

**RECEIVED**

APR 11 2005

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISIONCLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

CHRISTY MCCARTHY, by and through  
her next friend, Jamie Travis;  
TODD GORDON, by and through his next  
friend, Trisha Gordon; ALLISON PRATT,  
by and through her next friend, Paula Pratt;  
GAIL TRUMAN, by and through her next  
friend, Ken Truman; JIM FLOYD, Jr., by  
and through his next friend, Jim Floyd, Sr.;  
SAM LINDSAY, by and through his next  
friend, Betty Lindsay; OSHEA BROOKS;  
JOE RAY CAMACHO; MICAH CHASTAIN,  
by and through his parent and next friend,  
Lori Chastain; SUE ANN ORTIZ;  
A.L., by and through her next friend, L.L.;  
PATRICK SOSTACK and SCOTT SOSTACK,  
by and through their parents and next friends,  
Gary and Lisa Sostack; SHYAN FOROUGH,  
by and through his parents and next friends,  
Reza and Arzu Forough; DAVID ZWEIFEL,  
by and through his parents and next friends,  
Linda and Leroy Zweifel; THE ARC  
OF TEXAS, on behalf of its members;  
and For Those Similarly Situated; ASHTON  
BOWLEN, by and through her mother and  
next friend, Patricia Bowlen; TYLER  
BLANCHARD, by and through his mother  
and next friend, Faith Blanchard; GARRETT  
GILLARD, by and through his mother and  
next friend, Keeya Gillard; KAMERON  
LANE, by and through his mother and next  
friend, Angie Lane; MADISON POLK, by  
and through her father and next friend, John  
Polk; and PAIGE SMITH, by and through her  
mother and next friend, Gretta Smith,  
Plaintiffs,

v.

DON A. GILBERT, in his official capacity  
as Commissioner of the Texas Health  
and Human Services Commission;  
KAREN F. HALE, in her official capacity  
as Commissioner of the Texas Department  
of Mental Health and Mental Retardation;  
and JAMES R. HINE, in his official  
capacity as Commissioner of the Texas  
Department of Human Services,  
Defendants.

**ORIGINAL**

Case No. A-03-CA-231-SS

HONORABLE SAM SPARKS

**PLAINTIFFS' THIRD AMENDED COMPLAINT**

Plaintiffs Christy Travis, by and through her next friend, Jamie Travis; Todd Gordon, by and through his next friend, Trisha Gordon; Gail Truman, by and through her next friend, Ken Truman; Jim Floyd, Jr., by and through his next friend, Jim Floyd, Sr.; Sam Lindsay, by and through his next friend, Betty Lindsay; Joe Ray Camacho; Patrick Sostack and Scott Sostack, by and through their parents and next friends, Gary and Lisa Sostack; Shyan Forough, by and through his parents and next friends, Reza and Arzu Forough; the ARC of Texas, on behalf of its members, and for those similarly situated; Ashton Bowlen, by and through her mother and next friend, Patricia Bowlen; Tyler Blanchard, by and through his mother and next friend, Faith Blanchard; Garrett Gillard, by and through his mother and next friend, Keeya Gillard; Kameron Lane, by and through his mother and next friend, Angie Lane; Madison Polk, by and through her father and next friend, John Polk; Billy Burch by and through his father, William Burch, Sr.; and Nathaniel Burkett, by his guardian and brother Clint Daniels file this Third Amended Complaint and respectfully show as follows:

**I. INTRODUCTION**

1. Plaintiffs bring this action to challenge Defendants' failure to provide at a reasonable pace community-based living options through programs like the Home and Community-based Waiver Services ("HCS") program, and the Community Living Assistance and Support Services ("CLASS") waiver program to persons with mental retardation and developmental disabilities.<sup>1</sup>

2. For persons with mental retardation, the HCS program offers services and supports that enable these individuals to remain at home, live independently, or live in a small home-like setting. The HCS waiver program helps persons with mental retardation avoid institutional settings

---

<sup>1</sup>Developmental disabilities other than mental retardation include "related conditions" such as spina bifida and cerebral palsy.

including nursing facilities, state schools, publicly and privately operated intermediate care facilities for the mentally retarded (“ICF/MR”) and other residential treatment facilities. Similarly, for persons with developmental disabilities other than mental retardation, the CLASS waiver program helps persons with developmental disabilities remain at home or live independently in the community. Like the HCS waiver program, the CLASS waiver program prevents or alleviates the need for ongoing institutionalization in a nursing facility or ICF/MR.

3. Defendants are not implementing the HCS and CLASS waiver programs or other programs intended to enable disabled individuals to live in the community and avoid unnecessary institutionalization so that persons eligible for and in need of HCS and CLASS waiver services receive these services within a reasonable period of time. Despite waiting years for HCS and CLASS waiver services, approximately 40,000 individuals continue to wait indefinitely for waiver services. Many are currently confined in institutional settings, while thousands more who are at risk of being institutionalized wait at home for HCS or CLASS waiver services.

4. Moreover, with appropriate services, Plaintiffs could safely live in integrated settings in their own homes and communities. That is, with the programs and supports that are available through CLASS and HCS waiver programs, eligible individuals living at home are far less likely to deteriorate and regress and ultimately be institutionalized.

5. Accordingly, Plaintiffs seek to represent a class of all individuals, other than those who are in a state school, nursing facility, or ICF/MR with 14 beds or more, who have been on the waiting lists for HCS or CLASS waiver services for more than one year.

6. Unnecessary segregation of people with disabilities is unlawful. In enacting the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, Congress recognized that “historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. § 12101(a)(2).

7. More recently, the United States Supreme Court affirmed that “unjustified institutional isolation of persons with disabilities is a form of discrimination.” *Olmstead v. L.C., ex rel. Zimring*, 527 U.S. 581, 600 (1999).

8. To remedy such unlawful discrimination, regulations implementing the ADA such as those contained in Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq.* (“Section 504”), 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) and 28 C.F.R. § 41.51(d).<sup>2</sup>

9. In response to the Supreme Court's decision interpreting the ADA's integration mandate, the United States Department of Health and Human Services, through its Health Care Financing Administration (“HCFA”),<sup>3</sup> sent a letter to state Medicaid directors on July 25, 2000, advising the Medicaid directors that “although the *Olmstead* decision interpreted the ADA, unjustified segregation by a federally funded program would also constitute disability discrimination under Section 504 [of the Rehabilitation Act].” HCFA, *Dear State Medicaid Director* (July 25, 2000).

10. Based on this and other HCFA letters, Defendants were informed that Medicaid policies that contribute to the unnecessary segregation of people with disabilities are illegal. As early as 1998, HCFA advised state Medicaid directors that the ADA requires that “Medicaid policies, practices and procedures promote, rather than hinder, integration.” HCFA, *Dear State Medicaid Director* (July 29, 1998).

---

<sup>2</sup>Because of the similarities between the integration provisions of the ADA and Section 504, these two laws are to be construed and applied in a consistent manner. *See Frederick L. v. Department of Pub. Welfare*, 364 F.3d 487, 491 (3d Cir. 2004).

<sup>3</sup>HCFA's name has been changed to the Center for Medicare and Medicaid Services (“CMS”). For purposes of this complaint references will reference HCFA and not CMS.

11. Yet, despite clear directives from HCFA, Defendants continue to maintain policies and practices that unlawfully limit and restrict the availability of services like Medicaid-funded CLASS and HCS waivers and result in the unnecessary segregation of persons with mental retardation or developmental disabilities.

12. This case is being brought to remedy these ongoing violations of federal law and to obtain prospective relief necessary to ensure that the Plaintiffs and class members receive the support services like the CLASS and HCS waiver programs provide to others.

13. In sum, Plaintiffs and class members seek to address Defendants' systematic and continuing failure to provide individual Plaintiffs with services at a reasonable pace in the most integrated setting that is appropriate so that they can achieve greater independence, be more integrated into the community, and have a better quality of life.

14. Accordingly, Plaintiffs and class members seek a declaration that the manner in which Defendants operate both the CLASS and HCS waiver programs violates the Medicaid Act, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Fourteenth Amendment to the United States Constitution. Moreover, based on these claims and the nature of the requested relief, Eleventh Amendment immunity is not available to the Defendants. *See Martin v. Taft, et al.*, 2002 WL 31101079 (S.D. Ohio 2002) page 13, *A. Eleventh Amendment Immunity*, *McCarthy v. Hawkins*, 391 F.3d 676 (2004).

## **II. JURISDICTION AND VENUE**

15. This is a civil action for declaratory and injunctive relief authorized by 42 U.S.C. § 1983 to redress the ongoing deprivation under color of state law of rights guaranteed by federal law. This Court has jurisdiction over this action and over Defendants pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (a)(4). This action is also brought pursuant to Title II of the ADA, 42 U.S.C. § 12133, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The agencies represented by Defendants are public entities within the meaning of Title II of the ADA and are

recipients of federal financial assistance within the meaning of Section 504 of the Rehabilitation Act. The amount in controversy exceeds the minimum jurisdictional limits of this Court. Plaintiffs' claims are also authorized by 42 U.S.C. § 1396 *et seq.*; 42 U.S.C. §§ 1983 and 1988; 42 U.S.C. § 301 *et seq.*; and 42 U.S.C. §§ 12115 *et seq.*

16. Declaratory and injunctive relief is authorized under 28 U.S.C. §§ 2201 and 2202, as well as Rules 57 and 65 of the Federal Rules of Civil Procedure.

17. Venue is proper in this Court under 28 U.S.C. § 1391 because part of the claims arose within this district and division, and Defendants operate and administer the HCS and CLASS waiver programs in this district and division.

### **III. PARTIES**

#### **A. Plaintiffs.**

18. All of the individual Plaintiffs are Medicaid recipients and have disabilities within the meaning of the ADA, 42 U.S.C. § 12131(2), and Section 504. They each qualify for either the HCS or CLASS waiver services, and some Plaintiffs qualify for both. The individual Plaintiffs would be able live in less restrictive settings with waiver supports and services provided at a reasonable pace. The Plaintiffs are individually listed below:

a. Christy Travis, formerly Christy McCarthy, is 24 years old and lives at home with her family in West Columbia, Texas. She suffered brain damage when she was given the pertussis vaccine. She has a seizure disorder, is non-ambulatory, and has mental retardation. Christy's mother, Jamie Travis, is her next friend in this proceeding. Christy has been on the HCS waiting list for approximately eight years.

b. Todd Gordon is 21 years old and lives at home with his family in Alvin, Texas. He has fragile X syndrome. Todd's sister, Trisha Gordon, is his next friend in this proceeding. Todd has been on the HCS waiting list for approximately seven years.

c. Gail Truman is 42 years old and lives with her parents in Friendswood, Texas. She has mental retardation. Gail's father, Ken Truman, is her next friend in this proceeding. Gail has been on the HCS waiting list for approximately eight years.

d. Jim Floyd, Jr. is 45 years old and lives with his mother and father in Dickinson, Texas. He has autism. Jim's father, Jim Floyd, Sr., is his next friend in this proceeding. Jim has been on the HCS waiting list for approximately eight years.

e. Sam Lindsay, Jr. is 56 years old and lives with his mother and father in Marshall, Texas. He has mental retardation. Sam's mother, Betty Lindsay, is his next friend in this proceeding. Sam has been on the HCS waiting list for approximately seven years.

f. Joe Ray Camacho is 35 years old and lives in a nursing facility in Aransas Pass, Texas. At the age of 19, he had a motorcycle accident in which he suffered a closed head injury, and as a result, he uses a wheelchair. He was living in an ICF/MR placement until approximately 2003. Joe Ray has been on the HCS waiting list for approximately five years, and upon information and belief, he will be on the HCS waiting list for at least another three years.

g. Patrick Sostack is 14 years old and lives with his parents, Gary and Lisa Sostack, who are his next friends in this proceeding. Patrick has autism. He has been on the HCS and CLASS waiting lists for seven years.

h. Scott Sostack is 14 years old and is Patrick Sostack's twin brother. Scott lives with his parents, Gary and Lisa Sostack, who are his next friends in this proceeding. Scott has autism. He has been on the HCS and CLASS waiting lists for seven years.

i. Shyan Forough is eight years old and lives with his mother Arzu Forough, his parent and next friend in this proceeding. Shyan has autism. He has been on the HCS and CLASS waiting lists for five years, and upon information and belief, he will be on the HCS and CLASS waiting lists for another two years.

j. Plaintiff ARC of Texas is the oldest and largest nonprofit, volunteer organization in the State of Texas committed to expanding opportunities for people with mental retardation and other developmental disabilities to be included in their communities. Plaintiff ARC of Texas is an association that has standing to represent its members. *See Warth v. Seldon*, 422 U.S. 490, 511 (1975). The ARC of Texas works to support families, advance public policies, provide training programs, and build a statewide network of advocates. Since its establishment in 1950, the ARC of Texas has been instrumental in the creation of virtually every program, service, right, and benefit that is now available to more than half a million Texans with mental retardation. Today, the ARC of Texas continues to advocate for the inclusion of people with mental retardation and other developmental disabilities in all aspects of society.

k. Ashton Bowlen is twelve years old and lives in Vidor, Texas, with her mother Patricia Bowlen, her parent and next friend in this proceeding. Ashton has autism and is nonverbal. She has been on the HCS and CLASS waiting lists for seven years.

l. Tyler Blanchard is nine years old and lives in Mauriceville, Texas, with his mother Faith Blanchard, his parent and next friend in this proceeding. Tyler has autism. He has been on the HCS and CLASS waiting lists for more than three years.

m. Garrett Gillard is ten years old and lives in Lumberton, Texas, with his mother Keeya Gillard, his parent and next friend in this proceeding. Garrett has autism. He has been on the HCS and CLASS waiting lists for seven years.

n. Kameron Lane is eight years old and lives in Groves, Texas, with his mother Angie Lane, his parent and next friend in this proceeding. Kameron has both a brain disorder and a seizure disorder. He has been on the CLASS waiting list for more than three years.



b. Madison Polk is eleven years old and during the pendency of this case has been placed at Bayes Achievement Center in Huntsville, Texas, over two hours away from her parents John and Robin Polk who live in Vidor, Texas. Without necessary community services Madison has been institutionalized. Madison has been on the HCS and CLASS waiting lists for over nine years.

r. Billy Burch is 44 years old and has lived in an ICF/MR in San Antonio, Texas, for approximately fifteen years. Billy is quadriplegic, blind, and has mental retardation. Billy's parents and siblings reside in Edinburg, Texas. Billy's parents were not advised of the availability of waiver services when Billy was accepted into his current ICF/MR facility. Consequently, Billy applied for HCS waiver services as soon as his family learned about the program, approximately five years ago. Billy's family has been advised that Billy may remain on the HCS waiting list for another ten years.

s. Nathaniel Burkett is 27 years old and resides in an ICF/MR in Beaumont, Texas. Nathaniel has mental retardation. Nathaniel has been on the HCS waiting list for approximately three years, and he has been advised that he may remain on the waiting list for another ten years.

**B. Defendants.**

19. Defendant Albert Hawkins<sup>4</sup> is sued in his official capacity as Commissioner of the Texas Health and Human Services Commission ("THHSC"). The THHSC is the single state agency responsible for the Medicaid program in Texas and receives federal funds. In Mr. Hawkins's capacity as Commissioner, he is charged with contracting with medical providers and delegating

---

<sup>4</sup>Don Gilbert was executive director of the Texas Health and Human Services Commission at the time this suit was originally filed. Albert Hawkins subsequently replaced Don Gilbert, and the Court recognized the substitution of Albert Hawkins for Don Gilbert, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, in its May 23, 2003 Order on Defendants' Motion to Dismiss.

particular responsibilities to the Texas Department of Aging and Disability Services. Albert Hawkins has already been served with process.

20. Defendant James R. Hine is sued in his official capacity as the Commissioner of the Texas Department of Aging and Disability Services ("TDADS"). TDADS's responsibilities include evaluating for services individuals who are mentally retarded and developmentally disabled. TDADS is responsible for administering Medicaid waiver programs, including the CLASS and HCS waiver programs. Prior to the establishment of TDADS in September, 2004, the CLASS waiver program was administered by the Texas Department of Human Services ("TDHS"). Defendant James R. Hine was the Commissioner of TDHS. Prior to the establishment of TDADS, the HCS waiver program was administered by the Texas Department of Mental Health and Mental Retardation ("TDMHMR").<sup>5</sup> The Commissioner of TDMHMR, Karen F. Hale, was named in her official capacity as a defendant in the Original Complaint filed in this action. Both Karen F. Hale and James R. Hine have already been served process.

#### **IV. CLASS ACTION ALLEGATIONS**

21. Plaintiffs bring this action on their own behalf and on behalf of all persons similarly situated pursuant to Rule 23(b)(1) & (2) of the Federal Rules of Civil Procedure. Plaintiffs seek to represent a class of all individuals who have been on the waiting lists for HCS or CLASS waiver services for more than one year. Plaintiffs seek to represent these class members for purposes of injunctive and declaratory relief.

22. A class action is proper pursuant to Rule 23(a) of the Federal Rules of Civil Procedure.. As evidenced above, this class is so numerous that joinder of all class members is impracticable. The class consists of approximately 40,000 persons who Defendants have identified

---

<sup>5</sup>Because administration of the HCS and CLASS waiver programs has been recently transferred from TDMHMR and TDHS, respectively, to TDADS, for purposes of this Third Amended Petition, references to "Defendants" and to "TDADS" include TDMHMR and/or TDHS, and references to TDMHMR and/or TDHS include TDADS.

as requesting services and living in the community and who need residential services in order to remain in the community, and approximately 12,000 residents who are institutionalized and who are eligible for the kind of residential services that will enable them to become more fully integrated into the community.

23. There are questions of law and fact that are common to members of the class. These questions include but are not limited to:

- a. Whether Defendants failed to exercise professional judgment by neglecting to plan for the residential needs of Texans with mental retardation and developmental disabilities;
- b. Whether Defendants failed to determine the most integrated residential setting appropriate for class members who are served in an institutional setting such as an ICF/MR;
- c. Whether Defendants failed to determine if individuals with mental retardation and developmental disabilities residing in ICF/MRs meet the essential eligibility requirements for habilitation in a community-based setting;
- d. Whether Defendants failed to determine if individuals with mental retardation and developmental disabilities residing in the community meet the essential eligibility requirements for habilitation in a community-based setting;
- e. Whether Defendants failed to develop and implement a comprehensive, effective working plan for providing qualified persons with mental retardation and developmental disabilities residing in institutions such as ICF/MRs with medicaid waiver services in a less restrictive setting, and with waiting lists for such services that move at a reasonable pace;
- f. Whether Defendants failed to develop and implement a comprehensive, effective working plan for providing qualified persons with mental retardation and developmental disabilities living in the community with access to waiting lists that move at a reasonable pace, and that prevent such persons from being unnecessarily institutionalized;
- g. Whether Defendants' implementation of its Medicaid waiver program, and its denial of equal access to waiver services, are rationally related to a legitimate state interest;
- h. Whether the ADA prohibits unnecessarily segregated services to persons with mental retardation and developmental disabilities;
- i. Whether the Due Process Clause requires Defendants to provide Plaintiffs with residential services so that they will be able to live in the community and avoid institutionalization;
- j. Whether community-based residential services and placements are necessary to prevent and remedy the harm experienced by the Plaintiffs;

24. The claims of the named Plaintiffs are typical of the claims of the class as a whole. All individual members of the class have been or will be subjected to the same harm as Plaintiffs as a result of the actions of the Defendants.

25. The Plaintiffs will fairly and adequately protect the interests of the entire class. Plaintiffs' counsel have been class counsel in numerous other cases.

26. A class action is proper pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure. Separate actions could create inconsistent and varying adjudications with respect to the individual members of the class, which would establish incompatible standards of conduct for Defendants. Adjudications with respect to other members would, as a practical matter, be dispositive of the interests of the other members not parties to the litigation.

27. Moreover, Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole. This satisfies Rule 23(b)(1) of the Federal Rules of Civil Procedure.

## **V. STATUTORY FRAMEWORK**

### **A. The Medicaid Program.**

27. Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, establishes Medicaid, a joint federal-state program, to provide medical and related care to eligible persons. Costs are shared between the federal and the state governments.

28. States are not required to participate in Medicaid, but may do so by submitting an appropriate Medicaid plan to HCFA. Once a state elects to participate in Medicaid, it must do so in accordance with applicable federal statutes and regulations. Texas is a participating state.

29. For participating states, providing certain Medicaid services is mandatory. Other services can be provided at the decision of the state. Once a state elects to provide an optional

service, however, it must do so in accordance with Medicaid statutes and regulations governing the provision of that service.

30. Title XIX requires that the state plan provide medical assistance “with reasonable promptness to all eligible individuals,” 42 U.S.C. § 1396a(a)(8), and continue furnishing the service until the recipient is found to be ineligible to continue to receive assistance. 42 U.S.C. § 1396a(a)(10). States must assure that care and services under the plan are provided in a manner consistent “with the best interests of the recipients.” 42 U.S.C. § 1396a(a)(19).

31. An optional service that states may elect to provide is an ICF/MR. 42 U.S.C. § 1396d(a)(15). An ICF/MR is a residential institution that provides health and rehabilitative services to eligible persons with developmental disabilities. 42 U.S.C. § 1396d(d). Texas provides this optional service.

32. States that provide ICF/MR services may also implement a Medicaid waiver program. This alternative to ICF/MR services includes an array of home and community-based services for eligible recipients who, in the absence of waiver services, would require institutionalization in an ICF/MR. This Medicaid program is called a “waiver” because HCFA waives certain technical obligations otherwise incumbent on Medicaid-participating states electing to participate in this program. Texas offers Medicaid waiver programs; the HCS and CLASS waiver programs are described above.

33. Title XIX requires that when a state agrees to provide Medicaid waiver services, it provide assurances that, *inter alia*, individuals are evaluated for their need for the level-of-care provided by an ICF/MR, and if found eligible for such a level-of-care, they are offered the option of Medicaid waiver services. 42 U.S.C. §§ 1396n(c)(2)(B), 1396n(c)(2)(C); 42 C.F.R. § 441.302(c)-(d). States must assure HCFA that, absent the waiver, “recipients of the waiver would receive the appropriate type of Medicaid-funded institutional care . . . that they require.” 42 C.F.R. § 441.302(g).

34. Under a Medicaid waiver program, a state's estimate of average per capita costs cannot exceed the average per capita costs for the same level-of-care provided in institutions in that state, 42 U.S.C. § 1396n (c)(2)(D). However, if actual expenses exceed the estimate in a particular case, the federal government will not withhold payment. 42 U.S.C. § 1396n(c)(9).

35. Medicaid Waiver services are generally far less expensive than institutional care. In fact, the THHSC states that "home and community-based care can be a cost-effective alternative to care in a nursing facility or ICF/MR." Texas Health and Human Services Commission, *Texas Medicaid in Perspective*, 4<sup>th</sup> Ed at 4-18 (April 2002). Further, as stated by the THHSC:

The average monthly cost for a Medicaid client in an ICF/MR was \$4,874 compared to \$3,927 for a client receiving home and community-based services from the TDMHMR as an alternative to ICF/MR care. Institutional services comprise 73 percent of the long-term care budget even though only 16 percent of long-term care clients are in institutions.

*Id.* at 4-18.

36. State officials failed to properly project the number of people who, because they are eligible, would apply for waiver services. As a result of underestimating the need for waiver services, Defendants have not taken advantage of available federal matching funds. Furthermore, state officials have failed to successfully apply for a waiver amendment. Such an amendment would enable Defendants to accommodate more individuals with waiver services. Regulations specifically allow states to request and for HCFA to approve additional waiver requests. *See* 42 C.F.R. § 441.303(f)(6); *see* 42 C.F.R. § 441.305(a).

37. Approval for Medicaid waivers that cover individuals with mental retardation and other developmental disabilities requires the state to assure HCFA that "necessary safeguards . . . have been taken to protect the health and welfare of individuals provided services under the waiver." 42 U.S.C. § 1396n(c)(2)(A); 42 C.F.R. § 441.302(a).

38. Both the ICF/MR program and the Medicaid waiver program are public services subject to Title II of the ADA, 42 U.S.C. §§ 12161-12165.

39. Medicaid waiver recipients are entitled to medically necessary Medicaid services, *i.e.*, those services necessary to ensure their “health and welfare.” 42 U.S.C. § 1396n(c)(2)(A). The services are incorporated into the recipient’s plan of care. 42 U.S.C. §§ 1396n(c)(1) and (c)(4)(B). Services received by recipients can vary as their circumstances change for better or worse. In some cases, relatively minor assistance may be required; in other cases, more intensive services may be necessary.

40. Plaintiffs and the class they represent are currently entitled to services at the level-of-care provided at an ICF/MR and/or through the Medicaid waiver program.

41. The federal Medicaid statute and regulations require Defendants to provide notice and hearing rights to any person whose claims for medical assistance under the plan are denied or are not acted upon with reasonable promptness. 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 431.200 *et seq.*

**B. The Integration Mandate of the ADA.**

42. In enacting the ADA, 42 U.S.C. § 12101 *et seq.*, Congress stated that “historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. § 12101(a)(2).

43. Congress found that “discrimination against individuals with disabilities persists in . . . institutionalization . . . and access to public services.” 42 U.S.C. § 12101(a)(3). Congress found that “individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . , segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” 42 U.S.C. § 12101(a)(5).

44. Congress further concluded that “[i]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society,



based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.” 42 U.S.C. § 12101(a)(7).

45. 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).

46. Discrimination under the ADA includes the segregation of persons with disabilities from society as a result of unnecessary institutionalization. As the Senate Labor and Human Relations Committee observed: “one of the debilitating forms of discrimination is segregation imposed by others . . . . Discrimination also includes exclusion, or denial of benefits, services, or other opportunities that are as effective and meaningful as those provided to others.” S. Rep. No. 116, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 6 (1989). Thus, Congress recognized that “discrimination against persons with disabilities entails more than just disparate treatment, and that simply requiring evenhanded treatment would not remedy all discrimination.”

47. 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). The affirmative duty embodied in 28 C.F.R. § 35.130(d) stems from the recognition that failing to integrate individuals with disabilities into society (*e.g.*, unnecessary institutionalization) constitutes unlawful discrimination under the ADA.

48. Furthermore, the ADA imposes a duty on Defendants to allocate resources so that there is sufficient funding for those who are needlessly institutionalized or about to experience unjustified institutionalization. Pursuant to this duty, Defendants are required to seek legislative approval of budgetary requests to meet this obligation. 28 C.F.R. § 35.130(b)(3)(I)-(ii).



49. The regulations implementing the ADA further require that qualified individuals with disabilities (a) have the same opportunity to participate in a benefit or program to the same extent as any other equally qualified program participant, and (b) have the same opportunity to achieve the benefits or results other qualified individuals have the opportunity to obtain. See 28 C.F.R. § 35.130(b)(1)(I)(iii-iv).

50. Each Plaintiff and each class member is “a qualified individual with a disability” within the meaning of 42 U.S.C. § 12131(2).

51. The ICF/MR program, the HCS waiver program, and the CLASS waiver program are “public services” subject to Title II of the ADA, 42 U.S.C. §§ 12161-12165. Title II of the ADA, 42 U.S.C. §§ 12131-12134, extends to state and local governments the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. It requires that the services, programs, and activities of state and local governments be administered in “the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d).

52. Defendant THHSC has failed to coordinate the activities, programs, and resources of its agencies, including Defendant TDADS, including its predecessor agencies TDMHMR and TDHS, to ensure that its programs and services are administered in the most integrated setting, consistent with the needs of class members.

53. Since the enactment of the ADA, the United States Supreme Court has held that “unjustified institutional isolation of persons with disabilities is a form of discrimination.” *Olmstead*, 527 U.S. at 600, and is prohibited by the ADA, 42 U.S.C. § 12101 *et. seq.* Defendants are obligated to “administer services, programs, and activities in the most integrated setting appropriate to the needs of persons with disabilities.” 42 U.S.C. § 12132 and 29 U.S.C. § 794, as implemented by 28 C.F.R. § 35.130(d) and 28 C.F.R. § 41.51(d). With appropriate community-based long-term care

and services, available under a lawful Medicaid waiver program, Plaintiffs could live in integrated settings in their own home and communities.

54. In light of the *Olmstead* decision, HCFA issued a policy letter that says. “States are obligated to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability. . . .” HCFA also concluded that under Medicaid it is the “State’s responsibility, . . . to periodically review the services of all residents in Medicaid-funded institutional settings.” HCFA, *Dear State Medicaid Director* (January 14, 2000). (All HCFA letters to State Medicaid Directors are available at: [www.healthlaw.org/medicaid.SHTML#policy](http://www.healthlaw.org/medicaid.SHTML#policy).)

55. HCFA also cited to *Olmstead* for the proposition that a “[State’s] requirement to provide services in the most integrated setting appropriate applies not only to persons already in institutional settings but to those being assessed for public institutionalization.” *Id*

56. In fact, as early as July 1998, HCFA informed Defendants that Medicaid policies that contribute to unnecessary segregation of people with disabilities are illegal. HCFA advised state Medicaid directors that the ADA requires that “Medicaid policies, practices and procedures, promote rather than hinder, integration.” HCFA, *Dear State Medicaid Director* (July 29, 1998). (*Id.*)

57. Subsequent to HCFA policy letters regarding ADA implementation, President George W. Bush signed an Executive Order on June 19, 2001, directing States to ensure that persons with disabilities are not institutionalized needlessly, and that individual service needs be met at home or in other community-based settings. *Executive Order--Community-Based Alternatives For Individuals With Disabilities, June 19, 2001*.

58. President Bush’s Order states that not providing community-based alternatives often leads to the needless isolation and segregation of persons with disabilities, in violation of Title II of the ADA, 42 U.S.C. §§ 12101 *et seq.* *Id.*

59. The President's Executive Order goes on to say that the United States Supreme Court's decision in *Olmstead* requires that States comply with Title II of the ADA and that States assure the federal government that services, programs and activities will be administered to eligible persons with disabilities in the most integrated setting appropriate to their needs. *Id.* His Executive Order also states that, "the federal government must assist States and localities to implement swiftly the *Olmstead* decision, so as to help ensure that all Americans have the opportunity to live close to their families and friends, to live more independently, to engage in productive employment, and to participate in community life." *Id.*

**C. The Integration Mandate of the Rehabilitation Act.**

60. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) states that "No 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."

61. Binding regulations promulgated by the United States Attorney General require that recipients of federal financial assistance "administer programs and activities in the most integrated setting appropriate to the needs of the qualified individuals with disabilities." 28 C.F.R. § 41.51(d).

62. Furthermore, section 504 imposes a duty on Defendants to allocate resources so that there is sufficient funding for those who are needlessly institutionalized or about to experience unjustified institutionalization. Pursuant to this duty, Defendants are required to seek legislative approval of budgetary requests necessary to meet this obligation. 28 C.F.R. § 35.130(b)(3)(I)-(ii).

63. The regulations implementing Section 504 also require that qualified individuals with disabilities (a) have the same opportunity to participate in a benefit or program to the same extent as any other equally qualified program participant, and (b) have the same opportunity to achieve the benefits or results other qualified individuals have the opportunity to obtain. See 28 C.F.R. § 35.130(b)(1)(I)(iii-iv).

64. Individuals with disabilities should not be unduly segregated or subjected to different or separate treatment. And whenever possible, persons with disabilities should be given the opportunity to fully access programs or activities that enable them to participate and function in their most integrated setting. *Jackson v. Fort Stanton Hosp. and Training Sch.*, 757 F. Supp.1243, 1296-99 (D.N.M. 1988).

65. Defendants receive federal financial assistance for providing HCS and CLASS waiver services. Defendants are subject to the Rehabilitation Act.

## **VI. THE WAIVER PROGRAMS**

66. The Medicaid waiver program, which includes both the HCS program (for persons with mental retardation) and the CLASS program (for persons with developmental disabilities such as cerebral palsy), was adopted by Congress in order to allow individuals who would otherwise require care in a nursing home or ICF/MR to receive needed services in their own homes and in home-like settings. 42 U.S.C. § 1396n. *See* Senate Report No. 97-139 and House Conference Report No. 97-208, 1981 U.S. CODE CONG. & ADMIN. NEWS 396. The regulations state that “section 1915(e) [1396n] of the Act permits states to offer, under a waiver of statutory requirements, an array of home and community based services that an individual needs to avoid institutionalization.” 42 C.F.R. § 441.300.

67. Federal law provides that the average cost per person in the community through the Medicaid waiver program must not exceed the average cost for the same level of services in facilities or institutions. 42 U.S.C. § 1396n (c)(2)(D).

68. Home and community-based waiver funds may not be used to support services to individuals who reside in an ICF/MR. 42 C.F.R. § 441.301(b)(1)(ii); 42 U.S.C. § 1396n.

69. Under a Medicaid waiver, a state can provide an array of services, including services that are not identified in Title XIX as approved optional services. 42 U.S.C. § 1396n (c)(4)(B); 42 C.F.R. § 440.180. For example, a state can provide habilitative services, vocational services, and

respite services even though these services are not a specified optional service. Thus, Medicaid waiver programs give the state the right to receive federal reimbursement when it agrees to provide services that it would not otherwise be reimbursed for under Title XIX.

70. Medicaid waiver programs allow states to “waive” certain Title XIX requirements. Specifically, a state’s waiver program may choose to provide services to specific groups of persons or in a limited geographic region, thus waiving comparability or state-wideness requirements. 42 U.S.C. §§ 1396n(c)(3), (9)-(10).

71. In sum, the purpose of Title XIX’s Medicaid waivers is to encourage states to provide services to assist individuals with disabilities to avoid being institutionalized. 42 C.F.R. § 441.300. As long as Medicaid services vis-a-vis institutional services are “cost-neutral,” the preference is to provide services in the community. *See* 42 U.S.C. § 1396n(c)(2)(D).

**A. HCS Waiver.**

72. Texas has offered the HCS waiver since 1982.

73. Individuals are eligible for HCS waiver services if they (a) have mental retardation, (b) meet the standard of care for services in an ICF/MR, and (c) are eligible for medical assistance.

74. The HCS waiver program currently serves approximately 8,000 recipients.

75. There are approximately 26,698 additional persons who have requested HCS waiver services. Of those who have requested services and been placed on a waiting list, more than 8,000 are children.

76. Defendant TDADS is the single state agency whose responsibility it is to administer the HCS waiver program. Prior to the establishment of TDADS in September 2004, TDMHMR was the single state agency with responsibility for administering the HCS waiver program.

77. The services provided under the HCS waiver include case management, respite care, habilitation, minor home modifications, skilled nursing, adaptive aids, counseling and therapies,

dental treatment, and residential assistance, *i.e.*, supported home living, foster/companion care, and residential support.

78. In adopting the HCS waiver program, Texas has waived Title XIX's comparability requirements and limited eligibility to persons with mental retardation, but Texas has not waived Title XIX's state-wideness requirement. Thus, HCS waiver services are available to persons with mental retardation statewide.

79. In the absence of HCS waiver services these individuals are entitled to receive services in an ICF/MR.

**B. CLASS Waiver.**

80. The CLASS waiver program has been available in Texas since 1991 for persons with related conditions. A related condition is a developmental disability other than mental retardation which may include such conditions as cerebral palsy and spina bifida.

81. Individuals are eligible for CLASS waiver services when (a) they have a related condition, (b) meet the standard of care for services in an ICF/MR, and (c) are eligible for medical assistance.

82. The CLASS waiver program currently serves approximately 1,800 persons.

83. There are approximately 13,453 additional persons who have requested CLASS waiver services and are on a waiting list for the program. Of those who have requested services and been placed on a waiting list, more than 7,000 are children.

84. Defendant TDADS is the single state agency responsible for administering the CLASS waiver program. Prior to the establishment of TDADS in September 2004, TDHS was the single state agency with responsibility for administering the HCS waiver program

85. Services under the CLASS waiver program include case management, habilitation, respite, nursing services, psychological services, physical therapy, occupational therapy, speech pathology services, adaptive aids, and minor home modifications.

86. In adopting the CLASS waiver program, Texas has waived both Title XIX's comparability requirements to limit eligibility to persons with related conditions and the Title XIX state-wideness requirement. Thus, CLASS waiver services may be provided statewide but only in a limited number of geographic catchment areas.

87. In the absence of CLASS waiver services, applicants for the CLASS program are entitled to receive services in an ICF/MR.

**C. Implementation of HCS and CLASS Waiver Services.**

88. Subsequent to the United States Supreme Court decision in *Olmstead*, the THHSC developed a plan purportedly to comply with the ADA's integration mandate, called the Promoting Independence Plan ("PIP"). THHSC attempted to develop policies, practices, and procedures to ensure that persons with disabilities are not unduly segregated. Unfortunately, THHSC's plan is not reasonable. Individuals with mental retardation and related conditions are being segregated based on where they live.

89. On information and belief, THHSC's PIP provides that state school residents and ICF-MR residents living in facilities with at least 14 beds receive waiver services within six months of requesting services. Similarly, qualified individuals living in nursing facilities receive CLASS waiver services within six months of requesting services.

90. In contrast, THHSC's PIP makes no provision for the following: HCS eligible residents living in ICF/MR facilities with less than 14 beds, HCS eligible individuals living in the community, or CLASS eligible individuals living in the community. Because the PIP does not address the needs of the vast majority of individuals who are eligible for HCS and CLASS waiver services, more than 40,000 Texans with mental retardation or related conditions, many of whom have waited years for waiver services, will have to continue to wait even more years before either HCS or CLASS waiver services become available.

91. In addition, upon information and belief, nearly all of the waiver service slots that have become available over the last two years have gone not to the individuals who have been on the waiting list the longest, but to individuals who had been receiving other services from the State of Texas, paid for exclusively with state dollars. In effect, Defendants have used waiver slots, as they became available, to "refinance" the provision of services and obtain Medicaid financing in substitution for state financing of services. Waiver services have gone not to those who are on the waiting lists the longest, but to those whose situation allows Defendants to use the waiver program to transfer the financial burden of providing such services from the state to the Medicaid program.

## **VII. STATEMENT OF FACTS**

### **Christy Travis**

92. Christy Travis is 24 years old and has been residing at her home in West Columbia, Texas. Ms. Travis has a seizure disorder, is non-ambulatory, and has mental retardation. She recently graduated from high school, and her family would very much like for her to remain at home.

93. Ms. Travis requested HCS services pursuant to the TDMHMR regulations in effect at the time she submitted her application. Neither TDMHMR nor TDADS has evaluated her for HCS eligibility. Instead, Ms. Travis was placed on a waiting list, and she has remained on that waiting list for approximately eight years. Upon information and belief, Defendants are unable to give Ms. McCarthy an estimate of when she will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before her application is evaluated. Ms. Travis is expected to live only another ten years.

94. Ms. Travis has received no written notice from Defendant TDADS or its predecessor agency TDMHMR that the services she has requested are being denied or delayed.



95. Upon information and belief, the waiver services Ms. Travis has requested could be provided at a lower cost than an ICF/MR placement.

**Todd Gordon**

96. Todd Gordon is 21 years old and has fragile X syndrome. Mr. Gordon has been on the HCS waiting list for approximately seven years. He lives at home with his family but needs significant care. Without this care, he is in danger of being institutionalized.

97. Neither Defendant TDADS nor its predecessor agency TDMHMR informed Mr. Gordon that he may be eligible for HCS waiver services. When Mr. Gordon learned of the program, he requested HCS services pursuant to the TDMHMR regulations in effect at the time he submitted his application. Neither TDMHMR nor TDADS has evaluated him for HCS eligibility. Instead, Mr. Gordon was placed on a waiting list, and he has remained on that waiting list for approximately eight years. Upon information and belief, Defendants are unable to give Mr. Gordon an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

98. As of the filing of this complaint, Mr. Gordon remains on the HCS waiting list. He has received no written notice from Defendant TDADS or its predecessor agency TDMHMR that the services he has requested are being denied or delayed.

99. Upon information and belief, the waiver services Mr. Gordon has requested could be provided at a lower cost than an ICF/MR placement.

**Gail Truman**

100. Gail Truman is 40 years old and resides with her parents, who are 76 and 70 years old. She has mental retardation. Her parents are currently able to provide the services she requires to remain at home. Upon information and belief, when her parents are no longer able to care for her, it is unlikely that Ms. Truman will be able to avoid being institutionalized.

101. Ms. Truman requested HCS services pursuant to the TDMHMR regulations in effect at the time she submitted her application. Neither TDMHMR nor TDADS has evaluated her for HCS eligibility. Instead, Ms. Truman was placed on a waiting list, and she has remained on that waiting list for approximately eight years. Upon information and belief, Defendants are unable to give Ms. Truman an estimate of when she will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before her application is evaluated.

102. As of the filing of this complaint, Ms. Truman remains on the HCS waiting list. She has received no written notice from Defendant TDADS or its predecessor agency TDMHMR that the services she has requested are being denied or delayed.

103. Upon information and belief, the waiver services Ms. Truman has requested could be provided at a lower cost than an ICF/MR placement.

**Jim Floyd, Jr.**

104. Jim Floyd, Jr. lives with his mother and father. He is 45 years old, and his parents are 70 and 76. Mr. Floyd has autism and is in need of waiver services to remain in the community. Because of the lack of waiver services, Mr. Floyd's parents hope to outlive him, so as not to subject him to an institution.

105. Mr. Floyd has requested HCS services pursuant to the TDMHMR regulations in effect at the time he submitted his application. Neither TDMHMR nor TDADS has evaluated him for HCS eligibility. Instead, Mr. Floyd was placed on a waiting list, and he has remained on that waiting list for approximately eight years. Upon information and belief, Defendants are unable to give Mr. Floyd an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

106. As of the filing of this complaint, Mr. Floyd remains on the HCS waiting list. He has received no written notice from Defendant TDADS or its predecessor agency TDMHMR that the services he has requested are being denied or delayed.

**Sam Lindsay**

107. Sam Lindsay lives with his mother and father. He is 55 years old, and his parents are 81 and 79. Mr. Lindsay has mental retardation, and as he has aged, it has become increasingly difficult for his parents to address his needs without additional assistance. Upon information and belief, if Mr. Lindsay does not receive waiver services, it is likely he will have to be institutionalized in the future.

108. Mr. Lindsay has requested HCS services pursuant to the TDMHMR regulations in effect at the time he submitted his application. Neither TDMHMR nor TDADS has evaluated him for HCS eligibility. Instead, Mr. Lindsay was placed on a waiting list, and he has remained on that waiting list for approximately eight years. Upon information and belief, Defendants are unable to give Mr. Lindsay an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

109. As of the filing of this complaint, Mr. Lindsay remains on the HCS waiting list. He has received no written notice from Defendant TDADS or its predecessor agency TDMHMR that the services he has requested are being denied or delayed.

**Joe Ray Camacho**

110. Joe Ray Camacho is 35 years old and resides in a nursing care facility in Aransas Pass, Texas. Mr. Camacho lived in an ICF/MR facility in Rockport, Texas, from approximately October 1995 to July 2004. Mr. Camacho left the ICF/MR facility in an attempt to live more independently within the community. He was unable to obtain the services he required, however, and was forced to enter the nursing home in which he now lives. Upon information and belief, Mr.

Camacho would not have had to accept placement in a nursing home if he had received the HCS waiver services that he has requested.

111. At the recommendation of his ICF/MR treatment team, in January 2001 Mr. Camacho requested HCS services pursuant to the TDMHMR regulations in effect at the time he submitted his application. Neither TDMHMR nor TDADS has evaluated him for HCS eligibility. Instead, Mr. Camacho was placed on a waiting list, and he has remained on that waiting list for approximately five years.

112. Mr. Camacho was eligible to apply for HCS waiver services when he was admitted to the Rockport ICF/MR facility in October 1995, but Defendants never informed him of either the placement option or the option to be put on the HCS waiting list. As a result, Mr. Camacho lost six years of seniority on the HCS waiting list. Upon information and belief, Defendants are unable to give Mr. Camacho an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

113. As of the filing of this complaint, Mr. Camacho remains on the HCS waiting list. He has received no written notice from Defendant TDADS or its predecessor agency TDMHMR that the services he has requested are being denied or delayed.

114. Mr. Camacho's has been advised that he is an appropriate candidate for foster care services, which could be provided under the HCS waiver for which Mr. Camacho has applied. Upon information and belief, the waiver services Mr. Camacho has requested could be provided at a lower cost than an ICF/MR placement.

**Patrick Sostack**

115. Patrick Sostack is 14 years old and lives with his parents, Gary and Lisa Sostack. Patrick has autism, and he attends middle school where his classes are modified to address his educational needs.

116. Since Patrick's initial diagnosis almost 12 years ago, his parents have spent tens of thousands of dollars trying to address a variety of issues related to his autism, especially behavioral issues at home. Patrick's family has used all of its available financial resources to help Patrick become a more independent, socially appropriate, and educationally competent young man.

117. Patrick continues to need a variety of services especially related to behavior management. Without the CLASS waiver services he has requested, Patrick is unlikely to receive these needed services. Without such services, he will be less likely to be functionally independent and to be socially appropriate: qualities he will need to work and live with minimal assistance.

118. Moreover, every day Patrick waits for CLASS services, the amount of time he will need to achieve his goal of being more self-reliant increases. Similarly, not getting CLASS services increases the possibility that at some point, he may need institutional services. The family also needs the assistance of a case manager to address the array of service needs Patrick currently has, as well the array of service needs that he will have as he grows older. Patrick's family also needs respite services.

119. Through his parents, Patrick has requested CLASS services pursuant to the TDHS regulations in effect at the time he submitted his application. Neither TDHS nor TDADS has evaluated him for CLASS eligibility. Instead, Patrick was placed on a waiting list, and he has remained on that waiting list for approximately seven years. Upon information and belief, Defendants are unable to give Patrick an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

120. As of the filing of this complaint, Patrick remains on the CLASS waiting list. He has received no written notice from Defendant TDADS or its predecessor agency TDHS that the services he has requested are being denied or delayed.

**Scott Sostack**

121. Scott Sostack is Patrick's 14-year-old twin brother. Scott has also been diagnosed with autism, and he also lives with his parents, Lisa and Gary Sostack. Scott attends middle school, where his classes are modified to address his educational needs in light of his autism diagnosis.

122. Since Scott's initial diagnosis almost 12 years ago, his parents have spent tens of thousands of dollars trying to address a variety of issues related to his autism, especially behavioral issues at home. Scott's family has used all of its available financial resources to help Scott become a more independent, socially appropriate, and educationally competent young man.

123. Scott continues to need a variety of services especially related to behavior management. Without the CLASS waiver services he has requested, Scott is unlikely to receive these needed services. Without such services, he will be less likely to be functionally independent and to be socially appropriate; qualities he will need to work and live with minimal assistance.

124. Moreover, every day Scott waits for CLASS services, the amount of time he will need to achieve his goal of being more self-reliant increases. Similarly, not getting CLASS services increases the possibility that at some point, he may need institutional services. The family also needs the assistance of a case manager to address the array of service needs Scott currently has, as well the array of service needs that he will have as he grows older. Scott's family also needs respite services.

125. Through his parents, Scott has requested CLASS services pursuant to the TDHS regulations in effect at the time he submitted his application. Neither TDHS nor TDADS has evaluated him for CLASS eligibility. Instead, Scott was placed on a waiting list, and he has remained on that waiting list for approximately seven years. Upon information and belief, Defendants are unable to give Scott an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

126. As of the filing of this complaint, Scott remains on the CLASS waiting list. He has received no written notice from Defendant TDADS or its predecessor agency TDHS that the services he has requested are being denied or delayed.

**Shyan Forough**

127. Shyan Forough is eight years old and lives with his parents, Reza and Arzu Forough. Shyan has autism, and is currently in school, where his educational program is modified to address his educational needs in light of his autism diagnosis. Shyan has a variety of behavioral issues that require ongoing behavior management, and which affect other developmental areas related to social and functional independence.

128. Since Shyan's initial diagnosis, his parents have spent thousands of dollars trying to address a variety of issues related to his autism, especially behavioral issues at home. Shyan's family has essentially used all of its available financial resources to help Shyan become a more independent, socially appropriate, and educationally competent young man.

129. Without CLASS waiver services, Shyan will not receive the services he needs to be functionally independent and socially appropriate; qualities he will need to live and eventually work more independently.

130. Every day Shyan goes without CLASS waiver services, the amount of time he will need to achieve self-reliance increases. Similarly, every day he has to wait for CLASS waiver services, the possibility that he may need institutional services increases. In addition, the family needs the assistance of a case manager to address the array of service needs Shyan currently has, as well as future service needs that come with growing-up. His family also needs respite care services.

139. Through his parents, Shyan has requested CLASS services pursuant to the TDHS regulations in effect at the time he submitted his application. Neither TDHS nor TDADS has evaluated him for CLASS eligibility. Instead, Shyan was placed on a waiting list, and he has remained on that waiting list for approximately five years. Upon information and belief, Defendants

are unable to give Shyan an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

131. As of the filing of this complaint, Shyan remains on the CLASS waiting list. He has received no written notice from Defendant TDADS or its predecessor agency TDHS that the services he has requested are being denied or delayed.

### **Ashton Bowlen**

132. Ashton Bowlen is twelve years old and lives with her mother, Patricia Bowlen, in Vidor, Texas. Ashton has been diagnosed with autism. She is also nonverbal, making communication all the more difficult. With regard to developmental services, Ashton receives in-home training from her school district. Currently, Ashton only receives respite care.

133. Through her mother, Ashton requested HCS and CLASS services pursuant to the TDHS and TDMHMR regulations in effect at the time she submitted her applications. Neither TDADS nor its predecessor agencies TDHS and TDMHMR has evaluated her for HCS or CLASS eligibility. Instead, Ashton was placed on a waiting list, and she has remained on that waiting list for approximately seven years. Upon information and belief, Defendants are unable to give Ms. Ashton an estimate of when she will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before her application is evaluated.

134. Without the HCS and CLASS waivers, Ashton will not receive necessary educational and developmental services, without which she will be less likely to be functionally independent and to be socially appropriate; qualities she will need to work and live with minimal assistance.

135. Moreover, every day Ashton waits for HCS and CLASS services, the time needed for her to become self-reliant increases. Similarly, not receiving HCS and CLASS services increases the possibility that at some point, she may need institutional services.



136. Furthermore, Ashton desperately needs to stay at home in order to receive proper care and attention in a familiar and familial setting. As a result of already having waited since Ashton was five years old for HCS and CLASS services, Patricia Bowlen worries to the extent of suffering from panic attacks.

137. As of the filing of this complaint, Ashton remains on the HCS and CLASS waiting lists. She has received no written notice from Defendant TDADS or its predecessor agencies TDHS and TDMHMR that the services she has requested are being denied or delayed.

### **Tyler Blanchard**

138. Tyler Blanchard is nine years old and lives with his mother, Faith Blanchard, in Mauriceville, Texas. Tyler has been diagnosed with autism. He receives educational services through his school district. He also receives in-home respite care.

139. Through his mother, Tyler requested HCS and CLASS services pursuant to the TDHS and TDMHMR regulations in effect at the time he submitted his applications. Neither TDADS nor its predecessor agencies TDHS and TDMHMR has evaluated him for HCS or CLASS eligibility. Instead, Tyler was placed on a waiting list, and he has remained on that waiting list for approximately three years. Upon information and belief, Defendants are unable to give Tyler an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

140. Without the HCS and CLASS waivers, he will not receive necessary developmental services, without which he will be less likely to be functionally independent and to be socially appropriate; qualities he will need to work and live with minimal assistance.

141. As of the filing of this complaint, Tyler remains on the HCS and CLASS waiting lists. He has received no written notice from Defendant TDADS or its predecessor agencies TDHS and TDMHMR that the services he has requested are being denied or delayed.

**Garrett Gillard**

142. Garrett Gillard is ten years old and lives with his mother, Keeya Gillard, in Lumberton, Texas. Garrett has been diagnosed with autism. He requires services to enable him to stay at home.

143. Through his mother, Garrett requested HCS and CLASS services pursuant to the TDHS and TDMHMR regulations in effect at the time he submitted his applications. Neither TDADS nor its predecessor agencies TDHS and TDMHMR has evaluated him for HCS or CLASS eligibility. Instead, Garrett was placed on a waiting list, and he has remained on that waiting list for approximately seven years. Upon information and belief, Defendants are unable to give Garrett an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

144. Without the HCS and CLASS waivers, he will not receive necessary developmental services, without which he will be less likely to be functionally independent and to be socially appropriate; qualities he will need to work and live with minimal assistance.

145. As of the filing of this complaint, Garrett remains on the HCS and CLASS waiting lists. He has received no written notice from Defendant TDADS or its predecessor agencies TDHS and TDMHMR that the services he has requested are being denied or delayed. 146.

**Kameron Lane**

147. Kameron Lane is eight years old and lives with his mother, Angie Lane, in Groves, Texas. Kameron was diagnosed with two disorders. He has a brain disorder and a seizure disorder. Furthermore, he is developmentally delayed.

148. Through his mother, Kameron requested CLASS services pursuant to the TDHS regulations in effect at the time he submitted his application. Neither TDADS nor its predecessor agencies TDHS and TDMHMR has evaluated him for CLASS eligibility. Instead, Kameron was

placed on a waiting list, and he has remained on that waiting list for approximately three years. Upon information and belief, Defendants are unable to give Kameron an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

149. Without the CLASS waiver, he will not receive necessary developmental services, without which he will be less likely to be functionally independent and to be socially appropriate; qualities he will need to work and live with minimal assistance.

150. As of the filing of this complaint, Kameron remains on the CLASS waiting lists. He has received no written notice from Defendant TDADS or its predecessor agency TDHS that the services he has requested are being denied or delayed.

#### **Madison Polk**

151. Madison Polk is eleven years old and until recently lived with mother and father, John and Robin Polk in Vidor, Texas. Madison has been diagnosed both with autism and a seizure disorder.

152. Madison requested CLASS services pursuant to the TDHS regulations in effect at the time she submitted her application. Neither TDHS nor TDADS has evaluated her for CLASS eligibility. Instead, Madison was placed on a waiting list, and she has remained on that waiting list for approximately nine years. Upon information and belief, Defendants are unable to give Madison an estimate of when she will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before her application is evaluated.

153. During the pendency of this case, Madison's condition has worsened. Left without alternatives for community services, Madison was placed at Bayes Achievement Center in Hunstville, over two hours away from her family.

154. As of the filing of this complaint, Madison remains on the CLASS waiting list. She has received no written notice from Defendant TDADS or its predecessor agency TDHS that the services she has requested are being denied or delayed.

**Billy Burch**

155. Billy Burch is 44 years old and lives in an ICF/MR in San Antonio, Texas. Mr. Burch has lived in this facility for approximately fifteen years. Mr. Burch is quadriplegic, legally blind, and has moderate mental retardation. Mr. Burch works 30 hours per week making greeting cards.

156. Mr. Burch's parents and siblings live in Edinburg, Texas, and they have unsuccessfully sought placement for Mr. Burch in ICF/MR facilities in Edinburg. Mr. Burch's family spends approximately \$6,500 per year to bring Mr. Burch to Edinburg for Thanksgiving, Christmas, Easter, and 30 days each summer. The Burch's also travel to San Antonio to visit Mr. Burch approximately once per month.

157. Mr. Burch's parents have located an HCS provider who could meet Mr. Burch's needs in a community placement in Edinburg if Mr. Burch's application for HCS waiver services is granted.

158. Although Mr. Burch has been in his current ICF/MR placement for over fifteen years, he was not advised by TDADS or its predecessor agency that he could apply for the HCS waiver program until approximately 2000. Mr. Burch requested CLASS services in 2000 pursuant to the TDHS regulations in effect at the time he submitted his application. Neither TDHS nor TDADS has evaluated him for CLASS eligibility. Instead, Mr. Burch was placed on a waiting list, and he has remained on that waiting list for approximately five years. Upon information and belief, Defendants are unable to give Mr. Burch an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the

applications of those on the wait list for waiver services, it will be years before his application is evaluated.

159. As of the filing of this complaint, Mr. Burch remains on the CLASS waiting list. He has received no written notice from Defendant TDADS or its predecessor agency TDHS that the services he has requested are being denied or delayed.

**Nathaniel Burkett**

160. Nathaniel Burkett is 27 years old and lives in an ICF/MR in Beaumont, Texas. He has moderate mental retardation. Mr. Burkett lived at home with his parents until 1999. While he was living at home, Mr. Burkett worked at a fast food restaurant. Mr. Burkett moved into an ICF/MR when his father was 78 and was no longer able to provide the care and supervision Nathaniel requires.

161. Mr. Burkett currently attends the Gulf Coast Opportunity Center, where he studies job readiness and independent living skills such as meal preparation, behavioral skills, self medication, and hygiene.

162. Mr. Burkett requested CLASS services pursuant to the TDHS regulations in effect at the time he submitted his application. Neither TDHS nor TDADS has evaluated him for CLASS eligibility. Instead, Mr. Burkett was placed on a waiting list, and he has remained on that waiting list for approximately three years. Upon information and belief, Defendants are unable to give Mr. Burkett an estimate of when he will be evaluated for waiver services. Moreover, based upon the pace at which Defendants are currently processing the applications of those on the wait list for waiver services, it will be years before his application is evaluated.

163. As of the filing of this complaint, Mr. Burkett remains on the CLASS waiting list. He has received no written notice from Defendant TDADS or its predecessor agency TDHS that the services he has requested are being denied or delayed.

## VIII. CAUSES OF ACTION

### Count I

#### **Medicaid: Failure in Amount, Duration, and Scope**

164. States participating in the Medicaid program must set “reasonable standards . . . consistent with objectives of the [Medicaid Act].” 42 U.S.C. § 1396a(a)(17). The regulations interpreting these statutory requirements mandate that every service and benefit included in the state Medicaid plan be “sufficient in amount, duration, and scope to reasonably achieve this purpose.” 42 U.S.C. § 1396a (a)(10) and 42 C.F.R. § 440.230(d).

165. By their actions set forth above, Defendants’ policies and practices violate federal requirements for an adequate amount, duration, and scope of ICF/MR-level services, including 42 U.S.C. § 1396a (a)(10); 42 C.F.R. § 440.200 *et seq.*

166. Plaintiffs acknowledge that this claim was dismissed by the Court in its May 23, 2003 Order granting in part and denying in part Defendants’ Motion to Dismiss. This claim is realleged for purposes of appeal and to affirmatively refute any claim of abandonment.

### Count II

#### **Medicaid: Failure to Provide Choice of Services**

167. Under federal Medicaid law and the assurances made by the Defendants in HCS and CLASS waiver programs, individuals with mental retardation and other developmental disabilities have the freedom to choose whether to receive Medicaid services in an ICF/MR or in a waiver program.

168. Under the CLASS and HCS waiver programs there are a variety of feasible alternatives to ICF/MR care including residential support and habilitation, day services, family support, respite services and transportation.

169. Defendants’ administration of the Medicaid program denies Plaintiffs and Plaintiff class members their freedom of choice by (a) failing to inform them of their feasible alternatives to

Medicaid-funded ICF/MR facilities, including HCS and CLASS waiver programs, and (b) failing to implement their choices for Medicaid services in violation of 42 U.S.C. § 1396n (c)(2)(C).

170. Plaintiffs acknowledge that this claim was dismissed by the Court in its May 23, 2003 Order granting in part and denying in part Defendants' Motion to Dismiss. This claim is realleged for purposes of appeal and to affirmatively refute any claim of abandonment.

**Count III**  
**Medicaid: Failure to Accept Applications For CLASS**  
**and HCS Waiver Services**

171. Plaintiffs incorporate by reference all the paragraphs set forth herein.

172. Federal law requires that Medicaid services shall be furnished with reasonable promptness to all eligible individuals, and without delay caused by the state agency's administrative procedures.

173. The Defendants refuse to accept applications from eligible Medicaid applicants, including Plaintiffs and class members, thus denying them access to medical assistance through HCS and CLASS waiver programs in a timely manner. This violates 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930(a).

174. Plaintiffs acknowledge that this claim was dismissed by the Court in its May 23, 2003 Order granting in part and denying in part Defendants' Motion to Dismiss. This claim is realleged for purposes of appeal and to affirmatively refute any claim of abandonment.

**Count IV**  
**42 U.S.C. § 1983: Failure to Provide Medicaid CLASS and HCS Waiver Services**  
**With Reasonable Promptness Once Application Is Made**

175. Defendants voluntarily participate in the federal Medicaid program under 42 U.S.C. §§ 1396 *et seq.* As a condition to participation, Defendants must ensure that medically necessary services for eligible individuals with mental retardation or developmental disabilities are provided in a reasonably prompt manner. Defendants' Medicaid program includes the CLASS and HCS waiver programs.

176. Federal law requires any State which elects to participate in the Medicaid program under 42 U.S.C. §§ 1396 *et. seq.*, provide all services, including CLASS and HCS waiver services, to eligible individuals with reasonable promptness in violation of 42 U.S.C. § 1396a (a)(8).

177. The Plaintiffs have not received these services despite applying for them years ago. The Plaintiffs remain on a waiting for these services.

178. The Defendants have administered and continue to administer the State's Medicaid system in a manner that limits the availability of CLASS and HCS waiver services to persons with mental retardation or developmental disabilities, and that precludes providing these services to Plaintiffs and other class members in a reasonably prompt manner.

179. This failure to provide Medicaid waiver services under CLASS and HCS waiver programs is the result of arbitrary and unreasonable policies, practices, and decisions.

180. The Defendants' failure to provide CLASS and HCS waiver services to eligible individuals in a reasonably prompt manner violates Plaintiffs' rights under the Medicaid Act and its implementing regulations, the ADA, *Olmstead*, Section 504 of the Rehabilitation Act, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The violation of these rights creates a cause of action under 42 U.S.C. § 1983.

181. Plaintiffs acknowledge that this claim was dismissed by the Court in its May 23, 2003 Order granting in part and denying in part Defendants' Motion to Dismiss. This claim is realleged for purposes of appeal and to affirmatively refute any claim of abandonment.

#### **Count V**

#### **Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Failure to Comply With The Integration Mandate**

182. The ADA, 42 U.S.C. § 12101 *et seq.*, mandates that public entities like the Defendant state agencies, provide services to persons with disabilities in the most integrated setting appropriate to meet the individual's needs, rather than segregated settings. It also requires that public entities ensure that available services are offered on a nondiscriminatory basis. Section 504 of the



Rehabilitation Act of 1973 contains a similar requirement for recipients of federal financial assistance. 29 U.S.C. § 794.

183. Title II of the ADA 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 such entity.” 42 U.S.C. § 12132. The regulations implementing Title II of the ADA and Section 504 require a public entity to administer its 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).

184. The Defendants’ failure to provide individual Plaintiffs and members of the Plaintiff class with community mental retardation or developmental disability habilitation and support services in the most integrated setting appropriate violates 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d).

185. The Defendants’ failure to administer programs like the HCS and CLASS waivers so that there are sufficient resources allocated to ensure that those who are unnecessarily institutionalized or at risk of unjustified institutionalization, including Plaintiffs and members of the Plaintiff Class, are provided with community-based services in the most integrated setting appropriate violates 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(b)(3)(I)-(ii).

186. The Defendants’ failure to provide qualified individuals with disabilities the same opportunity to participate in a benefit or program to the same extent as any other equally qualified program participant and the same opportunity to achieve the benefits or results other qualified individuals have the opportunity to obtain violates 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(b)(1)(I)-(iii-iv).

187. In addition to the above, the Defendants’ failure to provide service like the HCS waiver to individuals living in 14 bed and smaller ICF/MRs is not the most integrated setting to meet

their service needs in violation of 42 U.S.C. § 12132; 29 U.S.C. § 504; 28 C.F.R. § 35.130(d); and 28 C.F.R. § 41.51.

188. By their actions set forth above, the Defendants continue to deny Plaintiffs services like the HCS and CLASS waivers in the most integrated setting appropriate to their needs in violation of the ADA, 42 U.S.C. § 12101 *et seq.*; 29 U.S.C. § 504 and the implementing regulations including 28 C.F.R. § 35.130(b)(1) (I-iii, vii), 35.130(b)(3)(I-ii), 35.130(d); and 28 C.F.R. §§ 41.51(b)(1)(i-iii, iv), 41.51(b)(3)(i-ii).

#### **Count VI Violation of Due Process**

189. The Defendants' failure to provide the Plaintiffs and members of the class with written notices and an opportunity to be heard when ICF/MR level of services are denied or not acted upon with reasonable promptness, violates federal law, including 42 U.S.C. § 1396a (a)(3); 42 C.F.R. § 431.200 *et. seq.*; and the Due Process Clause of the Fourteenth Amendment.

190. Plaintiffs acknowledge that to the extent this claim is based upon the Due Process Clause of the Fourteenth Amendment, as opposed to the due process provisions of the Medicaid Act and associated regulations, this claim was dismissed by the Court in its May 23, 2003 Order granting in part and denying in part Defendants' Motion to Dismiss. This claim as it relates to the Due Process Clause is realleged for purposes of appeal and to affirmatively refute any claim of abandonment.

#### **Count VII Violation of Equal Protection of the United States Constitution**

191. The Defendants violate the Plaintiffs' and class members' rights secured by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by establishing,

subsidizing, and otherwise sanctioning enactments, programs, policies, and practices that have excluded, separated, and segregated persons with mental retardation or developmental disabilities.

192. Specifically, Defendants have administered the HCS and CLASS waiver programs so that similarly situated applicants for HCS and CLASS waivers are not treated equally in that applicants are not evaluated in the order that they applied to the waiver programs. As a result, some applicants may be evaluated and receive waiver services under the HCS or CLASS program before others who applied for the program before them.

193. For example, since the inception of this action, the HCS waiver applications of original named Plaintiffs Allison Pratt and Oshea Brooks have been approved, while other similarly situated named Plaintiffs, such as Christy Travis, Todd Gordon, and Sam Lindsay, who have been on the HCS and/or CLASS waiver waiting lists longer than Pratt or Brooks, remained on the waiting lists.

194. Allison Pratt, who has mental retardation, was on the HCS waiting list for approximately four years. Ms. Pratt lived at home with her parents. Oshea Brooks, who has cerebral palsy, diplegia, and mild mental retardation, was on the HCS waiting list for approximately four years. Mr. Brooks lived in an ICF/MR.

195. Christy Travis, who has mental retardation, physical disabilities, and a seizure disorder, has been on the HCS waiting list for eight years. Sam Lindsay, who has mental retardation, has been on the HCS waiting list for seven years. Todd Gordon, who has fragile X syndrome, has been on the HCS waiting list for seven years. Ms. Travis, Mr. Lindsay, and Mr. Gordon each live at home.

196. In addition, upon information and belief, Defendants have assigned HCS and/or CLASS waiver slots to individuals who were already receiving services funded by the state ahead of similarly situated individuals who remain on long waiting lists for waiver services.

197. By their actions set forth above, the Defendants have failed and continue to fail to provide Plaintiffs with equal protection regarding the provision of waiver services in violation of the Equal Protection Clause of the United States Constitution.

**Count VIII  
Civil Rights Act**

198. Defendants were, at all times relevant to this Complaint, acting under color of state law.

199. Defendants, by their actions and inactions as alleged in this Complaint, have caused Plaintiffs and class to be subjected to the deprivation of their rights secured by the Constitution and laws of the United States, specifically the Social Security Act, and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution.

200. These violations by these defendants constitute a violation of the Civil Rights Act, 42 U.S.C. Section 1983.

201. Plaintiffs acknowledge that this claim realleges certain claims dismissed by the Court in its May 23, 2003 Order granting in part and denying in part Defendants' Motion to Dismiss. To the extent that this claim realleges claims other than those under 42 U.S.C. § 1983 regarding violations of the due process provisions of the Medicaid Act, the ADA and Rehabilitation Act, and the Equal Protection Clause, this claim is realleged for purposes of appeal and to affirmatively refute any claim of abandonment.

**Count IX  
Declaratory Judgment**

202. Plaintiffs and class members bring this claim for declaratory relief pursuant to 28 U.S.C. § 2201.

203. An actual controversy exists between Plaintiffs and Defendants with respect to the nature and extent of Plaintiffs' rights under the Medicaid Act and its regulations, the ADA and its regulations, Section 504 of the Rehabilitation Act and its regulations, and the Due Process and Equal Protection Clauses under the Fourteenth Amendment to the United States Constitution.

204. Plaintiffs request that this Court declare the rights and obligations of the respective parties under applicable federal Medicaid law and regulations, the ADA and regulations, Section 504 of the Rehabilitation Act and regulations, and the United States Constitution.

205. Plaintiffs acknowledge that this claim seeks relief based upon certain claims dismissed by the Court in its May 23, 2003 Order granting in part and denying in part Defendants' Motion to Dismiss. To the extent that this claim seeks relief based upon claims other than those brought pursuant to 42 U.S.C. § 1983 and the due process provisions of the Medicaid Act; the ADA and Rehabilitation Act; and the Equal Protection Clause, this claim is realleged for purposes of appeal and to affirmatively refute any claim of abandonment.

### **PRAYER**

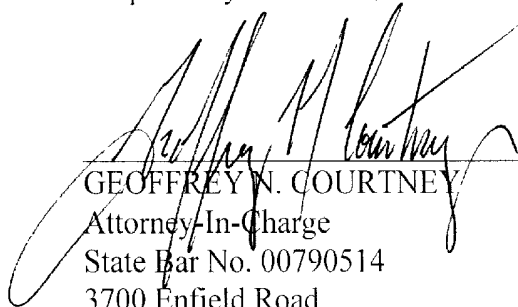
WHEREFORE, Plaintiffs respectfully pray that this Court grant the following relief:

- A. Certify this action as a class action;
- B. Declare that the Defendants have violated the Plaintiffs' and class members' rights under the Medicaid Act and implementing regulations by failing and refusing to provide eligible individuals with services like the CLASS or HCS waivers;
- C. Declare that the Defendants have violated the Plaintiffs' and class members' rights under the ADA and implementing regulations and Section 504 of the Rehabilitation Act and its implementing regulations by failing to provide eligible individuals with services like the CLASS or HCS waivers and thus failing to provide them with services in the most integrated setting appropriate to their needs;
- D. Declare that Defendants' Promoting Independence Plan violates Olmstead because persons living in ICF/MRs with less than 14 beds and eligible persons living in the community are not provided access to waiver services at a reasonable pace.

- E. Declare that Defendants providing services like the HCS and CLASS waivers to all eligible individuals would not require a fundamental alteration of the state's mental health and mental retardation system.
- F. Declare that Defendants providing services like HCS and CLASS waivers would not constitute an undue financial burden on Defendants.
- G. Declare that the Defendants have violated Plaintiffs' and class members' rights to procedural and substantive due process under the Fourteenth Amendment to the United States Constitution;
- H. Enter a permanent injunction requiring the Defendants to provide Plaintiffs and class members with medically necessary services like CLASS or HCS waivers at a reasonably prompt pace;
- I. Enter a permanent injunction requiring the Defendants to provide Plaintiffs and class members with services in the most integrated setting appropriate to their needs.
- J. Award Plaintiffs reasonable attorneys' fees, expenses, and costs of suit.
- K. Award Plaintiffs and class members all other such appropriate relief, either at law or in equity, as the Court may deem appropriate, just, and proper.

Dated: April 1, 2005

Respectfully submitted,



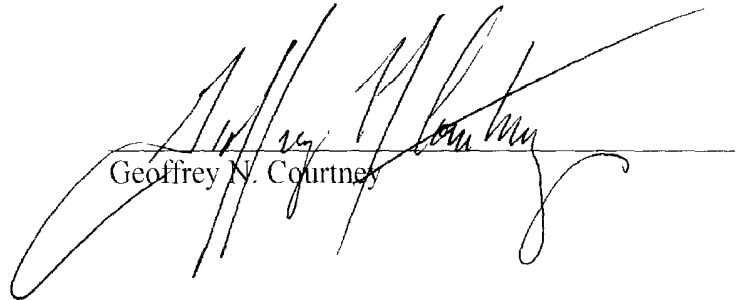
GEOFFREY N. COURTNEY  
Attorney-In-Charge  
State Bar No. 00790514  
3700 Enfield Road  
Austin, Texas 78703  
(512) 236-0875 (Phone)  
(512) 236-0878 (Fax)

GARTH A. CORBETT  
State Bar No. 04812300  
ADVOCACY, INCORPORATED  
7800 Shoal Creek Boulevard, Suite 171-E  
Austin, Texas 78757-1014  
(512) 454-4816 (Phone)  
(512) 454-3999 (Fax)

ATTORNEYS FOR PLAINTIFFS

### CERTIFICATE OF SERVICE

I certify that on this 1st day of April, 2005, a true and correct copy of this document was delivered via U.S. certified mail, return receipt requested, to the attorney for defendants, Nancy K. Juren, Assistant Attorney General, General Litigation Division, P. O. Box 12548, Capitol Station, Austin, Texas 78711-2548.



Geoffrey N. Courtney