

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GERALD NELSON, JOAN BZDAWKA,
SANDRA EHRLICHMAN, MARILYN
BERDIKOFF, LENORE CZARNECKI,
JOHN GORTON, CLASSIE MARCILIS,
CONSTANCE EWIG, BERT SIEGEL
and KATHLEEN JOHNSON, each on
their own behalf and on behalf of a
class of persons similarly situated,

Plaintiffs,

v.

Case

No. 04-C-0193

MILWAUKEE COUNTY, WISCONSIN
DEPARTMENT OF HEALTH AND FAMILY
SERVICES, and HELENE NELSON, in her
official capacity as Secretary of DHFS,

Defendants

THIRD AMENDED COMPLAINT

The plaintiffs, by their counsel, Robert Theine Pledl, hereby state the following as their third amended complaint:

INTRODUCTION

(1) This action is brought on behalf of Milwaukee County residents with disabilities that are now or will in the future receive services from the Family Care program which is operated and/or overseen by Milwaukee County, the Wisconsin Department of Health and Family Services and DHS Secretary Helene Nelson. The plaintiffs allege that various aspects of the Family Care program violate the Americans

with Disabilities Act, §504 of the Rehabilitation Act, the United States Constitution, the Medicaid Act and the Wisconsin Patients Bill of Rights.

JURISDICTION AND VENUE

(2) This action is brought under the Americans with Disabilities Act, 42 U.S.C. §12101, et seq.; §504 of the Rehabilitation Act, 29 U.S.C. §794; 42 U.S.C. §1983 and 42 U.S.C. §1396a. There are also supplemental state law claims.

(3) This Court has jurisdiction of this action pursuant to 29 U.S.C. §794, 42 U.S.C. §12132, 28 U.S.C. §1331, 28 U.S.C. §1343 and 28 U.S.C. §1367.

(4) Venue in this district is proper pursuant to 28 U.S.C. §1391.

PARTIES

(5) Plaintiff Gerald Nelson is a resident of Milwaukee County. His address is 6275 South 106th Street, Hales Corners, Wisconsin. He is incompetent and has a legal guardian. The guardian has retained the undersigned to serve as his counsel. He appears here through his next friend and guardian, Jane Prentice.

(6) Plaintiff Joan Bzdawka is a resident of Milwaukee County. Her address is 4570 South 117th Street, Greenfield, Wisconsin. She is incompetent and has a legal guardian. The guardian has retained the undersigned to serve as her counsel. She appears here through her next friend and guardian, Richard Miller.

(7) Plaintiff Sandra Ehrlichman is a resident of Milwaukee County. Her address is 4570 South 117th Street, Greenfield, Wisconsin. She is incompetent and has a legal guardian. The guardian has retained the undersigned to serve as her counsel. She appears here through her next friend and guardian, Nancy Steeves.

(8) Plaintiff Marilyn Berdikoff is a resident of Milwaukee County. Her address is 10136 West Vienna Street, Wauwatosa, Wisconsin. She is incompetent and has a legal guardian. The guardian has retained the undersigned to serve as her counsel. She appears here through her next friend and guardian, Lois Degner.

(9) Plaintiff Lenore Czarnecki is a resident of Milwaukee County. Her address is 3620 Denton, St. Francis, Wisconsin. She has significant mental disabilities that affect her ability to make decisions. Her daughter is her agent under a power of attorney and has retained the undersigned to serve as her counsel. She appears here through her next friend and agent, Carolyn Cetnarowski.

(10) Plaintiff John Gorton is a resident of Milwaukee County. His address is 7550 South 13th Street, Oak Creek, Wisconsin. He has significant disabilities that affect his ability to make decisions. His niece is his agent under a power of attorney and has retained the undersigned to serve as his counsel. He appears here through his next friend and agent, Deborah Brunk.

(11) Plaintiff Classie Marcilis is a resident of Milwaukee County. His address is 7810 West Waterford Street, Milwaukee, Wisconsin. He is incompetent and has a legal guardian. The guardian has retained the undersigned to serve as his counsel. He appears here through his next friend and guardian, Dorothy Reynolds.

(12) Plaintiff Constance Ewig is a resident of Milwaukee County. Her address is W5021 Takodah Drive, Fond du Lac, Wisconsin.

(13) Plaintiff Bert Siegel is a resident of Milwaukee County. His address is 5609 West Morgan, Milwaukee, Wisconsin.

(14) Plaintiff Kathleen Johnson is a resident of Milwaukee County. Her address is 3534 North 13th Street, Milwaukee, Wisconsin.

(15) Defendant Milwaukee County is a municipal corporation with its principal place of business located at 901 North 9th Street, City and County of Milwaukee, Wisconsin.

(16) Defendant Wisconsin Department of Health and Family Services is an administrative agency of the State of Wisconsin. Its headquarters is located at 1 West Wilson Street, Madison, Wisconsin.

(17) Defendant Helene Nelson is Secretary of the Wisconsin Department of Health and Family Services and is sued in her official capacity. She is responsible for the overall operation of DHFS. Secretary Nelson's address is 1 West Wilson Street, Madison, Wisconsin.

FACTUAL ALLEGATIONS

Services for Persons with Disabilities

(18) Historically, most persons with disabilities were placed in nursing homes and other large custodial institutions if their families were not able to provide suitable care. Most of this institutional care is and has been funded through the federal Medicaid program. The reliance on institutions to provide residential care has changed over time and many persons with disabilities now reside in the community.

(19) Persons with disabilities live in a variety of settings and utilize a variety of services. Many live independently, are employed and otherwise participate in community life in ways that are indistinguishable from persons without any disabilities.

(20) Many persons with disabilities who require assistance receive care provided in their own home by outside caregivers.

(21) Certain persons with disabilities such as developmental disabilities, mental illness, brain injury, Alzheimers, physical disabilities, etc. are unable to live independently in a single-family home or an apartment. Many of the persons with disabilities who are unable to live independently reside with their families. Many adults with disabilities acquired before birth or early in life continue to live with their aging parents until the death or illness of the caregivers makes that impossible.

(22) Persons with disabilities may also receive care in various types of residential facilities that are licensed or certified pursuant to Wisconsin statutes and regulations promulgated by the Wisconsin Department of Health and Family Services.

(23) Many persons with disabilities who receive residential services also attend day programs. These are programs that provide educational services, assistance with and training in activities of daily living and recreational activities. Day programs frequently include opportunities for participants to engage in community activities ranging from shopping to attending sports events and other recreational activities. A day program may also include a vocational component.

(24) In Wisconsin and nationally, the trend in disability service delivery is towards greater consumer choice and more consumer-directed services. Persons with disabilities who can make their own decisions are permitted to choose their own providers and to make their own decisions about treatment and care. Guardians and agents under a power of attorney make these same decisions on behalf of persons with disabilities who cannot do so because of the extent of their disabilities.

(25) Individuals with disabilities and/or their guardians or agents choose particular day programs and places to live for a variety of reasons. The reasons include the availability of specific disability services, appearance and layout, personal preferences regarding staff and other participants or residents, access to public or specialized transportation, proximity to churches, proximity to stores, proximity to recreational facilities, accessibility to work opportunities or vocational services, neighborhood characteristics, and closeness to friends and relatives.

(26) A great deal of care goes into choosing a residential facility or a day program. Individuals may be referred to a particular provider by a County caseworker based on the general characteristics of the person and the facility or program, but that would only be the beginning of the process. Many individuals/guardians/agents choose a facility or program based on its proximity to family, friends, recreational activities, church and a variety of other community activities. Provider staff, the guardian/agent and the individual himself or herself also try to determine in advance whether the client will get along well with both staff and other residents and participants in terms of personalities and similar interests. The inability of certain residents to get along with each other is likely to lead to another move. That is the reason that so much attention is paid to choosing compatible residents, participants and staff. Certain individuals also have special or unusual service needs that could require a specialized service provider. All of these factors could affect the choice of a particular facility or program.

(27) Many Individuals with disabilities develop attachments to the other clients and to particular staff members in a residential facility and/or day program.

(28) Many persons with disabilities have difficulty learning and adapting to new situations. This may cause behavioral problems when moving from an institution to a community setting, from a community setting to an institution, or from one community setting to another as the individual learns the routine and expectations of the new setting.

(29) If the services being provided to a person with disabilities are not sufficient to meet their needs, there is an increased probability that the person will have to be moved to another setting and an increased probability that they will be transferred to a more restrictive facility or institution.

(30) Given the complexity of locating and arranging suitable services, obtaining the approval of the person and/or guardian/agent, getting through the initial period of adjustment and the development of relationships by the client, there is a general preference among families, guardians, agents, service providers, County agencies and the clients themselves for remaining in a particular residential setting and day program.

(31) Living in one's own home with services is generally more integrated and less restrictive than living in a facility such as an adult family home, community-based residential facility or nursing home, unless an individual has certain needs that cannot be met in their own home.

(32) Smaller residential settings, 3 or 4-person Adult Family Homes (AFHs) for example, are generally more integrated and less restrictive than larger facilities such as a 20-person community-based residential facilities (CBRFs), unless an individual has certain needs that cannot be met in the smaller setting.

(33) The most restrictive form of residential placement is a nursing home or other institution. Most persons with disabilities and/or their guardians/agents prefer to live in the community and receive the services described above outside of an institution if they are able to do so.

(34) Wis. Stat., §§46.215, 51.42 and 51.437 require each county in Wisconsin to provide specified services to persons with disabilities.

(35) Wis. Stat., §51.61 requires the State and Wisconsin counties, as well as other persons and entities providing services to persons with disabilities, to observe certain rights that are guaranteed to persons with mental illness, developmental disabilities, alcoholism or drug dependency.

(36) Wis. Stat., §§55.06 and 55.07 require prescribe certain rights and procedures that are applicable to persons with disabilities that are determined by a Wisconsin Circuit Court to meet the criteria for protective placement.

Funding for Disability Services

(37) Many persons with disabilities who require residential facilities, day programming or institutional care are not financially able to pay for the services and depend on public funding sources.

(38) One source of funding for disability services in Milwaukee County and in other Wisconsin counties are the Medicaid Waiver programs such as the Community Options Program (COP), Community Integration Program (CIP) and Brain Injury Waiver (BIW). These programs pay for specific services in each state pursuant to various laws and regulations and various agreements with the United States Department of Health

and Human Services. Waiver programs involve an approximate 60/40 mix of Federal and non-Federal funds. The precise percentage is adjusted from time to time.

(39) If the service needs of a particular person served by one of the Waiver programs increase, the service provider will usually negotiate a higher rate with the funding source for continuing to serve that person. Wisconsin counties, including Milwaukee County, have historically granted rate increases in situations of this type.

(40) Even if a particular person's needs do not increase, the cost of providing residential, day programming and other disability services is subject to significant inflation. The largest expenses of providing disability services are salary and insurance costs. The costs of health care and health insurance have increased significantly in recent years and this has caused providers to seek increases from their funding sources. There have also been huge increases in liability insurance across the entire residential care industry.

(41) While the increases have usually been less than the amounts requested, disability service providers have been able to obtain cost of living rate increases under the Waiver programs in all Wisconsin counties and have been able to obtain increases from the Disability Services Division of Milwaukee County.

(42) Historically, the Milwaukee County Adult Services Division (now known as Disability Services Division) had provided services to persons with developmental disabilities and physical disabilities regardless of age. Over time, the responsibility for serving persons with these disabilities who were 60 and over was transferred to the Milwaukee County Department of Aging (MCDA) which had already been serving

elderly persons without these specific disabilities. Prior to Family Care, MCDA funded many of these services using Waiver money.

Family Care

(43) The Wisconsin Family Care program was established by Wis. Stat., §§46.286 - 46.2895 and Wis. Stat., §§46.2805 - 46.285 set forth statutory definitions, specify the powers and duties of DHFS and the DHFS Secretary, and govern care management organizations and resource centers. Wis. Stat., § 46.281 sets out the powers and duties of DHFS and the DHFS Secretary relative to Family Care.

(44) Wis. Stat., §46.281(1)(f) required DHFS to "[p]rescribe and implement a per person monthly rate structure for costs of the family care benefit."

(45) Wis. Stat., §46.281(1)(c) required DHFS to negotiate a new agreement with the United States Department of Health and Human Services (DHHS) to establish a capitated system.

(46) DHFS submitted a proposal to DHHS for a §1915(b) Capitated Waiver program (1915(b) waiver) for Milwaukee County Family Care regarding the waiver that is currently in effect for Milwaukee County.

(47) The Milwaukee County 1915(b) waiver application requested that DHHS waive the application of 42 U.S.C. §1396a(a)1 regarding "statewide", 42 U.S.C. §1396a(a)(10)(b) regarding "comparability of services", and 42 U.S.C. §1396a(a)23 regarding "freedom of choice". DHHS did subsequently approve the waiver of these provisions.

(48) The Milwaukee County 1915(b) waiver application did not request the waiver of any provisions of the Federal Medicaid Act other than those described in

paragraph 47. All of the other applicable provisions of the Federal Medicaid Act remain in full force and effect with regard to the portions of the Family Care program in Milwaukee County covered by the 1915(b) waiver at present and at all relevant times.

(49) DHFS also submitted a proposal to DHHS for two §1915(b) Capitalized Waiver programs regarding the waivers that are currently in effect for Milwaukee County to serve 60 and over persons with disabilities (1915(c) disability waiver), and for persons with mental retardation/developmental disabilities (1915(c) MR/DD waiver).

(50) The 1915(c) disability waiver application requested that DHHS waive the application of 42 U.S.C. §1396a(a)1 regarding "statewideness", 42 U.S.C. §1396a(a)(10)(b) regarding "comparability of services", and 42 U.S.C. §1396a(a)(10)(C)(i)(III) regarding "community deeming rules". DHHS did subsequently approve the waiver of these provisions.

(51) The 1915(c) disability waiver application did not request the waiver of any provisions of the Federal Medicaid Act other than those described in paragraph 50. All of the other applicable provisions of the Federal Medicaid Act remain in full force and effect with regard to the portions of the Family Care program covered by the 1915(c) disability waiver at present and at all relevant times.

(52) The 1915(c) MR/DD waiver application requested that DHHS waive the application of 42 U.S.C. §1396a(a)1 regarding "statewideness", 42 U.S.C. §1396a(a)(10)(b) regarding "comparability of services", and 42 U.S.C. §1396a(a)(10)(C)(i)(III) regarding "community deeming rules". DHHS did subsequently approve the waiver of these provisions.

(53) The 1915(c) MR/DD waiver application did not request the waiver of any provisions of the Federal Medicaid Act other than those described in paragraph 52. All of the other applicable provisions of the Federal Medicaid Act remain in full force and effect with regard to the portions of the Family Care program covered by the 1915(c) MR/DD waiver at present and at all relevant times.

(54) DHFS offered contracts to various Wisconsin counties to begin the operation of Family Care.

(55) Milwaukee County DSD continues to utilize the Waiver programs for persons under 60, but Milwaukee County decided to sign a contract with DHFS to place all eligible persons 60 and over into Family Care. It was under no obligation to do so.

(56) In 2000, MCDA began to operate its disability services under the umbrella of Family Care. Under Family Care MCDA receives a specific monthly payment from the State for each eligible person enrolled in Family Care. MCDA then contracts with various agencies and service providers who deliver services to a specific person.

(57) Pursuant to Waiver program policies and procedures established by DSD and DHFS, Milwaukee County residents with disabilities under the age of 60, or their guardians or agents if appropriate, are generally permitted to select and approve specific day programs and residential settings.

(58) Pursuant to Family Care policies and procedures established by MCDA and DHFS, the ability of Milwaukee County residents 60 and over, or their guardians or agents if appropriate, to select and approve specific day programs and residential settings is substantially limited by MCDA's practice of placing individuals based on cost and administrative convenience rather than client choice.

(59) Pursuant to Waiver program policies and procedures established by DSD and DHFS, persons with disabilities are evaluated for potential services using procedures that focus on the capacity of the individual for independent living. This results in many persons with significant disabilities who do receive funding for community services instead of institutional care.

(60) Pursuant to Family Care policies and procedures established by MCDA and DHFS, persons with disabilities are evaluated for potential services using procedures that focus more narrowly on the medical needs of the individual. The result is that many fewer persons with significant disabilities receive funding for community services. The evaluation process also has a negative effect on the right to obtain appropriate placement and services in the least restrictive setting in *Watts* review proceedings and proceedings in general held under Wis. Stat., Chapter 55 for persons in Family Care.

(61) Pursuant to Family Care policies and procedures established by MCDA and DHFS, Family Care does not automatically enroll eligible individuals who are in nursing homes or other institutions, or who are in the process of entering nursing homes or other institutions.

(62) Pursuant to Family Care policies and procedures established by MCDA and DHFS, numerous persons in nursing homes who are eligible for Family Care and who could reside in the community if evaluated using appropriate professional standards and judgment have not been enrolled in Family Care and therefore remain institutionalized.

(63) Pursuant to Waiver program policies and procedures established by DSD and DHFS, day and residential providers have been granted rate increases from DSD for serving Milwaukee County residents with disabilities under the age of 60.

(64) Under Family Care policies and procedures established by MCDA and DHFS, day and residential providers have not been granted rate increases from MCDA for serving Milwaukee County residents disabilities 60 years of age and older.

(65) The capitated rate set by DHF S is insufficient to provide appropriate services to persons with disabilities in Milwaukee County.

(66) A mail survey of Family Care pr oviders around the State conducted in January and February of 2004 by Dr. Gerald Kallas of Senior Residential Care of America, Inc. showed that 80% of the respondents said that they were being paid below their cost of care as dete rmined by an audit. Only 8.5% of the respondents said they were being paid equal to their cost of care and 5.7% said they were being paid above their cost of care.

(67) The failure to provide reasonable ra tes and cost of living rate increases has and will cause service providers to either cut the level of services or refuse to serve Milwaukee County residents wit h disabilities with the result that they will b e forced to move from their homes and to lose other disa bility services. This will cause substantial numbers of these residents to be admitted to in stitutions such as nursing homes. Many Milwaukee County residents who are already in nursing homes and other institutions will remain there if service providers are unwilling to serve them under the Family Care rate structure.

Gerald Nelson

(68) Gerald Nelson has a developmental disability and a physical disability. He is 71 years old.

(69) Mr. Nelson resided in his family's home until his mother became too ill to care for him in November of 1998. Milwaukee County then placed him temporarily in a community-based residential facility (CBRF) operated by Homes for Independent Living located in Menomonee Falls.

(70) Shortly before his mother's death in January of 1999, Milwaukee County placed Mr. Nelson at Whitnall House, another CBRF operated by HIL in Hales Corners. He also began to receive day program services at Paragon Industries which is associated with HIL.

(71) Mr. Nelson's guardian approved of his admission to Whitnall House and the Paragon day program.

(72) It is the guardian's continued desire that Mr. Nelson remain at Whitnall House and Paragon.

(73) Milwaukee County filed Watts reports with the Milwaukee County Probate Court stating that Mr. Nelson's placement at Whitnall House was appropriate to his needs and recommending that his placement there continue.

(74) Mr. Nelson receives funding for his disability services from Family Care through Milwaukee County Department on Aging (MCDA).

(75) The rates that MCDA have approved for HIL to serve Mr. Nelson at Whitnall House and Paragon are lower than the rates being paid to HIL by Milwaukee County DSD and by other Wisconsin counties for serving individuals with similar needs.

(76) HIL attempted over the course of several years to negotiate with MCDA to obtain a higher daily rate for providing services to Mr. Nelson and other clients.

(77) MCDA has refused to approve a cost of living rate increase for Gerald Nelson or any other MCDA client.

(78) HIL gave notice that it would terminate its contract with MCDA effective April 1, 2004. HIL later signed an agreement to continue serving Mr. Nelson at the existing rates.

(79) HIL will continue to contract with DSD to serve Milwaukee County residents with disabilities under the age of 60. HIL has notified MCDA that it would prefer to continue serving Mr. Nelson and all other MCDA clients and that the funding dispute is the only reason for the contract termination.

(80) MCDA intends to move Mr. Nelson to a different CBRF and day program over the guardian's objection and has stated that it will seek the guardian's removal if the disagreement continues, however, pursuant to a stipulation entered in this action, MCDA has agreed that it will not move Mr. Nelson over the guardian's objection pending resolution of the issues in this action or further order of the Court.

(81) It would be very traumatic and harmful to Gerald Nelson to be forcibly removed from his home.

(82) Due to the severity of Gerald Nelson's disabilities, it is likely that moving him would worsen his condition and lead to placement in a nursing home or similar institution.

Joan Bzdawka

(83) Joan Bzdawka has a developmental disability. She is 68 years old.

(84) Ms. Bzdawka resided in the community with her family until 1955. She was then placed in the Milwaukee County Mental Health Complex until 1968 when she was transferred to the Central Wisconsin Center for the Developmentally Disabled, another large institution.

(85) Ms. Bzdawka was transferred from Central Center in 1995 to a succession of CBRFs in Milwaukee County. She moved to Vienna House in 1996 and Arbor House in 2000. Both houses are operated by HIL. She also attends the Paragon day program. Each of the transfers to a CBRF and to the Paragon program was with her guardian's approval.

(86) It is the guardian's continued desire that Ms. Bzdawka remain at Arbor House and Paragon.

(87) Milwaukee County filed Watts reports with the Milwaukee County Probate Court stating that Ms. Bzdawka's placement at Vienna House and Arbor House was appropriate to her needs and recommending that her placement there continue.

(88) Ms. Bzdawka receives funding for her disability services from Family Care.

(89) The rates that MCDA have approved for HIL to serve Ms. Bzdawka at Arbor House and Paragon are lower than the rates being paid to HIL by Milwaukee County DSD and by other Wisconsin counties for serving individuals with similar needs.

(90) HIL attempted over the course of several years to obtain a rate increase from MCDA to obtain a higher daily rate for providing services to Ms. Bzdawka and other clients. MCDA has refused to approve a cost of living rate increase.

(91) MCDA intends to move Ms. Bzdawka to a different CBRF and day program over the guardian's objection and has stated that it will seek the guardian's

removal if the disagreement continues, however, pursuant to a stipulation entered in this action, MCDA has agreed that it will not move Ms. Bzdawka over the guardian's objection pending resolution of the issues in this action or further order of the Court.

(92) It would be very traumatic and harmful to Ms. Bzdawka to be forcibly removed from her home.

(93) Due to the severity of Ms. Bzdawka's disabilities, it is likely that moving her would worsen her condition and lead to placement in a nursing home or similar institution.

Sandra Ehrlichman

(94) Sandra Ehrlichman has a developmental disability. She is 60 years old.

(95) Ms. Ehrlichman resided in the community with her family until 1960. She was then placed in the Southern Wisconsin Center for the Developmentally Disabled.

(96) Ms. Ehrlichman was transferred from Southern Wisconsin Center to Arbor House in 2000. She also attends the Paragon day program. The transfer to Arbor House and to the Paragon program was with her guardian's approval.

(97) It is the guardian's continued desire that Ms. Ehrlichman remain at Arbor House and Paragon.

(98) Ms. Ehrlichman receives funding for her disability services from Family Care. Prior to her 60th birthday she received Waiver funding through DSD.

(99) The rates that MCDA have approved for HIL to serve Ms. Erlichman at Arbor House and Paragon are lower than the rates being paid to HIL by Milwaukee County DSD and by other Wisconsin counties for serving individuals with similar needs.

(100) HIL attempted over the course of several years to obtain a rate increase from MCDA to obtain a higher daily rate for providing services to Ms. Erlichman and other clients. MCDA has refused to approve a cost of living rate increase.

(101) MCDA intends to move Ms. Erlichman to a different CBRF and day program over the guardian's objection and has stated that it will seek the guardian's removal if the disagreement continues, however, pursuant to a stipulation entered in this action, MCDA has agreed that it will not move Ms. Erlichman over the guardian's objection pending resolution of the issues in this action or further order of the Court.

(102) It would be very traumatic and harmful to Ms. Ehrlichman to be forcibly removed from her home.

(103) Due to the severity of Ms. Ehrlichman's disabilities, it is likely that moving would worsen her condition and lead to placement in a nursing home or similar institution.

Marilyn Berdikoff

(104) Marilyn Berdikoff has a developmental disability. She is 60 years old.

(105) Ms. Berdikoff resides at Vienna House, a CBRF operated by HIL and attends the Paragon day program. The admission to Vienna House and to the Paragon program was with her guardian's approval.

(106) Ms. Ehrlichman receives funding for her disability services from Family Care. Prior to her 60th birthday she received Waiver funding through DSD.

(107) It is the guardian's continued desire that Ms. Berdikoff remain at Vienna House and Paragon.

(108) The rates that MCDA have approved for HIL to serve Ms. Berdikoff at Vienna House and Paragon are lower than the rates being paid to HIL by Milwaukee County DSD and by other Wisconsin counties for serving individuals with similar needs.

(109) HIL attempted over the course of several years to obtain a rate increase from MCDA to obtain a higher daily rate for providing services to Ms. Berdikoff and other clients. MCDA has refused to approve a cost of living rate increase.

(110) MCDA intends to move Ms. Berdikoff to a different CBRF and day program over the guardian's objection and has stated that it will seek the guardian's removal if the disagreement continues, however, pursuant to a stipulation entered in this action, MCDA has agreed that it will not move Ms. Berdikoff over the guardian's objection pending resolution of the issues in this action or further order of the Court.

(111) It would be very traumatic and harmful to Ms. Berdikoff to be forcibly removed from her home.

(112) Due to the severity of Ms. Berdikoff's disabilities, it is likely that moving her would worsen her condition and lead to placement in a nursing home or similar institution.

Lenore Czarnecki

(113) Lenore Czarnecki has Alzheimers disease, a disability associated with the aging process. She is 81 years old.

(114) Ms. Czarnecki resided at home with her husband until four years ago. She was then placed in a CBRF operated by Senior Residential Care of America, Inc.

(115) Ms. Czarnecki receives funding for her disability services from Family Care.

(116) It is the desire of her family and her agent, Carolyn Cetnarowski, that Ms. Czarnecki remain at her current residence.

(117) Senior Residential Care of America, Inc. has attempted to obtain a rate increase from MCDA for providing services to Family Care clients, but MCDA has refused to approve a cost of living rate increase.

(118) MCDA has reduced the rates paid to Senior Residential Care under the current contracts in comparison to previous contracts.

(119) Senior Residential Care has issued public statements that it is losing money under current Family Care rates and will not be able to sustain these losses for much longer.

(120) It is probable that in the foreseeable future Senior Residential Care will refuse to accept Family Care clients or will have to close its residential facilities entirely.

(121) It would be very traumatic and harmful to Ms. Czarnecki to be forcibly removed from her home.

(122) Due to the severity of Ms. Czarnecki's disability, it is likely that moving her would worsen her condition and lead to placement in a nursing home or similar institution.

John Gorton

(123) John Gorton has physical and mental disabilities. He is 77 years old.

(124) Mr. Gorton resided in his own home until 1997 when his condition worsened significantly. He was hospitalized and then placed in various nursing homes. After trying several assisted living facilities, approximately 2 ½ years ago he was then placed in a CBRF operated by Senior Residential Care of America, Inc.

(125) Mr. Gorton receives funding for his disability services from Family Care.

(126) It is the desire of his family and his agent, Deborah Brunk, that Mr. Gorton remain at his current residence.

(127) Senior Residential Care has issued public statements that it is losing money under current Family Care rates and will not be able to sustain these losses for much longer.

(128) It is probable that in the foreseeable future Senior Residential Care will refuse to accept Family Care clients or will have to close its residential facilities entirely.

(129) It would be very traumatic and harmful to Mr. Gorton to be forcibly removed from his home.

(130) Due to the severity of Mr. Gorton's disability, it is likely that moving him would worsen his condition and lead to placement in a nursing home or similar institution.

Classie Marcilis

(131) Classie Marcilis has a developmental disability and other mental disabilities. He is 60 years old.

(132) Mr. Marcilis has lived in his own home with supportive services provided by Dungarvin, a national disability services provider. Services were funded through DSD until his 60th birthday last year.

(133) For some time prior to and at the time of his 60th birthday, Dungarvin was paid \$135.33 per day to provide supportive services through waiver funding that was arranged by DSD.

(134) Since his 60th birthday, funding for Mr. Marcilis's services have been funded through Family Care. The daily rate paid to Dungarvin for providing supportive services was reduced to \$111.16 per day.

(135) The Family Care Program has reassessed Mr. Marcilis's daily living skills. This reassessment is expected to further reduce his level of funding for supportive services and make it more likely that he will have to move to a larger more restrictive setting for reasons of cost.

(136) It is probable that in the foreseeable future Dungarvin will refuse to serve Mr. Marcilis for the rates that MCDA and Family Care clients have and will authorize.

(137) It is the desire of his family and his guardian, Dorothy Reynolds, that Mr. Marcilis remain at his current residence and that he not be transferred to a more restrictive and less integrated setting such as a CBRF or nursing home.

(138) It would be very traumatic and harmful to Mr. Marcilis to be forcibly removed from his home.

(139) Due to the severity of Mr. Marcilis's disability, it is likely that moving would worsen his condition and lead to placement in a nursing home or similar institution.

Constance Ewig

(140) Constance Ewig has developmental disabilities. She is 60 years old.

(141) Ms. Ewig resided at home with her family until her mother's death approximately 10 years ago. She then resided in a series of apartments with various services and intermittent periods of hospitalization. Several years ago she was placed in Hearthiside Rehabilitation Center, a large institution for persons with developmental disabilities.

(142) Until March of 2004, Ms. Ewig was eligible for services through the Milwaukee County Disabilities Services Division (DSD). In March of 2004, she reached her 60th birthday and now receives funding for her disability services from Family Care through MCDA.

(143) In 2003, Hearthside was in the process of closing and Ms. Ewig was moved to a CBRF. DSD had difficulty locating enough community residences for all of the Hearthside residents and she was referred to Takodah House, a CBRF in Fond du Lac which is operated by Lifeline Services.

(144) Ms. Ewig has been more successful and more satisfied at Takodah House than at any of her other residences since her mother died.

(145) Constance Ewig likes Takodah House and would like to remain there. She also likes her doctor, psychiatrist, day program and friends in Fond du Lac.

(146) When Ms. Ewig turned 60, Lifeline Services was notified by MCDA that it would not be offered a contract to serve her under Family Care and that she would be moved to a different CBRF that is located within Milwaukee County.

(147) Ms. Ewig filed a petition for administrative review of this decision.

(148) Following a hearing on Ms. Ewig's petition, Administrative Law Judge Joseph A. Nowick issued a decision on July 20, 2004 upholding the decision to move her to another CBRF instead of directing MCDA and the Family Care program to contract with Lifeline Services and Takodah House so that she could remain in Fond du Lac County.

(149) On August 11, 2004, Ms. Ewig filed an appeal from the administrative decision pursuant to Wis. Stat., §227.53. *Ewig v. Wisconsin Department of Health and*

Family Services, et al., Case No. 04-CV-007043 (Milwaukee County Circuit Court). On August 12, 2004, her counsel in that case, Atty. Patrick Berigan from the Wisconsin Coalition for Advocacy, moved for a stay of the State court proceeding pending the outcome of this action. That motion remains pending at this time.

(150) It would be very traumatic and harmful to Ms. Ewig to be forcibly removed from her home.

(151) Due to the severity of Ms. Ewig's disability, it is likely that moving her would worsen her condition and lead to placement in a nursing home or similar institution.

Bert Siegel

(152) Bert Siegel has physical disabilities resulting from multiple sclerosis. He was first diagnosed in 1983 and is now 60 years old.

(153) Mr. Siegel was able to live independently until 2000. He was unable to walk following surgery that year and has required assistance since that time. His sister began to provide care at that time. She moved here from another State and gave up her job in order to do so. She was paid by waiver funding through DSD until Mr. Siegel turned 60 years old and became eligible for Family Care.

(154) Mr. Siegel is non-ambulatory and has very limited mobility in his upper body. He is quite large and must use a Hoyer lift for transfers in and out of his bed or wheelchair. He requires assistance to reposition himself and with other activities of daily living. It is necessary for someone to provide this care 24 hours per day.

(155) For some time prior to and at the time of Mr. Siegel's 60th birthday, his sister was being paid \$8.00 per hour for 46 hours per week of supportive home care.

(156) Following Mr. Siegel's admission into Family Care, his sister was approved to provide 46 hours per week of supportive home care at a lower rate of \$7.30 per hour. She was paid an additional \$25 per night flat rate to provide care as needed during her sleeping hours.

(157) DHFS issued a memorandum dated March 1, 2004 regarding "Guidelines for Paying Family Caregivers". The actual Guidelines were attached to the memorandum.

(158) MCDA and its contractors conducted a reevaluation of Mr. Siegel's care pursuant to the March 1, 2004 memorandum and guidelines. Following this reevaluation, the hours of supportive home care by his sister that were authorized for payment through Family Care were reduced from 46 hours to 32 hours per week. Authorization for the \$25 per night flat overnight rate was eliminated entirely.

(159) Mr. Siegel's sister will have to find another source of income outside of the home because of the funding cuts and will be unable to care for him as she is now doing.

(160) Due to the severity of Mr. Siegel's disability, it is likely that the failure to provide sufficient funding for supportive home care will lead to his placement in a nursing home or similar institution.

(161) It would be very traumatic and harmful to Mr. Siegel to be forcibly removed from his home.

Kathleen Johnson

(162) Kathleen Johnson has disabilities resulting from a severe medical condition which was diagnosed in early 2003. She is 69 years old.

(163) Ms. Johnson lived independently in her own home until she was hospitalized with gastro-intestinal bleeding. Her condition was so severe that her physician advised placement in a nursing home. Instead, she returned home and her daughter has lived with her in order to provide care. Ms. Johnson is restricted to her bed. She is unable to walk or transfer without assistance. She is unable to eat anything by mouth and is tube-fed through a port which has been surgically implanted in her stomach. She requires around-the-clock assistance.

(164) Ms. Johnson's daughter, who was previously employed as a pharmacy technician, was unable to work because of the extensive care that she was providing to her mother. Family Care made arrangements to pay the daughter for 38.5 hours per week of supportive home care and 28 hours per week of personal care services.

(165) DHFS issued a memorandum dated March 1, 2004 regarding "Guidelines for Paying Family Caregivers". The actual Guidelines were attached to the memorandum.

(166) MCDA and its contractors conducted a reevaluation of Ms. Johnson's care pursuant to the March 1, 2004 memorandum and guidelines. Following this reevaluation, the hours of supportive home care by her daughter that were authorized for payment through Family Care were reduced from 38.5 hours to 2 hours per week. The hours of personal care services will also be reduced.

(167) Ms. Johnson's daughter will have to find another source of income outside of the home because of the funding cuts and will be unable to care for her as she is now doing.

(168) Due to the severity of Ms. Johnson's disability, it is likely that the failure to provide sufficient funding for supportive home care will lead to her placement in a nursing home or similar institution.

(169) It would be very traumatic and harmful to Ms. Johnson to be forcibly removed from her home.

Class Certification

(170) The named plaintiffs bring this action on their own behalf and also seek to represent a class of Milwaukee County residents who now qualify or who will in the future qualify for services through the Family Care program.

(171) Approximately 5,200 Milwaukee County residents are currently enrolled in Family Care. There are at least another 10,000 Milwaukee County residents in nursing facilities or living in the community who would meet the eligibility standards for Family Care.

(172) Approximately 5,000 persons with developmental and/or physical disabilities who are under age 60 currently receive services through the Milwaukee County Disability Services Division.

(173) Several hundred of the approximately 5,000 clients currently receiving services from DSD receive residential or other disability services outside of Milwaukee County.

(174) Approximately 1,000 individuals with disabilities receive care from family caregivers and hundreds of those individuals have had their level of funding reduced since the March 1, 2004 memorandum and guidelines described above in paragraphs 157 and 165.

(175) The number of persons currently receiving developmental disability (DD) or physical disability (PD) services from Milwaukee County DSD who will turn 60 during each calendar year from now until 2010 is as follows:

| <u>Year</u> | <u>DD Clients</u> | <u>PD Clients</u> | <u>Total</u> |
|-------------|-------------------|-------------------|--------------|
| 2004 | 44 | 104 | 148 |
| 2005 | 52 | 135 | 187 |
| 2006 | 59 | 134 | 193 |
| 2007 | 62 | 160 | 222 |
| 2008 | 61 | 139 | 200 |
| 2009 | 90 | 116 | 206 |
| 2010 | 72 | 119 | 191 |

(176) All of the approximately 5,000 clients currently receiving DD and PD services from DSD will eventually turn 60 if they live long enough.

(177) The number of persons with disabilities who are now or will in the future be affected by Family Care policies and procedures is very large and it would impractical to bring them all before the Court.

(178) Each year additional persons with disabilities are born in Milwaukee County, and each year additional persons without disabilities residing in Milwaukee County become disabled through accidents, injuries, disease and/or the progression of the aging process.

(179) It would impossible to identify or bring these unidentified future members of the putative class before the Court.

(180) The requirements of Rule 23 of the Federal Rules of Civil Procedure have been met in that: (a) it is impossible to identify future members of the class and the number of persons already served by DSD who will transfer to Family Care is so numerous that joinder of all class members is impractical; (b) there are questions of law

or fact common to the class; (c) the claims of the representative parties are typical of the claims of the class; and (d) the representative parties will fairly and adequately protect the interests of the class.

(181) Pursuant to Rule 23(b)(2), Milwaukee County, DHFS and Secretary Nelson have acted or refused to act on grounds generally applicable to the putative class, thereby making appropriate preliminary and final injunctive relief and/or corresponding declaratory relief with respect to the class as a whole.

LEGAL CLAIMS

Count One: Americans with Disabilities Act Discrimination on the Basis of Disability

(182) The previous allegations are incorporated here as if fully set forth.

(183) The individual plaintiffs and the putative class members are “qualified individuals with a disability” pursuant to 42 U.S.C. §12131(2).

(184) MCDA and DHFS are public entities covered by Title II of the ADA.

(185) The Americans with Disabilities Act prohibits the defendants from discriminating against persons with disabilities. 42 U.S.C. §12131 ; 42 U.S.C. §12132; 28 C.F.R. §35.130

(186) Serving the named plaintiffs and the putative class members in a non-discriminatory manner can be reasonably accommodated.

(187) The above-described acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson discriminate against persons with disabilities in the following ways: (a) individuals being served by Family Care in Milwaukee County receive inferior treatment as compared to similar individuals being served by Milwaukee County DSD and in other counties by the Waiver programs, (b) individuals with more

severe disabilities being served by Milwaukee County Family Care receive inferior treatment as compared to similar individuals with less severe disabilities being served by Milwaukee County Family Care, and (c) the failure to provide adequate services and funding denies Milwaukee County residents with disabilities who are 60 years of age and older their right to receive publicly-funded services in the most integrated and least restrictive setting appropriate to their needs.

Count Two: Americans with Disabilities Act
Prohibition on Provision of Services and Using Methods of Administration
that Subject Persons with Disabilities to Discrimination

(188) The previous allegation are incorporated here as if fully set forth.

(189) Regulations implementing Title II of the ADA provide that:

A public entity, in providing any aid, benefit or service, may not directly or through contractual, licensing, or other arrangements, on the basis of disability --

- (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit or service;
- (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded others;
- (iii) Provide a qualified individual with a disability with an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
- (iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits or services that are as effective as those provided to others;
- (v) Provide a qualified individual with a disability with an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
- (vi) Provide a qualified individual with a disability with an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
- (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service. 28 C.F.R. §35.130(b)(1).

(190) Another portion of the regulations implementing Title II states:

A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or]

(ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities. . ." 28 C.F.R. §35.130(b)(3).

(191) Serving the named plaintiffs and the putative class members in a non-discriminatory manner can be reasonably accommodated.

(192) The above-described acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson discriminate against persons with disabilities in the following ways: (a) individuals being served by Family Care in Milwaukee County receive inferior treatment as compared to similar individuals being served by Milwaukee County DSD and in other counties by the Waiver programs, (b) individuals with more severe disabilities being served by Milwaukee County Family Care receive inferior treatment as compared to similar individuals with less severe disabilities being served by Milwaukee County Family Care, and (c) the failure to provide adequate services and funding denies Milwaukee County residents with disabilities who are 60 years of age and older their right to receive publicly-funded services in the most integrated and least restrictive setting appropriate to their needs.

Count Three: Americans with Disabilities Act
Mandate to Administer Services and Programs in the Most Integrated Setting

(193) The previous allegations are incorporated here as if fully set forth.

(194) Regulations implementing Title II of the ADA 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." 28 CFR §35.130(d).

(195) Serving the named plaintiffs and the putative class members in more integrated settings can be reasonably accommodated.

(196) MCDA, DHFS and Secretary Nelson are obligated by the ADA to administer programs in a manner that supports the availability of programs and services for persons with disabilities in the most integrated setting.

(197) The above-described acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson discriminate against persons with disabilities in the following ways: (a) individuals being served by Family Care in Milwaukee County receive inferior treatment as compared to similar individuals being served by Milwaukee County DSD and in other counties by the Waiver programs, (b) individuals with more severe disabilities being served by Milwaukee County Family Care receive inferior treatment as compared to similar individuals with less severe disabilities being served by Milwaukee County Family Care, and (c) the failure to provide adequate services and funding denies Milwaukee County residents with disabilities who are 60 years of age and older their right to receive publicly-funded services in the most integrated and least restrictive setting appropriate to their needs.

Count Four: §504 of the Rehabilitation Act.
Discrimination on the Basis of Disability

(198) The previous allegations are incorporated here as if fully set forth.

(199) Section 504 of the Rehabilitation Act, 29 U.S.C. §794 states:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(200) Milwaukee County and DHFS now receive and have received federal financial support at all relevant times.

(201) The named plaintiffs and the putative class members are disabled pursuant to 29 U.S.C. §705(9).

(202) Serving the named plaintiffs and the putative class members in a non-discriminatory manner can be reasonably accommodated.

(203) The above-described acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson discriminate against persons with disabilities in the following ways: (a) individuals being served by Family Care in Milwaukee County receive inferior treatment as compared to similar individuals being served by Milwaukee County DSD and in other counties by the Waiver programs, (b) individuals with more severe disabilities being served by Milwaukee County Family Care receive inferior treatment as compared to similar individuals with less severe disabilities being served by Milwaukee County Family Care, and (c) the failure to provide adequate services and funding denies Milwaukee County residents with disabilities who are 60 years of age and older their right to receive publicly-funded services in the most integrated and least restrictive setting appropriate to their needs.

Count Five: §504 of the Rehabilitation Act.
Prohibition on Using Methods of Administration that Subject
Persons with Disabilities to Discrimination

(204) The previous allegations are incorporated here as if fully set forth.

(205) Regulations implementing §504 state that "a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons. . ." 45 C.F.R. §84.4(b)(4).

(206) Serving the named plaintiffs and the putative class members in a non-discriminatory manner can be reasonably accommodated.

(207) The above-described acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson discriminate against persons with disabilities in the following ways: (a) individuals being served by Family Care in Milwaukee County receive inferior treatment as compared to similar individuals being served by Milwaukee County DSD and in other counties by the Waiver programs, (b) individuals with more severe disabilities being served by Milwaukee County Family Care receive inferior treatment as compared to similar individuals with less severe disabilities being served by Milwaukee County Family Care, and (c) the failure to provide adequate services and funding denies Milwaukee County residents with disabilities who are 60 years of age and older their right to receive publicly-funded services in the most integrated and least restrictive setting appropriate to their needs.

Count Six: §504 of the Rehabilitation Act.
Failure to Administer Services and Programs in the Most Integrated Setting

(208) The previous allegations are incorporated here as if fully set forth.

(209) MCDA, DHFS and Secretary Nelson are obligated under §504 to administer programs in a manner that supports the availability of programs and services for persons with disabilities in the most integrated setting.

(210) Serving the named plaintiffs and the putative class members in more integrated settings can be reasonably accommodated.

(211) The above-described acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson discriminate against persons with disabilities in the following ways: (a) individuals being served by Family Care in Milwaukee County receive inferior treatment as compared to similar individuals being served by Milwaukee County DSD and in other counties by the Waiver programs, (b) individuals with more severe disabilities being served by Milwaukee County Family Care receive inferior treatment as compared to similar individuals with less severe disabilities being served by Milwaukee County Family Care, and (c) the failure to provide adequate services and funding denies Milwaukee County residents with disabilities who are 60 years of age and older their right to receive publicly-funded services in the most integrated and least restrictive setting appropriate to their needs.

Count Seven: 42 U.S.C. §1983 and the First and Fourteenth
Amendments to the United States Constitution

(212) The previous allegations are incorporated here as if fully set forth.

(213) The actions of Milwaukee County, DHFS and their officers, agents, servants and employees with regard to the named plaintiffs and the putative class members were and are under color of state law.

(214) Individuals who reside with other persons in order to receive care for their disabilities form and maintain relationships with the other persons in their home that are similar to family relationships. They also form personal relationships and attachments to other persons at day programs and employment programs for persons with disabilities. These are small groups with a high degree of selectivity in the process of forming the relationship that are private and exclude outsiders to the same degree as any family.

(215) Small groups that have a high degree of selectivity in forming and maintaining their relationship and that exclude others from critical aspects of the relationship are protected by the Bill of Rights and especially the First Amendment from unjustified interference by the State.

(216) Persons with disabilities have a substantial liberty interest in personal autonomy and in being free from unnecessary restrictions on personal liberty under State and Federal law.

(217) Persons with disabilities under the age of 60 who are eligible to receive services from Milwaukee County are situated similarly to persons with disabilities who are 60 years of age and older who are eligible to receive services from Milwaukee County except for the differential treatment described above.

(218) Persons with more significant disabilities who are 60 and over and who are eligible to receive services from Milwaukee County are situated similarly to persons with less significant disabilities who are 60 and over and who are eligible to receive services from Milwaukee County except for the differential treatment described above.

(219) The above-described acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson discriminate against persons with disabilities in the following ways: (a) individuals being served by Family Care in Milwaukee County receive inferior treatment as compared to similar individuals being served by Milwaukee County DSD and in other counties by the Waiver programs, and (b) individuals with more severe disabilities being served by Milwaukee County Family Care receive inferior treatment as compared to similar individuals with less severe disabilities being served by Milwaukee County Family Care.

Count Eight: 42 U.S.C. §1983 and the Medicaid Act

(220) The previous allegations are incorporated here as if fully set forth.

(221) The Medical Assistance (Medicaid) program is authorized under Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq.

(222) The purpose of Title XIX is to "enabl[e] each State . . . to furnish . . . rehabilitation and other services to help such families and individuals attain or retain capacity for independence and self-care." 42 U.S.C. §1396.

(223) The Federal Medicaid Act provides:

A State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are

available under the plan at least to the extent that such care and services are available to the general population in the geographic area; . . .

42 U.S.C. §1396a(a)(30)(A).

(224) The State of Wisconsin, DHFS and the Secretary of DHFS have chosen to participate in the Medicaid program.

(225) DHFS and the Secretary of DHFS have not sought or obtained a waiver of 42 U.S.C. §1396a(a)(30)(A) in connection with the operation of Family Care in Milwaukee County.

(226) The above-described acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson violate Title XIX because they are inconsistent with the requirements of "efficiency, economy and quality of care" and further, because the Family Care funding scheme and rate structure is not "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. §1396a(a)(30)(A).

Count Nine: Wis. Stat., §51.61 - Wisconsin Patients Rights

(227) The previous allegations are incorporated here as if fully set forth.

(228) The named plaintiffs and the putative class members are "patients" covered by the Wisconsin Patients Rights law pursuant to Wis. Stat., §51.61(1) and/or Wis. Stat., §55.07.

(229) The specific authority in Wis. Stat., §51.61(7) to bring an action for injunctive relief against "the state or any political subdivision thereof" overrides the notice and claim provisions in Wis. Stat., §893.80 and Wis. Stat., §893.82.

(230) Milwaukee County's employees, agents and contractors had actual notice of the facts relevant to this complaint at all relevant times and any failure to give notice has not been prejudicial to Milwaukee County.

(231) The specific authority in Wis. Stat., §51.61(7) to bring an action for either damages or injunctive relief against "the state or any political subdivision thereof" constitutes a specific waiver of any defenses that DHFS or Secretary Nelson might otherwise have under the Eleventh Amendment to the United States Constitution.

(232) The acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson as set out above violate the rights of the named plaintiffs and the putative class members to the least restrictive conditions necessary to achieve the purposes of admission, commitment or placement pursuant to Wis. Stat., §51.61(1)(e).

(233) The acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson as set out above violate the rights of the named plaintiffs and the putative class members to prompt and adequate treatment, rehabilitation and educational services appropriate to their condition pursuant to Wis. Stat., §51.61(1)(f).

(234) The acts, omissions, policies and procedures of MCDA, DHFS and Secretary Nelson as set out above violate the rights of competent individuals and guardians or agents acting on behalf of individuals to make all appropriate decisions and to exercise legal rights pursuant to Wis. Stat., §51.61(1)(a) - (x) & (8).

CONCLUSION

WHEREFORE, plaintiffs request judgment as follows:

- (A) A declaratory judgment, a preliminary injunction and a permanent injunction pursuant to the Americans with Disabilities Act, §504 of the Rehabilitation Act and Wis. Stat., §51.61 directed to Milwaukee County, DHFS and Secretary Nelson prohibiting any further discriminatory

treatment of Milwaukee County residents with disabilities 60 years of age and older and ensuring that the named plaintiffs and the members of the putative class receive services appropriate to their condition in the most integrated and least restrictive setting.

- (B) A declaratory judgment, a preliminary injunction and a permanent injunction pursuant to 42 U.S.C. §1983, the First and Fourteenth Amendments to the United States Constitution and the Medicaid Act directed to Milwaukee County and Secretary Nelson prohibiting any further discriminatory treatment of Milwaukee County residents with disabilities 60 years of age and older and ensuring that the named plaintiffs and the members of the putative class receive services appropriate to their condition in the most integrated and least restrictive setting.
- (C) Preliminary and permanent injunctive relief pursuant to the ADA, §504, 42 U.S.C. §1983, the First and Fourteenth Amendments to the United States Constitution, the Medicaid Act and Wis. Stat., §51.61 prohibiting Milwaukee County from cutting funding to or moving the named plaintiffs or any other members of the putative class except for legitimate and non-discriminatory reasons with the approval of the individual or their guardian or agent, as appropriate.
- (D) Payment of the reasonable actual attorney fees including litigation expenses and costs pursuant to 29 U.S.C. §794a, 42 U.S.C. §1988, 42 U.S.C. §2000d-7, 42 U.S.C. §12205 and Wis. Stat., §51.61(7).

Date: August 19, 2004

ROBERT
Attorney

THEINE PLEDL
for the Plaintiffs

s/

Robert Theine Pledl

State Bar No. 1007710
1110 N. Old World Third St., Suite 670
Milwaukee, Wisconsin 53203
TEL 414-225-8999
FAX 414-224-0811
EMAIL pled@sbcglobal.net