UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHARLES STROUCHLER, SARA CAMPOS, by her next friend ANA SIMARD, and AUDREY ROKAW, by her next friend NINA PINSKY, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

NIRAV SHAH, M.D., as Commissioner of the New York State Department of Health, and ELIZABETH BERLIN, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and ROBERT DOAR, as Administrator of the New York City Human Resources Administration/Department of Social Services,

Defendants.

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ECF

FIRST AMENDED COMPLAINT

Docket No. 12 CV 3216 (SAS)(GWG)

Filing Date:
April 24, 2012

I. PRELIMINARY STATEMENT

1. Plaintiffs are elderly or disabled Medicaid recipients who depend on continuous personal care services (also known as "home care") in order to continue to live in their homes in the community. This 24-hour care is also known as "split-shift" care because it is provided by home attendants working in shifts day and night. It is provided and paid for by the New York State Medical Assistance program. In violation of the court's holding in Mayer v. Wing, 922 F. Supp. 902 (S.D.N.Y. 1996) (Scheindlin, J.), due process, and other federal laws, Plaintiffs are threatened with drastic reductions of these essential split-shift home care services as a result of new practices and procedures, including the City Defendant's reliance on a state regulation, challenged in this proceeding. Accordingly,

Plaintiffs seek declaratory relief invalidating the regulation and Defendants' new policies, as well as an injunction preventing arbitrary reductions and terminations of home care that bear no relationship to an individual's need for services.

2. Contrary to the specific holding of *Mayer v. Wing*, and its implementing regulations, the City Defendant has notified the named Plaintiffs and members of the Plaintiff class that their home care will be reduced or terminated even though there has been no change in their medical condition and need for service, and even when they have been receiving the same amount of home care services for many years, in some cases for more than a decade.

3. Further, when making the decisions to reduce services to Plaintiffs needing 24- hour continuous home care services the City Defendant often relies on a state regulation, challenged in this proceeding, which defines continuous care as

> the provision of uninterrupted care, by more than one person, for more than 16 hours per day for a patient who, because of the patient's medical condition and disabilities, requires total assistance with toileting, walking, transferring or feeding at times that cannot be predicted.

18 N.Y.C.R.R.§ 505.14(a)(3)(2012).

4. Rather than being used appropriately to provide home care services to those with a medical need for it, City Defendant is improperly using this regulation to deny split-shift care to almost all Medicaid patients, usually in one of three ways. In some cases it is by asserting that the patient's needs are "predictable" – even if the assistance is for a task such as toileting which cannot be predicted. In other cases it is by asserting that the need for assistance is not "total" but "some" – even if "some assistance" is assistance with a task such as changing a soiled adult diaper which the patient could not possibly do on her own. In still other cases it is by asserting that a bedbound patient may not receive

frequent nighttime assistance with turning to prevent bedsores because "turning" does not appear in the definition of continuous care.

5. The result is that, despite a prior determination of the medical need for split-shift care, City Defendant has notified Plaintiffs and members of the class that their service will be reduced, in many cases to "sleep-in" care in which an aide is in the home twenty-four hours per day but is expected to be able to sleep during the nighttime hours. As a result, a patient who needs to have an alert attendant at night will not receive medically necessary services.

6. The City Defendant has begun a process of re-evaluating every case in which there has been an authorization of split-shift personal care services in order to reduce and/or eliminate the City's 24-hour caseload. As a result, City Defendant has denied medically necessary services to individuals who cannot assist themselves with crucial life-sustaining activities because the individual is somehow able to even minimally participate in a task or because the individual's nighttime needs can be anticipated or "predicted." Because many of the named Plaintiffs and members of the Plaintiff class have extensive needs at night requiring an alert, awake aide, their health and safety cannot be maintained at home with care only by a sleep-in aide, and they will experience avoidable medical problems requiring treatment or hospitalization, or they will be forced to move to a nursing home.

7. As a result of the communications between the City Defendant and Defendant Shah and the numerous Fair Hearings requested by members of the proposed class and the extraordinarily high number of decisions reversing the City's reductions and terminations of split-shift home care, both State Defendants know of the City's unlawful actions. In

addition, both State Defendants know that the City has been strictly following a state regulation that makes "the local professional director or his or her designee [referred to as the "local medical director" ("LMD")]" the final decision-maker. Although all Defendants are aware that the LMDs are not following the law, none of the Defendants has taken adequate steps to train the LMDs regarding the relevant law for the provision of split-shift home care, and to require the LMDs to follow the law. Rather than taking any steps to address the LMD's obvious flouting of the relevant legal and regulatory requirements, State Defendant Shah has affirmatively and purposefully endeavored to ensure that the LMDs remain the sole decision makers by repeatedly instructing the City Defendant that the LMDs and only the LMDs must make these decisions and that the City must follow the LMD determinations whether they comply with the law or not.

8. Plaintiffs therefore bring this action for declaratory and injunctive relief to prevent and declare illegal the reduction of their Medicaid home care in violation of the Medicaid Act, 42 U.S.C. § 1396 et seq. and its implementing regulations; Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq. and its implementing regulations; Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794; and the Supremacy Clause and the Due Process Clause of the 14th Amendment of the United States Constitution.

II. JURISDICTION AND VENUE

9. Jurisdiction over this action is conferred upon this Court by 28 U.S.C. §§ 1331, 1343, and 1367. This action is authorized by 42 U.S.C. § 1983 as an action seeking redress of the deprivation of statutory and constitutional rights under color of law; the Americans with

Disabilities Act, 42 U.S.C. § 12133; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(2).

10. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(b) in that it is the judicial district where all named Plaintiffs reside and where a substantial part of the events giving rise to this action occurred.

III. PARTIES

11. Plaintiff CHARLES STROUCHLER is a 68 year old man who lives alone in Manhattan. Because of his serious medical conditions and impairments, he has been receiving 24-hour split-shift Medicaid covered home care 7 days a week since approximately 1997.

12. Plaintiff SARA CAMPOS is a 91 year old woman who lives alone in Manhattan. Because of her serious medical conditions and impairments, she has been receiving 24-hour split-shift Medicaid covered home care for the past several years.

13. Plaintiff AUDREY ROKAW is a 93 year old woman who lives alone in Manhattan. Because of her serious medical conditions and impairments, she has been receiving 24-hour split-shift Medicaid covered home care 7 days a week since 2010, following a favorable decision in an administrative hearing.

14. Defendant NIRAV SHAH, M.D. is the Commissioner of the New York State Department of Health ("DOH") and is responsible for the administration of the Medicaid program in the State of New York. He maintains offices for the administration of Medicaid home care services at Corning Tower, Empire State Plaza, Albany, NY 12237.

15. Defendant ELIZABETH BERLIN is the Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance ("OTADA") and is responsible for administering and supervising the Office of Administrative Hearings in

New York State, including ordering aid-continuing and directing local districts to review cases to ensure that the agency is following the principles and findings of State Fair Hearing decisions in similar cases. She maintains offices at 40 North Pearl Street, Albany, New York 12243. In New York City OTADA conducts hearings at 14 Boerum Place, Brooklyn, New York.

16. Defendant ROBERT DOAR is the Administrator of the New York City Human Resources Administration ("HRA") and is responsible for administering and supervising the Medicaid program in New York City. He maintains offices at 180 Water Street, New York, New York 10038.

IV. APPLICABLE STATUTES AND REGULATIONS

The Medicaid Program

17. Medicaid is a joint federal-state program established under Title XIX of the Social Security Act (the "Medicaid Act"), which provides federal funding for state programs that furnish medical assistance and rehabilitation and other services to needy individuals. 42 U.S.C. § 1396 et seq.; 42 C.F.R. § 430 et seq.

18. States are not required to participate in the Medicaid program, but if they do, their state programs must conform to federal law and regulations in order to qualify for federal financial participation. 42 U.S.C. §§1396, 1396a, 1396c.

19. Any state participating in the Medicaid program must adopt an approved State plan, and must administer the program through a "single state agency." 42 U.S.C. § 1396a (a) (5); 42 C.F.R. § 431.10(b) (1). New York has elected to participate in the Medicaid program, and the "single state agency" responsible for the administration of the Medicaid program

in New York is the New York State Department of Health ("DOH"). N.Y. Soc. Serv. § 363-a (1).

20. The DOH, as the "single state agency," has exercised its authority under the law to delegate certain administrative responsibilities of the program to local districts. However, DOH remains ultimately responsible for the actions of its agents, including HRA, and to ensure that its agents comply with the federal and state statutes and regulations governing the Medicaid program. 42 U.S.C. § 1396a (a) (5); 42 C.F.R. §§ 431.10, 431.50, 435.903; N.Y. Soc. Serv. §§ 22, 363-a (1), 364(2).

21. The Human Resources Administration ("HRA") is the local social service provider responsible for the day-to-day operations of the Medicaid program in New York City, acting pursuant to a local plan developed and maintained by HRA under the guidance of the DOH.

22. DOH may not delegate to HRA, or any other agent (including its local medical directors) the authority to (i) exercise administrative discretion in the administration or supervision of the State plan, or (ii) issue, policies, rules, and regulations on program matters. 42 C.F.R. § 431.10(e) (1).

23. Although DOH retains the ultimate responsibility for making decisions regarding Medicaid eligibility and services, if a recipient requests an administrative hearing, known as a "Fair Hearing," the hearing is conducted by a hearing officer employed by OTADA, who will issue a recommended decision to the Commissioner of DOH who then issues the final administrative decision.

24. Federal regulations require that DOH, as the single state agency, have methods to keep itself informed of local agency compliance with the State plan and "procedures for

determining eligibility" and must "take corrective action to ensure" compliance by the local agency. 42 C.F.R. § 435.903.

25. Federal law requires that "medical assistance…shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8).

26. Under federal Medicaid requirements, states must provide comparable benefits, i.e., benefits that are equal in "amount, duration, and scope," to all categorically needy Medicaid beneficiaries. 42 U.S.C. § 1396a(a)(10)(B); 42 C.F.R. § 440.240(a), (b)(1). "Categorically needy" Medicaid beneficiaries are beneficiaries in "categories" specified by federal law, such as aged, blind and disabled individuals eligible for Supplemental Security Income (SSI) and other poverty-based programs. 42 U.S.C. §1396a(a)(10)(A).

27. The Medicaid Act also requires states to provide benefits to categorically needy Medicaid benefits that are comparable in "amount duration and scope," to those benefits provided to" medically needy" Medicaid beneficiaries. 42 U.S.C. § 1396a (a)(10)(B)(ii); 42 C.F.R. §§ 440.240 (b)(1). Medically needy Medicaid beneficiaries are beneficiaries who do not receive cash public assistance because they have income or resources in excess of the requirements for receipt of such assistance, but who nevertheless meet categorical requirements for such assistance, e.g., they are over age 65, blind, or disabled, and have insufficient financial means to pay for their medically necessary care. Individuals in this group become eligible for Medicaid by spending their excess income on medical care.

28. Federal Medicaid law requires participating states to establish reasonable standards, consistent with the objectives of the Medicaid Act, for determining the extent of covered services. 42 U.S.C. § 1396a(a)(17), (19).

29. Federal law prohibits unreasonable reductions in the amount, duration or scope of services based on diagnosis, type of illness, or condition. 42 C.F.R. § 440.230(c), 42 U.S.C. § 1396a (a)(10)(B).

30. Under federal law, a Medicaid recipient has a right to receive covered Medicaid services, and each service must be "sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b), 42 U.S.C. §1396a(10)(B).

31. While the Medicaid Act does not explicitly state that "medically necessary" services be provided, it is a judicially accepted implicit component of the federal legislative scheme.

Home Care Services under Medicaid

32. Under the Medicaid Act, "Medical Assistance" includes payment of part or all of the cost of home care services. 42 U.S.C. § 1396d(a)(22). Personal care services, also called "home care services," are services furnished to an individual who is not in an inpatient or institutionalized setting, and are authorized by a physician and provided in accordance with the State's Medicaid service plan. 42 C.F.R. § 440.167(a).

33. The Federal Centers for Medicare and Medicaid Services explains that personal care services "include a range of human assistance provided to persons with disabilities and chronic conditions . . . *which enables them to accomplish tasks that they would normally do for themselves if they did not have a disability*," and "most often relate[] to . . . eating, bathing, dressing, toileting, transferring, . . . maintaining continence, . . . personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management." Centers for

Medicare and Medicaid Servs., STATE MEDICAID MANUAL § 4480(C), at 4-495 (1999)(emphasis added).

34. In New York State, "Medical Assistance" includes personal care services prescribed by a physician. N.Y. Soc. Serv. § 365-a(2)(e).

35. Under the New York plan, "[p]ersonal care services means some or total assistance with personal hygiene, dressing and feeding; and nutritional and environmental support functions," such as assistance with feeding, toileting, and walking, where such services are essential to the maintenance of the patient's health and safety in his or her own home. 18 N.Y.C.R.R., § 505.14(a)(1). New York State's plan also allows for the provision of personal care through the Consumer Directed Personal Assistance Program (CDPAP) which enables an attendant to perform certain tasks that are beyond the general scope of home attendant practice. N.Y. Soc. Serv. § 365-f; 18 N.Y.C.R.R., § 505.28.

36. In order to receive personal care services, the patient must have a stable medical condition which is defined as a condition that: (a) is not expected to exhibit sudden deterioration or improvement; (b) does not require frequent medical or nursing judgment to determine changes in the patient's plan of care; and (c)(1) is such that a physically disabled individual is in need of routine supportive assistance and does not need skilled professional care in the home; or (c)(2) is such that a physically disabled or frail elderly individual does not need professional care but does require assistance in the home to prevent a health or safety crisis from developing. 18 N.Y.C.R.R. § 505.14(a)(4)(i)(a) – (c)(1) & (2).

37. Because a home attendant may be trained to provide certain skilled services under the consumer directed personal assistance program, the program uses a slightly more relaxed

definition of medical stability, requiring only that the person's condition is not expected to exhibit sudden deterioration or improvement and does not require frequent medical or nursing judgment to determine changes in the consumer's plan of care. 18 N.Y.C.R.R. § 505.28 (b)(13). The requirements of 18 N.Y.C.R.R. § 505.14(a)(4)(i)(c)(1) & (2) do not apply to individuals who are receiving home care through the Consumer Directed Personal Assistance Program.

Procedure for Requesting Home Care Services

38. 18 N.Y.C.R.R. § 505.14(b) sets out the procedure for a Medicaid recipient to request home care services. First, the recipient's doctor must fill out a request for personal care services in accordance with 18 N.Y.C.R.R. § 505.14(c)(i).

39. Next, the City Defendant will determine if the individual is eligible for home care by reviewing the physician's order and conducting a social assessment, a nursing assessment, an assessment of the appropriateness and cost-effectiveness of the specified services, and an assessment of any other factors as required by the regulation. 18 N.Y.C.R.R. § 505.14(b)(2)(i)-(v).

40. For any case in which 24-hour continuous care is requested, the City Defendant must complete an independent medical review either by the local professional director, a physician designated by the local professional director or a physician under contract with the local social services department to review personal care services cases. 18 N.Y.C.R.R. § 505.14(b)(4)(i).

41. A social assessment is conducted by having a discussion with the patient about his/her circumstances and preferences and evaluating "the potential contribution of informal

caregivers, such as family and friends, to the patient's care." 18 N.Y.C.R.R. § 505.14(b)(3)(ii)(a),(b),(d).

42. A nursing assessment is completed by a nurse and includes a review and interpretation of the physician's order, "an evaluation of the functions and tasks required by the patient," an assessment of the degree of assistance required, "an evaluation whether adaptive or specialized equipment . . . can be provided safely and cost-effectively," a "development of a plan of care in collaboration with the patient or his/her representative;" and a recommendation for authorization of services. 18 N.Y.C.R.R. § 505.14(b)(3)(iii).

43. When all of the evaluations are completed, the local professional director or designee reviews these assessments and "is responsible for the final determination of the level and amount of care to be provided." Services can only begin once the authorization is complete. 18 N.Y.C.R.R. § 505.14(b)(4)(ii).

44. At the end of the initial authorization period, a reauthorization must be completed in order to continue services. The reauthorization procedure follows the same steps as the original authorization, except that a nursing assessment is not required "if the physician's order indicates that the patient's medical condition is unchanged." The reauthorization includes "an evaluation of the services provided during the previous authorization period." 18 N.Y.C.R.R. § 505.14(b)(5)(ix).

45. 18 N.Y.C.R.R. § 505.28(d) and (f) sets forth a parallel assessment and authorization process for individuals participating in the consumer-directed personal assistance program.

Notice and Administrative Hearing Requirements Upon
Reduction or Termination of Services

46. Federal law and regulations require timely and adequate notice to Medicaid applicants and recipients of any action to deny, discontinue, suspend or reduce medical assistance authorization or services. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 435.919; 435.912, 431.210; U.S Const. Amend. XIV, § 1.

47. Federal law and regulations also require that a state's Medicaid program provide Medicaid applicants and recipients an opportunity for an administrative Fair Hearing when Medicaid benefits are denied, reduced or terminated. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.220.

48. When determinations are made to reduce or terminate Medicaid benefits, recipients who request a Fair Hearing in a timely manner are entitled to receive benefits unchanged pursuant to Aid Continuing Directives until a decision after a Fair Hearing is issued. 42 U.S.C. 1396a(a)(3); 42 U.S.C. § 1396a(a)(3); 42 C.FR. § 431.230(a), 431.231(c), U.S. Const. Amend. XIV, § 1. Fair Hearing systems must meet the due process standards set forth in *Goldberg v. Kelly,* 397 U.S. 254 (1970), 42 C.F.R. § 431.205(d).

49. Once a plan of care is created and services are authorized for a Medicaid recipient, those services may be reduced or discontinued only "when such services are … no longer medically necessary or when the social services district reasonably expects that such services cannot maintain or continue to maintain the client's health and safety in his or her home." 18 N.Y.C.R.R. § 505.14(b)(5)(v)(a).

50. Pursuant to the court order in *Mayer v. Wing,* to avoid arbitrary service reductions in violation of the Due Process Clause, services may only be reduced under certain delimited circumstances. Thus, the relevant state regulations outline different categories

of appropriate reasons for the reduction or termination of services, including in pertinent part: that "the client's medical, mental, economic or social circumstances have changed and the district determines that the personal care services provided under the last authorization or reauthorization are no longer appropriate or can be provided in fewer hours than they were previously," that "a mistake occurred in the previous personal care services authorization," that "the client can be more appropriately and cost-effectively served through other Medicaid programs and services," that "the client's health and safety cannot be assured with the provision of personal care services," that "the client's medical condition is not stable;" or that "the services the client needs exceed the personal care aid's scope of practice . . . ." 18 N.Y.C.R.R. § 505.14(b)(5)(v)(c)(1), (2), (5-7), (9).

51. In administrative hearings challenging a reduction or termination of medical assistance, "the social services agency must establish that its actions were correct." 18 N.Y.C.R.R. § 358-5.9(a).

52. The Fair Hearing decision issued by the commissioner must be based exclusively on the administrative record. The Commissioner must issue a written decision that sets forth the hearing issues, the relevant facts, and the applicable law, regulations, and approved policy, if any, upon which the decision is based. The hearing decision must include findings of fact, a determination of the issues, and the reasons for the determination, along with any specific action to be taken by the social services agency. Further, the hearing decision must be supported by substantial evidence. 18 N.Y.C.R.R. § 358-6.1(a), 18 N.Y.C.R.R. § 358-5.9(b).

53. Under the authority granted by 18 N.Y.C.R.R. § 358-6.3, when Defendant Berlin determines from a Fair Hearing that the local district "has misapplied provisions of law,

regulations or …State-approved policy," she may direct the local district to review "other cases with similar facts for conformity with the principles and findings in the decision." When the State gives the local district the direction permitted by 18 N.Y.C.R.R. § 358-6.3, the local district is then required to review its cases and report to the State regarding the actions it has taken to comply with the State's direction. 18 N.Y.C.R.R. § 358-6.5. Such reports are required within 30 days of the State's direction, and as often thereafter as the State directs. *Id.*

Disability Discrimination Prohibitions and Requirements

54. Title II of the Americans with Disabilities Act ("ADA") provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

55. Thus, under the ADA, public entities are required to provide meaningful access to their programs, services and activities, and provide any accommodations or modifications necessary for people with disabilities to access those services. 42 U.S.C. §§ 12131, 12132.

56. Regulations implementing Title II of the ADA provide: "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).

57. The ADA prohibits discrimination based on type of disability.

58. The ADA's regulations further provide that "[a] public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(8).

59. Section 504 of the Rehabilitation Act states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

60. Section 504's regulations prohibit recipients of federal financial assistance from utiliz[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) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons. 28 C.F.R. § 41.51(b)(3)(i); 45 C.F.R. § 84.4(b)(4).

61. Furthermore, pursuant to the requirements of Title II of the ADA and Section 504, public entities and recipients of federal financial assistance must "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d), 28 C.F.R. § 41.51(d).

Medicaid Home Care Services in New York

62. Medicaid-funded home care services enable people, like the named Plaintiffs, who need assistance with the activities of daily living (essential life activities such as ambulating, bathing, eating, toileting) to receive care from a home attendant while remaining safely in

their own homes, rather than having to permanently reside in a Medicaid-funded nursing home, hospital or other institution.

63. Medicaid home care services are provided for a set numbers of hours depending on the patient's needs and the availability of other informal caregivers to provide assistance. Where medically necessary, individuals receiving home care can obtain up to twenty-four hour split-shift care, which involves two home attendants coming to the home, each for twelve hour shifts, seven days per week. 18 N.Y.C.R.R. §§ 505.14(a)(3), (5).

64. The City Defendant also provides "live-in" (also known as "sleep-in") attendants for individuals who do not require continuous care, but who may need very occasional assistance during the night. These sleep-in attendants generally work in a 12-hour shift (with one "duty free" hour) and are expected to be able to sleep at night, but to be in the home in the event of an emergency or occasional need for assistance during times outside their shift.

65. On information and belief, the City Defendant contracts with various home care agencies to provide home care assistance to Medicaid recipients, and the terms of the contracts require that the home attendants have time to sleep at night, so that one individual does not have to work both day and night.

66. The applicable regulation distinguishes between "total" and "some" assistance. It has long provided that split-shift care is available to individuals who require "total assistance with toileting and/or walking and/or transferring and/or feeding at unscheduled times during the day and night." 18 N.Y.C.R.R. § 505.14(a)(3). Total assistance is defined to mean that "a specific function or task is performed and completed for the patient." In contrast, "some assistance" is defined to mean that "a specific function or task is

performed and completed by the patient with help from another individual." 18 N.Y.C.R.R. § 505.14(a)(2)(i), (ii).

67. The State Defendant recently amended the regulation applicable to personal care services by providing that split-shift personal care services may only be approved if the patient requires "total assistance with toileting, walking, transferring or feeding **at times that cannot be predicted**." 18 N.Y.C.R.R. § 505.14(a)(3) [emphasis added]. The former regulation provided such care could be approved when the patient required assistance "**at unscheduled times during the day and night**." [emphasis added].

68. Defendant Shah has formally noted that the modification of the regulation was not expected to result in any service changes for current recipients of split-shift personal care services. 12 OHIP-ADM 1.

69. Notwithstanding the State Defendant's statement, the City Defendant notified all Local Medical Directors (LMDs) that upon subsequent reviews of continuous care cases, the LMDs should determine whether the care should be reduced to live-in services where an individual's need for assistance could be "predicted" or where the person could be found to "participate" in the activity of daily living.

70. While the change in regulatory language seems minor, the new language is being used by the City Defendant to permit the reduction of services in split-shift cases regardless of the importance of such assistance to the maintenance of the individual's health and safety, the frequency with which the individual requires such assistance during the nighttime hours, or the individual's complete inability to perform the activity without the attendant's assistance.

V. FACTS RELATING TO INDIVIDUAL PLAINTIFFS

Plaintiff Charles Strouchler

71. Charles Strouchler is a 68-year old man who had worked as an artist until becoming disabled by the effects of multiple sclerosis. He now has advanced multiple sclerosis, with quadriplegia, limitations in respiratory functioning, and difficulty swallowing. He also has Factor XI deficiency, a form of hemophilia. All of these conditions prevent him from performing his activities of daily living without the assistance of a home attendant. For the past 15 years, he has been receiving split-shift personal care services in his home. His services are delivered through the consumer directed personal assistance program.

72. Mr. Strouchler requires the alert attention of a home attendant at night to reposition him every two hours to avoid the development of bed sores and to reposition his arms and legs when he experiences painful spasms at various times throughout the night. In addition, he requires assistance with bladder catheterization and with necessary adjustments to his breathing mask, and assistance to clear his airways to avoid choking when he is in a reclining position. He also requires assistance during the day and night for occasional nasal and rectal bleeding episodes that he experiences. Aside from the turning every two hours, all his other nighttime needs are at unscheduled and unpredictable times.

73. At the time of his most recent re-assessment for services, Mr. Strouchler's physician recommended that his split-shift services be reauthorized as they had been for the prior 14 years.

74. Mr. Strouchler's request for continued split-shift services was reviewed by Local Medical Director (LMD) Charles Levit, who had also reviewed Mr. Strouchler's for his prior

reauthorization of services in August 2011. In his August 2011 review, Dr. Levit, had determined that Mr. Strouchler should be reauthorized for split-shift services "without change." In his Local Professional Review form dated February 10, 2012, however, Dr. Levit determined that despite Mr. Strouchler's need for assistance with nighttime catheterization and repositioning every two hours, Mr. Strouchler's services should be reduced to sleep-in care because his needs were "predictable" and could be "scheduled."

75. In a notice dated February 23, 2012 the City determined to reduce Mr. Strouchler's care because his "nighttime needs which involve turning/positioning and toileting are anticipated and can be scheduled." The notice went on to conclude that "therefore a mistake had occurred in your previous authorizations and you do not meet the criteria for continuous care."

76. The only statement regarding a mistake in a previous assessment is found in Dr. Levit's February 10, 2012 Local Professional Review form which states that "prior split-shift authorizations appear to have been incorrect." Such conclusion would also apply to Dr. Levit's own August 2011 recommendation to re-authorize split-shift services for Mr. Strouchler.

77. Mr. Strouchler appealed the City's determination and a hearing was held on April 9, 2012.

78. At the hearing Mr. Strouchler presented medical evidence of his numerous nighttime needs and challenged City Defendant's assertion that a mistake had been made in the last 14 re-authorizations of split-shift services.

79. Dr. Levit testified inconsistently and contradictorily at the hearing. First, he stated that split-shift care should be given to individuals with "excessive" nighttime needs, which he

explained was either more than twice per night or more than four times per night. Either way, he recognized that since, at a minimum, Mr. Strouchler requires turning and positioning every two hours, this need would exceed either interpretation of "excessive" nighttime needs. At the same time, Dr. Levit asserted that it didn't matter whether or not Mr. Strouchler's nighttime needs were "excessive" because he would not be entitled to split-shift care because his nighttime needs were "predictable."

80. Dr. Levit also testified that the "mistake" that had been made in previous authorizations was a "regulatory mistake." Although he could not provide an entirely clear response, Dr. Levit stated that the Local Medical Directors received an e-mail directive in October, 2011, instructing them that all split-shift cases were to be reviewed to see if the services could be reduced because the individual's needs could be "predicted."

81. Mr. Strouchler was informed that the State was re-opening his appeal and would be conducting a new hearing *de novo*.

82. A second hearing was held on June 13, 2012. Dr. Levit did not appear at this hearing. Instead, Dr. Anita Aisner, a Local Medical Director supervisor, appeared to testify on the City Defendant's behalf.

83. Dr. Aisner attempted to identify the "alleged mistake" from the 14 prior assessments, as a failure to recognize that Mr. Strouchler's needs were predictable and could be scheduled.

84. Counsel for City Defendant argued that it was appropriate to reduce Mr. Strouchler's because sleep-in care was more cost-effective than split-shift care and identified the prior "mistake" as the authorization of split-shift rather than sleep-in care.

85. Mr. Strouchler is currently awaiting a hearing decision.

86. Mr. Strouchler lives alone in an apartment at St. Margaret's House, a HUD 202/Section 8 housing facility for older individuals and individuals with mobility impairments and other disabilities, which is located near the South Street Seaport. It is a source of great satisfaction to him that he is able to continue to live at home in his apartment, a situation that deeply enriches his life and allows him to maintain relationships with friends and loved ones in a way that would be difficult or impossible in an institution.

Plaintiff Sara Campos

87. Sara Campos is a 91 year old Medicaid recipient who lives alone is Manhattan.

88. Ms. Campos is extremely ill. She suffers from dementia, pain secondary to osteoporosis, chronic diarrhea and osteoarthritis.

89. Ms. Campos requires total assistance with every activity of daily living, including the need for turning and re-positioning at least every two hours per night and day to prevent bedsores, and frequent diaper changes to ensure skin integrity.

90. Despite her condition, Ms. Campos receives many benefits from remaining at home, among familiar surroundings and in the familiar community where she is most comfortable. Her loved ones can visit her frequently in her home. Her family believes that if she were transferred to a nursing home, her condition would deteriorate rapidly.

91. For the past several years, Ms. Campos has been able to remain at home because she receives Medicaid funded split-shift personal care services in the amount of 24- hours per day.

92. On February 10, 2012, Ms. Campos received two notices from City Defendant which stated that her personal care services were going to be reduced from 24 hour split-shift

services, to twenty-four hour sleep-in services and another which stated that her services were being reauthorized for twenty-four hour split-shift services.

93. On the notice that stated her services were being reduced the stated reason was "our review has determined that your re-authorizations for split-shift care was based on your insomnia and no accommodation for sleep-in services, as such a mistake was made in your initial authorization, therefore you do not meet the criteria for continuous care."

94. This notice to reduce care is based on a December 9, 2011 determination made by one of the City's Local Medical Directors, Aura Mask. In her report Dr. Mask concluded that Ms. Campos's home care should be reduced because her nighttime repositioning and toileting needs can be scheduled, and as such, do not meet the definition for split-shift care.

95. On February 22, 2012, Ms. Campos's representative requested a Fair Hearing to challenge the reduction of her personal care services. The State ordered "aid continuing" pending the hearing decision, and for this reason only her services have remained unchanged.

96. It is not true that Ms. Campos's nighttime needs can be scheduled and are predictable. In order to prevent bedsores, it is medically necessary that her adult diapers be changed promptly when they are soiled. This happens several times per night.

97. Moreover, even if these medical needs could be predicted, they far exceed what one sleep-in aide is capable of doing. Sleep-in aides are on duty at least one 24-hour period, and must be able to sleep. Because it is medically necessary that Ms. Campos be repositioned at least every two hours, night and day, it would be impossible for a sleep-in attendant to perform this service.

98. On June 6, 2012, the Fair Hearing was held. The decision has not yet been issued.

99. If Ms. Campos loses her Fair Hearing she will have to be admitted to a nursing home because a sleep-in aide will not be able to give her the nighttime care she requires to remain in the community.

Plaintiff Audrey Rokaw

100. Audrey Rokaw is a 93 year old Medicaid recipient who lives alone is Manhattan.

101. Ms. Rokaw is severely disabled, with dementia, osteoarthritis, and congestive heart failure.

102. Ms. Rokaw requires total assistance with every activity of daily living, including frequent diaper changes to ensure skin integrity.

103. Despite her condition, Ms. Rokaw enjoys living at home, visited frequently by her loved ones, and in familiar and comfortable surroundings.

104. Ms. Rokaw has been receiving home care since she first applied for it in 2010. At that time she was originally approved for 24- hour sleep-in care.

105. Because that amount of care was insufficient, she requested a Fair Hearing, which in 2010 resulted in a final administrative decision that due to her medical condition she was eligible twenty-four hour split-shift care.

106. On March 12, 2012, Ms. Rokaw received two notices from City Defendant which stated that her personal care services were going to be reduced from 24- hour split-shift services, to twenty-four hour sleep-in services and another which stated that her services were being reauthorized for twenty-four hour split-shift care.

107. On the notice that stated her services were being reduced, the stated reason was: “Our current evaluation confirms that you do not require feeding at night and you require

partial assistance with ambulating, transferring, and toileting. This reflects a change in your medical condition and your personal care services can be provided in fewer hours than were previously authorized. Time cannot be provided for redirecting and calming you, as stand-alone tasks."

108. This notice to reduce care is based on a determination made by one of the City's Local Medical Directors, Aura Mask, on November 17, 2011. In her report Dr. Mask concludes that Ms. Rokaw's home care should be reduced because her night time toileting needs are "partial," as opposed to "total," and as such do not meet the definition of continuous care.

109. On March 12, 2012, Ms. Rokaw's representative requested a Fair Hearing to challenge the reduction of her personal care services. The State ordered "aid continuing" until a decision after the Fair Hearing, and for this reason only her services have remained unchanged.

110. It is not true that Ms. Rokaw's night-time needs can be provided by a sleep-in aide. Her aides report that she needs to have her diaper changed five to six times per night. In order to prevent skin breakdown, it is medically necessary that her adult diapers be changed promptly when they are soiled. She is unable to change her diapers by herself and needs the aide to change them for her.

111. Sleep-in aides are on-duty at least one 24-hour period, and often for several consecutive 24-hour periods and must be able to sleep. Because it is medically necessary that Ms. Rokaw to be changed five to six times per night, it would be impossible for a sleep-in attendant to perform this service, and if services were reduced to sleep-in, she would have to move to a nursing home.

112. Ms. Rokaw's hearing was held on May 2, 2012. At the hearing, the City's Local Medical Director, Aura Knox Mask, testified that in her medical opinion Ms. Rokaw was not eligible for continuous care because her night time needs were "partial" as opposed to "total" and that Ms. Rokaw's medical condition had improved.

113. On May 8, 2012 a decision was issued which reversed the City's determination to reduce Ms. Rokaw's care. Among other problems noted with the City's determination, the Fair Hearing decision found that the City failed to complete the assessment in accordance with the regulations, that the City failed to present any evidence at all of a change in Ms. Rokaw's condition, and that their record did not justify any reduction in services.

114. Even if City Defendant's determinations in the named Plaintiffs' cases are reversed by the State Defendants after Fair Hearings, their situations are capable of repetition at their next home care re-assessment.

115. What happened to the named Plaintiffs reflects the City Defendant's planned effort to dramatically reduce split-shift home care services and the State's failure to take adequate steps to correct a clear pattern of unlawful reductions and terminations beyond Defendant Berlin's almost uniform reversal of these unlawful decisions in individual Fair Hearings.

VI. CLASS ACTION ALLEGATIONS

116. Named Plaintiffs bring this action pursuant to Fed. R. Civ. P. Rule 23(a) and (b)(2) on behalf of themselves and as representatives of a class of:

> All New York City Medicaid recipients who have been determined by either a Court or City or State Defendants to meet the eligibility requirements for continuous personal care services and who at any time since January 1, 2011 have been or are being threatened with or subjected to a reduction or discontinuance of Medicaid-funded continuous personal care services because City Defendant has

determined that they do not meet the criteria for continuous personal care services.

117. The class is so numerous that joinder of class members would be impracticable. There are currently approximately 1100 individuals living in New York City who are receiving split-shift Medicaid-funded personal care services. Approximately 35,000 residents of New York City currently receive some personal care services and may need split-shift care at some point in the future.

118. Further, it would be impracticable for the members of the class, who are by definition elderly and disabled and impoverished, to obtain legal services on an individual basis to assert their claims. Consequently, they will likely be unable to assert their legal rights without certification of a class to represent them.

119. Questions of law and fact common to the class predominate over individual questions. The common questions of law and fact are whether the new regulation and policy result in the reduction of split-shift home care in a way that violates Medicaid law, due process and the ADA.

120. All named class members have claims typical of the class in that they all have received reduction or termination notices notwithstanding that there has been no significant change in their medical condition or circumstances. Furthermore, although there are individual differences in particular medical conditions of the named Plaintiffs, in every one of their cases, the City Defendant has informed them of a decision to reduce their long-term split-shift services because: 1) they need "some" but not "total" assistance with the performance of an activity or activities of daily living; or 2) their nighttime needs are "predictable" or can be scheduled; or 3) the City Defendant made a mistake in a prior assessment; or 4) there had been a change in their condition that alters their need for care;

or 5) the City Defendant will no longer consider their need for some recognized hands-on task such as turning and positioning. Named Plaintiffs, like members of the class have received notices of such reductions, which fail to comply with Constitutional and statutory notice requirements, and fail to comply with standards set forth in *Mayer v. Wing*, and fail to take into account the need for alert nighttime assistance to allow the recipient to remain at home, rather than having to go to an institution.

121. Named Plaintiffs will adequately protect the rights of class members. There are no conflicts of interest between the named Plaintiffs and members of the class in that all would benefit if the City is ordered to refrain from arbitrary decision making and to apply rational and appropriate standards for determining the amount of home care services to be authorized.

122. Named Plaintiffs are represented by Leslie Salzman and Toby Golick, Clinical Professors of Law at Cardozo Law School, Ben Taylor, Senior Staff Attorney at New York Legal Assistance Group, and Donna Dougherty, Director of JASA/Legal Services for the Elderly in Queens. All of Plaintiffs' attorneys are experienced in class action litigation and specifically class actions involving issues under the Medicaid program, including the Medicaid home care programs.

123. A class action is the superior method for a fair and efficient adjudication of this matter in that Defendants have acted in a manner generally applicable to the class and a class action will avoid numerous separate actions by class members that would unduly burden the courts and create the possibility of inconsistent decisions, thereby making final injunctive and declaratory relief appropriate as to the class as a whole.

VII. FACTS APPLICABLE TO THE CLASS AS A WHOLE

124. Since approximately January 2011, City Defendant has been engaged in a concerted effort to reassess the continuing eligibility of members of the proposed class for receipt of continuous personal care services, with the objective of drastically reducing the number of home care hours authorized for each individual's care. When authorizing an amount of home care services, the City Defendant adopts the determinations of its Local Medical Directors also known as LMDs. Relying on the LMD determinations, the City Defendant has been reducing or discontinuing home care even when there has been no change in the individual's needs or eligibility for personal care services, or any other lawful ground for the reduction.

125. In many instances, the City Defendant is clearly making decisions in reverse order by first deciding to reduce care and then attempting to justify the reduction after the fact by claiming that there must have been a prior mistake or change in condition, without identifying and articulating either the mistake or the change in condition. In Ms. Campos' and Mr. Strouchler's cases and in other instances, the City Defendant has invoked the justification of a "mistake in a prior authorization," when the individual has received the same level of services for many years, sometimes for more than a decade. In other cases like that of 93-year old Audrey Rokaw, the City takes the remarkable position that the individual's health has miraculously improved in order to justify its determination.

126. The City Defendant is and has been using a radical new interpretation and application of the state regulation defining split-shift services, including its language regarding the need

for "total assistance" as a pretext to reduce split-shift care.. The City Defendant now irrationally interprets this regulation to mean that even when a partially paralyzed individual needs an attendant to change his or her diaper, or when an individual cannot get to or use a toilet or commode without the physical assistance of an attendant, those individuals do not require "total" assistance with toileting. The City's position on this, as they have repeatedly stated at Fair Hearings, is that where a patient can participate in a task in any way at all, no matter how small, the assistance is not "total" assistance justifying split-shift care.

127. The City Defendant also is and has been irrationally interpreting the state home care regulation defining continuous care to deny coverage to individuals who require services, such as scheduled turning every two hours to avoid bed sores, because such care can be "predicted," even though there is no way a sleep-in home attendant could perform these tasks day and night, and still have any opportunity to sleep.

128. City Defendant has been implementing the patently unlawful and arbitrary decisions of its LMDs and has not provided any direction, education or training regarding the relevant legal requirements to ensure that its LMDs are making lawful decisions in these cases.

129. As a result of the City Defendant's efforts to reduce home care, the number of Fair Hearings requested by Medicaid recipients facing reduction in their care has increased, and notwithstanding the high rate of reversals of reductions and terminations after Fair Hearing decisions, the City Defendant has persisted and even increased the number of unlawful decisions using the same improper interpretation and application of the regulations.

130. During the four-month period from January 1, 2011 through April 30, 2011, State Defendant Berlin reversed City Defendant in all of the ten Fair Hearings challenging reductions of split-shift care, and reversed City Defendant in six out of the seven Fair Hearings challenging terminations of split shift care. The one case the City won was only due to the recipient's failure to make a timely request for the hearing.

131. An analysis of Fair Hearing decisions issued between August 1, 2011 and June 15, 2012 indicates that State Defendant reversed City Defendant in approximately 240 out of the 244 challenged reductions, and reversed City Defendant in 44 out of 48 challenged terminations.

132. In fact, in June, 2011 City Defendant sent a letter to State Defendant Shah requesting that he eliminate split-shift home care services for all Medicaid recipients through a variety of regulatory amendments and/or policy statements. In this letter, the City Defendant also expressed his concern that the City's efforts to maximize its cost savings from moving people out of split shift care into either sleep-in care, managed care, or nursing homes were being thwarted by the State's administrative hearing decisions reversing the City's reductions and terminations of split-shift care. Although State Defendant Shah did not implement City Defendant's proposed regulatory and programmatic changes, as is evident from its actions and inactions, it has tacitly approved the City Defendant's reduction plan.

133. Both State Defendants had actual knowledge of the City Defendant's on-going effort to eliminate or drastically reduce split-shift services. Both State Defendants were aware of the unprecedented numbers of split-shift home care service recipients who were requesting hearings to challenge proposed reductions and terminations of their care, and

both State Defendants were aware that those unsupported and unlawful City determinations were being reversed in approximately 96% of the hearing decisions. Upon information and belief, State Defendant Berlin did not take any action to direct the City Defendant to apply any of its Fair Hearing decisions reversing home care terminations and reductions to similarly situated cases as permitted by 18 NYCRR § 358-6.3.

134. The Fair Hearing process has made it evident that even when the LMD is legally or factually wrong, or even when the LMD appears to be biased or on a personal campaign against split-shift home care, the City Defendant is following the LMD's recommendation. State Defendants have knowledge, from at least the Fair Hearing proceedings, that the City Defendant has given its LMDs complete and unfettered discretion to make final home care determinations. All Defendants have clear knowledge that the LMDs are frequently making decisions in direct contravention of the *Mayer* decision, federal and state law, state regulations, and long-standing state policies regarding home care.

135. None of the Defendants has taken any corrective measures to address the fact that the LMDs are flagrantly disregarding or misapplying law. Indeed, the City Defendant has encouraged the LMDs to increase their reviews of split-shift cases, and, upon information and belief, to reduce the number of home care hours granted. In fact, at a recent hearing, one LMD testified that she had recently reviewed 30 continuous care cases over one weekend and determined to reauthorize continuous care in only two of the 30 cases.

136. Not only is State Defendant Shah aware of the City's clear pattern and practice of implementing the unlawful decisions of its LMDs, but, in the face of this pattern of

unlawful decision-making, continues to take the position that City Defendant ***must*** implement those LMD decisions under 18 N.Y.C.R.R. § 505.14(b)(4)(ii), without requiring appropriate City action (such as adequate training, accurate instructions and guidance) to ensure that the decisions of its local medical staff comply with all relevant legal requirements and long-standing State policy. See, e.g., 11 OHIP/ADM-6, p. 8 (September 12, 2011); NYS Office of Temporary and Disability Assistance Office of Administrative Hearings Memorandum to All Administrative Law Judges and Professional Staff, p.2 (September 19, 2011). As a result, City Defendant claims that it has no choice about whether or not to adopt and defend the LMD determinations, and State Defendant Shah takes the position that the City must follow the LMD's decision unless it is reversed by a Fair Hearing determination.

137. In light of the City's written correspondence explaining the various mechanisms for eliminating split-shift services and the City's adoption and implementation of those identified methods for reducing or terminating split-shift services in cases brought to Fair Hearings at which virtually none of the City's determinations have been upheld, the State was on clear notice that City Defendant was violating the regulatory, statutory and constitutional rights of recipients of split-shift home care services. Having direct knowledge of this history of blatant and widespread errors, the State must have known to a moral certainty that when re-authorizing services for recipients of split-shift care, City Defendant would deprive Plaintiffs and other recipients of split-shift services of their rights. The State Defendant not only failed to take obvious steps to prevent the City's manifest misconduct, it also purposefully exacerbated the problem by repeatedly

directing the City to continue to follow the LMD determinations no matter what they said.

138. By requiring the City Defendant to continue following the decisions of its LMDs without requiring any action to ensure that LMDs render lawful decisions, State Defendants have facilitated the reductions and terminations of split shift home care services. Accordingly, State Defendant Shah has acquiesced in or tacitly authorized the unlawful actions of the City Defendant, State Defendants have demonstrated a deliberate indifference to City Defendant's widespread denials of necessary home care services. By failing to act to require the City Defendant to follow the law, and by repeatedly directing City Defendant to blindly follow the LMDs' unlawful determinations, the State Defendants are causing unlawful reductions and terminations of home care.

139. While virtually all of the errors in City determinations in individual cases that have been brought to Fair Hearings have been corrected by the State Defendants through its administrative review, some significant number of Medicaid recipients have not and will not request hearings because of age or infirmity.

VII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF: AGAINST ALL DEFENDANTS FOR ARBITRARY AND IRRATIONAL REDUCTIONS OF MEDICALLY NECESSARY HOME CARE SERVICES

140. City Defendant has a policy and practice of arbitrarily and irrationally reducing or discontinuing Plaintiffs' split-shift home care services when there has been no significant change in their conditions or circumstances that would justify the reduction of services.

141. City Defendant has arbitrarily proposed to reduce or discontinue personal care services previously authorized for Plaintiffs to a level that is inadequate to ensure their health and safety at home.

142. Both State Defendants were on clear notice that City Defendant was engaging in a policy and practice of unlawfully reducing and discontinuing split shift services. The State Defendants failed to take obvious steps to prevent the City's manifest misconduct, other than to reverse the City's determinations in the individual Fair Hearing decisions of those recipients who had successfully requested State review. In addition, State Defendant Shah has continued to insist that the City Defendant follow the LMD determination, right or wrong, unless that decision is reversed by a Fair Hearing Decision, but the State has not required the City or its LMDs to follow applicable law. By failing to act and by its policy regarding the LMDs, the State Defendants have caused individuals to lose home care services to which they are legally entitled.

143. Defendants' policy and practice of authorizing the reduction and discontinuance of home care services where there has been no change in the recipient's condition or circumstances that would justify the reduction violates Plaintiffs' rights under the Due Process Clause of the 14th Amendment to the United States Constitution as specifically set forth in *Mayer v. Wing*, and State Defendant's own regulations at 18. N.Y.C.R.R. § 505.14 (b)(5)(v)(c).

SECOND CLAIM FOR RELIEF: AGAINST DEFENDANTS SHAH AND DOAR FOR REDUCTIONS OF HOME CARE SERVICES WITHOUT ADEQUATE NOTICE

144. Defendants Shah and Doar have a policy and practice of reducing Plaintiffs' home care services without providing notice that articulates any change in the individual's circumstances or condition that would justify such a reduction.

145. Defendants Shah and Doar have a policy and practice of reducing Plaintiffs' home care services pursuant to notices that claim that a mistake had been made in a previous authorization or authorizations, but provide no factual information regarding the alleged prior mistake.

146. Defendants Shah and Doar have a policy and practice of sending multiple notices to home care recipients that contain contradictory information, for example sending two notices on the same day, one reducing care, and the other reauthorizing the same level of care.

147. Defendants Shah and Doar's policy and practice of authorizing the reduction of home care services where the notice fails to articulate the factual basis or reason justifying such a reduction, and of sending multiple notices with contradictory information violates Plaintiffs' rights under 42 U.S.C. 1396a(a)(3), 42 C.F.R. §§ 435.919; 435.912, 431.210; and the Due Process Clause of the 14th Amendment to the United States Constitution.

THIRD CLAIM FOR RELIEF: AGAINST DEFENDANTS SHAH AND DOAR FOR VIOLATION OF THE ADA and SECTION 504 and their INTEGRATION MANDATES

148. Named Plaintiffs are all disabled within the meaning of the ADA and Section 504, as they have physical and/or mental impairments that substantially limit one or more major life activity. 42 U.S.C. 12102(2); 29 U.S.C. 794; 705(20).

149. Named Plaintiffs are all "qualified individuals with a disability" within the meaning of the ADA, 42 U.S.C. 12131(2); 28 C.F.R. 35.104, and Section 504, because they are capable of living safely at home with adequate home care assistance and meet the income eligibility requirements to receive Medicaid home care services.

150. Additionally, relevant treating medical professionals, and often prior nursing and medical professionals affiliated with City Defendant, have recommended split-shift personal care services as a medically appropriate mode of care for Plaintiffs. Plaintiffs have not experienced a change in condition or circumstances that would alter their continued eligibility for services.

151. Defendants are the Commissioners of the State Office of Temporary and Disability Assistance and Department of Health and the New York City Commissioner of the Human Resources Administration, which are public entities that receive federal financial assistance for the administration of the Medicaid program making them subject to the provisions of Title II of the ADA and Section 504.

152. Defendants are utilizing regulatory criteria and methods of administration that have the effect of subjecting qualified individuals with disabilities such as Plaintiffs to discrimination and that have the purpose or effect of substantially impairing accomplishment of the objectives of the Medicaid home care program.

153. Defendant Doar has been authorizing the reduction and termination of the personal care services of Plaintiffs when there has been no change in their needs or circumstances justifying the reductions, and Defendant Shah has permitted and facilitated such reductions and terminations.

154. As a consequence of these reductions of home care, named Plaintiffs will suffer injuries and the unavoidable deterioration of their health status and conditions, necessitating additional treatment or hospitalizations, or they will be required to enter less integrated institutional settings to obtain their long-term care services. In fact, City Defendant engaged in a policy and practice of reducing and terminating split-shift services with the knowledge that the practice would result in the institutionalization of significant numbers of home care recipients.

155. Named Plaintiffs have been and can be appropriately and safely cared for in their homes with home care services authorized by Defendants without any fundamental alteration of the Defendants' ability to provide services to other individuals with disabilities needing long-term care under the Medicaid program.

156. Defendants' conduct subjects Plaintiffs to disability-based discrimination and impairs the accomplishment of the objectives of the Medicaid personal care program and has resulted in, will result in, or threatens to result in the unnecessary institutionalization of named Plaintiffs, in violation of their right to receive services in the most integrated setting appropriate to their needs as guaranteed by Title II of the Americans with Disabilities Act, 42 U.S.C. 12131, et seq.; 28 C.F.R. 35.130(b)(3), (b)(8) and (d); and Section 504 of the Rehabilitation Act, 29 U.S.C. 794; 28 C.F.R. § 41.51(b)(3)(i) and (d); 45 C.F.R. § 84.4(b)(4).

FOURTH CLAIM FOR RELIEF: AGAINST ALL DEFENDANTS FOR VIOLATIONS OF LAW BASED ON THE APPLICATION OF STATE REGULATIONS THAT DEFINE "CONTINUOUS CARE"

157. The Medicaid personal care regulation defining continuous, 24-hour home care services, 18 N.Y.C.R.R. § 505.14 (a)(3), is inherently irrational on its face and permits local districts to deny medically necessary services to individuals needing significant amounts of home care services to continue to safely reside in the community.

158. City Defendant is relying on the continuous care definition to deny split-shift services to Plaintiffs based on the nature of their medical condition, rather than based on their medical need for services to maintain their health and safety at home.

159. City Defendant is utilizing 18 N.Y.C.R.R. § 505.14(a)(3) to deny medically necessary home care services to individuals such as named Plaintiffs who have a medical need for frequent nighttime assistance with significant health-sustaining home care tasks because City Defendant will not consider an individual's need for assistance with turning and re-positioning or because Defendants determine that an individual needs "some" but not "total" assistance with personal care services or because the individual's need for assistance with personal care is "predictable" or capable of being scheduled.

160. Under the language of the regulations and its application by City Defendants, an individual who needs assistance with toileting/diaper changing at unpredictable times to avoid the development of bed sores would be authorized for split-shift care while a person needing assistance with turning and positioning every two hours during the night would not be authorized for split-shift care because his needs are predictable.

161. Under the language of the regulations and its application by City Defendant, a person needing assistance with toileting six times per night would be theoretically entitled to split-shift care, while a person who cannot move his body and requires re-positioning six times per night to avoid the development or exacerbation of bedsores would not be entitled to split-shift care because "toileting" assistance appears in the definition while assistance with "turning and positioning" does not.

162. Similarly, under the regulatory definition for split-shift care, the City Defendant will provide split-shift care to a person deemed to need "total assistance" with toileting, but deny split-shift services to a person deemed to need "some assistance" with toileting because she can theoretically get to a toilet or commode, albeit only with assistance. Thus, applying the regulatory modification, City Defendant will provide nighttime assistance with toileting to those very few individuals deemed to need "total assistance" with toileting, while the person who needs physical assistance to get to the toilet or commode would be forced to lie in her own waste during the nighttime hours because she is deemed to need only "some assistance" with toileting.

163. The regulatory language is used to provide awake, nighttime care to some individuals needing intensive nighttime assistance to maintain their health and safety in the home, while denying those Medicaid services to other recipients with the same need for such intensive nighttime assistance.

164. The regulatory language is irrational, fails to insure that medically necessary services are provided to eligible individuals, and fails to ensure that the amount duration and scope of any services available to any Medicaid recipient be the same as that made available to other Medicaid recipients.

165. The continuous care regulation, 18 N.Y.C.R.R. § 505.14(a)(3), on its face and as applied, denies medically necessary home care services to some individuals with the need for such assistance many times during the nighttime hours, while denying such services to others with the same medical need for nighttime assistance, in violation of Plaintiff's rights under 42 U.S.C. § 1396a(a)(10)(B); 42 U.S.C. § 1396a(a)(17); 42 C.F.R. §§ 440.240(a), (b)(1) and 440.230(b),(c), U.S. Const. Amend. XIV §1, and U.S. Const. Art. VI, §2.

166. Despite Defendant Shah's instructions that the amendment to the regulation was not intended to make any substantive changes, the City Defendant through its LMDs has utilized the new regulation to justify terminations and reductions in violation of law. State Defendants know of this practice, but have failed to take any steps or to require the City Defendant to take any steps to interpret the regulation in accordance with prior state interpretations of the regulation.

FIFTH CLAIM FOR RELIEF: AGAINST ALL DEFENDANTS FOR VIOLATIONS OF THE MEDICAID ACT

167. Defendant's policy and practice of arbitrarily and irrationally reducing Plaintiffs' home care services when there has been no significant change in the recipient's condition or circumstances has created a situation where some categorically needy Medicaid recipients receive the medically necessary home care they need, while others do not.

168. Defendant's policy and practice of arbitrarily and irrationally reducing Plaintiffs' home care services when there has been no significant change in the recipient's condition or circumstances has created a situation whereby some medically needy home care recipients receive the services that are medically necessary even though other individuals who are categorically needy do not.

169. Defendant's policy and practice of arbitrarily and irrationally reducing Plaintiffs' split-shift home care services when there has been no significant change in the recipient's condition or circumstances violates the "comparability of services" requirements of the Medicaid Act which require that the amount, scope and duration of any services available to any Medicaid recipients be equal to that made available to other recipients. By engaging in this policy and practice, Defendants violate Plaintiffs rights under 42 U.S.C. § 1396a(a)(10)(B)and the Supremacy Clause of the U.S. Constitution., Art. IV.

SIXTH CLAIM FOR RELIEF AGAINST DEFENDANT BERLIN

170. Defendant Berlin is a necessary party to effectuate relief that Plaintiffs seek in this action. Berlin has authority to operate the Fair Hearing system, to order "Aid Continuing," and has authority to direct that Fair Hearing principles be applied in similarly situated cases.

WHEREFORE, it is respectfully requested that this Court make and enter judgment:

1. Certifying a class pursuant to Fed. R. Civ. P. Rule 23(a) and (b)(2);

2. Declaring that Defendants' practices and procedures result in arbitrary and irrational reductions of home care services in violation of the Medicaid Act and due process rights;

3. Declaring the Defendant Shah and Doar have failed to provide adequate notice of reductions and terminations, in violation of the Medicaid Act and due process

4. Declaring that Defendants Shah and Doars are failing to provide services to Plaintiffs, in violation of the anti-discrimination provisions and integration mandates of the ADA and Section 504;

5. Declaring that Defendant Shah' regulation defining split-shift care is invalid on its face and as applied by Defendant Doar because it d fails to assure that Medicaid recipients receive personal care services equal in amount, scope, and duration to that provided to other Medicaid recipients and that are sufficient to reasonably achieve the Medicaid Act's purpose of providing medically necessary covered services;

6. Declaring that Defendant Shah and Doar have violated the comparability provisions of the Medicaid Act by arbitrarily reducing and terminating home care services.

7. Enjoining all Defendants, separately and together, to adopt and implement rules and procedures to ensure that named Plaintiffs and members of the class will not be arbitrarily and irrationally denied necessary home care services Enjoining Defendants Shah and Doar, , from reducing Plaintiffs' home care services without clearly identifying a reason for the decision pursuant to the regulations set out in 18 N.Y.C.R.R. § 505.14 and Due Process and including that reason in the notice to home care recipients;

8. Directing Defendant Berlin to take all necessary steps to implement the relief requested herein to the extent it involves the administration of the Fair Hearing system under her authority;

9. Awarding reasonable attorney's fees, as provided by 42 U.S.C. § 1988(b); 42 U.S.C. 12102(2); 29 U.S.C. 794; 705(20);

10. Awarding costs and disbursements; and

11. Granting such other and further relief as this Court deems just and proper.

Dated: June 27, 2012
New York, New York

_____/s/_____
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