IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ISAAC A., et al., Plaintiffs, v. RUSSEL CARLSON, et al., Defendants.	Civil Action No. 1:24-cv-00037-AT

DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss the class complaint for lack of subject-matter jurisdiction and failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), (6).

Dated: March 4, 2024

Respectfully submitted,

/s/ Bryan K. Webb
Christopher M. Carr
Attorney General
Georgia Bar No. 112505
Bryan K. Webb
Deputy Attorney General
Georgia Bar No. 743580
Georgia Department of Law
40 Capitol Square SW
Atlanta, Georgia, 30334
404-458-3408
bwebb@law.ga.gov

Attorneys for Defendants

/s/ Patrick Strawbridge
Patrick Strawbridge*
Consovoy McCarthy PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Frank H. Chang*
C'Zar Bernstein*
Consovoy McCarthy PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
**pro hac vice*

CERTIFICATE OF SERVICE

I certify that I filed this document through the CM/ECF system.

/s/ Patrick Strawbridge

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DEFENDANTS' MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS

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INTRODUCTION

The Georgia Advocacy Office filed this lawsuit on behalf of four individuals and unidentified "Children." Plaintiffs allege that they need as-yet-uncreated "Remedial Services." Instead of Georgia's *existing* services, they want this Court to order Georgia to create and provide *new* services. Plaintiffs seek that sweeping relief even though they don't allege that their doctors determined that community placement is appropriate, that their doctors think the Remedial Services are medically necessary, or that they had requested the required screenings or the Remedial Services. The Medicaid Act, ADA, and Rehabilitation Act do not mandate Plaintiffs' preferred service structure. But this Court need not even reach the merits because Plaintiffs' "shotgun pleading" violates basic pleading rules, is barred by sovereign immunity, and fails to allege Article III and prudential standing.

BACKGROUND

I. Legal Background

A. The Medicaid Act

Congress enacted the Medicaid Act under its spending power. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323 (2015). Medicaid is a "contract." *Id.* at 328. Congress "offers federal funding to states to assist" the needy "in obtaining medical care." *NFIB v. Sebelius*, 567 U.S. 519, 541 (2012). If a state accepts, it "must comply with federal criteria governing matters such as who receives care and what services are provided at what cost." *Id.* at 541-42. Yet states maintain broad discretion in implementing their plans. *Moore v. Reese*, 637 F.3d 1220, 1248, 1255 (11th

Cir. 2011). "In Georgia, [the Department of Community Health] is the single state agency tasked with administering the Medicaid program." *Id.* at 1233.

Under Medicaid, the state must adopt a "plan for medical assistance," 42 U.S.C. §1396a(a), that the "Secretary [of Health and Human Services] shall approve" if it "fulfills the conditions specified in subsection (a)," §1396a(b). Subsection (a), in turn, has three relevant operative conditions. First, the "State Plan … must … provide … for making *medical assistance* available" within the meaning of "section 1396d(a)." §1396a(a)(10)(A) (emphasis added). Second, the plan must "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." §1396a(a)(8). Finally, the plan must "provide for" the following:

> (A) informing all persons in the State who are under the age of 21 … of the availability of *early and periodic screening, diagnostic, and treatment services* as described in section 1396d(r) of this title …,
>
> (B) providing or arranging for the provision of such screening services in all cases where they are requested, [and]
>
> (C) arranging for … corrective treatment the need for which is disclosed by such child health screening services[.]

§1396a(a)(43) (emphasis added).

The Act defines two relevant concepts in §1396d. First, the "term 'medical assistance' means payment of part or all of the cost of [identified] care and services or the care and services themselves, or both." §1396d(a). The Act then identifies

the services within the meaning of "medical assistance." The first relevant services are "early and periodic screening, diagnostic, and treatment services (as defined in subsection (r)) for individuals … under the age of 21." §1396d(a)(4)(B). The second are "other diagnostic, screening, preventative, and rehabilitative services, including … remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner[.]" §1396d(a)(13)(C).

Second, Congress enacted §1396d(r) to "provide EPSDT services to all Medicaid-eligible persons under the age of 21." *Moore*, 637 F.3d at 1233. The "term 'early and periodic screening, diagnostic, and treatment services' means" screening, vision, dental, hearing, and "other … measures described in subsection (a)." §1396d(r)(1)-(5). Relevant here, "[s]creening services" are those "provided … at intervals which meet reasonable standards of medical … practice, as determined by the State" and provided "at such other intervals, indicated as medically necessary." §1396d(r)(1)(A)(i)-(ii). The phrase includes "other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) to … ameliorate … mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." §1396d(r)(5). Under §1396d(r)(5), the State's obligations include only those measures "that are (1) outlined in § 1396d(a) and (2) necessary to correct or ameliorate conditions discovered by the screening services, (3) regardless of whether a state plan provides such services to adults." *Moore*, 637 F.3d at 1233 (cleaned up).

Putting all this together, plans must "mak[e] … available," §1396a(a)(10), screening services, §1396d(a)(4)(B), (r)(1)(A), and "remedial services … recommended by a physician or other licensed practitioner," §1396d(a)(13)(C), to ameliorate "conditions discovered by the screening services," §1396d(r)(5). Beneficiaries must "request[]" screening services before the plan must "arrang[e] for … corrective treatment the need for which is disclosed by such … screening services." §1396a(a)(43). And the plan must provide "remedial services" "with reasonable promptness" to those who "make application for" them. §§1396a(a)(8), 1396d(a)(13)(C).

As for enforcement, "Congress expressly conferred" only "the withholding of federal funds." *Does v. Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017). The Secretary "shall" do so if he "finds … that … there is a failure to comply substantially with" section 1396a. §1396c.

B. The ADA and Rehabilitation Act

Title II of the ADA and the Rehabilitation Act are anti-discrimination provisions. The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. The Rehabilitation Act is similar: "No otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits

of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. §794(a). Under implementing regulations, the public entity must administer services in "the most integrated setting appropriate." 28 C.F.R. §35.130(d) (ADA); *see also* 28 C.F.R. §41.51(d) (Rehabilitation Act).

II. Factual Background

A. Plaintiffs' "Remedial Services"

Plaintiffs seek "to compel" the state to provide what they call "Remedial Services." Compl. ¶¶1, 3. Plaintiffs say that Georgia currently does not provide the Remedial Services to "any child." ¶7. Plaintiffs define Remedial Services to include "Intensive Care Coordination, Intensive In-Home Services, and Mobile Crisis Response Services." ¶1. Plaintiffs assert that these services are defined in an "informational bulletin." ¶1 & n.1. "Intensive care coordination includes assessment" and coordination for various services including crisis responses. Cindy Mann, *Joint CMCS and SAMHSA Informational Bulletin*, at 3 (2013), perma.cc/7U4F-P34P. "Intensive in-home services are therapeutic interventions delivered to children … in their homes and other community settings to improve youth and family functioning and prevent out-of-home placement." *Id.* at 4. And "[m]obile crisis services are available 24/7" at home or elsewhere "where a crisis may be occurring" for "children and families needing help on an emergency basis." *Id.* at 5.

Georgia's Medicaid plan already includes "three Specialty Services" that *sound* like the Remedial Services: "Intensive Customized Care Coordination (IC3),

Intensive Family Intervention (IFI), and Mobile Crisis." ¶145. Plaintiffs still allege that they "are not the Remedial Services" they want. *Id.*

IC3. Plaintiffs admit that IC3 is "Georgia's intensive care coordination service" that "is intended to benefit children … who need Intensive Care Coordination." ¶¶150-51. But this is not the Remedial Service that Plaintiffs want (Intensive Care Coordination). ¶¶1, 7, 239.

IFI. Plaintiffs allege that the "IFI service … is not the functional equivalent of Intensive In-Home Services." ¶145. They allege that IFI "is a short-term, crisis-focused intervention that specifically excludes some children based upon diagnosis." ¶145. Plaintiffs allege that a service counts as Intensive In-Home Services only if it's provided for an *unlimited* period. *See* ¶164. IFI is thus not the Remedial Service that Plaintiffs want (Intensive In-Home Services). *See* ¶¶1, 7, 239.

Georgia Crisis and Access Line. The federal government confirms that Georgia's mobile crisis response "exemplifies many of the best practices," is a "national leader," and is provided "24/7/365 throughout the state."[1] Plaintiffs still allege that it is not "available in a timely way to the Children" without specifying which children. ¶175. They allege that unidentified families "report" "wait[ing] hours for

[1] SAMHSA, *Fact Sheet: Spotlight on Georgia's Mental Health and Substance Use Crisis Care* (last visited Mar. 4, 2024), perma.cc/TJ5C-EKXA. This Court "may take judicial notice of government websites." *Lamonte v. City of Hampton*, 576 F. Supp. 3d 1314, 1327 n.12 (N.D. Ga. 2021); *Chapman v. Abbott Labs.*, 930 F. Supp. 2d 1321, 1323 (M.D. Fla. 2013); Fed. R. Evid. 201(b)(2).

a mobile crisis response." ¶179. Again, this is not the Remedial Service that Plaintiffs want (Mobile Crisis Response Services). ¶¶1, 7.

B. This lawsuit

Plaintiffs sued the DCH, DBHDD, and DHS Commissioners for allegedly violating the Medicaid Act, ADA, and Rehabilitation Act. ¶¶209-33. The individual Plaintiffs are children A, B, C, and D. ¶¶22-64. They each suffer from "multiple mental health conditions." ¶¶24-25, 36, 47, 57. They allege that they "currently nee[d], but [are] not receiving, the Remedial Services." ¶¶33, 44, 54, 64. GAO sues "on behalf of its constituents." ¶¶6, 67. Out of 208 paragraphs, only about 50 pertain clearly to A, B, C, and D. ¶¶22-64, 66-70. A and B allege that they are in inpatient treatment and under DFCS's legal custody. ¶¶33, 44. C alleges that his treatment team recommended discharge from inpatient treatment but remains in inpatient treatment because his mother refused to pick him up. ¶53. D alleges that he is home with his family. ¶63. The complaint is filled with allegations about "the Children" generally, which includes unknown "constituents." ¶¶4, 69.

The complaint alleges that the state must provide "the Children" all the Remedial Services. *E.g.*, ¶¶8-9, 16, 223, 231. It alleges that they "are deprived of necessary services in their homes and communities." ¶1. It also alleges that they are "subjected to unnecessary institutionalization because responsible agencies" don't provide the Remedial Services. ¶1. And it claims that Georgia's failure to provide the Remedial Services violates federal law. ¶¶209-33.

Plaintiffs seek sweeping declaratory and injunctive relief. ¶¶234-40. They want to "compel" the state to provide Remedial Services. ¶¶6, 16, 238-39. The injunction would require Georgia to "[e]stablish and implement policies, procedures, and practices" to provide them. ¶239(d). And it would require Georgia to make new rules to establish "comprehensive discharge planning and connection to the Remedial Services upon discharge from a Psychiatric Institution." ¶239(g).

ARGUMENT

This Court should dismiss the complaint for six reasons. Fed. R. Civ. P. 12(b)(1), (6). ***First***, Plaintiffs improperly filed a shotgun pleading. ***Second***, sovereign immunity bars the Medicaid Act and ADA claims. ***Third***, Plaintiffs lack Article III and prudential standing. ***Fourth***, Plaintiffs' requested relief violates the anticommandeering principle. ***Fifth***, Plaintiffs fail to state Medicaid claims. ***Sixth***, Plaintiffs fail to state ADA and Rehabilitation Act claims.

I. Plaintiffs improperly filed a shotgun pleading.

Shotgun pleadings "'are flatly forbidden.'" *Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021). The complaint should be dismissed for four reasons.

First, every count incorporates every allegation, including those "of any count or counts that precede it." *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001). The counts do so without referencing "the previous allegations." *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006); ¶¶209, 214, 218, 226. They obfuscate by omitting "several material facts in Count[s]" I to IV about A, B,

C, and D. *See Strategic Income Fund, LLC v. Spear, Leeds & Kellog Corp.*, 305 F.3d 1293, 1296 (11th Cir. 2002). When one goes back dozens of irrelevant allegations to the ones about A, B, C, and D, the "passive, rather than the active, voice"[2] causes further "obfuscation." *Id.* Plaintiffs' tack violates the "prohibition on shotgun pleadings." *Moore v. Noggle*, 2022 WL 205331, at *3 n.3 (N.D. Ga.).

Second, the complaint is "replete with conclusory, vague, and immaterial facts." *Barmapov*, 986 F.3d at 1325. General allegations about "the Children" apparently refer to an entire class of unidentified children. ¶4. It's impossible to know whether those allegations are true of *all* such children or any of A, B, C, and D.[3] Because they incorporate *all* allegations, the "counts include [ones] that are immaterial to the underlying causes of action" for A, B, C, and D. *Barmapov*, 986 F.3d at 1325. And the complaint "offers no explanation," *id.* at 1326, why each of the Remedial Services is medically necessary for each of A, B, C, and D. ¶22-64.

Third, Plaintiffs' complaint "lumps multiple claims together in one count[.]" *Ledford v. Peeples*, 657 F.3d 1222, 1239 (11th Cir. 2011). Count I "mixes together" alleged violations of at least four Medicaid provisions. *Solar Star Sys., LLC v. Bellsouth Tele., Inc.*, 2011 WL 3648267, at *6 (S.D. Fla.). But each "provision in question" might give rise to a distinct claim. *Blessing v. Freestone*, 520 U.S. 329, 342 (1997);

[2] *E.g.*, Compl. ¶¶1, 27-28, 30, 39, 41, 47, 50-51, 58-59, 61-62.

[3] *E.g.*, Compl. ¶¶4, 14, 145, 156, 157, 159, 166, 167, 168, 169, 175, 182, 183, 185, 193, 196, 198, 210, 212, 216, 221-23, 230-31.

infra 30-43. Plaintiffs implicitly assert at least *eight* potential claims in just two paragraphs. ¶¶210-11. They don't even explicitly assert those separate claims for A, B, C, and D. Plaintiffs therefore (at best) implicitly allege different claims for each based on different facts, all in one count. ¶¶22-64. Counts III and IV fare no better. Count III potentially alleges three ADA claims *in a single paragraph* of a single count. ¶222. Count IV likewise potentially advances multiple claims. ¶¶229-31. The complaint violates Rule 10(b)'s "'one claim per count' rule." *Woodburn v. Fla. Dep't of Child & Fam. Servs.*, 854 F. Supp. 2d 1184, 1204-05 (S.D. Fla. 2011).

Finally, Counts III and IV assert "multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions[.]" *Barmapov*, 986 F.3d at 1325. DCH, DBHDD, and DHS Commissioners all have varied responsibilities. Yet, Plaintiffs allege generally that "Defendants' actions" and "inactions" violate the ADA and Rehabilitation Act. ¶¶222-23, 229-31. They do not identify which Defendant is responsible for which acts or omissions that allegedly injured which of A, B, C, or D. The complaint should therefore be "dismissed." *Barmapov*, 986 F.3d at 1326; *Moore*, 2022 WL 205331, at *3 n.3; *Woodburn*, 854 F. Supp. 2d at 1205; *Solar Star*, 2011 WL 3648267, at *6.

II. Sovereign immunity bars Plaintiffs' Medicaid Act and ADA claims.

Georgia's sovereign immunity extends to "state officials when 'the state is the real, substantial party in interest.'" *Pennhurst v. Halderman*, 465 U.S. 89, 101 (1984). "[A] suit against state officials that is in fact a suit against a State is barred

regardless of whether it seeks damages or injunctive relief." *Id.* at 101-02. Here, DCH, DBHDD, and DHS each enjoy immunity. *McClendon v. Ga. DCH*, 261 F.3d 1252, 1259 (11th Cir. 2001). The relief Plaintiffs seek (¶¶236-41) would "'expend itself on the public treasury or domain,'" "'interfere with the public administration,'" and "'compel [the State] to act.'" *Pennhurst*, 465 U.S. at 101 n.11. So the State is immune unless an exception applies.

Sovereign immunity is subject to three exceptions. First, Plaintiffs' suit is barred unless the state has "unequivocally" waived its immunity. *Id.* at 99-100. Second, it is barred unless Congress has validly and "unequivocal[ly]" abrogated immunity. *Id.* Finally, courts pretend that an official is not acting for the state when a plaintiff sues for a continuing violation of federal law and seeks only certain prospective relief. *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

A. The State is immune from Plaintiffs' Medicaid claims.

The first two exceptions do not apply to Plaintiffs' Medicaid claims. ¶¶17, 214-25. Georgia has not waived its immunity. Ga. Const. art. I, §2 ¶IX(f). Georgia's participation in Medicaid is not consent. *See Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981). And Congress did not unequivocally abrogate Georgia's immunity in the Act. *See Fla. Ass'n of Rehab. Facilities, Inc. v. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1226 n.13 (11th Cir. 2000). The same is true of §1983. *See Quern v. Jordan*, 440 U.S. 332, 341 (1979). So, Plaintiffs' claims are barred if they operate against the state.

B. The state is immune from Plaintiffs' ADA claims.

Congress purported to abrogate immunity in Title II. §§12101(b)(4), 12202. A three-factor "claim-by-claim" approach governs whether it did so validly. *United States v. Georgia*, 546 U.S. 151, 159 (2006). All three favor Defendants.

First, Plaintiff must allege a Title II violation. *Id.* Explained below (at 43-50), Plaintiffs fail to do so for several reasons. By failing to state an ADA claim, Plaintiffs "fai[l] at the first step of the *Georgia* test." *Schwarz v. Ga. Composite Med. Bd.*, 2021 WL 4519893, at *4 (11th Cir.).

Second, the Court must determine "to what extent [the alleged] misconduct also violated the Fourteenth Amendment." *Georgia*, 546 U.S. at 159. Plaintiffs do not allege any Fourteenth Amendment violations.

Finally, if Plaintiffs do not allege a Fourteenth Amendment violation, abrogation of immunity must "nevertheless [be] valid" (i.e., congruent and proportional). *Schwarz*, 2021 WL 4519893, at *4. Courts must examine the right at issue, the existence of a history of discrimination, and whether Title II is an appropriate response. *Nat'l Ass'n of the Deaf v. Florida*, 980 F.3d 763, 771 (11th Cir. 2020). But "absent the need to vindicate a fundamental right or protect a suspect class, Congress may not abrogate state sovereign immunity." *Guttman v. Khalsa*, 669 F.3d 1101, 1122 (10th Cir. 2012); *see Tennessee v. Lane*, 541 U.S. 509, 523, 533-34 (2004). Here, Plaintiffs identify no fundamental right or suspect class. Freedom from disability discrimination does not count. *Guttman*, 669 F.3d at 1118. To be sure,

"Congress could validly abrogate … immunity to protect the right of students with disabilities to get an education" and "to participate in the democratic process." *Deaf*, 980 F.3d at 772. But these exceptions "prov[e] the rule." *Guttman*, 669 F.3d at 1123 & n.4. Because Plaintiffs fail to assert any comparable rights, Georgia's immunity is unscathed. *See id.* at 1123-24; *Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-74 (2001) (immunity remains despite extensive record of disability discrimination).

In any event, there is no enforceable right to new programs or more funding. *Cf. Disability Rts. Cal. v. County of Alameda*, 2021 WL 212900, at *11 (N.D. Cal.). Congress cannot abrogate the states' immunity to allow private suits to compel states to provide new programs and more funding. Such a remedy "substantively redefine[s] the States' legal obligations" and cannot be justified by the ADA's "legislative record" which focused on removing discrimination. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000); *see* 42 U.S.C. §12101.

C. Plaintiffs' request for affirmative relief operates against the state.

Ex parte Young created "a 'fiction' that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254-55 (2011) (cleaned up). Here, Plaintiffs cannot invoke the *Ex Parte Young* exception for two reasons.

1. Plaintiffs cannot point to officials with the relevant enforcement authority. The fiction does not apply if the state officials lack "any enforcement authority" to enforce allegedly invalid "state laws." *WWH v. Jackson*, 595 U.S. 30, 43-44 (2021).

Plaintiffs "do not direct this Court to any enforcement authority" that Defendants possess to prescribe the Remedial Services as medically necessary or to prescribe community placement over inpatient care. *Id.*

To start, DCH, DBHDD, and DHS all provide funding and oversight only for specific Medicaid programs. Individual Plaintiffs all allege they are "enrolled in Medicaid." ¶¶22, 34, 45, 55. But they don't specify which type of program.[4] By failing to state which program each child was enrolled in, Plaintiffs fail to direct this Court to which of the three state officials would have had potential enforcement authority. But even if Plaintiffs had identified specific program enrollment, Defendants would still lack the enforcement authority *Ex parte Young* requires.

As to Counts I and II, Commissioner Carlson lacks authority to provide EPSDT services unless they "are recommended as medically necessary by a physician." O.C.G.A. §§49-4-169.1(4)-(5), 49-4-169.2, 49-4-169.3(c). A, B, C, and D fail to allege that any physician recently (or ever) prescribed any of the Remedial Services as medically necessary. *See infra* 37-40. The injunction and declaration Plaintiffs seek would not, and cannot, require any physician to say the Remedial Services are medically necessary. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1254 (11th Cir. 2020) (injunction and declaration would not bind other necessary actors); *Mi Familia Vota v. Abbott*, 977 F.3d 461, 468 (5th Cir. 2020) (prospective relief against

[4] For example, CHIP, aged, blind, or disabled, or foster care.

official "would not *require*" third parties to act and therefore prospective relief "would not afford the Plaintiffs with the relief that they seek"). Federal law allows a medical-necessity limitation based on a state's definition, and Plaintiffs don't challenge it. *Moore*, 637 F.3d at 1248, 1255. Commissioner Carlson therefore lacks the authority to provide the Remedial Services to A, B, C, and D.

As to the ADA and Rehabilitation Act claims against all Defendants (Counts III and IV), Plaintiffs fail to allege that Defendants have the authority to determine that the individual Plaintiffs would benefit from community placement, release them from inpatient care, or create new benefits that *might* help them avoid needing inpatient care in the future. To be sure, DCH has some authority to review care management organizations' (insurers) decisions about coverage. *See* O.G.C.A. §49-4-153. DCH, however, does not control how Plaintiffs' doctors diagnose their patients; nor can DCH medically determine whether inpatient treatment is no longer needed for certain patients. DCH lacks the relevant "enforcement authority." *WWH*, 595 U.S. at 43.

As for DBHDD, none of the individual Plaintiffs are alleged to be among the population for whom it funds or oversees non-emergency community-based services. DBHDD only provides oversight and funding of non-emergency services for a minority of Georgia children enrolled in the aged, blind, and disabled (fee-for-service) Medicaid program. *See* DBHDD, *Requirements to Access DBHDD Funds for Child & Adolescent Behavioral Health Services*, 01-106 (Jan. 1., 2011),

gadbhdd.policystat.com/policy/9027197/latest. Plaintiffs don't allege that they are enrolled in this type of program versus other types funded and overseen by other agencies. Nor can DBHDD create emergency and non-emergency services to be provided through Georgia's other Medicaid program. And DBHDD does not control Plaintiffs' physicians' medical diagnoses. *Cf.* 42 C.F.R. §441.152-53. So, DBHDD lacks the relevant "enforcement authority" for ADA purposes (i.e., determining whether Plaintiffs should receive inpatient care or community-based care). *WWH*, 595 U.S. at 43.

Plaintiffs similarly fail to point to the relevant enforcement authority for DHS Commissioner Broce. To start, DHS cannot create services that the state provides. Next, C and D allege that they are not in DFCS's custody. ¶¶53, 63. Plaintiffs fail to point to any authority suggesting that DHS must coordinate services for children not within DFCS's custody. Of course, DHS strives to provide the necessary services for the children in its care. But state law defines DHS's responsibility and authority as obtaining the "medical, hospital, psychiatric, surgical, or dental services … as may be considered appropriate and necessary by competent medical authority." O.G.C.A. §49-5-8(a)(9). And DHS must rely on actions of third parties—it does not control doctors' diagnoses or even insurers that would ultimately pay for services. Nor can it dictate whether an inpatient treatment or community-based treatment would be more appropriate. *Cf.* 42 C.F.R. §441.152-53. DHS lacks the relevant enforcement authority for purposes of the ADA.

2. *Ex parte Young* "does not apply when the state is the real, substantial party in interest." *Stewart*, 563 U.S. at 254-55. For that reason, it does *not* allow all suits against officials for declaratory or injunctive relief. *E.g.*, *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997). It is unavailable if "'the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign.'" *Zapata v. Smith*, 437 F.2d 1024, 1025-26 (5th Cir. 1971) (quoting *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 691 n.11 (1949)). Here, Plaintiffs cannot invoke *Ex parte Young* for four reasons.

First, the affirmative action Plaintiffs demand "implicates special sovereignty interests." *Idaho*, 521 U.S. at 281. Plaintiffs seek sweeping relief that would require the appropriation of new funds, the promulgation of new rules, and the provision of new services to implement a federal program. ¶¶236-39. "[A]n injunction ordering" an official "to promulgate a rule requiring" subordinates to act "raise[s] serious federalism concerns." *Jacobson*, 974 F.3d at 1257. When a suit implicates those concerns, courts cannot enjoin State officials "to issue an … order or directive or to take other sweeping affirmative action." *Mi Familia*, 977 F.3d at 470. Explained below (at 28-29), "the federal government" cannot "commandeer States to enact or enforce a federal regulatory scheme." *Jacobson*, 974 F.3d at 1257. Doing so is a "direct affront to state sovereignty." *Murphy v. NCAA*, 584 U.S. 453, 474 (2018).

Second, "*Ex parte Young* cannot be used to obtain … an order for specific performance of a State's contract." *Stewart*, 563 U.S. at 256-57. Medicaid is a "Spending Clause contract." *Armstrong*, 575 U.S. at 328. Plaintiffs, at best, are third-party beneficiaries seeking specific performance for an alleged breach. ¶¶236-39. That kind of injunctive and "declaratory relief" is "directed at the sovereign" because it declares Plaintiffs' "rights … vis-à-vis the" sovereign. *Larson*, 337 U.S. at 689 n.9. The principle holds when the contract is between sovereigns. *Waterfront Comm'n of N.Y. Harbor v. Governor of N.J.*, 961 F.3d 234, 241 (3d Cir. 2020). So, "the relief requested would, in effect, require the sovereign's specific performance of a contract." *Tamiami v. Miccosukee Tribe*, 177 F.3d 1212, 1225-26 (11th Cir. 1999).

Third, the judgment Plaintiffs seek would "expend itself on the public treasury" and "interfere with public administration" of the state's program. *See Stewart*, 563 U.S. at 255. Plaintiffs are transparent about both. They seek to "compel" Georgia "to provide" them with costly services and to tell the State how to "administer [its] systems." ¶3. And they seek an injunction commanding the state to "[e]stablish and implement administrative policies, procedures, and practices" to start providing costly services not part of the state's plan now. ¶¶238-39. That "relief would effectively force the restructuring of state mental health care at the State's expense." *Waterfront Comm'n*, 961 F.3d at 239. So the state is the real party in interest. *See Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam).

Finally, a court "can only direct affirmative action" if the official's duty is "merely ministerial in its nature" and does not involve "control[ling] … discretion." *Young*, 209 U.S. at 158-59. Controlling discretion is what Plaintiffs seek to do here. Officials have discretion to administer the mental-health program with an even hand. *Olmstead v. Zimring*, 527 U.S. 581, 603 n.14 (1999); *id.* at 606 (plurality). They also "retain discretion to design and administer their Medicaid programs," including "'defining the scope of … EPSDT" services. *Moore*, 637 F.3d at 1238. Officials also have the discretion "to place quantity and durational limits on required services." *Id.* at 1246. In short, "the Medicaid Act does not set forth a uniform manner in which states must implement the EPSDT" provisions. *Id.* at 1238; *id.* at 1244 ("broad discretion … for … extent of medical assistance").

III. Plaintiffs lack standing.

A. The individual Plaintiffs lack standing.

Standing consists of three elements: injury in fact, traceability, and redressability. "[W]hen plaintiffs seek prospective relief to prevent future injuries, they must prove that their threatened injuries are 'certainly impending.'" *Jacobson*, 974 F.3d at 1245. Allegations of past injuries are not enough. *Id.* Plaintiffs must allege standing "for each claim that they press and for each form of relief they seek." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Plaintiffs must also sometimes show prudential standing. *Mata Chorwadi, Inc. v. City of Boynton Beach*, 66 F.4th 1259, 1264 (11th Cir. 2023). A, B, C, and D lack standing.

1. No injury in fact.

To begin, Plaintiffs lack standing to seek *all* the Remedial Services. *See* ¶1 & n.1. Explained above (at 8-10), Plaintiffs' shotgun pleading lumps all "Remedial Services" together. But the Mobile Crisis Response Service applies to *emergencies*. *Id.*; Mann, *supra*, at 5. Plaintiffs do not allege an ongoing emergency. ¶¶22-64. Nor do they allege that one is "'certainly impending.'" *Jacobson*, 979 F.3d at 1245.

More, individual Plaintiffs' injuries are not personal and distinct. Plaintiffs must allege an injury in fact that is "concrete and particularized" and "actual or imminent." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). A particularized injury is one that 'affect[s] the plaintiff in a personal and individual way.'" *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020). Plaintiffs must assert "a personal, distinct injury," not a "generalized grievance." *Id.* A generalized grievance is "'undifferentiated and common to all members of the public.'" *Id.*

The Supreme Court's decision in the student-loan forgiveness case bolsters these principles. There, a group of citizens "claim[ed] they [were] injured because the Government has not adopted a lawful benefits program under which they would qualify for assistance." *Dep't of Educ. v. Brown*, 600 U.S. 551, 563-64 (2023). The Court observed that "the same could be said of anyone who might benefit from a benefits program that the Government has not chosen to adopt." *Id.* at 564.

Individual Plaintiffs only allege a generalized grievance. Plaintiffs' theory is that Defendants are violating federal law by failing to provide the "Remedial

Services." ¶7. Rather than focusing on "personal" and "distinct" injuries that individual Plaintiffs suffered, *Wood*, 981 F.3d at 1314, the complaint resorts to "statewide" and "systemic" allegations.[5] Such an "undifferentiated and common" injury is not particularized. *Wood*, 981 F.3d at 1314.

Plaintiffs' remaining allegations about the individual Plaintiffs also fail to show a particularized injury. Although Plaintiffs vaguely allege that A, B, C, and D "need[]" the Remedial Services, ¶¶33, 44, 54, 64, they fail to allege that these services are *medically necessary* under the meaning of the Medicaid Act and Georgia law, or *appropriate* as relevant in the ADA and Rehabilitation Act context. *See infra* 37-40, 44-47. At most, Plaintiffs allege that A, B, C, and D "*might* benefit from a benefits program" which Georgia allegedly "has not chosen to adopt." *Brown*, 600 U.S. at 564 (emphasis added). This alleged lack of the Remedial Services does not affect A, B, C, and D in an "individual" way. *Wood*, 981 F.3d at 1315. This injury, according to Plaintiffs, is shared by at least "85,000 children" in Georgia. ¶200. When the asserted harm is "shared in substantially equal measure by … a large class of citizens," it is not particularized. *Wood*, 981 F.3d at 1315 (cleaned up). Besides, the "logic" of Plaintiffs' standing theory—wanting that Georgia's Medicaid program "'be administered according to the law'"—"sweeps past even that boundary" to all Medicaid recipients. *Id.* at 1314.

[5] *See, e.g.*, Compl. ¶¶1, 3, 11, 14, 135, 182, 188, 196, 202, 208.

2. No traceability.

Individual Plaintiffs fail to allege traceability. "[T]he key questions are who caused the injury and how it can be remedied." *City of S. Miami v. Governor*, 65 F.4th 631, 640 (11th Cir. 2023). To have standing, a plaintiff must allege that his injury is "'fairly … trace[able] to the challenged action of defendant[s].'" *Swann v. Sec'y*, 668 F.3d 1285, 1288 (11th Cir. 2012). "Simply describing an agency's regulatory responsibilities is not enough." *BBX Cap. v. FDIC*, 956 F.3d 1304, 1312 (11th Cir. 2020). "[A]n injury is not fairly traceable to the actions of a defendant if caused by the 'independent action of some third party not before the court.'" *Swann*, 668 F.3d at 1288. And "a plaintiff lacks standing to challenge a rule if an independent source would have caused him to suffer the same injury." *Id.*

Individual Plaintiffs' injuries are not traceable to the challenged actions of the officials. Plaintiffs fail to explain how their alleged injuries are fairly traceable to each Defendant. *Supra* 13-16. Plaintiffs have solely relied on Defendants' general "regulatory responsibilities," which is not enough. *BBX*, 956 F.3d at 1312. Plaintiffs fail to allege traceability for that reason alone.

Plaintiffs' alleged injuries are also independently caused by their physicians. *See Swann*, 668 F.3d at 1288. Under the state's plan, DCH must provide therapy services "which are recommended as medically necessary by a physician," "whether or not [they] are in the state plan." *See* O.C.G.A. §49-4-169.1(4)-(5), 49-4-169.3(c). So even if the Remedial Services were already included in the state plan,

the state would not need to provide it unless a physician prescribes it. O.C.G.A. §49-4-169.1(4). Plaintiffs fail to allege that a physician recommended the Remedial Services as medically necessary. They also fail to allege that the officials control their physicians or that the officials have any authority to direct their prescriptions. *Cf.* O.C.G.A. §33-20-18(d). Nor do Plaintiffs challenge the state's medical-necessity limitation. *See Moore*, 637 F.3d at 1233. And federal law allows the states to define medical necessity. *See id.* at 1255. Therefore, even if the state were to include Remedial Services within its plan, Plaintiffs would not receive them. *See BBX Capital*, 956 F.3d at 1313 (no standing against government agency where "approval" required "two 'yeses' from the governing agencies").

3. No redressability.

To allege redressability, Plaintiffs need to show that it is "'likely,'" not "merely 'speculative' that the injury will be redressed by a favorable decision.'" *Brown*, 600 U.S. at 561. It must be the effect of the court's judgment on the defendant—not absent third parties—that redresses their injury. *Jacobson*, 974 F.3d at 1254. A plaintiff's injury isn't redressable if other actors, "who aren't parties to the litigation," are "free to engage" in the conduct allegedly injuring them. *Supporting Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1205 (11th Cir. 2021).

A judgment in Plaintiffs' favor will not "'directly' redress [their] alleged injuries." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1302 (11th Cir. 2019). Even if this Court were to order the state to include the Remedial Services in its plan, Plaintiffs

will receive the Remedial Services *only if* their physician prescribes them. O.C.G.A. §49-4-169.1(4); *see also Moore*, 637 F.3d at 1233. This is also true of ADA and Rehabilitation Act claims. *See Olmstead*, 527 U.S. at 607 (plurality); *id.* at 612 (Kennedy, J.). Individual Plaintiffs' physicians are not parties here. So, this Court's judgment will not bind them.

A judgment in Plaintiffs' favor will not "indirectly" provide redress either. Doctors are already free to say whether therapy services are medically necessary, "whether or not such services are in the state plan." O.C.G.A. §49-4-169.1(4). Plaintiffs "would remain in the same position they were in when they filed the operative complaint." *Supporting Working Animals*, 8 F.4th at 1205. Plaintiffs fail to allege that this Court's order requiring Defendants to include the Remedial Services in the state plan will significantly increase the likelihood that the physicians will prescribe the Remedial Services (and community placements) for them. *Cf. Jacobson*, 974 F.3d at 1258. Indeed, Plaintiffs have not alleged—and cannot allege—that physicians would "ignore a state statute" requiring medical necessity and prescribe the Remedial Services anyway. *See id.* at 1257; *see also Lewis*, 944 F.3d at 1301-02 (no redressability in challenge to minimum-wage restriction because order enjoining official would not cause non-party employers to start paying more money).

4. No prudential standing as to Plaintiffs A and B.

This Court should dismiss A and B from this suit. *Elk Grove v. Newdow* instructs federal courts to dismiss cases that are saddled with "domestic relations

issues." 542 U.S. 1, 13 (2004). The "deference to state law" requires "federal courts to decline to hear a case involving 'elements of the domestic relationship.'" *Id.* at 12-13, 15-16 (father "lack[ed] the right to litigate as [child's] next friend" because mother had custody). "[I]t is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." *Id.* at 17.

Here, A's and B's mothers, A.A. and B.B., face the same "domestic relations issues" that require dismissal. *Id.* at 13. Plaintiffs allege that state courts have transferred temporary legal custody of A and B from A.A. and B.B. to DFCS. *See* ¶¶29, 43; O.C.G.A. §15-11-212(a)(2)(D) (state court may "[g]rant or transfer temporary legal custody" to DFCS.). A.A.'s and B.B.'s next-friend status is defined by state "domestic relations law." *Newdow*, 542 U.S. at 16. Because DFCS has obtained temporary legal custody of A and B, DFCS has "the same rights and powers with regard to such child as does his or her parent, guardian, or legal custodian including the right to consent to medical treatment." O.C.G.A. §15-11-130(b); *see also id.* §15-11-2(22); *id.* §49-5-3(11). "'[O]nce the juvenile court judge in his discretion commits a juvenile to [DFCS]—custody and control of the juvenile is thereby and thereafter exclusively in the division." *In re RLM*, 321 S.E.2d 435, 437 (Ga. Ct. App. 1984).

Even if A.A. and B.B. had some residual right to bring this suit, *but see id.*, DFCS still has at least the "same rights and powers" as A.A. and B.B. O.C.G.A.

§15-11-130(b). Were this suit to proceed, it would place this Court in an untenable position of having to decide whose wishes relating to A's and B's medical decisions should win—either DHS's/DFCS's (whom the state court entrusted), or A.A.'s and B.B.'s. *Newdow* teaches federal courts to stay away from resolving such disputes. *See, e.g.*, *A.N. v. Williams*, 2005 WL 3003730, at *3-4 (M.D. Fla.); *Mulready v. Mulready*, 2007 WL 1791120, at *2 (D. Conn.).

B. The proposed class lacks standing.

The proposed class lacks standing because the named Plaintiffs do. *Supra* 19-26; *Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243, 1253 (11th Cir. 2023).

C. GAO lacks associational standing.

GAO relies entirely on associational standing to sue on behalf of "Individual Plaintiffs and members of the proposed class [who] are constituent members of GAO." ¶69. GAO can't satisfy two requirements for associational standing. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). First, GAO fails to identify constituents who can sue in their own right. Second, this suit requires GAO constituents' individual participation.

1. GAO fails to identify constituents who have standing.

GAO fails to allege that "one of its constituents" has standing. *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999). Here, GAO must show that its constituents (individual Plaintiffs and the proposed class members) can sue on their own. Explained above (at 19-26), individual Plaintiffs and the proposed class lack standing.

GAO's allegations about the proposed class are insufficient. An association must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). But all GAO does is describe the contours of the class. *See* ¶¶197-200. There is no specific allegation that at least one identified member has standing. *See Jacobson*, 974 F.3d at 1249 (rejecting a political party's description "as having members" because "it failed to identify any of its members, much less one who will be injured by the [challenged] ballot statute"). GAO's reliance on the proposed class boils down to "a statistical probability that some of those members are threatened with concrete injury." *Summers*, 555 U.S. at 497; *see also* ¶200. But statistical probability cannot support standing. *See Summers*, 555 U.S. at 498-99; *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1204 (11th Cir. 2018).

2. This suit requires GAO constituents' individual participation.

Associational standing is inappropriate if "the nature of the claim and the relief sought" "makes[s] the individual participation of each injured party indispensable to proper resolution of the cause." *Hunt*, 432 U.S. at 342-43. An association cannot claim standing if "both the fact and extent of injury would require individualized proof." *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).

GAO lacks standing to press all claims on behalf of its constituents. All require individualized assessments. *Supra* 19-26; *infra* 37-42. The determination of

medical necessity for the Medicaid Act requires individualized screening and assessment. *Supra* 19-26; *infra* 37-42. The ADA and Rehabilitation Act claims also require individualized assessment about whether community placement is appropriate and whether such placement can be reasonably accommodated. *See Olmstead*, 527 U.S. at 607 (plurality); *id.* at 612 (Kennedy, J.). So, GAO lacks associational standing. *See, e.g.*, *Parents/Pro. Advoc. League v. City of Springfield*, 934 F.3d 13, 35 (1st Cir. 2019) (no associational standing because "adjudication of the claims here would turn on facts specific to each student, including unique features of each student's unique disability, needs, services, and placement"); *Disability Rts. Fla., Inc. v. Palmer*, 2019 WL 11253085, at *6 (N.D. Fla.) (similar).

IV. Plaintiffs' requested relief will violate the anticommandeering principle.

Congress may not command state officials to enact, administer, or enforce "'a federal regulatory program.'" *Murphy*, 584 U.S. at 473 (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997)). Under Plaintiffs' theory, Congress has done just that. To hear them tell it, federal law commands the state to provide services and "'promulgate and enforce laws and regulations.'" *Printz*, 521 U.S. at 926. They assert that federal statutes require not only the provision of services, but also the promulgation of new rules, the adoption of new policies, and the appropriation of new funds. ¶¶236-39; *but see Jacobson*, 974 F.3d at 1257 ("ordering the Secretary to promulgate a rule" raises "serious federalism concerns"). But Congress cannot "impress the state executive into its service" to "enforce a federal … program."

Printz, 521 U.S. at 907, 926, 935. And it cannot acquire that extraconstitutional power even if the states "'consent'" to conditions in spending-power statutes. *Cf. New York v. United States*, 505 U.S. 144, 182 (1992); *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 192-93 (2023) (Gorsuch, J., concurring) (reserving question "for another day"); *Alexander v. Choate*, 469 U.S. 287, 307 (1985). If Medicaid "give[s] rise to a federal right enforceable under §1983," it violates "the anti-commandeering doctrine." *See Burban v. City of Neptune Beach*, 920 F.3d 1274, 1276, 1280-82 (11th Cir. 2019).

V. Plaintiffs fail to state Medicaid Act claims.

A. There is no private right of action to enforce the Medicaid Act.

Plaintiffs bring their Medicaid claims under §1983. ¶¶17, 212. Section 1983 provides a cause of action against "[e]very person" who deprives any other "person" "of any rights … secured by … laws." But §1983 cannot support Plaintiffs' claims. The state is not a "person." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989). "[L]egal rights provided for in spending power legislation" are not "'secured' as against States." *Cf. Talevski*, 599 U.S. at 192-93 (Gorsuch, J., concurring) (reserving question "for another day"). And the Medicaid provisions Plaintiffs cite don't create private rights. *See Armstrong*, 575 U.S. at 331-32 (plurality).

1. The state is not a "person" under §1983.

"[O]fficials acting in their official capacities are" not "'persons' under § 1983." *Will*, 491 U.S. at 71. Explained above (at 13-19), Georgia is the real party

in interest. And "Congress, in passing §1983, had no intention to disturb the state's … immunity." *Id.* at 66. This Court should dismiss the §1983 claims.

2. Rights in Spending Clause legislation are not "secured" as against the state.

Section 1983 applies only to "rights … *secured by* … la[w]." §1983. The Medicaid Act is a law. *Talevski*, 599 U.S. at 193 (Barret, J., concurring). But it does not secure the rights Plaintiffs assert. The asserted rights would come into being (if ever) only if Georgia agrees to Medicaid's conditions and the Secretary approves the state's plan. §1396a(b). The asserted rights could then go out of being if the state later opts out of Medicaid or the Secretary terminates the state's participation. §1396c. The Act itself therefore does not "[e]ffectually guar[d]" or "ma[k]e certain" Plaintiffs' asserted rights. *Secured*, Webster, *American Dictionary of the English Language* (1828). So, "rights provided for in spending power legislation" are not "'secured' as against States." *Cf. Talevski*, 599 U.S. at 192-93 (Gorsuch, J., concurring).

3. The Medicaid provisions Plaintiffs cite do not unambiguously create private rights.

To "create § 1983-enforceable rights," the Medicaid provisions Plaintiffs cite "must *unambiguously* confer individual federal rights." *Id.* at 180. *Gonzaga University v. Doe*, 536 U.S. 273 (2002), is now the "method for ascertaining unambiguous conferral." *Talevski*, 599 U.S. at 183. "[I]t is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under" §1983. *Gonzaga*, 536 U.S. at 283. Court must look to "the text and structure of" the Act. *Id.* at 286. The text must

have "explicit 'right-or-duty-creating language'" or this Court cannot "impute … an intent to create a private right." *Id.* at 284 n.3. Examples of unambiguous rights include Title VI, "*No person … shall …* be subjected to discrimination," *id.* at 284 n.3, 287, and provisions that "expressly" create "rights," *Talevski*, 599 U.S. at 184.

The provisions Plaintiffs cite do not unambiguously confer rights. Plaintiffs cite §1396d(a)(4)(B) and §1396d(r)(1)(A). ¶210-11. But §1396d "is purely definitional," and "definitional provisions are not enforceable under §1983." *Burban*, 920 F.3d at 1280. The question is whether the operative provisions Plaintiffs cite—all in §1396a(a)—unambiguously confer rights. ¶¶210-11, 215-16. All take the same form: "A state plan for medical assistance must … provide…." §1396a(a) (8), (10), (43). None is styled as a protective prohibition. *E.g.*, 42 U.S.C. §2000d. None "expressly" confers "rights." *Talevski*, 599 U.S. at 184. And the same mandatory language—"must provide"—is not enough to create rights. *Armstrong*, 575 U.S. at 323, 328-29 (§1396a(a)(30)(A) does not create enforceable private right); *Harris v. James*, 127 F.3d 993, 1010 (11th Cir. 1997) (same for §1396a(a)(19)).

The "text and structure" of §1396a shows that Congress did not unambiguously create rights in subsections (a)(8), (10)(A), and 43(C). *See Gonzaga*, 536 U.S. at 286. Those provisions appear "in a section of the Medicaid Act concerning state plans for medical assistance." *Gillespie*, 867 F.3d at 1040. Section 1396a provides that the "Secretary shall approve any plan which fulfills the conditions specified in subsection (a)." §1396a(b). "Subsection (a), in turn, declares that '[a] State plan

for medical assistance must' satisfy some eighty-three conditions," *Gillespie*, 867 F.3d at 1040, including the ones at issue. Those conditions focus on the requirements for a systemwide State plan, not individuals. The state plan must "provide … for making medical assistance available," §1396a(a)(10), "with reasonable promptness," §1396a(a)(8), and "arrang[e] for … corrective treatment" revealed as medically necessary by "requested" screenings, §1396a(a)(43)(B)-(C). There are several "significant difficulties with the contention that" the text "unambiguously" creates enforceable rights. *See Gillespie*, 867 F.3d at 1041.

First, "the focus of the Act is two steps removed from the interests of the patients who seek services from a Medicaid provider." *Id.* "[S]ubsection (a)" identifies the conditions that determine whether "the Secretary shall approve" the state's plan. §1396a(b). Subsection (b) therefore clarifies that the provisions in subsection (a) are "directive[s] to the federal agency charged with approving state Medicaid plans, not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid." *Armstrong*, 575 U.S. at 331 (plurality). "[S]uch language 'reveals no congressional intent to create a private right of action.'" *Id.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)). Unlike Title VI's focus on protecting "persons" who shall not be "subjected to discrimination," subsection (a) "focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating." *Sandoval*, 532 U.S. at 289. Section 1396a's provisions "speak only to the Secretary." *See*

Gonzaga, 536 U.S. at 287; *accord Arrington v. Helms*, 438 F.3d 1336, 1346 (11th Cir. 2006). In short, even if subsection (a) "includes mandatory language that ultimately benefits individuals," it is "a directive to a federal agency," not as a conferral of "enforceable federal rights." *Gillespie*, 867 F.3d at 1041.

Second, "Congress expressly conferred another means of enforcing a state's compliance with" subsection (a). *Id.* Section 1396c(2) declares that "further payments will not be made to the State" if the Secretary finds "that in the administration of the plan there is a failure to comply substantially with" "section 1396a." "Congress also authorized the Secretary to promulgate regulations that are necessary for the proper and efficient operation of a state plan." *Gillespie*, 867 F.3d at 1041 (citing §1396a(a)(4)). The "explicitly conferred means of enforcing compliance with" subsection (a) "suggests that other means of enforcement are precluded." *Armstrong*, 575 U.S. at 331-32 (plurality) (citing *Sandoval*, 532 U.S. at 290).

Two other features of the Act bolster that conclusion. First, its provisions deploy vague standards requiring nonjudicial discretion: "reasonable," "reasonable standards of medical … practice," medical necessity, "best possible functional level," etc. *See* §§1396a(a)(8), (43), 1396d(a)(13), (r). "Explicitly conferring enforcement of th[ese] judgment-laden standard[s] upon the Secretary alone" suggests that "the administrative remedy" in "§1396c" is exclusive. *See Armstrong*, 575 U.S. at 328-29 (majority). Moreover, that suggestion of ambiguity is stronger in the spending-power context. Third-party beneficiaries like Plaintiffs generally cannot

sue to enforce "contracts between two governments." *Id.* at 332 (plurality). Displacing the express enforcement mechanism with a private one requires establishing "a private right … by mere implication." *Id.* Congress needed to do more. *Cf. Talevski*, 599 U.S. at 184 (statute "expressly" protects "rights").

Finally, "statutes with an 'aggregate' focus do not give rise to individual rights." *Gillespie*, 867 F.3d at 1042. Explained above, §1396c "links funding to substantial compliance with its conditions." *See Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1200 (8th Cir. 2013). "[P]erfect compliance is not demanded." *Id.* at 1200-01. The aggregate focus that §1396c clarifies is why states must report "to the Secretary" systemwide "information relating to early and periodic screening, diagnostic, and treatment services." §1396a(a)(43)(D).

Section 1396c(2) therefore refutes any suggestion that subsections (a)(8), (10)(A), and (43)(C) unambiguously create enforceable *individual* rights—tantamount to requiring perfect compliance. *See Kincade*, 712 F.3d at 1200-01. The Act allows what Plaintiffs complain about—"a sizeable minority of … beneficiaries" who "fail to receive the full panoply of offered benefits." *Id.*; *see also Planned Parenthood v. Kauffman*, 981 F.3d 347, 373 (5th Cir. 2020) (Elrod, J., concurring) ("Converting this substantial-compliance regime … to a system allowing plaintiffs to sue for each and every individual violation would conflict with the statute's text and structure[.]"). So, subsection (a) does not unambiguously create private rights. *See Arrington*, 438 F.3d at 1346-47 ("'substantial compliance' provisions in

Spending Clause legislation are inconsistent with individually enforceable rights"); *31 Foster Children v. Bush*, 329 F.3d 1255, 1272 (11th Cir. 2003) ("substantial conformity requirement" betrays "an aggregate instead of an individual focus" despite "references to individual children"); *Gillespie*, 867 F.3d at 1042 (similar).

Those structural considerations show that subsection (a) is at best ambiguous about individual rights. *See Gillespie*, 867 F.3d at 1041-42. Subsection (a)'s reference to "individuals," §1396a(a)(8), (10)(A), and "persons," §1396a(43), using the "mandatory language … 'must' provide" does not save Plaintiffs' claims from the ambiguity the structural considerations establish. *Gillespie*, 867 F.3d at 1042. This Court must read those provisions "in the context of the statute as a whole," not "in isolation." *Id.* at 1043. Their "references to the individuals whom the statute ultimately benefits are made only in the context of what the states must do to receive federal funding." *Kauffman*, 981 F.3d at 373 (Elrod, J., concurring). "Where structural elements of the statute and language in a discrete subsection give mixed signals about legislative intent, Congress has not spoken—as required by *Gonzaga*—with a clear voice that manifests an unambiguous intent." *Gillespie*, 867 F.3d at 1043 (cleaned up). And "[a]mbiguity precludes enforceable rights." *31 Foster Children*, 329 F.3d at 1270.

Doe v. Chiles, 136 F.3d 709 (11th Cir. 1998), is not binding. To be sure, that decision held that §1396a(a)(8) is enforceable under §1983. *Id.* at 719. But *Chiles* predated *Gonzaga* and relied on pre-*Gonzaga* decisions like *Wilder v. Virginia*

Hospital Ass'n, 496 U.S. 498 (1990). *Chiles*, 136 F.3d at 715-19. As a result, it applied a test that *Gonzaga* rejected. Rather than ask whether §1396a(a)(8) "unambiguously" confers an individual *right*, *Chiles* applied a three-factor test that asks whether "Congress has 'intended that the provision in question *benefit* the plaintiff.'" *Id.* at 715 (emphasis added). But *Gonzaga* later clarified that "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced by the authority" of §1983. 536 U.S. at 282-83. And more recent Eleventh Circuit precedent has deployed the above *Gonzaga*-style reasoning. *See 31 Foster Children*, 329 F.3d at 1270-72; *Arrington*, 438 F.3d at 1345-47.

If *Gonzaga* did not clearly overrule the earlier decisions on which *Chiles* relied, *Armstrong* did. 575 U.S. at 331 n.* ("our later opinions plainly repudiate the ready implication of a §1983 action that *Wilder* exemplified"); *Gillespie*, 867 F.3d at 1040 (the Supreme Court "overruled" pre-*Gonzaga* cases "such as *Wilder*" (cleaned up)); *Kauffman*, 981 F.3d at 359; *id.* at 374 (Elrod, J., concurring). And pre-*Armstrong* circuit decisions that relied "significantly … on the Supreme Court's analysis in the now-repudiated *Wilder* decision" are no longer good law. *See Gillespie*, 867 F.3d at 1040 & n.2, 1043. This Court must therefore give these provisions a fresh look. *See United States v. DiFalco*, 837 F.3d 1207, 1216 (11th Cir. 2016).

B. Even if there were private causes of action to enforce the Medicaid Act, Plaintiffs failed to allege their elements.

"[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court must follow a "two-step framework" to determine whether the complaint survives. *McCulloch v. Finley*, 907 F.3d 1324, 1333 (11th Cir. 2018). First, it must "identify" and "discard" "conclusory allegations." *Id.* Second, after assuming "any remaining factual allegations are true," it must "determine" whether they "'plausibly give rise to an entitlement to relief.'" *Id.* Allegations that "'are merely consistent with a defendant's liability fall short of being facially plausible.'" *Doe v. Samford Univ.*, 29 F.4th 675, 685 (11th Cir. 2022). And this Court can "'infer … obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.'" *Id.* at 686.

Defendants advance Counts I and II against DCH Commissioner Carlson. ¶¶209-13, 214-17. Both fail to "state a cause of action" because Plaintiffs failed to allege "essential element[s]." *See Middlebrooks v. City of Eustis*, 563 F. Supp. 1060, 1061 (M.D. Fla. 1983).

1. Plaintiffs fail to allege that the Remedial Services are medically necessary for their ongoing conditions.

The state must provide services "only if they are 'medically necessary.'" *Moore*, 637 F.3d at 1232-33. To state a claim, A, B, C, and D had to plausibly allege

that each of the Remedial Services is medically necessary for them. *Accord* ¶96. Plaintiffs failed to do so.

This Court must first identify "the allegations … that are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680. Plaintiffs allege that each child "needs, but is not receiving, the Remedial Services." ¶¶33, 44, 54, 64; *see also* ¶27, 39, 50, 63 ("necessary"). "These bare assertions … amount to nothing more than a 'formulaic recitation of the elements' of" Plaintiffs' Medicaid claims, *Iqbal*, 556 U.S. at 681, namely, that the desired services "are 'medically necessary,'" *Moore*, 637 F.3d at 1233. This Court must "discard" them. *McCullough*, 907 F.3d at 1334.

After "discard[ing] conclusory allegations," this Court must determine whether the remaining "allegations state a plausible claim." *Id.* at 1335. Plaintiffs have little beyond "bare assertion[s] that the procedures [are] 'medically necessary.'" *See Prospect Med., P.C. v. Cigna Corp.*, 2013 WL 3146867, at *4 (D.N.J.). The only factual support alleged is that each child has various mental illnesses that necessitate treatment. ¶¶22-64. But that allegation is "'merely consistent with'" the Remedial Services being the necessary treatment for A, B, C, and D. *See Iqbal*, 556 U.S. at 678, 681. There are no allegations that would make that medical conclusion plausible, such as that physicians recently endorsed it for A, B, C, and D.

That factual omission is fatal for another reason. "A state may adopt a definition of medical necessity that places limits on a physician's discretion." *Moore*, 637 F.3d at 1248, 1255. The state may also "'place appropriate limits on [EPSDT]

service[s] based on … medical necessity.'" *Id.*; *see also* 42 C.F.R. §440.230(d). Under Georgia law, "medically necessary services" means services "a physician or other licensed practitioner" prescribes "whether or not such services are in the state plan." O.C.G.A. §49-4-169.1(4). And "services provided pursuant to the EPSDT Program" are those "which are recommended as medically necessary by a physician." *Id.* §49-4-169.1(5). The EPSDT provision itself covers services "described in subsection (a)." §1396d(r)(5). And subsection (a), in turn, covers "remedial services (provided in a facility, a home, or other setting) *recommended by a physician or other licensed practitioner*." §1396d(a)(13)(C) (emphasis added).

Plaintiffs fail to allege that a physician prescribed as currently medically necessary any of the Remedial Services. That omission shows "'more likely explanations'" why Plaintiffs did not receive them: no physician has recently recommended any as medically necessary. *McCullough*, 907 F.3d at 1335.

Indeed, Plaintiffs' "specific allegations" about past events support that likelier explanation "over the general" and "'conclusory'" allegations of medical necessity. *See SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1362 (11th Cir. 2022). A alleges that, in the past, his "treating clinicians determined that he could return to his family home" and provided him "with basic outpatient services," suggesting that they determined that those services were adequate. ¶27. B alleges that, "in December 2022, his mother refused to accept a facility discharge plan because it did not include the provision of the services" *she*

thought necessary, again indicating that no physician prescribed them. ¶42. C alleges that his 2022 "treatment team concluded that he was ready for discharge" and suggested a "transition plan that did not provide intensive home and community-based services." ¶53. Finally, D alleges that "the IFI provider advised his family that [he] needed to be in a home with no other children and encouraged them to place him in DFCS custody." ¶62. Plaintiffs "fail[] to state a plausible claim 'given more likely explanations.'" *McCullough*, 907 F.3d at 1335.

2. Plaintiffs fail to state a claim under §1396a(a)(43).

Plaintiffs allege that the state violated §1396a(a)(43)(C). ¶¶210-11. To state a claim, Plaintiffs had to allege two things. First, that they "requested" and received screening services. §1396a(a)(43)(B)-(C). And second, that they are not receiving "corrective treatment the need for which is disclosed by such child health screening services." *Id.* Regulations also require that beneficiaries first "request … regularly scheduled examinations and evaluations of the[ir] general … mental health." 42 C.F.R. §441.56(b)(1); *accord id.* §441.56(e).

"Plaintiffs did not allege that they requested screening pursuant to Subsection (43)(B)." *See Troupe v. Barbour*, 2013 WL 12303126, at *4 (S.D. Miss.). "[I]f Plaintiffs never requested and received a Subsection (43)(B) screening, then there can be no 'need for [corrective treatment] disclosed by such child health screening[.]'" *Id.* That result would remain true even if the state lacked the "infrastructure to

provide the screening" because "the statute contains no exception to [the] requirement." *Id.* Accordingly, Plaintiffs fail to state a claim. *Id.* at *5.

3. Plaintiffs fail to state a claim under §1396a(a)(10)(A).

Plaintiffs also allege that the state "has failed to provide or otherwise arrange for the Remedial Services" in violation of §1396a(a)(10)(A). ¶210. That provision requires that the state's plan "mak[e] medical assistance available" within the meaning of "section 1396d(a)." §1396a(a)(10)(A). "Medical assistance" includes "remedial services," *id.* §1396d(a)(4), (13)(C), that are "[1] necessary … to correct or ameliorate … mental illnesses and conditions [2] discovered by the screening services," *id.* §1396d(r)(5), and "[3] recommended by a physician or other licensed practitioner," *id.* §1396d(a)(13)(C). *See Garrido v. Dudek*, 731 F.3d 1152, 1154 (11th Cir. 2013) (plan must provide remedial services only if condition is medically "necessary" and "discovered during an EPSDT screen").

Plaintiffs fail to allege those elements. They fail to allege that any of the Remedial Services is medically necessary. *Supra* 37-41. They fail to allege that they requested and received screening services that discovered the present conditions for which they allegedly require Remedial Services. *Id*. And they fail to allege that any physician prescribed the Remedial Services as medically necessary. *Id*. The Remedial Services are thus not within any of the measures "outlined in § 1396d(a) and … necessary to correct or ameliorate conditions discovered by the screening services." *See Moore*, 637 F.3d at 1233-34 (cleaned up).

4. Plaintiffs fail to state a claim under §1396a(a)(8).

Plaintiffs also allege that the state has failed "to ensure the provision of medically necessary Remedial Services to the Children with 'reasonable promptness.'" ¶216. The state's plan must "provide that all individuals [1] wishing to make application for medical assistance … shall have an opportunity to do so, and [2] that such assistance shall be furnished with reasonable promptness[.]" §1396a(a)(8). The "medical assistance" Plaintiffs seek—Remedial Services—must be "[3] necessary to ameliorate mental illnesses discovered by the screening services" and "[4] recommended" as such by a physician. §1396d(a)(13)(C), (r)(5) (cleaned up).

Plaintiffs fail to allege any of these elements. Again, Plaintiffs fail to allege that the Remedial Services are medically necessary as discovered by screening services. *Supra* 37-41. And they fail to allege that any physician recommended the Remedial Services as medically necessary. *Supra* 37-41. Because Plaintiffs fail to allege that they are entitled to the Remedial Services, there is no requirement that they be "furnished with reasonable promptness." §1396a(a)(8).

Plaintiffs also do not allege that any had requested the *Remedial Services* rather than existing ones. *See* ¶145. Plaintiff A alleges that his "mother was unable to support his return to her care" because the state did not "provide the Remedial Services," but he never alleges that she asked for any of them. ¶29. Plaintiff B alleges that his mother "request[ed] … more intensive services in the community" and that he received "existing service[s]" between 2018 and 2021, ¶¶39-41, but he

never alleges that she requested any of the *Remedial Services*. Plaintiff C alleges that his mother didn't want "any transition plan that did not provide for intensive home and community-based services," ¶53, but he fails to allege that she asked for any of the Remedial Services. Finally, Plaintiff D alleges that his mother "sought intensive mental health services" against advice that Plaintiff D "needed to be in a home with no other children," ¶62-63, but he fails to allege that she asked for any of the Remedial Services. Plaintiffs thus fail to state a claim under §1396a(a)(8).

VI. Plaintiffs fail to state ADA and Rehabilitation Act claims.

Under Title II's and the Rehabilitation Act's implementing regulations, the public entity must administer its services in "the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. §35.130(d); *see also* 28 C.F.R. §41.51(d) (similar).

Plaintiffs fail to allege cognizable ADA and Rehabilitation Act claims for five reasons. ***First***, the ADA and Rehabilitation Act do not require the states to create new benefits that they provide to no one. ***Second***, Plaintiffs' unjustified-institutionalization theory independently fails under *Olmstead* because Plaintiffs fail to allege that a treating professional determined that the community-based placement and the Remedial Services are appropriate for Plaintiffs. ***Third***, Plaintiffs' risk-of-institutionalization theory also fails because the law doesn't recognize such a claim, and even if it did, Plaintiffs fail to allege it. ***Fourth***, Plaintiffs fail to allege

any other discrimination claims. ***Fifth***, Plaintiffs' claims fail because their requested relief will fundamentally alter Georgia's mental-health program.

A. The ADA and Rehabilitation Act do not require the states to create new benefits.

The ADA and Rehabilitation Act do not require the state to create new programs. A state cannot have unlawfully discriminated "by denying a benefit that it provides to no one." *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999). So, Plaintiffs' allegation that Defendants are violating the ADA and Rehabilitation Act by "fail[ing]" "to provide" the Remedial Services" states no claim. ¶¶7, 223.

No text requires the state to create *new* entitlements, benefits, or services. All that the ADA requires is that the state not discriminate against qualified individuals with a disability and not "exclude[]" them—or "den[y] [them] the benefits of"—"the services, programs, or activities of a public entity" by reason of their disability. 42 U.S.C. §12132. The Rehabilitation Act's text uses the same words "exclude[]," "den[y]," and "discriminat[e]." 29 U.S.C. §794(a). And *Olmstead* confirms that these provisions only demand adherence "to the ADA's nondiscrimination requirement with regard to the services they in fact provide." 527 U.S. at 603 n.14 (majority). It also emphasized that the law does not impose on states "a 'standard of care' for whatever medical services they render" or requirement to "'provide a certain level of benefits to individuals with disabilities.'" *Id.*

Justice Kennedy's controlling opinion also confirms that states need not create new programs. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977). He observed that a plaintiff can allege a violation of the integration mandate only if it "would not … require the creation of a new [service]." *Olmstead*, 527 U.S. at 612 (Kennedy, J.). It would be "a quite different matter to say that a State without a program in place is required to create one"—a requirement that would implicate a "political" "judgment … not within the reach of [the ADA]" and raise "[g]rave constitutional concerns." *Id.* at 612-13. Lower courts have similarly understood that the ADA and Rehabilitation Act do not require creating new programs. *See, e.g.*, *Maione v. Zucker*, 2020 WL 5751582, at *11 (S.D.N.Y.) (no obligation to provide "'new benefits" or to "meet a disabled person's particular needs'").[6] Here, Plaintiffs ask this Court to order Defendants to provide them with new Remedial Services that they say Defendants currently "do[] not provide" to "any child." ¶¶7,223, 225, 231, 233, 239. Plaintiffs' request for new benefits is not cognizable.

B. Plaintiffs fail to state an *Olmstead* claim.

Plaintiffs' ADA and Rehabilitation Act claims fail because Plaintiffs fail to allege that they are unjustifiably kept in inpatient care. In some cases, the state *might* be required to provide existing community-based care *if* the physician

[6] *E.g.*, *Steimel v. Wenert*, 823 F.3d 902, 913 (7th Cir. 2016); *Townsend v. Quasim*, 328 F.3d 511, 518 (9th Cir. 2003); *Cohon ex rel. Bass v. N.M. Dep't of Health*, 646 F.3d 717, 729 (10th Cir. 2011); *Disability Rts. Fla., Inc. v. Palmer*, 2019 WL 11253085, at *5 (N.D. Fla.).

recommends it, the patient doesn't oppose it, *and* the state can reasonably accommodate the patient in the community. *Olmstead*, 527 U.S. at 607 (plurality).

1. A and B fail to allege an *Olmstead* claim because they fail to allege that they are being held in inpatient care *despite* their physicians' recommendations that they be placed in community. "[N]othing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.* at 601-02 (majority). "[T]he State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program." *Id.* at 602. Without these qualifications, "it would be inappropriate to remove a patient from the more restrictive setting." *Id.*; *accord id.* at 607 (plurality) (States are "required to provide community-based treatment … when the State's treatment professionals determine that such placement is appropriate."); *id.* at 610 (Kennedy, J.). And lower federal courts have applied this requirement. *See, e.g.*, *United States v. Mississippi*, 82 F.4th 387, 398 (5th Cir. 2023); *AA v. Buckner*, 2021 WL 5042466, at *8 (M.D. Ala.) (similar); *Disability Rts. Cal.*, 2021 WL 212900, at *12 (similar).

2. C fails to allege an *Olmstead* claim. Non-opposition to community placement is another element for an *Olmstead* claim. *See* 527 U.S. at 603 (majority); *id.* at 607 (plurality); *id.* at 610 (Kennedy, J.). Here, C's treatment team recommended discharging C because he "no longer required" inpatient care. ¶53. Yet, Plaintiffs

admit that C.C. opposed C's return under C's "transition plan." *Id.* But the law does not impose a "'standard of care'" or require states to provide "'a certain level of benefits.'" *Olmstead*, 527 U.S. at 603 n.14. And the physician's opinion "in determining the appropriate conditions for treatment" is entitled to "the greatest of deference." *Id.* at 610 (Kennedy, J.). Even if C.C. finds "much to protest about [the] medical judgments," it is not disability "discrimination." *Carpenter-Barker v. Ohio Dep't of Medicaid*, 752 F. App'x 215, 221 (6th Cir. 2018).

3. D cannot assert an *Olmstead* claim. The Supreme Court in *Olmstead* was concerned with "unjustified *institutional* isolation." 527 U.S. at 600 (emphasis added). *Olmstead* "controls" where the issue is "the location of services"—between institutional, inpatient, or residential treatment, and community-based care—"not whether services will be provided." *Cohon*, 646 F.3d at 729. And D alleges that his family kept him "at home when not at school." ¶¶63-64. "[T]he actions of the family of a person with disabilities [does] not arise out of any service provided by the State, and [does] not implicate the integration mandate." *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 321 (E.D.N.Y. 2009).

4. Plaintiffs fail to state an *Olmstead* claim under the Rehabilitation Act. A, B, C, and D fail to allege that they are being kept in inpatient care in an unjustified manner "*solely* by reason of" their disabilities. §794(a) (emphasis added) ¶¶227-33.

C. Plaintiffs fail to state an at-risk claim.

Plaintiffs allege that "Defendants' administrative policies, practices, and procedures … plac[e] them at a serious risk of segregation." ¶222. They also allege the risk of needing inpatient care—that is, that they are "likely" "to experience" the need for inpatient treatment. ¶¶ 33, 44, 54, 64. This theory fails for two reasons.

First, "[n]othing in the text of Title II [or] its implementing regulations … suggests that a *risk of institutionalization*, without actual institutionalization, constitutes actionable discrimination." *Mississippi*, 82 F.4th at 392. The ADA states only that "no individual shall be 'excluded,' 'denied,' or 'subjected to discrimination.'" *Id.* The Rehabilitation Act says the same. 29 U.S.C. §794. This is also true of the implementing regulations, which do not "speak to 'risks' of maladministration." *Mississippi*, 82 F.4th at 392. For these reasons, the ADA and Rehabilitation Act do not recognize at-risk claims.

Second, even if they did, Plaintiffs fail to state an at-risk claim. The courts that have embraced the at-risk theory still recognize that the plaintiffs are limited to "seek[ing] access to *existing* benefits" that "have been granted to some persons with disabilities, but not to them." *Steimel*, 823 F.3d at 913 (emphasis added). This theory, thus, requires Plaintiffs to "point to … a risk that [they] will need to endure institutionalization to receive specific services that could be provided in the community." *Disability Rts. Cal.*, 2021 WL 212900, at *12. The plaintiff must "plead with particularity which services the [defendants] must relocate" from an institutional

setting to a community setting. *Id.*; *see also id.* at *3 (dismissing case where plaintiff alleged defendants' failure to "'provide … intensive community-based services upon discharge'" put its constituents "'at serious risk' of … institutionalization").

Here, Plaintiffs fail to allege "with particularly which services" Defendants must relocate to an outpatient setting from an inpatient setting. *Id.* at *12. Plaintiffs use the term "Psychiatric Institutions" throughout the complaint to refer to at least four types of in-person care. ¶8. But these facilities cover a broad range of services that, by definition, *cannot* be transferred to an outpatient setting. For instance, psychiatric residential treatment facilities exist to provide "'quality active treatment that can only be provided in an inpatient setting and for whom alternative, less restrictive forms of treatment have been tried and found unsuccessful or are not medically indicated.'" ¶8 n.4. In addition, this theory separately cannot proceed under the Rehabilitation Act because Plaintiffs fail to allege that the alleged risk of needing inpatient care is "solely by reason of" their disabilities. 29 U.S.C. §794.

D. Plaintiffs fail to state any other discrimination claims.

Plaintiffs also assert that Defendants are discriminating against them in administering services based on "co-occurring" disabilities. ¶222. But that allegation doesn't fit with Defendants' alleged failure to provide the Remedial Services to *any* child. ¶¶7, 223. There's no plausible basis to allege that A, B, C, and D are placed in or at risk of inpatient care "by reason of" or "solely by reason of" their co-occurring disabilities. 42 U.S.C. §12132; 29 U.S.C. §794. And "the more likely

explanation[]" is that the state determined that remedial services aren't medically necessary for those with co-occurring conditions. *See Iqbal*, 556 U.S. at 681-83.

E. Plaintiffs' requested relief will fundamentally alter Georgia's mental-health program.

The ADA and Rehabilitation Act "do[] not require public entities to fundamentally alter the nature of the service they provide in order to accommodate people with disabilities." *Rose v. Rhorer*, 2014 WL 1881623, at *4 (N.D. Cal.). Requiring the states to "'create new programs that provide heretofore unprovided services to assist disabled persons'" constitutes a fundamental alteration. *Id.* The *Olmstead* plurality was concerned about fundamental-alteration issues in the context of adjudicating claims of *two* plaintiffs. *Olmstead*, 527 U.S. at 607 (plurality). "Sweeping institution-wide directives … are never 'narrowly tailored' to remedy individual instances of discrimination." *Mississippi*, 82 F.4th at 400. Plaintiffs' requested rehaul (¶¶7, 236-39) is "far more than the reasonable modifications the statute or regulations require[]."*Choate*, 469 U.S. at 300. Where the relief "would transform" the state's program "into something else entirely," courts should dismiss "at the pleading stage." *Shavelson v. Bonta*, 608 F. Supp. 3d 919, 929 (N.D. Cal. 2022).

CONCLUSION

The Court should dismiss the complaint.

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Respectfully submitted,

/s/ Bryan K. Webb
Christopher M. Carr
Attorney General
Georgia Bar No. 112505
Bryan K. Webb
Deputy Attorney General
Georgia Bar No. 743580
Georgia Department of Law
40 Capitol Square SW
Atlanta, Georgia, 30334
404-458-3408
bwebb@law.ga.gov

/s/ Patrick Strawbridge
Patrick Strawbridge*
Consovoy McCarthy PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Frank H. Chang*
C'Zar Bernstein*
Consovoy McCarthy PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
frank@consovoymccarthy.com
czar@consovoymccarthy.com
**pro hac vice*

Attorneys for Defendants

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I certify that I filed this document through the CM/ECF system.

/s/ Patrick Strawbridge

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I certify that this brief was prepared with Book Antiqua size 13 per LR 5.1.

/s/ Patrick Strawbridge