

1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF MICHIGAN
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4 **ROBERT EAGER; DORA OATS,**
5 **through her next friend,**
6 **Crystal Oats; HOWARD HUGGER,**
7 **through his guardian,**
8 **Sharon Cook; TERRELL KING;**
9 **GEORGETTE KRAFT through her**
10 **husband and next friend, Roy Kraft;**
11 **DENNIS LOWE, through his**
12 **guardian John Munger; EVELYN G. WRIGHT**
13 **through her son and next friend, Paul Mayzes;**
14 **MICHIGAN DISABILITY RIGHTS COALITION;**
15 **MICHIGAN ASSOCIATION OF CENTERS**
16 **FOR INDEPENDENT LIVING; MICHIGAN**
17 **CAMPAIGN FOR QUALITY CARE;**
18 **GREAT LAKES CENTER FOR INDPENDENT**
19 **LIVING; and GRAND RAPIDS CENTER**
20 **FOR INDEPENDENT LIVING,**

21 Plaintiffs,

22 v.

23 **JOHN ENGLER, in his official capacity as**
24 **Governor of the State of Michigan, and**
25 **James K. Haveman Jr., in his official capacity**
26 **as Director of the Michigan Department of Community Health,**

27 Defendants.
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WRD
Case No.
5:02CV0044
Hon.

David W. McKeague
U.S. District Judge

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26 COMPLAINT
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I. Introduction

1. This is a complaint seeking declaratory and injunctive relief brought by elderly and younger persons with disabilities and by organizations whose mission is to advocate for community placement for people with disabilities to challenge the Defendants' failure to provide needed, community-based long term care services in violation of the Medical Assistance Act ("Medicaid") 42 U.S.C. §1396 et seq.; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq.; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). The plaintiffs individually named are each eligible for, desire, have applied for or have attempted to apply for and have been denied community-based Medicaid-funded services, specifically services available pursuant to the Home and Community Based Waiver Program (hereinafter "the Waiver program"), 42 U.S.C. § 1396n. Plaintiffs have been unable to gain access to these critical services because, as of October 1, 2001, Defendants Engler and Haveman have unlawfully restricted funding to the Waiver program, thus resulting in the closure of the program to virtually all new applicants. Because of Defendant Engler's and Haveman's actions, the individually named plaintiffs and those in similar situations on behalf of whom the organizational Plaintiffs advocate will remain unnecessarily institutionalized or remain at imminent risk of unnecessary institutionalization.

2. The Medicaid program traditionally funded long term care services only in institutional settings. However, Congress recognized the strong desire of most people with disabilities, like the individual Plaintiffs, to remain in their own homes or to return to their own homes. It therefore authorized states to obtain waivers to provide Medicaid-funded long term care services in the community as an alternative to nursing home placement. 42 U.S.C. § 1396n. Michigan, like every other state, thereafter sought and obtained a waiver to provide home and community-based care and began providing services in 1992. Effective October 1, 1999, Michigan made a commitment to provide these waiver services to 15,000 individuals each year and did so until September 30, 2001.

3. As of October 1, 2001, the beginning of the current fiscal year, however, Defendants chose to reduce funding for the waiver program by \$20 million and have thus ensured that the

1 individual Plaintiffs, like virtually all individuals who are not already receiving waiver services, will
2 be unable to do so during the current fiscal year. The individual Plaintiffs have therefore been forced
3 to seek long term care services in nursing homes or to remain in the community without these
4 essential services and remain at risk of institutionalization. Defendants have therefore unnecessarily
5 segregated and isolated the individual Plaintiffs in nursing homes or put the individual Plaintiffs at
6 risk of unnecessary institutionalization, in violation of the ADA, Section 504, and the Medicaid Act.
7 Similarly, Defendants have also unlawfully and unnecessarily segregated and isolated many of the
8 individuals on whose behalf the organizational Plaintiffs advocate or put these individuals at risk of
9 unlawful and unnecessary institutionalization.

10 **II. Jurisdiction and Venue**

11 4. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and
12 1343(a)(3)-(4).

13 5. This action is authorized pursuant to 29 U.S.C. § 794a, 28 U.S.C. §§ 2201-2202, and
14 by 42 U.S.C. §§ 1983 and 12133.

15 6. Venue is appropriate in this District pursuant to 28 U.S.C. §1391(b) because Plaintiffs
16 Eager, Hugger, Wright, Michigan Association of Centers for Independent Living, Michigan
17 Disabilities Rights Coalition, and Grand Rapids Center for Independent Living reside in this District,
18 Defendants have their official place of business in this District, and because a substantial part of the
19 events or omissions giving rise to the claims set forth in this complaint occurred in this District.

20 **III. Parties**

21 **A. Individual Plaintiffs**

22 7. Plaintiff Robert Eager is a 44-year-old Traverse City resident who has been diagnosed
23 with Multiple Sclerosis which causes him to have a disability as defined in the ADA at 42 U.S.C.
24 §12102(2)(A) and a disability as used in Section 504.

25 8. Plaintiff Dora Oats is a 77-year-old resident of Ypsilanti who suffered a devastating
26 stroke in August, 2001 which causes her to have a disability as defined in the ADA at 42 U.S.C.
27 §12102(2)(A) and a disability as used in Section 504. Due to her disability, Ms. Oats brings this
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1 action through Crystal Oats, her granddaughter and next friend.

2 9. Plaintiff Howard Hugger is a 100-year-old resident of Lansing who suffers from
3 leukemia, chronic obstructive pulmonary disease, cognitive impairments, and other conditions that
4 cause him to have a disability as defined in the ADA at 42 U.S.C. §12102(2)(A) and a disability as
5 used in Section 504. Due to his disabilities, Mr. Hugger brings this action through his niece and
6 guardian, Sharon Cook.

7 10. Plaintiff Terrell King, age 29, is paralyzed from the neck down as the result of a
8 football injury which causes him to have a disability as defined in the ADA, 42 U.S.C. §12102(2)(A)
9 and a disability as used in Section 504.

10 11. Plaintiff Georgette Kraft is an 81-year-old resident of the Rivergate Convalescent
11 Center in Riverview, Michigan. Ms. Kraft has Alzheimer's disease and arthritis, which causes her to
12 have a disability, as defined in the ADA at 42 U.S.C. §12102(2)(A) and a disability as used in
13 Section 504. Due to her disabilities, Ms. Kraft brings this action through her husband and next
14 friend, Roy Kraft.

15 12. Plaintiff Dennis Lowe, age 42, has a cognitive impairment and seizure disorder as a
16 result of a traumatic brain injury and thus has a disability as defined in the ADA at 42 U.S.C.
17 §12102(2)(A) and a disability as used in Section 504. Due to his disability, Mr. Lowe brings this
18 action through his guardian, John Munger.

19 13. Plaintiff Evelyn G. Wright, age 82, is a resident of Irons, Michigan, who has organic
20 brain syndrome and severe arthritis which causes her to have a disability as defined in the ADA at 42
21 U.S.C. §12102(2)(A) and a disability as used in Section 504. Due to her disabilities, Ms. Wright
22 brings this action through her son and next friend, Paul Mayzes.

23 **B. Organizational Plaintiffs**

24 14. Plaintiff Michigan Disability Rights Coalition (MDRC) is a non-profit, state-wide
25 network of individuals and organizations that advances the interests of Michigan's disability
26 community through community capacity building, grassroot activism, public education and
27 advocacy. The Michigan Disability Rights Coalition has several thousand members and partners

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1 with other organizations as part of its coalition. As a result of the Defendants' omissions or actions,
2 as more full described herein, MDRC is forced to expend time and organizational resources
3 advocating for additional community placements for individuals with significant disabilities.

4 15. Plaintiff Michigan Association of Centers for Independent Living (MACIL) is a
5 nonprofit corporation whose members are Centers for Independent Living (CILs). *See* 29 U.S.C. §
6 796f. Its purpose it to promote the independent living philosophy and to advocate for the individual
7 and collective program, service and financial needs of CILs throughout Michigan. As a result of
8 Defendants' omissions or actions, as more fully described herein, MACIL is forced to expend time
9 and organizational resources advocating for additional community placements for individuals with
10 significant disabilities

11 16. Plaintiff Michigan Campaign for Quality Care is an unincorporated, grassroots
12 organization of consumers who seek better care and better choices for Michigan's nursing home
13 residents. As a result of the acts or omissions of Defendants as more fully described herein, many
14 Campaign members are unable to leave of substandard nursing homes and return to the community
15 or move their family members in substandard nursing homes back to the community where the
16 residents would prefer to live. The Michigan Campaign for Quality Care and its members continue
17 to suffer injury as a result of the Defendants' actions due to the needs of the organization and its
18 members to spend time and resources advocating for community alternatives for themselves and
19 their family members.

20 17. Plaintiff Great Lakes Center for Independent Living (GLCIL), as a center for
21 independent living, is a nonprofit corporation funded through the Rehabilitation Act, 29 U.S.C. §
22 796f, to serve and represent people with disabilities in the Detroit area. GLCIL assists clients in
23 achieving community integration and avoiding unnecessary institutionalization. Many of its clients
24 face continued and unwanted institutionalization or are at risk of unnecessary institutionalization
25 because of the acts or omissions of Defendants, as more fully described herein.

26 18. Plaintiff Grand Rapids Center for Independent Living (GRCIL), as a center for
27 independent living, is a nonprofit corporation funded through the Rehabilitation Act, 29 U.S.C.

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1 §796f, to serve and represent people with disabilities in the Grand Rapids area. GRCIL assists
2 clients in achieving community integration and avoiding unnecessary institutionalization. Many of
3 its clients face continued and unwanted institutionalization or are risk of unnecessary
4 institutionalization because of the acts or omissions of Defendants, as more fully described herein.

5 19. As a result of the defendants' actions, the Great Lakes Center for Independent Living
6 and the Grand Rapids Center for Independent Living have been forced to spend time and resources
7 to advocate for community based services, rather than assisting persons with disabilities with other
8 issues, including obtaining accessible and affordable housing, equal employment opportunities, and
9 access to places of accommodation. These injuries will continue in the future so long as defendants'
10 actions and practices are unchanged.

11 **C. Defendants**

12 20. Defendant John Engler is Governor of Michigan and, pursuant to Const 1963, art 5,
13 §1, all executive power of the State of Michigan rests with him. Defendant Engler also has the
14 responsibility, pursuant to Const. 1963, art. 5, § 18, to prepare and submit a budget to the Michigan
15 Legislature.

16 21. Defendant James K. Haveman, Jr. is the Director of the Michigan Department of
17 Community Health (hereinafter "MDCH"), appointed by the Governor of Michigan. As such,
18 pursuant to MCL 330.1104, all executive authority of the MDCH rests with him. MDCH is the
19 single state agency responsible for administering the Michigan Medicaid Program, including the
20 Home and Community Based Services Waiver Program. *See* 42 U.S.C. § 1396a(a)(5).

21 **IV. Factual Allegations**

22 **A. Plaintiffs' need for community-based services**

23 22. Plaintiff Robert Eager was diagnosed in 1991 with multiple sclerosis while employed
24 as a supervisor in a steel fabrication plant. One year later, as his disability worsened, Mr. Eager was
25 no longer able to perform his duties and was forced to leave work. Mr. Eager has continued to
26 experience a progressive loss of function in his hands and legs and now uses a wheelchair and is
27 challenged and exhausted by virtually every activity of daily living.

1 23. Mr. Eager has two sons, Donald, 11, and Justin, 15, as well as, 18-year-old stepson,
2 Brent Diehl, whom he raised. Mr. Eager is divorced and, although his children live with their
3 mother, they visit Mr. Eager regularly and sometimes spend the night with him. Mr. Eager values
4 tremendously the time he and his children spend together at his home. If Mr. Eager is forced to seek
5 nursing home placement, both the quantity of time his children will spend with him and the quality
6 of their relationship will be severely diminished.

7 24. Currently, Mr. Eager receives no services and manages to survive in the community
8 only because of the extraordinary efforts and kindness of friends, but he is uncertain whether the
9 friends who assist him will be able to continue to do so in the future.

10 25. There is no dispute that Mr. Eager has been determined financially and medically
11 eligible for the Home and Community Based Waiver program. As recently as January 18, 2002, at a
12 hearing in front of an administrative law judge of the MDCH, representatives of the Area Agency on
13 Aging of Northwest Michigan, the waiver agent designated to provide services in Mr. Eager's region
14 of the state, acknowledged that the only reason they were not able to provide services to Mr. Eager
15 was because Defendants reduced available funding for the waiver program.

16 26. Because of his disabilities and his financial status, Mr. Eager is eligible to enter a
17 nursing home today and have his care paid for by Medicaid at far greater cost to the State than the
18 cost of maintaining him in the waiver program. Although Mr. Eager is a generally a genial,
19 optimistic and determined man, because he so values his independence and his family life, he has
20 repeatedly stated that he would refuse food and water if he were forced to enter a nursing home.

21 27. Plaintiff Dora Oats was completely independent prior to her devastating stroke in
22 August, 2001. She is now paralyzed on her right side; needs supervision or assistance with many
23 activities of daily living such as bathing, toileting, and transferring herself from her bed to her
24 wheelchair; is unable to perform routine chores such as cooking, cleaning, shopping, and money
25 management; suffers from confusion and disorientation; requires round-the-clock supervision; is at
26 risk of falling; and needs assistance managing her household.

27 28. Ms. Oats' granddaughter, Crystal Oats, provides round-the-clock care to her at Ms.
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1 Oats' home and was forced to leave her job in October to take care of Ms. Oats. Other family
2 members provide some additional assistance when they are able. Ms. Oats receives only four hours
3 per week of homemaker services from the Area Agency on Aging. Because Crystal Oats has three
4 children, and because both she and Plaintiff have very limited resources, she will soon have to return
5 to work to support her family. In the absence of services pursuant to the Home and Community
6 Based Waiver Program, Ms. Oats will then require nursing home placement.

7 29. Crystal Oats and her family are unaware of a local nursing home that would accept
8 Plaintiff and provide high quality care to her. They also believe that Plaintiff would become more
9 disoriented and deteriorate if taken out of her familiar surroundings. Moreover, Plaintiff Dora Oates
10 has repeatedly expressed her pride in her home of more than 40 years and her strong desire to remain
11 there. Therefore, Plaintiff and her family are anxious to ensure Ms. Oats does not need to be
12 institutionalized.

13 30. Plaintiff Dora Oats applied for the waiver program in September 2001, was found
14 eligible for waiver services after a telephone screen, but was denied services because no waiver slots
15 were available. Crystal Oats appealed the decision on behalf of her grandmother and a hearing was
16 held on November 29, 2001. However, in December, Administrative Law Judge Gregory J. Kershul
17 denied the appeal, concluding that administrative law judges had no authority to allot more funds to
18 a region or contractor than the state determines it will provide and cannot order the provision of
19 services if there are insufficient funds to pay for them.

20 31. Plaintiff Howard Hugger is a 100-year-old man who suffers from some cognitive
21 declines, leukemia, diabetes, chronic obstructive pulmonary disease, and a thyroid condition. Until
22 July, 2001, Mr. Hugger lived alone in his home and received services under the Home and
23 Community Based Waiver program. After a fall in his home and treatment in several local health
24 care facilities, he was no longer able to live independently and moved in with his niece, Sharon
25 Cook. Ms. Cook is a 61-year-old woman who suffers from fibromyalgia, chronic fatigue syndrome,
26 arthritis and back problems and who has herself been receiving Social Security Disability payments
27 since 1996.

1 32. In September, 2001, Mr. Hugger suffered two more falls and became disoriented.
2 After a brief hospital stay, he was placed in the Eaton County Medical Facility, a local nursing
3 home. Pursuant to a petition filed in Probate Court by Cass County Protective Services, an agency
4 named Guardianship Alternatives was appointed as Mr. Hugger's conservator and Ms. Cook was
5 appointed to serve as his guardian.

6 33. During the more than three months in which Mr. Hugger lived in the nursing home,
7 Ms. Cook alleges he lost approximately one pound per week, did not receive appropriate care for
8 several medical conditions, became sluggish and depressed, and asked constantly when he could
9 return to Ms. Cook's home.

10 34. Because Mr. Hugger's condition and spirits were deteriorating in the nursing home,
11 Ms. Cook agreed to bring Mr. Hugger home again on Christmas Day, 2001 and he has remained in
12 her home since that time. His spirits and energy have markedly improved and he has repeatedly
13 expressed his desire to remain in his niece's home. However, because of her own disabilities, Ms.
14 Cook has been overwhelmed by Mr. Hugger's needs including constant assistance with toileting,
15 feeding, and ambulation; 24 hour supervision; sleep interruptions as often as a dozen times a night;
16 the responsibility for arranging for Mr. Hugger's continuing health care and benefits; and the
17 responsibility for sorting through the contents of Mr. Hugger's former apartment.

18 35. Until February 20, 2002, Medicare paid for an aide to bathe Mr. Hugger, but that
19 service was discontinued on February 21, 2002, Mr. Hugger's 100th birthday. On or about
20 February 22, 2002, counsel for Mr. Hugger was informed by Marion Owen, Acting Director for the
21 Tri-County Office on Aging, that there were approximately 100 people on the waiting list ahead of
22 Mr. Hugger for assistance with basic needs like bathing. Subsequently, after Mr. Hugger was
23 hospitalized with pneumonia, Sparrow Hospital arranged temporarily for additional services,
24 including assistance with bathing, but could not guarantee how long those services would continue
25 to be provided. Because Ms. Cook is unable to lift Mr. Hugger and bathe him, Ms. Cook might be
26 forced to place Mr. Hugger in a nursing home for his last days when his temporary services are
27 discontinued.

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1 36. Plaintiff Terrell King is a 29-year-old resident of Madonna Nursing Home in Detroit
2 whose spinal cord was severed as a result of a football injury in 1992. Mr. King entered the nursing
3 home seven years ago to spare his mother the burden of caring for him.

4 37. Mr. King is essentially paralyzed from the neck down, although he has limited range
5 of motion in his arms. Mr. King uses a power wheelchair for ambulation.

6 38. A lifelong resident of the City of Detroit, Mr. King regularly leaves the nursing home
7 to visit with family and friends and to attend social activities in the community. Mr. King
8 desperately seeks to move out of the nursing home so that he can enjoy a more normal and integrated
9 lifestyle, spend more time with people his own age, and pursue an education.

10 39. Mr. King has contacted the Defendants' waiver agent more than once and as recently
11 as February 4, 2002. On that date, he encountered a telephone recording which asked him to leave a
12 message. He did so and asked that he be contacted concerning the availability of a slot in the waiver
13 program. To date, Mr. King has not heard back from Defendants' waiver agent.

14 40. Mr. King's caseworker at the Great Lakes Center for Independent Living believes he
15 can find an appropriate apartment for Mr. King in Detroit and that Mr. King would be able to live
16 independently if he had waiver services to help him with basic care, food preparation, and other
17 activities of daily living. Without the services of the Home and Community Based Waiver Program,
18 however, Mr. King will be forced to remain in the nursing home, surrounded by many individuals
19 who are decades older than he is and who do not share his interests or participate in similar activities.

20 41. Plaintiff Georgette Kraft is an 81-year-old woman who resides in a nursing home in
21 Riverview, Michigan and has lived there for more than two years. Ms. Kraft lives in a nursing home
22 so that she may receive long-term care services she needs to survive. Ms. Kraft could live in her
23 apartment with her husband, where she could be provided with long-term care services through the
24 Home and Community Based Waiver Program.

25 42. Ms. Kraft and her husband, Roy Kraft, have had a long and happy marriage. It is
26 their mutual hope that they will be able to spend their remaining days together in their apartment.

27 43. Mr. Kraft comes to the nursing home to provide services to his wife on an almost
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1 daily basis. He provides for her what the nursing home cannot or will not provide. He provides her
2 the type of personal attention and loving care that only a family member can provide.

3 44. Georgette Kraft's son, David Kraft, contacted a local waiver provider in an attempt to
4 obtain services for his mother but was informed there were no waiver slots available. Absent those
5 waiver services, Mr. Kraft is unable to care for his wife in their apartment. With the provision of
6 those services, Mrs. Kraft can return to her home and live with her husband.

7 45. Plaintiff Dennis Lowe is a 42-year-old resident of Rochester Hills, Michigan who
8 resides in an assisted living facility. Mr. Lowe has a cognitive impairment and a seizure disorder
9 that are the result of a traumatic brain injury. He lives in his own apartment which he has furnished
10 and which he pays for out of his disability income.

11 46. Due to his disability, Mr. Lowe requires assistance with certain activities of daily
12 living, including showering, shaving and, occasionally, dressing. Mr. Lowe also requires assistance
13 with meal reminders and with the dispensing of medications.

14 47. Each of those services that Mr. Lowe requires can and would be paid for by the Home
15 and Community Based Waiver. However, the waiver agent that was contacted by Mr. Lowe's sister,
16 Etta Dahlen, of Royal Oak, Michigan, informed her that no waiver slots were available and thus Mr.
17 Lowe cannot be admitted to the Waiver Program. Absent these services through the Home and
18 Community Based Waiver Program, Mr. Lowe will be forced to enter a nursing home.

19 48. Plaintiff Evelyn G. Wright is an 82-year-old resident of Irons, Michigan, a rural
20 community. Ms. Wright has Organic Brain Syndrome and severe arthritis.

21 49. Because of her cognitive impairments, Ms. Wright has significant difficulty in
22 managing her medication and requires assistance to help her with this task. She also requires
23 assistance with the activities of daily living and with cleaning and maintaining her household.

24 50. Ms. Wright is a proud and independent woman. She has a true horror of
25 institutionalization because of the trauma she suffered when she was institutionalized as a young girl
26 in a home for children. Entering a nursing home now would greatly diminish the quality of her life,
27 separate her from friends and family, and rob her of her independence.

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1 51. Ms. Wright has been evaluated by the Defendants' local waiver agent, the Area
2 Agency on Aging of West Michigan. She was found to be eligible for services under the Home and
3 Community Based Waiver Program. However, the waiver agent was unable to provide those
4 services, due to the actions of Defendants in reducing funding to the program.

5 52. Absent waiver services, Ms. Wright will continue to rely upon the assistance of her
6 son, who himself has a disability, and her daughter-in-law, Barbara Mayzes. However, her son and
7 daughter-in-law do not have the resources to provide the complete array of services that Ms. Wright
8 requires to ensure a high quality of life and to ensure her safety while at home.

9 **B. The Importance of Community Integration**

10 53. People forced to accept long term care in an institutional setting experience separation
11 from family, friends, and familiar surroundings and a significant loss of privacy. They may also
12 experience difficulty adjusting to new environments, depression, loneliness, boredom, and physical
13 and mental deterioration.

14 54. In 1990, when enacting the ADA, Congress expressly recognized that "historically,
15 society has tended to isolate and segregate individuals with disabilities, and despite some
16 improvements, such forms of discrimination against individuals with disabilities continue to be a
17 serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

18 55. The Supreme Court has expressly recognized that "unjustified institutional isolation
19 of persons with disabilities is a form of discrimination" in violation of the ADA. *Olmstead v. L.C.* ,
20 *ex. Rel. Zimring*, 119 S.Ct. 2176, 2187 (1999).

21 56. On January 10, 2001, the U.S. Department of Health and Human Services, in a letter
22 to State Medicaid directors, identified the Home and Community Based Waiver Program as a
23 primary vehicle for states to satisfy their obligations pursuant to the *Olmstead* decision.

24 57. On June 18, 2001, President George W. Bush issued an Executive Order asserting
25 that the United States is committed to community-based alternatives for individuals with disabilities,
26 that unjustified isolation or segregation of qualified individuals with disabilities through
27 institutionalization is a form of disability-based discrimination prohibited by Title II of the

1 Americans with Disabilities Act, and that the federal government must assist States to implement
2 swiftly the *Olmstead* decision “so as to help ensure that all Americans have the opportunity to live
3 close to their families and friends, to live more independently, ”... and to participate in community
4 life.” Exec. Order No. 13217, 66 Fed Reg. 33155 (June 18, 2001).

5 58. The Michigan legislature long ago recognized the importance of the Home and
6 Community Based Waiver Program by codifying a requirement in 1988 that the State make the
7 program available to individuals who would otherwise require institutional care. *See* MCL
8 400.109c.

9 59. Unlike the vast majority of states, Michigan has not adopted a plan to comply with
10 the *Olmstead* decision and has engaged in only minimal implementation of initiatives that would
11 hasten community integration or reduce unnecessary institutionalization. In fact, in addition to
12 reducing funding for the waiver program for the current fiscal year, as more fully set forth below,
13 paragraphs 85-88, *infra*, as of December 12, 2001, the Michigan Department of Community Health
14 has instructed waiver providers that they may no longer seek additional waiver funding to assist
15 residents transitioning out of nursing homes into community settings. *See* Appendix 1,
16 Memorandum from Kathie Black, Michigan Department of Community Health to MI Choice Waiver
17 Executive Directors, MI Choice Waiver Program Managers, Elizabeth O’Hara and Ellen Weaver,
18 Michigan Association of Centers for Independent Living.

19 60. Up until this point, the waiver program has been the State’s primary vehicle for
20 furthering community integration. The effective closure of the program to new applicants including
21 eligible individuals who seek to return to the community from nursing homes means that the state is
22 moving backwards, not forwards, in pursuing community integration and that individuals with
23 disabilities, like the individual plaintiffs and the individuals who are represented by or members of
24 the organizational plaintiff groups, face continued discrimination and despair.

25 C. The Medicaid Home and Community Based Waiver Program

26 1. Overview

27 61. The Medicaid program is a joint federal-state program in which states may choose to
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1 participate and is designed to provide medical care to indigent populations. 42 U.S.C. §1396 et seq.

2 62. Michigan, like all states, has chosen to participate in Medicaid.

3 63. The federal government provides the majority of funding for state Medicaid
4 programs.

5 64. All states must designate a single state agency to administer the Medicaid program.
6 MDCH is the agency so designated by the state of Michigan. MCL 400.105.

7 65. States must provide a certain array of services to designated indigent populations
8 pursuant to federal law, 42 U.S.C. § 1396(a)(10), but may also serve additional populations and/or
9 provide optional coverage for additional medical services.

10 66. Mandatory services include, *inter alia*, nursing facility services for eligible
11 individuals requiring long term care. 42 U.S.C. § 1396a(a)(10)(A).

12 67. Pursuant to 42 U.S.C. §1396n, however, states may seek a waiver from the federal
13 Centers for Medicare and Medicaid Services (CMS) to pay for long term care services to eligible
14 individuals in the community. This program is commonly known as the Home and Community
15 Based Waiver program.

16 **2. Administration of the Michigan Waiver Program**

17 68. In 1992, the Michigan Medicaid Program received approval from the federal
18 government to implement in 11 counties a Home and Community Based Waiver program for elderly
19 and disabled individuals who were determined to be financially eligible for Medicaid and medically
20 eligible for long term care services.

21 69. Services available under the waiver program include homemaker services, adult day
22 care, transportation, personal care, personal emergency response systems, counseling, environmental
23 modifications, respite services, chore services, private duty nursing, medical supplies and equipment
24 not covered by the State Medicaid plan, and training in a variety of independent living skills. *See* 42
25 C.F.R. 440.180; MCL 400.109c.

26 70. Waiver services are provided by designated regional waiver agents including area
27 agencies on aging and other nonprofit organizations. These organizations enter into contracts with
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1 MDCH that set forth how the waiver program is to be administered and how the waiver agent will be
2 reimbursed.

3 71. These designated waiver agents accept applications for the waiver program and
4 screen applicants to determine their medical eligibility and appropriateness for waiver services. For
5 individuals found eligible for waiver services, the waiver agents develop a plan of care and oversee
6 the delivery of services.

7 72. The MDCH has committed in its waiver application to the federal government, see
8 paragraphs 74-78 *infra*, that it will be not limit the cost of services that can be provided to an
9 individual waiver client. However, in FY 2001, the average per diem cost was less \$42 per waiver
10 client.

11 73. Until October 1, 2001, each waiver agent was allotted a specific number of the 15,000
12 waiver slots statewide. The allocation of these slots was based on a fiscal year starting on October 1
13 and ending on September 30.

14 **3. Michigan's Federal Waiver Application**

15 74. In 1995, MDCH submitted, and the federal government approved, a five-year waiver
16 plan.

17 75. On March 2, 2000, the MDCH received approval from CMS to expand its waiver to
18 serve 15,000 people statewide retroactive to October 1, 1999.

19 76. The terms of the waiver program approved by the federal government are set forth in
20 the state's waiver application and in subsequent amendments contained in correspondence between
21 the state and the federal government concerning the program.

22 78. The 1995 waiver application granted by the federal government expired in 2000.
23 MDCH submitted a renewal application to continue the waiver program for a period of five years for
24 15,000 unduplicated individuals per year. Subsequently, the State sought, and CMS has approved,
25 multiple 90 day extensions of the terms of the 1995 waiver to permit continued services to 15,000
26 eligible individuals during the fiscal year.

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1 **4. The Demand for Waiver Services**

2 79. Despite the requirements of federal law, the MDCH has in place no procedure for
3 advising individuals eligible for Medicaid-funded long term care services of the availability of
4 services under the waiver program.

5 80. Despite this lack of a procedure to ensure that individuals entering nursing homes are
6 advised of their right to seek community based services under the waiver, waiver agents generally
7 filled all of their allocated slots long before September 30.

8 81. Because waiver agents were specifically directed by MDCH not to maintain waiting
9 lists, the full extent of the unmet community need for waiver services is not known nor is there any
10 mechanism to determine how long people who seek waiver services wait before they receive them.
11 Upon information and belief, however, hundreds of people with disabilities seeking waiver services
12 to avoid institutionalization were formally or informally denied those services in previous fiscal
13 years once all slots were filled.

14 82. Despite being instructed not to maintain waiting lists, upon information and belief,
15 numerous waiver providers have recently begun to maintain lists of individuals who are seeking
16 admission to the waiver program and who they determine in telephone screens to be eligible for
17 waiver services. For example, since September 1, 2001, even though many referral sources know
18 that the program is essentially closed and have therefore stopped making referrals, the Area Agency
19 on Aging in Lansing has identified and had to turn away in excess of 450 people who are seeking
20 access to waiver services and who appear eligible for those services. *See* Appendix 2, Affidavit of
21 Marion Owen, Executive Director, Tri-County Office on Aging.

22 **5. Funding for the Waiver Program and Reduction in Number of Clients**
23 **Approved for the Waiver Program effective October 1, 2001.**

24 83. In authorizing the budget for the MDCH, the Michigan Legislature allocated in
25 excess of \$1.2 billion for the provision of nursing home and personal care services and enabled the
26 Department to tap these funds to support the waiver program “in lieu of nursing home services for
27 individuals seeking long term care services.” 2001 PA 60, §1681.
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1 84. In FY 2001, upon information and belief, the Department expended \$146 million on
2 the waiver program. These funds were distributed to waiver agents based on the number of waiver
3 clients they served and the costs waiver agents incurred in providing services to those clients.

4 85. In a letter to the Michigan House of Representatives dated July 23, 2001 regarding
5 FY 2002 appropriations to the Department of Community Mental Health (“MDCH”), Governor
6 Engler stated that he had “instructed the Department [of Community Health] *to reduce the number of*
7 *participants in the [waiver] program.....*” See Appendix 3.

8 86. In September, 2001, the Department announced it intended to reduce spending on the
9 program to \$126 million and may in fact, expend even less than that in this fiscal year.

10 87. Along with the reduction in funding, MDCH announced a new funding formula
11 which eliminated the Department’s prior practice of allocating a designated number of “slots” to
12 each waiver provider. Instead, waiver agents were offered a fixed amount and were instructed to use
13 these funds to support FY 2001 waiver clients who would continue to receive services in the new
14 fiscal year (“carry-over clients”) and any new clients the waiver providers chose to admit to the
15 program.¹ However, upon information and belief, the funding offered to waiver providers
16 constituted a 20 to 30 percent decrease from the funding they received in FY 2001. Affidavit of
17 Marion Owen, Appendix 2.

18 _____
19 ¹ Upon information and belief, the Department determined the amount of funding
20 allocated to each waiver agent this fiscal year by determining the number of waiver clients being
21 served by each provider on a “snapshot date” in September, 2001 and multiplying that number by
22 270 (the number of days the Department determined represented the average length of
23 stay in the waiver program) and by the average amount of money per day that waiver agents were
24 previously entitled to receive for providing services to waiver clients. Waiver agents were subsequently
25 informed that they will be eligible for a contract amendment to obtain slightly more funding for
26 individuals who remain in the program more than 270 days, but this additional funding is
27 insufficient to enable waiver agents to admit new applicants into the program.

1 funding the waiver program in such a manner that, upon information and belief, fewer than 11,000
2 people will actually be served in the waiver program during this fiscal year. Affidavit of Marion
3 Owen, Appendix 2.

4 96. MDCH has failed to implement the waiver and, therefore, has failed to provide
5 medical assistance under the State Medicaid plan in violation of Title XIX.

6 **Count II -- Title XIX of the Social Security Act: Failure to Furnish Medical Assistance with**
7 **Reasonable Promptness**

8 97. Plaintiffs restate and reallege paragraphs 1-96.

9 98. Title XIX requires that the State plan provide “[medical] assistance shall be furnished
10 with reasonable promptness to all eligible individuals.” 42 U.S.C. § 1396a(a)(8). This means, *inter*
11 *alia*, that MDCH must furnish medical assistance promptly without any delay caused by the
12 agency’s administrative procedures. 42 C.F.R. § 435.930(a).

13 99. The services authorized by the home and community based waiver are “medical
14 assistance” services and MDCH has failed to furnish such services to Plaintiffs with reasonable
15 promptness in violation of Title XIX.

16 **Count III -- Title XIX of the Social Security Act: Failure to Allow Applications**

17 100. Plaintiffs restate and reallege paragraphs 1-99.

18 101. Title XIX requires that the state plan shall “provide that all individuals wishing to
19 make application for medical assistance under the plan shall have the opportunity to do so....” 42
20 U.S.C. § 1396a(a)(8); 42 C.F.R. § 435.906.

21 102. The services authorized by the home and community based waiver are “medical
22 assistance” services and MDCH has failed to provide the opportunity for some of the individual
23 Plaintiffs to apply for those services or to complete the application process, in violation of Title XIX.

24 **Count IV -- Title XIX of the Social Security Act: Violation of Waiver Assurances**

25 103. Plaintiffs restate and reallege Paragraphs 1-102.

26 104. Title XIX requires that a state must provide assurances that, *inter alia*, individuals
27 who may be eligible for home and community based services under the waiver program will be
28

1 advised of the availability of these services as an alternative to nursing home placement. 42 U.S.C.
2 §1396n(c)(2); 42 CFR §§ 441.302(c)-(d).

3 105. Defendants have violated Title XIX by failing to inform individuals eligible for
4 services under the waiver program of the availability of those services.

5 **Count V -- Violations of the Americans with Disabilities Act: Unnecessary Segregation**

6 106. Plaintiffs restate and reallege Paragraphs 1 through 105.

7 107. The individual Plaintiffs are qualified individuals with disabilities because they have
8 physical and, in some cases, mental impairments that substantially limit one or more major life
9 activities and are qualified to receive long term care services funded by MDCH. 42 U.S.C. §
10 12102(2) and 12131(2); 29 U.S.C. §705(20)(B).

11 108. The individual Plaintiffs are protected by the Americans with Disabilities Act
12 (“ADA”), 42 U.S.C. 12132.

13 109. MDCH is a public entity subject to the ADA. 42 U.S.C. 12131(1).

14 110. The individual Plaintiffs can, with appropriate supports and services, live in
15 community-based programs. For these individuals, segregation and institutionalization in nursing
16 homes is unjustified and unnecessary.

17 111. Defendants violate Title II of the ADA by failing to provide services to Plaintiffs in
18 the most integrated setting appropriate to their needs. 42 U.S.C. 12132; 28 C.F.R. § 35.130(b).

19 112. Providing services to the individual Plaintiffs in the most integrated setting
20 appropriate to their needs rather than in a segregated institution would not result in a fundamental
21 alteration of the programs provided by MDCH.

22 113. Defendants have developed no plan to ensure that the individual Plaintiffs are
23 provided with services in the most integrated setting appropriate to their needs.

24 **Count VI -- Violation of the Americans with Disabilities Act: Discriminatory Methods of
25 Administration**

26 114. Plaintiffs restate and reallege Paragraphs 1 through 113.

27 115. Defendants have administered long term care services funded by Title XIX in such a
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1 manner as to force the individual Plaintiffs to be unnecessarily segregated or at risk of unnecessary
2 segregation.

3 116. Defendants are therefore violating Title II of the ADA by using methods of
4 administration that have the effect of subjecting individual Plaintiffs to discrimination on the basis of
5 disability. 42 U.S.C. § 12132; 28 C.F.R. §35.130(b)(3).

6 **Count VII --Violation of the Rehabilitation Act: Unnecessary Segregation**

7 117. Plaintiffs restate and reallege Paragraphs 1 through 116.

8 118. The individual Plaintiffs are qualified individuals with disabilities because they have
9 physical and, in some cases, mental impairments that substantially limit one or more major life
10 activities and are qualified to receive long term care services funded by MDCH. 29 U.S.C.
11 §705(20)(B).

12 119. The individual Plaintiffs are protected by Section 504 of the Rehabilitation Act, 29
13 U.S.C. §794(a).

14 120. MDCH receives federal financial assistance through, *inter alia*, the Medicaid
15 Program and, is therefore subject to Section 504 of the Rehabilitation Act, 29 U.S.C. §§794(a) and
16 794(b)(1)(A).

17 121. The individual Plaintiffs can, with appropriate supports and services, live in
18 community-based programs. For these individuals, segregation and institutionalization in nursing
19 homes is unjustified and unnecessary.

20 122. Defendants violate Section 504 by failing to provide services to the individual
21 Plaintiffs in the most integrated setting appropriate to their needs. 29 U.S.C. §794(a); 28 C.F.R. §
22 41.51(d); 45 C.F.R. §84.4(b)(2).

23 123. Providing services to the individual Plaintiffs in the most integrated setting
24 appropriate to their needs rather than in a segregated institution would not result in a fundamental
25 alteration of the programs provided by MDCH.

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1 (4) For each eligible applicant for the Home and Community Based Waiver Program,
2 fund all medically necessary and appropriate services available under the waiver for no fewer than
3 15,000 individuals per year.

4 (5) Maintain waiting lists for all individuals who appear to be eligible for the waiver
5 program.

6 (6) Implement a plan to provide with reasonable promptness home and community
7 based waiver services or other comparable community-based services to individuals on the waiting
8 list to avoid unnecessary institutionalization or continued unnecessary segregation.

9 E. Issue such other injunctive relief as shall be necessary to enjoin defendants from
10 continuing to violate the individual Plaintiffs' rights to community-based services pursuant to the
11 Medicaid Act, the ADA, and § 504 of the Rehabilitation Act.

12 F. Award Plaintiffs any additional relief as may be just, proper, and equitable.

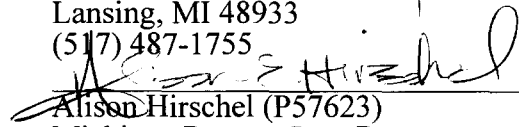
13 G. Award Plaintiffs reasonable litigation expenses, costs, and attorneys fees, pursuant to 29
14 U.S.C. §794a(b), 42 U.S.C. §1988, and 42 U.S.C. § 12205.²

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Respectfully submitted:



Mark A. Cody (P42695)
Michigan Protection and Advocacy Service, Inc.
106 W. Allegan, Suite 300
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(517) 487-1755



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(734) 998-6100

Attorneys for Plaintiffs

27 ² Michigan Poverty Law Program makes no claim for attorney fees in this action.

28

From: Linda K. Holcomb
To: i:macilleliz@match.org; i:macillellen@match.org; MI Choice Waiver Group; waiver executive directors
Date: Wed, Dec 12, 2001 3:42 PM
Subject: Nursing Home Transitions to MI Choice Waiver Services

MEMORANDUM

TO: MI Choice Waiver Executive Directors
MI Choice Waiver Program Managers
Elizabeth O'Hara and Ellen Weaver,
Michigan Association of Centers of Independent Living

FROM: Kathie Black

RE: Nursing Home Transitions to MI Choice Waiver Services

CC: Brenda Fink, Michael Daeschlein, Eva Duckworth, Elizabeth Gallagher, Vicky Jenks, Martha Misener, Jim Schwartz, Mary Gear, Deanna Mitchell, Bill Prince

DATE: December 12, 2001

This is to confirm the announcement made yesterday at the training meeting for MI Choice Waiver Agents that MDCH will stop authorizing additional funds to waiver agents for individuals transitioning out of nursing facilities. This is effectively immediately. We are hopeful that we will be able to continue additional resource support for individuals who can return to the community and need enrollment in the waiver in the event of nursing facility closures.

There are a number of referrals made prior to 12-12-01 in process. Planning for these individuals will continue. Referrals made to MDCH prior to 12-12-01 will not be affected by this change.

We continue to appreciate your commitment to serving those individuals already enrolled during this transition period. If you have questions about this matter, please feel free to contact your contract manager or me at 517-241-8026.

CC: Black, Kathie; Daeschlein, Michael; Duckworth, Eva; Fink, Brenda; Gallagher, Elizabeth A.; Gear, Mary; JENKS, VICKI; Misener, Martha; Mitchell, Deanna L.; Prince, Bill; Schwartz, Jim

App. 1

Affidavit of Marion Owen, Executive Director of the Tri-County Office on Aging

Marion Owen, being duly sworn, deposes and says:

1. I am the Executive Director of the Tri-County Office on Aging, an Area Agency on Aging located in Lansing, Michigan.

2. The Tri-County Office on Aging is a waiver provider in Michigan's Home and Community Based Waiver Program

3. Since 1992, I have served as the Director of the Waiver Program in the Tri-County Office on Aging.

4. Until October 1, 2001, the Michigan Department of Community Health (MDCH) allotted a specific number of waiver "slots" to each waiver provider.

5. As a waiver provider, we were permitted to fill all the slots that had been allocated to us as long as the average daily aggregate cost of providing services to the waiver clients in those slots did not exceed an amount determined by the state. Thus, we knew that our total budget for the waiver program, not including any additional funds the state agreed to provide for especially expensive cases, was the average daily amount set by the state multiplied by the number of days waiver clients in our slots remained in the program.

6. As of October 1, 2001, the beginning of the new State fiscal year, MDCH changed the funding formula for the waiver program. In FY 2002, MDCH offered the Tri-County Office on Aging a contract for \$6,937,561, an amount that represented a 25 percent less than the \$9,202,230 MDCH paid the agency for waiver services in FY 2001.

7. I understand from my contacts with staff at other Area Agencies on Aging that in FY 2002, they were also subject to substantial cuts, generally in excess of 20 percent, over the funding provided by MDCH for the waiver program in previous years.

8. As of September 30, 2001, the Tri-County Office on Aging was providing services to 583 individuals in the waiver program and was obligated to continue to serve these "carry-over clients" in the new fiscal year as long as the clients remained financially and medically eligible for the program.

9. Because of the reduction in funding for the waiver program for FY 2002, the Tri-County Office on Aging was not able to accept any new waiver clients into the program after October 1, 2000.

10. All the funding the Tri-County Office on Aging receives for the waiver program for this fiscal year will be needed to pay for services for existing clients. The agency fears that the

funds may not be sufficient to meet current clients' needs and is, in fact, already spending more than its target aggregate daily average on waiver services.

11. I understand that since October 1, 2001, only a very small number of new clients have been admitted into the waiver program across the state. Moreover, I understand that fewer than 11,000 clients are being served statewide this fiscal year.

12. Since the inception of the waiver program, waiver providers were specifically directed by the Michigan Department of Community Health not to maintain waiting lists for waiver applicants. However, since September 1, 2001, the Tri-County Office on Aging has been contacted by more than 459 people who were seeking waiver services and who had to be turned away because the agency had insufficient funds to admit additional waiver clients.

13. Because many people knew that the Tri-County Office on Aging was unable to accept any new waiver clients this fiscal year, organizations including hospitals, health care providers and others that previously referred clients to the waiver program ceased doing so and the number of inquiries we received was far lower than I would have anticipated if we were able to provide services to new applicants.

14. This declaration is based upon my personal knowledge, and if I am subpoenaed as a witness, I can testify competently to the facts contained herein.

I declare that the statements above are true and correct to the best of my knowledge, information and belief.

Marion Owen
Marion Owen, Executive Director,
Tri-County Office on Aging

Subscribed and sworn to before me this 18th day of March, 2002. RP

Rosemary A. Ptaskey
Notary Public

My Commission expires on:

ROSEMARY A. PTASKEY
Notary Public, Clinton County, NY
My Commission Expires Sept. 11, 2007



STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

JOHN ENGLER
GOVERNOR

July 23, 2001

Michigan House of Representatives
State Capitol Building
Lansing, Michigan 48909

Ladies and Gentlemen:

Today I have signed Enrolled House Bill 4254, the Fiscal Year 2002 Department of Community Health appropriation. However, I am returning it to you because of items of which I disapprove, pursuant to Article V, Section 19, of the Michigan Constitution. The specific items vetoed are contained within the attached copy of the bill that has been filed with the Secretary of State.

This bill appropriates over \$8.6 billion, an amount that represents a significant commitment to the health of Michigan's citizens. Highlights of the bill include:

- The appropriation of over \$5.6 billion to support the Medicaid program, which provides health care for 1.1 million low income residents of Michigan. I commend you for protecting this essential program from budgetary reductions, even in this constrained economy.
- The provision of nearly \$2 billion to support mental health and substance abuse services. The continuance of this generous level of funding to Community Mental Health Service Programs will support quality care for those most in need.
- The Department of Community Health was given unprecedented flexibility to develop a plan to curtail prescription drug cost increases. My goal is to design pharmacy options that encourage "best practice" drug utilization and still obtain the savings assumed in this bill.
- A rate increase for the Children's Waiver Program that will bring its rates into alignment with those paid to other Medicaid providers.

App. 3

Michigan House of Representatives
Page 2
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- The appropriation of nearly \$600 million for other public health and aging programs.

Several appropriations and policies included in this bill are inconsistent with my recommendations and I have directed the Department of Community Health to address them in the following manner:

- Summer Food Service Program – I am instructing the Department to delay implementation of this federal program until it can be determined that the federal government will provide sufficient funding to support the administrative costs of the program.
- Home and Community Based Waiver Services – This bill includes language, Section 1689, which will increase per recipient costs, but it fails to provide additional funding to finance these costs. I urge the Legislature to rescind this policy. In the interim, I have instructed the Department to reduce the number of participants in the program to insure that spending does not exceed the \$126 million appropriation.

As members of the Legislature are aware, the State of Michigan is now experiencing a period of constrained revenue. More than ever, we need to be certain that we focus available funding on high priority programs that efficiently and effectively utilize taxpayer resources. While many of the new initiatives you included in this bill have merit, I am unwilling to begin new initiatives in this difficult economic period. Accordingly, I have found it necessary to veto the items discussed below.

I have vetoed the following appropriations because they inappropriately restrict funding to selected providers or specific areas of the state: Section 906, Section 1021, Section 1023, Section 1121, Section 1127, and Section 2203.

I am vetoing the following appropriations because they deviate unacceptably from my recommendation and divert funding from higher priority initiatives: the Senior Olympics line item, Section 419, Section 1008, Section 1115, Section 1125, the Early Childhood Collaborative Secondary Prevention line item (and associated boilerplate in Section 1126), and Section 1688.

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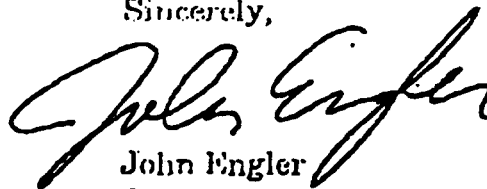
I have vetoed Section 1686, which allows nursing homes to reduce licensed beds and maintain eliminated space as an allowable Medicaid cost, because it is unlikely that this policy will qualify for federal matching funds. However, I am instructing the Department to convene a workgroup with the industry to formulate a policy that addresses the industry's bed surplus problem and complies with federal regulations.

I have vetoed funding for refurbishing the Beaver Island medical clinic that is included in this bill in Section 1644. Fiscal constraints require that we focus our limited resources on the Mackinac Island upgrade, a facility with a much greater patient load. I will, however, consider supporting funding for the Beaver Island clinic in the Fiscal Year 2003 budget.

Finally, I am vetoing the following language sections because they inappropriately place restrictions on revenues not yet received by the state: Section 224 and Section 1124.

While I have found it necessary to make numerous modifications to the bill you sent me, I have concurred with the vast majority of your appropriation actions. I appreciate the Legislature's cooperation in the development of the Department of Community Health's appropriation bill.

Sincerely,



John Engler
Governor

cc: Michigan State Senate
The Honorable Candice Miller