

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

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MICHAEL DUBOIS, MELVIN M. and  
CHARLES SMITH, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

Case No. *4:03cv107-SPM*

v.

RHONDA MEDOWS, in her official  
capacity as Secretary, Florida Agency for  
Health Care Administration, and  
JOHN AGWUNOBI, in his official  
capacity as Secretary, Florida Department  
of Health,

Defendants.

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF  
(CLASS ACTION)

PRELIMINARY STATEMENT

1. This is a statewide class action brought on behalf of over 226 persons with brain or spinal cord injuries that have been unnecessarily segregated in nursing homes and similar institutions in order to receive Medicaid funded long-term health care services, or put at imminent risk of such segregation. Defendants' systemic and continuing failure to provide the named Plaintiffs and alleged class members

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(Plaintiffs) with medically necessary home and community based services violates the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and implementing regulations, Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794(a), and implementing regulations, and Title XIX of the Social Security Act (the Medicaid Act), 42 U.S.C. §1396a *et seq.*, and implementing regulations. Plaintiffs are eligible for home and community based services through Florida's Medicaid Program. However, due to Defendants' failure to adequately fund and administer Florida's home and community based services program for persons with traumatic brain or spinal cord injuries, there is a lack of community based services to meet Plaintiffs' needs. The named Plaintiffs bring this action on behalf of themselves and all others with traumatic brain or spinal cord injuries who are inappropriately confined and segregated in nursing homes and similar institutions or, who are or will be at risk of being institutionalized, because of Defendants' failure to provide home health care and other supportive services to meet their needs to live in the community. Plaintiffs seek injunctive relief to remedy these systemic violations of federal law.

2. Since 1999, Florida has operated the Brain or Spinal Cord Injury Medicaid Home and Community Based Waiver Program (BSCI Waiver Program). The BSCI Waiver Program enables a limited number of persons with traumatic brain or spinal cord injuries to avoid unnecessary institutionalization and to receive medically necessary services while living at home. As a result of under funding and

poor administration, the State has a waiting list of over 226 persons who are eligible for, but unable to obtain, these services. There are currently at least 124 unfilled slots in the BSCI Waiver Program. There may be hundreds of persons that are eligible for these services, who were never informed about the existence of the services or, who are on the waiting list.

3. Plaintiffs bring this action to compel Defendants to provide Plaintiffs with home and community based care services in the least restrictive setting that is most appropriate to their needs. Plaintiffs seek a declaration that denial of due process and services with reasonable promptness violates the Medicaid Act and implementing regulations, the ADA and implementing regulations, Section 504, and implementing regulations and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Medicaid Act and Fourteenth Amendment claims are brought pursuant to 42 U.S.C. §1983. Plaintiffs seek to remedy the pervasive, systemic and continuing failure of Defendants to provide them with BSCI Waiver Program services in a reasonably prompt manner as required by federal law. Plaintiffs also seek to remedy Defendants' failure to provide these services in the most integrated setting appropriate to their needs -- their homes and communities. Plaintiffs seek injunctive relief to require Defendants to comply with federal statutory and constitutional law.

#### **JURISDICTION**

4. This Court has jurisdiction over the claims presented in this action

pursuant to 28 U.S.C. §§1331,1343(a)(3) & (4).

5. Plaintiffs' claims for relief are predicated upon 42 U.S.C. §12101 *et seq.*, 29 U.S.C. §794, 42 U.S.C. §1396 *et seq.* and 42 U.S.C. §1983, which authorizes actions to redress the deprivation, under color of state law, of rights privileges and immunities secured by the Constitution and laws of the United States.

6. Declaratory relief is authorized by 28 U.S.C. §§2201 and 2202.

7. Plaintiffs seek permanent injunctive relief pursuant to Fed. R. Civ. P. 65.

#### **VENUE**

8. Venue lies in the Northern District pursuant to 28 U.S.C. §1391(b), and in the Tallahassee Division, because a substantial part of the events giving rise to this action occurred in Leon County, Florida, and both Defendants may be found there. N.D. Fla. R. 3.2(A).

#### **PLAINTIFFS**

9. Plaintiff Michael Dubois (Dubois) is a 35 year old man with quadriplegia following a spinal cord injury in 1983 as a result of a diving accident. He receives Supplemental Security Income (SSI), Medicaid and Medicare. Since his injury at age 16, he has resided in several nursing homes because his elderly parents are unable to care for him. Medicaid pays for the nursing home where he currently resides in Gainesville, Florida. Dubois applied for BSCI Waiver Program services on August 11, 2000, and meets the eligibility criteria.

10. Plaintiff Melvin M. is a 23 year old man who lives in Perry, Florida. He has paraplegia as a result of a shooting incident in 1998.<sup>1</sup> He was in a coma following this incident and experiences memory problems due to a possible brain injury. He receives SSI and Medicaid. He applied for BSCI Waiver Program services on or about April 8, 2002, and meets the eligibility criteria.

11. Plaintiff Charles Smith (Smith) is a 38 year old man who lives with his mother in Pensacola, Florida. Smith has quadriplegia as a result of a spinal cord injury from a car accident in 1990. He receives SSI and Medicaid. Due to medical conditions related to his spinal cord injury, he has been hospitalized for infections several times since his injury. He applied for the BSCI Waiver Program on or about January 23, 2001, and meets the eligibility criteria.

12. Although each of the named Plaintiffs is eligible for the BSCI Waiver Program, none of them have been provided with services.

### **DEFENDANTS**

13. Defendant Rhonda Medows (Medows) is Secretary of Florida's Agency for Health Care Administration (AHCA) and is sued in her official capacity. AHCA is the state agency responsible for administering Florida's Medicaid Program, including the Waiver Program. §20.42, Fla. Stat. (2002). Under state law, Medows is responsible for implementing policy and rules for the agency, as well as planning,

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<sup>1</sup> Plaintiffs have, contemporaneously with the Complaint, filed a Motion to Proceed Under A Pseudonym for named Plaintiff Melvin M..

directing, organizing, supervising, administering and executing the functions of AHCA and proposing AHCA's budget to the Governor. §20.05, Fla. Stat. (2002). As Secretary, she is responsible for ensuring that AHCA operates in conformity with federal law, including but not limited to operating the Florida Medicaid Program.

14. Defendant Agwunobi (Agwunobi) is Secretary of Florida's Department of Health (DOH) and is sued in his official capacity. Agwunobi is responsible for all administrative, policy, planning and budgetary matters for the DOH, including those which affect Florida's participation in Medicaid Waiver Programs. §20.05, Fla. Stat. (2002). He is responsible for the DOH decisions that result in the funding of and administration of programs for persons with brain or spinal cord injuries. *Id.*; §381.79, Fla. Stat. (2002). As Secretary, he is also responsible for ensuring that DOH operates in conformity with federal law.

15. At all times relevant to this Complaint, Defendants were acting under color of state law and knew or should have known of the policies, practices, acts and conditions alleged herein.

#### **CLASS ACTION ALLEGATIONS**

16. Pursuant to Fed. R. Civ. P. 23(a) and (b)(2), the named Plaintiffs bring this action on behalf of themselves and all other persons similarly situated.

17. The proposed class consists of all individuals with traumatic brain or spinal cord injuries who are eligible or will be eligible to receive BSCI Waiver Program services and have not received such services.

18. Numerosity: The Plaintiff class is so numerous that joinder of all its members is impracticable. There are currently over 226 class members. The class also includes future class members, likely to number in the hundreds, that will be eligible to receive BSCI Waiver Program services based on their future applications.

19. Commonality: There are questions of law or fact that are common to all named Plaintiffs, as well as to all putative class members: Whether Defendants have violated the Medicaid Act, the ADA, §504 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

20. Typicality: The claims of the named Plaintiffs are typical of the claims of the class as a whole.

21. Adequate representation: The named Plaintiffs will fairly represent and adequately protect the interests of members of the class as a whole. The named Plaintiffs do not have any interests antagonistic to those of other class members. By filing this action, the named Plaintiffs have displayed an interest in vindicating their rights, as well as the claims of others who are similarly situated. The relief sought by the named Plaintiffs will inure to the benefit of members of the class generally. The named Plaintiffs are represented by counsel who are skilled and knowledgeable about civil rights litigation, Medicaid law, practice and procedure in the federal courts and the prosecution and management of class action litigation.

22. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making final injunctive and declaratory relief

appropriate with respect to the class as a whole under Fed. R. Civ. P. 23(b)(2). Although the disabilities of the class members vary, they share a common need for services provided by the BSCI Waiver Program, are eligible for these services and have not been provided these services. A class action is superior to individual lawsuits for resolving this controversy.

### **STATEMENT OF FACTS**

#### **A. Medicaid Statutory and Regulatory Framework**

23. Medicaid is a joint federal/state program authorized by Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* It provides medical assistance to low income individuals who meet certain eligibility requirements. The federal government provides 58.8% of the costs of services provided under the program and the state of Florida provides the remaining 41.2%.

24. States are not required to participate in the Medicaid Program. If a state elects to participate, however, it is required to comply with applicable federal statutory and regulatory requirements. 42 U.S.C. §1396. Florida voluntarily participates in the Medicaid Program. §409.902, Fla. Stat. (2002).

25. AHCA, under the direction of Defendant Medows, is the State agency that is responsible for administering Florida's Medicaid services. §20.42, Fla. Stat. (2002).

26. Under federal and state law, there are numerous categories of Medicaid eligibility for low income disabled individuals. See, *e.g.*, 42 U.S.C.



§1396a(a)(10); 42 C.F.R. §§435.120-.138, .230-.236; §§409.903 & .904, Fla. Stat. (2001); Fla. Admin. Code R. 65A-1.710; See *also* Department of Children and Families' (DCF) Integrated Public Assistance Policy and Procedures Manual, §2040.0800. Individuals that receive SSI are categorically eligible for Medicaid. 42 U.S.C. §1396a(a)(10)(A); 42 C.F.R. §436.110.

27. Under 42 U.S.C. §§1396 *et seq.*, any state which has elected to participate in the Medicaid Program must ensure that all medically necessary services, including BSCI Waiver Program services, are provided to eligible persons with reasonable promptness. 42 U.S.C. §1396a(a)(8); 42 C.F.R. §435.930. Individuals who apply for Medicaid on the basis of disability are entitled to receive a timely determination of their eligibility within 90 days of their application and to be informed of this right. 42 C.F.R. §435.911. Applicants are also entitled to a written notice of the agency's decision on their application. 42 C.F.R. §435.912.

28. State Medicaid Plans must provide the 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(a)(3); 42 C.F.R. §431.200 *et seq.* The regulations which implement this statutory requirement define the process that is due to Medicaid recipients. See 42 C.F.R. §431.200 *et seq.* When an individual's eligibility for medical assistance under the plan is denied or not acted upon with reasonable promptness, he or she is entitled to a written notice that informs him or her of the action the agency intends to take, the reasons for the

action, the law that supports the action and an explanation of the right to request a fair hearing. 42 C.F.R. §§431.210 & 435.912.

**B. The Home and Community Based Waiver Program**

29. Congress adopted the Home and Community Based Waiver (Waiver Program) in order to allow individuals who would otherwise require care in a nursing home or other institutional settings to receive services in their own homes and in home-like settings. See S. Rep. No. 97-139 & H.R. Conf. Rep. No. 97-208, *reprinted in* 1981 U.S.C.C.A.N. 396.

30. The BSCI Waiver Program is one of several Waiver Programs in Florida. See Fla. Admin. Code R. 65A-1.701(1), (3), (5), (10) & (24).

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 Medicaid Act, states may include as medical assistance the cost of home and community based services, which if not provided, would require care to be provided in a nursing home, hospital or other institutional setting. 42 U.S.C. §1396n(c); 42 C.F.R. §435.217. 42 U.S.C. §1396n(c)(1) provides:

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... the cost of which could be reimbursed under the State plan.

33. To receive permission to operate a Waiver Program, the State must assure the federal government that the estimated average per person expenditures under the proposed waiver are no greater than the estimated per person expenditures the State would make for the same individuals if the waiver was not granted. 42 U.S.C. §1396n(c)(2)(D). In addition, the State must make assurances that once the waiver is operating, the actual total expenditures made under the waiver will be no greater than the total amount the State would have made for services in nursing facilities, hospitals or other institutional settings for individuals being served under the waiver. 42 C.F.R. §441.302(f).

34. In establishing the Medicaid Waiver Programs, Congress requires that individuals with disabilities have the freedom to choose whether to receive services in an institution (e.g., nursing home) or in the community through the Waiver Program. 42 U.S.C. §1396n(c)(2)(C); 42 C.F.R. §441.302(d)(1) & (2). A state must ensure that individuals who

are determined to be likely to require the level of care provided in a hospital, [or] nursing facility...are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, [or] nursing facility services...

42 U.S.C. §1396n(c)(2)(C).

35. Individuals who live in hospitals or nursing homes cannot also receive services under the Home and Community Based Waiver, but can be eligible for such services (*e.g.*, residing in a nursing home and on a waiting list for a Waiver Program). 42 C.F.R. §441.301(b)(1)(ii).

36. States are also required to annually provide the Secretary of Health and Human Services with information on the impact of the waiver and the type and amount of medical assistance provided under the Medicaid State Plan and on the health and welfare of recipients. 42 U.S.C. §1396n(c)(2).

37. Florida first obtained approval for a Home and Community Based Waiver for persons with brain or spinal cord injuries in 1999. This BSCI Waiver Program was approved for a three year period and a renewal application was approved as of July 2002, by the Centers for Medicare and Medicaid Services (formerly the Health Care Financing Administration) – the federal agency that reviews waiver applications.

38. The BSCI Waiver Program is a category of Medicaid services that is established to provide cost-effective alternatives to institutional care for individuals that have brain or spinal cord injuries. 42 U.S.C. §1396n(c); 42 C.F.R. §§440.180 & 441.300.

39. To be eligible for the BSCI Waiver Program, an individual must meet certain income and asset criteria, as well as medical criteria which would qualify

them for the Medicaid Institutional Care Program (ICP)(*i.e.*, nursing home care). See 42 U.S.C. §1396n(c) & (d); 42 C.F.R. §441.301. See also Fla. Admin. Code R. 65A-710(4). DCF is the state agency that is responsible for determining financial eligibility for Medicaid. §§409.901(18), .902, .919, Fla. Stat. (2002). DOH is the state agency that is responsible for taking, processing and making final determinations on individuals' applications for services through the BSCI Waiver Program. §20.43, Fla. Stat. (2002).

40. Defendants' approved BSCI Waiver Program application authorizes the State, for the 2002-03 fiscal year, to provide home and community based services to 300 individuals to allow them to live at home rather than unnecessarily reside in institutions. Approximately only 176 individuals are currently receiving services through the BSCI Waiver Program, thus, leaving at least 124 unfilled slots in the program.

41. Florida's approved application for the BSCI Waiver Program provides assurances to the Centers for Medicare and Medicaid Services that Medicaid beneficiaries will be offered an informed choice of alternatives. Specifically, the State assures that "when an individual is determined to be likely to require [nursing facility] level of care... the individual... will be informed of any feasible alternatives under the waiver, and given the choice of either institutional or home and community-based services." Florida's Section 1915(c) Waiver Application for a Medicaid Home and Community Based Services Waiver for Persons with Traumatic

Brain or Spinal Cord Injuries, dated June 7, 2002, at 43.

**C. The Brain and Spinal Cord Injury Program**

42. Florida also operates a Brain and Spinal Cord Injury Program (BSCIP) through state-only funding. §381.7395, Fla. Stat. (2002). The BSCIP provides short-term rehabilitative services to assist individuals in making a transition back into the community following a traumatic brain or spinal cord injury.

43. The BSCIP is not a Medicaid program and is administered by the DOH. The BSCIP is funded through traffic-related fines, surcharges for driving and boating under the influence convictions and temporary license tag fees. These funds are deposited into the BSCIP Rehabilitation Trust Fund. §381.79, Fla. Stat. (2002). The BSCIP is a payor of last resort for individuals that reside in Florida and have brain or spinal cord injuries. *Id.*

44. Unlike the BSCIP, the BSCI Waiver Program is intended to provide long-term home and community based care for individuals with brain or spinal cord injuries. Persons with brain or spinal cord injuries can be eligible to and receive services through BSCIP, in addition to being eligible for the BSCI Waiver Program.

45. Under §381.77, Fla. Stat. (2002), the DOH is required to conduct an annual survey of Florida's nursing homes to determine the number of persons 55 years of age and under who reside in such facilities due to brain or spinal cord injuries. "All persons identified in such a survey shall be evaluated as to their rehabilitation potential, and any person who may benefit from rehabilitation shall be

given an opportunity to participate in an appropriate rehabilitation program for which she or he may be eligible.” *Id.*

**D. Americans with Disabilities Act**

46. On July 12, 1990, Congress enacted the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, which establishes important civil rights for persons with disabilities.

47. 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.” *Id.* §12101(a)(2).

48. Congress found that “discrimination against individuals with disabilities persists in... institutionalization... and access to public services.” *Id.* §12101(a)(3).

49. 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.” *Id.* §12101(a)(5).

50. 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.

*Id.* §12101(a)(7).

51. 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. *Id.* §12101(b)(1) & (2).

52. Title II of the 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, program or activities of a public entity, or be the subject of such discrimination by such an entity.” *Id.* §12132. Implementing regulations require that “[a] public entity shall 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).

53. The ADA was enacted to help serve “...the Nation’s proper goals regarding individuals with disabilities, [which goals] are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for each individual.” 42 U.S.C. §12101(a)(8). Disabilities are defined, with respect to an individual, to include “a physical or mental impairment that substantially limits one or more of the major life activities of such individual...such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing,



learning, and working.” 28 C.F.R. §35.104.

54. In a July 29, 1998, letter from the United States Department of Health Care Finance Administration (HCFA) to state Medicaid Directors, HCFA advises that the “most integrated setting” standard applies to States, including State Medicaid programs,” and urges States to meet the objectives of the ADA “ by continuing to develop home and community based services options for persons with disabilities to live in integrated settings.”

55. The “most integrated setting” means a setting “that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.” 28 C.F.R. Part 35, App. A, at 450 (1998).

56. Under the ADA’s “community integration mandate,” unnecessary institutionalization of individuals with disabilities constitutes prohibited discrimination under the ADA.

57. Each Plaintiff and class member is a “qualified individual with a disability” within the meaning of 42 U.S.C. §§12102(2) & 12131(2).

58. The Medicaid Program, the Medicaid Home and Community Based Services Waiver Program and the Brain and Spinal Cord Injury Program are public services subject to Title II of the ADA. *Id.* §12131-12134.

**E. Section 504 of the Rehabilitation Act**

59. Section 504 provides:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title,

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. Under Section 504, an “individual with a disability” includes any person who “has a physical or mental impairment which substantially limits one or more of such person’s major life activities.” *Id.* §705(20)(B).

61. Each Plaintiff and class member is an “individual with a disability” within the meaning of 29 U.S.C. §705(20)(B).

62. Under Section 504, a “program or activity receiving Federal financial assistance” includes the “a department, agency, special purpose district, or other instrumentality of a State or of a local government.” *Id.* §793(b)(1)(A).

63. The Medicaid Program, the Medicaid Home and Community Based Services Waiver Program and the Brain and Spinal Cord Injury Program are public services subject to Section 504. *Id.*

64. Section 504 and implementing regulations require that services be provided in the most integrated setting appropriate to an individual’s needs. 28 C.F.R. §41.51(d); 45 C.F.R. §84.4(b)(2).

**F. Due Process**

65. All individuals who meet the eligibility criteria for the BSCI Waiver Program are entitled to medical assistance services and those services shall be

furnished with reasonable promptness. 42 U.S.C. §1396a(a)(8); 42 C.F.R. §435.930. When an individual's claim for medical assistance is denied or not acted upon with reasonable promptness, the State must provide him or her with due process, pursuant to the Fourteenth Amendment to the United States Constitution, through written notice and an opportunity for a fair hearing. 42 U.S.C. §1396a(a)(3); 42 C.F.R. §431.200 *et seq.*

**G. Named Plaintiffs' Allegations**

**Michael Dubois**

66. Plaintiff Dubois is a 35 year old man with quadriplegia following a spinal cord injury in 1983 as a result of a diving accident. He receives SSI, Medicaid and Medicare. Medicaid pays for the nursing home where he currently resides in Alachua County, but will not pay for him to live in a home-setting. Since his injury at age 16, he has lived in several nursing homes because his parents are unable to care for him. Dubois requires use of a motorized wheelchair and needs assistance with bathing, dressing, personal grooming, transferring from his wheelchair and toileting. He works part-time at Target Department Store and won an award for his volunteer work with elementary school children.

67. On or about August 11, 2000, Dubois applied for the BSCI Waiver Program. He never received any written determination about his application. At that time, he was verbally informed by a case worker from the BSCI Waiver Program that he met the eligibility requirements and that he would be placed on a

waiting list because no funds were available. Since his application, he has never received any written notice about his placement on the waiting list, that the services he needs are being denied, or concerning his right to appeal the denial. For over two years, the State has never informed him about when he will receive services.

68. Dubois' independent living needs can be met in a home-setting which will prevent him from being forced to continue to live in a nursing home. To live in the community, he needs several hours of personal care services per week to assist with his bathing, dressing, personal grooming and toileting. He also needs modifications to his home. All of these services are available through the BSCI Waiver Program. Although Medicaid will pay for Dubois to reside in a nursing home, it will not pay for him to receive medically necessary services in the community through the BSCI Waiver Program. (Dubois also needs medical supplies, which would continue to be provided for, as now, through the Medicaid State Plan.)

69. As a result of Defendants' policies and practices, Dubois continues to be institutionalized and unnecessarily segregated and excluded from full participation in the community. Without BSCI Waiver Program services, he is confined to a nursing home even though the State has recommended that a community placement is the most appropriate setting for him and he wants to be an active member of the community. Although Medicaid will pay for Dubois to live in a nursing home, it will not provide payment for him to live in a home-setting through

the provision of BSCI Waiver Program services.

**Melvin M.**

70. Plaintiff Melvin M. is 23 years old and developed paraplegia as a result of a shooting incident in 1998. He receives SSI and Medicaid. He has severe contractures in his legs which cause them to remain in a rigid, bent position, and he experiences pain in his hip areas. He requires use of a motorized wheelchair for mobility and needs diapers due to bowel incontinence. He is able to dress only his upper body, needs some assistance in transferring from his wheelchair and needs assistance with bathing, toileting and food preparation. He also experiences some memory problems that are possibly due to a traumatic brain injury related to a coma and stroke following his initial injury. He has also experienced pressure sores in the past due to lack of movement. His treating physician has recommended an orthopedic evaluation, physical therapy and occupational therapy, however, he has received none of these services.

71. To remain living at home, Melvin M. needs home modifications, physical and occupational therapies, an evaluation and possible treatment for traumatic brain injury, assistance with his activities of daily living (e.g., bathing, dressing, toileting, food preparation) and life skills training. All of these services are available through the BSCI Waiver Program. Although Medicaid would pay for Melvin M. to reside in a nursing home, it will not pay for him to receive medically necessary services in his home and community through the BSCI Waiver Program.

(Melvin M. also needs medical supplies, physical therapy, occupational therapy and an orthopedic evaluation and he has not been able to obtain these through the Medicaid State Plan.)

72. On or about April 8, 2002, Melvin M. applied for the BSCI Waiver Program. He was verbally informed by a case worker from the BSCI Waiver Program that he met the eligibility requirements and that he would be placed on a waiting list because no funds were available. Since his application, he has never received any written notice of his status, that the services he needs are being delayed or denied, or concerning his right to appeal the delay or denial.

73. The BSCIP, a state-only funded program, has provided Melvin M. with limited case management and some diaper supplies. However, these services are on a limited basis and are not available for long-term home and community based care. This funding can be terminated at any time.

74. Melvin M. desperately wants to develop the skills needed to live independently. Melvin M.'s reliance on his friends and family for daily incontinence care and constant assistance with his activities of daily living is straining the few fragile social supports he has now. It is uncertain how much longer his current inadequate care arrangements will last. Without home and community based services, his health remains in jeopardy and he is at risk of being forced to live in an institution. Although Medicaid will pay for Melvin M. to live in a nursing home, it will not provide payment for him to live in his home through the provision of BSCI

Waiver Program services.

**Charles Smith**

75. Plaintiff Smith is a 37 year old man who has quadriplegia as a result of a spinal cord injury from a diving accident in 1990. He receives SSI and Medicaid. Due to medical conditions related to his spinal cord injury, he has been hospitalized several times for infections. Smith uses a motorized wheelchair. His mother is his primary care giver. Frequently, his mother has to take business related trips. Smith's sister, who does not reside with him, also assists in taking care of him, but she, too, is only able to provide very limited care. This means that Smith is left alone at home.

76. On or about January 23, 2001, Smith applied for the BSCI Waiver Program. He never received any written determination about his application. At that time, he was verbally informed by a case worker from the BSCI Waiver Program that he would be placed on a waiting list for services. Since his application, he has never received any written notice of his status, that the services he needs are being delayed or denied, or concerning his right to appeal the delay or denial. For over two years, the State has never informed him about if or when he will receive services.

77. To remain living at home, Smith needs daily personal care services to assist him with bathing, dressing and toileting, transferring from his wheelchair and personal grooming. All of these services are available through the BSCI Waiver

Program. (He also needs medical supplies, which would, as now, be provided through the Medicaid State Plan.)

78. Without BSCI Waiver Program services, Smith is at imminent risk of being forced to live unnecessarily in a nursing home. Although Medicaid would pay for Smith to live in a nursing home, it will not provide payment for him to live at home through the provision of BSCI Waiver Program services.

#### **H. Defendants' Unlawful Actions**

##### **Medicaid Act Violations**

79. Defendants administer the BSCI Waiver Program in a manner which limits the availability of these medically necessary services for Plaintiffs and which precludes the provision of services in a reasonably prompt manner. 42 U.S.C. §1396a(a)(8); 42 C.F.R. §435.930. Defendants' failure to provide BSCI Waiver Program services to eligible individuals with reasonable promptness is proximately caused by Defendants' arbitrary and unreasonable policies and practices.

80. The inadequate funding of the BSCI Waiver Program and the maintenance of a waiting list that can take up to several years to provide services is in violation of the Medicaid Act provisions that require states participating in the Waiver Program to provide Medicaid recipients in need of Waiver Program services with a choice between institutional services (*e.g.*, a nursing home) and community based services. 42 U.S.C. §1396(n)(c)(2). This provision creates binding obligations on any state that elects to provide supports and services in individuals



homes and community under a Waiver Program. Defendants' application for the BSCI Waiver Program incorrectly states that they are in compliance with this obligation. Plaintiffs are forced into unnecessary and inappropriate institutionalization in order to obtain medically necessary care or are put at risk of being forced into an institution. Defendants' actions jeopardize Plaintiffs' health and safety.

**Americans with Disabilities Act Violations**

81. There are numerous persons with brain or spinal cord injuries that are inappropriately confined to an institution or at risk of being confined to an institution because of Defendants' policies and practices.

82. Defendants routinely place individuals eligible for BSCI Waiver Program services on a waiting list which is comprised of a list of persons who have applied for services, but who have not received any such services. The named Plaintiffs have been waiting for these services for anywhere from one year to over two and a half years. On information and belief, class members have been on this waiting list, in some cases, for several years.

83. Defendants fail to provide individuals with disabilities with services in the most integrated setting appropriate to their needs -- their homes and community. Instead, Defendants' actions with regard to their administration and under funding of the BSCI Waiver Program make services available only in an institutional setting. Without these services, individuals with disabilities are forced to live an institution

or are placed at risk of having to live in an institution.

**Due Process Violations**

84. Defendants have consistently denied Plaintiffs their rights to BSCI Waiver Program services and to due process.

85. As a matter of practice, Defendants do not provide Plaintiffs with due process protections. Typically, Defendants deny services, stating verbally that funds are not available. Defendants do not provide written notice that is required under the United States Constitution and the Medicaid Act and implementing regulations for procedural protections, including the right to appeal adverse determinations.

86. Defendants routinely take applications for the BSCI Waiver Program, but fail to issue determinations on the applications. Individuals are not notified that their applications have been denied or that they have been placed on a waiting list for services. Individuals are not given adequate notice, or any notice, of the reasons whether or why their application has been denied.

**CLAIMS FOR RELIEF**

**COUNT I**

**AMERICANS WITH DISABILITIES ACT**

87. Paragraphs 1 through 86 are incorporated herein as if fully set forth.

88. Each named Plaintiff and class member is a “qualified individual with a disability” within the meaning of 42 U.S.C. §12101(2).

89. The Department of Health, the Medicaid Program, the Waiver Program and the Brain and Spinal Cord Injury Program are all public services subject to Title II of the ADA. 42 U.S.C. §§12131-12134.

90. Defendants' denial of necessary services, while offering the option of more expensive, institutional services, violates the ADA and implementing regulations, specifically, the "integration mandate" of the ADA, 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." Defendants' actions force Plaintiffs to unnecessarily live in a nursing home or other institutional settings or place them at risk of having to do so in violation of the ADA. By failing to make BSCI Waiver Program services available to the named Plaintiffs and others similarly situated, Defendants are in violation of the ADA by not providing individuals with disabilities with services in the most integrated setting appropriate to their needs -- their homes and community.

91. Defendants' failure to have a waiting list for BSCI Waiver Program services that moves at a reasonable pace forces individuals with disabilities to unnecessarily live in an institution or be placed at risk of having to live in an institution in violation of the ADA and implementing regulations.

92. Providing BSCI Waiver Program services to Plaintiffs in their homes would not fundamentally alter the nature of services under the program.

93. Plaintiffs have suffered harm and will continue to suffer harm, for

which there is no adequate remedy at law, as a direct and proximate result of Defendants' violations of the ADA.

**COUNT II**

**SECTION 504 OF THE REHABILITATION ACT OF 1973**

94. Paragraphs 1 through 86 are incorporated herein as if fully set forth.

95. Defendants receive federal funds and are subject to the requirements of Section 504.

96. The BSCI Waiver Program receives federal financial assistance. The BSCI Waiver Program is a Medicaid Program which receives 41.2% of its funding from the state of Florida and 58.8% from the federal government. 29 U.S.C. §793(b)(1)(A).

97. Each of the named Plaintiffs and the class members are individuals with disabilities as defined under 29 U.S.C. §705(20)(B). This includes any person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities." Plaintiffs are substantially limited in various major life activities, including caring for themselves, walking, performing manual tasks and working.

98. Plaintiffs are "otherwise qualified" to participate in the BSCI Waiver Program and to receive BSCI Waiver Program services. The named Plaintiffs are eligible for BSCI Waiver Program services.

99. Defendants' practices, policies and procedures, as described above,

violate the rights of Plaintiffs that are secured by Section 504 by forcing Plaintiffs to unnecessarily live in a nursing home or other institutional setting and placing them at risk of having to do so. By failing to make BSCI Waiver Program services available to the named Plaintiffs and others similarly situated, Defendants are in violation of Section 504 by not providing individuals with disabilities with services in the most integrated setting appropriate to their needs -- their homes and community -- and by discriminating against Plaintiffs solely on the basis of disability.

100. Plaintiffs have suffered harm and will continue to suffer harm, for which there is no adequate remedy at law, as a direct and proximate result of Defendants' violations of Section 504.

### **COUNT III**

#### **MEDICAID ACT – REASONABLE PROMPTNESS** **42 U.S.C. §1396a(a)(8) PURSUANT TO 42 U.S.C. §1983**

101. Paragraphs 1 through 86 are incorporated herein as if fully set forth.

102. This count is brought pursuant to 42 U.S.C. §1983. At all times relevant to this action, Defendants have acted under color of state law.

103. Federal law requires any state which has elected to participate in the Medicaid program under 42 U.S.C. §1396 *et seq.*, to provide all services, including BSCI Waiver Program services, with reasonable promptness. 42 U.S.C. §1396a(a)(8); 42 C.F.R. §435.930.

104. Defendants fail to provide BSCI Waiver Program services with

reasonable promptness in violation of 42 U.S.C. §1396a(a)(8), 42 C.F.R. §435.930 and 42 U.S.C. §1983.

105. Plaintiffs have suffered harm and will continue to suffer harm, for which there is no adequate remedy at law, as a direct and proximate result of Defendants' violations of 42 U.S.C. §1396a(a)(8); 42 C.F.R. §435.930 and 42 U.S.C. §1983.

#### **COUNT IV**

##### **MEDICAID ACT – FREEDOM OF CHOICE** **42 U.S.C. §1396n(c)(2) PURSUANT TO 42 U.S.C. §1983**

106. Paragraphs 1 through 86 are incorporated herein as if fully set forth.

107. This count is brought pursuant to 42 U.S.C. §1983. At all times relevant to this action, Defendants have acted under color of state law.

108. Defendants have violated 42 U.S.C. §1396n(c)(2) by denying Plaintiffs their freedom of choice of an appropriate Waiver Program that meets their health and welfare needs.

109. Defendants' application for the BSCI Waiver Program incorrectly states that they are in compliance with 42 U.S.C. §1396n(c)(2).

110. Without adequate services available in the community, Plaintiffs will be unnecessarily institutionalized and are placed at risk of unnecessary institutionalization.

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

112. Plaintiffs have suffered harm and will continue to suffer harm, for which there is no adequate remedy at law, as a direct and proximate result of Defendants' violations of 42 U.S.C. §1396n(c)(2) and 42 U.S.C. §1983.

**COUNT V**

**DUE PROCESS PURSUANT TO 42 U.S.C. §1983**

113. Paragraphs 1 through 86 are incorporated herein as if fully set forth.

114. This count is brought pursuant to 42 U.S.C. §1983. At all times relevant to this action, Defendants have acted under color of state law.

115. All individuals who meet the eligibility criteria for the BSCI Waiver Program are entitled to medical assistance services and those services shall be furnished with reasonable promptness. 42 U.S.C. §1396a(a)(8); 42 C.F.R. §435.930. When an individual's claim for medical assistance is denied or not acted upon with reasonable promptness, the State must provide him or her with due process through written notice and an opportunity for a fair hearing. 42 U.S.C. §1396a(a)(3); 42 C.F.R. §431.200 *et seq.*

116. Defendants have not provided any procedural protections for Plaintiffs. Defendants do not provide Plaintiffs with written notice informing them of the denial or delay in services or that they have an opportunity for a fair hearing to challenge this action.

117. By denying Plaintiffs notice and the opportunity for a fair hearing to challenge the denial or delay of BSCI Waiver Program services, Defendants have

violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, federal Medicaid laws and implementing regulations and the terms of Florida's Waiver Program agreement with CMS.

118. Plaintiffs have suffered harm and will continue to suffer harm, for which there is no adequate remedy at law, as a direct and proximate result of Defendants' violations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, federal Medicaid law and implementing regulations, the terms of Florida's Waiver Program agreement with CMS and 42 U.S.C. §1983.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Certify this action as a class action.
- B. Declare that Defendants' failure to provide Plaintiffs with services in the most integrated setting appropriate to their needs violates their rights under the ADA, and implementing regulations, and under Section 504 of the Rehabilitation Act of 1973, and implementing regulations.
- C. Declare that Defendants have violated Plaintiffs' rights under the Medicaid Act, and implementing regulations, by failing to and refusing to provide them with BSCI Waiver Program services in a reasonably prompt manner and by failing to provide them with the right to be informed of and the freedom to choose community based services rather than institutionalization.



D. Declare that Defendants' denial of BSCI Waiver Program services without written notice and the right to a hearing is in violation of Plaintiffs' rights under the Medicaid Act, and implementing regulations, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

E. Enter a permanent injunction requiring Defendants to provide Plaintiffs with BSCI Waiver Program services in the most integrated setting appropriate to their needs.

F. Enter a permanent injunction requiring Defendants to provide Plaintiffs with medically necessary BSCI Waiver Program services with reasonable promptness to enable them to live in the community and to assure their health and safety.

G. Enter a permanent injunction requiring Defendants to inform Plaintiffs and their families of the choice of individualized, home and community based services available to them and to make this option available.

H. Enter a permanent injunction requiring Defendants to inform Plaintiffs, in writing, of their due process and Medicaid Act rights.

I. Enter a permanent injunction requiring Defendants to remove arbitrary administrative barriers which prevent Plaintiffs from accessing BSCI Waiver Program services.

J. Award Plaintiffs their reasonable attorneys' fees and costs.

K. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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