.R. §§ 45-2.015, 45-2.017(1)(E); Mo. Dep't of Mental Health, Missouri's Medicaid Waivers for Persons Who Have Developmental Disabilities (Fact Sheet), http://dmh.mo.gov/mrdd/progs/waiver/factsheet.htm. See also Mo. Dep't of Mental Health, Wait List Reports, http://dmh.mo.gov/mrdd/issues/waitlist/reports.htm; Mo. Dep't of Mental Health Frequently Asked Questions and Answers, http://dmh.mo.gov/mrdd/issues/waitlist/waitfaqs.htm ("Due to limitations on the availability of funding, the Missouri Division of Developmental Disabilities is unable to immediately provide services to all individuals with disabilities").

The Defendants also argue that the mere existence of waivers alleviates harm. Defs' Opp. at 9-10. However, this Court and others have already decided that an after-the-fact, "case-by-case" procedure (even if available) for obtaining non-covered services does not alleviate the irreparable harm caused by unlawfully excluding these services from coverage in the first place. Lankford, 451 F.3d at 512-13; Nemnich, 1992 WL at 178963 at 2. In Nemnich, a case challenging Missouri's denial of optional dental services, this Court rejected Defendants' argument that the ability to apply for an exception negates irreparable harm. 1992 WL at 178963 at 2. Defendants' exceptions process was inadequate because the number of exceptions permitted was capped, there was "no guarantee" of an exception in any particular case, and the application could be a lengthy administrative process, during which plaintiffs and other Missouri Medicaid recipients would continue to suffer irreparable harm.[12] Id. Such back-door procedures (i.e., applying for waivers) are similarly insufficient here, as they suffer from similar restrictions (see supra n. 11), and *all* Plaintiffs have failed to obtain coverage of adult diapers despite seeking help from various State agencies and case managers (see supra p. 11). The mere existence of state "waiver" programs for *some* limited number of individuals who are "actually fac[ing] institutionalization" (Defs' Opp. at 9) is no substitute for coverage of this medically necessary item through the Missouri Medicaid program.[13]

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[12] Reliance on such a system is also unlawful because it fails to ensure that non-experimental, medically necessary services—and eligibility for those services—are provided "in a manner consistent with simplicity of administration and the best interests of recipients." See, e.g., DeLuca v. Hammons, 927 F. Supp. 132, 135-136, n. 6 (S.D. N.Y. 1996) (quoting 42 U.S.C. § 1396a(a)(19)).

[13] In the instant case, as opposed to Nemnich and Lankford, Defendants refuse to make even their limited "Exceptions Process" available to plaintiffs. Ex. 1-4, Plfs' Mem.

Moreover, Defendants' speculation that Plaintiffs could theoretically obtain coverage of medically necessary incontinence briefs through some alternative program at some time in the future does not alleviate the harm they are experiencing now. In Lankford, this Court appropriately found that "Plaintiffs suffer harm from being denied under a **system** that fails to satisfy Medicaid's reasonable-standards requirement." U.S. Dist. LEXIS 14950 at *10 (emphasis added). "Missouri must abide by, and plaintiffs have a right to have a system that abides by, Medicaid requirements." Id. at *11. Plaintiffs in the instant case suffer similar irreparable harm from the State's systemic failure to cover medically necessary services.

Plaintiffs have already shown the balance of the hardships tips clearly in their favor. *Even if* Defendants were to incur some fiscal cost, *as a matter of law* that cost is insignificant compared to the denial of Medicaid services for very low-income Missourians. See Plfs' Mem. at 27-29 (and the cases cited therein).[14] Moreover,

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at 12. However, Defendants' conjecture about obtaining these services through waiver programs administered by other state agencies is similarly inadequate to alleviate Plaintiffs' irreparable harm.

[14] Defendants assert that costs "could be significant to provide briefs to all." Defs' Opp. at 10. Plaintiffs are not asking for any such remedy; rather they are requesting a process by which they can obtain coverage if the supplies are medically necessary. As pointed out in Plaintiffs' earlier memorandum, such costs are insignificant in comparison to the nursing home costs that could be incurred without coverage of these items. Defendants' complaint about the alleged "administrative burden" of having to amend their state plan pending preliminary relief is unpersuasive. Defendants currently do not list *every* DME item or supply in their plan. They merely list "examples" and indicate that "medically necessary items of miscellaneous durable medical equipment are covered and provided through the MO HealthNet Durable Medical Equipment Program." Ex.33. Moreover, Defendants did not need to amend their plan prior to implementing this Court's injunctive order in Lankford. Thus, while Plaintiffs do not concede any administrative burden, Defendants do not need to amend their state plan in order to provide relief to the Plaintiffs. Federal funding for complying with the Court order (currently at 74 cents of every dollar spent), is also not an issue. See 42 C.F.R. § 431.250(b)(2) (providing federal funding for provision of services pursuant to a court

Plaintiffs submit that the public "has a compelling interest in carrying out the Medicaid program" **in compliance with federal law**. See Defs' Opp. at 10; Plfs' Mem. at 29. Because Plaintiffs meet all of the relevant factors, this Court should preliminarily enjoin Defendant from continuing to deny adult incontinence briefs to Plaintiffs in violation of the "reasonable standards" provisions of the Medicaid Act, [15] as well as the integration mandate of the ADA.

**Conclusion**

For the reasons stated above and in Plaintiffs' opening memorandum, as well as binding Eighth Circuit precedent, this Court should grant Plaintiffs' Motion for a Preliminary Injunction.

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order). See also infra note 15 for a list of cases granting preliminary relief in similar circumstances.

[15] See, e.g., Kai v. Ross, 336 F.3d 650 (8th Cir. 2003) (preliminarily enjoining state to continue benefits after finding state law consistent with Medicaid Act); Weaver v. Reagen, 886 F.2d 194 (8th Cir. 1989) (enjoining Missouri from denying Medicaid coverage of AZT); Olson v. Norman, 830 F.2d 811 (8th Cir. 1987) (sustaining permanent injunction against state's unlawful termination of Medicaid benefits); White v. Martin, 2002 U.S. Dist. LEXIS 27281 (W.D. Mo. 2002) (preliminarily enjoining Missouri to provide transitional Medicaid benefits); Nemnich v. Stangler, 1992 WL 178963 (W.D. Mo. 1991) (preliminarily enjoining Missouri from denying Medicaid coverage of dental services); McNeil-Terry v. Roling, 142 S.W.3d 828, 834 (Mo. Ct. App. 2004) (preliminarily and permanently enjoining Missouri Medicaid agency from reducing scope of necessary dental services through rulemaking or other non-statutory means); J.D. v. Sherman, No. 06-4153-CV-C-NKL, 2006 U.S. Dist. LEXIS 78446, at *10 (W.D. Mo. 2006) (preliminarily enjoining Missouri Medicaid agency to cover medically necessary transplant services); Lankford, No. 05-4285-CV-C-DW, 2007 U.S. Dist. LEXIS 14950, at *14 (preliminarily enjoining Missouri Medicaid agency from continuing to deny medically necessary DME).

Respectf ully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 18, 2010, I electronically filed the foregoing with the clerk of the Court using the CM/ECF system which sent notification of such filing to the following counsel of record:

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