IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Sarah Crabtree, Velma Ledbetter, Carl Anders, George Dylan Brown, Willowdeen Burrows, Hazel S. Graham, Harold Lee Murphey, Larry Scott Ervin, Megan Allen, Jessica W. Pipkin, Florence Adams, Lena Burgess, Wilma F. Stills, Odell Owens, Ellar Lowman, Marvin Ray Berry, Jr., Carol Smith, Betty Jean Taylor, Delores Baker, Lorrinda Mabry, Joel DeHaas, Margaret Connelly,

Plaintiffs,

v

David Goetz, Commissioner, Tennessee Department of Finance and Administration; Darin Gordon, Deputy Commissioner and Director, Bureau of TennCare

Defendants.

No. 3 08 0939

JUDGE TRAUGER

COMPLAINT

INTRODUCTION

1. This case is brought by individuals who range in age from 21 to 97 years old They suffer from a variety of chronic and disabling conditions, including cerebral palsy, muscular dystrophy, traumatic brain injury, Parkinson's disease, stroke, and Alzheimer's disease. The Plaintiffs have limited income, and they are all eligible for and obtain their health care services through TennCare, Tennessee's Medicaid program. The Department of Finance and Administration, which administers the program, has determined that each Plaintiff needs home health and/or private duty nursing services. These Medicaid-funded services have allowed the Plaintiffs to live successfully at home, participating in family and community life.

2. On or about August 8, 2008, the Department informed Plaintiffs that, starting on September 7, 2008, their home-based nursing services will be reduced and/or eliminated. Most people will qualify for private duty nursing services only if they are on a ventilator for at least 12 hours each day or have a tracheotomy. Home health nursing care (from licensed practical nurses (LPNs)) is being capped at no more than 8 hours each day, up to 27 hours each week, and home health aide care (from certified nurse's assistants (CNAs) is being capped at no more than 8 hours each day. These new limits are being imposed without regard to Plaintiffs' medical needs and without regard to whether the reductions in services will necessitate Plaintiffs' institutionalization. Plaintiffs, in order to reside in their homes and communities, have been previously approved for and received more than these capped amounts. However, TennCare-participating managed care organizations (MCOs) are telling providers to change their orders to reflect no more home care than the limited amounts; otherwise, their patients will get no care at all.

3. These exclusions and inflexible caps are causing Plaintiffs to lose vital home-based nursing services. Without these services, Plaintiffs will be forced into more restricted, segregated nursing home settings; some of the Plaintiffs have stated they would rather die than go into a nursing home.

4. The Tennessee General Assembly recently approved a new Long-Term Care Community Choices Act to correct Tennessee's acknowledged overreliance on nursing homes, which results in the unnecessary segregation of people with disabilities. *See* Long-Term Care Community Choices Act of 2008, Pub. Chap. No. 1180, Senate Bill No. 4181, An Act to amend Tenn. Code annotated, Title 63 and Title 68 and 71 (Long-Term

Care Community Choices Act). The new program will be implemented beginning next year. The new program will broaden the availability of home and community based services (HCBS) that substitute social support services for both home-based nursing and institutional care in nursing facilities.

5. The Tennessee General Assembly has recognized that "the current long-term care system is heavily dependent on the most costly services with 98 percent of long-term care funding spent on institutional care and with limited utilization of lower cost home and community-based options even though such options would better meet the needs and preferences of people who need care and their families." *Id.* Despite this, Defendants are not waiting for the implementation of the Long-Term Care Community Choices Act, but are immediately terminating or reducing community-based services to Plaintiffs who will have no option other then institutional nursing facilities.

6. Tennessee currently ranks 51st among state Medicaid programs in the provision of HCBS, the same rank it has held for many years, a problem the Governor and legislators have stated they will address with the new program. Defendants have stated that they are imposing the new limits on home health and private duty nursing services to encourage patients to make greater use of HCBS, even though the direct effect of the new limits will be to unnecessarily institutionalize Plaintiffs. Plaintiffs do not oppose the new program or the State's goal of reducing the needless isolation of people with disabilities in nursing facilities. However, Defendants are imposing the nursing cuts before the new HCBS services are available and without making an individualized assessment of the most integrated setting in which TennCare services can be appropriately provided to the Plaintiffs. Defendants thus exacerbate the problem of

needless institutionalization by immediately forcing the Plaintiffs to go into nursing homes or face grave risks to their health.

7. The Department's actions violate the Americans with Disabilities Act (ADA), Title II, 42 U.S.C. § 12132, and its implementing regulations, and Section 504 of the Rehabilitation Act, 29 U.S.C. §794(a), and its implementing regulations. Among other things, these laws require the Department to administer its services and programs in the most integrated setting appropriate to the needs of the individual with disabilities.

8. Plaintiffs seek declaratory and injunctive relief to preserve their care in the community until adequate HCBS alternatives are available that will ensure that Plaintiffs are able to receive TennCare services in the most integrated setting appropriate to their needs and conditions, which has been demonstrated to be in Plaintiffs' homes.

JURISDICTION AND VENUE

9. The Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 65. Plaintiffs' causes of action for disability discrimination are authorized by 42 U.S.C. § 12133 and 29 U.S.C. § 794(a).

10. Venue is proper because a substantial part of the actions and omissions of which Plaintiffs complain occurred in this District. 28 U.S.C. § 1391(b).

DEFENDANTS

11. David Goetz is the Commissioner of Tennessee Department of Finance and Administration. He is the cabinet level official responsible for supervising Darin Gordon, the Director of TennCare. As such, Commissioner Goetz is responsible for implementing and managing the Tennessee Medicaid program, including Tennessee's contracting with

Managed Care Organizations and Tennessee's Medicaid Home and Community-based Services (HCBS) Waiver for the Elderly and Disabled, and its fee-for-service nursing home payment system, consistent with federal law, including the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Medicaid Act. Commissioner Goetz is sued in his official capacity.

12. Darin Gordon is the Deputy Commissioner of the Tennessee Department of Finance and Administration and is the Director of the Bureau of TennCare. As such, he is responsible for day-to-day management of TennCare consistent with federal law, including the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Medicaid Act. Director Gordon is sued in his official capacity.

PLAINTIFFS

13. Plaintiff Sarah Crabtree is a 28-year-old Medicaid recipient who lives in Gibson, Tennessee.

14. Plaintiff Velma Ledbetter is a 72-year-old Medicaid recipient who lives in Livingston, Tennessee.

15. Plaintiff Carl Anders is a 54-year-old Medicaid recipient who lives in Murfreesboro, Tennessee.

16. Plaintiff George Dylan Brown is a 28-year-old Medicaid recipient who lives in Hendersonville, Tennessee.

17. Plaintiff Willowdeen Burrows is a 93-year-old Medicaid recipient who lives in Mt. Juliet, Tennessee.

18. Plaintiff Hazel S. Graham is an 89-year-old Medicaid recipient who lives in Crossville, Tennessee.

19. Plaintiff Harold Lee Murphey is a 30-year-old Medicaid recipient who lives in Rockvale, Tennessee.

20. Plaintiff Larry Scott Ervin is a 29-year-old Medicaid recipient who lives in Alexandria, Tennessee.

21. Plaintiff Megan Allen is a 21-year-old Medicaid recipient who lives in Portland, Tennessee.

22 Plaintiff Jessica W. Pipkin is a 27-year-old Medicaid recipient who lives in Lynnville, Tennessee.

23. Plaintiff Florence ("Florrie") Adams is a 21-year-old Medicaid recipient who lives in Cookeville, Tennessee

24. Plaintiff Lena Burgess is a 97-year-old recipient of Medicaid who lives in Crossville, Tennessee.

25 Plaintiff Wilma F. Stills is a 76-year-old Medicaid recipient who lives in Gray, Tennessee.

26. Plaintiff Odell Owens is an 80-year-old Medicaid recipient who lives in Columbia, Tennessee

27. Plaintiff Ellar Lowman is a 74-year-old Medicaid recipient who lives in Chattanooga, Tennessee.

28. Plaintiff Marvin Ray Berry, Jr. is a 36-year-old Medicaid recipient who lives in Murfreesboro, Tennessee.

29 Plaintiff Carol Smith is a 30-year-old Medicaid recipient who lives in Knoxville, Tennessee.

30. Plaintiff Betty Jean Taylor is a 69-year-old Medicaid recipient who lives in Mt. Juliet, Tennessee.

31. Plaintiff Delores Baker is a 78-year-old Medicaid recipient who lives in Nashville, Tennessee.

32. Plaintiff Lorrinda Mabry is a 43-year-old Medicaid recipient who lives in Antioch, Tennessee.

33. Plaintiff Joel DeHaas is a 21-year-old Medicaid recipient who lives in Chuckey, Tennessee.

34. Plaintiff Margaret Connolly is an 84-year-old Medicaid recipient who lives in Bristol, Tennessee.

THE AMERICANS WITH DISABILITIES ACT

35. Title II of the Americans with Disabilities Act (ADA) provides that "no qualified individual with a disability shall, by reason of 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 such entity." 42 U.S.C. § 12132.

36. Regulations implementing Title II of the ADA require that a public entity administer its 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).

37. Regulations implementing Title II provide that "a public entity may not, directly or through contractual or other arrangements, utilize criteria or other 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 entity's program with respect to individuals with disabilities...." 28 C.F.R. § 35.130(b)(3).

38. The Department of Finance and Administration is a public entity under Title II of the ADA and its implementing regulations.

SECTION 504 OF THE REHABILITATION ACT

39. Section 504 of the Rehabilitation Act of 1973 provides, "No otherwise qualified individual with a disability in the United States..., shall, solely by reason of her or his disability, be excluded from 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.

40. Regulations implementing Section 504 require a recipient of federal financial assistance to administer its services, programs, and activities in "the most integrated setting appropriate" to the needs of qualified individuals with disabilities. 28 C.F.R. § 41.51(d).

41. Regulations implementing Section 504 prohibit recipients of Federal financial assistance from

> [u]tiliz[ing] criteria or methods of administration... (i) [t]hat have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap [or] (ii) [t]hat have the...effect of substantially impairing accomplishment of the recipients' program with respect to handicapped persons.

45 C.F.R. § 84.4(b)(4); 28 C.F.R. § 41.51(b)(3)(i).

42. The Department of Finance and Administration is a program that receives Federal financial assistance under Section 504 and its implementing regulations. Federal Medicaid funds account for approximately 63% of the cost of the Tennessee Medicaid program.

MEDICAID AND TENNCARE

43. In 1965, Congress enacted Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396v, establishing Medicaid, a medical assistance program cooperatively funded by the federal and state governments. The purpose of Medicaid is to furnish, as far as practicable, "medical assistance on behalf of ... aged, blind or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services" and "to help such families and individuals to *attain or retain capability for independence or self-care* ..." 42 U.S.C. § 1396 (emphasis added).

44. The Secretary of Health and Human Services administers the Medicaid program at the federal level through the Centers for Medicare & Medicaid Services (CMS), which has urged states pursuant to the ADA to avoid unnecessary institutionalization of person with disabilities in nursing facilities.

45. State participation in Medicaid is voluntary. Once a state elects to participate, it must adhere to the federal legal requirements, as provided by the United States Constitution, the Medicaid Act and implementing regulations, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act of 1973.

46. Coverage of certain services is mandatory under Medicaid for most Medicaid beneficiaries. *See* 42 U.S.C. § 1396a(a)(10)(A)(i) (incorporating 42 U.S.C. § 1396d(a)(1)-(5), (17), (21)). Mandatory services include services in a nursing facility. *Id.* Mandatory services include home health services for "any individual who, under the state plan, is entitled to nursing facility services." 42 U.S.C. §§ 1396a(a)(10)(D), 1396d(a)(7). Coverage for home health services must include nursing services and home

health aide services, 42 C.F.R. § 440.70(b)(1) and (2), both of which Defendants are reducing or eliminating for each named Plaintiff.

47. In addition, the Medicaid Act allows states to provide for coverage of home health nursing services for persons who are not entitled to nursing facilities services and private duty nursing because they meet the "level of care" requirements established by a state. *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(7), (8), (22). Tennessee covers these services. On information and belief, Plaintiffs meet Defendants' "level of care" for a nursing facility.

48. The Medicaid Act authorizes states to obtain Home and Community-based Services (HCBS) waivers from CMS to provide for alternatives to nursing home care and services. These programs cover a range of home-based services for limited numbers of Medicaid recipients. *See* 42 U.S.C. § 1396n(c). Tennessee covers these services.

49 The Bureau of TennCare is designated as the "single state agency" responsible for the administration and supervision of Tennessee's Medicaid Program under Title XIX of the Social Security Act, including both the managed care and the long term care components. *See* T.C.A. § 71-5-104.

50. Under the Tennessee Medical Assistance Act of 1968, Defendants are required to administer the TennCare program in conformity with federal law and the terms of any federal waiver granted the state. *See* T.C.A. §§ 71-5-102, 104.

51. Until 1994, Tennessee operated its Medicaid program on a fee-for-service basis, paying claims submitted directly to the state by health care providers who served eligible individuals.

52. In 1993, Tennessee obtained from the Secretary of Health and Human Services a Medicaid waiver under Section 1115 of the Social Security Act, 42 U.S.C. § 1315. The waiver permitted the State to replace its traditional Medicaid program with a program called TennCare.

53. The Tennessee Medicaid program provides for coverage through two separately administered programs: (1) managed care, which is implemented through private managed care organizations (MCOs) on a pre-paid, capitated basis and which currently provides Plaintiffs with their home nursing services; and (2) long term care, which is directly administered by the Department and reimburses for both nursing home and Home and Community-based Waiver Services (HCBS) to prevent unnecessary institutionalization. An individual can be enrolled in TennCare and receive services through the HCBS long term care program.

54. The Department enrolls Medicaid recipients, including Plaintiffs, into managed care organizations (MCOs). The Department pays participating MCOs to provide a medical home to enrolled recipients, manage recipients' care, and assure proper utilization of services, including home health nursing and private duty nursing services. The MCOs' contracts do not include payment for, or management of, enrollees' HCBS waiver or institutional nursing home care.

55. When deciding the type and scope of services that an individual TennCare enrollee needs, the MCOs must apply the Department's definition of medical necessity. That definition explicitly includes a determination of whether the requested service will supplant family or natural supports. *See* T.C.A. § 71-5-144(b)(1) (requiring the MCO to determine whether the service is for the convenience of an enrollee or family member or

necessary for the eligible individual). The Department has not terminated, withheld or reduced payments to any MCO nor sanctioned any MCO for misapplying the medical necessity definition by supplanting family or natural supports with TennCare-covered nursing care. In order to obtain federal reimbursement, Tennessee has repeatedly certified to CMS that it has administered the TennCare program in conformity with all applicable federal Medicaid requirements, which include a requirement that all services must be medically necessary for the patient who receives them.

56. According to the Department, the home care cutbacks are needed because the "unlimited availability of these services under the TennCare managed care program has meant that families and other natural caregiver support systems have been supplanted . . . ." Letter from Darin J. Gordon, Director, Bureau of TennCare, Department of Finance and Administration, to Susan Cuerdon, Acting Director, Family and Children's Health Programs Group, Centers for Medicare & Medicaid Services at 2 (Feb. 29, 2008) (hereinafter "Gordon Letter of Feb. 29, 2008") (Ex. A, Mot. for Prelim. Inj.).

57. The Department informed CMS that the reduction and elimination of home nursing services will result in Medicaid recipients' expanding their use of the Home and Community Based Services waiver for the Elderly and Disabled (HCBS-ED). *Id.* The State recently received approval from CMS to expand the HCBS-ED waiver to more people.

58. The HCBS-ED waiver currently offers services including personal care services, home maker, case management, respite care, personal emergency response systems, home-delivered meals, and minor home modifications. According to Defendant Gordon, "The State's HCBW waiver programs have never covered home health

services." Letter from Darin J. Gordon, Deputy Comm'r, to Gordon Bonnyman, Tennessee Justice Center (Feb. 21, 2008) (Ex. B, Mot. for Prelim. Inj.).

59. On information and belief, there are approximately 4,700 individuals enrolled in the HCBS-ED waiver and 1,300 waiver "slots" that are unfilled and available. Defendants have not referred Plaintiffs to the HCBS waiver slots; assessed the Plaintiffs to determine if they would be eligible for these services; or determined what, if any, changes might be appropriate in Defendants' existing HCBS waiver services which would obviate the need for the persons to be institutionalized in nursing facilities.

60. Effective July 1, 2008, Tennessee's newly enacted Long-Term Care Community Choices Act of 2008 provides:

> Sec. 3 . . . (c) The long-term care system shall promote independence, choice, dignity, and quality of life . . . and shall include consumer-directed options that offer more choices regarding the kinds of long-term care services people need . . .
>
> (e) The long-term care system . . . shall offer services . . . delaying or preventing the need for more expensive, institutional care . . .
>
> Sec. 8(a) The commissioner shall develop level of care criteria for new nursing facility admissions which ensure that the most intensive level of long-term care services is provided to persons with the highest level of need.
>
> Sec. 9(a) The commissioner shall develop and implement strategies to encourage the utilization of cost-effective home and community-based services in lieu of institutional placement.
>
> Sec. 15(a) The commissioner shall, upon approval of a waiver amendment granting authority from the federal government, develop and make available consumer-directed options for persons receiving home and community-based long-term care services under the long-term care program, which may include, but are not limited to, the ability to select, direct, and/or employ persons . . . personal care assistant/attendant . . . the ability to direct and supervise a paid personal aide in the performance of a health care task . . . .

Long-Term Care Community Choices Act of 2008, Pub. Chap. No. 1180, Senate Bill No. 4181, An Act to amend Tenn. Code Annotated, Title 63 and Title 68 and 71.

61. Despite the enactment of the Long-Term Care Community Choices Act of 2008, on or about August 8, 2008, the Bureau of TennCare sent notices to Medicaid recipients "about Private Duty Nursing (PDN) and Home Health Care for adults age 21 and older." TennCare August 8, 2008 Notice (Ex. C, Mot. for Prelim. Inj.). The notice informs recipients that most adults will qualify for PDN only if they are on a ventilator for at least 12 hours each day or have a tracheotomy.

62. In addition, TennCare is capping Home Health Nursing Care for most people at no more than 8 hours each day up to 27 hours each week, and TennCare is capping Home Health Aide Care for most people at no more than 8 hours each day. Defendants did not notify the Plaintiffs of existing HCBS waivers, assess them for placement in an available HCBS waiver slot, or determine what services would be available to them under the Long-Term Care Community Choices Act.

63. The August 8, 2008 notice states, in part:

> Starting September 7, 2008, TennCare will **not** cover PDN for adults age 21 and older unless:
>
> - You are ventilator dependent for at least 12 hours each day.
> - **OR,** you have a functioning tracheotomy AND need certain other kids of nursing care too.
>
> ..... You may be able to get Home Health Care. **Keep reading to find out about changes to Home Health Care.**
>
> ..... You may qualify for **part time** (intermittent) **nursing OR home health aide care.**
>
> **Part-time and intermittent Home Health Nursing Care**
>
> For most people TennCare will **only** pay for:
> - Up to one nurse visit each day (Each visit must be less than 8 hours.)
> - No more than 27 hours of nursing care each week

Home Health Aide Care

For most people, TennCare will **only** pay for:

- Up to 2 home health aide visits each day
- No more than 8 hours of home health aide care each day

What if you need both Home Health Nursing AND Aide care?

For most people TennCare will **only** pay for:

- No more than 8 hours of nursing and home health aide care combined each day
- No more than 35 hours of nursing and home health aide care combined each week

If you would qualify for care in a Skilled Nursing Home but want to get care at home, you may be able to get:

- Up to 30 hours of nursing care each week
- Up to 40 hours of nursing and home health aide care combined each week.

Id. (Emphasis in original.)

64. The August 8 notice informs recipients that the only basis for appeal is if the agency has the age wrong and the recipient is actually under age 21. *Id.*

65. TennCare MCOs are telling health care providers to revise patients' orders to reduce services to the limits set forth in the August 8, 2008 letter and that patients without new orders will not receive any care at all. According to TennCare's counsel, "[t]he practical real world effect of what will occur if enrollees and their doctors refuse to work with home health agencies and the MCOs to design an acceptable plan of care within the limits is that patient will go without any care – a result that might be avoided if the doctor concludes that it is appropriate to write a new prescription within the benefit limits." Letter from Nicole Jo Moss, Cooper & Kirk, to Michele Johnson, Tennessee Justice Center (Sept. 17, 2008) (Ex. D, Mot. for Prelim. Inj.).

66. According to the CMS annual data, Tennessee spends approximately 98 percent of its Medicaid long term care dollars on institutional care and less than 2 percent on Home and Community Based Services.

67. CMS has ranked Tennessee 51st in the country for a number of years with regards to its institutional versus community-based long-term Medicaid care and services.

68. On information and belief, the Tennessee Medicaid program has currently amassed budget surpluses that are being held in a TennCare Reserve Fund that total over $500 million. These are funds that have been appropriated for the operation of the TennCare program but that have not been expended. These funds are distinct from the State of Tennessee's Rainy Day Fund, which, on information and belief, currently stands at approximately $750 million.

PLAINTIFFS' FACTS

69. Plaintiff Sarah Crabtree is a 28-year-old Medicaid recipient who lives with her family in Gibson, Tennessee. Her TennCare MCO is United American Healthcare Corporation (UAHC) Health Plan of Tennessee. Ms. Crabtree is the mother of three young children.

70. Two years ago, Ms. Crabtree was injured in a car accident. She suffered a traumatic brain injury, and, as a result, was left with a severe seizure disorder and incontinency. She is unable to bear weight and is totally bedridden. She needs around-the-clock attention and care. She must be transported to medical appointments via ambulance.

71. After the accident, Ms. Crabtree spent time in two nursing homes. In the first one, she almost lost her leg. The nursing home staff did not address the blood clot in Ms.

Crabtree's leg even after her mother brought it to their attention. The clot kept getting bigger, and Ms. Crabtree developed a fever. Ms. Crabtree got so sick that her mother took her from the nursing home and to an emergency room. Ms. Crabtree had almost hemorrhaged to death and was barely able to keep her leg.

72. At the second nursing home, Ms. Crabtree developed seven decubitus ulcers – bedsores caused when a patient is not turned frequently enough. The poison caused by one ulcer is enough to kill someone, but the nursing home allowed seven to develop. Her physicians think this is the reason she is not able to bear weight on her feet to this day. At that point, Ms. Crabtree's family decided to take her home.

73. Ms. Crabtree has been receiving home health care from a certified nurse's assistant (CNA) each day through TennCare. Ms. Crabtree's mother and father take turns caring for her when the CNA cannot. Her parents also raise her three children. The children love their mother, and they are a very happy family together. Ms. Crabtree's oldest child is eight, and she looks forward every day to his arrival home from school. He tells his mother what he learned at school each day. Ms. Crabtree's two other children are six and three. Ms. Crabtree and all of her children love to play on the bed together, read stories, and laugh. Ms. Crabtree's mother is so burdened with caring for Ms. Crabtree and her children that she has had to send the six-year old off for long stays with his paternal grandparents. During these times, Ms. Crabtree misses seeing all of her children regularly; she would be even sadder if she were forced into a nursing home away from her children.

74. On or about August 8, 2008, Ms. Crabtree received a notice from TennCare informing her that her home health nursing care would be reduced.

75. The registered nurse at Ms. Crabtree's home health agency, CareAll, believes Ms. Crabtree will end up in a nursing home if she does not get the nursing hours she needs. Ms. Crabtree needs to be changed, cleaned and turned every two hours. Ms. Crabtree's mother could do this for Ms. Crabtree only if she gave up sleep and caring for Ms. Crabtree's three children. Based on her past experiences in a nursing home, Ms. Crabtree's parents are afraid she will die if she has to go to a nursing home.

76. Plaintiff Velma Ledbetter is a 72-year-old Medicaid recipient who lives in Livingston, Tennessee. She is enrolled in the Amerigroup MCO.

77. Ms. Ledbetter has suffered a stroke. She broke her hip and cannot walk without a walker. She is prone to blood clots in her legs and suffers from congestive heart failure. Ms. Ledbetter is insulin dependent and must receive insulin five to six times per day, including in the nighttime. She also has a "porti-cath" surgically implanted to administer IV solutions, including antibiotics when she gets kidney infections. She weighs 80 pounds. It is essential that Ms. Ledbetter receive nursing care. The nurses must flush out her porti-cath, administer her insulin, and help her with all activities of daily life.

78. Last year, Ms. Ledbetter went to a nursing home for physical therapy. Within one week, she developed blood clots in her legs, causing her feet to swell like balloons. Her lungs began to fill up with fluid. Meanwhile, the nursing home was treating her for a kidney infection, which she did not have. Ms. Ledbetter's daughter eventually persuaded the nursing home to send her mother to a hospital emergency room, even though she was told her mother would never again be welcome in that nursing home. Ms. Ledbetter was admitted to the hospital's intensive care unit for four days and to the recovery wing of the

hospital for almost two additional months. Since she left the hospital at the end of February 2008, she has received private duty nursing through TennCare.

79. On or about August 8, 2008, Ms. Ledbetter received a notice from TennCare informing her that her private duty nursing services would be eliminated. She has attempted to appeal by phone. If her services are terminated, Ms. Ledbetter will be forced to go to a nursing home. Her two daughters cannot provide the constant care that Ms. Ledbetter needs. One daughter lives far away and the other is caring for a daughter with hydrocephalus.

80. Plaintiff Carl Anders is a 54 year-old Medicaid recipient who lives in Murfreesboro, Tennessee. His TennCare MCO is TennCare Select. Mr. Anders is a veteran of the United States Army.

81. Four years ago, Mr. Anders suffered a stroke that left him cognitively intact but completely physically disabled. He lives with his sister, LaMonica Barnett, who cares for Mr. Anders with the help of home health nursing assistance.

82. Immediately following his stroke, Mr. Anders spent two years in two different nursing homes, where he suffered aspiration pneumonia three times. Aspiration pneumonia is caused by lung infection due to foreign materials (e.g. food, liquid, vomit) being inhaled into the lungs; this can be fatal. His tracheotomy tube was dislodged from his neck several times due to staff neglect, and he was in and out of the hospital emergency room with various infections, including Methicillin-resistant Staphylococcus aureus (MRSA) and Urinary Tract Infections (UTIs). He also had severe eye problems and limited vision. He is now under an ophthalmologist's care and is regaining his vision. This specialized care was not available to him in either nursing home.

83. In 2006, Ms. Barnett moved her brother into her home. Since then, Mr. Anders has not been hospitalized, has not been to the emergency room, and does not have reoccurring infections. He has access to needed therapies and can take steps now with assistance. He no longer has a tracheotomy tube nor is he connected to a ventilator because his nurses perform the frequent suctioning needed to keep his airways clear. He also takes breathing treatments three times a day to aid in this effort. He can now open his mouth with the assistance of Botox injections and Thera-Bite therapy. These therapies were not available to him in the nursing homes, and his mouth was clinched shut as a result. He remains on a feeding tube but is receiving speech and swallowing therapy. Mr. Anders is able to communicate with his sister and her family and is thriving in her home. He has a renewed sense of purpose being in a home environment with family and friends. Where he once felt devalued and stripped of his dignity, he has regained hope. In Mr. Anders's own words, "When I was in the nursing home, I just laid in the bed and stared at the walls. I would not even look outside." While in the nursing home, he was unnecessarily in bed for 22 hours a day. The nursing home staff did not take him out of the room. He had no say in his treatment plan or the type of care he received. He now is an active participant in his own care.

84. Mr. Anders first received a notice of reduction in July 2008; his sister filed an appeal on his behalf. Ms. Barnett received a continuance while she attempts to find counsel.

85. On or around August 8, 2008, Mr. Anders received a notice from TennCare informing him that his home health services would be reduced. According to his sister, if Mr. Anders's home health care hours are significantly reduced she will no longer be able

to care for him in her home. The only alternative will be to put him in a nursing home. Given his past experiences, she is afraid he will not be adequately cared for and concerned about the effect that being separated from her family will have on him. Dr. Garvin, his physician, says that nursing home placement will likely cause Mr. Anders's condition to deteriorate because he remains susceptible to severe infections. Dr. Garvin also notes that Mr. Anders is likely to regress physically, despite all of the progress he has made since suffering the stroke.

86. Plaintiff George Dylan Brown is a 28-year-old Medicaid recipient who lives in Hendersonville, Tennessee. His TennCare MCO is Americhoice, and he also participates in the HCBS waiver.

87. Mr. Brown was in a car accident in 2002 and is, as a result, a quadriplegic. His physician has prescribed, and his MCO has covered, private duty nursing as medically necessary. His physician also says he needs a Personal Assistant (PA), and this has been covered through the HCBS waiver.

88. Mr. Brown recently moved out of his parents' home and into a house with a roommate. He is working full-time at the Center for Independent Living and is a strong advocate for individuals with disabilities. Mr. Brown sits on the Governor's Council on Independent Living and Developmental Disabilities. He is extremely outgoing and enjoys playing poker and discussing politics. His nurses and PAs assist him with all activities of daily living and make it possible for him to be involved in his community.

89. On or around August 8, 2008, Mr. Brown received a notice from TennCare informing him that his private duty nursing would be eliminated. According to his physician, Dr. Carmack, Mr. Brown's life will change drastically if he loses this care. He

will be unable to live and work in the community. He has no family members who can meet his private duty nursing needs. If he is forced into a nursing home, his quadriplegia will make him susceptible to infections.

90. Plaintiff Willowdeen Burrows is a 93-year-old Medicaid recipient who lives in Mt. Juliet, Tennessee with her daughter, Betty Jean Taylor. She is enrolled in Americhoice MCO.

91. Ms. Burrows is paralyzed on her right side, cannot walk, and has 98 percent hearing loss in both ears. She cannot get herself in and out of the bed, on or off the toilet, tend to her toilet hygiene alone, walk without assistance, use a telephone to dial a call, bathe, dress herself, or prepare her own meals. She is insulin dependent. Ms. Burrows has been receiving medically necessary private duty nursing.

92. On or about August 8, 2008, Ms. Burrows received a notice from TennCare informing her that her private duty nursing services would be eliminated. According to Dr. Enayt, her treating physician, Ms. Burrows must have appropriate and medically necessary private duty nursing each day. Her home health agency has informed Ms. Burrows that, after services are reduced by TennCare, her home health nursing care will be significantly reduced.

93. Without appropriate and medically necessary private duty nursing, Ms. Burrows will not be able to live in her home. She has no local family to care for her, other than a grandson. However, the grandson suffers from Charcot Marie Tooth disease, a severe neuromuscular disease that destroys both nerves and muscles, and he struggles to care for himself. Since receiving this notice, Ms. Burrows has been crying and is despondent over the news that she may have to move into a nursing home while her

daughter, Betty Jean, is taken to Knoxville, Chattanooga, or Memphis and put in a nursing home in one of those cities. She loves her home and the people who have been caring for her. She and her daughter have lived together for many years and are totally dependent on each other. Their wish is to remain together for as long as they live.

94. Plaintiff Hazel S. Graham is an 89-year-old Medicaid recipient who lives in Crossville, Tennessee. She is enrolled in Amerigroup MCO.

95 When she was 55-years-old, Ms. Graham suffered a stroke that left her disabled. She is incontinent and unable to put on her own diapers. She is confined to a wheelchair. She cannot bathe, cook for or feed herself, dress, lift herself to transfer from one place to another, or take her own medication. Ms. Graham takes medication for bipolar disorder.

96. Ms. Graham has no family able to assist her. She moved to Tennessee from California some years ago to be close to her friend, Ruthann Booher. As Ms Graham's health deteriorated, Ms. Booher "adopted" Ms. Graham and became her care giver. For several years, Ms. Graham was able to live without TennCare assistance. By 2006, however, Ruthann had a shoulder injury and could no longer care for Ms. Graham alone.

97. TennCare determined that Ms. Graham needs private duty nursing each day. With this assistance, Ms. Graham is alert and recognizes her friends and caregivers

98. On or about August 8, 2008, Ms. Graham received a notice informing her that her private duty nursing services would be eliminated. Without home care, Ms Graham's option is to move into a nursing home. Ms. Graham was in a nursing home previously for over two months to receive physical therapy. She became depressed and missed her home and two cats. During her last nursing home stay, Ms. Graham was not

cared for adequately. For example, Ms. Booher visited her one morning at 10am, and Ms. Graham's diaper had not been changed from the night before.

99. Plaintiff Harold Lee ("Lee") Murphey, is a 30-year-old Medicaid recipient who lives with his mother in Rockvale, Tennessee. His TennCare MCO is Americhoice.

100. Mr. Murphey has Duchene's Muscular Dystrophy. As a result of Duchene's, he has a heart condition. He also has a chronic lung disorder. Mr. Murphey has had a spinal fusion to immobilize his vertebrae and reduce abnormal motions. He uses a ventilator. At night, he is hooked to a breathing machine, called a bi-pap, so that he can get enough air into his lungs.

101. Mr. Murphey eats very little by mouth and cannot chew or swallow, except for an occasional ice cream. He cannot feed, bathe or dress himself. He cannot reposition his hands or legs. He needs to receive chest percussions to keep his passages clear. He cannot lift his hand to push a call button. He cannot be left alone for five minutes. Mr. Murphey can talk.

102. Mr. Murphey's pediatrician, Dr. Little, has continued to be his physician. Dr. Little has prescribed, and Mr. Murphey's MCO has covered, appropriate home health services from a licensed practical nurse (LPN). He needs a nurse to take care of his ventilator and mouth piece. Twice, recently, the power went out and the nurse had to bag him–something a less qualified home health aide would not be able to do under the state Nurse Practice Act. He lives with his mother, who works to pay the mortgage and put food on the table. There is no nursing home in his community or area that can accommodate his needs

103. Mr. Murphey recently graduated from Middle Tennessee State University with a degree in journalism. His dream is to be a sports writer, focusing on car racing. He enjoys sitting in his chair, using his computer, and socializing with friends and neighbors who drop by his house. He enjoys playing cards; someone else has to hold the cards.

104. On July 23, 2008, Mr. Murphey received a notice from TennCare informing him that his home health services would be reduced. If his coverage is reduced, Mr. Murphey will be forced to enter a nursing home. His mother cannot provide all of the additional care both because she works and because she cannot lift him and position him by herself. When she is the only one with Mr. Murphey, she cannot even take a shower as she cannot be away from him that long. Mr. Murphey will lose his home and community life and is afraid that he will not be able to pursue his journalistic dreams.

105. Mr. Murphey appealed the reduction but his hearing was dismissed. Services have been continued, with the caveat that his MCO may still send him a reduction notice.

106. Plaintiff Larry Scott Ervin is a 29-year-old Medicaid recipient who lives with his parents in Alexandria, Tennessee. He is enrolled in Americhoice MCO.

107. Mr. Ervin was in a motorcycle accident in 2001. Vertebrae in his neck were broken, and his spinal cord was severed. His diaphragm muscle does not work, so Mr. Ervin cannot cough, sneeze, or laugh. He currently is in a great deal of pain but hopes to get that pain under control soon. His physicians think the pain is the result of spasms from nerve endings that were cut in the accident.

108. Mr. Ervin is interested in crime work and is considering going to college at Middle Tennessee State University. Prior to his injury, Mr. Ervin worked for the police department and as a full time welder.

109. Mr. Ervin is outgoing. He enjoys going to church, the movies, and the mall. He visits with his nieces and nephews regularly and watches movies or plays games on the laptop with them. He uses a voice-command computer and enjoys scanning the Internet. He is a football fan, especially of the Tennessee Volunteers.

110. Mr. Ervin's 59-year-old mother and his 60-year-old father have cared for Mr. Ervin since the accident. His physician has prescribed, and the MCO has covered, home health services so that Mr. Ervin can remain in his home. A licensed practical nurse (LPN) helps Mr. Ervin with activities of daily life. The LPN works with Mr. Ervin on his bowel program and to monitor his occasional dysreflexia, which if not caught will cause a stroke or heart attack. The LPN also helps Mr. Ervin with his medicines and turns him every two to four hours when he is in bed. With a hand brace, Mr. Ervin can put his spoon into a bowl and lift it up to his mouth. He cannot lower the spoon back into the bowl.

111. Until June 2008, Mr. Ervin was receiving appropriate and medically necessary CNA care each day. A gentleman from Elder Care, hired by Americhoice, assessed Mr. Ervin. He arrived during shift change and interviewed both of Mr. Ervin's nurses. He then told the family that Mr. Ervin actually needed more care than he was getting and that he was going to go back to Americhoice and recommend more care. Mr. Ervin then received a notice that his care was to be reduced.

112. In June 2008, he received a notice from Americhoice stating that, due to his physician's decision, his hours were being reduced. Indicating that he felt misled by the MCO, Mr. Ervin's physician, Dr. Sherwood, wrote a new order prescribing the minimum care Mr. Ervin should receive of LPN care each day and of CNA care. Meanwhile, Mr. Ervin's mother appealed the cutback. In early September, she was contacted by Americhoice and informed that she had won Mr. Ervin's hearing (even though she had never received a notice that a hearing was going to occur). Despite "winning," however, an Americhoice representative then informed Mrs. Ervin that they would be reducing Mr Ervin's home care hours pursuant to the policy stated in the August 8, 2008 notice, which he did receive. He then got a notice dated September 8, 2008 that said starting September 22, Mr Ervin's home health aide hours and LPN hours would be reduced.

113. If Mr. Ervin's services are reduced as set forth in the August 8th policy, then he will have to go into a nursing home. His parents will not be able to provide the level of care that he needs. According to Mr. Ervin's mother, "If Scott goes to a nursing home, he'll give up and so will we." Mrs. Ervin ministered at nursing homes for five years. She is familiar with life in a nursing home and is concerned that Mr. Ervin will be eaten up with pressure sores within 30 days There are no nursing homes close by that will take him.

114. Plaintiff Megan Allen is a 21-year-old Medicaid recipient who lives in Portland, Tennessee. She is enrolled in the Blue Cross MCO.

115. Megan has cerebral palsy. Her physician has prescribed, and the MCO has covered, home care nursing assistance as medically necessary.

116. Until very recently, Ms. Allen was a student at Middle Tennessee State University. She was able to attend and complete her classes with the help of her aides. She was majoring in Recreational Administration and hopes to work in the tourism industry in the Nashville area.

117. Ms. Allen is confined to a wheelchair and can do very little on her own. While in her dorm room, her home care assistants could assist her in taking medication and help her with all activities of daily life. Ms. Allen was prohibited from taking an aide with her to class or anywhere else, on or off campus. This restriction presented many challenges. She fell behind in her school work because she was unable to set up for class without an aide's help. She could not attend any college function that required assistance if it took place outside of her dorm room. She could not go to church or eat in the cafeteria with her friends.

118. In June 2008, Ms. Allen received a notice from TennCare informing her that her home health services would be reduced. She appealed that reduction, and has appealed subsequent changes in care, as well. She has tried to get along with less home health care in the past, but was left lying in her bed for hours on end with no one to care for her. Due to the stress of her uncertain home health care, Ms. Allen was forced to withdraw from college. If the cuts to her home health care continue, Ms. Allen may be forced into a nursing home.

119. Ms. Allen was receiving all of the home and community-based services that she needed through the EPSDT program until she reached age 21.

120. Plaintiff Jessica W. Pipkin is a 27-year-old Medicaid recipient who lives in Lynnville, Tennessee. Her TennCare MCO is Americhoice.

121. Ms. Pipkin is the mother of two young children, ages four and nine. She was paralyzed from a car accident in 2004. The accident broke her neck, and she is a quadriplegic. Ms. Pipkin has been receiving appropriate home health nursing care through her MCO.

122. Ms Pipkin needs assistance with all activities of daily life, including feeding, bathing, brushing her teeth, and turning in bed every two hours at night. Her hands do not move at all. She moves about in a wheelchair that she controls by blowing into a straw. She requires assistance coughing to clear her lungs. Ms. Pipkin has a condition called "autonomic dysreflexia," which, if it is not treated very quickly (within about 10 minutes), can lead to stroke from skyrocketing blood pressure. This can happen at any time. One or more times each day, problems are averted by repositioning. Ms. Pipkin's bowels can become unpredictably obstructed and cause her blood pressure to spike. When this happens, she needs a bowel treatment that only a nurse can perform. Each day, Ms. Pipkin needs catheter care, a bowel treatment which takes 20 minutes to one hour, and medication administration and monitoring.

123. On or about August 8, 2008, Ms. Pipkin received a notice from TennCare informing her that her home health care will be reduced. Ms. Pipkin's family is already helping as much as they can. If the hours are reduced, there will be no alternative other than a nursing home. Ms. Pipkin will lose her home life and the vital role she is playing in the lives of her two young children. She does homework with her older child, who is a straight "A" student, and goes to all his sports games. Ms. Pipkin organizes and plans the children's meals, and hosts a Bible study group each Sunday at her home.

124. Plaintiff Florence ("Florrie") Adams is a 21-year-old Medicaid recipient who lives in Cookeville, Tennessee. She is enrolled in the Amerigroup MCO.

125. Ms. Adams has muscular dystrophy and is extremely limited in her movements. She cannot walk, move her arms or legs, lift or grab items, transfer out of her wheelchair, or turn over when lying down. Ms. Adams can move her head and some of her fingers. She is able to use a motorized wheelchair and can use a laptop computer and computer mouse. Ms. Adams can sign documents when a pen is placed in her hand.

126. Ms. Adams's husband has muscular dystrophy, but his condition is not as severe. He is in a wheelchair but can transfer himself. However, he cannot lift or transfer Ms. Adams. Mr. Adams has a specialized van and can drive it. The Adams have a 3-year-old daughter who is not disabled.

127. Before October 2007, Ms. Adams received appropriate and medically necessary nursing care from licensed practical nurses (LPNs). She began receiving the care through TennCare as EPSDT when she was 16 years old. Ms. Adams graduated high school and was taking classes at a community college in Cookeville. In October 2007, TennCare reduced her services, and Ms. Adams appealed the decision. During the pending appeal, she went without necessary care. She was forced to quit school. She was unable to move or do things, such as use the bathroom. In February 2008, Ms. Adams obtained appropriate care as a result of the appeal. However, the care is provided by CNAs. CNAs are not authorized to leave the house with a patient, so Ms. Adams has not been able to return to college. Ms. Adams wants to obtain her college diploma, so she is taking a class on line. CNAs are not authorized to administer medicine, so Ms.

Adams is experiencing problems opening medicine bottles, getting water, and lifting the pill to her mouth.

128. In late May 2008, Ms. Adams received a letter from Amerigroup stating that they would reduce her home health services or she could choose to be placed in a nursing home. Ms. Adams filed an appeal, which is still pending. On or about August 8, 2008, Ms. Adams received a notice from TennCare informing her that her home health services would be reduced despite the pending appeal. In August, an Amerigroup case worker told Ms. Adams that they could force her into a nursing home. Ms. Adams became so depressed that she attempted to admit herself to a mental hospital. Three mental hospitals were called and no hospital would accept her because she required too much care.

129. Plaintiff Lena Burgess is a 97-year-old recipient of Medicaid who lives in Crossville, Tennessee. She is enrolled in Amerigroup MCO.

130. Ms. Burgess is the mother of ten children. She worked on the family farm, cooking and raising her large family. Her husband worked in the rock quarries. Ms. Burgess is incredibly independent and has lived alone since her husband passed away.

131. TennCare has approved medically necessary certified nursing assistant (CNA) care for Ms. Burgess. She has numerous health problems, including requiring oxygen 24 hours per day, incontinency, congestive heart failure, arthritis, and some dementia. The CNAs help Ms. Burgess eat, change her diapers, use the restroom, bathe, take medicines, and move from one room to the next.

132. On or about September 8, 2008, Ms. Burgess received a notice from TennCare informing her that her home health services will be significantly reduced. On September 15, 2008 Ms. Burgess' nurse, Sherry Breeding, was contacted by an

Amerigroup case manager and told to get new orders to reduce patients' hours. She understood that, as of September 19, 2008, patients without new orders would not receive any care and, after September 21, Amerigroup would not reimburse her organization, Highland Run, for any such care. On September 16, Ms. Breeding was contacted by the Amerigroup case manager and informed that only the reduced hours will be covered, even if an administrative law judge orders otherwise. Doctors are reducing orders stating they have no choice or the patient will get no care. Decl. of Sherry Breeding (Ex. E, Mot for Prelim. Inj.).

133. Without the necessary home health services, Ms. Burgess will not be able to live at home. She will have to go to a nursing home because there are no family members living near enough or unburdened by the necessity of work to care for Ms. Burgess full time. Ms. Wyatt is able to provide only limited assistance because she suffers from painful arthritis and is not able to transfer or carry her mother. Ms. Burgess told her daughter that she would "rather die than go to a nursing home."

134. Plaintiff Wilma F. Stills is a 76-year-old Medicaid recipient who lives with her brother in Gray, Tennessee. She is enrolled in TennCare/BlueCare MCO.

135. Ms. Stills has been disabled, probably since birth. She has always been a bit slow and spastic; however, her physicians recently diagnosed her with Alzheimer's disease. Ms. Stills needs assistance with all activities of daily living and with her medications. She can feed herself but must be watched carefully so that she does not aspirate her food or choke on liquids. She has required suctioning to remove mucus from her throat. She suffers from severe acid reflux disease that affects her swallowing and

digestion. Ms. Stills has been receiving appropriate licensed practical nurse (LPN) care in her home through TennCare.

136. On or about August 8, 2008, Ms. Stills received a notice from TennCare informing her that her home care services would be reduced. TennCare/Blue Care has told her family that her hours will be reduced starting September 18. Ms. Dingus, her sister and power of attorney, has been told she has no appeal rights. Ms. Dingus appealed anyway. On September 9, Ms. Dingus received a call from a TennCare representative who said to disregard the cutoff date of September 18 and that she would continue her care pending the appeal. Ms. Dingus has spoken with nursing homes in the area, and they have told her they do not have staff to give Ms. Stills the care she needs.

137. Ms. Stills lives with a brother, but he is in poor health and cannot help provide the nursing care that Ms. Stills needs. Ms. Dingus, her sister, is also in poor health and can no longer assist Ms. Stills as she has in the past. The family has already spent most of their savings getting health care for Ms. Stills.

138. Dr. Vincent, her treating physician, is of the opinion that Ms. Stills needs home nursing care and that nursing home placement would not be a good option for her, physically or mentally.

139. Ms. Stills had surgery eighteen months ago and was put in nursing home for three weeks afterwards. The nursing staff did not help her stand or move correctly, and the meniscus muscle in her knee tore. The nursing staff did not help her get to bed properly during the post operative period, and she bled all over the bed. The nursing staff did not drain her tubes correctly, and she ended up with an abscess. While at the nursing home, Ms. Stills was given such a high dosage of pain medicine that the lower lobes of

both her lungs collapsed from shallow breathing. Ms. Stills is terrified of going to a nursing home. Her current nurses have said that Ms. Stills will die if she is put in a nursing home.

140. Plaintiff Odell Owens is an 80-year-old Medicaid recipient who lives in Columbia, Tennessee. He is enrolled in the Amerigroup MCO.

141. Mr. Owens has Alzheimer's disease. He cannot bathe, toilet, or cook by himself. He walks using a cane or walker. He is hand fed. TennCare has been covering home health aides his doctor ordered as medically necessary.

142. On or about August 8, 2008, Mr. Owens received a notice from TennCare informing him that his home health care would be reduced. Mr. Owens does not have family to fill in gaps when nurses cannot be there. He is estranged from his three children. His niece, Ms. Booker, provides as much help to him as she can; however, she works 40+ hours each week and cares for her three young children.

143. Without the home health care, Mr. Owens will have to go to a nursing home. Ms. Booker fears he is too fragile to be safe in a nursing home. In December 2007, Mr. Owens spent three weeks in a nursing home because of a broken hip. On occasions when Ms. Booker would visit, her uncle would be sitting before a full plate of food with no one taking the time to feed him. Late one night, Ms. Booker received a telephone call from the nursing home telling her that her uncle had fallen out of his wheelchair. Nursing staff had not put him to bed at a reasonable hour, nor were they watching him. While at the nursing home, Mr. Owens was in a daze all the time. He would not talk, and he was very confused. Within one week of being back in his home, Mr. Owens perked up and began recognizing his surroundings, his niece and his home health aides

144. Plaintiff Ellar Lowman is a 75-year-old Medicaid recipient who lives with her son in Chattanooga, Tennessee. Her TennCare MCO is BlueCare.

145. Ms. Lowman has suffered two strokes, which immobilized the left side of her body. She has Parkinson's disease and diabetes. She cannot walk and cannot transfer or turn herself in bed. She is incontinent. She needs assistance with transferring, skin care, repositioning, bathing, and food preparation.

146. Ms. Lowman lives with her 45-year-old son, who is mentally disabled. He cannot read, drive, do paperwork, or speak with providers about his mother's care. He can prepare simple meals, change her diapers, and check on her at night and throughout the day. Ms. Lowman and her son have always lived together, and they share a close psychological bond.

147. Ms. Lowman's treating physician has prescribed, and BlueCare has covered, necessary and appropriate home health nursing care as medically necessary. Ms. Lowman's daughter also assists with her care; however, she is also the caretaker for her disabled husband and her father-in-law, who has Alzheimer's disease. She lives 30 minutes away and can only provide assistance two days each week.

148. On or about August 8, 2008, Ms. Lowman received a notice from TennCare informing her that her home health nursing care services would be reduced. On August 16, 2008, her home health agency stopped providing the home health nursing services she had been receiving.

149. According to Dr. Johnson, her treating physician, Ms. Lowman needs appropriate and medically necessary home health nursing each day. Otherwise, she will be forced into a nursing home. According to Dr. Johnson, placing Ms. Lowman in a

nursing home will cause her condition to deteriorate because she will not receive the attentive care she gets at home. Separation from her son will be traumatic for them both. Ms. Lowman spent three to four weeks in a rehabilitation center after each of her two strokes. Her acute distress at being in what she perceived to be a nursing home hindered her physical recovery.

150. Plaintiff Marvin Ray Berry, Jr. is a 36-year-old Medicaid recipient who lives in Murfreesboro, Tennessee. His TennCare MCO is Americhoice. Mr. Berry is a named plaintiff in the *Newberry* case, which has required TennCare to cover his medically necessary home health services but is set to expire in October 2008.

151. When Mr. Berry was a child, a family member accidentally shot him with a gun. His spinal cord was injured. He is a quadriplegic, paralyzed from the neck down. Mr. Berry uses a power wheel chair which he steers using his mouth.

152. Mr. Berry has been able to remain out of the hospital recently because of the home health services he has received through TennCare, specifically care from a CNA. Mr. Berry needs assistance with all his activities of daily living—eating, bathing, toileting, breathing. Mr. Berry is highly susceptible to infections and needs care to, for example, monitor his condition and reposition him every few hours. Without this care, Mr. Berry is likely to end up in the hospital, as he did several years ago.

153. In July, two Americhoice nurse practitioners came to Mr. Berry's home to assess his need for nursing care. He asked why they were assessing his care and if he was likely to lose care. He understood them to say that it was obvious that he needed 24 hour care.

154. In September 2008, Mr. Berry received a notice from Americhoice stating that his home health aide services would be reduced to five hours per day, seven days per week. If his coverage is reduced, he will be forced to enter a nursing home. Mr. Berry does not have any family who can help with his care. His mother is unable to pick him up. His mother lives more than an hour away, has chronic neck and back pain, and is a single parent raising Mr. Berry's eight-year-old brother.

155. Several years ago, Mr. Berry graduated from Austin Peay University with a degree in Business Administration/Financial Management. He desperately wants to find work and does not see how he can do that if he is in a nursing home. Mr. Berry is afraid he will get very depressed and mentally shut down if he has to go to a nursing home. He is also afraid of getting severe infections that will require hospital care. According to his physician, Dr. Junard, Mr. Berry is at great risk of experiencing deterioration in his physical and mental health or even death if he is placed in a nursing home.

156. Plaintiff Carol Smith is a 30-year-old Medicaid recipient who lives with her parents in Knoxville, Tennessee. She is enrolled in the BlueCare MCO. Ms. Smith is a named plaintiff in the *Newberry* case, which has required TennCare to cover her medically necessary home health services but is set to expire in October 2008.

157. Ms. Smith has cerebral palsy. She needs assistance with all activities of daily life. She uses a communication device to assist with her speech. She is experiencing increased breathing problems and requires someone periodically to clear her airway. Ms. Smith also needs percussions approximately three to four days each week, sometimes all day long.

158. After being evaluated by TennCare last year, Ms. Smith was recommended for appropriate and medically necessary nursing care. The family did not think the nurses were needed at night while Ms. Smith was asleep and the MCO agreed.

159. On or about September 10, 2008, Ms. Smith received a notice dated September 8, 2008 from TennCare informing her that her nursing services would be further reduced effective September 18, 2008. TennCare has proposed to decrease Ms. Smith's nursing hours to about a third of what she currently receives. In addition, TennCare proposed to provide Ms. Smith's home care through CNAs. However, CNAs are not typically trained to watch for signs of aspiration and choking on mucus or food. She received a TennCare notice dated September 10, 2008 indicating that there was no adverse action and that the appeal she filed September 4, 2008 was being closed.

160. Ms. Smith works part-time for the Association for Retarded Citizens, doing consumer satisfaction surveys. In addition to her part-time work, she is frequently visited by friends. Ms. Smith is now able to live in the surroundings she grew up in and is able to get around outside in her wheelchair.

161. Ms. Smith's parents, Billy and Jean, have physical disabilities. Her father has a back injury, a heart condition, and high blood pressure. Her mother has muscular dystrophy that has worsened to the point where she has no strength in her hands and has difficulty standing up. Ms. Smith's mother can no longer lift her. Ms. Smith's parents are doing all they can to assist with her care. A couple of years ago, after having been nominated by Ms. Smith, Jean was named mother of the year in Tennessee and made it to the finals in the national competition.

162 Without the appropriate home health services, Ms. Smith faces life in a nursing home. She gets depressed just thinking about this possibility and the effects it would have on her life with her parents and friends and on her employment at the Association for Retarded Citizens. She is afraid she will not be able to experience the outdoors as she is now and will either be in bed all the time or sitting against a wall in a hallway. Now, Ms. Smith is independent and able to do things the way she wants when she wants. She would not have this freedom in a nursing home.

163 Dr. Yarbrough, her treating physician, believes that nursing home placement is inappropriate for Ms. Smith. One of her nurses told her that a nursing home is not an appropriate placement for her, that the patient to caregiver ratio is one to thirty during the day and one to sixty at night. She is certain that Ms. Smith will deteriorate very quickly in a nursing home.

164. Plaintiff Betty Jean Taylor is a 69-year-old Medicaid recipient who lives in Mt. Juliet, Tennessee with her mother, Willowdeen Burrows. She is enrolled in Americhoice MCO.

165. Ms. Taylor has advanced Charcot Marie Tooth disease, a severe neuromuscular disease that destroys both nerves and muscles. She cannot walk or stand. She has 75 percent hearing loss in both ears. She cannot get in or out of the bed without assistance, and cannot bathe, toilet, dress herself, or prepare her own meals. She uses a ventilator, has a functioning tracheotomy, and otherwise uses an oxygen machine. Ms. Taylor cannot communicate verbally when she is on the ventilator. Ms. Taylor's hands are clawed to the point that she cannot use them to manipulate her ventilator. She must

be put on and taken off the ventilator, and she requires regular suctioning. Her MCO has approved private duty nursing as appropriate and medically necessary.

166. On or about August 8, 2008, Ms. Taylor received a notice from TennCare informing her that her private duty nursing services would be eliminated. Although she is on a ventilator, her home health agency has informed her that she will lose her current services.

167. If her services are reduced, Ms. Taylor will not be able to live in her home. She has no local family to care for her, other than her son, who also suffers from Charcot Marie Tooth disease and struggles to care for himself.

168. Ms. Taylor's physicians, Dr. Butka, a pulmonologist, and Dr. Peltier, a neurologist, are both of the opinion that nursing home placement is physically dangerous for Ms. Taylor and that it would also take a psychological toll on her. Since receiving the August 8th notice, Ms. Taylor sits with her head down. She is afraid to go to sleep in a nursing home for fear that her ventilator will get clogged, and she will choke and die because she will not have adequate nursing care at the facility. During the night while she is on the ventilator, if something were to happen and no one were there to watch her, Ms. Taylor would have no way of communicating the problem.

169. Plaintiff Delores Baker is a 78-year-old Medicaid recipient who lives in Nashville, Tennessee. She is enrolled in the Americhoice MCO.

170. When Ms. Baker was younger and healthier, she helped organize and run sports events for children. She worked in the elementary school cafeteria.

171. Ms. Baker suffers from diabetes, chronic lower abdominal pain, insulin dependency, dementia, and neuropathy. She is bed-ridden 98 percent of the time and

only gets up to shower and dress. She needs someone to give her medicines and help feed, bathe, and dress her.

172. Currently, Ms. Baker receives private duty nursing through her MCO as medically necessary. However, the MCO has informed her son, Scott Baker, that she will have her private duty nursing services significantly reduced and will qualify for only a few hours of home health assistance each day. Mr. Baker will not be able to stay home and take care of his mother if her hours are cut. He is a fireman, and his schedule does not permit him to remain at home. There is no one else to care for her. Without the home-based care, Mr. Baker will have to look for a nursing home for his mother.

173. Mr. Baker says that if she were to go to a nursing home, he would "give her six months."

174. Plaintiff Lorrinda Mabry is a 43-year-old Medicaid recipient who lives alone in her own apartment in Antioch, Tennessee. She is enrolled in Amerigroup MCO and in the Tennessee Home and Community Based Waiver.

175. Ms. Mabry has cerebral palsy, which has resulted in physical and communicative disabilities. Since birth, she has required extensive home health services on a daily basis, including assistance with eating and drinking, toileting, bathing, transferring, and communicating. These services allow Ms. Mabry to manage her medical conditions and maintain her active role in the community. Ms. Mabry's mother performed these duties until she became unable to do so three years ago. At that point, her treating physician prescribed home health nursing services as medically necessary and they have been provided through TennCare and the Home and Community Based Waiver.

176. On or about August 8, 2008, Ms. Mabry received a notice from TennCare informing her that her home nursing services would be reduced. She began working through her home health agency to find out why. She has been told she is on a "no reduction" list for the time being. She does not understand what that is.

177. According to Dr. Dallas, Ms. Mabry's treating physician, the reduced home health hours announced in the August 8, 2008 notice will not allow Ms. Mabry to remain safely at home. She will need to be institutionalized.

178. Institutionalization will significantly restrict Ms. Mabry's life. She is a committed activist for people with disabilities and has advocated before the media, elected officials, in community meetings, and through direct actions. She was one of the first children with disabilities to integrate the Nashville schools in the 1970s. Her advocacy is only possible because she is integrated in the community, due to her home nursing services. Ms. Mabry will also suffer psychologically if placed in a nursing home and has said she would prefer to die rather than be placed in a nursing home.

179. Plaintiff Joel DeHaas is a 21-year-old Medicaid recipient who lives with his family in Chuckey, Tennessee. His TennCare MCO is Americhoice.

180. Mr. DeHaas was in a car accident a few years ago and suffered a brain and spinal cord injury. He is a quadriplegic. Mr. DeHaas needs care, including catheterization and help with eating, dressing, and bathing. He communicates with a voice interaction computer machine. Mr. DeHaas's mother and father cannot stay home with him all the time because they need to work to support the family.

181. Mr. DeHaas's physician has prescribed four hours a day of caregiver care, which the Tennessee Medicaid Waiver program is covering. Mr. DeHaas's physician

ordered nursing care in mid-July but Mr. DeHaas has not received it. Mr. DeHaas needs someone constantly near him; he has a condition quadriplegics can get called "autonomic dysreflexia." One symptom of this disease is that if Mr. DeHaas needs to go to the bathroom and there is no one to catheterize him, his blood pressure will rise to dangerous and life-threatening levels. A request for private duty nursing is pending. A private duty nurse is needed to perform the medication procedures that Mr. DeHaas's caregiver aides cannot do for him, such as catheterization, changing his colostomy bag, and giving him his medications.

182. Mr. DeHaas wants to attend college. This dream is the reason he has diligently gone to a rehabilitation clinic. His persistence and the rehabilitation services have paid off. Mr. DeHaas was recently awarded his GED.

183. On August 8, 2008, Mr. DeHaas received a notice from TennCare informing him that home health services would be reduced. The notice also stated that private duty nursing will be approved for only for a couple of medical conditions, neither of which Mr. DeHaas has. If Mr. DeHaas cannot get the nursing care that he needs, he will be forced to enter a nursing home. His mother worries that, at the nursing home, Mr. DeHaas will not be able to obtain the college education that he desperately wants. He will be separated from his family. Mr. DeHaas's physician, Dr. Svendsen, is of the opinion that placement in a nursing home will adversely affect Joel's physical and mental health and is inappropriate. Mr. DeHaas will not receive the type of monitoring and catheterization he needs. Dr. Svendsen is also of the opinion that Mr. DeHaas will suffer psychologically in a nursing home because he will not be around his family, his pet, and other young people.

184. Plaintiff Margaret Connolly is an 84-year-old Medicaid recipient who lives alone in Hilham, Tennessee. Her TennCare MCO is Amerigroup. Her daughter and sister visit frequently to take care of Ms. Connolly's affairs.

185. Ms. Connolly is diagnosed with Alzheimer's disease, is incontinent, and is bed ridden. She has heart problems, and one heart valve is completely gone. Chronic Obstructive Pulmonary Disease obstructs her breathing, causing her to use a breathing machine. Ms. Connolly loves animals and currently has three parrots, two dogs, and two cats who keep her company.

186. Ms. Connolly is a strong-willed, independent woman who values self-sufficiency. It has been difficult for Ms. Connolly to have to rely on home health nursing aides. However, at this point in her life, Ms. Connolly is dependent on a certified nursing assistant (CNA) to help her do most things, including using the restroom, taking medicines, eating, and dressing. Her doctor requested 40 hours per week, less than what her doctor thought was appropriate, but what the doctor believed was the maximum the MCO would approve, even though it was less than was medically necessary and appropriate. She is not sure whether this change is the result of pressure from the MCO, or the home health agency, or because of the new TennCare policy. Ms. Connolly currently receives an inadequate number of hours of CNA's per week.

187. On August 8, 2008, Ms. Connolly received a notice from TennCare informing her that her home health nursing services would be reduced even more. If Ms. Connolly's nursing care is reduced, she will have to rely on her 78-year-old sister to manage some of her care. This sister is clearly aging and is not fit to be lifting another person. Ms. Fulton, Ms. Connolly's daughter, suffers from a poor back and cannot lift

her and give her care she needs. The daughter will use her own retirement fund to hire a nurse if Ms. Connolly's only other option is to go into a nursing home. However, these measures are only stop-gap and will not last long. After this, it is unclear what will happen to Ms. Connolly

188. On information and belief, TennCare MCOs are contacting providers and telling them to reduce their orders to come within the limits announced in the August 8, 2008 TennCare notice; otherwise, their patients will get no services at all. On September 15, 2008, Sherry Breeding, a home health nurse, was contacted by Amerigroup and told to get new orders to reduce patients' hours. She understood that, as of September 19, 2008, patients without new orders would not receive any care and, after September 21, Amerigroup would not reimburse her organization, Highland Run, for any such care. Decl. of Sherry Breeding (Ex. E, Mot for Prelim. Inj.). On September 10, 2008, Dr. Thomas Jenkins was contacted by AmeriChoice and told to write new prescriptions to be consistent with the new quantitative limits for home care. He was told if he did not change the orders immediately his patients would go without any care at all, beginning September 22, 2008. Decl. of Thomas Jenkins, M.D. (Ex. F, Mot. For Prelim. Inj.).

FIRST CLAIM FOR RELIEF
(Title II of the Americans with Disabilities Act)

189. Plaintiffs adopt and restate the allegations set forth in paragraphs 1-188 of this complaint.

190. Plaintiffs are individuals with disabilities in that they have physical and other impairments that substantially limit one or more of their major life activities, including but not limited to breathing, walking, speaking, and standing.

191. Plaintiffs are qualified persons with disabilities in that they are capable of safely living at home with necessary services and they meet the essential eligibility requirements for the receipt of services from and participation in the State Medicaid program with reasonable modification to the rules, policies, and practices of that program, 42 U S C §12131(2).

192. Without reasonable modification of the rules, policies, and procedures governing the TennCare program, Plaintiffs will be forcibly isolated and segregated in harmful institutional settings against their will

193. Defendants' denial of Medicaid funding for the in-home health services that Plaintiffs require to avoid segregation in an institution and remain in the integrated home settings that are appropriate to their needs constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, and its implementing regulation, 28 C.F.R. § 130.51(d).

194. Defendants have utilized criteria and methods of administration that subject Plaintiffs to discrimination on the basis of disability, including unnecessary institutionalization, by (1) failing to assess properly the services and supports that would enable Plaintiffs to remain in the community, (2) failing to ensure that Plaintiffs have access to Medicaid-covered services that will meet their needs in the community, and (3) compelling health care providers to reduce recommended levels of in home nursing services, in violation of Title II of the ADA and implementing regulations.

SECOND CLAIM FOR RELIEF
(Section 504 of the Rehabilitation Act)

195. Plaintiffs adopt and restate the allegations set forth in paragraphs 1-194 of this complaint.

196. Plaintiffs are "qualified person[s] with disabilities" within the meaning of Section 504, because they have physical and/or mental impairments that substantially limit one or more major life activities, and they meet the essential eligibility requirements for long term care under TennCare.

197. Defendants' denial of Medicaid funding for the in-home health services that Plaintiffs require to avoid segregation in an institution and remain in the integrated home settings that are appropriate to their needs constitutes unlawful discrimination in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. §794(a), and its implementing regulation, 28 C.F.R. §41.51(d).

198. Defendants have also utilized criteria and methods of administration that subject Plaintiffs to discrimination on the basis of disability, including risk of unnecessary institutionalization, by (1) failing to assess properly the services and supports that would enable Plaintiffs to remain in the community, (2) failing to ensure that Plaintiffs have access to Medicaid-covered services that will meet their needs in the community, and (3) compelling health care providers to reduce recommended levels of in home nursing services, thereby violating Section 504 and its implementing regulations.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

A. Declare the Defendants' denial of funding for Plaintiffs' necessary and appropriate in-home nursing services constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

B. Declare that the across-the-board reductions in private duty nursing and home health care announced in the TennCare August 8, 2008 notice, as those reductions

are applied to the Plaintiffs, constitute unlawful discrimination in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

C. Grant preliminary and permanent injunctions enjoining the Defendants, their officers, agents, employees, attorneys, and all persons who are in active concert or participation with them from imposing the across-the-board reductions in home health care and private duty nursing services announced in the TennCare August 8, 2008 notice on Plaintiffs and requiring Defendants, their officers, agents, employees, attorneys, and all persons who are in active concert or participation with them to provide for individualized coverage of Plaintiffs' service needs in the least restrictive, most integrated setting, including making assessments of the extent to which Plaintiffs' service needs can and will be met by enrolling them in the existing Home and Community-Based Services waiver.

D. Maintain the injunction described in C, above, until such time as home and community based services through the Long Term Care Community Choices Act are expanded to include each Plaintiff and individualized coverage of each Plaintiffs' service needs in the least restrictive, most integrated setting.

E. Waive the requirement for the posting of a bond as security for the entry of preliminary relief.

F. Award the Plaintiffs the costs of this action and reasonable attorney's fees pursuant to 29 U.S.C. § 794a and 42 U.S.C. § 12133 and any other applicable provision of law.

F. All such other and further relief as the Court deems to be just and equitable.

Dated: September 23, 2008

Respectfully submitted,

By _____

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