

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Broward Division

NIGHT BOX
FILED *[Signature]*

JUL 31 1998

CARLOS JUENKE
CLERK, USDC / SDFL / FTL

WOLF PRADO-STEIMAN, by and through his mother and next friend, **LAURA PRADO**, and **M.C.**, by and through his mother and next friend, **O.M.**, **LUCY ADAWI**, by and through her mother and next friend, **VICKY ADAWI**, **JENNIFER BASTIDAS**, **DANIEL LAVIN**, by and through his father and next friend, **JOSE LAVIN**, **DANIEL SHELL**, by and through his parents and next friends **CAROLYN** and **DONALD SHELL**, on behalf of themselves and all other persons similarly situated, and the **ADVOCACY CENTER FOR PERSONS WITH DISABILITIES, INC.**,

PLAINTIFFS,

Case No. 98-6496-
CIV-Ferguson

- vs -

LAWTON CHILES in his official capacity as Governor and Chief Executive of the State of Florida, **EDWARD FEAVER**, in his official capacity as Secretary, Department of Children and Families, **CHARLES KIMBER**, in his official capacity as Deputy Secretary of the Department of Children and Families, **DONNA ALLEN**, in her official capacity as Assistant Deputy Secretary of the Department of Children and Families, **JOHN BROWN**, in his official capacity as Department of Children and Families District Administrator, District 10, **DOUG COOK**, Department of Children and Families, in his official capacity as Director of the Agency for Health Care Administration for the State of Florida, **RICHARD T. LUTZ**, in his official capacity as Director of Florida Medicaid for the Agency for Health Care Administration

DEFENDANTS.

FIRST AMENDED CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

1. This is a statewide class action brought on behalf of the more than 20,000 individuals with developmental disabilities

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eligible for services under Florida's Medicaid Home and Community Based Services Waiver Program ("Home and Community Based Waiver"), who have been denied procedural due process and adequate services. As a result of the lack of services in the community, many individuals are institutionalized or at risk of institutionalization. Many individuals regress, losing skills that they gained from education programs and therapy services available to children.

2. Plaintiffs seek a declaration that denial of procedural due process and adequate services with reasonable promptness violates Title XIX of the Social Security Act, 42 U.S.C. § 1396a, 42 C.F.R § 431.200, *et seq.*, the Americans with Disabilities Act, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983. Plaintiffs also seek injunctive relief to require defendants to comply with federal statutory and constitutional law.

JURISDICTION

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 & 1343(3) and (4), and 42 U.S.C. § 1983. This Court is authorized to order the requested relief by these statutes and by 28 U.S.C. §§ 2201 and 2202.

4. This action arises under 42 U.S.C. § 12131, *et seq.*, 29 U.S.C. § 794, and 42 U.S.C. § 1983.

VENUE

5. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) because (1) all defendants reside in districts in Florida,

and defendant John Brown reside in the Southern District of Florida and (2) the cause of action arises within the Southern District of Florida as to Plaintiffs Wolf Prado-Steiman and M.C.

PLAINTIFFS

6. WOLF PRADO-STEIMAN is a seven year old boy with autism who presently lives at home with his parents and older sister in Broward County. His mother applied for Medicaid Waiver Services on his behalf and was provided with respite in Martin County. When his family moved to Broward County, he was provided with behavioral services to address his behavioral issues. In April 1997, his mother was informed that his behavioral services were going to be terminated. She was not provided with any notice of appeal rights or rights to continued benefits. WOLF needs behavioral services urgently because school will be closed for one month this summer, and his behavioral problems, including running away, have increased. His mother has been told that he will be put on a waiting list for services.

7. M.C. is an 18 year old man with cerebral palsy who lives in Broward County. He uses a wheelchair and an augmentative communication device. His mother, O.M. has applied for Medicaid Waiver services on his behalf. She has requested and been denied personal care and respite services. Because he has grown, it is very difficult for her to continue to provide him personal care without assistance. M.C. wants companion services so that he can socialize like other teen-age boys. He brings this action by his mother, O.M. He does presently not have a legal guardian.

8. LUCY ADAWI is a 50 year old woman with mild mental retardation, mobility impairment, and a psychiatric disability (schizoaffective disorder). She presently lives in Dade County with her mother, Vicky Adawi, who is in her 80s and has health problems. Over the past few years, she has resided at several Assisted Living Facilities and has been hospitalized at Jackson Memorial Hospital. She needs physical and occupational therapy. She also needs intensive support for her daily living skills (such as bathing, toileting, dressing). Lucy and her mother want to continue to live together but defendants have refused to provide Lucy with adequate supports to enable her to live with her mother. Following her hospitalization at Jackson, a petition was filed to involuntarily place Lucy Adawi. General Master Lewis S. Kimler found that "Respondent's mother would like for her to live at home, but the mother is elderly and not physically capable of meeting her daughter's needs without in-home supports and services." He recommended that she be involuntarily admitted to residential services provided by defendants. On June 1, 1998, the court confirmed the recommendation. As a result of defendants' failure to support LUCY ADAWI with adequate supports, the court has ordered her to be institutionalized. Every day without services, she is at risk of harm. She brings this case by her mother and next friend, VICKY ADAWI.

9. JENNIFER BATSIDAS is a 22 year old woman with cerebral palsy who lives in Broward County. She has quadriplegia and needs to use a motorized wheelchair for mobility. She lives with her 64

year old mother. She presently has nothing to do all day. BATSIDAS has requested assistance from defendants in obtaining appropriate vocational services and supports to assist her. She wants to be a poet. She needs assistance with bathroom modifications, including installation of a grab bar and purchase of a shower chair. Defendants have refused to provide her with any services. Without necessary modifications, her bathroom is unsafe and she is at risk of injury.

10. DANIEL LAVIN is a 22 year old man with profound mental retardation and cerebral palsy. He lives in Dade County with his parents, who both work. He has had nothing to do since he graduated from high school in 1997. Defendants did not provide any assistance in developing a transitional plan for Daniel as he aged out of the educational system. Daniel now receives no services from Developmental Services. Because his parents work, he is often left alone with his 71 year old grandmother. He needs bathroom modifications to make his bathroom accessible for him. He has been denied services under the Home and Community Based Waiver, and has never been provided with any written notice. He brings this action by his father and next friend, JOSE LAVIN. He does not presently have a legal guardian.

11. DANIEL SHELL is a 32 year old man with moderate mental retardation and cerebral palsy, who lives in Brevard County with his parents. His right side has dystonia and is weak. He has a balance problem. He is on the Medicaid Home and Community-Based Waiver. His physical therapist recommended, and his physician has

prescribed, physical therapy equipment to increase his endurance, to control his movement disorder, to strengthen and increase mobility in his right arm, and to improve his balance problem. His parents Donald and Carolyn Shell are co-guardian advocates. They have requested that the Medicaid Home and Community-Based Waiver provide him with the therapy equipment prescribed by his treating physician. Defendants have refused to provide the equipment and have not provided any notice of due process rights. His mother wrote a letter requesting an appeal on March 19, 1998, and has not received any response to date. As a result of the lack of this equipment, Daniel Shell has lost skills that he had previously gained from physical therapy. He brings this case by his parents and next friends, Carolyn and Donald Shell.

12. Plaintiffs Wolf Prado-Steiman, M.C., Lucy Adawi, Jennifer Bastidas, Daniel Lavin and Daniel Shell are eligible for ICF/DD services and for Home and Community-Based Waiver services.

13. THE ADVOCACY CENTER FOR PERSONS WITH DISABILITIES, INC. (ADVOCACY CENTER) provides protection and advocacy services to people with developmental disabilities pursuant to the Developmental Disabilities Act, 42 U.S.C. § 6042. In order to fulfill its responsibility to protect and advocate for persons with developmental and mental disabilities, the ADVOCACY CENTER has the authority to pursue legal remedies.

DEFENDANTS

14. LAWTON CHILES is Governor of the State of Florida and is sued here in his official capacity. CHILES has the

responsibility to ensure that the agencies of the Executive Branch of the State, including the Department for Children and Families (DCF) and the Agency for Health Care Administration (AHCA), act in full compliance with the Constitution and the laws of the United States.

15. EDWARD FEAVER is Secretary of DCF and has responsibility for the control and the administration of human services, including the Developmental Services Program and its related Medicaid Program in the State of Florida. He is sued here in his official capacity.

16. CHARLES KIMBER is a Deputy Secretary for DCF and has responsibility for the control and the administration of human services, including the Developmental Services Program and its related Medicaid Program in the State of Florida. He is sued here in his official capacity.

17. JOHN BROWN is the District Administrator for DCF District 10, which includes Broward County. He is sued here in official capacity.

18. Defendant DOUG COOK is the Director of the Agency for Health Care Administration. He is sued here in his official capacity. He is responsible for administering the Florida Medicaid program so that it complies with federal law.

19. Defendant RICHARD T. LUTZ is the Director of the Division of Medicaid of AHCA. He is sued here in his official capacity. He is responsible for the overall operation of Medicaid and is required to ensure that it complies with federal law.

20. All defendants have at all relevant times acted under color of state law and knew of or should have known of the policies, practices, acts and conditions alleged.

CLASS ACTION ALLEGATIONS

21. The named plaintiffs bring this action on their own behalf and on behalf of all other similarly situated persons pursuant to Fed. R. Civ. P. 23(a), and (b)(2).

22. The proposed class consists of all current and future individuals with developmental disabilities who are receiving Home and Community Based Waiver Services or who are eligible to receive Home and Community Based Waiver Services.

23. The requirements of Fed.R.Civ.P. Rule 23(a) are satisfied in this case as follows:

a. Numerosity: The class is so numerous that joinder of all members is impracticable. Upon information and belief, the class consists of more than 20,000 individuals.

b. Commonality: There are questions of law or fact common to all named plaintiffs as well as to all members of the class, to wit: whether the defendants' have violated the Medicaid Act, 42 U.S.C. § 1983, and the Due Process and Equal Protection Clauses of the Constitution of the United States.

c. Typicality: The claims of the named plaintiffs are typical of the claims of the class as a whole.

d. Adequate representation: By filing this action, the named plaintiffs, individually and through their guardians and next friends, have displayed an interest in vindicating their rights, as

well as the claims of others who are similarly situated. The named plaintiffs will fairly and adequately protect and represent the interests of the class. Furthermore, the named plaintiffs are represented by legal counsel who are skilled and knowledgeable about the Medicaid Program, civil rights litigation, practice and procedure in the federal courts, and the prosecution and management of class action litigation. The relief sought by the named plaintiffs will inure to the benefit of members of the class generally.

24. The requirement of Fed. R. Civ. P. 23(b)(2) is also satisfied. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole. Although the disabilities of the class members vary, they share in common a need for services provided by the Home and Community Based Waiver Program.

STATUTORY AND CONSTITUTIONAL FRAMEWORK

25. The Medicaid program, established by Title XIX of the Social Security Act, 42 U.S.C. § 1396, et seq., is a cooperative federal-state program to enable the states to furnish medical assistance to families and individuals who are unable to meet the costs of necessary medical services. 42 U.S.C. § 1396. Costs of the program are shared by the federal and state governments, with the federal government contributing approximately 55 per cent of the cost of services in Florida.

26. A state is not obligated to participate in the Medicaid Program. If a state elects to participate, however, it must operate its program in compliance with federal statutory and regulatory requirements. 42 U.S.C. § 1396a. Florida has chosen to participate in the Medicaid program.

27. Medicaid is permitted to control the utilization of covered services through the application of a medical necessity test. When applying a medical necessity standard, the Florida Medicaid Program must ensure that recipients with the most severe disabilities or conditions are served before recipients with less severe disabilities. 42 C.F.R. § 440.230(d).

28. State plans must also provide an opportunity for a fair hearing to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness. 42 U.S.C. § 1396a(3) and 42 C.F.R. § 431.200, *et seq.*

29. Defendants must mail and give advance notice at least ten (10) days before the date of termination of or reduction in Medicaid benefits. 45 C.F.R. § 431.211.¹ The purpose of the advance notice is to afford the recipient of the service an opportunity for a pre-termination hearing. 42 C.F.R. § 431.231(c).

THE HOME AND COMMUNITY-BASED WAIVER

30. Congress adopted the Home and Community-Based Waiver in order to allow individuals who would otherwise require care in a nursing home or ICF/DD to receive services in their own homes and

¹ There are limited exceptions to the advance notice requirement at 45 C.F.R §§431.213 and 431.214, which are not applicable here.

in home-like settings. See Senate Report No. 97-139 and House Conference Report No. 97-208, 1981 U.S. Code Cong. & Admin. News., at 396.

31. The regulations state that "Section 1915(c) of the Act permits states to offer, under a waiver of statutory requirements, an array of home and community-based services that an individual needs to avoid institutionalization." 42 C.F.R. § 441.300 (emphasis added).

32. Under the waiver provisions of the Act, states may include as "medical assistance" the cost of home or community based services which, if not provided, would require care to be provided in a nursing home or an Intermediate Care Facility for Persons with Mental Retardation (Developmental Disabilities) (ICF/DD). 42 U.S.C. §1396n(c); 42 C.F.R. § 435.217. 42 U.S.C. § 1396n(c)(1) states:

The Secretary may by waiver provide that a State plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan. . . .

33. Federal law sets a ceiling for funds used under the Home and Community Based Waiver. 42 U.S.C. § 1396n(c)(2)(D) requires that "the average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individual does not exceed 100 percent of the average per

capita expenditure that the State reasonably estimates would have been made in that fiscal year . . . if the waiver had not been granted." Thus, federal law permits states to fund Home and Community-Based Waiver up to the same average rate as ICF/DDs.

34. Congress provided that a Home and Community-Based Waiver shall not be granted unless the State provides assurances that "necessary safeguards (including adequate standards for provider participation) have been taken to protect the health and welfare of individuals provided services under the waiver" 42 U.S.C. § 1396n(2)(A); 42 C.F.R. § 441.302 (a). Those safeguards must include "[a]dequate standards for all types of providers that provide services under the waiver." 42 C.F.R. § 441.302 (a)(1).

35. Congress also requires that individuals with developmental disabilities have the freedom of choice as to whether to receive services in an ICF/DD or under the Home and Community-Based Waiver. 42 U.S.C. § 1396n(2)(C) provides that individuals "who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded (developmentally disabled)."

36. Florida first obtained approval for a Home and Community-Based Waiver in 1982 for day treatment services. A subsequent comprehensive amendment to Florida's Home and Community-Based

Waiver, approved in 1992, adopts the philosophy of avoiding institutional care and provides supports and services to individuals with developmental disabilities in their own homes or home-like settings.

DEFENDANTS' UNLAWFUL ACTIONS

37. Defendants have consistently denied individuals with developmental disabilities their rights to HCBW services and to due process.

38. As a matter of practice, defendants do not provide plaintiffs with procedural due process protections. Typically, defendants deny individuals services, stating that funds are not available. Defendants do not provide notice that the Medicaid statute provides for procedural protections, including the right to appeal adverse determinations.

39. Defendants routinely terminate individuals like Wolf Prado-Steiman and M.C. from services and never provide any notice of procedural protections, including the right to appeal adverse determinations and the right to continued benefits pending appeal.

40. Defendants fail to provide individuals with services in the most integrated setting, their homes and community. Instead, defendants make services available only in institutional setting. Families that care for their children at home do not even receive the most basic services. For example, individuals in institutions who are not continent receive diapers whereas individuals who live at home with their families are routinely denied diapers.

41. Defendants routinely deny individuals physical therapy, occupational therapy, speech therapy, and assistive technology devices and services.

42. For many families, respite, personal care, and companion services are vital to keep their family members home. Yet, defendants routinely deny these services. Without these services, many parents are forced to institutionalize their children.

43. Despite defendants' claims of lack of funds, the federal match (55%) is available for HCBW services. Nonetheless, defendants continue to serve many individuals eligible for HCBW services with general revenue dollars, failing to take advantage of the federal match.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

AMERICANS WITH DISABILITIES ACT

44. On July 12, 1990, Congress enacted the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, (ADA), establishing the most important civil rights for persons with disabilities in our nation's history.

45. Congress stated in its findings that, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

46. Congress found that "discrimination against individuals with disabilities persists in . . . institutionalization . . . and access to public services." 42 U.S.C. § 12101(a)(3).

47. Congress found that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . , segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5).

48. Congress further found that:

individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. § 12101(a)(7).

49. A major purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide clear, strong, consistent and enforceable standards addressing discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)1&2.

50. Each plaintiff and each class member is "a qualified individual with a disability" within the meaning of 42 U.S.C. § 12131(2).

51. The Home and Community-Based Waiver program are public services subject to Title II of the ADA, 42 U.S.C. §§ 12131-12134.

52. Defendants routinely deny individuals who live in their own homes or with their families or in community settings services such as physical therapy, occupational therapy, speech therapy, and dental services that are available to individuals who are in ICF/DDs.

53. Defendants' denial of necessary services, while offering the option of more expensive, institutional services violates the ADA, and specifically the "Integration Mandate" implementing the ADA as found in 28 C.F.R. § 35.130(d) which requires that: "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."

54. The ADA also prohibits discrimination in access to covered services that are based on either severity of disability, or diagnosis.

55. Defendants have engaged in diagnosis-based decision making by denying or limiting access to benefits, services and opportunities because a person has a particular disability, impairment or diagnosis.

SECOND CAUSE OF ACTION

SECTION 504 OF THE REHABILITATION ACT OF 1973

56. Defendants receive federal funds and are therefore subject to the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794.

57. Plaintiffs meet the definition of having a "handicap" within the meaning of 29 U.S.C. § 706(7) and are otherwise qualified individuals under Section 504.

58. Defendants' practices, policies and procedures described above, violate the rights of plaintiffs and class members that are secured by Section 504 by discriminating against these individuals solely on the basis of disability.

THIRD CAUSE OF ACTION

PROCEDURAL DUE PROCESS AND SECTION 1983

59. Plaintiffs' eligibility for and receipt of Medicaid services creates a property right subject to due process protection under the Fourteenth Amendment to the Constitution of the United States.

60. Florida's Home and Community-Based Waiver specifically provides for a fair hearing, as required by 42 C.F.R. Part 431, subpart E, to Medicaid recipients who are denied the services(s) of their choice or the provider(s) of their choice.

61. Defendants have not provided any procedural protections for plaintiffs and class members.

62. By denying plaintiffs and class members the opportunity for a fair hearing to challenge the termination of Home and Community Based Waiver and for continued benefits, defendants have violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, federal Medicaid law and regulations, and the terms of Florida's Home and Community-Based Waiver.

FOURTH CAUSE OF ACTION

42 U.S. C. § 1396a(8) and 42 U.S.C. § 1983

63. Defendants fail to provide HCBW services with reasonable promptness in violation of 42 U.S.C. § 1936a(8) and 42 U.S.C. § 1983.

FIFTH CAUSE OF ACTION

42 U.S.C. § 1396n and 42 U.S.C. § 1983.

64. Serving individuals in institutions is contrary to the letter and intent of 42 U.S.C. § 1396n.

65. Defendants fund institutional placements using the Home and Community-Based Waiver. Such a use of HCBW funds violates the exclusion of institutional programs from the Home and Community-Based Waiver program and therefore violates 42 U.S.C. § 1396n and 42 U.S.C. § 1983.

SIXTH CAUSE OF ACTION

42 U.S.C. § 1396n(2) (a) and 42 U.S.C. § 1983

66. Defendants are violating 42 U.S.C. § 1396n(2) (a) and 42 U.S.C. § 1983 by providing inadequate services to individuals eligible for Home and Community-Based services for the Home and Community-Based Waiver. Defendants do not provide sufficient resources to protect the health and welfare of individuals provide services under the waiver. 42 U.S.C. § 1396n(2) (A). As a result of defendants' failure to provide necessary services, individuals experience pain, emotional harm, and regress, losing skills that they had previously gained from school and from therapeutic services.

SEVENTH CAUSE OF ACTION

42 U.S.C. § 1396n(c)(2) and 42 U.S.C. § 1983

67. Defendants have violated 42 U.S.C. § 1396n(c)(2) by denying plaintiffs their freedom of choice of an appropriate Home and Community-Based Waiver program that meets their health and welfare needs.

68. Defendants provide only limited services to individuals to remain in their own homes, family homes or community homes.

69. Without adequate services available in the community, individuals are unnecessarily institutionalized.

70. Defendants are therefore in violation of 42 U.S.C. § 1396n(c)(2) and 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

- A. Assume jurisdiction of this action.
- B. Order that plaintiffs may maintain this action as a class action pursuant to Rule 23, Fed.R.Civ.P.
- C. Declare defendants' denial, reduction and termination of Home and Community Based Waiver Services under the Medicaid program without written notice unlawful, and declare defendants' reduction and termination of Home and Community-Based Waiver services without an opportunity for a pre-termination hearing and continued benefits unlawful.
- D. Order defendants to provide plaintiffs and members of the class with necessary services to enable them to live in the community.

E Award plaintiffs their costs and reasonable attorneys' fees.

F Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,



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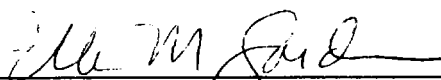
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CERTIFICATE OF SERVICE

The foregoing papers were served via U.S. Mail on July 31, 1998 to the counsel listed below:

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