

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

**KENNETH ROMAN, RICKII AINEY
and ELIZABETH FOSTER, on behalf
of themselves and all others similarly
situated,**

Plaintiffs

v.

**BRUCE GREENSTEIN, in his official
capacity as Secretary of the Louisiana
Department of Health and Hospitals, and
LOUISIANA DEPARTMENT OF HEALTH
AND HOSPITALS,**

Defendants.

)
) **Civil Action No. 3:10-cv-00635-JJB-SCR**
)
)
)

) **Judge James J. Brady**
)
)

) **Magistrate Judge Stephen C. Riedlinger**
)

) **CLASS ACTION**
)
)
)
)
)

DEFENDANTS' ANSWER TO THE COMPLAINT IN INTERVENTION

Bruce Greenstein and the Louisiana Department of Health and Hospitals
("DHH"), collectively "Defendants", by and through their counsel, answer the paragraphs in the
Complaint in Intervention as follows:

Introductory Paragraphs

1. The first sentence of paragraph 1 contains Plaintiffs' characterization of their claims to which no response is required. To the extent that a response is required, Defendants deny that the challenged regulation will result in hundreds of people entering nursing facilities. Defendants admit that DHH has assessed each named plaintiff's ability to self-perform the activities of daily living ("ADLs") and instrumental activities of daily living ("IADLs") and determined that each met Louisiana's medical standards for admission to a nursing facility at the time of his or her most recent assessment. Defendants deny the remaining allegations in paragraph 1.

2. Defendants admit that Mr. Roman, Ms. Ainey, and Ms. Foster have disabilities; that each has at least one chronic medical condition; and that, collectively, they have been diagnosed with the conditions expressly enumerated in paragraph 2.

3. Defendants admit that the named plaintiffs collectively require, and have in the past received, some assistance with ADLs including eating, bathing, dressing, grooming, transferring, ambulation, toileting, and remembering to take medication. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the second sentence in paragraph 3. Defendants deny the remaining allegations in paragraph 3 and state that meal preparation, grocery shopping, and laundry are not considered ADLs as that term is used in the Long-Term Personal Care Services (“LT-PCS”) program.

4. Defendants admit the allegations in paragraph 4 except insofar as they apply to class members who do not currently receive LT-PCS; to that extent, Defendants deny the allegations in paragraph 4.

5. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first sentence of paragraph 5. Defendants deny the second sentence of paragraph 5.

Jurisdiction and Venue

6. Paragraph 6 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the Americans with Disabilities Act (“ADA”) or the Rehabilitation Act.

7. Paragraph 7 sets forth a jurisdictional claim, which does not require a response. To the extent that a response is required, Defendants deny those allegations that are inconsistent with applicable law. Defendants specifically deny that federal law provides

Plaintiffs with a cause of action and aver that the Eleventh Amendment bars the relief Plaintiffs seek.

8. Paragraph 8 is an assertion of venue, which does not require a response.

Plaintiffs

9. Defendants admit the allegations in the first and second sentences of paragraph 9. The third sentence of paragraph 9 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the ADA or the Rehabilitation Act.

10. Defendants deny that Rickii Ainey was 30 years old when Plaintiffs filed their Complaint in Intervention, and aver that Rickii Ainey was 31 years old at the time. The third sentence of paragraph 10 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the ADA or the Rehabilitation Act. Defendants admit the remaining allegations in paragraph 10.

11. Defendants admit the allegations in the first and second sentences of paragraph 11. The third sentence of paragraph 11 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the ADA or the Rehabilitation Act. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the fourth sentence of paragraph 11.

Defendants

12. Defendants admit the first sentence of paragraph 12. The second and third sentences of paragraph 12 state legal conclusions to which no response is required; to the extent

that a response is required, Defendants deny those allegations that are inconsistent with applicable law.

13. Defendants admit the allegations in paragraph 13.

The Americans with Disabilities Act

14. Paragraph 14 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the ADA.

15. Paragraph 15 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the ADA. Defendants specifically deny that 28 C.F.R. §35.130(d) is enforceable through a private right of action and that the ADA itself incorporates the standards in 28 C.F.R. §35.130(d).

16. Paragraph 16 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the ADA. Defendants specifically deny that 28 C.F.R. §35.130(b)(3) is enforceable through a private right of action.

17. Defendants admit that DHH is a public entity within the meaning of the ADA.

Section 504 of the Rehabilitation Act

18. Paragraph 18 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the Rehabilitation Act.

19. Paragraph 19 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the Rehabilitation Act. Defendants specifically deny that 28 C.F.R. §41.51(d) is

enforceable through a private right of action and that the Rehabilitation Act itself incorporates the standards set forth in 28 C.F.R. §41.51(d).

20. Paragraph 20 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the Rehabilitation Act. Defendants specifically deny that the regulations cited in paragraph 20 are enforceable through a private right of action.

21. In response to the first sentence of paragraph 21, Defendants admit that Louisiana's Medicaid program receives federal financial participation. The remainder of the first sentence of paragraph 21 sets forth legal conclusions to which no response is required, and to the extent that a response is required, Defendants deny those allegations. Defendants deny the allegations in the second sentence of paragraph 21.

The Long Term Personal Care Services Program

22. Paragraph 22 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with applicable law.

23. Defendants admit that Louisiana participates in the Medicaid program and has adopted a state plan for medical assistance under Title XIX of the Social Security Act. The remaining allegations in paragraph 23 set forth legal conclusions to which no response is required; to the extent that a response is required, Defendants deny those allegations that are inconsistent with applicable law.

24. Defendants admit that the Secretary of the United States Department of Health and Human Services has delegated much of her authority under the Medicaid program to the

Centers for Medicare & Medicaid Services (“CMS”). Defendants deny that the remaining allegations in paragraph 24 accurately and fully characterize the policies of CMS.

25. Defendants admit the allegations in the first sentence of paragraph 25. The second sentence of paragraph 25 sets forth legal conclusions to which no response is required; to the extent that a response is required, Defendants deny those allegations that are inconsistent with the Medicaid statute.

26. Defendants admit the allegations in paragraph 26 accurately describe the services a personal care worker may be authorized to provide to an LT-PCS recipient. Defendants deny that every beneficiary receives all of the assistance described.

27. Paragraph 27 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants state that, to be eligible to receive LT-PCS, an individual must, inter alia, (1) meet the medical standards for admission to a nursing facility; (2) require limited assistance with at least one activity of daily living; and (3) face a substantial possibility of deterioration in mental or physical condition or functioning if neither home-and-community-based services nor nursing-facility services are provided in less than 120 days. Defendants further state that the third criterion is considered met if the recipient: (a) is in a nursing facility and could be discharged if community-based services were available; (b) is likely to require nursing-facility admission within the next 120 days; or (c) has a caregiver who has a disability or is over the age of 70. Defendants deny the allegations in paragraph 27 to the extent that they are inconsistent with the above.

28. Defendants admit the allegations in the first sentence of paragraph 28. Defendants aver that the amount of LT-PCS services an individual may receive is based on his or her ADL Index score of the Minimum Data Set-Home Care assessment tool. The ADL Index

measures the degree of assistance an individual required to perform late-loss ADLs during the look-back period prior to the assessment. If the degree of assistance an individual requires to perform ADLs changes, an individual's eligibility for LT-PCS may change, as may the number of hours of LT-PCS the individual is eligible to receive. Defendants deny the allegations in the second sentence of paragraph 28 to the extent that they are inconsistent with the above.

29. Defendants deny the allegations in paragraph 29.

30. Defendants admit the allegations in paragraph 30.

31. Defendants admit the allegations in paragraph 31, except that the emergency rule adopting the RUG III/HC methodology and the 42-hour limitation on LT-PCS became effective on March 20, 2009.

32. Defendants admit the allegations in paragraph 32.

33. Defendants deny the allegations in the last sentence of paragraph 33.

Defendants admit the remaining allegations in paragraph 33.

34. Defendants deny the allegations in paragraph 34.

35. Defendants aver that the reduction in maximum hours will be implemented for assessments of new LT-PCS recipients and for the annual reassessments of current recipients that take place on or after September 5, 2010.

36. Defendants deny the allegations in paragraph 36.

37. Defendants deny the allegations in the first sentence of paragraph 37.

Defendants admit the allegations in the second sentence of paragraph 37.

38. Defendants deny the allegations in paragraph 38.

39. Defendants admit that prior to reducing from 42 to 32 the maximum number of hours an LT-PCS recipient could receive every week and revising the methodology for

allocating hours within the permissible range, DHH estimated that these changes would result, on average, in a reduction of LT-PCS by three hours per week per LT-PCS recipient. Defendants admit that individuals who receive greater than 35 hours per week immediately before these changes are implemented will have their hours reduced by more than 3 hours per week.

Defendants deny the remaining allegations in paragraph 39.

40. Defendants deny the allegations in paragraph 40.

41. Defendants admit that the cost of providing care to a single plaintiff in a nursing facility is greater than the cost of providing him or her with 42 hours per week of LT-PCS. Defendants aver that many people who use LT-PCS would not use nursing facility services if LT-PCS services were reduced or eliminated.

42. Paragraph 42 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 42.

Named Plaintiffs' Need for Personal Care

Kenneth Roman

43. Defendants admit that Mr. Roman is currently 47 years old and lives in Jeanerette, Louisiana. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 43.

44. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 44.

45. Defendants admit that Mr. Roman has had at least one stroke. Defendants admit that Mr. Roman has hemiparesis. Defendants admit that Mr. Roman has identified himself as having diabetes, congestive heart failure, peripheral vascular disease, hypertension, coronary artery disease, renal failure, and irritable bowel syndrome. Defendants lack sufficient knowledge

or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 45.

46. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 46.

47. Defendants admit that Mr. Roman ambulates using a cane and has hemiparesis. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegation that Mr. Roman often falls as a result of his hemiparesis.

48. Defendants admit that Mr. Roman has been found eligible for, and currently receives, LT-PCS. Defendants admit that Mr. Roman's parents have disabilities and do not currently provide him with assistance in performing ADLs or IADLs. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegation that Mr. Roman lives alone.

49. Defendants admit the allegations in the first sentence of paragraph 49. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the second sentence of paragraph 49.

50. Defendants admit that Mr. Roman is incontinent and has in the past received assistance with all of his ADLs. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 50.

51. Defendants admit that Mr. Roman has in the past received assistance with transferring and bathing. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 51.

52. Defendants deny the allegations in paragraph 52. Defendants state that Mr. Roman's May 2008 assessment led to a recommendation of 43.25 hours per week of LT-PCS; an

April 2009 assessment led to a recommendation of 32.25 hours per week, plus 1.75 hours per month of additional assistance with IADLs; a March 2010 assessment led to a recommendation of 36.75 hours per week; and an April 2010 reassessment due to a change in status led to a recommendation of 39 hours per week.

53. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 53.

54. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 54.

55. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 55.

Rickii Ainey

56. Defendants deny that Ms. Ainey is 30 years old. Paragraph 2 of the Complaint in Intervention correctly alleges that Ms. Ainey is 31 years old. Defendants admit that Ms. Ainey lives alone in New Orleans, Louisiana. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 56.

57. Defendants admit that Ms. Ainey has arthrogryposis but lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 57.

58. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 58.

59. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 59.

60. Defendants admit that Ms. Ainey has in the past received the assistance described in paragraph 60.

61. Defendants admit that Ms. Ainey has in the past received assistance in meal preparation, grocery shopping, light housekeeping, and laundry. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 61.

62. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 62.

63. Defendants admit that Ms. Ainey's mother lives near her and that her sister lives in Arkansas. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 63.

64. Defendants admit the allegations in the first sentence of paragraph 64. Defendants deny the allegations in the second sentence of paragraph 64.

65. Defendants lack sufficient information or knowledge to form a belief as to the truth or falsity of the allegations in the first sentence of paragraph 65. Defendants deny the allegations in the second sentence of paragraph 65 and state that Ms. Ainey was initially approved for 38 weekly hours of LT-PCS plus 3.5 monthly hours.

66. Defendants admit the allegations in paragraph 66.

67. Defendants admit that Ms. Ainey is currently approved to receive 41 hours per week of LT-PCS. Defendants deny that Ms. Ainey lacks access to assistance other than that which she receives through the LT-PCS program. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 67.

68. Defendants deny the allegations in the first sentence of paragraph 68.

Defendants lack sufficient information to form a belief as to the truth or falsity of the remaining allegations in paragraph 68.

Elizabeth Foster

69. Defendants admit the allegations in paragraph 69.

70. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 70.

71. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 71.

72. Defendants admit that Ms. Foster is incontinent but lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 72.

73. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the first sentence of paragraph 73. Defendants admit the remaining allegations in paragraph 73.

74. Defendants deny that Ms. Foster's LT-PCS worker performs grocery shopping on her behalf or accompanies her to medical appointments; Defendants state that Ms. Foster's daughter is expected to provide such assistance. Defendants admit the remaining allegations in paragraph 74.

75. Defendants admit the allegations in the first sentence of paragraph 75. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in the second sentence of paragraph 75.

76. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 76.

77. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 77.

78. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 78.

79. Defendants deny the allegations in the last sentence of paragraph 79. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 79.

Class Action Allegations

80. Paragraph 80 sets forth Plaintiffs' characterization of this action and legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 80.

81. Paragraph 81 sets forth Plaintiffs' proposed class and does not require a response. To the extent that a response is required, Defendants deny the allegations in paragraph 81 and note that the Court has certified a class using a different class definition.

82. The first sentence of paragraph 82 sets forth a legal conclusion to which no response is required. Defendants admit the allegations in the second sentence of paragraph 82.

83. Defendants lack sufficient information or knowledge to form a belief as to the truth or falsity of the allegations in the first sentence of paragraph 83. Defendants deny the allegations in the second sentence of paragraph 83. The remaining allegations in paragraph 83 set forth legal conclusions and characterizations of the proposed class to which no response is required.

84. Paragraph 84 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 84.

85. Paragraph 85 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 85.

86. Paragraph 86 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 86, except that Defendants admit the allegations in the last sentence of paragraph 86.

87. Paragraph 87 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 87.

First Claim for Relief - Title II of the Americans with Disabilities Act

88. Defendants admit the allegations in paragraph 88.

89. Paragraph 89 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with the ADA.

90. Paragraph 90 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in the first sentence of paragraph 90 and lack sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 90.

91. Paragraph 91 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 91.

92. Paragraph 92 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 92.

93. Paragraph 93 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 93.

Second Claim for Relief - Section 504 of the Rehabilitation Act

94. Paragraph 94 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny those allegations that are inconsistent with applicable law.

95. Paragraph 95 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 95.

96. Paragraph 96 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 96.

97. Paragraph 97 sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants deny the allegations in paragraph 97.

* * *

Relief Requested

Defendants deny that Plaintiffs are entitled to the relief requested on page 20 of the Complaint in Intervention.

* * *

Defendants deny any and all allegations of the Complaint in Intervention not expressly admitted herein.

* * *

Affirmative Defenses

1. The Complaint in Intervention fails to state a claim for which relief can be granted.

2. The Complaint in Intervention does not allege violations of the ADA or Rehabilitation Act that can be remedied through a private right of action.

3. Defendants already have in place a comprehensive, effectively working plan for providing alternatives to institutionalization.

4. The relief requested by Plaintiffs would fundamentally alter Louisiana's long-term care services.

5. Plaintiffs' action is not a proper class action and the Complaint in Intervention fails to set forth an adequate basis for granting relief on behalf of a purported class.

6. Defendant DHH is immune from suit under the Eleventh Amendment.

WHEREFORE, Defendants respectfully request that the Court enter judgment in their favor on all claims alleged in the Complaint in Intervention and grant Defendants such other relief as this Court deems just and proper.

Dated: July 27, 2011

Respectfully

submitted,

/s/ Kimberly Humbles

Kimberly Humbles

La. Bar No. 24465

Kimberly.Humbles@la.gov

Michael J. Coleman

La. Bar No. 22756

Michael.Coleman@la.gov

Charles E. Daspit

La. Bar No. 4559

Charles.Daspit@la.gov

Neal R. Elliott

La. Bar No. 24084

Neal.Elliott@la.gov

Stephen R. Russo

La. Bar No. 23284

Stephen.Russo@la.gov

LOUISIANA DEPARTMENT OF HEALTH AND
HOSPITALS

P.O. Box 3836

Baton Rouge, LA 70821-3836

Telephone: 225-342-1128

Facsimile: 225-342-2232

Caroline M. Brown

cbrown@cov.com

D.C. Bar. No. 438342

Matthew Berns

mberns@cov.com

N.J. Bar No. 037232009

COVINGTON & BURLING LLP

1201 Pennsylvania Ave., N.W.

Washington, DC 20004-2401

Telephone: 202-662-6000

Facsimile: 202-662-6291

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify on this 27th day of July, 2011, that a true and correct copy of the foregoing **Answer to the Complaint in Intervention** was filed electronically using the CM/ECF system. Notice of this filing will be sent via operation of the Court's electronic filing system to the following:

Nell Hahn

nhahn@advocacyla.org

Stephen F. Gold

stevegoldada@cs.com

Bruce Vignery

bvignery@aarp.org

Kenneth Zeller

kzeller@aarp.org

Counsel for Plaintiffs

James L. Nelson

jim.nelson@usdoj.gov

Counsel for the United States

/s/ Matthew Berns
Matthew Berns