

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARKETRIC HUNTER, a minor child,
by and through his mother and legal
guardian, THELMA LYNNAH,
ZACHARY ROYAL, S.R., a minor
child, by and through her father and
natural guardian CHARLES REGNA,
J.M., a minor child, by and through his
grandmother and next friend MINNIE
MANUAL, R.E., a minor child, by and
through her mother and natural guardian
MICHELLE EAVES,

Plaintiffs,

vs.

DAVID A. COOK, in his Official
Capacity as Commissioner of the
GEORGIA DEPARTMENT OF
COMMUNITY HEALTH, and
GEORGIA MEDICAL CARE
FOUNDATION, INC., a Georgia
corporation,

Defendants.

CIVIL ACTION FILE NO.
1:08-CV-2930-TWT

SECOND AMENDED CLASS ACTION COMPLAINT
FOR INJUNCTIVE AND DECLARATORY RELIEF

Come now Plaintiffs Marketric Hunter, S.R., J.M. and R.E., all minor
children, by and through their legal guardians, and Zachary Royal and bring this

action on behalf of themselves and all similarly situated individuals pursuant to 42 U.S.C. §1983 for injunctive and declaratory relief against Defendant David A. Cook, in his official capacity as the Commissioner of Georgia's Department of Community Health, and Defendant Georgia Medical Care Foundation, Inc., a Georgia corporation, to redress Defendants' violations of the Plaintiff's rights under, *inter alia*, the Medicaid Act, 42 U.S.C. §1396 *et seq.*, and the United States Constitution, and pursuant to Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 *et seq.* (ADA) and shows as follows:

1.

This civil rights class action is authorized by 42 U.S.C. § 1983 to redress the deprivation under color of law of rights guaranteed by the Medicaid Act and the Supremacy Clause, U.S. Const., Art. IV, cl.2, and by 42 U.S.C. §12133. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

2.

This Court has authority to grant the plaintiff's claims for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure.

3.

Venue lies in the Atlanta Division of the Northern District of Georgia

pursuant to 28 U.S.C. § 1391(b).

4.

At all times relevant to this action, Defendants have acted under color of state law.

5.

Plaintiff Marketric Hunter (Marketric) is ten (10) years old and a resident of Savannah, Georgia. He brings this action by and through Thelma Lynah, his adoptive mother and legal guardian. Marketric is a medically fragile child with multiple system medical diagnoses. He is eligible to receive Medicaid and he has obtained some nursing services under the Georgia Pediatric Program (GAPP). He has been subjected to the application of policies of the GAPP program that are intended to and do have the effect of limiting, denying or reducing the amount of Medicaid-funded nursing services that he can or will receive in this state. In addition, Marketric is subjected to the application of GAPP policies to prevent him from accessing other Medicaid services including available home and community based Medicaid waiver programs in Georgia for which he is eligible.

6.

Plaintiff Zachary Royal is an 18 year old young man who lives with his father near Vienna, Georgia, in rural Dooley County. Zachary's mother Laura

passed away in 2007. Zachary is considered to be medically fragile and has Spinal Muscular Atrophy type 1, which puts him at very high risk for respiratory infections and associated adverse outcomes. He is eligible to receive Medicaid and he has obtained some nursing services under the Georgia Pediatric Program (GAPP). While his disease process is progressing and he is becoming more vulnerable, Defendants are applying GAPP “weaning” policies to Zachary’s receipt of nursing services that are intended to and effectively limit, deny and reduce the number of nursing hours available to Zachary in Georgia.

7.

Plaintiff S.R. is currently 4 years old and brings this action through her father and natural guardian Charles Regna. S.R. is eligible to receive Medicaid. She is considered medically fragile with multiple system medical diagnoses and has received some nursing services through GAPP. Defendants are applying GAPP policies to S.R.’s receipt of nursing services that are intended to and effectively deny, reduce and limit the amount of nursing services that she can receive through GAPP. Defendants have used GAPP “weaning” policies to impose a weaning schedule to reduce S.R.’s nursing hours and limit their availability to her in the future.

8.

Plaintiff J.M., a 15 year old Medicaid-eligible child, brings this action through his grandmother and next friend Minnie Manual. J.M. lives with his grandmother in Atlanta, Georgia. He is considered medically fragile with multisystem medical diagnoses. As a result of a brain tumor diagnosed in 2003 and complications from treatment, he was devastated neurologically. He requires 24 hour a day ventilator support, he has intractable seizures, and his gastrointestinal system and endocrine systems are completely dysfunctional. He requires skilled nursing interventions around the clock. He has received some nursing services through GAPP. Defendants are applying GAPP policies to J.M.'s receipt of nursing services that deny, reduce and limit the amount of nursing services that he can receive through GAPP. Defendants have used the GAPP "weaning" policy to reduce J.M.'s nursing hours in the past and have taken steps to impose further weaning through GAPP policies which will reduce J.M.'s nursing hours and limit their availability to him in the future.

9.

Plaintiff R.E. is 14 year old, Medicaid-eligible child residing with her parents and younger siblings in Atlanta, Georgia. R.E. brings this by and through her mother and natural guardian Michelle Eaves. R.E. is presumed to have

sustained damage to her brain at birth. In addition to diagnoses of cerebral palsy and mental retardation, R.E. also has, among other things, an intractable seizure disorder, chronic aspiration, asthma, dysphagia, obstructive sleep apnea, hypothyroidism and brittle bones. Defendants are applying GAPP policies to R.E.'s receipt of nursing services that deny, reduce and limits the amount of nursing services she can receive through GAPP. As a result of Defendants' application of GAPP "weaning" policies, R.E.'s nursing hours were reduced from 60 to 52 hours. R.E.'s doctors have been are requesting that she receive 84 hours of nursing care, but once "weaned," GAPP policies severely curtail R.E.'s ability to obtain an increase in nursing hours when determined to be necessary for her.

10.

At all times relevant to the allegations in this Second Amended Complaint, all Plaintiffs have been and continue to be eligible to receive Medicaid benefits and receive nursing services through GAPP.

11.

Defendant David A. Cook (Defendant Cook) is the Commissioner of Georgia's Department of Community Health (DCH). This action is brought against

Defendant Cook in his official capacity as the Commissioner of the Department of Community Health (DCH).

12.

The State of Georgia participates in the Medicaid program, a voluntary federal – state partnership for payment of certain healthcare for persons eligible to receive Medicaid.

13.

DCH is the state agency that administers the Medicaid program in Georgia. (Throughout this Complaint, Defendant Cook and DCH will at times be referred to collectively as “DCH.”)

14.

Defendant Georgia Medical Care Foundation, Inc. (GMCF) is a domestic, non-profit corporation, currently authorized to do business in this state.

15.

DCH has delegated tasks involved in the administration and operation of Georgia’s Medicaid program to Defendant GMCF.

16.

Among other things, DCH delegated to Defendant GMCF review of requests submitted by Medicaid providers to obtain prior authorization of Medicaid

payment for certain medical services for Medicaid recipients, including children under the age of 21 years.

17.

Upon information and belief, DCH delegated to Defendant GMCF other matters of administration and policy dissemination through communication with and training of Medicaid providers.

18.

The Medicaid Act requires states participating in Medicaid to provide certain services to Medicaid-eligible beneficiaries under age 21 years.

19.

The provisions of the Medicaid Act specific to beneficiaries under age 21 years are known as Early and Periodic Screening, Diagnostic and Treatment, or EPSDT, set forth at 42 U.S.C. §1396d(r). EPSDT is an enumerated category of service under the Medicaid Act, 42 U.S.C. §1396d(a)(4)(B).²⁰

The EPSDT provisions of the Medicaid Act include 42 U.S.C. §1396d(r)(5), which requires that states provide to children

“[s]uch other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and

conditions discovered by the screening services, whether or not such services are covered under the state plan.”

21.

Georgia law defines “medically necessary services” to mean “services or treatments that are prescribed by a physician or other licensed practitioner and which, pursuant to the EPSDT Program, diagnose or correct or ameliorate defects, physical and mental illnesses, and health conditions, whether or not such services are in the state plan.” O.C.G.A. § 49-4-169.1(4)

22.

In Georgia, the phrase “correct or ameliorate” has been defined by state statute to mean to “improve or maintain a child’s health in the best condition possible, compensate for a health problem, prevent it from worsening, prevent the development of additional health problems, or improve or maintain a child’s overall health, even if treatment or services will not cure the recipient’s overall health.” O.C.G.A. § 49-4-169.1(1).

23.

The phrase “conditions discovered by the screening services” in section 1396d(r)(5) refers to the unclothed physical examination described at 42 U.S.C. § 1396d(r)(1).

24.

The reference to “subsection (a)” referred to in 42 U.S.C. §1396d(r)(5) refers to 42 U.S.C. §1396d(a) of the Medicaid Act which lists broad categories of healthcare services that are covered by the Medicaid Act.

25.

Private duty nursing is one of the enumerated categories of service under subsection (a), *i.e.*, 42 U.S.C. §1396d(a)(8).

26.

“Private duty nursing” is defined in the Code of Federal Regulations, 42 C.F.R. §440.80. In pertinent part, private duty nursing is defined as “nursing services for recipients who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility....”

27.

Under 42 C.F.R. §440.80, private duty nursing must be provided by a registered nurse or a licensed practical nurse under the direction of the recipient’s treating physician.

28.

As a state participating in the Medicaid program, Georgia must provide private duty nursing as defined at 42 C.F.R. §440.80 to Medicaid eligible children under age 21 years when this service is found by a child's treating physician to be necessary to correct or ameliorate a child's condition or illness.

29.

The Georgia Pediatric Program (or GAPP) was created by DCH for administrative convenience to bundle together the administration of in-home private duty nursing for Medicaid-eligible children under 21 years old with a special waiver program for a medically fragile daycare service for Medicaid-eligible children under age 5 years.

30.

Until recently, DCH and GMCF referred to the in-home nursing component of its GAPP program as "private duty nursing."

31.

Once DCH acknowledged that its GAPP program does not actually provide "private duty nursing" as that service is defined at 42 C.F.R. §440.80, DCH, GMCF, and the GAPP Manual all refer to all in-home nursing services for children as "skilled nursing in shifts."

32.

At all times relevant to the allegations of this Complaint, DCH has had policies and procedures for its administration of the GAPP program. The published policies and procedures are to be found in the GAPP Manual. The most current manual is located at the following webportal:

<https://www.mmis.georgia.gov/portal/Portals/0/StaticContent/Public/ALL/HANDBOOKS/Georgia%20Pediatric%20Program-GAPP%2023-06-2011%20114124.pdf>

33.

DCH requires all providers and service recipients of GAPP nursing services and their families to adhere to the policies and procedures set forth in the GAPP manual for the provision of any Medicaid-funded nursing services for children in Georgia.

34.

DCH has delegated to GMCF the task of reviewing and deciding whether to approve or deny all requests for nursing services that are made on behalf of Medicaid-eligible children seeking nursing services in Georgia.

35.

On behalf of DCH, Defendant GMCF reviews all of the requests submitted by physicians and nursing agencies seeking prior approval for private duty nursing

or any other form of nursing service sought by Medicaid-eligible individuals under the age of 21 years in Georgia.

36.

Defendant GMCF applies the policies and procedures set forth in the GAPP Manual in determining whether to approve any in-home nursing services under GAPP.

37.

Defendant GMCF has been involved in the development of the policies and procedures to be applied by its staff in making prior approval decisions for nursing services for children.

38.

Staff at GMCF who review these prior approval requests meet as needed and quarterly with DCH staff and DCH lawyers to discuss how GMCF is to apply DCH policies and procedures when reviewing requests for in-home nursing services made under GAPP.

39.

Whenever GMCF's decision to deny Medicaid coverage for private duty nursing requested for an eligible child is appealed, GMCF's staff is required to provide testimony for DCH at appeals hearings.

40.

The staff at GMCF who review these prior approval requests and DCH staff conference or meet as needed and quarterly with nursing agency providers to train agency staff and answer questions about the policies that GMCF will apply when reviewing requests for in-home nursing services made under GAPP.

41.

DCH has provided training to GMCF staff about how to conduct themselves as witnesses at appeals hearings.

42.

GMCF applies the policies and procedures of the GAPP program to deny requests for prior approval for nursing services, either by denying approval for any services or by approving less of the service than was requested.

43.

GMCF implements the policies and procedures of the GAPP program by imposing weaning schedules upon GAPP members whose own physicians and nurses have not recommended that the member's services should be reduced over time.

44.

GMCF applies GAPP policies and procedures to limit the number of Medicaid-funded private duty nursing hours that any child can receive, regardless of what the child's treating physicians have determined the child needs.

45.

GMCF makes its decisions about requested increases in hours or requests to maintain hours based upon whether the condition of the child has worsened enough during the previous review period.

46.

Defendant GMCF makes all decisions about the "medical necessity of the child" [sic] for any nursing services that will be provided to Medicaid-eligible children in Georgia in the manner that DCH has directed GMCF to make such determinations.

47.

Some of the DCH policies applied by GMCF in its determination of the "medical necessity of the child" [sic] and prior approval decisions are not reflected in the published GAPP Manual.

48.

GAPP policy that it will not cover nursing services for “individuals requiring excessive hours of skilled nursing care for an extended period or for an indefinite period of time” is not based upon what is medically necessary for the child.

49.

Among the policies and practices of GAPP is its limitation on the types of Medicaid-funded services that can be received when receiving any services under the GAPP program.

Plaintiff Marketric Hunter

50.

Marketric, now age 10, was a Medicaid beneficiary when he nearly drowned as a toddler. The near drowning caused a prolonged loss of oxygen to Marketric’s brain and caused devastating and irreparable neurologic injury.

51.

As a result of this catastrophic brain damage, Marketric has developed many serious and incurable conditions including -- but not limited to -- static encephalopathy, cerebral palsy, spastic quadriplegia with sustained clonus in all four extremities, intractable seizure disorder, chronic lung disease, chronic upper

airway obstruction, gastro esophageal reflux, scoliosis with curvatures, and severe mental retardation.

52.

Even though Marketric has severe health conditions that cannot be cured, these conditions and related conditions must be medically managed.

53.

Marketric's health conditions are difficult to control and can quickly become life-threatening. Marketric's physicians, DCH and GMCF all agree that Marketric is a child who is "medically fragile."

54.

Because his health conditions are difficult to control and can quickly become life-threatening, Marketric's physicians have determined that Marketric needs to receive the healthcare service "private duty nursing" in his home so that he can stay as healthy as possible, to compensate for the multiple health conditions he has, to improve or prevent these conditions from worsening, and to keep him from developing new problems.

55.

When he is most healthy, Marketric is alert and attempts to communicate. Marketric is too medically fragile and prone to infection to attend school outside of

his home, so he receives services and therapies at home to, among other things, help him communicate better.

56.

Marketric's physicians have determined that Marketric can and should live at home and receive his healthcare there as opposed to keeping him in a hospital.

57.

Marketric's treating physicians have been prescribing in-home private duty nursing services for Marketric for at least five (5) years.

58.

With each application for prior approval for private duty nursing services submitted on behalf of Marketric during the past five years, the nurses and physician making the applications have provided Defendants with extensive documentation of Marketric's medical conditions and health care needs.

59.

At all times relevant to the allegations in this Complaint, DCH has made or has administered payments for any Medicaid-funded healthcare that Marketric has received, and DCH has had available to it detail concerning the providers, types of healthcare service, the dates, and costs, including all such costs and services associated with periods of hospitalization, emergency room visits, medication

changes, physician services, and similar services throughout the at least the past five years.

60.

Prior to Defendants' failure to approve the request for an increase in nursing hours giving rise to this case, Defendant GMCF had been engaged in a consistent reduction in the number of approved nursing hours for Marketric.

61.

Defendants have been weaning and reducing the number of approved hours based upon their determination that Marketric is "chronically stable" and not ever going to get better.

62.

Previously, and notwithstanding his treating physicians' determination that greater numbers of private duty nursing hours are medically necessary for Marketric, Defendant GMCF had first capped Marketric's hours at 84 hours per week and had then reduced his hours to 70 hours per week.

63.

On May 7, 2008, Ms. Lynah received a notice from Defendant GMCF that Marketric's nursing hours were being reduced from 70 to 63 hours per week,

because he had not been in the hospital in the previous three month period and because he had not had any exacerbation in his “disease process.”

64.

Ms. Lynah appealed the reduction from 70 hours to 63 hours. This appeal was pending when, on September 5, 2008, Marketric was admitted to Children’s Medical Center in Augusta to have surgery to place a rod next to his spine to correct severe scoliosis.

65.

For the rod to be placed in Marketric’s back, an incision was made from the back of his neck down the full length of his back.

66.

As expected, after his surgery Marketric was sedated on pain medication in an effort to control his pain. Although a body cast was applied during surgery, it had to be removed because of Marketric’s particular medical and physical conditions. The surgical incision running the length of Marketric’s back prevented Marketric from receiving some respiratory treatments with medication, use of a CPT vest, and suctioning as he ordinarily would.

67.

As expected, during his recuperation, Marketric required pain medication and was at greater risk of complications. Marketric required even more intense medication, treatment, assessment, and modified positioning than he would required regularly in an effort to prevent a myriad of problems, including respiratory distress, respiratory infection, skin breakdown, increased seizure activity, and aspiration with g-tube feedings. Because of his incision, Marketric could not tolerate his normal respiratory treatment regimen. He is to be turned every hour, 24 hours per day, to keep his airway clear, while receiving all other medical interventions and skilled assessments.

68.

Marketric's primary treating physician, a Board certified pediatrician licensed to practice in the State of Georgia, determined that Marketric would require 168 hours per week of private duty nursing services after his surgery and requested Medicaid's approval for an increase in the number of nursing hours for Marketric upon his discharge from the hospital in Augusta and return to his residence in Savannah, Georgia.

69.

Marketric's physician and the nursing agency providing services to Marketric submitted to GMCF the physician's request for approval of the increase to 168 hours per week on August 18, 2008 in anticipation of his surgery on September 5, 2008.

70.

The request for an increase in hours had not been approved or denied when this action was filed. It is the policy and practice of Defendants to ignore or delay consideration of time-sensitive requests for increases in hours until after the critical time has passed in order to avoid giving any notice, reason or right to appeal.

71.

After Marketric's nursing hours were decreased in accordance with GMCF's plan adopted by the Court, Marketric was hospitalized two more times for respiratory infections and post-surgical complications.

72.

During this post-surgical period, DCH denied approval for payment for one of the medications prescribed for Marketric by his treating physician to treat an infection. The only way that Marketric could get the medication determined to be medically necessary for him was for him to be admitted to the hospital.

73.

GMCF applies GAPP policies and procedures to limit the number of Medicaid-funded provide duty nursing hours that Marketric can receive, regardless of what his treating physicians have determined that he needs.

74.

Defendants did not apply the EPSDT “correct or ameliorate” standard to any of the requests for nursing services for Marketric.

75.

On August 18, 2008, Defendant GMCF’s employees received the request submitted by Marketric’s physician and nursing agency under GAPP to increase his approved hours of nursing services to 168 hours after his surgery on September 5, 2008, during his period of recuperation.

76.

Ms. Lynah, Marketric’s adoptive mother, has never received any written notice from Defendant GMCF or Defendant Cook that the August 18th request has been approved or denied.

77.

GMCF has failed to timely consider Marketric’s physician’s request that Marketric receive 168 hours per week of nursing services until his physician

determines that he has sufficiently recovered from his surgery to allow a reduction in this level of service.

78.

Marketric was discharged home from Children's Medical Center on September 16, 2008, without the necessary nursing services that his physician has prescribed.

79.

Because Marketric receives some nursing services under the GAPP program, he has been denied access to other Medicaid funded services.

80.

As a result of Defendants' acts and omissions, Marketric has been and is being denied services essential to his health and is suffering irreparable injury.

Plaintiff S.R.

81.

Plaintiff S.R. is currently 4 years old and is Medicaid-eligible.

82.

She was born prematurely at 26 weeks gestation. Her twin died shortly after birth.

83.

S.R.'s medical diagnoses include of Reactive Airway Disease, chronic rhinitis, dysphagia, gastroesophageal reflux, cerebral palsy and seizure disorder.

84.

S.R. needs administration of multiple inhaled respiratory treatments, daily skilled health assessments, G-J-tube care, G-J tube-feedings, oxygen administration, monitoring of oxygen saturation, monitoring vital signs, aspiration precautions, suctioning, and the administration of multiple seizure and other medications through the G-J tube. In addition, S.R. has a shunt which must be monitored for proper function. S.R. is completely dependent upon others for all of her medical and other care.

85.

During the six months immediately preceding the filing of this Second Amended Complaint, S.R. has had multiple emergency room visits for respiratory illnesses and one for an increase in seizures for which she was transported by ambulance.

86.

S.R.'s mother, S.R.'s primary caregiver, feels that she would be unable to respond appropriately in the event of an emergency involving S.R. at home. She is now in early pregnancy and is unable to assist in lifting S.R.

87.

Although S.R.'s physician has opined that in his medical judgment, his patient needs 60 hours per week of nursing, S.R. had only been approved for 40 hours per week of nursing through the GAPP program.

88.

S.R.'s physicians have maintained that S.R. needs 60 hours of skilled nursing per week and that 40 hours is not appropriate or sufficient to meet S.R.'s medical needs.

89.

S.R.'s underlying diagnoses are life-long conditions that will not be cured. At the same time, S.R. is a "medically fragile" child and she requires skilled nursing care and other health care to ameliorate her multiple conditions, *i.e.* "to improve or maintain [her] health in the best condition possible, compensate for a health problem, prevent it from worsening, prevent the development of additional

health problems, or improve or maintain [her] overall health, even if treatment or services will not cure [her] overall health.” O.C.G.A. § 49-4-169.1(1)

90.

S.R., through her parents, was notified by Defendants that the number of skilled hours that she would be allowed to receive through the GAPP program would be reduced in accordance with the weaning schedule outlined by Defendants in the notice.

91.

By this notice, Defendants advised that S.R.’s skilled nursing hours were being reduced from 40 hours per week to 36 hours per week to 32 hours per week.

92.

Defendants applied GAPP policy to S.R. and imposed a weaning schedule to reduce, deny or limit the amount of skilled nursing services that are available to S.R.

93.

In providing notice of the implementation of its weaning policy, Defendants advised that S.R. had “received the same amount of nursing hours since 1/20/08.”

94.

In 2010, Defendants threatened to reduce S.R.'s approved nursing hours but withdrew the adverse action after S.R. appealed.

Plaintiff J.M.

95.

J.M., a 15 year old Medicaid-eligible child, lives with his grandmother in Atlanta, Georgia. His grandmother is aging and experiences health problems. J.M. already receives 98 hours of the intense, skilled care that he needs from his grandmother acting as a substitute for professional nursing care.

96.

J.M. was diagnosed with a brain tumor in 2003. He had surgery, radiation and chemotherapy and subsequently experienced numerous brain hemorrhages (bleeding), radiation necrosis (tissue death), spastic quadriparesis (near total paralysis), and a seizure disorder. Subsequently, he suffered from anoxic brain damage (loss of oxygen to the brain) after a cardiopulmonary arrest, fever and status epilepticus (uncontrolled, prolonged seizure). Now, his ability to interact with others is extremely limited and subtle. He suffers from bowel obstructions, dysphasia (inability to swallow), gastrointestinal dysfunction requiring bowel regimen, cathartics, rectal tub and g-tube venting, pancreatitis (inflammation of the

pancreas) and hepatomegaly (enlarged liver). He suffered cardiopulmonary arrest in 2009 and ventricular tachycardia in 2009. He has pulmonary insufficiency and requires 24 hour ventilator support and a tracheostomy. He has a history of pulmonary arrest in 2003 and respiratory failure in 2009. He suffers from endocrine dysfunction requiring hormone replacement therapy and adrenal insufficiency requiring additional medications. He requires ongoing assessment and treatment for edema, sodium wasting, central hypoventilation syndrome, hypernatremia and diabetes mellitus. He requires 24 hour nursing support to meet his medical needs.

97.

J.M. was previously approved for 84 hours of skilled nursing through the GAPP program. This amount was reduced pursuant to GAPP's weaning policy to 70 hours. Recently, J.M. was again notified that his nursing hours were being further reduced to 63 hours per week. While J.M.'s appeal of this reduction was pending, Defendants withdrew its adverse action and approved 70 hours of skilled nursing during the current approval period.

Plaintiff R.E.

98.

Plaintiff R.E. is 14 year old, Medicaid – eligible child residing with her parents and younger siblings in Atlanta, Georgia.

99.

It is presumed that R.E. suffered perinatal asphyxia as a newborn. R.E.'s medical diagnoses include cerebral palsy, mental retardation, intractable seizure disorder, microcephaly, premature Adenarche, gastroesophageal reflux, slow bowel motility, trachiamalasia, chronic aspiration, asthma, chronic rhinitis, dysphagia, obstructive sleep apnea, hypothyroidism and brittle bones.

100.

R.E.'s intractable seizure disorder has been linked to deterioration in her airway function. In the context of her seizures, her secretions increase and she requires intensive airway management with suctioning and positioning to maintain her airway. She also requires close monitoring and intervention due to sudden heart rate increase and decrease in oxygen saturation levels during seizures. Independent of her seizures, R.E. has episodes of choking on her own secretions as she cannot successfully clear those secretions on her own. She needs close monitoring and treatment to prevent aspiration pneumonia and oxygen deprivation.

Treatment involves frequent suctioning related to increased copious oral secretions, administration of up to 3 LPM of oxygen, close observation for respiratory distress, and the administration of nebulizer treatments every four hours and VEST treatments twice daily. She receives medications and nutrition via J-tube which requires close visual monitoring for reflux, aspiration, and proper tube placement and functioning. Her nutrition is delivered by use of a feeding pump on a continuous 18 hours schedule at a low rate.

101.

R.E.'s approved hours of nursing through the GAPP program were reduced from 60 hours per week to 52 hours per week as part of the GAPP program's weaning policy in spite of a general decline in R.E.'s health as indicated by multiple visits to the emergency room.

102.

R.E. now needs to be on oxygen at night with more aggressive respiratory therapy, she has had visits to the emergency room, and she was recently hospitalized for 4 days due to increased seizures and respiratory complications. Another previous visit to the emergency room was due to a foot injury during a transfer. X-rays showed her bones to be fragile and prone to easy breakage.

103.

Three of R.E.'s physicians have rendered opinions that R.E.'s current and deteriorating condition requires that she receive 84 hours of intense nursing care. Each doctor explained the specific reasons why increased nursing was medically necessary for R.E.

104.

Defendant GMCF denied the requested increase, restoring only the 8 hours taken away in the "weaning" it had decided to implement.

Plaintiff Zachary Royal

105.

Plaintiff Zachary Royal is an 18 year old young man who lives with his father near Vienna, Georgia, in rural Dooley County. Zachary's mother Laura passed away in 2007.

106.

Zachary has Spinal Muscular Atrophy Type 1 which affects all parts of his neuromuscular system and puts him at high risk for respiratory infections including pneumonia. It is well-documented that most children with SMA die from complications of respiratory infections. Zachary's disease process results in poor clearance of upper and lower airway secretions, hypoventilation during sleep, and

chest wall weakness. In addition, Zachary has asthma. He requires use of a Nasal Bipap at night with oxygen and supplemental oxygen as needed during the day. His oxygen saturation levels are trending down now, and he reports symptoms of air hunger. In order to ameliorate the effects of his disease, he must be monitored closely and given scheduled and as needed in-exsufflator, nebulizer and Theravest treatments. Because his cough is too weak to adequately clear his airway, he must be suctioned as needed. As his condition is worsening, his ability to chew and swallow are compromised.

107.

Zachary has now received notice that his nursing hours are being reduced through implementation of a weaning schedule. Zachary's hours are being weaned from 84 hours to 70 hours without agreement from his treating physicians or nursing agency.

Class Allegations

108.

Pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, individual named Plaintiffs Marketric Hunter, Zachary Royal, S.R., R.E., and J.M. bring this action on half of themselves and all other persons similarly situated. Plaintiffs bring this action on behalf of a class consisting of "all present or future

Medicaid-eligible individuals under age 21 years who receive private duty nursing or skilled nursing services through the GAPP program whose nursing services have been or will be denied, reduced or terminated by application of the policies and practices of the Georgia Pediatric Program (GAPP), and all GAPP recipients who will be denied other Medicaid services for which they are eligible as a result of the application of GAPP policies.

109.

The Plaintiff Class is so numerous that joinder of all of its members is impracticable. Upon information and belief, there are 600-800 persons in this Class, almost all of whom have had their nursing hours reduced or denied in the past year.

110.

Common questions of law and fact predominate over questions affecting individual Class members. Questions of law and fact common to members of the Class include but are not limited to whether the GAPP program policies and procedures and their implementation and application violate provisions of the Medicaid Act, the ADA and the U.S. Constitution.

111.

The claims of the individual named plaintiffs are typical of the claims of the Class as a whole and are typical of the claims of the subclasses in that the

individual named plaintiffs and members of the Plaintiff Class currently are eligible to receive Medicaid-funded EPSDT services including nursing care and qualified individuals with disabilities who will be affected similarly by the application of the policies and practices of the GAPP program. The claims arise from the same unlawful and discriminatory policies and practices of Defendants. The individual named plaintiffs will fairly represent and adequately protect the interests of members of the class as a whole. The individual named plaintiffs do not have any interests antagonistic to those of other members of the Plaintiff Class. By filing this action, the individual named plaintiffs have displayed an interest in vindicating their rights, as well as the claims of others who are similarly situated. The relief sought by the individual named plaintiffs will inure to the benefit of members of the Plaintiff Class generally. Plaintiffs are represented by counsel who are experienced, skilled, and knowledgeable about civil rights litigation, disability discrimination, Medicaid law, and practice and procedure in the federal courts.

112.

Class certification is appropriate pursuant to Federal Rule of Civil Procedure 23(b)(2) because Defendants have acted, refused to act, or will act on grounds generally applicable to the Plaintiff Class, thereby making final injunctive and declaratory relief appropriate with respect to the Plaintiff Class as a whole.

113.

Members of the Plaintiff Class share a common need for nursing services and Defendants' policies and actions in limiting, reducing or terminating nursing services or other Medicaid funded services.

COUNT ONE

114.

The allegations contained in the numbered paragraphs above are incorporated by reference as if set forth herein verbatim.

115.

Under the EPSDT provisions of the Medicaid Act, 42 U.S.C. §1396d(r), the named Plaintiffs and members of the Plaintiff Class have a right to receive Medicaid-funded private duty nursing services that their treating physicians have determined are necessary to improve their health or maintain their health in the best condition possible, to compensate for a health problem, to prevent a health problem from worsening, to prevent the development of additional health problems, or to improve or maintain their overall health, even if treatment or services will not cure their overall health.

116.

Defendants' failure to timely provide private duty nursing services as prescribed by the treating physicians of the named Plaintiffs and members of the Plaintiff Class increases the risk to them that one or more of their health problems will worsen, develop additional complications, hospitalization, and even death.

117.

The named Plaintiffs and members of the Plaintiff Class have suffered, continue to suffer, and will suffer irreparable injury as a result of, *inter alia*, Defendants' refusal to approve the requests submitted by the treating physicians of the named Plaintiffs and the Plaintiff Class as medically necessary to correct or ameliorate their multiple and complex conditions.

118.

The potential for harm to the Defendants is negligible if Defendant Cook is required to provide private duty nursing hours as prescribed by the treating physicians of the named Plaintiffs and the Plaintiff Class.

119.

The named Plaintiffs and the Plaintiff Class has a substantial likelihood of success on the merits of their claims based upon Defendants' violation of the Medicaid Act, 42 U.S.C. §§1396a *et seq.*

120.

It is in the public interest that the named Plaintiffs and the Plaintiff Class receive healthcare services covered by the Medicaid Act in the manner that his physician determines are necessary to provide medically necessary care at home and to avoid the increased risk of illness, hospitalization, and death that is created by limiting or reducing the medical care he receives.

121.

This is a proper case for the entry of a temporary restraining order to limit further and greater irreparable harm to the named Plaintiffs and the Plaintiff Class under Fed.R.Civ.P. 65(b).

COUNT TWO

122.

The allegations contained in the numbered paragraphs above are incorporated by reference as if set forth herein verbatim.

123.

Defendants have, by the actions and inactions set forth above, violated the Medicaid Act, 42 U.S.C. §§1396 *et seq.*, and its implementing regulations by:

(a) denying the named Plaintiffs and the Plaintiff Class all services to which they are entitled under EPSDT, in violation of 42 U.S.C. §1396d(r)(5);

(b) failing to inform the named Plaintiffs and the Plaintiff Class of the scope of services available under the EPSDT benefit of the Medicaid program, in violation of 42 U.S.C. §1396a(a)(43)(A);

(c) denying and reducing EPSDT services in amount, duration and scope because of the diagnosis, type of illness or condition of the named Plaintiffs and the Plaintiff Class, in violation of 42 C.F.R. §§440.230(b) and (c);

(d) denying services to the named Plaintiffs and the Plaintiff Class on the basis of cost, in clear violation of the Medicaid Act;

(e) failing to provide adequate written notice of its decisions to deny or reduce benefits;

(f) ignoring requests for Medicaid-funded services;

(g) failing to provide access to Medicaid-funded services with reasonable promptness;

(h) making arbitrary and capricious decisions to deny or reduce Medicaid-funded services to the named Plaintiffs and the Plaintiff Class and/or creating justifications for those decisions after the named Plaintiffs and the Plaintiff Class have sought to challenge them;

(i) failing to provide the named Plaintiffs and the Plaintiff Class with a meaningful opportunity to be heard and the means by which they might challenge any reduction or denial of Medicaid-funded services to them;

(j) refusing to allow nurses to travel with the named Plaintiffs and the Plaintiff Class to the doctor's office;

(k) refusing to consider the requests of treating physicians for nurses to travel with the named Plaintiffs and the Plaintiff Class and then refusing to provide notice of the denial of services;

(l) refusing to apply the proper legal standard for medical necessity to the approval of nursing services;

(m) denying services to the named Plaintiffs and the Plaintiff Class because their "disease process" has not deteriorated enough;

(n) refusing to actually provide Medicaid-funded "private duty nursing" to the named Plaintiffs and the Plaintiff Class, as that service is defined in 42 C.F.R. §440.80.

124.

The right to receive the EPSDT benefits to which the named Plaintiffs and the Plaintiff Class are entitled is a right secured by the laws of the United States, including, but not limited to, the Medicaid Act. In violation of 42 U.S.C. § 1983,

Defendants have subjected the named Plaintiffs and the Plaintiff Class to the deprivation of their rights under color of a statute, ordinance, regulation, custom, or usage of the State of Georgia.

COUNT THREE

125.

The allegations contained in the numbered paragraphs above are incorporated by reference verbatim.

126.

Defendant Cook has, by the actions and inactions set forth above, violated the right to due process of the named Plaintiffs and the Plaintiff Class which is protected by the 5th and 14th Amendments to the United States Constitution by:

(a) failing to provide adequate written notice of his decisions to deny or reduce services to which the named Plaintiffs and the Plaintiff Class is entitled in accordance with the Medicaid Act and a meaningful opportunity to challenge these decisions;

(b) by ignoring requests for services by the treating physicians of the named Plaintiffs and the Plaintiff Class, Defendant Cook is denying to them essential Medicaid-funded services, to which they are entitled to receive in accordance with the Medicaid Act, without providing any notice, however inadequate, of the

reasons for his decisions to deny benefits to the named Plaintiffs and the Plaintiff Class and a meaningful opportunity to challenge these decisions;

(c) making decisions about Medicaid coverage that are arbitrary and capricious;

(d) misleading the named Plaintiffs and the Plaintiff Class and their providers about the nursing service actually being provided to them under the GAPP program.

127.

The named Plaintiffs and the Plaintiff Class have a protected property interest in receiving Medicaid-funded services to which they are entitled under the Medicaid Act. The right to due process of the named Plaintiffs and the Plaintiff Class when being denied or suffering the loss of protected property rights is a right secured by the 5th and 14th Amendments to the Constitution of United States. In violation of 42 U.S.C. § 1983, Defendant Cook has subjected the named Plaintiffs and the Plaintiff Class to the deprivation of their right to due process under color of a statute, ordinance, regulation, custom, or usage of the State of Georgia.

COUNT FOUR

128.

Plaintiffs reallege and incorporate by reference herein each and every allegation and paragraph set forth previously.

129.

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 subjected to discrimination by such entity.” 42 U.S.C. § 12132.

130.

In enacting the ADA, Congress found that “[i]ndividuals with disabilities continually encounter various forms of discrimination, including ... segregation . . .” 42 U.S.C. § 12101(a)(5)

131.

Regulations implementing Title II of the ADA provide: “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).

132.

Defendant DCH is a public entity within the meaning of Title II of the ADA.

133.

Regulations implementing Title II of the ADA provide: “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 the accomplishment of the objectives of the entities program with respect to individuals with disabilities. . . .” 28 C.F.R. §35.130(b)(3).

134.

The United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) held that unnecessary institutionalization of individuals with disabilities is a form of discrimination under Title II of the ADA. In doing so, the Supreme Court interpreted the ADA’s “integration mandate” as requiring persons with disabilities to be served in the community when: (1) the state determines that community –based treatment is appropriate; (2) the individual does not oppose community placement; and (3) community placement can be reasonably accommodated. *Id.* 527 U.S. at 607.

135.

The ADA prohibits discrimination based on type of disability.

136.

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

137.

Pursuant to the ADA, public entities are required to provide meaningful access to their programs, services and activities, and provide any accommodations or modifications necessary for the people with disabilities to access those services.

138.

Each individual named Plaintiff and member of the Plaintiff Class is a "qualified individual with a disability" within the meaning of the ADA in that they (1) have physical and/or mental impairments that substantially limit one or more major life activities and meet the essential eligibility requirements in that they (2) are capable of living independently in their own homes and/or in the most

integrated community setting possible, with assistance, and (3) meet the Georgia Medicaid income eligibility requirements.

139.

Defendant's actions have placed members of the named Plaintiffs and members of the Plaintiff Class at imminent risk of unnecessary confinement in institutions, including nursing facilities, or other out of home placement that are not the most integrated community placements possible, in violation of the ADA's integration mandate.

140.

Defendant's discriminate against the named Plaintiffs and the Plaintiff Class members in ways that include, but are not limited to, failing to provide reasonable modifications to programs and services.

141.

Defendants have utilized eligibility criteria and methods of administration that subject the named Plaintiffs and members of the Plaintiff Class to discrimination on the basis of disability, in violation of 28 C.F.R. §35.130(b)(3) & (8), and otherwise denied meaningful access to their programs, services and activities.

142.

Defendants actions discriminate against individuals whose disabilities require that they receive substantial medical supports and services including skilled nursing services on a long term basis, in that the nursing services needed are made available on a short term basis.

143.

Defendants' actions violate Title II of the ADA.

144.

Pursuant to 42 U.S.C. §12133, the named Plaintiffs and members of the Plaintiff Class are entitled to declaratory and injunctive relief as well as reasonable attorney's fees and costs incurred in bringing this action.

COUNT FIVE

145.

The allegations set forth in the numbered paragraphs above are incorporated herein as fully as if set forth verbatim.

146.

Pursuant to 42 U.S.C. § 1988, the Plaintiffs should recover a reasonable attorney's fee as part of their costs for taking action to enforce Section 1983.

WHEREFORE, Plaintiffs respectfully requests that the Court:

(a) assume jurisdiction over this action and maintain continuing jurisdiction until Defendants are in full compliance with every order of this Court;

(b) certify this action as a class action and appoint the individual named Plaintiffs as Class representatives;

(c) declare Defendants' policies, practices, acts and omissions as set forth above violate the Medicaid Act, the right to due process of law under the 5th and 14th Amendments of the United States Constitution, and 42 U.S.C. §1983, and are preempted by the Supremacy Clause;

(d) declare Defendants' policies, practices, acts and omissions as set forth above violate the Americans with Disabilities Act;

(e) issue a temporary restraining order and preliminary injunction to prohibit Defendants from denying nursing services to the Plaintiffs that have been prescribed by their physician as necessary for them;

(f) enter a preliminary and permanent injunction against Defendants to prohibit them from denying necessary healthcare services as ordered for Plaintiffs by their primary care physicians;

(g) issue preliminary and permanent injunctive relief enjoining Defendants from violating Plaintiffs' rights to have all approvals required by Defendants issue

promptly, without delay caused by Defendants' prior approval process and requiring Defendants to immediately provide all medically necessary services to which Plaintiffs are entitled under the Medicaid program;

(h) issue preliminary and permanent injunctive relief enjoining Defendants from violating Plaintiffs' right to due process and requiring Defendants to provide written notice of the specific factual reasons and specific regulations and/or policies which it has applied when threatening to reduce or when denying Medicaid-funded services to which Plaintiffs are entitled under the Medicaid program;

(i) declare that Defendants' actions and inactions violate the Medicaid Act;

(j) declare that Defendants' actions and inactions violate his right to due process of law under the 5th and 14th Amendments to the United States Constitution;

(k) award Plaintiffs their litigation expenses, including reasonable attorney's fees; and

(h) award such other relief as may be just, equitable and appropriate.

Respectfully submitted this 7th day of July, 2011.

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