

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 00-CV-30156MAP

ERNAST HERMANSON, ROBERT)
O'DONNELL, HELEN KOPEC, DELLA)
WIMES, and FLORENCE ASHLEY, on)
behalf of themselves and all persons)
similarly situated, and STAVROS CENTER)
FOR INDEPENDENT LIVING and)
MASSACHUSETTS SENIOR ACTION)
COUNCIL, INC.,)
)
)
Plaintiffs)
)
v.)
)
THE COMMONWEALTH OF)
MASSACHUSETTS, ARGEO PAUL)
CELLUCCI in his capacity as Governor of)
Massachusetts, the DIVISION OF)
MEDICAL ASSISTANCE, WENDY E.)
WARRING in her capacity as Commissioner)
of the Division of Medical Assistance, the)
EXECUTIVE OFFICE OF HEALTH AND)
HUMAN SERVICES, and WILLIAM D.)
O'LEARY in his capacity as Secretary of the)
Executive Office of Health and Human)
Services,)
Defendants)
)

COMPLAINT
CLASS ACTION

INTRODUCTION

1. Plaintiffs Ernast Hermanson, Robert O'Donnell, Helen Kopec, Della Wimes and Florence

Ashley all have physical disabilities. As a result, each requires some assistance in performing activities of daily living such as dressing, bathing and toileting. Despite these disability-related limitations, all of the plaintiffs, consistent with their individual preferences, could live with some

degree of independence in the community if they received home-based personal care services. However, because Massachusetts applies more restrictive Medicaid eligibility rules to a person when (s)he turns sixty-five, the plaintiffs are unable to obtain or retain Medicaid eligibility. Without Medicaid coverage, they do not have the means to pay for a personal care attendant (PCA) which, in turn, means that they cannot safely and with dignity continue to live in the community. Some of the plaintiffs have been forced to move into nursing homes in order to get appropriate services and others are at risk of being forced into such a move, where, ironically, they receive the very personal care services they have been denied in the community, but at a greater cost both to them and the defendants.

2. In segregating plaintiff class members in nursing facilities and in failing to afford them equal access to community services and supports, the defendants contravene the integration and non-discrimination mandates of the Americans with Disabilities Act (hereafter “ADA”), 42 U.S.C. § 12101 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*; and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. This case is brought to remedy these violations of the law and to prevent the unnecessary institutionalization of the plaintiffs and the class they represent.

JURISDICTION

3. This Court has jurisdiction of this action pursuant to 28 U.S.C. §1331, 29 U.S.C. §794a, and 42 U.S.C. §12133. 42 U.S.C. §1983 provides a federal cause of action for plaintiffs’ constitutional claims.

PARTIES

4. Plaintiff Ernast Hermanson is seventy-five years old and currently resides at the Soldiers Home in Holyoke, Massachusetts. With the provision of personal care services in the

community, he would be able to return home to his family and friends.

5. Plaintiff Robert O'Donnell is sixty-four years old and resides at home with his wife Arline with the help of a personal care attendant paid for by the medical assistance program. They live at 11 Shingle Brook Road, Orange, Massachusetts. Upon turning sixty-five, he will be in jeopardy of losing his personal care assistance in the community and being institutionalized due to the more onerous financial eligibility rules applied by the defendants to disabled individuals once they turn 65.

6. Plaintiff Helen Kopec is an eighty-two year old widow who resides alone in her house at 27 Knipfer Avenue, Easthampton, Massachusetts with the help of a personal care attendant paid for by the medical assistance program. Due to the more onerous financial eligibility rules applied to disabled seniors in the medical assistance program, Ms. Kopec is at risk of losing her personal care assistance in the community and having to move to a nursing home.

7. Plaintiff Della Wimes is a sixty-six year old widow who lives alone in her home at 123 Lebanon Street, Springfield, Massachusetts with the help of a personal care attendant paid for by the medical assistance program. Due to the more onerous financial eligibility rules applied to disabled seniors in the medical assistance program, Ms. Wimes is at risk of losing her personal care assistance in the community and having to move to a nursing home.

8. Plaintiff Florence Ashley is a seventy-one year old widow who lives with her son and a frail, elderly aunt in her home at 28 Mosher Street, West Springfield, Massachusetts with the help of a personal care attendant paid for by the medical assistance program. Due to the more onerous financial eligibility rules applied to disabled seniors in the medical assistance program, Ms. Ashley is at risk of losing her personal care assistance in the community and having to move to a nursing home.

9. Plaintiff Stavros Center for Independent Living (hereafter “Stavros”) is a private, non-profit corporation and is one of the oldest independent living programs in the country. It serves Franklin, Hampshire, and Hampden counties of western Massachusetts. State and federal funds support Stavros’ independent living programs. Stavros administers the Medicaid personal care services program for the defendant Division of Medical Assistance in the counties that it serves.

In addition, it provides individual advocacy, peer counseling, skills training, information and referral to nearly two thousand people a year who have significant disabilities. Stavros also offers lift-equipped van transportation, independent living services to individuals who are deaf or hard of hearing, an equipment loan program, and assistive technology services. Directed, managed, and staffed by people with disabilities, Stavros is mandated to provide a full range of disability services to members of the plaintiff class, subject to available resources. The defendants’ actions impede Stavros’ ability to effectively provide community-based personal care services to individuals with disabilities over the age of sixty-four. Stavros is required to file annual reports concerning the number of persons whom they assist to move from institutions to the community with the Rehabilitation Services Administration (RSA), the federal agency responsible for enforcing and setting the standards for independent living centers. RSA uses this information to determine the level of funding which Stavros will receive. The defendants’ actions compromise Stavros’ ability to carry out its federal responsibilities and jeopardize its funding. Stavros’ principal office is located at 691 Southeast Street, Amherst, MA.

10. Plaintiff Massachusetts Senior Action Council, Inc. (“MSAC”) is a non-profit corporation

in existence since 1981. It is a statewide membership organization of senior citizens and persons with disabilities, many of whom are adversely affected by the defendants’ more stringent

Medicaid rules for disabled elders. MSAC has about 3000 members and has chapters in various parts of the Commonwealth, including two in Western Massachusetts. MSAC engages in a program of community organizing, legislative advocacy and public education. It is active in the areas of health care, housing and other fields important to maintaining the life-long dignity of elders. During its existence, MSAC has played major roles in successful advocacy for a ban on Medicare balance-billing and for the creation of the Senior Pharmacy Program and the Pharmacy Plus Program, among other efforts related to health care for seniors and disabled persons. MSAC's principal office is located at 186 Lincoln Street, Suite 901, Boston, MA 02111.

11. Defendant Commonwealth of Massachusetts is a public entity and exercises dominion and control over and is responsible for all facets of state government including the operation and administration of the state's health care programs and policies. The Governor of Massachusetts, who maintains offices for the conduct of business at the State House, Boston, Massachusetts 02108, is the chief executive officer of the Commonwealth.

12. Defendant Argeo Paul Cellucci, Governor of Massachusetts, is the chief executive officer of the Commonwealth. He is responsible for seeking funds from the legislature as well as for directing, supervising, and controlling the executive departments of state government.

Defendant Cellucci appoints the Secretary of the Executive Office of Health and Human Services ("EOHSS") and approves the appointment of the Commissioner of the Division of Medical Assistance. He is required to review the States' Medicaid Plan prior to its submission to the United States Department of Health and Human Services for approval. His office is at the State House, Boston, Massachusetts 02108. He is sued in his official capacity.

13. Defendant Division of Medical Assistance (DMA) is an agency of the Commonwealth

within EOHHS. It is established under M.G.L. c. 6A, §16B and is the single state agency which administers the Medicaid program in Massachusetts.

14. Wendy E. Warring is the Commissioner of DMA. Under M.G.L. c.6A, §16B, she is responsible for the administration of the Medicaid program. Her office is located at 600 Washington Street, 5th Floor, Boston, Massachusetts 02111. She is sued in her official capacity.

15. Defendant Executive Office of Health and Human Services (EOHHS), established by M.G.L.c.6A, §2, is the Commonwealth's cabinet level agency in charge of all health and human service programs in the Commonwealth. EOHHS manages policy development and service delivery in 15 state agencies, including the Division of Medical Assistance.

16. Defendant William D. O'Leary is the Secretary of EOHHS. Under M.G.L.c.6A, §3, he was appointed by the Governor and serves directly under him and at his pleasure. He serves as the executive officer of the Governor for accomplishing all of the purposes of EOHHS. He appoints the Commissioner of DMA. His office is located at One Ashburton Place, Room 1109, Boston, Massachusetts 02108. He is sued in his official capacity.

CLASS ACTION ALLEGATIONS

17. Pursuant to Rules 23(a)(1)-(4) and (b)(2) of the Federal Rules of Civil Procedure, plaintiffs bring this action as a class action on behalf of all Massachusetts adults with disabilities sixty-five years of age and over in Massachusetts who are in need of personal care services to remain in the community and who have been institutionalized or who are at risk of being institutionalized due to their inability to obtain such services from the defendants because of the more restrictive Medicaid eligibility criteria applied to disabled elders.

18. The size of the class is so numerous that joinder of all members is impracticable.

Joinder

is also impracticable because the class is dynamic and because the plaintiffs lack the knowledge, sophistication, and financial means to maintain individual actions.

19. There are questions of law and fact common to the class and the plaintiffs' claims are typical of the claims of the class.

20. The representative parties will fairly and adequately protect the interests of the class. Plaintiffs will vigorously represent the interests of the unnamed class members, and all members of the proposed class will benefit by the efforts of the named plaintiffs. The interests of the proposed class and those of the named plaintiffs are identical.

21. Defendants, their agents, employees, and predecessors and successors in office have acted or will act on grounds generally applicable to the class, thereby making appropriate injunctive or declaratory relief with respect to the class as a whole.

STATEMENT OF FACTS

A. Statutory and Regulatory Framework:

Medicaid Eligibility

22. Medicaid is a jointly funded state and federal program that provides medical services to low-income persons pursuant to Title XIX of the Social Security Act. 42 U.S.C. §1396 *et seq.*

23. State participation in the Medicaid program is optional. A state choosing to participate and receive federal matching funds for its Medicaid program must comply with the requirements of the federal Medicaid Act and with the federal regulations governing state Medicaid programs promulgated by the U.S. Department of Health and Human Services (HHS).

24. As a condition of participating in the federal Medicaid program, states must submit to HHS a state Medicaid plan that fulfills the requirements of the Medicaid Act. 42 U.S.C.

§1396a(a).

25. The mandatory requirements of a state Medicaid plan are set forth in 42 U.S.C.

§1396a(a). However, states can apply for a waiver of compliance with any of the requirements of 42 U.S.C. §1396a in order to conduct an experimental, pilot or demonstration project which in the judgment of the Secretary of HHS will promote the objectives of Title XIX. 42 U.S.C.

§1315.

26. Massachusetts has chosen to participate in the Medicaid program. Massachusetts operates a traditional Medicaid program for all persons aged 65 and older pursuant to a state plan as required by 42 U.S.C. §1396a(a). For all persons under 65 years of age who are not institutionalized, Massachusetts operates a Medicaid program pursuant to a waiver granted by the Secretary of HHS.

27. All individuals or families who are recipients of Supplemental Security Income (SSI) or Transitional Aid to Families With Dependent Children (TAFDC) benefits automatically qualify for Medicaid, regardless of their age. 42 U.S.C. §1396a(a)(10)(A)(i); 130 CMR § 501.004(B)(1).

28. All disabled individuals under age 65 and families with children whose income is less than 133% of the federal poverty level (currently \$926 per month for an individual) qualify for Medicaid under the waiver Massachusetts has received (referred to hereafter as the “MassHealth waiver”).

29. All individuals or families aged 65 or older financially qualify for Medicaid only if their income is less than 100% of the poverty level (currently \$696 per month for an individual).

30. All disabled individuals, regardless of age, whose income exceeds their financial eligibility standard can still qualify for Medicaid if they have incurred medical bills over a 6

month period (including any unpaid medical bills from an earlier time) which, when deducted from their income, reduce their income to the monthly deductible income standard. The monthly deductible income standard for an individual is \$542. The amount of medical bills that an individual must incur over a six month period before qualifying for Medicaid is known as the deductible amount. Individuals who qualify for Medicaid by meeting a deductible are known as medically needy.

31. Medically needy disabled individuals under age 65 only need to meet their deductible once. After satisfying the deductible once, their continuing eligibility for Medicaid is determined based upon a sliding income scale. As long as the income of the disabled individual under age 65 remains less than \$13,631 per year (195% of poverty), that individual continues to be eligible for full Medicaid. As his (her) income increases beyond \$13,631 per year, that individual must pay a modest premium which increases as his (her) income increases. 130 C.M.R. §§506.009-506.011.

32. Medically needy individuals aged 65 or over must satisfy recurring deductibles every six months in order to establish eligibility. 130 C.M.R. §520.028-520.035. This means that their Medicaid eligibility lasts for no longer than six months, after which they must again accumulate medical bills that meet their deductible in order to requalify for coverage, only to lose that coverage again at the end of that six month deductible period, *ad infinitum*.

33. For disabled elders with significant, fixed medical expenses for a personal care attendant, the recurring six month deductibles and lower financial eligibility level (100% of poverty rather than 133% of poverty for those under 65) create significant barriers to their ability to obtain and retain their personal care attendants and thereby avoid institutionalization.

Personal Care Services

34. The Massachusetts Medicaid program provides personal care services in the community as one of its covered services. 130 C.M.R. §422.401 *et seq.*

35. Personal care attendants (PCA's) are authorized by DMA for disabled individuals whose disability is permanent or chronic and who require at least ten hours per week of assistance with activities of daily living (ADL's) such as bathing, dressing, eating, toileting, or moving (*e.g.* walking or transferring from a wheelchair to a bed), or at least 14 hours per week of assistance with a combination of ADLs and instrumental activities of daily living (IADL's) such as housekeeping, laundry, shopping, transportation or other special needs. 130 C.M.R. §§422.403, 422.410.

36. Under the personal care services program, recipients are responsible for hiring, firing, scheduling and training PCA's. Payment to the PCA can, at recipient option, be made by a fiscal intermediary or directly by the recipient. 130 C.M.R. §422.419, 422.420.

37. DMA authorizes payment for PCA's at the hourly wage rate of \$9.50 and, for night attendant services, at the rate of \$19.00 for the entire night. 114.3 C.M.R. §9.03.

38. DMA has delegated to Independent Living Centers responsibility for the day-to-day administration of the PCA program, including evaluating an applicant's need for personal care services, training recipients regarding the skills necessary to supervise and train PCAs, as well as the record-keeping responsibilities inherent in the program. 130 C.M.R. §422.419, 422.421.

39. Personal care services are provided in order to assist the recipient to achieve independent living. 130 C.M.R. §422.402 (definition of personal care services).

40. Individuals in need of personal care services who are unable to obtain or retain their personal care attendants are left without the means to perform basic activities of daily living such as dressing, bathing, eating, moving and/or toileting. They may remain bedridden for extended

periods of time without access to food or toilet facilities, waiting for a friend or relative to stop by to assist them. Those without a network of friends or relatives become immediately in need of institutional care. Those with such a network are at serious risk of institutionalization as the strain on family and friends takes its toll.

Long Term Care

41. The Massachusetts Medicaid program covers long term care in a nursing facility for eligible recipients.

42. To be eligible for nursing home care, an individual must require either skilled nursing services on a daily basis, or a combination of three services designed to provide assistance with activities of daily living and/or nursing services, at least one of which must be a nursing service.

130 C.M.R. §456.409.

43. After certain deductions from income for things such as the support and maintenance of a spouse or children living in the community, an individual in a nursing facility, regardless of age, qualifies for Medicaid if his/her monthly countable income is less than or equal to the public pay rate (the rate paid by Medicaid) at the long term care facility. (Public pay rates vary from institution to institution but average in excess of \$3000 per month). However, the individual must pay all of his/her countable income except for a small personal needs allowance towards the cost of his/her care. 130 C.M.R. §§515.001 (definition of patient-paid amount), 520.025, 520.026.

44. The monthly cost of care in any nursing home is substantial, and far more than the general financial eligibility standard for either the under-65 or over-65 population residing in the community.

45. Nursing homes provide the same personal care services in an institutional setting (assistance with ADL's and IADL's) that PCA's provide in a community setting, but at a substantially greater cost to the state.

The Anti-Discrimination Provisions of the Americans With Disability Act and §504 of the Rehabilitation Act of 1973:

46. The Americans With Disability Act (ADA), 42 U.S.C. §12101 *et seq.*, provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

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

48. The regulations implementing the ADA require that: “a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. §35.130(d).

49. The ADA regulations prohibit the differential treatment of individuals with disabilities or any class of individuals with disabilities with respect to their opportunity to participate in or access the full range of aids, benefits or services in any program operated by a public entity. 28 C.F.R. §§35.130 (b)(i)(ii) and (b)(i)(iv). The regulations further provide that “[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; (ii) that have the purpose or effect of substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities....” 28 C.F.R. §35.101(b)(3).

50. The ADA regulations also provide that “[a] public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.” 28 C.F.R. §35.130(b)(8).

51. The ADA regulations further specify that “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. §35.130(b)(7).

52. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that “[n]o otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

53. Like the ADA, regulations implementing the anti-discrimination mandate of §504 provide that “[r]ecipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.” 28 C.F.R. §41.51(d).

54. The §504 regulations also provide that “[a] recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) [t]hat have the

effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons” 28 C.F.R. §41.51(b)(3).

B. The Plaintiffs' Factual Situation:

55. Plaintiff Ernest Hermanson is seventy five years old and currently resides at the Soldiers Home in Holyoke, Massachusetts. Mr. Hermanson receives \$711.50 per month in Social Security Benefits and an additional \$310.24 per month in state pension benefits. His wife, Edith, who continues to reside in the community, receives \$359.00 per month in Social Security benefits.

56. Up until January 1998, Mr. Hermanson lived independently with his wife of over fifty years. In January 1998 Mr. Hermanson had a stroke and in February 1998, due to a blood clot, he had his right leg amputated above the knee.

57. Following the stroke and amputation and a period of inpatient rehabilitation therapy, Mr. Hermanson was transferred to the Life Care Nursing Home on March 5, 1998 where he stayed until April 8, 1998 at a cost of \$290 per day. These costs were covered by Medicare subject to a co-payment of \$95.50 per day after the 16th day (resulting in a total co-payment of \$1528).

58. Mr. Hermanson's seventy four year old wife, Edith, was unable to adequately care for him upon his return home in November 1998. The family looked into personal care services from the Medicaid program at this time. However because of the income of Mr. Hermanson, he faced a six month deductible in excess of \$2878.44 before he would qualify for Medicaid.

59. Because Mr. Hermanson could not meet the six month deductible to qualify for Medicaid and did not want to return to a nursing home, his daughter took him into her home and she and other family members provided him with the personal care he required in shifts.

60. In April of 1999, Mr. Hermanson was admitted to Bay State Medical Center and his left leg was amputated. On May 5, 1999, he was discharged to Heritage Hall Nursing Home where he stayed until June 1, 1999. At the end of the stay, he returned home and his family resumed providing care in shifts.

61. In November 1999, Mr. Hermanson was again admitted to Bay State Medical Center due to complications from certain prescription medications he was taking. At the point of his discharge from the hospital, the family made the difficult decision that they could no longer manage to continue to provide the personal care assistance Mr. Hermanson needs to stay at home.

As a result, on December 8, 1999 Mr. Hermanson was discharged to Wingate Nursing Home, and on March 15, 2000 he was transferred to the Soldiers Home in Holyoke where he now resides. All except \$39.00 per month of the cost of his care at the Soldiers Home is borne by the Commonwealth of Massachusetts.

62. Mr. Hermanson wants to return home to be reunited with his wife and family. He needs assistance with many activities of daily living, but he is alert and oriented and handles all of his own medical and financial decisions. With the provision of personal care services in the community, Mr. Hermanson could return home and the Commonwealth would save money on his care.

63. Because of the disparate Medicaid eligibility rules for disabled elders, Mr. Hermanson would have to incur approximately \$3000.00 in medicaid expenses every six months before he would qualify for Medicaid if he was living at home. Because he cannot repeatedly cover the

cost of the deductible on his limited income, he is unable to obtain personal care services in the community and is now institutionalized at greater financial cost to the state and great emotional cost to Mr. Hermanson, his wife and family.

64. Plaintiff Robert O'Donnell is a sixty-four year old man who lives at home with his wife Arline in Orange, Massachusetts.

65. Mr. O'Donnell receives \$1080 per month in Social Security benefits.

66. In 1997, Mr. O'Donnell suffered a brain-stem cardiovascular accident which left him in a coma for six days. Following his hospital stay, he spent several months in a rehabilitation facility and then returned home to the care of his wife.

67. Mr. O'Donnell receives nutrition through a gastric tube and is dysphagic due to damage from the stroke. He also has sleep apnea, diabetes and a history of myocardial infarction. He can ambulate short distances with a walker, but needs assistance with bathing, dressing, transferring, toileting and taking medications.

68. Initially upon his return home following the stroke, Mr. O'Donnell's care at home was provided by the local home health care agency and covered by Medicare. However, the Medicare-covered home health services have been reduced over time and in April 1999, Mr. O'Donnell was approved for 23 hours per week of personal care attendant services paid for through MassHealth. Because he is under 65 years of age, Mr. O'Donnell received these services without having to meet recurring deductibles and his income is low enough that he does not have to pay a premium under the MassHealth sliding fee scale.

69. Without the personal care services provided by MassHealth, Mr. O'Donnell's wife would not be able to care for him and he would have to be placed in a nursing home.

70. Mr. O'Donnell will turn 65 on December 7, 2000. At that time, he will be subjected to

recurring six month deductibles in excess of \$3000 in order to qualify for personal care services at home. Because the O'Donnells do not have \$3000 in excess income with which to meet these recurring deductibles, he is at imminent risk of institutionalization when he turns 65 on December 7, 2000.

71. The cost to the defendants of providing care to Mr. O'Donnell in a nursing home will far exceed the cost of providing him with the personal care services he needs to remain at home with his wife.

72. Plaintiff Helen Kopec is an eighty-two year old widow who lives alone in her house in Easthampton, Massachusetts.

73. Ms. Kopec has had both her legs amputated below the knee and also suffers from arthritis, multiple sclerosis, degenerative joint disease and asthma.

74. In 1993, Ms. Kopec was placed in a nursing home where she stayed for three years. Her care in the nursing home was covered by Medicaid.

75. While in the nursing home, she learned of the Medicaid-funded personal care services program and immediately took steps to qualify for that program so that she could get out of the nursing home and back to her home in Easthampton.

76. In 1996, Ms. Kopec was discharged from the nursing home and began participating in the Medicaid-funded personal care services program.

77. Ms. Kopec is authorized to receive sixty-seven hours per week of personal care attendant services and a night attendant seven days per week.

78. Ms. Kopec receives \$827.00 in Social Security benefits each month. Because she is over sixty-five years of age, she must meet recurring six-month deductibles of \$1,710.00 to qualify for Medicaid.

79. She has met her six-month deductible in the past through a combination of her Medex health insurance premiums of \$111.47 per month and the use of unpaid nursing home bills. However, she has now exhausted the back nursing home bills and does not know how she will be able to meet her deductible in October 2000.

80. When her Medicaid coverage terminates on October 1, 2000, she will have no means to pay her personal care attendant. Without a personal care attendant, Ms. Kopec will be forced to go back into a nursing home and leave her home in Easthampton in which she was born and where she has lived her entire life.

81. Della Wimes is a sixty-six year old widow who lives alone in her house in Springfield, Massachusetts.

82. Ms. Wimes is blind, her left leg is amputated below the knee, and she suffers from diabetes and serious circulatory problems in her right leg.

83. Ms. Wimes is able to remain in her home of thirty-three years because she receives personal care services authorized and paid for by Medicaid. She requires assistance with all activities of daily living except eating. She also requires assistance putting on her prosthesis and with range of motion exercises to maintain flexibility and circulation in her legs, right arm and shoulder.

84. Ms. Wimes is currently authorized to receive forty-five hours per week of personal care services plus a night attendant.

85. Ms. Wimes was admitted to a nursing home for several months in 1997 following femoral bypass surgery. She is adamant that she does not want to return to a nursing home.

86. Ms. Wimes sole source of income is \$990 per month in Social Security benefits. In order to qualify for Medicaid, she must satisfy recurring six month deductibles of \$2668.

She met the deductible for the six month period from April 1 through September 30, 2000 by using her Medicare premiums of \$45.50 per month and submitting bills she incurred but could not pay for her personal care attendant for work performed during the uncovered portion of a previous deductible period.

87. Ms. Wimes personal care attendant has continued to provide services to her, despite going without payment for periods of time due to Ms. Wimes' need to satisfy her deductible every six months before Medicaid coverage resumes. However, Ms. Wimes personal care attendant cannot continue to provide free care to Ms. Wimes every six months so she can meet her deductible. Unless Ms. Wimes can provide some assurance of full and timely payment, she will lose her personal care attendant. Without a personal care attendant, Ms. Wimes will have to enter a nursing home.

88. The emotional harm that Ms. Wimes will suffer if forced out of her home and into an institution is severe and irreparable.

89. Florence Ashley is a seventy-one year old widow who lives with her son and a frail, elderly aunt in West Springfield, Massachusetts.

90. Ms. Ashley suffers from obesity and arthritis which is most severe in her knees, shoulders and elbows. She needs assistance with transfers, dressing, bathing, grooming and meal preparation. She also has limited mobility. She is currently approved by Medicaid for thirty-two hours per week of PCA services.

91. Ms. Ashley has twice been admitted to nursing homes in the recent past. In 1998, during her second nursing home stay, she applied and was approved for personal care services in the community by Medicaid. With these services, she was able to leave the nursing home and return to her own home.

92. Ms. Ashley's only income comes from a Social Security benefit of \$158 per month and a pension from the City of West Springfield in the amount of \$560.00 per month.

93. In order to qualify for Medicaid, Ms. Ashley must meet recurring six month deductibles of \$1059. She met her most recent deductible for the period from June 12, 2000 through December 11, 2000 by using her monthly Medicare premium; prescription drug co-payments and unpaid bills for her PCA for work that had previously been provided.

94. Ms. Ashley does not know how she will be able to meet her deductible in December 2000. She already owes her personal care attendant for services provided which were used to meet her prior deductibles. Her personal care attendant is not willing to continue to provide a period of free care to Ms. Ashley every six months so that she can use that unpaid bill to meet her deductible.

95. Unless she is able to ensure that her personal care attendant is paid in full and in a timely manner for the services provided, Ms. Ashley is at serious risk of losing her personal care attendant. Without a personal care attendant to care for her while her son is working, Ms. Ashley will be forced to return to a nursing home which will be more costly for the Commonwealth and will cause her serious emotional harm to her irreparable detriment.

96. Plaintiffs and the class they represent are, as a result of the structure, operation and administration of Massachusetts' Medicaid program, denied and deprived access to the personal care services they require unless they go into a nursing home, despite the fact that, with such services, they could continue to reside in the community.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF THE INTEGRATION MANDATE OF THE ADA

97. Defendants the Commonwealth of Massachusetts, Executive Office of Health and Human Services, and Division of Medical Assistance are public entities subject to the requirements of Title II of the ADA, 42 U.S.C. §§12131 *et seq.*

98. The plaintiffs and the class they represent are otherwise qualified to receive personal care services in the community.

99. The defendants, through the structure and operation of their health care delivery system, force plaintiffs and the class they represent to leave the community and enter nursing homes in order to be able to obtain personal care services, despite the fact that such services are available in the community and their provision in the community would be more cost effective for the state and more beneficial to the health and well-being of the individuals in need of such services.

100. The defendants' failure to provide the plaintiffs and the class they represent with personal care services in the most integrated setting appropriate to their needs violates 42 U.S.C. §12132 and 28 C.F.R. §35.130(d).

SECOND CLAIM FOR RELIEF
THE INTEGRATION MANDATE OF §504

101. The defendants receive federal financial assistance to operate their Medicaid Program and
and
are thus subject to the non-discrimination requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*

102. The defendants, through the structure and operation of their health care delivery system, force plaintiffs and the class they represent to leave the community and enter nursing homes in order to be able to obtain personal care services, despite the fact that such services are available in the community and their provision in the community would be more cost effective for the

state and more beneficial to the health and well-being of the individuals in need of such services.

103. The defendants' failure to provide the plaintiffs and the class they represent with personal care services in the most integrated setting appropriate to their needs violates 29 U.S.C. §794 and 28 C.F.R. §41.51(d).

THIRD CLAIM FOR RELIEF
DISCRIMINATORY IMPACT ON THE DISABLED UNDER THE ADA

104. The defendants, as a result of the MassHealth waiver and their criteria and methods of administration of the Medicaid program, have created a dual system of medical assistance in which medically needy disabled individuals under age 65 are able to obtain personal care services while continuing to reside in the community, while medically needy disabled individuals age 65 and over are unable to access personal care services without entering a nursing home.

105. The defendants have utilized criteria and methods of administration in their health care delivery system that have the tendency and the effect of subjecting plaintiffs and the class they represent to discrimination on the basis of disability with respect to their ability to access personal care services in the community, while at the same time substantially undermining accomplishment of the objectives of the personal care services program in particular and the Medicaid program in general. These actions violate 42 U.S.C. §12132 and 28 C.F.R. §§35.130(b)(i)(ii), (b)(i)(iv) and (b)(3).

FOURTH CLAIM FOR RELIEF
DISCRIMINATORY IMPACT ON THE DISABLED UNDER §504

106. The defendants, as a result of the MassHealth waiver and their criteria and methods of

administration of the Medicaid program, have created a dual system of medical assistance in which medically needy disabled individuals under age 65 are able to obtain personal care services while continuing to reside in the community, while medically needy disabled individuals age 65 and over are unable to access personal care services without entering a nursing home.

107. The defendants have utilized criteria and methods of administration in their health care delivery system that have the effect of subjecting plaintiffs and the class they represent to discrimination on the basis of handicap with respect to their ability to access personal care services in the community, while at the same time substantially undermining accomplishment of the objectives of the personal care services program in particular and the Medicaid program in general. These actions violate 29 U.S.C. §794 and 28 C.F.R. §41.51(b)(3).

FIFTH CLAIM FOR RELIEF DISCRIMINATORY ELIGIBILITY CRITERIA

108. The defendants have imposed and applied eligibility criteria including a lower financial eligibility standard and the need to satisfy recurring six month deductibles that screen out and tend to screen out disabled individuals age 65 or over in need of personal care services in the community from fully and equally enjoying such services.

109. The defendants imposition of such disparate eligibility standards on plaintiffs and the class they represent violates 42 U.S.C. §12132 and 28 C.F.R. §35.130(b)(8).

SIXTH CLAIM FOR RELIEF FAILURE TO REASONABLY ACCOMMODATE UNDER THE ADA

110. The defendants have failed and refused to reasonably accommodate plaintiffs and the class they represent by modifying or waiving those aspects of their health care delivery system, including the deductible rules and lower financial eligibility standards, which impair and deny to

plaintiffs and the class access to personal care services in the community. This failure to reasonably accommodate plaintiffs and the class they represent violates 42 U.S.C. §12132 and 28 CFR §35.130(b)(7).

SEVENTH CLAIM FOR RELIEF
FAILURE TO REASONABLY ACCOMMODATE UNDER §504

111. The defendants have failed and refused to reasonably accommodate plaintiffs and the class they represent by modifying or waiving those aspects of their health care delivery system, including the deductible rules and lower financial eligibility standards, which impair and deny to plaintiffs and the class access to personal care services in the community. This failure to reasonably accommodate plaintiffs and the class they represent violates 29 U.S.C. §794.

EIGHTH CLAIM FOR RELIEF
DENIAL OF EQUAL PROTECTION

112. The defendants, by depriving plaintiffs and the class they represent of access to personal care services in the community on a basis equal to that provided to similarly situated disabled individuals under 65 years of age, have denied plaintiffs and the class they represent equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

REQUESTED RELIEF

Wherefore, the plaintiffs request that the Court grant the following relief:

1. Enter an order certifying this action as a class action.
2. Issue a preliminary injunction restraining the defendants, their successors in office, agents, employees and assigns, and all persons acting in concert with them from failing to provide personal care services to the individual plaintiffs and the class they represent on the same basis as those services are provided to disabled individuals under 65 years of age pending

the hearing and disposition of this action;

3. Issue permanent injunctions restraining the defendants, their successors in office, agents, employees and assigns, and all persons acting in concert with them from:

a) discriminating against plaintiffs and the class they represent by failing to provide medically necessary personal care services to them in the most integrated setting appropriate to their needs;

b) discriminating against the plaintiffs and the class they represent by imposing upon them more stringent financial eligibility requirements which preclude them from being able to access personal care services in the community on a comparable basis with similarly situated individuals under 65 years of age.

c) utilizing methods of administration in the Medicaid program which have the effect of depriving plaintiffs and the class they represent of access to personal care services in the community and requiring them to enter nursing homes in order to be able to access such medically necessary services.

4. Issue a declaratory judgment declaring that:

a) the defendants have violated the Americans with Disabilities Act and §504 of the Rehabilitation Act of 1973 by failing to make reasonable modifications in their programs which provide personal care services in the community to ensure that plaintiffs and the class they represent can obtain such services without having to enter an institution;

b) the defendants have violated the ADA and §504 by establishing and maintaining methods of administration of their Medicaid program which have the effect of denying elder disabled individuals access to personal care services in the community on a comparable basis with similarly situated disabled individuals under 65 years of age.

c) the defendants have violated the ADA and §504 by imposing upon plaintiffs and the class they represent more stringent financial eligibility requirements which preclude or tend to preclude them from being able to access and enjoy personal care services in the community on a comparable basis with similarly situated disabled individuals under 65 years of age.

d) the defendants have violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States by, without a rational basis, denying and depriving plaintiffs and the class they represent of access to personal care services in the community on a comparable basis to that of similarly situated disabled individuals under 65 years of age.

5. Award plaintiffs their costs and reasonable attorneys fees pursuant to 42 U.S.C. §1988, 42 U.S.C. §12205, and 29 U.S.C. §794a.

6. Grant plaintiffs such other and further relief as to this court may seem just and proper.

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