ORIGINAL

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

MICHAEL BIRDSONG, KELLEY DOTSON, SUSAN EDWARDS, BOBBY JONES, MIA MURRAY LARRY PRITCHARD, and PATRICIA REDMOND, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, GEORGIA DEPARTMENT OF COMMUNITY HEALTH, GEORGIA DEPARTMENT OF HUMAN RESOURCES, JIM MARTIN, Commissioner, Georgia Department of Human Resources, in his official capacity, GARY REDDING, Commissioner, Georgia Department of Community Health, in his official capacity,

Defendants.

COMPLAINT – Class Action

CIVIL ACTION NO.

1:03-CV-0288

**COMPLAINT**

## I. INTRODUCTION

1. The Plaintiffs in this case are persons with physical disabilities who receive or are seeking to receive long-term health-care services under federally assisted state programs administered by Defendants. Although Plaintiffs prefer and are eligible to receive care in their homes and communities, Defendants' official practices and policies cause Plaintiffs to be unnecessarily segregated in nursing homes or at risk of nursing home placement. Defendants' actions violate Plaintiffs' rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Section 504"), Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396v ("Title XIX" or the "Medicaid Act") and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

2. The ADA is a legislative response to the fact that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

3. 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.

4. The Supreme Court has held that "unjustified institutional isolation of persons with disabilities is a form of discrimination" prohibited by the ADA. *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999).

5. In their administration of long-term health-care services and programs for persons with disabilities, Defendants are required to comply with the "integration mandate" dictated by the ADA, by Section 504, and by federal regulations. These authorities require that "[a] public entity shall administer services, programs, and activities 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) (imposing the same requirement on the administration of federally assisted programs). The "most integrated setting appropriate" is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, App. A, p. 450.

6. The ADA's implementing regulations further provide that "[a] public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) that have the effect of subjecting qualified

individuals with disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(3); *see also* 28 C.F.R. § 41.51(b)(3) (imposing the same requirement on the administration of federally assisted programs).

7. In their administration of long-term health-care services and programs for persons with disabilities, Defendants are legally obligated to make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

8. Defendants discriminate against Plaintiffs by violating the integration mandate. The most integrated setting for Plaintiffs to receive long-term health-care services is in their homes and communities. This setting is appropriate to Plaintiffs' needs, or could be made appropriate with reasonable modifications to the policies, practices, or procedures of Defendants. Defendants do not offer appropriate services to Plaintiffs in their homes and communities but continue to

provide Plaintiffs with services only in nursing homes, which are unnecessarily segregated settings.

9. Defendants already administer programs that could provide needed services to Plaintiffs outside of institutions. To serve some persons with physical disabilities in a non-institutional setting, Defendants operate two home and community based (HCB) programs. The United States Centers for Medicare and Medicaid Services ("CMS") have approved these programs for Medicaid reimbursement, and in conjunction with that approval, certain statutory requirements of the Medicaid program have been waived as authorized by Title XIX. For this reason, the programs are referred to as "waiver programs." Georgia's waiver programs are the Community Care Services Program (CCSP) and the Independent Care Waiver Program (ICWP). Defendants also administer two Medicaid-reimbursed demonstration programs approved by the CMS: ShepherdCare, an ICWP program with a demonstration case management component, and the SOURCE program, which serves elderly and disabled persons at varying levels of medical need.

10. The long-term health-care services provided under the programs Defendants administer are federally reimbursed under Title XIX. Defendants

administer the ICWP, ShepherdCare, SOURCE, and CCSP programs under Title XIX pursuant to waivers that allow them to include as "medical assistance" home or community-based services (other than room and board) pursuant to an approved state plan. As a condition to each waiver, the Medicaid Act requires Defendants to inform "individuals . . . determined to be likely to require the level of care provided in a hospital, nursing facility . . . that there are feasible alternatives, . . ., at the choice of such individuals, to the provision of inpatient . . . nursing facility services . . . ." 42 U.S.C. § 1396n(c)(2)(C). The Federal Regulations require "[a]ssurance that when a recipient is determined to be likely to require the level of care provided in a . . .[nursing facility] . . ., the recipient . . . will be – (1) Informed of any feasible alternatives available under the waiver; and (2) Given the choice of either institutional or home and community-based services." 42 C.F.R. § 441.302(d). In violation of the statute and regulations, Defendants administer state programs and services in a way that fails to adequately inform Plaintiffs of the waiver alternatives. This violation of the Medicaid Act further deprives Plaintiffs of a meaningful choice between nursing-home care and the more integrated care programs that are provided in the community, and of the opportunity to apply for and to be placed on the waiting lists for these HCB programs.

11. Title XIX further requires that Defendants provide Medicaid services to eligible persons with "reasonable promptness." 42 U.S.C. § 1396a(a)(8). In violation of this requirement, Defendants have failed to provide Plaintiffs with reasonably prompt access to long-term health-care services in home and community settings, although Plaintiffs are eligible for such services.

12. Among states with waiver programs, Georgia ranks close to the bottom in the percentage of Medicaid participants being served in community-based programs rather than in institutions. According to the Georgia Department of Community Health, in state fiscal year 2000 a total of 13,657 persons were served under the ICWP, CCSP, ShepherdCare and SOURCE programs, whereas 50,004 persons -- over three and one-half times as many -- were served in nursing homes. Upon information and belief, only a small number of those served in HCB programs are individuals who were provided with a choice to move into the HCB programs from nursing facilities.

13. In operating the HCB programs, Defendants utilize criteria and methods of administration that discriminate against Plaintiffs and defeat or substantially impair the accomplishment of the objectives of the waiver programs in violation of the ADA and Section 504. 28 C.F.R. § 35.130(b)(3)(i); 28 C.F.R.

§ 41.51(b)(3)(i). For example, Defendants utilize arbitrary age criteria in the ICWP, place overly restrictive limits on the number of attendant care hours an HCB waiver recipient can receive, and contract with only a very limited number of service providers that have wheelchair accessible facilities. All of these criteria and methods of administration have the effect of requiring Plaintiffs to receive public disability services in the segregated environment of a nursing home.

14. In order for Georgia's waiver programs to receive federal approval, Defendants were required to assure the Secretary of Health and Human Services that Defendants would provide persons in nursing homes or at risk of nursing-home placement with information about the more integrated care alternatives available under HCB programs. In the approximately two decades that waiver programs have been available in Georgia, Defendants have been aware that hundreds of persons in nursing homes or at risk of nursing home placement did not know they could apply for HCB programs. Despite this awareness, Defendants did not make this information available to these potential program consumers in a way that would permit meaningful access to the HCB programs.

15. Defendants have admitted that hundreds of persons with disabilities either in nursing homes or at risk of nursing home placement have been determined

by the State of Georgia to be eligible for HCB programs but have been placed on waiting lists and have not received community-based services.

16. Defendants' stated reason for this treatment of persons with disabilities is lack of funding for waiver programs. Nevertheless, Defendants have admitted that home and community-based care costs significantly less, on average, than institutional care. For example, the Georgia Department of Human Resources, Division of Aging Services, reported that in state fiscal year 2001 the per-client cost of the CCSP was a mere 26% of the cost of nursing-home care, for a total savings of $221 million in state and federal funds from the CCSP alone.

17. In the three and one half years since the *Olmstead v. L.C.* decision, the State has made no significant effort to operate its long-term care services in an even-handed manner so that persons who need HCB services have this option. Instead, the State spends nearly 80% of its long-term care Medicaid budget on institutional care and only 16% on HCB waiver programs. During this same time period, the waiting lists for the HCB programs have greatly increased.

18. CMS, the agency within the United States Department of Health and Human Services that funds Medicaid and sets the federal Medicaid policies with which Defendants must comply, has instructed Defendants that "no one should

have to live in an institution or a nursing home if they can live in the community with the right support." Letter from Timothy M. Westmoreland (former director, Center for Medicaid and State Operations) and Thomas Perez (former director, Office for Civil Rights, United States Department of Health and Human Services) to State Medicaid Directors of Jan. 14, 2000, at 1.

19. Plaintiffs could receive long-term health care in their own homes, or in other more integrated settings outside of nursing homes, if Defendants funded and administered Georgia's HCB programs in accordance with the integration mandate.

20. Plaintiffs bring this lawsuit to end Defendants' discriminatory practices and policies. Defendants violate the ADA and Section 504 by requiring that Plaintiffs be confined in nursing homes in order to receive long-term health-care services, when community-based care is both available and appropriate to Plaintiffs' needs. Defendants further violate the ADA and Section 504 by utilizing criteria and methods of administration in their HCB waiver programs that have the effect of discriminating against Plaintiffs. Defendants also violate Title XIX by failing to provide benefits to Plaintiffs with reasonable promptness, failing to adequately inform Plaintiffs of the waiver alternatives, and failing to allow

Plaintiffs a choice of institutional or home and community-based services. In administering a state program in such a way as to deprive Plaintiffs of federal rights, Defendants violate 42 U.S.C. § 1983.

## II. JURISDICTION AND VENUE

21. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343.

22. Plaintiffs' claims are authorized by 28 U.S.C. §§ 2201 and 2202, by 42 U.S.C. §§ 1983 and 12133, and by 29 U.S.C. § 794a.

## III. PARTIES

A. Plaintiffs

23. Michael Birdsong is a 35-year-old resident of Lawrenceville, Georgia.

24. Kelley Dotson is a 47-year-old resident of Lilburn, Georgia.

25. Susan Edwards is a 41-year-old resident of Alpharetta, Georgia.

26. Bobby Jones is a 68-year-old resident of Roswell, Georgia.

27. Mia Murray is a 33-year-old resident of Lilburn, Georgia.

28. Larry Pritchard is a 55-year-old resident of Austell, Georgia.

29. Patricia Redmond is a 42-year-old resident of Austell, Georgia.

B. Defendants

30. Defendant Sonny Perdue is the Governor of the State of Georgia. He is responsible for appointing the commissioner of the Department of Community Health ("DCH") and approving the appointment by the Board of the Department of Human Resources ("DHR") of its commissioner. He is sued in his official capacity for actions and omissions under color of state law.

31. Defendant DCH is the state agency responsible for administering the Georgia Medicaid Program. *See* 42 U.S.C. § 1396a(a)(5); O.C.G.A. § 31-5A-4(a). It is a public entity as defined in 42 U.S.C. § 12131(1), and is a recipient of federal financial assistance.

32. Defendant Gary Redding is the Commissioner of the DCH. Pursuant to O.C.G.A. § 31-5A-6, he is responsible for the functions and programs of the DCH, including the state Medicaid program and the HCB waiver programs. Defendant Redding is sued in his official capacity for actions and omissions under color of state law.

33. Defendant DHR is empowered under state law to apply for, receive, and administer federal funds under the Medicaid program and other federal health

programs. *See* O.C.G.A. § 31-2-2. It is a public entity as defined in 42 U.S.C. § 12131(1) and is a recipient of federal financial assistance.

34. Defendant Jim Martin is the Commissioner of the DHR. Pursuant to O.C.G.A. § 49-2-1, he is responsible for the functions and programs of the DHR, including its acceptance and disbursement of federal Medicaid funds. He is sued in his official capacity for actions and omissions under color of state law.

## IV. CLASS-ACTION ALLEGATIONS

35. Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), Plaintiffs Michael Birdsong, Kelley Dotson, Susan Edwards, Bobby Jones, Mia Murray, Larry Pritchard, and Patricia Redmond bring this action on behalf of themselves and all other persons similarly situated. The plaintiff class consists of all Georgia residents with disabilities (1) who could live in the community with appropriate support, including the HCB services administered by Defendants, (2) who do not oppose community placement, and (3) who, as a result of Defendants' actions or failure to act, are either (*a*) unnecessarily segregated in a nursing home, or (*b*) at risk of nursing home placement.

36. The exact size of the class is unknown to Plaintiffs, but the class is believed to be so large that individual joinder of all members would be

impracticable. According to the DCH website, there are approximately 50,000 persons with disabilities receiving Medicaid-funded nursing home services in Georgia. Approximately 5,000 are under 65 years of age. Many of these persons meet the criteria for inclusion within the plaintiff class. Moreover, many class members, especially those in nursing homes, have not been informed about long-term care services in HCB programs, and have therefore not attempted to apply for such programs even though they could live in the community with appropriate support.

37. The questions of law and fact common to the class are whether Defendants violate the ADA, Section 504, and Title XIX by: (1) requiring Plaintiffs to be unnecessarily segregated and confined in institutions in order to receive long-term health-care services, rather than providing those services in Plaintiffs' homes and communities; (2) utilizing criteria and methods of administration in the HCB waiver programs that discriminate against Plaintiffs and defeat or substantially impair the accomplishment of the objectives of the HCB waiver programs; (3) failing adequately to inform Plaintiffs of the availability of HCB waiver programs; (4) failing, in their administration of Medicaid-reimbursed long-term health-care programs, to provide Plaintiffs with a choice between

institutional (nursing home) or home and community-based services; and (5) failing to provide HCB services to eligible individuals with reasonable promptness.

38. The claims of the named Plaintiffs are typical of the class members' claims.

39. The named Plaintiffs will fairly and adequately protect the interests of the class. They have no conflict of interest with other class members. Plaintiffs' counsel is experienced in litigating class actions, including actions to enforce the civil rights of persons with disabilities.

40. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate class-wide injunctive and declaratory relief.

## V. FACTS

### A. Plaintiffs' Need For Community-Based Services

#### Michael Birdsong

41. Michael Birdsong is 35 years old. He suffers from spina bifida, hydrocephalus, and depression. He has been in nursing homes since September 2000, when he fell out of his wheelchair and hurt his knee while crossing the street.

He currently resides in the Life Care of Gwinnett, 3850 Safehaven Drive, Lawrenceville, GA 30344.

42. When Mr. Birdsong was first admitted to a nursing home, no one told him about community-based alternatives. He first learned of these alternatives from Toni Pastore, a paralegal with Atlanta Legal Aid Society, Inc.

43. In attempting to secure alternative community-based care, Mr. Birdsong has encountered a series of inconsistent responses. On September 24, 2001, Mr. Birdsong applied for ICWP, CCSP and ShepherdCare. His application for CCSP, which, like all Medicaid waiver programs, requires that Mr. Birdsong require the level of care provided in a nursing home, was approved on November 27, 2001. He has been on a waiting list for community-based services since that date.

44. In December 2001 and March 2002, Mr. Birdsong was denied ICWP and ShepherdCare purportedly because he had the ability to handle his needs independently and did not need nursing home care. He is appealing the ShepherdCare decision through the Office of State Administrative Hearings.

45. Upon information and belief, in June 2002, when it was time to determine the level of care in order to secure Medicaid reimbursement for

continued nursing home placement, the Georgia Medical Care Foundation, the same agency that evaluated him for one of the community-based programs, determined that he did meet the level of care required for nursing home services, *i.e.*, that he needed assistance in his activities of daily living.

46. The SOURCE program notified Mr. Birdsong's counsel in his ShepherdCare administrative appeal that Mr. Birdsong is eligible for SOURCE.

47. Mr. Birdsong wants to live in the community. He is interested in going back to school, possibly in computers or electronics. He wants to get a job and get off of public assistance. The nursing home is a restrictive and lonely place for him to live. He is a great deal younger than most of the other residents, and because of his institutionalization he is unable to participate in activities that interest him.

48. Before being institutionalized, Mr. Birdsong lived in his own apartment. He functions independently in many ways, although he does need some attendant care and housekeeping assistance. If appropriate services were provided, Mr. Birdsong could live in the community.

Kelley Dotson

49. Plaintiff Kelley Dotson is 47 years old. She has lived in Lilburn Health Care, a nursing facility at 788 Indian Trail Road, Lilburn, GA 30047, since early 2001.

50. Ms. Dotson has had a stroke and has some speech problems as a result of the stroke, but no other significant health issues. She was not advised that there were any home or community-based alternatives where she could receive disability services when she was admitted to the nursing home. However, a close friend learned of their availability and assisted her with an application for ICWP.

51. Ms. Dotson received no communication from Defendants about her ICWP application, and in March 2002 sought assistance from Atlanta Legal Aid in following up on her application. She applied for CCSP as well in April 2002. She was placed on the CCSP waiting list in May 2002. She later learned that she had been on an ICWP waiting list since December 2001 based on her prior application.

52. Ms. Dotson would like to live in the community and attend job-training classes. Her life in the nursing home frustrates her because she is active and willing to work, but can do nothing of consequence as long as she continues to live in the nursing home. She has found her nursing home stay very isolating

because of her speech difficulty and the long wait for a communication device evaluation.

53. With appropriate services, Ms. Dotson could live in the community.

Susan Edwards

54. Plaintiff Susan Edwards is 41 years old. She has had cerebral palsy since birth and uses a motorized scooter or wheelchair for ambulation. She currently lives at home with her parents in Alpharetta, Georgia. Her parents assist her with her activities of daily living.

55. Ms. Edwards first learned of the Medicaid waiver programs in 2001 when she participated in "Partners in Policymaking", a leadership and advocacy training program for people with developmental disabilities and their families.

56. In November 2002, with the assistance of staff members at Disability Link, the metro Atlanta Center for Independent Living, Ms. Edwards applied for the ICWP and the CCSP. She was determined eligible for the CCSP in November 2002 and placed on a waiting list. In December 2002, she was determined eligible for ICWP and placed on a waiting list.

57. Ms. Edwards is at risk of nursing home placement. She worries that when her aging parents become unable to care for her, she may some day have to live in a nursing home to receive the assistance she needs.

58. Ms. Edwards does not want to live in a nursing home. She would like to live in an apartment setting, perhaps with a roommate, and would like to get a meaningful job. Without the assistance of the Medicaid waivers, Ms. Edwards would not be able to live in an apartment or other community setting on her own.

Bobby Jones

59. Plaintiff Bobby Jones is 68 years old. He has diabetes, heart disease, glaucoma, hypertension, and vascular disease, and both of his legs have been amputated below the knee. Since March 1997, he has been institutionalized in Roswell Nursing Home, 1109 Green Street, Roswell, GA 30075.

60. When Mr. Jones first entered the nursing home in March 1997, he was not informed about home and community-based programs. He first learned of these programs from Toni Pastore in the fall of 2001.

61. In November 2001, Mr. Jones applied for ICWP, CCSP and ShepherdCare. His ICWP and ShepherdCare applications were denied because those programs do not offer services to persons over 64 years of age. He was

determined to be eligible for CCSP and was placed on a waiting list in December 2001.

62. Mr. Jones wants to live in the community. His regular visitors live some distance away from the nursing home and have difficulty visiting him. The nursing home is a restrictive environment for him. He does not often go on outings with the nursing home because the home does not bring along the necessary staff to change his adult diapers. Mr. Jones is on the waiting list for a subsidized housing complex near his old neighborhood, where he would like to live with his daughter.

63. Despite his many disabling conditions, Mr. Jones is independent in many ways. He enjoys cooking and can get himself out of bed by using a transfer board. With appropriate services, Mr. Jones could live in the community with his family.

Mia Murray

64. Plaintiff Mia Murray is 33 years old and is living in Lilburn Health Care Center, 788 Indian Trail Road, Lilburn, GA 30047, a nursing facility.

65. Ms. Murray was diagnosed with multiple sclerosis in 1986, but is otherwise medically stable. While she currently needs support in some of her

activities of daily living, she could gain additional ability and function with appropriate therapy and independent living skills training. None of this therapy or training is available to her in the nursing home.

66. When Ms. Murray was admitted to the nursing home she was not informed of the availability of home and community-based services. She overheard a conversation between Plaintiff Kelley Dotson, her roommate, and Toni Pastore of Atlanta Legal Aid, and sought assistance in making applications for waiver services from Ms. Pastore.

67. Applications were submitted on behalf of Ms. Murray in April 2002 for the ICWP, CCSP and ShepherdCare programs. She was denied ICWP services based on an alleged inability to direct her own services. This denial was successfully appealed through the Office of State Administrative Hearings, and she was place on a waiting list for services in October 2002. She was found eligible for CCSP services and placed on the waiting list in May 2002. Ms. Murray's ShepherdCare application is still pending.

68. Ms. Murray is anxious to leave the nursing home and is interested in working with vocational rehabilitation specialists. She has already completed two years toward a degree in management. Because of her age, her social and

intellectual needs are not being met at the nursing home. As a result, Ms. Murray has suffered from depression.

69. Ms. Murray would like to live in the community, and could do so with appropriate services.

Larry Pritchard

70. Plaintiff Larry Pritchard is 55 years old. He suffers from multiple sclerosis. He has resided since November 1998 at Austell Nursing Home, 1700 Mulkey Road, Austell, GA 30106.

71. Mr. Pritchard applied for ICWP, CCSP and ShepherdCare in October 2001. He was denied participation in CCSP purportedly because he is not ambulatory and because the program does not allocate an adequate amount of money per day to serve Mr. Pritchard's needs in the community. He was denied ICWP services in December 2001 also for "cost" reasons, but successfully appealed that decision through the Office of State Administrative Hearings and was retroactively placed on a waiting list for services as of October 2001. He was approved for ShepherdCare services (a program with the same criteria as the ICWP program) and placed on a waiting list in March 2002.

72. Mr. Pritchard would like to live in the community, and could do so with appropriate services. He would like to reestablish a relationship with his large family and lead a normal life where he is able to interact with neighbors and friends.

Patricia Redmond

73. Plaintiff Patricia Redmond is 42 years old. She suffered an intracerebral hemorrhage in November 2000. She also has diabetes, seizure disorder, and hypertension. She currently lives in Austell Nursing Home, 1700 Mulkey Road, Austell, GA 30106.

74. Ms. Redmond applied for ICWP and CCSP in September 2001, and for ShepherdCare in December 2001. She was approved for CCSP services in October 2001 and placed on a waiting list. She was denied ICWP services in January 2002 because she could not talk due to a tracheotomy. She was approved for ShepherdCare in March 2002, a program with the same eligibility criteria as ICWP. She successfully appealed the ICWP decision through the Office of State Administrative Hearings and was placed on that waiting list in June 2002.

75. Ms. Redmond would like to live in the community with her 12-year-old daughter.

76. With appropriate services, Ms. Redmond could live in the community.

B. Medicaid Program and HCB Waivers

77. The Medicaid program, authorized by Title XIX, is a joint federal-state program. Medicaid is a matching cost arrangement under which the federal government reimburses a portion of the expenditures incurred by states that elect to furnish medical assistance to individuals whose income and resources are insufficient to cover the costs of their medical care.

78. States are not required to participate in the Medicaid program, but, if they choose to do so, they must operate their programs within federal statutory and regulatory provisions. Each participating state must adopt a State Plan that delineates the standards for determining eligibility and identifies the extent of Medicaid benefits. Georgia has chosen to participate in the Medicaid program and has adopted a State Plan.

79. For every four dollars that Georgia puts into the Medicaid program, the federal government provides approximately six dollars toward health-care services for eligible Georgia recipients.

80. Each participating state must designate a single state agency responsible for administering the Medicaid program. The State of Georgia has so designated the Georgia Department of Community Health.

81. Title XIX mandates that a State Plan provide certain specified services that are included in its definition of "medical assistance." *See* 42 U.S.C. § 1396a(a)(10)(A) (incorporating 42 U.S.C. §§ 1396d(a)(1)-(5), (17), and (21)). These mandatory services include inpatient hospital services, outpatient services, nursing facility services, and physician's services, among other things.

82. In addition to the mandatory services, Title XIX also permits (but does not require) a State Plan to provide other specified "optional" services identified as "medical assistance" in 42 U.S.C. § 1396d(a). Georgia has chosen not to provide certain optional services relating specifically to community-based long-term care, including personal care services, under its regular Medicaid programs. It has chosen, instead, to provide home and community-based "waiver" services.

83. To receive federal reimbursement under a HCB waiver, a state must make certain assurances to the CMS. Among these is an assurance of "cost-neutrality," *i.e.*, that the average per capita cost of home care under the waiver

program will not exceed the average per capita cost of institutional care. 42 U.S.C. § 1396n(c)(2)(D).

84. Under a waiver, a state can provide an array of home or community-based services, including some services not identified in 42 U.S.C. § 1396d(a) as "medical assistance." 42 U.S.C. § 1396n(c)(4)(B); 42 C.F.R. § 440.180. These extra services could not be reimbursed under Title XIX apart from the waiver program. Thus, for example, a state can provide attendant care services in the community for persons with impairments, as well as other appropriate services to assist persons to reside in their homes and communities.

85. In an approved waiver program, the Medicaid Act allows a state to: waive the statutory requirements of statewide application and comparability, 42 U.S.C. §§ 1396a(a)(1) and (10)(B); alter the income and resource rules for eligibility, 42 U.S.C. § 1396a(a)(10)(C)(i)(III); and impose a cap upon the number of persons eligible for services under the waiver, provided that number is not capped at fewer than 200 persons. 42 U.S.C. § 1396n(c)(3) and (9)-(10).

86. Under the Medicaid statute and regulations, in order to participate in the waiver program a state must provide "[a]ssurance that when a recipient is determined to be likely to require the level of care provided in a hospital, [or] NF

[nursing facility] . . ., the recipient . . . will be (1) [i]nformed of any feasible alternatives available under the waiver; and (2) given the choice of either institutional or home and community-based services." 42 C.F.R. § 441.302(d)(1)-(2), 42 U.S.C. §1396n(c)(2)(C).

87. Despite their promise to provide eligible Medicaid recipients a choice of either institutional or HCB services, Defendants did not inform Plaintiffs of such alternatives, nor did they provide Plaintiffs with such a choice prior to their admission to a nursing home. Instead, in most cases, Plaintiffs learned that such choices and options were available from personnel associated with the Atlanta Legal Aid Society, Inc.

88. The purpose of Title XIX's HCB waivers is to encourage states to provide services to help individuals with disabilities avoid institutionalization.

89. Georgia has control over the development and provision of HCB services under its waiver programs.

90. For several years, Defendants have been aware that there are a substantial number of persons in nursing facilities or at risk of unnecessary institutionalization who could be served in the community using existing waiver programs.

C. Georgia's Long-Term Care Medicaid Program

91. Long-term care is assistance given over a sustained period of time to people who are experiencing long-term inabilities or difficulties in functioning because of a disability. Long-term care services are designed either to compensate for the individual's functional impairments, or to restore or improve functional abilities. There are five basic long-term care services available under Medicaid (whether mandatory or optional): Medicaid long-term "institutional" reimbursements for (1) nursing home facilities and (2) intermediate care facilities for the mentally retarded; and Medicaid long-term "community services" reimbursements for (3) personal care, (4) home health, and (5) HCB services under waiver programs. Georgia has not opted to offer personal care services under its state plan, but does offer the other four services.

92. As noted above, Georgia has two HCB waiver programs (ICWP and CCSP) and two demonstration projects (ShepherdCare and SOURCE) for adults who are either at risk of nursing home placement or who are currently receiving nursing home services.

93. Individuals are eligible under Defendants' waiver programs if: (1) they are disabled (or, in the CCSP program, are over the age of 65); (2) they meet

the standards of care for nursing home or intermediate-care-facility services; and (3) they are eligible for Medicaid. The ICWP and ShepherdCare programs do not serve individuals over 64 years of age.

94. In 2001, Georgia spent $1,099,000,000 in combined state and federal funds on long-term care. Approximately 79%, or $872,000,000, of Georgia's expenditures for long-term care services goes to institutional rather than HCB services. More than 69%, or $760,000,000, of these institutional expenditures goes to nursing homes. Only about 16% of the long-term care budget goes to HCB waiver programs, which translates into approximately 6% of Georgia's overall Medicaid budget.

95. While Georgia ranks near the bottom of all the states both in the percentage of its population that receives HCB waiver services, and in its per capita expenditures on such services, it ranks near the top in the percentage of its population that is institutionalized in order to receive long-term health care.

96. Defendants' HCB programs provide a broad range of services, including case management, homemaker services, personal care services, environmental accessibility modifications, personal emergency response systems and companion services.

97. Many class members in institutions and living in their homes have been waiting for years to obtain the community-based long-term care services they require. Meanwhile, Defendants continually place hundreds of individuals in nursing homes without providing information about alternatives, determining if they are appropriate candidates for community services, or offering such alternative services to persons who could reside in the community with appropriate services and supports. Defendants have failed to expand their waiver programs to the extent necessary to avoid unjustified institutionalization and segregation of the class members in nursing facilities.

98. Many class members in nursing homes were not provided with information at all or in a meaningful way nor were they provided with choices of home and community-based alternatives and are thus not on waiting lists for integrated services for which they are qualified.

99. For those class members who have applied for the HCB waivers, many are denied for arbitrary reasons. For example, they may not meet the ICWP criterion that limits the program to those individuals under 65 years of age; they may be considered non-ambulatory, thus not qualifying for Alternative Living Services (the personal care home option of the CCSP); they may be denied because

of an arbitrary limit on the number of hours of attendant care available. All of these methods of administration have the effect of continuing the illegal segregation of class members in nursing homes.

100. The Plaintiffs and class members are appropriate and willing candidates to receive services in the community. Defendants have failed and continue to fail to provide them with appropriate, community-based long-term care services. Instead, Defendants continue to require Plaintiffs and class members, as a condition of receiving services, to be unnecessarily segregated and isolated in nursing homes that often cost more than Defendants would have to spend for the same or similar services in the community.

101. Plaintiffs and class members are suffering severe and irreparable harm or are at risk of suffering imminent, irreparable injury and harm due to Defendants' actions, absent an award of injunctive relief.

## VI. CLAIMS FOR RELIEF

### COUNT I – The Americans with Disabilities Act: Failure to Provide Services in the Most Integrated Appropriate Setting.

102. Plaintiffs are qualified individuals with disabilities protected by the ADA, 42 U.S.C. § 12132, and are subjected to discrimination.

103. Defendants' requirement that Plaintiffs and class members be confined in unnecessarily segregated environments (i.e. nursing facilities), rather than in the community, in order to obtain long-term care and services, violates the ADA's integration mandate, which requires that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).

104. Plaintiffs and class members can receive and are appropriate candidates for receipt of publicly-funded long-term health-related services in the community, and the community is the most integrated setting appropriate to meet their needs. Nevertheless, Defendants have denied them access to the array of community-based services they need and instead have offered them services only if they are confined in segregated facilities

**COUNT II – Section 504 of the Rehabilitation Act: Failure to Provide Services in the Most Integrated Appropriate Setting.**

105. Plaintiffs are qualified individuals with disabilities protected by Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and are subjected to discrimination.

106. Defendants' requirement that Plaintiffs and class members be confined in unnecessarily segregated environments (i.e., nursing facilities) rather than in the community, in order to obtain long-term care and services, violates Section 504's "integration mandate."

107. Plaintiffs and class members can receive and are appropriate candidates for receipt of long-term health related services in the community, and the community is the most integrated setting appropriate to meet their needs. Nevertheless, Defendants have denied them access to the array of community-based services they need and, instead, have offered them services only if they are confined in segregated facilities.

**COUNT III – Americans With Disabilities Act : Utilization of Discriminatory Criteria and Methods of Administration.**

108. The ADA prohibits public entities from utilizing criteria that have the effect of subjecting persons with disabilities to discrimination. The ADA regulations provide that "[a] public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; (ii) that have the purpose or effect of defeating or

substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(3).

109. In violation of this requirement, Defendants have utilized criteria and methods of administration in their HCB waiver programs that have the effect of subjecting Plaintiffs and the class they represent to discrimination. Among these criteria and methods of administration that have the effect of requiring Plaintiffs and class members, as a condition of receiving disability services, to be unnecessarily segregated in nursing homes are: the use of arbitrary eligibility criteria (such as age and mobility limitations), the use of a limited number of service providers with wheelchair accessible facilities, and an unreasonable limit on the number of attendant care hours an applicant for these services may receive. These and other methods of administration substantially undermine accomplishment of the objective of the waiver programs, which is to provide an alternative to institutionalization.

**COUNT IV – Section 504 of the Rehabilitation Act: Utilization of Discriminatory Criteria and Methods of Administration.**

110. In violation of the Rehabilitation Act and 28 C.F.R. § 41.51(b)(3), Defendants have utilized criteria and methods of administration in their HCB

waiver programs that have the effect of subjecting Plaintiffs and the class they represent to discrimination. Among these criteria and methods of administration that have the effect of requiring Plaintiffs and class members, as a condition of receiving disability services, to be unnecessarily segregated nursing homes are: the use of arbitrary eligibility criteria (such as age and mobility limitations), the use of a limited number of service providers with wheelchair accessible facilities, and an unreasonable limit on the number of attendant care hours an applicant for these services may receive. These and other methods of administration substantially undermine accomplishment of the objective of the waiver programs, which is to provide an alternative to institutionalization.

**COUNT V – Medicaid: Failure to Provide Timely and Adequate Notice and Freedom of Choice in Home and Community-Based Waiver Services.**

111. Title XIX requires as a condition of the ICWP and CCSP waivers that Defendants give "[a]ssurance that when a recipient is determined to be likely to require the level of care provided in a . . . [nursing facility], . . ., the recipient . . . will be - (1) Informed of any feasible alternatives available under the waiver; and (2) Given the choice of institutional or home and community-based services." 42 CFR § 441.302.(d); 42 U.S.C. § 1396n(c)(2)(C).

112. In violation of this requirement, Defendants administer state programs and services in a way that fails to provide Plaintiffs with adequate information about the waiver alternatives and deprives Plaintiffs of a meaningful choice between nursing home care and the more integrated care settings that are available in the community and required by federal law, including the opportunity to be placed on waiting lists for HCB programs.

**COUNT VI – Medicaid: Failure to Provide Services with Reasonable Promptness**

113. Title XIX requires that Defendants provide Medicaid services to eligible individuals with "reasonable promptness." 42 U.S.C. § 1396a(a)(8).

114. Defendants use services provided through Medicaid ICWP and CCSP waivers as the primary means of attempting compliance with the ADA and § 504 requirements that Plaintiffs be provided with services in the most integrated setting appropriate. Because plaintiffs have chosen to rely primarily on the Medicaid waivers to attempt to comply with the requirements of the ADA and § 504, Defendants are obligated to make such services available with reasonable promptness.

115. In violation of this requirement, Defendants have failed to provide Plaintiffs with "reasonabl[y] prompt[]" access to waiver and other Medicaid services that would afford long-term health-care services in home and community-based settings, although Plaintiffs are qualified for such services.

## VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request:

a. That this Court exercise jurisdiction over this action.

b. That this Court declare that the actions and failure to act of Defendant Georgia Department of Community Health, Defendant Redding, and the other Defendants violate the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the Medicaid Act, and Section 1983 of the Civil Rights Act of 1871.

c. That this Court issue preliminary and permanent injunctions to enjoin Defendants from continuing to violate the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, Sections 1396a(a)(8) and 1396n(c)(2)(C) of the Medicaid Act and Section 1983 of the Civil Rights Act of 1871; to

require Defendants to immediately offer its long-term care services to Plaintiffs and class members in their homes and communities, rather than only in unnecessarily segregated institutional facilities; to require Defendants to notify in a meaningful manner all class members of the waiver alternatives and of their option to choose between institutional and home-based or community-based services; to require Defendants to allow those class members who choose home-based or community-based services to apply and be placed on a waiting list for the waiver programs; to enjoin Defendants from utilizing criteria and methods of administration in their HCB waiver programs that discriminate against Plaintiffs and class members and have the effect of defeating the purpose of the HCB waivers; and to require Defendants to provide long-term care in home-based and community-based settings with reasonable promptness.

d. That this Court issue such other relief as may be just, equitable and appropriate, including an award of reasonable attorneys'

fees, litigation expenses and costs pursuant to 42 U.S.C. §§ 1988 and 12205, and 29 U.S.C. § 794a(b).

Dated: January 31st, 2003

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