

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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GERALD N., et al.,

Plaintiffs,

v.

Case No. 04-C-0193

MILWAUKEE COUNTY, WISCONSIN  
DEPARTMENT OF HEALTH AND FAMILY  
SERVICES, and HELENE NELSON

Defendants.

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**MILWAUKEE COUNTY'S ANSWER TO THIRD AMENDED COMPLAINT**

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Defendant Milwaukee County, by the Office of the Corporation Counsel, for an answer to the Third Amended Complaint, admits, denies, and shows to the court as follows:

1. Answering paragraph 1, admits that the allegations of that paragraph accurately characterize the plaintiffs claims, but denies that the Family Care program as administered by the defendants operates in violation of the cited statutes and constitutional provisions.

2. Answering paragraph 2, admits that the plaintiffs base their claims on the cited statutes, but denies that any act or omission of defendant Milwaukee County operates to deny the plaintiffs any rights under those statutes.

3. Admits.

4. Admits.

5. Answering paragraph 5, admits those allegations pertaining to plaintiff Gerald Nelson's residence, admits that was adjudicated incompetent and has a guardian, and lacks information sufficient to form a belief as to the truth of the other allegations in this paragraph.

6. Answering paragraph 6, admits those allegations pertaining to plaintiff Joan Bzdawka's residence, admits that she was adjudicated incompetent and has a guardian, and lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in this paragraph.

7. Answering paragraph 7, admits those allegations pertaining to plaintiff Sandra Ehrlichman's residence, admits that she was adjudicated incompetent and has a guardian, and lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in this paragraph.

8. Answering paragraph 8, admits those allegations pertaining to plaintiff Marilyn Berdikoff's resident, admits that she was adjudicated incompetent and has a guardian, and lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in this paragraph.

9. Answering paragraph 9, admits, upon information and belief, those allegations pertaining to plaintiff Lenore Czarnicki's residence, and lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in this paragraph.

10. Answering paragraph 10, admits, upon information and belief, those allegations pertaining to plaintiff John Gorton's residence, and lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in this paragraph.

11. Answering paragraph 11, admits, upon information and belief those allegations pertaining to plaintiff Classie Marcilis' residence and that he was adjudicated incompetent and

has a guardian, and lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in this paragraph.

12. Answering paragraph 12, admits that Costance Ewig's address is W4021 Takodah Drive in Fond du Lac Wisconsin, and affirmatively alleges upon information and belief that that Constance Ewig's stated intention is to remain a resident of Fond du Lac and that she is aggressively resisting any effort to move her back to Milwaukee County. Constance Ewig has not been adjudicated incompetent. Therefore, there is substantial doubt whether she is a resident of Milwaukee County.

13. Admits

14. Admits.

15. Admits.

16. Admits.

17. Admits.

18. Answering paragraph 17, admits that the trend in recent years has been to "de - institutionalize" disabled persons as alleged in this paragraph, but lacks knowledge or information sufficient to form a belief as the truth of the other allegations in this paragraph.

19. Admits.

20. Admits.

21. Admits.

22. Admits.

23. Admits.

24. Answering paragraph 24, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

25. Admits.

26. Admits.

27. Admits.

28. Admits.

29. Admits.

30. Admits.

31.-33. Answering paragraphs 31 through 34, admits that there is a conventional belief that that the “least restrictive environment” will be found in the smallest residential setting which is consistent with an individual’s needs, as alleged in these paragraphs, affirmatively alleges that the least restrictive, most integrated setting for an individual disabled person will be based on several factors besides the size of the individual’s residence, and lacks knowledge or information sufficient to form a belief as whether “most” disabled persons and/or their legal representatives prefer a non-institutional placement.

34. Answering paragraph 34, admits that Wisconsin counties have certain duties with respect to mentally ill and developmentally disabled persons under the cited statutes, and affirmatively alleges that those duties are subject to fiscal and other limitations as set forth in those statutes.

35. Answering paragraph 35, admits that persons receiving services for mental illness and developmental disabilities have certain “patient rights” as specified in Wis. Stat. s. 51.61.

36. Admits.

37. Admits.

38. Admits.

39. Answering paragraph 39, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

40. Answering paragraph 40, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

41. Answering paragraph 41, admits that DSD has allowed rate increases to certain service providers on some occasions, but denies that DSD has a policy or practice of allowing “cost of living” rate increases to service providers and lacks knowledge or information sufficient to form a belief as to truth of the allegations of this paragraph with respect to the policies or practices of other counties.

42. Admits.

43. Admits.

44. Admits.

45. Admits

46. –53. Answering paragraphs 46 through 53, which relate to the Medicaid waiver (“1915(b) waiver”) pursuant to which the Family Care program has been established, admits that the Family Care program was established and is administered under the terms of such a waiver, but lacks knowledge or information sufficient to form a belief with respect to the specific content (or absence of content) of that waiver as alleged in those paragraphs.

54. Answering paragraph 54, admits that DHFS solicited proposals, by means of an “RFP” process, from designated counties, to establish and administer Family Care programs, and offered contracts to them.

55. Answering paragraph 55, admits that Milwaukee County was under no legal obligation to submit a proposal to DHFS or to enter into a contract to establish and administer a

Family Care program, but affirmatively allege that Milwaukee County was motivated to do so by the fact that Family Care offered the prospect of eliminating the waiting lists which had previously existed and which resulted in approximately 2,200 persons not receiving services which might permit them to be supported in less restrictive, community-based placements.

56. Admits.

57. Answering paragraph 57, admits that DSD attempts to reach consensus clients and/or their legal agents with regard to their choices of residential and day program providers, but denies that those choices are unlimited and affirmatively alleges that those choices are generally limited to providers who are within the network of DSD -contracted providers and also may be limited by cost considerations in the case of providers deemed by DSD to be unreasonably expensive.

58. Denies.

59. Admits

60. Denies

61. Denies.

62. Denies

63. Answering paragraph 63, admits that providers have been permitted to request rate increases, and admits that rate increases have been allowed on some occasions, but denies that DSD has a policy or practice of allowing rate increases.

64. Admits.

65. Answering paragraph 65, admits that higher Family Care capitated rates would be consistent with the actual costs experienced by the MCDA CMO in serving eligible Family Care clients, but denies that the services provided by the MCDA CMO have been inadequate.

66. Answering paragraph 66, admits, upon information and belief, that a survey described in this paragraph was conducted, and affirmatively allege, upon information and belief, that the number of responders to the survey was very small and did not constitute a representative sample of the providers who were surveyed.

67. Denies.

68. Admits.

69. Admits.

70. Admits.

71. Admits.

72. Admits.

73. Admits.

74. Admits.

75. Answering paragraph 75, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

76. Answering paragraph 76, admits that HIL has attempted to obtain higher rates, despite the fact that HIL's rates are already substantially higher than almost every other similar provider.

77. Admits.

78. Admits.

79. Admits.

80. Admits.

81. Denies.

82. Denies.

83. Admits.

84. Admits.

85. Admits.

86. Admits.

87. Admits.

88. Admits.

89. Answering paragraph 89, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

90. Answering paragraph 90, admits that HIL has attempted to obtain higher rates, despite the fact that HIL's rates are already substantially higher than almost every other similar provider, and admits that MCDA did not approve a cost of living rate increase.

91. Admits.

92. Denies.

93. Denies.

94. Admits.

95. Admits.

96. Admits.

97. Admits.

98. Admits.

99. Answering paragraph 99, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

100. Answering paragraph 100, admits that HIL has attempted to obtain higher rates, despite the fact that HIL's rates are already substantially higher than almost every other similar provider, and admits that MCDA did not approve a cost of living rate increase.

101. Admits

102. Denies.

103. Denies.

104. Admits.

105. Admits.

106. Admits.

107. Admits.

108. Answering paragraph 108, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

109. Answering paragraph 109, admits that HIL has attempted to obtain higher rates, despite the fact that HIL's rates are already substantially higher than almost every other similar provider, and admits that MCDA has not approved a cost of living rate increase.

110. Admits.

111. Denies.

112. Denies.

113. Admits.

113. Admits.

114. Admits.

115. Admits.

116. Admits, upon information and belief.

117. Answering paragraph 117, admits that Senior Residential Care requested a rate increase for 2003, and admits that MCDA declined to grant a rate increase.

118. Answering paragraph 118, upon information and belief denies that MCDA reduced rates paid to Senior Residential Care.

119. Answering paragraph 119, admits upon information and belief that the owner of Senior Residential Care has made such statements in at least one public forum, but lacks knowledge or information sufficient to form a belief as to the truth of those statements.

120. Answering paragraph 120, lacks knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

121. Denies.

122. Denies.

123. Admits.

124. Admits.

125. Admits.

126. Answering paragraph 126, lacks knowledge or information sufficient to form a belief as to truth of the allegations in this paragraph.

127. Answering paragraph 127, admits upon information and belief that the owner of Senior Residential Care has made such statements in at least one public forum, but lacks knowledge or information sufficient to form a belief as to the truth of those statements.

128. Answering paragraph 128, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

129. Denies.

130. Denies.

131. Admits.

132. Admits.

133. Answering paragraph 133, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

134. Denies, and affirmatively alleges that the current daily rate paid to Dungarvin is \$112.82

135. Answering paragraph 135, admits that the Family Care Program has undertaken or intends to undertake a re assessment of Classie Marcillis to ensure that he has a plan of care which is appropriate to his needs and which maximizes his functioning, but denies that the Family Care program has implemented any reduction in authorized services or funding for Mr. Marcilis and denies that the Family Care program has any intention to move Classie Marcillis to a more restrictive setting for reasons of cost or any other reason.

136. Answering paragraph 133, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

137. Admits, upon information and belief.

138. Denies.

139. Denies.

140. Admits.

141. Admits upon information and belief.

142. Admits.

143. Admits.

144. Answering paragraph 144, admits that Constance Ewig's CBRF placement has been successful and more satisfactory to her than her previous placements because a CBRF is a more

appropriate placement for an individual with her needs, and denies that this satisfaction is necessarily attributable to her placement in Takodah House.

145. Answering paragraph 145, admits that Constance Ewig has express a preference to remain in her current placement.

146. Answering paragraph 146, admits that MCDA stated its intention not to fund CBRF services at Takotah House and to provide Constance Ewig an appropriate community placement in Milwaukee County within the network of CBRF providers under contract with the Family Care Program and which the Family Care Program is reasonably capable of supervising, affirmatively alleges that, in addition to those reasons, MCDA has well founded concerns about the quality of care and the safety of residents in Takodah House, and further affirmatively alleges that Constance Ewig is not subject to guardianship and protective placement and may therefore reside wherever she chooses.

147. Admits.

148. Answering paragraph 148, admits that the ALJ did not order MCDA to contract with Lifeline Services and Takodah House but denies that the ALJ upheld “the decision to move [Constance Ewig] to another CBRF” because there was no such decision to review.

149. Denies, and affirmatively alleges that the state court action is proceeding on an expedited schedule and that the order of the ALJ has been stayed pending disposition of the state court action.

150. Denies.

151. Denies.

152. Admits.

153. Answering paragraph 153, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

154. Answering paragraph 154, admits that Bert Sie gel is multiply disabled and requires substantial support and services to remain in a community placement, which support and services the Family Care program is currently funding or providing, but denies that he requires 24 hour per day “care”.

155. Answering paragraph 155, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

156. Admits.

157. Admits.

158. Denies. MCDA did undertake an reevaluation of Bert Siegel’s care plan of care, which yielded a recommendation to reduce authorization for certain services. However, those reductions were not implemented and were ultimately rescinded following Bert Siegel’s subsequent hospitalization. Bert Seigel’s care plan will probably be reevaluated aga in based upon his post-hospitalization condition and needs. Currently Bert Seigel’s sister is paid for 42 hours of supportive home care per week at the rate of \$7.30 per hour plus \$25 per night (generating total annual caregiver income of approximately \$27,264). Additional Family Care services for Bert Seigel include two visits per day, seven days per week, by a home health aid, purchase by Family Care of an electric wheel chair with specialized adaptive seating and purchase by Family Care of a specialized bariatric bed with airflow mattress.

159. Answering paragraph 159, lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

160. Denies.

161. Denies.

162. Admits.

163. Answering paragraph 163, admits the truth of those allegations which describe Kathleen Johnson's medical conditions but deny that she "requires around -the-clock assistance"

164. Answering paragraph 164, admits that in February, 2004, Kathleen Johnson was authorized for 38.5 hours per week of supportive home care and 28 hours per week of personal care services to be provided by her daughter, but affirmatively alleges that this level of care has not been authorized continuously nor is it necessarily representative of the level of authorized care in Kathleen Johnson's case. Kathleen Johnson's case has been subject to ongoing reevaluation and multiple grievances and appeals.

165. Admits

166. Answering paragraph 166, admits that Kathleen Johnson's plan of care has been reevaluated from time to time but not necessarily as a consequence of the "March 1, 2004 memorandum and guidelines". Currently, Kathleen Johnson's daughter is not compensated for supportive home care on the basis of an hourly authorization. Rather, she is being compensated at a daily "live-in" rate of \$74.55 per day, seven days per week (approximately \$27,210 per year).

167. Answering paragraph 167, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

168. Denies

169. Denies.

170. Answering paragraph 170, admits that the plaintiffs seek to represent a class.

171. Answering paragraph 171, admits that approximately 5,200 Milwaukee County residents are currently enrolled in Family Care, and lacks knowledge or information sufficient to form a belief as to how many other Milwaukee County residents, if any, would meet the eligibility standards for Family Care.

172. Admits.

173. Admits.

174. Admits. In approximately 250 to 300 cases, authorized funding for family-provided supportive home care has been reduced.

175. Admits.

176. Admits.

177. Answering paragraph 177, admits that the number of persons potentially affected by Family Care procedures is large, but denies that those persons constitute a properly certifiable class.

178. Admits.

179. Admits.

180. Denies.

181. Denies.

182. Answering paragraph 161, incorporates by reference the responses to paragraphs 1 through 181, as hereinabove set forth.

183. Admits.

184. Admits.

185. Admits

186. Answering paragraph 186, denies that the plaintiffs are served in a manner which constitutes actionable “discrimination” under the ADA, and therefore denies that additional “reasonable accommodation” is necessary, and affirmatively alleges that the Family Care program cannot be operated so as to accommodate all the stated desires and remedy all the complaints of the plaintiffs without a substantial modification to the nature of the program which would be unduly burdensome.

187. Denies.

188. Answering paragraph 166, incorporates by reference the responses to paragraphs 1 through 187, as hereinabove set forth.

189. Answering paragraph 189, admits that this paragraph contains generally accurate excerpts and/or paraphrases of portions of the regulations cited in this paragraph.

190. Answering paragraph 190, admits that this paragraph contains generally accurate excerpts and/or paraphrases of portions of the regulations cited in this paragraph.

191. Answering paragraph 191, denies that the plaintiffs are served in a manner which constitutes actionable “discrimination” under the ADA, and therefore denies that additional “reasonable accommodation” is necessary, and affirmatively alleges that the Family Care program cannot be operated so as to accommodate all the stated desires and remedy all the complaints of the plaintiffs without a substantial modification to the nature of the program which would be unduly burdensome.

192. Denies.

193. Answering paragraph 193, incorporates by reference the responses to paragraphs 1 through 192, as hereinabove set forth.

194. Admits.

195. Answering paragraph 195, denies that the services being offered to the plaintiffs are not consistent with the most integrated settings reasonably appropriate to their needs, and therefore denies that additional “reasonable accommodation” is necessary, and affirmatively alleges that the Family Care program cannot be operated so as to accommodate all the stated desires and remedy all the complaints of the plaintiffs without a substantial modification to the nature of the program which would be unduly burdensome.

196. Answering paragraph 196, admits that the defendants are subject to the “integration mandate” of the ADA, but affirmatively alleges that defendants’ obligations under the integration mandate are limited to those services which can be reasonably accommodated, taking into account the resources available to the defendants and the needs of other disabled individuals.

197. Denies.

198. Answering paragraph 198, incorporates by reference the responses to paragraphs 1 through 197, as hereinabove set forth.

199. Admits.

200. Admits.

201. Admits.

202. Answering paragraph 202, denies that the plaintiffs are served in a manner which constitutes actionable discrimination under the Rehabilitation Act, and therefore denies that additional “reasonable accommodation” is necessary, and affirmatively alleges that the Family Care program cannot be operated so as to accommodate all the stated desires and remedy all the complaints of the plaintiffs without a substantial modification to the nature of the program which would be unduly burdensome.

203. Denies.

204. Answering paragraph 204, incorporates by reference the responses to paragraphs 1 through 203, as hereinabove set forth.

205. Admits.

206. Answering paragraph 206, denies that the plaintiffs are served in a manner which constitutes actionable discrimination under the Rehabilitation Act, and therefore denies that additional “reasonable accommodation” is necessary, and affirmatively alleges that the Family Care program cannot be operated so as to accommodate all the stated desires and remedy all the complaints of the plaintiffs without a substantial modification to the nature of the program which would be unduly burdensome.

207. Denies.

208. Answering paragraph 208, incorporates by reference the responses to paragraphs 1 through 207, as hereinabove set forth.

209. Answering paragraph 209, admits that the defendants are subject to the “integration mandate” of the ADA, but affirmatively alleges that defendants’ obligations under the integration mandate are limited to those services which can be reasonably accommodated, taking into account the resources available to the defendants and the needs of other disabled individuals.

210. Answering paragraph 210, denies that the services being offered to the plaintiffs are not consistent with the most integrated settings reasonably appropriate to their needs, and therefore denies that additional “reasonable accommodation” is necessary, and affirmatively alleges that the Family Care program cannot be operated so as to accommodate all the stated desires and remedy all the complaints of the plaintiffs without a substantial modification to the nature of the program which would be unduly burdensome.

211. Denies.

212. Answering paragraph 212, incorporates by reference the responses to paragraphs 1 through 211, as hereinabove set forth.

213. Admits.

214. Denies.

215. Answering paragraph 215, affirmatively alleges that the paragraph consists of legal conclusions which summarize the views of plaintiffs' counsel with respect to a complex area of constitutional jurisprudence, and therefore defendant Milwaukee County cannot admit or deny the allegations of that paragraph, and denies the apparent implication of those allegations that residents of a community based residential facility have a constitutionally protected interest in the integrity of their relationship with each other or with their caregivers that is any way analogous to the relationships of a biological family, and denies that residents of a community based residential facility enjoy any heightened First Amendment rights which operate to guarantee perpetual funding of a particular desired placement.

216. Answering paragraph 196, affirmatively alleges that the paragraph consists of legal conclusions which summarize the views of plaintiffs' counsel with respect to a complex area of constitutional jurisprudence, and therefore defendant Milwaukee County cannot admit or deny the allegations of that paragraph, and denies that the plaintiffs' status as disabled persons gives rise to any heightened "liberty interest" which supports their claims in this action.

217. Denies.

218. Denies.

219. Denies.

220. Answering paragraph 220, incorporates the responses to paragraphs 1 through 219, as hereinabove set forth.

221. Admits

222. Answering paragraph 222, admits that the provision of 42 U.S.C. s. 1396 quoted in this paragraph identifies one of the stated purposes of the federal Title XIX appropriation.

223. Admits.

224. Admits.

225. Answering paragraph 225, lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

226. Denies.

227. Answering paragraph 226, incorporates by reference the responses to paragraphs 1 through 226, as hereinabove set forth.

228. Answering paragraph 228, lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

229. Denies.

230. Denies

231. Answering paragraph 231, lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

232. Denies.

233. Denies.

234. Denies.

**AFFIRMATIVE DEFENSES**

206. Defendant Milwaukee County realleges and incorporates as through fully set forth herein paragraphs 1 through 105 of this Answer.

207. The Third Amended Complaint fails to state a claim upon which relief can be granted.

208. The plaintiffs have failed to comply with the notice and claim procedures of Wis. Stat. s. 893.80, a condition precedent to invoking the pendant jurisdiction of the Court when alleging violation of state law of common law.

209. This action is frivolous.

WHEREFORE Defendant demands judgment dismissing the Third Amended Complaint upon its merits, and costs and reasonable attorney fees according to law.

Dated at Milwaukee, Wisconsin this 10<sup>th</sup> day of September, 2004

**OFFICE OF CORPORATION COUNSEL**

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Mary Ellen Poulos  
Principal Assistant Corporation Counsel  
State Bar No. 01014190  
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