

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

PAULA SMITH, individually and on
behalf of similarly situated persons,

Plaintiff,

v.

DEPARTMENT OF PUBLIC WELFARE
OF THE COMMONWEALTH OF
PENNSYLVANIA; BEVERLY
MACKERETH, in her official capacity
as Secretary of the Department of
Public Welfare of the Commonwealth
of Pennsylvania,

Defendants.

Civil Action No. 2:13-cv-5670-AB

Class Action

SECOND AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

1. Plaintiff, Paula Smith, is a 56-year-old woman who has had multiple sclerosis since 2006. Ms. Smith resides in a fully accessible apartment with her 17-year-old daughter. Ms. Smith's daughter must assist her mother with her activities of daily living, including transferring to and from her bed and her wheelchair, dressing, showering, and grooming.

2. Defendants administer a program, known as the "Act 150 Program," to provide community-based attendant care services to individuals with significant physical disabilities.

3. Eligibility for the Act 150 Program is based solely on whether an individual needs attendant care services and is able to direct those services. There are no income or asset limits for eligibility, but Act 150 Program participants whose income exceeds 300% of the federal poverty level pay a weekly fee toward the cost of the services based on the amount of his or her income.

4. Plaintiff Smith is eligible for the Act 150 Program, but it has a waiting list of 316 people, which has remained relatively constant for two years.

5. Since Ms. Smith cannot receive services under the Act 150 Program, she must depend on her teenage daughter, who wishes to attend college and live on campus, for assistance with her activities of daily living. When her daughter goes to college, Ms. Smith will be forced to enter a nursing home.

6. Ms. Smith is not alone. Defendants only offer Pennsylvanians on the waiting list for the Act 150 Program attendant care services in segregated nursing facilities, not in the community which is the most integrated setting appropriate to their needs. This results in their unnecessary institutionalization or places them at serious risk of unnecessary institutionalization.

7. Defendants' failure to assure that Ms. Smith and others similarly situated can access community-based attendant care services through the Act 150 Program violates the integration mandates of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794.

8. Plaintiff Smith seeks declaratory and injunctive relief to allow her and others similarly situated to reside in the community rather than in institutions.

II. JURISDICTION AND VENUE

9. The Court has jurisdiction over these claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. §§ 1343(a)(3) and (4).

10. Plaintiff's claims for declaratory and injunctive relief are authorized under 28 U.S.C. §§ 2201-02 and Fed. R. Civ. P. 65. Plaintiff's causes of action for disability discrimination are authorized by 42 U.S.C. § 12133 and 29 U.S.C. § 794a.

11. Venue is proper under 28 U.S.C. § 1391(b). Defendants have offices located in this district, and Defendants' actions in denying Plaintiff's request for attendant care services took place in this district.

III. **PARTIES**

12. Plaintiff Paula Smith is a 56-year-old woman who resides in Philadelphia, Pennsylvania.

13. Defendant Department of Public Welfare (DPW) is the single-state agency that administers the Medical Assistance Program in Pennsylvania, 42 U.S.C. § 1396a(a)(5) and 55 Pa. Code § 101.1(e), which includes funding for nursing facilities, and has the responsibility to establish and implement the Act 150 Program, 62 Pa. Cons. Stat. § 3054(a). DPW also has responsibility to assure that its programs, including the Medical Assistance Program and Act 150 Program, are administered in accordance with federal law, including the ADA and RA.

14. Defendant Beverly Mackereth is Secretary of Public Welfare of the Commonwealth of Pennsylvania. Defendant Mackereth is responsible to oversee and administer DPW and its programs, including Medical Assistance and the Act 150 Program, and to assure that they comply with federal law. Defendant Mackereth is sued in her official capacity only for actions and omissions under color of state law.

IV. **CLASS ACTION**

15. Pursuant to Fed. R. Civ. P. 23(a) and (b)(2), Plaintiff Smith brings this action on behalf of herself and the following class of persons:

All Pennsylvanians who are or will be placed on the waiting list for the Act 150 Program.

16. The class is so numerous that joinder of all its members is impracticable. There are approximately 316 people who are on the Act 150 Program waiting list. Based on information and belief, many of these people either are institutionalized or are at serious risk of institutionalization because they cannot access community-based attendant care services. Joinder is also impracticable because class members lack the knowledge and financial means to maintain individual actions.

17. There are questions of law or fact that are common to Ms. Smith and putative class members, including whether: (a) Defendants violate the ADA and RA by offering attendant care services to them only in segregated, institutional settings rather than the community; (b) Defendants have decreased the number of persons served by the Act 150 Program despite a waiting list; (c) Defendants have refused to use available funding or to request additional funding to provide services to individuals on the Act 150 Program's waiting list or to use available funding to provide services to Plaintiff and class members; (d) Defendants' policies and practices – including decreasing the number of persons served by the Act 150 Program, maintaining a waiting list for the Act 150 Program, and refusing to

use available funding or seek additional funding to serve people on the waiting list – result in a lack of necessary community-based attendant care services so that individuals on the waiting list are unnecessarily institutionalized or at serious risk of unnecessary institutionalization; (e) Defendants fail to provide Ms. Smith and class members with meaningful choice of community-based long-term care alternatives to nursing facilities; and (f) Defendants have no plan, with timelines and benchmarks, to move people off of the Act 150 Program waiting list at a reasonable pace.

18. Ms. Smith's claims are typical of the claims of putative class members. Ms. Smith, like all class members, is eligible for attendant care services in the Act 150 Program and has been placed on a waiting list for those services.

19. Ms. Smith will fairly represent and adequately protect the interests of members of the class as a whole. Ms. Smith has no interests antagonistic to those of other class members.

20. By filing this action, Ms. Smith has displayed an interest in vindicating her rights, as well as the claims of others who are similarly situated.

21. The relief sought by Ms. Smith will inure to the benefit of members of the class generally.

22. Ms. Smith is represented by counsel who are skilled and knowledgeable about civil rights litigation, disability discrimination, practice and procedure in the federal courts, and the prosecution and management of class action litigation.

23. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief appropriate with respect to the class as a whole under Fed. R. Civ. P. 23(b)(2).

V. FACTUAL ALLEGATIONS

24. Plaintiff, Paula Smith, is a 56-year-old woman with multiple sclerosis.

25. As a result of her impairment, Ms. Smith uses a motorized wheelchair for ambulation.

26. After Ms. Smith graduated from Dobbins High School, she received an Associate Degree from the Berean Institute.

27. Ms. Smith worked for the Navy Quarter Master as a billing clerk for a number of years and then worked for 17 years as a data support clerk for the Philadelphia Water Department until 2006 when her multiple sclerosis became too debilitating for her to continue working.

28. Paula Smith is the grandmother of four grandchildren and the mother of four daughters, ages 32, 26 (twins) and 17. Only her youngest daughter, Faith C., currently resides at home.

29. In 2006, when she could no longer work due to her disability, Ms. Smith applied to receive attendant care services through the Attendant Care Waiver.

30. The Attendant Care Waiver is a Medical Assistance-funded Home and Community Based Services Waiver program administered by DPW's Office of Long Term Living (OLTL). To be eligible for this or other HCBS Waiver programs, an individual's income and resources cannot exceed limits established by the Medical Assistance Program.

31. Due to her disability, Ms. Smith needs attendant care services to provide her assistance with her daily living activities, including transferring to and from her wheelchair and bed, bathing, dressing, meal preparation, light housekeeping, laundry, and shopping.

32. DPW determined that Ms. Smith met the program and financial eligibility criteria for the Attendant Care Waiver and began receiving 35 hours a week of services in October, 2006 – 26 hours a week for basic attendant care services and 9 hours a week for ancillary services, such as shopping, laundry, light housekeeping, and changing linens.

33. Sometime in late 2007, Ms. Smith became eligible for Social Security Disability Insurance (SSDI) benefits and began receiving about \$1,100 a month in addition to her monthly pension of about \$1,200. Ms. Smith's increased income made her financially ineligible for the Attendant Care Waiver and resulted in her termination from that program.

34. Besides the HCBS Waiver programs, DPW's OLTL administers the Act 150 Program.

35. The Act 150 Program, created by the Attendant Care Services Act, 62 Pa. Cons. Stat. Ann. § 3051 *et seq.*, authorizes DPW to fund attendant care services for eligible individuals to provide them assistance with their activities of daily living and allow them to live independently in their own homes and communities rather than in institutions.

36. Unlike Medical Assistance programs, there are no income or asset requirements that limit eligibility for the Act 150 Program. Eligibility for the Act 150 Program is based solely on the applicant's need for attendant care services and the ability to direct his or her services. Individuals whose income exceeds 300 percent of the federal poverty level, however, are required to contribute toward the cost of their services.

37. Ms. Smith was transferred to the Act 150 program at the time she was terminated from the Attendant Care Waiver and she continued to

receive attendant care services for 35 hours a week. In 2008, she became unable to budget her limited income and to maintain her copayments for the Act 150 Program, and she had to leave the program.

38. Since late 2008, Plaintiff Smith has had to rely exclusively on her teenage daughter to assist her with many activities of daily living.

39. Ms. Smith toilets herself with the commode she keeps in her bedroom.

40. Although her right hand dexterity is poor, causing her to cut herself at times, Ms. Smith attempts to cook and prepare supper for her daughter and herself.

41. As a result of her multiple sclerosis and her impairments, Ms. Smith is presently fatigued all the time. When she tries to transfer on her own or even walk short distances, she falls sometimes and her daughter must lift her.

42. Ms. Smith wears incontinence pads because she is frequently incontinent and must stay wet and soiled until her daughter returns from school.

43. Ms. Smith's teenage daughter, Faith C., wakes at 5 a.m. to help her mother with her morning activities of daily living and then leaves for

school. After school she assists her mother with the remaining activities of daily living which are required.

44. Faith is a senior in high school. She plans to attend college, reside on campus, and not to continue to provide attendant care services for her mother.

45. Ms. Smith likes to visit Faith at her school, go to the movies and malls, have her grandchildren visit, and go out to restaurants.

46. Ms. Smith presently receives monthly SSDI benefits in the amount of \$1,332 and a monthly pension from the Philadelphia Water Department in the amount of \$1,220.44, which makes her financially ineligible for HCBS Waiver Programs.

47. In late 2009, Ms. Smith received skills training in Financial Management, Meals and Nutrition Skills, Health and Wellness from Liberty Resources, Inc., a non-profit organization that advocates for individuals with disabilities. She also participated in Accessing Public Transportation classes at Liberty Resources to learn how to access and ride public buses.

48. Ms. Smith applied for Act 150 attendant care services approximately two years ago with the assistance of Liberty Resources. On several occasions in the last two years, she has contacted Maximus, the

enrollment broker for the Act 150 Program, but has not received any indication when she will receive attendant care services.

49. Although Ms. Smith applied for and is eligible to receive community-based attendant care services through the Act 150 Program, she will not be able to secure those services because there is a waiting list for that program.

50. Since at least Fiscal Year 2007-08, DPW has decreased the number of persons who received attendant care services under the Act 150 Program. In Fiscal Year 2007-08, there were 2,479 budgeted slots available. In Fiscal Year 2011-12, there were budgeted slots for 2,277 individuals. In Fiscal Year 2012-13, there were budgeted slots to serve only 2,016 individuals.

51. As the number of budgeted slots for the Act 150 Program has decreased, the waiting list for the Program has grown. In December 2012, there were 294 individuals on the Act 150 Program waiting list. There currently are approximately 316 individuals on that waiting list.

52. DPW has stated that there is a two-year waiting list for the Act 150 Program.

53. DPW has stated that it will continue to serve individuals who currently participate in the Act 150 Program, but will not serve any additional individuals in the current Fiscal Year, 2013-14.

54. On information and belief, DPW knows or should know that there are individuals, like Ms. Smith, on the Act 150 Program waiting list who are at serious risk of institutionalization if they cannot access attendant care services in the community through that program.

55. DPW has not sought funding to expand the Act 150 Program and, to the contrary, has decreased funding for it despite the waiting list and the fact that individuals on that waiting list are unnecessarily institutionalized or at risk of unnecessary institutionalization.

56. On information and belief, the cost of funding attendant care services through the Act 150 Program to Ms. Smith and putative class members would be less than the cost to DPW's Medical Assistance program of providing them with attendant care services in nursing.

VI. CLAIMS

A. Count I - Violation of Title II of the ADA

57. Paragraphs 1 through 56 are incorporated by reference. This Count is brought solely against Defendant Mackereth in her official capacity for acts and omissions under color of state law.

58. Ms. Smith and putative class members are individuals with physical impairments that substantially limit one or more major life activities, including walking and caring for themselves. As such, they are persons with disabilities protected by the ADA. 42 U.S.C. § 12102(1)(A).

59. Ms. Smith and putative class members are eligible for the Act 150 Program and, as such, are qualified persons with disabilities under the ADA. 42 U.S.C. § 12131(2).

60. DPW, administered by Defendant Mackereth, is a public entity subject to the requirements of Title II of the ADA. 42 U.S.C. § 12131(1).

61. Defendant Mackereth violates Title II of the ADA, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d), by failing to offer Ms. Smith and putative class members attendant care services in the community, which is the most integrated setting appropriate to their needs, and, instead, offering them such services only in segregated institutions and by either subjecting them to unnecessary institutionalization or placing them at serious risk of unnecessary institutionalization.

62. Defendant Mackereth violates Title II of the ADA, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(b)(3), by using methods of administration that subject Ms. Smith and putative class members to discrimination through actual or serious risk of unnecessary segregation and

institutionalization, including, but not limited to: (a) failing to assess whether persons on the Act 150 Program waiting list are institutionalized or at serious risk of institutionalization; (b) failing to use available funding to provide services to Ms. Smith and putative class members through the Act 150 Program; (c) allowing the Act 150 Program to serve fewer and fewer people despite the increasing need for such services; and (d) failing to have a plan with specific and concrete benchmarks and timelines within which DPW will provide Ms. Smith and putative class members with community-based attendant care services through the Act 150 Program.

B. Count II - Violation of Section 504 of the RA

63. Paragraphs 1 through 62 are incorporated by reference. This Count is brought solely against Defendant DPW.

64. Ms. Smith and putative class members are individuals with physical impairments that substantially limit one or more major life activities, including walking and caring for themselves. As such, they are persons with disabilities protected by Section 504 of the RA. 29 U.S.C. § 705(20)(B).

65. Ms. Smith and putative class members are eligible for the Act 150 Program and, as such, are qualified persons with disabilities under Section 504 of the RA.

66. Defendant DPW is a recipient of Federal financial assistance and, as such, is subject to the requirements of Section 504 of the RA. 29 U.S.C. § 794(b).

67. Defendant DPW violates Section 504 of the RA, 29 U.S.C. § 794 and 28 C.F.R. § 41.51(d), by failing to offer Ms. Smith and putative class members attendant care services in the community, which is the most integrated setting appropriate to their needs, and, instead, offering them such services only in segregated institutions and by either subjecting them to unnecessary institutionalization or placing them at serious risk of unnecessary institutionalization.

68. Defendant DPW violates Section 504 of the RA, 29 U.S.C. § 794 and 28 C.F.R. § 41.51(b)(3), by using methods of administration that subject Ms. Smith and putative class members to discrimination through actual or serious risk of unnecessary segregation and institutionalization, including, but not limited to: (a) failing to assess whether persons on the Act 150 Program waiting list are institutionalized or at serious risk of institutionalization; (b) failing to use available funding to provide services to Ms. Smith and putative class members through the Act 150 Program; (c) allowing the Act 150 Program to serve fewer and fewer people despite the increasing need for such services; and (d) failing to have a plan with

specific and concrete benchmarks and timelines within which DPW will provide Ms. Smith and putative class members with community-based attendant care services through the Act 150 Program.

VI. RELIEF REQUESTED

69. Plaintiff Smith respectfully requests that the Court grant the following relief:

- a. exercise jurisdiction over this action;
- b. certify this case to proceed as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2);
- c. issue appropriate declaratory and injunctive relief; and
- d. grant such other relief as may be appropriate, including awarding reasonable attorneys' fees, litigation expenses, and costs pursuant to 42 U.S.C. § 12205 and 29 U.S.C. § 794a(b).

Respectfully submitted,

Dated: October 28, 2013

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CERTIFICATE OF SERVICE

I, Robin Resnick, hereby certify that the foregoing Second Amended Complaint was served on the following by first class mail postage prepaid and email on the following counsel on October 28, 2013:

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