

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Barbara Hickey,)
)
Plaintiff,)
)
vs.)
) Docket No.: _____
)
Emma Forkner, In Her Official Capacity as the)
Director of the South Carolina Department of)
Health and Human Services; **Beverly Buscemi,**)
in Her Official Capacity as the Director of the)
South Carolina Department of Disabilities and)
Special Needs,)
)
Defendants.)
_____)

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

Barbara Hickey (hereinafter referred to as the "Plaintiff") complaining of the Defendants herein, alleges the following:

I. INTRODUCTION

1. Plaintiff Hickey is an elderly person with severe disabilities, including severe cerebral palsy and scoliosis, who uses a motorized wheelchair for ambulation. Plaintiff Hickey brings this action against the above-named Defendants to enforce her rights under the Americans with Disabilities Act of 1990 (ADA), (42 U.S.C. § 12131) and Section 504 of the Rehabilitation Act of 1973 (Section 504), (29 U.S.C. § 794) to continue to receive services in the most integrated setting appropriate to her needs, which is in her home and her community, and to avoid being forced into an institution to receive these services.

2. Plaintiff has been successfully living in her own home in Florence, South Carolina with services provided pursuant to Defendants' Mental Retardation and Related Disabilities (MR/RD) Medicaid Waiver program since 2001. In particular, Plaintiff requires and

has been receiving fifty (50) hours of home-based Personal Care Assistance (“PC II services”) which have allowed her to remain in her home and community.

3. As set forth in the South Carolina Department of Disabilities and Special Needs MR/RD Waiver Manual, PC II services involve “[a]ctive, hands-on assistance in the performance of Activities of Daily Living (ADL’s) or Instrumental Activities of Daily Living (IADL’s) provided to the waiver participant in his/her home.” ADL’s include, but are not limited to: assistance with eating, bathing, dressing, toileting, transferring, maintaining continence, and assistance with ambulation. *Id.* IADL’s include, but are not limited to: light housework, laundry, meal preparation, shopping, home safety, assistance with communication, medication monitoring, limited assistance with financial matters, and escort or transportation services.

4. On December 1, 2009, without any individualized inquiry into her condition, Defendants advised Plaintiff Hickey that her fifty (50) hours a week of PC II services were being cut to twenty-eight (28) hours per week due to Defendants’ recent amendment to the MR/RD Waiver which capped PC II services for all non-institutionalized persons at twenty-eight (28) hours per week (hereinafter the “personal care cap”) regardless of the extent of their disability or their personal circumstances. The personal care cap applies solely to persons living in the community and not to persons who consent to institutional care.

5. Defendants’ secured approval of their MR/RD Waiver amendment from the U.S. Department of Health and Human Services’ Centers for Medicaid and Medicaid Services (“CMS”), effective January 10, 2010, upon Defendants’ representation that they were merely making “minor adjustments” to the MR/RD Waiver program.

6. Plaintiff is at imminent risk of institutionalization if her PC II services are reduced

to match the personal care cap amount of twenty-eight (28) hours a week. It is only because of her current home-based PC II services that Plaintiff has been able to avoid being institutionalized.

7. Unnecessary institutionalization and segregation of individuals with disabilities is a form of discrimination under the ADA and Section 504 of the Rehabilitation Act, and Plaintiff opposes being forced by Defendants into an institution to receive the care she needs.

II. JURISDICTION AND VENUE

8. This is an action for declaratory and injunctive relief for violations of Title II of the Americans with Disabilities Act of 1990 (ADA), (42 U.S.C. § 12131) and Section 504 of the Rehabilitation Act of 1973 (Section 504), (29 U.S.C. § 794).

9. Jurisdiction for the Plaintiff's claims is based on 28 U.S.C. § 1331, 1343(a)(3) and (4).

10. Plaintiff's claims for declaratory and injunctive relief are authorized by 28 U.S.C. § 2201- 2202 and Federal Rule of Civil Procedure 65.

11. Venue is proper in the Florence Division of the District of South Carolina pursuant to 28 U.S.C. § 1391(b), because Defendants reside, operate and perform their official duties in this District and a substantial part of the actions and omissions of which Plaintiff complains occurred in this District and in this Division, and Plaintiff resides in this Division.

III. PARTIES TO THE ACTION

A. DEFENDANTS

12. Emma Forkner is sued for prospective injunctive relief in her official capacity as the Director of South Carolina Department of Health and Human Services (SCDHHS), which is the cabinet level agency responsible for the administration of all Medicaid programs. Director

Forkner is responsible for administering South Carolina's long-term care system for persons who have disabilities and has responsibility for the oversight, supervision and administration of all Medicaid programs.

13. Beverly Buscemi is the Director of the South Carolina Department of Disabilities and Special Needs (SCDDSN) and she is sued for prospective injunctive relief in her official capacity. SCDDSN is a state agency responsible for the administration and supervision of various components of South Carolina's Medicaid program. Director Buscemi bears the ultimate responsibility for the implementation and management of South Carolina's Medicaid Programs administered and supervised by SCDDSN, including in particular the state's MR/RD Waiver program and HASCI Waiver program.

B. PLAINTIFF

14. Plaintiff, Barbara Hickey, is a sixty seven (67) year old woman who lives in her own specially adapted, wheelchair accessible home in Florence, South Carolina. She suffers from severe cerebral palsy and scoliosis and uses a motorized wheelchair to ambulate.

15. Ms. Hickey has extremely limited motor control. She requires hands-on assistance with all transfers to and from her bed and motorized wheelchair; as well as total personal care assistance with most activities of daily living, including: bathing, skin care, dressing and grooming, toileting, incontinence care, positioning and turning in bed, ambulation, meal preparation set-up and clean-up, and home care/housekeeping tasks such as sweeping, laundry, bed making, and changing bed linens. Ms. Hickey also requires partial assistance with oral hygiene and feeding.

16. Plaintiff meets Defendant's "level of care" criteria for medical eligibility to receive institutional care in an Intermediate Care Facility Mental Retardation (ICF/MR) as a

result of her related disability. An ICF/MR is a segregated, institutional facility which serves persons who have mental retardation or a related disability. It is the most expensive placement in the SCDDSN system at \$270 dollars per day (\$92,280 dollars per year).

17. Based on her being both Medicaid eligible and ICF/MR eligible Plaintiff has, for many years, participated in Defendants' MR/RD Medicaid waiver program, which is administered by SCDDSN under contract with SCDHHS.

18. Prior to receiving all of her in-home care through the MR/RD Waiver program, Ms. Hickey received the majority of her in-home assistance from a close family friend and live-in caretaker who passed away in April of 2000.

19. Ms. Hickey received in-home care from Defendants after the death of her live-in caretaker and on March 20, 2001, Ms. Hickey began receiving all of her in-home care through the MR/MD Waiver program. Based on Defendants' assessments, Ms. Hickey was authorized to receive thirty-nine (39) hours of weekly in-home care in 2001, forty-one (41) hours in 2002, and fifty (50) hours in 2004, and has remained at that fifty (50) hours assessment level since that time. Indeed, her 2007 Needs Assessment recognized that Ms. Hickey's actual needs justified more hours, but noted that Ms. Hickey was satisfied with her level of fifty (50) hours of PC II services per week. Her condition has not improved, nor have her needs diminished or changed, since that 2007 assessment.

20. Because of the nature and extent of her disability, it is only by receiving these fifty (50) hours a week in PC II services since 2004 that Plaintiff has been able to remain in her home and in her community.

21. In order to appropriately accommodate Ms. Hickey's needs in her home, SCDDSN has paid up to \$7,500 dollars in Medicaid funds for "environmental modifications."

These modifications include, but are not limited to: installation of a remote-controlled, electric backdoor, partition wall, rails, ramps, vinyl flooring, pipe-lines, lights and switches; and removal of steps, walls, sub-floors, and existing door units.

22. Ms. Hickey's fifty (50) hours of Personal Care II (PC II) services are provided through Care Pro/Medical One which contracts with SCDDSN to provide the appropriate amount of home-based assistance to Ms. Hickey throughout the week. Ms. Hickey's PC II assistants have been with her for many years, one for over fifteen (15) years. Because they are required to assist Ms. Hickey with the most intimate details of daily life, Ms. Hickey values her long relationships with her assistants very highly and her continued relationship with them is critical to her emotional and mental well-being.

23. Ms. Hickey's profound physical limitations require substantial accommodations and the daily activities and routines that have been established by her assistants are both time consuming and invaluable. Every morning Ms. Hickey is confined to her bed, unable to move or change positions, until her assistant arrives. Upon arrival, the assistant's first duty is to lift Ms. Hickey from her bed, dispose of her soiled diaper, and assist Ms. Hickey with toileting. After the assistant bathes, dresses and re-diapers Ms. Hickey, she then lifts her into her wheelchair, where she will remain for the balance of the day. These activities are significantly arduous as they require total assistance. Bathing alone takes forty-five (45) minutes to complete, dressing is allotted for thirty (30) minutes daily, incontinence care and toileting are budgeted for an entire hour each day, even just positioning and turning in bed requires fifteen (15) minutes to complete with total assistance. Of this morning hygiene routine, the only activity that Ms. Hickey needs only partial assistance with is brushing her teeth.

24. Once dressed and in her wheelchair, Ms. Hickey's assistant prepares, sets up and

cleans up breakfast, which Ms. Hickey is able to eat with partial assistance. After breakfast, Ms. Hickey's assistant performs basic housekeeping tasks, such as: vacuuming, sweeping, mopping, dusting, doing laundry, and cleaning Ms. Hickey's bedroom and bathroom. Ms. Hickey owns a handicap accessible van that her assistants are able to use to transport her for errands and appointments when needed.

25. After her morning assistant leaves, Ms. Hickey is free to spend her afternoon as she pleases. Frequently she will go on a "stroll" through her neighborhood to the nearby stores and restaurants. Ms. Hickey does the majority of her grocery shopping during these afternoons at the local Food Lion, where the employees know her and are always happy to assist her with getting things off shelves, placing them in her cart, getting her checked out and placing her shopping bags on her wheelchair. Because she has lived in the same neighborhood for almost two (2) decades, Ms. Hickey's neighbors know who she is, they say hello when they see her, and they will often stop and help her if there is something in the road blocking her path. On some afternoons, Ms. Hickey will have her assistant drop her off at a local bingo parlor and she will spend several hours enjoying the company of friends and acquaintances while playing a few games of dollar bingo. Ms. Hickey sometimes enjoys going to matinee movies, riding through the mall, or going to larger discount department stores (such as K-Mart) to pick up necessary household items that aren't available at her Food Lion or Dollar Store. Often Ms. Hickey will simply choose to enjoy the peace and tranquility of her own home and backyard. Most importantly, Ms. Hickey has the freedom to choose how she will spend her time and whom she will spend it with.

26. In the evening, Ms. Hickey's second assistant arrives at her home to prepare her for the evening. She first provided total assistance with toileting and incontinence care. The

assistant then sets up and prepares dinner for Ms. Hickey, who requires partial feeding assistance. After Ms. Hickey's assistant has cleaned up after dinner (an activity that requires complete assistance), she then goes through the process of preparing Ms. Hickey for bed. Ms. Hickey requires total assistance with this process, which involves lifting Ms. Hickey out of her day clothes, re-diapering her, re-dressing her in night clothes, and then positioning her in bed. Ms. Hickey is then left in bed with her LifeLine emergency button, remote, and phone, where she will wait until morning when her assistant returns to begin the process again.

27. If her fifty (50) hours a week of PC II services are cut to twenty-eight (28) hours, pursuant to the personal care cap that SCDDSN and SCDHHS have recently sought to impose on persons living in the community, Ms. Hickey will be forced into a more restrictive, congregate institutional setting to receive the care that she needs, where she will be segregated from her community and forced to give up the peace and tranquility of her own home.

28. Plaintiff's PC II service hours have been temporarily continued at her pre-personal care cap level of fifty (50) hours per week, pending an appeal to the Administrative Law Court, specifically regarding the Defendant's violations of due process and the Medicaid Act, but are subject to being immediately capped at twenty-eight (28) hours per week upon conclusion of such proceedings.

IV. STATUTORY AND REGULATORY FRAMEWORK

A. ANTI-DISCRIMINATION LAWS

29. In enacting the Americans with Disabilities Act (hereinafter "ADA"), Congress found that "individuals with disabilities continually encounter various forms of discrimination, including . . . segregation . . ." 42 U.S.C § 12101(a)(5). Title II of the ADA provides that "no qualified individual with a disability shall, by reason of disability, be excluded from participation

in or be denied the benefits of services, programs, or activities of a public entity or be subject to discrimination by such entity.” 42 U.S.C § 12132. A “public entity” is defined as any state or local government or other instrumentality of a state or local government. 42 U.S.C § 12131(1)(A) and (C). This includes both SCDHHS and SCDDNS.

30. Congress further stated that “institutionalization” is one of the “critical areas” in which discrimination against individuals with disabilities persists. 42 USC § 12103(a)(3). It further found that “historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination ... continue to be a serious and pervasive social problem.” 42 USC § 12102(A)(2). Pursuant to these findings, the United States Department of Justice (“DOJ”) promulgated regulations providing 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) (1991). The “most integrated setting” is defined as “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.” 28 C.F.R. Part 35, Subpart G, App. A.

31. In addition, “A public entity may not, directly or through contractual or other arrangements, utilize criteria or other methods of administration: (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the entity’s program with respect to individuals with disabilities . . .” 28 C.F.R. § 35.130(b)(3).

32. Section 504’s regulations also prohibit recipients of federal financial assistance from utilize[ing] criteria or methods of administration “[t]hat have the effect of subjecting

qualified handicapped persons to discrimination on the basis of handicap [or] [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons." 28 C.F.R. § 41.51(b)(3)(i); 45 C.F.R. § 84.4(b)(4).

33. In 1999 the United States Supreme Court held that the unnecessary institutionalization of individuals with disabilities is a form of discrimination under Title II of the ADA. *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999). In doing so, the Court interpreted the ADA's "integration mandate" as requiring States to provide persons with disabilities treatment in community based settings, rather than institutional settings when: (1) community-based treatment is appropriate; (2) the individual does not oppose community placement; and, (3) community placement can be reasonably accommodated. *Olmstead*, 527 U.S. at 607.

34. On November 2, 2000, the Governor of South Carolina issued Executive Order 2000-26, which pledged South Carolina's commitment "to providing community-based alternatives for persons with physical, mental, or developmental disabilities" that "effectively foster [their] independence and acceptance" and that allows such persons to "live productive lives in their own communities." Exec. Order No. 2000-26, 24-11 S.C. Reg. 2 (2000). Further, the Executive Order established a South Carolina Home and Community-Based Services Task Force, whose sole objective was to develop a comprehensive, effective, working plan to comply with the Supreme Court's ruling in the *Olmstead* case. *Id.*

35. On November 4, 2006, SCDDSN issued a directive, which specifically cited *Olmstead* and stated that the agency "is committed to providing services in community-based settings, which are not ICF/MRs, when it is appropriate and honors the wishes of those who desire [to live outside of institutional facilities]." The directive went on to state that the MR/RD

Waiver allows persons to live in “a home of their own . . . and receive needed services in that setting which are funded by Medicaid.” SCDDSN Directive 700-03-DD.

B. FEDERAL AND STATE MEDICAID PROGRAMS

36. Medicaid is a cooperative, jointly funded program between the federal and state governments that provides medical assistance to, among others, low-income individuals with disabilities. 42 U.S.C §1396-1396v. On the federal level, Medicaid is administered by the Centers for Medicaid and Medicaid Services (CMS), an agency within the United States Department of Health and Human Services (USDHHS).

37. The purpose of Medicaid is to furnish, as far as practical, “medical assistance on behalf of...aged, blind or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services” and “to help such families and individuals to attain or retain the capability for independence or self-care.” 42 U.S.C § 1396-1.

38. In participating in the Medicaid program South Carolina must comply with the requirements of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and *Olmstead*. Under Title II of the ADA, a state may not amend or administer Medicaid programs, including waiver programs, in such a way as to violate the integration mandate.

39. SCDHHS administers the South Carolina Medicaid program in South Carolina. SCDHHS in turn contracts with SCDDSN for the implementation and provision of services for Medicaid programs. Both SCDHHS and SCDDSN are responsible for complying with all federal laws, regulations and directives including those pertaining to the ADA and Section 504 of the Rehabilitation Act.

40. The federal Medicaid Act authorizes states to provide home and community based “Waiver” services to allow eligible individuals to opt for long-term care services in an integrated

home or community setting, rather than in institutional settings, thus furthering the purposes of the integration mandate. 42 U.S.C § 1396n(c). Congress specifically intended for such Medicaid waiver programs to benefit people who have the most severe disabilities and to provide an alternative to institutional care, at the choice of the participant. *Olmstead*, 527 U.S. at 601.

41. South Carolina administers several Medicaid waiver programs, including the MR/RD waiver program, which is at issue in the present case. The MR/RD program is available to individuals who: (1) are Medicaid eligible; (2) have a diagnosis of mental retardation, a related disability or autism; (3) have been given the option of in-home or in-community services as opposed to services at an ICF/MR facility, but have chosen to remain in their community; (4) require a degree of care that would be provided in an ICF/MR facility; (5) have needs that can be met by the provision of waiver services; and (6) in-home or in-community services can be provided at a cost that is equal to or less than the cost of institutional care. SCDDSN, *MR/RD: MR/RD Waiver Eligibility Requirements* (visited March 18, 2010) <<http://ddsn.sc.gov/consumers/medicaidwaiver/Pages/MRRD.aspx>>.

42. More specifically, the MR/RD program is available to those individuals, like the Plaintiff, who have a “related disability,” which is found to be severe, chronic, requires similar treatment to those individuals with mental retardation, and meets all of the following conditions: (1) it is attributable to cerebral palsy, among other things; (2) it is likely to continue indefinitely; (3) it results in substantial live-activity limitation (i.e. self care, mobility, capacity for independent living, etc); and (4) the onset date for the disability was before age twenty-two (22). South Carolina Code 44-20-30 and SCDDSN Directive 100-30-DD.

43. SCDHHS receives federal funding to operate Medicaid programs, including all home and community based waiver programs. Federal funds for the MR/RD Medicaid Waiver

program are passed on by SCDHHS to SCDDSN. State funds paid to SCDDSN are used to “match” these federal Medicaid funds. Federal dollars have historically been matched at a 70.32% rate, meaning that for every state dollar that is expended about \$2.37 in federal funds are matched. However, beginning in 2009, under the American Recovery and Reinvestment Act (ARRA), states began receiving enhanced federal matching dollars. For South Carolina, pursuant to ARRA, federal dollars are currently matched at an increased rate of 79.58%, meaning that for every state dollar that is expended about \$3.90 in federal funds are matched.

44. Individuals eligible for home and community based services are entitled to receive all the services listed in S.C. Code Regs. §§ 126-301 and 126-304.

45. Personal care services, as described in S.C. Code Regs. § 126-301(A)(5), are also referred to as Personal Care Assistance (PCA). Providers can be authorized by SCDDSN to provide PCA service at two (2) different levels depending on a recipients assessed need, namely Personal Care I (PC I), which is limited to a lower level of care, and Personal Care II (PC II) which is more expansive.

46. Plaintiff is qualified for and has been receiving fifty (50) hours of PC II services in her home since 2004. These PC II services allow her to remain in her home and community, which is the most integrated setting appropriate to her needs.

V. FACTUAL ALLEGATIONS

A. NOTICE OF WITHDRAWAL OF CARE

47. On December 1, 2009 Ms. Hickey received a written notice informing her that her PC II service hours would be reduced from fifty (50) hours a week to twenty-eight (28) hours a week, effective January 1, 2010.

48. In January 2010, SCDDSN reduced Ms. Hickey’s hours to twenty-eight (28) per

week. Ms. Hickey was only able to survive in her home during that time because her PC II assistants worked past the number of hours that they were being paid so that Ms. Hickey would not be in danger. Ms. Hickey's fifty (50) hours a week were temporarily restored pending resolution of agency administrative proceedings pursuant to her request for reconsideration sent by letter of January 13, 2010.

49. On January 19, 2010, the director of SCDDSN responded to Ms. Hickey's request for reconsideration by stating that "[w]hile we understand and appreciate the hardship these changes may place upon you, we are not at liberty to exceed the established limits. Therefore I must uphold the decision to reduce your Personal Care II Services."

50. Ms. Hickey filed a request for a fair hearing with SCDHHS on January 25, 2010. Instead of scheduling a fair hearing, the hearing officer issued an "Interlocutory Order" demanding that Ms. Hickey set forth the reasons that she believed an error had been made in the determination of her eligibility for Medicaid benefits in writing by February 12, 2010. Ms. Hickey responded in writing on February 12, 2010 again requesting that a fair hearing be granted. On February 17, 2010 a Hearing Office from SCDHHS issued an "Order of Dismissal" stating that no fair hearing would be granted.

51. On March 1, 2010 Plaintiff, through counsel, filed with SCDHHS a Motion to Alter or Amend Judgment, specifically requesting that Ms. Hickey be provided with a fair hearing as required by federal statute. In response, counsel for SCDHHS filed a Return recommending that the Hearing Officer uphold his Order of Dismissal and deny Ms. Hickey her right to a fair hearing.

52. On July 27, 2010 Plaintiff received a Final Ruling on her Motion to Alter or Amend the Judgment of the Order of Dismissal finding that her Motion was denied and that she

would not be provided with a fair hearing.

53. In response to Plaintiff's fair hearing denial, and to preserve her rights, she appealed the Hearing Officer's decision to the Administrative Law Court on August 27, 2010. That action is currently pending.

B. REASONABLE ACCOMMODATION OF COMMUNITY BASED TREATMENT

54. Plaintiff is a qualified individual with a disability under the Americans with Disabilities Act.

55. If her current level of PC II services are cut from fifty (50) to twenty-eight (28) hours then Ms. Hickey will be forced into a more restrictive, congregate institutional setting, where she will be segregated from her community and her friends.

56. Ms. Hickey has never been institutionalized and she desires to remain in her home and community, which is the least restrictive setting. Ms. Hickey does not want to be forced into an institutional setting to receive the care she needs.

57. Community placement in her own home is appropriate for Ms. Hickey, as evidenced by the opinion of her treating physician and her receipt of Medicaid services in her home through the SCDHHS and SCDDSN MR/MD Waiver program since at least 2001. Further, Ms. Hickey desperately wants to remain in her home. She is a fiercely independent woman who not only places great value on her freedom but also on her privacy.

58. Maintaining Plaintiff's current and necessary level of PC II services can be reasonably accommodated taking in to account the resources available to the State and the needs of others with mental disabilities. Further, continuing to provide Plaintiff's with fifty (50) hours of PC II services in her community would not fundamentally alter the nature of the Defendants services, programs or activities.

59. The cost of continuing to provide the current level of PC II services to Plaintiff is far less than the cost would be to care for her in an institution, which will be necessary if her services are reduced from fifty (50) to twenty-eight (28) hours.

60. According to the agency's 2009 MR/RD Amendment Application to CMS for a § 1915(c) Home and Community Based Services Waiver, PC II services cost SCDDSN \$16.00 per hour, which comes to \$800.00 per week for the fifty (50) hours per week needed by the Plaintiff. Moreover, since Defendant's personal care cap still allows for twenty-eight (28) hours of services per week at a cost of \$448.00, the incremental cost of providing the additional twenty-two (22) hours of in-home PC II services needed to provide adequate care to the Plaintiff, is just \$352.00 more per week. As cited in the same application, the cost of institutional care (i.e. an ICF/MR facility) costs \$270 per day, which comes to \$1,890.00 per week. Thus, the cost of continue to provide Ms. Hickey with adequate in-home PC II services is far less than institutionalizing her.

61. In addition to failing to make reasonable accommodations for Ms. Hickey's disability under the MR/RD Waiver, Defendants have failed to make reasonable accommodations for Ms. Hickey under another waiver that would also allow Ms. Hickey to avoid institutionalization. SCDDSN provides up to forty-nine (49) hours of PC II services each week in its Head and Spinal Cord Injury (HASCI) Waiver, which includes "similar disabilities," such as Ms. Hickey's. SCDDSN Directive 100-30-DD. After Defendants acted to cut Ms. Hickey's PC II services, Defendants subsequently offered to provide forty-nine (49) PC II hours under the HASCI Waiver and reiterated this offer in briefing their response to Ms. Hickey's Motion to Alter or Amend the Judgment of the Hearing Officer's denial of her request for a hearing. Defendants' subsequently withdrew this offer.

62. After the Hearing Officer's denial of Plaintiff's request for a hearing on July 27, 2010 and during the thirty (30) day period in which Plaintiff was to file an administrative appeal period, Defendants again indicated that they were considering offering Plaintiff HASCI services. After the appeal period had run and Plaintiff had filed a notice of appeal to preserve her rights, Defendants notified Plaintiff that they would not offer her HASCI services.

63. The HASCI Waiver provides for persons to be placed on the waiver prior to age sixty-five (65), but they can then remain on the waiver and continue to receive services after age sixty-five (65). Although Defendants concluded that Ms. Hickey was otherwise qualified for this waiver because of her disability, they have refused to make a reasonable accommodation for Ms. Hickey's needs based on her disability by waiving their timing restrictions in the particular circumstances of her case.

64. In addition to disregarding the financial and administrative feasibility of maintaining Plaintiff in her home, Defendants, upon information and belief, have not properly allocated funds in accordance with the integration mandate in that they have focused on allocating funds for services in institutional settings rather than allocating funds for the same services in home based settings.

VI. FIRST CLAIM FOR RELIEF
AMERICANS WITH DISABILITIES ACT
(AGAINST ALL DEFENDANTS)

65. Plaintiff realleges and incorporates by reference each and every allegation set forth above in this Complaint as though the same were repeated herein verbatim.

66. Plaintiff is a qualified individual with a disability in that she (1) has a physical impairment that substantially limited one or more major life activities; and (2) meets the essential

eligibly requirements for community based long-term care under South Carolina's Medicaid program.

67. Plaintiff does not oppose community placement, which can be reasonably accommodated, as demonstrated by her continuous care in the community for many years.

68. Defendants have required that PC II services to the Plaintiff be arbitrarily reduced from fifty (50) hours a week to no more than twenty-eight (28) hours a week without any reassessment of her individual need, without any evidence of reduced need and without provision of integrated, community-based replacement services, thereby placing Plaintiff at imminent risk of institutionalization in violation of the ADA's integration mandate.

69. Defendants have utilized criteria and methods of administration that subject Plaintiff to discrimination on the basis of her disability, including placing her at risk of unnecessary institutionalization, by: (1) failing to assess properly the services and supports that would enable Plaintiff to remain in the community; (2) failing to ensure that Plaintiff has access to Medicaid-covered services that will meet her needs in the community; (3) failing to make reasonable modifications to home and community-based waiver programs avoid discrimination on the basis of disability (4) basing their decisions regarding levels of service solely on economic considerations and not taking into account her assessed needs; and (5) allocating resources for institutional versus community long-term care contrary to the desires and needs of people with disabilities, thus compelling health care providers to reduce recommended levels of in-home and community-base services.

70. Defendants' actions are in violation of Title II of the ADA and without an injunction Plaintiff will be isolated and segregated from her community against her will by being

forced into a segregated, institutional setting.

VII. SECOND CAUSE OF ACTION
SECTION 504 OF THE REHABILITATION ACT
(AGAINST ALL DEFENDANTS)

71. Plaintiff realleges and incorporates by reference each and every allegation set forth above in this Complaint as though the same were repeated herein verbatim.

72. Plaintiff is a qualified person with a disability within the meaning of Section 504, because she (1) has physical and/or mental impairments that substantially limit one or more major life activities; and (2) she meets the essential eligibility requirements for community based long-term care under South Carolina's Medicaid program.

73. Defendants' reduction of Medicaid funding for the PC II in-home health services that Plaintiff requires to avoid segregation in an institution and to remain in an integrated home setting that is appropriate to her needs, constitutes unlawful discrimination in violation of Section 504's integration mandate.

74. Defendants have utilized criteria and methods of administration that further subject Plaintiff to discrimination on the basis of disability, including risk of unnecessary institutionalization, by: (1) failing to assess properly the services and supports that would enable Plaintiff to remain in the community; (2) failing to ensure that Plaintiff has access to Medicaid-covered services that will meet her needs in the community; (3) failing to make reasonable modifications to home and community-based waiver programs avoid discrimination on the basis of disability (4) basing their decisions regarding levels of service solely on economic considerations and not taking into account her assessed needs; and (5) allocating resources for

institutional versus community long-term care contrary to the desires and needs of people with disabilities, thus compelling health care providers to reduce recommended levels of in-home and community-base services.

75. Defendant's action are in violation of Section 504 and without an injunction Plaintiff will be isolated and segregated from her community against her will by being forced into an institutional setting.

VIII. PRAYER FOR RELIEF

WHEREFORE, having set forth her Complaint against the Defendants, Plaintiff would respectfully pray that this Court issue an Order granting the following relief and remedies:

- A. Assume jurisdiction over this action and maintain continuing jurisdiction until Defendants are in full compliance with every Order of this Court.
- B. Declare that Defendants' policies, practices, acts and omissions, as set forth above, violate Plaintiff's rights under the ADA and Section 504 of the Rehabilitation Act by *inter alia*:
 - i. Denying Plaintiff her entitlement to services in the most integrated non-institutional setting; and
 - ii. Discriminating against Plaintiff on the basis of disability and on the basis of severity of disability, by utilizing methods of administration, adopting and applying policies, and engaging in practices that result in unnecessary segregation and institutionalization.
- C. Declare that Defendants' personal care cap of twenty-eight (28) hours for PC II services under the MR/RD Waiver as applied to the Plaintiff, without provision for continuation of essential services in her home which is the most integrated

setting appropriate to the needs of Plaintiff, and Defendants' conditioning Plaintiff's receipt of medically necessary Medicaid services on her accepting segregation in an institutional setting violates the ADA and Section 504, laws which prohibit discrimination on the basis of disability and unjustified institutionalization and which require Defendants to administer their services and programs in the most integrated setting appropriate to the needs of individuals with disabilities, including:

- D. Grant a preliminary and permanent injunction enjoining Defendants, their officers, employees, attorneys, and all other persons who are in active concert or participation with them from violation of Plaintiff's rights under the ADA and Section 504 of the Rehabilitation Act.
- E. Grant a preliminary and permanent injunction enjoining Defendants, their officers, employees, attorneys, and all other persons who are in active concert or participation with them from terminating, reducing, or suspending Plaintiff's fifty (50) hours of in-home PC II, MR/RD Medicaid waiver services, and all other services to which she is entitled or was receiving under the MR/RD waiver program at the time Defendant's notice of reduction in services on December 1, 2009.
- F. Grant a preliminary and permanent injunction enjoining Defendants, their officers, employees, attorneys, and all other persons who are in active concert or participation with them to take all actions necessary within the scope of their authority to implement the above injunctions.
- G. Maintain the injunctions above until such time as adequate in-home personal care

assistance, and other MR/RD waiver program care and services as required under federal law are provided so as to ensure the Plaintiff receives the services which meet her needs in the most integrated setting appropriate to her needs.

- H. Waiving the requirement for the posting of a bond as security for the entry of preliminary relief, on the grounds of Plaintiff's indigency.
- I. Award Plaintiff costs of this action and reasonable attorney's fees pursuant to 20 U.S.C. § 794a; 42 U.S.C. § 12133, 12205 and as otherwise may be allowed by law.
- J. Grant such other and further relief as the Court deems to be just and equitable.

RESPECTFULLY SUBMITTED,

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