IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BILL M., *et al.*,	)	
	)	**Case No. 4:03CV3189**
Plaintiffs,	)	
	)	
vs.	)	**PLAINTIFFS'**
	)	**MEMORANDUM**
NEBRASKA DEPARTMENT OF HEALTH	)	**BRIEF IN**
AND HUMAN SERVICES FINANCE AND	)	**OPPOSITION TO**
SUPPORT, *et al.*,	)	**DEFENDANTS'**
	)	**MOTION TO DISMISS**
Defendants.	)	**AMENDED COMPLAINT**

INTRODUCTION

On August 28, 2003, the Representative Plaintiffs in this action filed an amended complaint, (Filing 23), on behalf of themselves and other persons with similar disabilities. The Plaintiffs seek declaratory and injunctive relief, alleging that the Defendants and their agents (hereinafter "Defendants") failed to provide Plaintiffs with funds for the home and community-based developmental disability services for which they are eligible, in violation of the Medical Assistance Act (hereinafter"Medicaid") 42 U.S.C. §1396 *et seq.*; the Americans with Disabilities Act of 1990 as amended, and its implementing regulations, (hereinafter "ADA"), 42 U.S.C. § 12101 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (hereinafter "Section 504"); and 42 U.S.C. §1983. The representative Plaintiffs are eligible for, desire, have applied for or have attempted to apply for, and have been denied home and community-based Medicaid-funded services, available pursuant to the Home and Community

Based Waiver Program (hereinafter "the Waiver Program"), 42 U.S.C. § 1396 (n), and *Neb. Rev. Stat.* § 68-1018 *et seq.*, and its implementing regulations.

Plaintiffs have been unable to gain access to these critical services because Defendants have unlawfully restricted funding to the Waiver program, resulting in: 1) unlawful extended waiting periods to receive any community-based services, and 2) the failure to provide services to Plaintiffs which are sufficient in amount, duration, and scope to fulfill their purpose; ensure their health and safety; and to increase or maintain independent functioning, self-determination, interdependence, productivity, and community integration. Based on the Defendants' actions, the Representative Plaintiffs, and all those similar individuals, are at imminent risk of unnecessary institutionalization or are institutionalized in Intermediate Care Facilities for the Mentally Retarded (hereinafter "ICF/MR") or other institutions.

On October 10, 2003, the Defendants filed a Motion to Dismiss Amended Complaint, (Filing 30) and a supporting Brief, (Filing 31). The Defendants have moved to dismiss portions of the Plaintiffs' claim. First, the Defendants argue that the Plaintiffs are not entitled to injunctive relief because they have an adequate remedy at law. (Filing 31, Defendants' Brief at 10). Second, the Defendants argue the Plaintiffs are not entitled to declaratory relief because they have another, more appropriate remedy. (Filing 31, Defendants' Brief at 12). Third, the Defendants suggest claims against NDHHS and Finance and Support

are barred by the 11th Amendment. (Filing 31, Defendants' Brief at 13).

Fourth, the Defendants argue the Plaintiffs' First and Second Claims for Relief must be dismissed because they fail to show that the Plaintiffs were discriminated against on the basis of their disability. (Filing 31, Defendants' Brief at 15). Fifth, the Defendants argue the Plaintiffs' First and Second Claims for relief are not yet ripe. (Filing 31, Defendants' Brief at 22). Sixth, the Defendants argue the Plaintiffs' First and Second Claims for Relief must be dismissed because Plaintiffs have not shown that they meet essential eligibility requirements as required by the ADA and Section 504. (Filing 31, Defendants' Brief at 26). Seventh, the Defendants argue the Plaintiffs' Third, Fourth, and Fifth claims must be dismissed because they are based on Medicaid statutes and regulations and the Plaintiffs have not pled facts showing that the additional services they demand would be covered by Medicaid. (Filing 31, Defendants' Brief at 23).

The Eighth argument asserted by the Defendants suggests the Plaintiffs' Sixth and Seventh Claims for Relief must be dismissed because they are based wholly on state law and not a federally protected right. (Filing 31, Defendants' Brief at 27). Finally, the Defendants argue the Plaintiffs' Seventh Claim for Relief does not include facts showing that the Plaintiffs were damaged. (Filing 31, Defendants' Brief at 30). Each of the Defendants' contentions are without merit, and this Court should deny each aspect of the Defendants' Motion to Dismiss for the following reasons.

STANDARD ON RULING ON A MOTION TO DISMISS

In considering a Motion to Dismiss, the Court must accept the allegations contained in the complaint to be true. *United States v. Gaubert*, 499 U.S. 315, 327 (1991). *Doe v. Norwest Bank of Minnesota*, 107 F.3d 1297, 1304 (8th Cir. 1997) (citing *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994)). "In construing a Motion to Dismiss, [the Court] must construe all facts alleged in the complaint are true, construe the complaint liberally in the **light most favorable to the plaintiff**, and affirm the dismissal **only if 'it appears beyond a doubt that the plaintiff can prove no set of facts that would entitle the plaintiff to relief.'**" *Lynch v. Omaha World-Herald Co.*, 2003 WL21339670 (D.Neb.); *Wellmark, Inc. v. Deguara*, 257 F.Supp. 2d 1209 (S.D. Iowa, 2003); and *De Wit v. Firstar Corp.*, 879 F.Supp. 947, 959 (N.D. Iowa 1995) (emphasis added). In addition, the Court is to make all reasonable inferences in favor of the non-moving party. *McCormack v. Citibank, N.A.*, 979 F.2d 643, 646 (8th Cir. 1992). Dismissal is to be the exception, rather than the rule, and should occur "only in the 'unusual case' where the complaint on its face reveals some insuperable bar to relief." *De Wit*, at 959 (citing *Fusco v. Xerox Corp.*, 676 F.2d 332 (8th Cir. 1982)). The Court should not determine whether the plaintiff will ultimately prevail, but rather whether the plaintiff is entitled to present evidence in support of his or her claim. *Swartzbaugh v. State Farm Ins. Cos.*, 924 F. Supp 932 (E.D. Mo. 1995).

I.
PLAINTIFFS' COMPLAINT PROPERLY SEEKS DECLARATORY AND INJUNCTIVE RELIEF.

First, the Defendants argue that the Plaintiffs are not entitled to Declaratory Relief pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure based on the assertion the state administrative appeal procedure is a more appropriate remedy. (Filing 31, Defendants' Brief at 12). Second, the Defendants argue that the Plaintiffs are not entitled to Injunctive Relief pursuant to 28 U.S.C. § 2202, 42 U.S.C. §1983, and Rule 65 of the Federal Rules of Civil Procedure because Plaintiffs have an appropriate remedy at law. (Filing 31, Defendants' Brief at 10).

The Defendants' Motion to Dismiss the Plaintiffs' claims based on the aforementioned assertions must be denied for the following reasons. First, the Defendants cannot challenge the propriety of this action on the grounds the Plaintiffs have not exhausted state remedies because the Plaintiffs have alleged deprivations under color of state law of rights secured under the United States Constitution and Acts of Congress. (Filing 31, Amended Complaint at 1-2). The doctrine of non-exhaustion of state administrative remedies applies in the instant case and has been followed by this Court, "[o]rdinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. §1983 need not exhaust administrative remedies before filing suit in court." *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed. 2d (2002). *See*, *Patsy v. Board of Regents,* 102 S.Ct. 2557, 457 U.S. 496,

73 L.Ed.2d 172 (1982)(state procedural barriers will not be allowed to thwart the vindication of a federal right). *Green v. Ten Eyck*, 572 F. 2d 1233, 1239 (8th Cir. 1978).

Additionally, according to the Federal Rules, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Fed. R. Civ. P. 57. Furthermore, a request for declaratory relief may be considered independently of whether other forms of relief are appropriate. *Powell v. McCormack*, 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed. 2d 491 (1969). Although the state administrative appeal process exists, it is hardly an adequate or a more appropriate remedy for the claims raised by the Plaintiffs.

First, the Defendants have failed to acknowledge the limitations of their own administrative appeal procedure. Specifically, the state administrative appeal process lacks jurisdiction to address the deprivation of federal rights alleged by the Plaintiffs. The Defendants purport that the use of the State administrative appeal procedures set forth under *Neb. Rev. Stat.* § 83-1219 (Reissue 1999) is the appropriate forum for the Plaintiffs' claims. (Filing 31 Defendants' Brief at 10-13). This is patently incorrect. The Defendants exhibit a profound misunderstanding of the claims raised by the Plaintiffs, "[t]he essence of their allegations is that each applied for additional DD services, and was denied." (Filing 31, Defendants Brief at 10). More accurately, the Plaintiffs allege

that the actual mechanism the Defendants employ to allocate services under the Federal Medicaid Home and Community Based Waiver Services is flawed. Furthermore, due to the Defendants' failure to appropriately administer the Waiver Program, the Plaintiffs are at risk of being unnecessarily placed at ICF/MR facilities, nursing homes, or other institutional settings, contrary to applicable law.[1]

Second, according to the Defendants' own administrative rules and regulations, appeals are limited to the following areas:

> 05.01 Appeals are limited to the application of regulations regarding, or on any actions or decisions by the Department or a provider on matters relating to: 005.01A The initiation, change or termination of eligibility for specialized services; 005.01B The refusal to initiate, change or terminate the determination of eligibility for specialized services; 005.01C The assessment or placement of the person; or 005.01D The provision of specialized services or records relating thereto.

205 NAC 005.01. Hence, appeals under the administrative process are limited to the rights set forth under Title 205 of the Nebraska Administrative Code. The administrative appeal process is not the appropriate forum for the adjudication of systemic violations of Federal and State law. For each of these reasons, the Plaintiffs respectfully request that this Court deny the Defendants' Motion to

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1 The Plaintiffs' Amended Complaint alleges violations of the Medical Assistance Act, 42 U.S.C. § 1396 et seq; the Americans with Disabilities Act of 1990, and its implementing regulations, 42 U.S.C. § 12101 et seq. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, 47 U.S.C. § 1983 and the United States Constitution.

Dismiss for the Plaintiffs claims on the grounds of non-exhaustion of state remedies.

II.
NDHHS AND FINANCE AND SUPPORT VOLUNTARILY ACCEPT FEDERAL FUNDS AND THUS WAIVE THEIR ELEVENTH AMENDMENT IMMUNITY TO LAWSUITS BROUGHT IN FEDERAL COURT FOR VIOLATIONS OF SECTION 504 OF THE REHABILITATION ACT.

First, the Defendants argue that the State itself, and therefore its agencies by extension, generally may not be sued unless the State expressly waives its immunity. (Filing 31, Defendants' Brief at 13-15). The Defendants do concede, however, that "[e]ven in the absence of express waiver by the State, Congress may, by unequivocal legislation, abrogate the states' Eleventh Amendment immunity." (Filing 31, Defendants' Brief at 15-16). Therefore, the Defendants' Motion to Dismiss the Plaintiffs' Section 504 claim based on Eleventh Amendment immunity must be denied.

Moreover, Defendants offer no authority for their claim of state immunity from suit under Section 504 on the basis that no such supporting authority exists. In direct contradiction to the Defendants' assertion, the Eighth Circuit Court of Appeals has held explicitly that Congress **did** act pursuant to a valid exercise of power in enacting Section 504 of the Rehabilitation Act. *Doe v. The State of Nebraska*, 345 F.3d 593, (8th Cir. 2003)(emphasis added), citing *Jim C. v. United States* (intervening on appeal), 235 F.3d 1079 (8th Cir. 2000). In *Doe*, the Plaintiffs, an adoptive mother, through her estate, and her adopted son, brought

suit under Section 504 of the Rehabilitation Act. *Id.* at 595. The Defendants, the Nebraska Department of Health and Human Services, and various state officials, moved for summary judgment on the § 504 claim on the ground that they are immune from suit under the Eleventh Amendment. *Id.* at 596. The District Court denied the motion, holding, *inter alia*, that the defendants had waived their sovereign immunity, pursuant to the waiver provision of § 504, 42 U.S.C. § 2000d-7, by accepting federal funds for their foster care and adoption programs. *Id.* On appeal, the Eighth Circuit held that **any state agency that accepts federal funds waives its Eleventh Amendment immunity to suits brought in federal court for violations of Section 504 of the Rehabilitation Act**. *Id.* at 597(emphasis added).

NDHHS and Finance and Support are both agencies of the State of Nebraska. (Filing 31, Defendants' Brief at 4). Defendants also concede that they are both departments which are responsible for implementation of, and compliance with, Nebraska's Medicaid plan. *Neb. Rev. Stat.* §§ 68-1019 *et. seq.*; 83-3101 to 3108; and 68-1035.01. (Filing 31, Defendants' Brief at 4). Furthermore, the State of Nebraska chooses to participate in the federal Medicaid program and accepts federal funds for use by the agencies in implementing the program. (Filing 31, Defendants' Brief at 4). In accordance with the 8th Circuit's recent decision in *Doe* and since both NDHHS and Finance and Support have received federal funds, they clearly have waived their Eleventh

Amendment immunity to suits brought in federal court for violations of Section 504 of the Rehabilitation Act in this case. Therefore, the Defendants' Motion to Dismiss the Plaintiffs' Section 504 claim on the grounds of Eleventh Amendment immunity must be denied.

Furthermore, the Defendants' Motion to Dismiss the Plaintiffs' ADA claim on the grounds of Eleventh Amendment immunity must be denied. In *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000), the Eighth Circuit held that 42 U.S.C. § 2000 d-7 (a)(1) was a valid exercise of Congress' spending power, and incident to its spending power, Congress may attach conditions on the receipt of federal funds, "[s]pecifically, Congress may require a waiver of state sovereign immunity as a condition of securing federal funds, even though Congress could not order the waiver directly." *Id.* at 1081, citing *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*, 144 L.Ed. 2d 605, 119 S.Ct. 2219, 2231 (1999).

Specifically, 42 U.S.C. § 2000 d-7 (a)(1) states:

> A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of Section 504 of the Rehabilitation Act, the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, or the provisions of any other federal statute prohibiting discrimination by recipients of Federal financial assistance.

The ADA is a federal statute prohibiting discrimination and the agency Defendants are recipients of federal financial assistance in the relevant form of Medicaid. More recently, *Doe v. The State of Nebraska*, 345 F.3d 593, (8th Cir.

2003), held that NDHHS's receipt of federal funds effected a knowing waiver by contract of its sovereign immunity to actions brought under Title II of the ADA as well as Section 504 of the Rehabilitation Act.

Therefore, Congress validly required a waiver of state sovereign immunity for a suit based on violations of federal discrimination statutes, including the ADA, as a condition for receiving federal funds, including Medicaid. Perhaps, such waiver of state sovereign immunity explains why the U.S. Supreme Court decided the merits of *Olmstead v. L.C.*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed. 2d 540 (1999), a case very similar in nature as the instant case. The Court decided *Olmstead*, even though long-standing federal court doctrine requires a federal court to refuse to decide a case on its merits until it has first determined it has jurisdiction. *See*, *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 287 L.Ed. 462 (1884); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed. 2d 210 (1998). If a suit against a state, pursuant to the ADA, for discrimination in the operation of federally-funded programs for persons with mental disabilities violated the Eleventh Amendment as the Defendants argue, then the Supreme Court could not have proceeded to decide the merits of the ADA claim in *Olmstead*.

III.
SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT DOES NOT DEFEAT PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF UNDER THE ADA.

As shown above, Defendant agencies have waived sovereign immunity to

suits brought under the ADA and Section 504 of the Rehabilitation Act in the operation of the State's Medicaid program by virtue of their receipt of federal Medicaid funds. In addition, even in the absence of such a contractual waiver, sovereign immunity is no bar to an action seeking injunctive relief. Defendants may be compelled to comply with federal law via suit for declaratory and injunctive relief notwithstanding sovereignty. *See*, *Ex parte Young*, 209 U.S. at 155-56. *Ex parte Young* reconciles the mandate of the Supremacy Clause, U.S. Const. art. VI § 2, with the principles of federalism represented by the Eleventh Amendment, U.S. Const. amend. XI, by permitting suits for injunctive relief to comply prospectively with federal law. *See*, *Alden v. Maine*, 119 S.Ct. at 2263 ("suits for declaratory and injunctive relief against state officers . . . must be permitted if the Constitution is to remain the supreme law of the land"); *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed. 2d 371 (1985).

The ADA may be enforced through *Ex parte Young*. *See*, *J.B. v. Valdez*, 186 F.3d at 1286-87; *Nelson v. Miller*, 170 F.3d at 1271; *Henrietta D. v. Giuliani*, 81 F.Supp.2d 425, 430 (E.D.N.Y. 2000); *Salcido v. Woodbury County*, 66 F.Supp.2d 1035, 1042-45 (N.D. Iowa 1999); *Uttilla v. City of Memphis*, 40 F.Supp.2d 968, 975-978 (W.D. Tenn. 1999, (aff'd, 200 U.S. App. LEXIS 3228 (6th Cir. Feb. 23, 2000). Accordingly, without regard to the effectiveness of the abrogation in the ADA, §12202, Defendants may be compelled to comply prospectively with the ADA.

A recent case involving Title of the ADA, *In Board of Trustees of the University of Alabama v. Garrett*, 121 S.Ct. 955, (2001), the Court clearly confirmed that sovereign immunity does not excuse a state agency from compliance with federal law, and such agencies may be compelled to comply with federal law by an action for declaratory and injunctive relief against the appropriate state officer. In *Garrett*, the United States Supreme Court ruled that individuals could not sue states or their agencies for **monetary damages**, but specifically indicated that suits for **injunctive relief** would be allowed. *Id.* at 968 n.9 (emphasis added). Additionally, it is important to note that in *Garrett*, the defendant was the actual Board of Trustees, not simply the Trustees in their official capacities. *Id.* at 958.

Combining the language of this footnote with the factual basis of this case, it follows that individuals can bring "actions for injunctive relief under *Ex parte Young*" against not only agents of a state in their official capacities, but also against the state itself or its agencies. (quoting *Garrett* at 968 n.9). The defendant in *Garrett* was the actual Board of Trustees, not simply the Trustees in their official capacities. *Id.* at 958. Therefore, the Defendants' motion to dismiss the Plaintiffs' ADA claim for injunctive relief as it relates to NDHHS and NDHHS Finance and Support must be denied.

Moreover, the Plaintiffs urge this Court to recognize that the Defendants' immunity arguments are based on *Alsbrook v. City Maumelle,* 184 F.3d 999 (8th Cir. 1999). However, the 8th Circuit in *Gibson v. Arkansas Department of*