IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

GERALD NELSON, by his legal guardian and next friend, JANE PRENTICE; JOAN BZDAWKA, by her legal guardian and next friend, RICHARD MILLER; SANDRA EHRLICHMAN, by her legal guardian and next friend, NANCY STEEVES; MARILYN BERDIKOFF, by her legal guardian and next friend, LOIS DEGNER; LENORE CZARNECKI, by her agent and next friend, CAROLYN CETNAROWSKI; and JOHN GORTON, by his agent and next friend, DEBORAK BRUNK, each on their own behalf and on behalf of a class of persons similarly situated,

Plaintiffs,

v. Case No. 04-C-0193

MILWAUKEE COUNTY; WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES; and HELENE NELSON, in her official capacity as Secretary of DHFS,

Defendants.

STATE DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTIONS TO DISMISS FOURTH AMENDED COMPLAINT

The Wisconsin Department of Health and Family Services ("DHFS") and DHFS Secretary Helene Nelson (collectively, "the State defendants"), by their undersigned counsel, submit the following limited comments in reply to the arguments contained in plaintiffs' brief opposing the State defendants motions to dismiss the Fourth Amended Complaint and Milwaukee County's motion for judgment on the pleadings. For the most part, the State defendants rely on the arguments and authorities set forth in their brief-in-chief, much of which is ignored and not disputed by plaintiffs' brief in opposition.

ISSUES ARGUED IN REPLY

1. Must the affidavits of plaintiffs' experts be stricken because their purpose is clearly evidentiary and not, as plaintiffs assert, merely illustrative?

2. Must the Fourth Amended Complaint be dismissed for lack of jurisdiction because plaintiffs lack standing or because their claims of possible future injury are not ripe for adjudication?

3. Have plaintiffs failed to rebut defendants' arguments demonstrating the inadequacy of plaintiffs' various claims for relief under the ADA, Rehab Act § 504 and the Medicaid statute privately enforceable under 42 U.S.C. § 1983?

ARGUMENT

I. THE AFFIDAVITS OF PLAINTIFFS' EXPERTS MUST BE STRICKEN BECAUSE THEIR PURPOSE IS CLEARLY EVIDENTIARY RATHER THAN ILLUSTRATIVE, SO THAT IT IS IMPROPER FOR THE COURT TO CONSIDER THEM FOR PURPOSES OF DECIDING MOTIONS TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS, RULES 12(B)(6) AND (C).

The State defendants have submitted motions to dismiss based on F.R.C.P. 12(b)(6) and 12(c) and Milwaukee County seeks judgment on the pleadings pursuant to Rule 12(c). Although the State defendants have submitted documents which can be judicially noticed and considered in the context of deciding legal motions concerning the sufficiency of the complaint without converting the legal motions into motions for summary judgment, *see* brief-in-chief at 28-29, all of the defendants have carefully limited their submissions to materials the Court can properly consider in deciding legal motions concerning the sufficiency of the complaint.

Plaintiffs concede that the State defendants' brief-in-chief contains a reasonably complete summary of the factual allegations of the Fourth Amended Complaint. *See* Brief at 4. However, plaintiffs have also filed with their brief in opposition voluminous attached materials which they

discuss freely throughout their brief, even going so far as to refer to a work-in-progress by another expert that is not even submitted or properly identified (*see* brief at 9, n.2). *See also* Affidavit of Gerald J. Kallas, M.D. (with attachments), Affidavit of Thomas Cook (with attachments), and Second Affidavit of Lincoln Burr. These affidavits and nearly all of the evidentiary material attached, unlike the government documents referenced in the State defendants' motions to dismiss, are not properly subject to judicial notice because they are not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. Rule 201(b); *see* brief-in-chief at 28-29 (citing cases).

Plaintiffs seek to justify their submission and substantial reliance on these materials on the pretense that the materials are not submitted for "evidentiary" purposes, *i.e*. to supplement the factual allegations of the complaint relating to standing and the nature of plaintiffs' claims, but are simply submitted for "illustrative" purposes, *i.e.*, to show that "there might be" a set of facts consistent with the allegations in the complaint. *See* Brief at 4-5, 13 n.3, citing *Thomas v. Guardsmark, Inc.*, 381 F.3d 701, 704 (7th Cir. 2004); and *Hart v. Sheahan*, 396 F.3d 887, 895 (7th Cir. 2005). Despite plaintiffs' attempts to label these materials otherwise, they appear to be evidentiary in nature and are certainly used for evidentiary purposes to support plaintiffs' claims of standing and regarding the sufficiency of the numerous claims. Plaintiffs refer to facts and opinions stated in these affidavits as if they were set forth in the complaint and as if they must be accepted as true for purposes of the pending motions, rather than for "illustrative" purposes at all.

The State defendants respectfully submit that these affidavits and attached documentation should be stricken or ignored by the court in deciding the pending motions.[1]

II. THE FOURTH AMENDED COMPLAINT MUST BE DISMISSED BECAUSE THE INDIVIDUAL PLAINTIFFS LACK STANDING AND THEIR CLAIMS OF POSSIBLE FUTURE INJURY ARE NOT RIPE FOR ADJUDICATION.

A. Plaintiffs misstate the law by arguing that individual plaintiffs need not have standing so long as unnamed members of the putative class do.

Tacitly recognizing the weakness of their individual claims of actual or threatened injury and, therefore, standing, plaintiffs repeatedly suggest that whether or not they have individual standing does not matter because "[s]tanding in class actions is determined with reference to the class as a whole rather than simply looking at the potential impact on the named plaintiffs," brief at 1-2. *See also id.* at 24-25 (arguing that if plaintiffs lack standing, the court should hold the question of standing in abeyance until after a class is certified). This argument is flatly, demonstrably and unequivocally wrong and it is no accident plaintiffs cite no authority to support it. Indeed, the very cases plaintiffs cite contradict the argument. For example, in *Payton v. County of Kane*, 308 F.3d 673, 682 (7th Cir. 2002), a case which turned on the propriety of certifying a *defendant* rather than a plaintiff class, the court had no doubt that the named

[1]Because this reply brief will focus primarily on the legal issues relating to standing and the adequacy of plaintiffs' numerous claims, and because plaintiffs concede that the State defendants have accurately summarized the factual contents of the amended complaint that must be taken as true for purposes of the motions, the Kallas, Cook and Burr affidavits and attachments are not discussed in detail in this brief. For the most part, however, the affidavits appear to repeat at length facts, opinions, conjecture and hypotheses that are already outlined in the complaint. To the extent the affidavits go beyond the complaint, the State defendants strongly object to their consideration for purposes of deciding the pending motions.

plaintiffs themselves had individual standing. *See Id.*, 308 F.3d at 677. There, the court pointedly emphasized:

> This is not a case where the named plaintiff is trying to piggy-back on the injuries of the unnamed class members. *That, of course, would be impermissible, in light of the fact that "a named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs*; it bears repeating that a person cannot predicate standing on injury which he does not share. *Standing cannot be acquired through the back door of a class action*."

Id., 308 F.3d at 682 (emphasis supplied), quoting *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., dissenting). *See also Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976), quoting *Warth v. Seldin*, 422 U.S. 490 (1975): "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'"

If none of the named plaintiffs have standing, this case must be dismissed: "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *see also Bailey v. Patterson*, 369 U.S.31, 32 (1962) (plaintiffs cannot represent a class of whom they are not a part).

B. Because plaintiffs do not dispute their lack of standing to seek retroactive relief, it will likely be unnecessary for the Court to reach the question whether their claims for retroactive declaratory and monetary relief against the State defendants are barred by the Eleventh Amendment and sovereign immunity.

Both the State defendants brief-in-chief at 23-27 and plaintiffs' response brief at 25-28 argue the scope of this Court's jurisdiction and authority to award plaintiffs the retroactive

declaratory and monetary relief they seek against the State defendants in view of the Eleventh Amendment and the State's sovereign immunity. However, the plaintiffs have failed to respond to—and appear implicitly to concede—the State defendants' argument that plaintiffs lack standing to seek retroactive declaratory or monetary relief against any of the defendants for the period prior to filing of this lawsuit because they have not alleged any direct or tangible injury to themselves for that period of time. *See* brief-in-chief at 15-18; *cf.* plaintiffs' brief at 22 (asserting "a substantial likelihood they *will be harmed* by the alleged violations of federal law that they have identified in the Family Care program") (emphasis added).

Based on other cases plaintiffs have cited, this implicit concession of partial lack of standing is well advised. *See Tandy v. City of Wichita*, 380 F.3d 1277, 1283-84, 1289-90 (10th Cir. 2004) (recognizing that the "injury in fact" requirement of constitutional standing is satisfied differently depending on whether the plaintiff seeks prospective or retrospective relief). *Accord*: *Discovery House. v. Consol City of Indianapolis*, 319 F.3d 277, 280 (7th Cir. 2003) (quoting prior Supreme Court precedent that "'a plaintiff must demonstrate standing separately for each form of relief sought'").

The *Tandy* decision first recites the familiar three requirements for establishing Article III standing:

> To establish Article III standing, a plaintiff must show that: (1) she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested.

Id., 380 F.3d at 1283 (footnote and citations omitted).

With regard to retrospective relief, a plaintiff "satisfies the 'injury in fact' requirement if she suffered a past injury that is concrete and particularized." *Tandy*, 380 F.3d at 1284. As

discussed in the State defendants' brief-in-chief at 17, and plaintiffs do not dispute, none of the plaintiffs claims *any* past violation of the integration, least restrictive setting and reasonable accommodation requirements of the Americans with Disabilities Act ("ADA") and Rehabilitation Act, nor any violation of 42 U.S.C. § 1396a(a)(30)(A) ("(a)(30)(A)"), with regard to themselves personally. Because plaintiffs claim no past injury whatever to themselves, it necessarily follows that they lack standing to seek retrospective declaratory or monetary relief. *See Tandy*, 380 F.3d at 1283-84.

C. Plaintiffs lack standing based on threats to their current residential placements and their claims of threatened future injury are not ripe for adjudication.

The State defendants refer the Court to the arguments contained in their brief-in-chief at 21. Plaintiffs do not challenge the State defendants' argument that they lack standing to challenge the capitated rates DHFS pays to the Milwaukee County Care Management Organization ("CMO") under the terms of the Family Care contract, *see id.* at 21-23. However, they do make an unconvincing attempt to argue current and future standing based on threats to their current residential placements and their claims that, if they are required to change their community placements at all, they are "likely to suffer harm including institutionalization," brief at 24.

First, plaintiffs assert that they have a "legitimate interest in continuing to live in a particular home of their choice," brief at 22. Whether they have a legitimate, subjective, heartfelt, sincere interest in continuing to stay in their current residential placements, however, simply begs the real question relevant to the question of standing: whether this interest is one protected by the laws plaintiffs seek to invoke, and therefore, one that is likely to be redressed by

a favorable decision according them relief authorized by those statutes. *Cf. Valley Forge, Etc. v. Americans United, Etc.*, 454 U.S. 464, 472 (1982); *Tandy*, 380 F.3d at 1283.

As pointed out previously, a court has jurisdiction under the ADA and Rehabilitation Act to insure that plaintiffs remain in the most integrated setting appropriate to their needs and that they be reasonably accommodated. Plaintiffs have failed to cite any authority for the proposition that this Court has the authority under the ADA, the Rehabilitation Act or the Medical Assistance ("MA") statutes to require that plaintiffs remain in a particular or specific community placement, if, as plaintiffs' residential providers threaten here, those providers no longer participate in the Family Care program. Indeed, the State defendants have not located any precedent supporting this proposition either. Therefore, plaintiffs cannot establish standing based on the mere likelihood that they will need to move to a different community placement if their providers make good on their threats to terminate their Family Care contracts, because such a move is not a legally cognizable injury that this court can likely redress.

In order to seek prospective relief,

> [T]he plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the future. . . . The threatened injury must be "certainly impending" and not merely speculative. A claimed injury that is contingent upon speculation or conjecture is beyond the bounds of a federal court's jurisdiction.

Tandy, 380 F.3d at 1283-84 (citations omitted).

Another case cited by plaintiffs clearly illustrates the difference between a case in which a threat of future injury is real and immediate—and thus sufficient to demonstrate standing—and this case, where the threats of future injury in the form of plaintiffs' having to move to a nursing home are merely speculative and conjectural. *See Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003). In *Fisher*, the plaintiffs were participants in a community-based

Medicaid program in which the Oklahoma Health Care Authority had previously provided unlimited, medically-necessary prescription benefits for participants in the community-based program and had provided such prescription benefits for institutionalized MA recipients as well.

In order to deal with a funding crisis, the Health Care Authority decided to terminate the unlimited, medically-necessary prescription benefits for the community-based recipients, limiting them to five prescriptions per month, regardless of medical necessity. *Id.*, 335 F.3d at 1177-78. The plaintiffs were community-based recipients with very high monthly prescription costs and, typical of Medicaid-eligible persons, very low income. *Id.*, 335 F.3d at 1179-80. Because the prescriptions were medically necessary, Fisher and the other plaintiffs faced a real and immediate threat of institutionalization in order to continue to obtain the medications their health required. While the defendants in *Fisher* denied discrimination and disputed the merits of the plaintiffs' ADA and Rehabilitation Act claims, including whether they would really be forced into nursing homes, there was simply no grounds to challenge plaintiffs' standing because the claims of future injury were sufficiently real, probable and immediate.

In contrast, here plaintiffs are threatened with nothing more than a move to a different community placement. Furthermore, the Milwaukee Family Care contract effectively binds the CMO to provide appropriate services to plaintiffs in the most integrated, least restrictive setting in exchange for the monthly capitated rate of those individuals. *See* CMO Contract at 15, 19, 151, 164, Addendum X.4.19 (Exhibit 2002; *see* brief-in-chief at 3 n.2 for full citation to the Contract). Plaintiffs to not allege that the CMO is violating this important obligation under the contract nor is there any basis to presume that the CMO will do so in the future. There are no *facts* (as opposed to opinions, fears and speculation) in the complaint to support an inference that a change in community placement, in itself, will violate plaintiffs' rights to remain in an

integrated setting. Rather, plaintiffs actual claim is that such a move may lead to one or more other changes in placement and that, ultimately, sometime in the future, they will end up in nursing homes, notwithstanding their desire to remain in the community.

These threats of future harm, unlike those presented in *Fisher*, are simply too speculative and conjectural to support standing to litigate plaintiffs' claims. While the likelihood of future harm for purposes of establishing standing is "a matter of probabilities rather than certainties," *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 910 (7th Cir. 2003), plaintiffs here have established nothing more than the *possibility*, not the probability, of future harm. In short, plaintiffs' claims based on threatened future injury are simply not ripe for adjudication and must be dismissed for lack of standing.

III. PLAINTIFFS FAIL TO STATE CLAIMS FOR RELIEF UNDER THE ADA, THE REHABILITATION ACT OR THE MEDICAID STATUTE, 42 U.S.C. § 1396a(a)(30)(A).

A. Plaintiffs' ADA and Rehabilitation Act arguments must be rejected because applicable law does not obligate states to meet all individualized preferences and desires of a state Medicaid beneficiary.

Plaintiffs' intentional discrimination and disparate impact arguments (brief at 13-15) fundamentally misconstrue ADA and Rehabilitation Act requirements. The ADA and Rehabilitation Act do not require states to provide either a particular standard of care or a particular level of benefits to persons with disabilities. They do not guarantee that each recipient of state medical benefits will receive care precisely tailored to his or her individual preferences. Instead, they require only that a state not discriminate in the services it has chosen to provide. *Radaszewski v. Maram*, 383 F.3d 599, 608-09 (7th Cir. 2004), citing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999).

The states "retain 'substantial discretion to choose the proper mix of amount, scope and duration limitations on coverage.'" *Vaughn v. Sullivan*, 83 F.3d 907, 912 (7th Cir. 1996), *quoting Alexander v. Choate*, 469 U.S. 287, 303 (1985). The benefit provided through Medicaid is a particular package of health care services, with the general aim of assuring that individuals will receive necessary medical services. *Alexander*, 469 U.S. at 302.

The ADA and Rehabilitation Act do not require that decisions affecting allocation of program resources, including decisions relating to funding of those resources, be made in a way that meets the preference of each individual program beneficiary. For example, closure of a specialized facility did not run afoul of the ADA and Rehabilitation Act when most services provided at that facility were to be provided at a new location one mile away. *Cercpac v. Health & Hospitals Corp.*, 147 F.3d 165, 168 (2nd Cir. 1998). Contrast that with a cost-saving measure impermissibly eliminating the only county hospital focused on the needs of disabled individuals, providing services disproportionately required by the disabled and available nowhere else in the county. *Rodde v. Bonta*, 357 F.3d 988, 996-97 (9th Cir. 2004). Even plaintiffs conjure up nothing so drastic.

The forgoing authorities further rebut plaintiffs' confusing claims about "effective access to health care services" (brief at 15-16). *See also* brief-in-chief at 36-37.

As for plaintiffs' arguments about integration requirements of the ADA and Rehabilitation Act (brief at 16-17), plaintiffs already benefit from community placements serving them in the most integrated setting appropriate to their needs. The CMO, by contract, must continue to provide all services necessary to cost-effectively meet the plaintiffs' assessed needs. *See*' brief-in-chief at 7-8, 38-39. As explained at pages 9-10 above, the present plaintiffs' circumstances are easily distinguished from those of the *Fisher* plaintiffs.

Plaintiffs fail to identify a single authority indicating that integration requirements of the ADA and Rehabilitation Act entitle them to demand specific providers, regardless of the parameters of the state benefit package they receive. That, however, is the bottom line of both their integration requirement claims and their reasonable accommodation claims (brief at 17-18). Controlling case law proves otherwise. *Radaszewski*, 383 F.3d at 608-09; *Olmstead*, 527 U.S. at 603 n.14; *Vaughn,* 83 F.3d at 912; *Alexander*, 469 U.S. at 303. *See also* brief-in-chief at 38-39.

Moreover, because the present plaintiffs fail to make out a *prima facie* case of discrimination, the issue of reasonable accommodation is not properly before the Court. When properly considered in response to a *prima facie* case of discrimination, reasonable accommodations can be ordered to alleviate barriers hindering equal opportunity to accessing services and benefits already provided—but not to create special substantive rights, such as tailoring benefits to recipients' personal preferences. *Cf. Wisconsin Cmty. Services, Inc. v. City of Milwaukee*, 413 F.3d 642, 646 (7th Cir. 2005).

Similiarly, the defense of fundamental alteration is not implicated unless plaintiffs prove entitlement to some reasonable accommodation. The present plaintiffs have not, so, again, this issue is not properly before the Court. In any event, no legal rule prohibits resolution of fundamental alteration issues by judgment on the pleadings. *Cf.* plaintiffs' brief at 12-13.

When a fundamental alteration defense requires resolving issues of material fact, consideration beyond judgment on the pleadings could be warranted. *McGary v. City of Portland*, 386 F.3d 1259, 1207 (9th Cir. 2004); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996). Plaintiffs cite only cases where material facts concerning costs of benefit expansion had to be determined and weighed against material facts concerning affected access to benefits (brief at 12-13). *Cf. Michelle P. v. Holsinger*, 356 F. Supp. 2d 763, 764, 770

(E.D. Ken. 2005) (plaintiffs wait-listed for community based services apparently sought expansion of state's Home and Community Based Services waiver program in order to receive services); *Radaszewski*, 383 F.3d at 614 (whether funding specific, expensive placement for one individual would fundamentally alter care provided by Illinois to others with similar needs).

No such issue of material fact remains in the present case. Plaintiffs freely admit what they want: "[Plaintiffs] seek an *overall modification of Family Care policies* and *changes in overall funding*" (brief at 17; emphasis added). The policy and funding changes plaintiffs want would transform Family Care from a capitated-rate system to a demand-driven fee-for-service system (brief-in-chief at 33). It is hard to imagine a more fundamental alteration of the policy and funding choices *Alexander* and *Olmstead* entitle defendants to make.

B. Although plaintiffs insist, despite recent precedent, that they have a private right of action under (a)(30)(A), they fail to address or dispute the affirmative requirements for stating a claim under (a)(30)(A) and related statutes and rules governing the sufficiency of the capitated Family Care rates that is the focus of Claim 9.

The only argument plaintiffs develop with regard to the adequacy of their Medicaid claim based on (a)(30)(A) is that they have a private right of action to challenge the Family Care capitated rates based on § 1983 (*see* brief at 18-20). While defendants believe that the Seventh Circuit decision in *Methodist Hospitals v. Sullivan*, 91 F.3d 1026 (7th Cir. 1996), recognizing a

private right of action for providers must be reexamined in light of *Gonzaga University v. Doe*, 536 U.S. 273 (2002), it is up to the Seventh Circuit, not this Court, to do so.[2]

Plaintiffs fail to analyze the facts alleged in the complaint in light of the language of (a)(30)(A) or, in the context of a challenge to capitated rates, the closely related requirements of the managed care waiver provisions of 42 U.S.C. § 1396n(b) and the applicable federal regulation, 42 C.F.R. § 438.6. *See also Clayworth v. Bonta*, 295 F.Supp.2d 1110 (E.D. Cal. 2003), discussed in State defendants' brief-in-chief at 41-42 n.22. Instead, plaintiffs make a completely conclusory argument, unsupported by analysis or citation of precedent, that "the complaint is clearly sufficient," presumably to state a claim challenging the sufficiency of the capitated rates under (a)(30)(A). Brief at 19-20. Therefore, while the State defendants strongly urge that Claim 9 fails to state a claim based on (a)(30)(A), they rely on the discussion of this issue contained in their brief-in-chief at 39-44 which plaintiffs do not challenge.

CONCLUSION

For the reasons discussed above and in their brief-in-chief, the State defendants submit that the Fourth Amended Complaint must be dismissed for lack of jurisdiction based on lack of standing and ripeness; that claims for retroactive declaratory and monetary relief against them are

[2]The State defendants do, however, call to the Court's attention the recent decision of the Ninth Circuit in *Sanchez v. Johnson*, __ F.3d __, 2005 WL 1804195 (9th Cir.), decided August 2, 2005, affirming the decision of the district court of the same name, 301 F.Supp. 1060 (N.D. Cal. 2004). The Tenth Circuit decision in *Sanchez* contains a thorough analysis of the language of (a)(30)(A) in light of *Gonzaga*, and holds that the statute does not create individual rights enforceable under § 1983 by either Medicaid recipients or providers of Medicaid services. *Sanchez*, 2005 WL 1804195 *8. The court also points out that, since *Gonzaga*, no federal court of appeals has concluded that (a)(30)(A) provides either Medicaid recipients or providers with a statutory right enforceable under § 1983. *Sanchez*, 2005 WL 1804194 *4.

barred by sovereign immunity and the Eleventh Amendment; and that the various claims in the complaint must be dismissed because they fail to state claims on which relief can be granted.

Dated this 5th day of August, 2005.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General

s/Maureen McGlynn Flanagan
MAUREEN MCGLYNN FLANAGAN
Assistant Attorney General
State Bar #1013639

s/Mary E. Burke
MARY E. BURKE
Assistant Attorney General
State Bar #1015694

Attorneys for Defendants
Wisconsin Department of Health
and Family Services and Helene Nelson

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
Fax: (608) 267-2223
Telephone: (608) 266-1780 (Flanagan)
Email: flanaganmm@doj.state.wi.us
Telephone: (608) 266-0323 (Burke)
Email: burkeme@doj.state.wi.us

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