

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JACQUALYN THORPE )  
Deanwood Rehabilitation Center )  
5000 Nannie Helen Burroughs Ave., NE )  
Washington, DC 20019; )

DONALD DUPREE )  
Joye Assisted Living )  
6417 Kansas Ave. NE )  
Washington, DC 20012; )

ROY FOREMAN )  
Washington Center for Aging Services )  
2601 18th St., NE )  
Washington, DC 20018; )

LARRY MCDONALD )  
Unique Residential Care Center )  
901 First St., NW )  
Washington, DC 20001; )

CURTIS WILKERSON )  
Sheridan Rd SE, Apt 407 )  
Washington, DC 20020; )

LAVONDIA CARTER )  
Carolyn Boone Lewis Nursing Facility )  
1380 Southern Ave., SE )  
Washington, DC 20032; )

ROBERT COLLINS )  
Specialty Hospital of Washington )  
Hadley Nursing Facility )  
4601 Martin Luther King Jr. Ave., SW )  
Washington, DC 20032; )

WINIFRED GOINES )  
United Medical Center Nursing Facility )  
1310 Southern Ave., SE )  
Washington, DC 20032; )

**PLAINTIFFS'**  
**THIRD AMENDED COMPLAINT**  
Civil Action No. 1:10-cv-02250 (ESH)

JOSEPH GRAY )  
Specialty Hospital of Washington )  
Hadley Nursing Facility )  
4601 Martin Luther King Jr. Ave., SW )  
Washington, DC 20032; )  
) )  
CARL MAGBY )  
Washington Nursing Facility )  
2425 25 St., SE )  
Washington, DC 20020; and )  
) )  
DENISE RIVERS )  
United Medical Center Nursing Facility )  
1310 Southern Ave., SE )  
Washington, DC 20032; )  
) )  
on behalf of themselves and all others )  
similarly situated, )  
) )  
Plaintiffs, )  
) )  
v. )  
) )  
DISTRICT OF COLUMBIA, a municipal )  
Corporation, )  
) )  
Defendant. )  
\_\_\_\_\_ )

**THIRD AMENDED CLASS ACTION COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF**

Federal law requires that the District of Columbia provide services to people with disabilities in the most integrated setting appropriate to their needs. But the District has failed to comply with this obligation, leaving an estimated 500 to 2,900 people with disabilities unnecessarily institutionalized in nursing facilities, segregated and isolated from their families and friends. These individuals desperately want to return to their communities and could do so if the District were to comply with federal law.

This class action therefore seeks injunctive and declaratory relief to require the District of Columbia to comply with its long-standing, federally-mandated obligations and prohibit its unlawful practice of unnecessarily segregating people with physical disabilities in nursing facilities in order to access the long-term care services they need. This class, which includes each of the Named Plaintiffs, requires a District-wide common system of transition services to connect its members with community-based supports and long-term care services.

### **PRELIMINARY STATEMENT**

1. Plaintiffs are the named individuals and a class of similarly-situated individuals with physical disabilities who desperately desire the freedom to live in their community but instead remain institutionalized in nursing facilities against their will. Plaintiffs could be served in community-integrated settings, but remain – and likely will continue to remain – in nursing facilities for years because Defendant provides few opportunities, if any, for Plaintiffs to obtain long-term care services in more integrated settings.

2. Defendant, the District of Columbia, through its Mayor and the officials who plan, oversee, fund, and regulate services, programs, and activities for persons with disabilities, has unnecessarily and inappropriately institutionalized Plaintiffs in nursing facilities despite federal law requiring that Defendant honor the class members' desires and abilities to live in more integrated settings in the community with appropriate long-term care services and supports.

3. Defendant is in violation of Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq.*, because it unlawfully discriminates against Plaintiffs by institutionalizing them in nursing facilities and isolating them from their communities.

4. Title II of the ADA prohibits discrimination against individuals with disabilities. In enacting the ADA, Congress found that “individuals with disabilities continually encounter various forms of discrimination, including . . . segregation.” 42 U.S.C. § 12101(a)(5). Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. The United States Department of Justice promulgated regulations under Title II requiring 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) (emphasis added).

5. Section 504 of the Rehabilitation Act provides that no person 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.” 29 U.S.C. § 794(a). Regulations implementing Section 504 require that a public entity administer programs, services, and activities in “the most integrated setting appropriate” to the needs of individuals with disabilities. 28 C.F.R. § 41.51(d).

6. The United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), held that the unnecessary institutionalization of individuals with disabilities is a form of discrimination under Title II of the ADA. The Court concluded that state and local governments may be held liable for failing to serve people with disabilities in the most integrated settings appropriate to their needs.

7. Despite the passage of fourteen years since the decision in *Olmstead*, Defendant continues to fail to facilitate access to community-based long-term care services and supports for

Plaintiffs in the most integrated setting appropriate to their needs for assistance with activities of daily living (e.g., bathing, dressing, toileting, mobility, eating) and instrumental activities of daily living (e.g., grocery shopping, meal preparation, laundry, medication management).

8. Because of Defendant's failure to fund or otherwise make available sufficient community-based alternatives, individuals with physical disabilities often have nowhere to go but nursing facilities.

9. Defendant's programs and activities for persons with physical disabilities systematically deny or ignore Plaintiffs' choices and preferences for integrated community-based long-term care, leaving them to languish in institutional nursing facilities even though appropriate community-based long-term care services and settings exist that could be made available at the same or even lower cost.

10. Defendant is able to appropriately discharge Plaintiffs with community-based long-term care services.

11. Plaintiffs are needlessly segregated from their families, friends, and community life.

12. Plaintiffs' plight is shared by many. According to federal and local data, when offered a choice between community and nursing facility-based care, more than 500 District of Columbia nursing facility residents would choose to receive long-term care services in more integrated settings in the community instead of being forced to remain in a nursing facility. Based on local data, 84% of individuals screened are eligible to live in the community with the existing network of community-based long-term care services.

13. Upon information and belief, many more nursing facility residents would choose to live in more integrated settings in the community if they were informed about community-

based options to assist them with their activities of daily living (e.g., bathing, dressing, toileting, mobility, eating), and instrumental activities of daily living (e.g., meal preparation, grocery shopping, laundry, housekeeping.).

14. Plaintiffs bring this action to compel Defendant to comply with its federal legal obligations.

### **JURISDICTION**

15. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiffs' claims for declaratory and injunctive relief are authorized under 28 U.S.C. §§ 2201-02 and 42 U.S.C. § 1983. At all times relevant to this action, Defendant has acted under color of state law.

16. Plaintiffs' claims for violations of Title II of the ADA, 42 U.S.C. §§ 12131 and 12132 *et seq.*, are asserted against the District of Columbia, a "State or local government" as defined by the statute.

17. Plaintiffs' claims for violations of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq.*, are asserted against the District of Columbia, a "State or local government" as defined by the statute.

### **VENUE**

18. Venue lies in the District of Columbia pursuant to 28 U.S.C. § 1391(b)(1)-(2) because the Defendant is the District of Columbia, and because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in the District.

**DEFENDANT**

19. Defendant District of Columbia is responsible for operating its programs, services, and activities in conformity with the ADA and Section 504 of the Rehabilitation Act. In light of the violations by its governmental agencies individually and collectively, the District of Columbia is sued under the Rehabilitation Act and the ADA.

20. At all times relevant to this Complaint, Defendant knew or should have known of the policies, practices, acts, and conditions alleged herein.

**PLAINTIFFS**

**All Plaintiffs**

21. Plaintiffs are all District of Columbia residents with physical disabilities that substantially limit their ability to perform major life activities. They are also regarded by Defendant as having such impairments, and therefore are individuals with disabilities for purposes of the ADA and the Rehabilitation Act. *See* 42 U.S.C. § 12102; 29 U.S.C. § 705(20).

22. Plaintiffs are all currently housed in nursing facilities and their care is funded by the District.

23. All Plaintiffs could be served in the community through the long-term care services Defendant already has available.

24. Although residing in the community with long-term care services is the most integrated setting where the Plaintiffs' needs can be met, Defendant has offered them personal care and long-term care services only in a nursing facility setting.

25. All Plaintiffs want to leave the nursing facilities in which they reside, and they could do so with appropriate long-term care services and supports.

**The Named Plaintiffs**

**Plaintiff Jacquelyn Thorpe**

26. Plaintiff Jacquelyn Thorpe is a sixty-four year old woman who has resided at Deanwood Rehabilitation Center since March 2008.

27. Ms. Thorpe is diagnosed with Guillain Barre Syndrome and hypertension, and has a history of a stroke, kidney disease and deep vein thrombosis. She needs assistance getting in and out of her wheelchair, making meals and managing her medications. Ms. Thorpe dresses and feeds herself and wants to leave the facility and return to the community.

28. Ms. Thorpe could live in the community with appropriate services and supports. She has been determined by health care professionals to be appropriate for community placement.

29. Ms. Thorpe is a member of the Red Hat Society at the facility and has family members who visit her.

30. Ms. Thorpe has told the nursing facility doctor that she wants to return to the community and the doctor wrote a letter to the District of Columbia Housing Authority (DCHA) in October 2011 that she needed a wheelchair-accessible apartment. As of January 2013, DCHA's website did not reflect the submission of her application. Ms. Thorpe told the nursing facility social workers that she needs help with transitioning to the community.

**Plaintiff Donald Dupree**

31. Plaintiff Donald Dupree is a forty-eight year old man who resided at Washington Nursing Facility from June 2006 until his discharge in late August 2012. He was initially admitted for post-surgery recovery after he had a brain tumor removed.

32. Mr. Dupree has been diagnosed with a cerebellopontine angle (CPA) tumor and schizophrenia. His nursing facility records indicate that he requires assistance with the following activities of daily living: medication management, bathing, meal preparation, overall mobility, money management, and housekeeping.

33. Mr. Dupree is capable of living independently in the community with appropriate health care, personal care assistance, and residential supports. He has been determined by health care professionals to be appropriate for community placement.

34. Mr. Dupree wanted to live in the community. Dr. Orit Simhoni is his court-appointed guardian. She supports his desire to live in the community and located a community placement for him and arranged for him to get the services he needed.

35. Mr. Dupree was discharged from Washington Nursing Facility to an assisted living facility on August 29, 2012.

36. Mr. Dupree did not start receiving his home health services until September 8, 2012.

37. On September 13, 2012, he was assigned to an Assertive Case Management (ACT) team for case management services.

38. Mr. Dupree began day program services on September 11, 2012.

39. Mr. Dupree was briefly hospitalized in the winter of this year.

40. Mr. Dupree lives in fear that he may be forced to return to a nursing facility in the future should he require even short-term hospitalization.

**Plaintiff Roy Foreman**

41. Plaintiff Roy Foreman is a sixty-seven year old man who has resided at Washington Center for Aging Services since May 2006.

42. Mr. Foreman was admitted to Washington Center for Aging Services from the Specialty Hospital of Washington, DC after sustaining a fall at home that led to a spinal cord injury resulting in paraplegia. He is also diagnosed with decubitus ulcers, diabetes, and depression.

43. The staff at the nursing facility assists him with bathing, dressing, transferring, and toileting.

44. Mr. Foreman could live in the community with appropriate services and supports to help him with transferring in and out of his wheelchair, bathing, dressing, bowel and bladder care, grocery shopping, laundry, and housekeeping. He also needs nurse visits for medication management and wound care.

45. He has been determined by health care professionals to be appropriate for community placement.

46. Mr. Foreman has a strong preference to live independently in the community and has asked for transition assistance. The District has failed to provide Mr. Foreman with transition assistance to access long-term home and community based services. For example, the DC Housing Authority offered Mr. Foreman three wheelchair-accessible apartments on three separate occasions. Mr. Foreman did not move into any of the apartments because Defendant failed to assist him to access the Medicaid Waiver for People who are Elderly or have Physical Disabilities (EPD Waiver). As a result, he is still in the nursing facility.

**Plaintiff Larry McDonald**

47. Plaintiff Larry McDonald is a fifty-eight year old man who has resided at Unique Residential Care Center since September 2006 when he was first admitted for a seizure that lasted three days.

48. Mr. McDonald is diagnosed with a seizure disorder, hypertension, and dementia. His nursing facility records indicate that he requires assistance with medication management, bathing, and dressing. Based on the level of his needs, Defendant has recertified Mr. McDonald for nursing facility care.

49. Mr. McDonald could live independently in the community, with either a family member or on his own with appropriate health care, personal care, and residential supports. He needs help with managing medications, meal preparation, getting to appointments, housekeeping, counseling, sobriety supports and finding community doctors and specialists.

50. He has been determined by health care professionals to be appropriate for community placement.

51. Mr. McDonald has family with whom he wants to spend time in the community, and he prefers to live in the community. He told his social worker and other staff at the nursing facility that he wants to move into the community.

52. In the summer of 2011, MFP staff visited Mr. McDonald and found him eligible for MFP assistance.

53. Mr. McDonald applied for public housing in November 2011.

54. Mr. McDonald has not received further assistance from Defendant to check the status of his housing application, assist him to apply for services in the community, or to otherwise transition him to the community. He has not received any notice from MFP regarding his current status in that program.

**Plaintiff Curtis Wilkerson**

55. Plaintiff Curtis Wilkerson is a fifty year old man who resided at United Medical Center from December 2009 until mid-October 2012. He transferred to that facility from Fox Chase Nursing Home where he resided for six years.

56. Mr. Wilkerson is diagnosed with paraplegia, a neurogenic bladder, and recurring bladder infections.

57. Mr. Wilkerson was the president of the Resident Council in the facility.

58. Mr. Wilkerson was determined by health care professionals to be appropriate for community placement. He requires one person to assist him with transferring in and out of his bed and wheelchair, and with bathing, dressing, and other activities of daily living.

59. Mr. Wilkerson repeatedly expressed his preference to live in the community. He has a supportive family and a clear understanding of his care needs and medicines, and he is a strong advocate for himself.

60. Mr. Wilkerson applied for accessible public housing through the District of Columbia Housing Authority and updated his application in 2011. In June 2012, he was offered an accessible public housing apartment, but he declined it because there were problems with the apartment (e.g., the elevator was not accessible), and because Defendant failed to arrange for his EPD Waiver home health aide services in the community to assist with his activities of daily living.

61. Mr. Wilkerson sought transitional assistance from Defendant's Aging and Disability Resource Center (ADRC), which failed to arrange waiver services despite the fact that DCHA had offered him a second accessible public housing apartment, and there were 40 EPD Waiver slots reserved for nursing facility residents. So, Mr. Wilkerson contacted the MFP

Program, which failed to serve him because Defendant had arranged for a lottery but did not hold it in July as planned. After repeated requests, the MFP Program eventually approved Mr. Wilkerson for participation in that program.

62. After a six-week delay, he successfully moved into the wheelchair-accessible public housing apartment in October 2012, but Defendant failed to take all the necessary steps to facilitate his transition. Despite the fact that the MFP Program typically pays a portion of participants' apartment rental security deposit and first month's rent, Mr. Wilkerson had to pay his own deposit and rent until Defendant coordinated these payments nearly four months later. Defendant also failed to coordinate Mr. Wilkerson's personal care in the community. It was not until November 2012 that he received a care plan, proper medications and medical supplies, and some of the necessary, properly functioning equipment to assist with his activities of daily living (e.g., to enable him to transfer from his bed into his wheelchair).

63. Mr. Wilkerson lives in fear that he may be forced to return to a nursing facility in the future should he require even short-term hospitalization.

**Lavondia Carter**

64. Lavondia Carter is 43 years old. She has resided at Carolyn Boone Lewis Health Care Center (CBL) since April 4, 2011 when she was admitted due to pneumonia and weight loss.

65. She is a Medicaid and Supplemental Security Income (SSI) beneficiary.

66. Ms. Carter has tetraplegia (paralysis of her arms and legs) due to Arnold-Chiari syndrome and a spinal cord injury. She uses a motorized wheelchair and needs assistance with mobility, dressing, bathing, toileting, taking medications, and eating.

67. Ms. Carter would like to live in the community again where she would have more control over her life. She expressed her desire for transition assistance with her social worker

and requested help to get community-based alternative options and with applying for Metro Access, the accessible paratransit service in DC.

68. Because the nursing facility did not help her arrange the necessary equipment she needed for transportation, Ms. Carter missed an opportunity to visit an apartment that was available, and she lost her housing opportunity as a consequence.

69. Ms. Carter requested to be on the EPD Waiver waiting list and was placed on the list. Her current status on the waiting list is unknown.

70. Ms. Carter needs help with transition planning and arranging the services she needs to assist with her activities of daily living (e.g., bathing, dressing, toileting, eating, and mobility) in the community. The transition assistance is essential to coordinate housing, EPD Waiver services, nursing visits, and medical appointments. The MFP Program has determined that Ms. Carter can live independently with the services she needs to help with her activities of daily living. The District has not provided Ms. Carter with transition assistance.

**Plaintiff Robert Collins**

71. Plaintiff Robert Collins is a fifty year old man. He was admitted to the Specialty Hospital of Washington Hadley (Hadley) on January 19, 2012.

72. He is a DC Medicaid beneficiary.

73. Mr. Collins has physical disabilities due to complications of diabetes, leg surgery, and neuropathy (loss of sensation and nerve pain). He uses a wheelchair. He also has glaucoma.

74. With some modifications, such as pre-measured insulin, he could handle his diabetes care, although he would need reminders. Mr. Collins needs assistance with bathing, dressing, getting in and out of bed, toileting, medication management, meal preparation, and housekeeping. With this help and assistance with coordinating medical appointments, he is capable of living independently.

75. He has talked to his social worker and people from the DC government about his desire to return to the community. Mr. Collins is on the DCHA public housing waiting list.

76. The MFP Program has determined that Mr. Collins can live independently with the services he requires to assist with his activities of daily living, but no one has assisted him to transition to the community.

**Plaintiff Winifred Goines**

77. Plaintiff Winifred Goines is eighty years old. She was initially admitted to the nursing facility at United Medical Center (UMC) in the winter of 2010. She has been continually living at UMC since the Summer of 2012. Prior to her admission, she lived in her own home in the community.

78. She has physical disabilities and Chronic Obstructive Pulmonary Disorder (COPD), hypertension, and morbid obesity. She uses a wheelchair and needs assistance with bathing, getting dressed, toileting, managing medications, getting in and out of bed, and meal preparation. With that assistance through the Medicaid Program and the EPD Waiver, she is capable of living independently.

79. Ms. Goines is required to share a room at UMC with someone she does not know, and there is no privacy.

80. Ms. Goines has told the staff at UMC that she wants to move to the community. She has applied for services through the EPD Waiver and has requested help from MFP. The MFP Program determined that Ms. Goines could live in the community with services to assist her with daily activities.

81. To date, Defendants have not provided any transition services to allow Ms. Goines to access community based services. She remains at the facility waiting for assistance to transition back to the community.

**Plaintiff Joseph Gray**

82. Plaintiff Joseph Gray is a sixty-seven year old man. He has resided at the Specialty Hospital of Washington Hadley (Hadley) since February 16, 2010.

83. He is a beneficiary of Medicaid, Medicare, and Social Security.

84. Mr. Gray has physical disabilities. He was admitted to Hadley after being hospitalized for a burst blood vessel, requiring brain surgery. He became blind following his admission, and subject to seizures that are under control, and blood sugar monitoring.

85. He is ambulatory; he needs assistance to travel distances until he learns how to use a cane.

86. Mr. Gray wants to move back to the community and has asked his social worker for help with transitioning. He needs help with managing medications, meal preparation, getting to appointments, grocery shopping, and housekeeping. With this assistance, he could live in the community.

87. A health care professional has determined that Mr. Gray can live independently with assistance to help with activities of daily living.

88. Defendant has not provided Mr. Gray with assistance in applying for housing, applying for long-term care services in the community, or any other transition assistance.

**Plaintiff Carl Magby**

89. Plaintiff Carl Magby is seventy-seven years old. He has been at Washington Nursing Facility (WNF) in DC since March 4, 2009.

90. Mr. Magby is a beneficiary of Medicaid, Medicare, and Social Security.

91. He has physical disabilities; his left leg was amputated and as a result, he uses a wheelchair. He also has impaired vision and kidney disease.

92. Mr. Magby needs assistance with bathing and dressing, toileting, mobility, medication management, meal preparation, and housekeeping. He can transfer in and out of bed and his wheelchair independently. The MFP Program has determined that Mr. Magby can live independently with the services he needs to assist with his activities of daily living.

93. Mr. Magby dislikes living in the nursing facility where he has no privacy or peace and quiet and is subject to regimented schedules for eating and other activities.

94. He wants to live in an apartment.

95. He has requested assistance with community transition from the nursing facility social worker. Mr. Magby was placed on the EPD Waiver waiting list but his current status on the waiting list is unknown.

96. Although he completed the DCHA application for public housing, there is no record of its submission in the DCHA database as of January 2013. Because the District has not assisted him with adequately preparing for transition, including ensuring that his housing application was submitted and processed, Mr. Magby is still in the nursing facility.

**Plaintiff Denise Rivers**

97. Plaintiff Denise Rivers is fifty years old. She has resided at the nursing facility at United Medical Center (UMC) since June 22, 2011.

98. Ms. Rivers has physical disabilities due to a blood vessel that burst in her leg which led to surgery. She also has hepatitis C, diabetes, and osteoarthritis. Some of her osteoarthritis symptoms include contracture of her joints, joint pain, inflammation, and muscle weakness. Ms. Rivers uses a wheelchair to get around.

99. Ms. Rivers needs assistance with bathing, getting dressed, using the bathroom, medication management, mobility, and meal preparation. She can transfer independently in and out of her bed and wheelchair, but due to limited mobility, needs assistance with bathing and dressing. With that help, she is capable of independent living.

100. UMC is housed within a hospital; it is sterile and nothing like a home. Ms. Rivers has no privacy and no control over her living space.

101. Nursing facility health care professionals have determined that she meets the EPD Waiver level of care requirements.

102. Ms. Rivers, through her nursing facility social worker, repeatedly requested assistance from MFP because she meets the required level of care for both the EPD Waiver and MFP. To date, no one from the DC government, including MFP, has responded to her requests for transition assistance.

103. Ms. Rivers' social worker requested that the DC Department of Health Care Finance place her on the EPD Waiver waiting list. Her current status on the waiting list is unclear.

104. Ms. Rivers has expressed her desire to leave the nursing facility and live with her family in an apartment.

### **GENERAL ALLEGATIONS**

105. Individuals with long-term care needs requiring assistance with activities of daily living (bathing, dressing, mobility, toileting, and eating) are eligible to receive long-term care services from the District of Columbia.

106. Defendant funds these services largely through the Medicaid program, a joint federal and state program that provides medically-necessary services to low-income persons pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*

107. Approximately 83 percent of D.C. nursing facility residents are D.C. Medicaid recipients.

108. The District receives 70 cents in federal reimbursement for every dollar it spends on Medicaid services.

109. The District also participates in the federal MFP Program designed to provide federal funds to state Medicaid programs to transition people into community-based settings. The District would receive 85 cents in federal Medicaid reimbursement for each dollar it spends for services provided to people who transition from nursing facilities to the community under the MFP Program.

110. Defendant provides nursing facility-based services through privately-owned and operated nursing facilities – many of which are for-profit businesses – and through nursing

facilities (such as Unique Residential and a skilled nursing facility unit at United Medical Center) that are owned by the District and operated through leasing arrangements or contracts with nursing facility management companies.

111. There are approximately 2,700 beds in 19 skilled nursing facilities in the District of Columbia, with an occupancy rate of over 95 percent.

112. Approximately 200 *additional* D.C. residents currently are placed in 31 out-of-state nursing facilities; D.C. Medicaid continues to fund their care.

113. The District also provides in-home and community-based long-term care services to people with disabilities under the Medicaid program.

114. People with disabilities are entitled to personal care aide services in their homes under the District of Columbia's Medicaid State Plan and the Medicaid Waiver Programs for those who are Elderly or have Physical Disabilities ("EPD Waiver"). The District's EPD Waiver program has a fixed number of slots (4,162) for beneficiaries.

115. The District's Medicaid EPD Waiver Program provides up to sixteen hours of daily home and community-based long-term care services for adults with physical disabilities, including personal care services. The Medicaid State Plan provides up to eight hours of daily personal care services as well as skilled nursing services. The Department on Aging also provides home health care assistance to individuals with physical disabilities.

116. Under these options, people with disabilities who would otherwise qualify for nursing facility services are able to live independently with long-term care community-based supports and services, including personal care services, personal emergency response services, and other long-term care services otherwise found in nursing facilities.

117. Defendant licenses, certifies, or contracts with private home health agencies and community support agencies to provide these long-term care services in the community.

**Nursing Facilities Are Institutions**

118. Nursing facilities are, for the most part, neither integrated into nor part of the communities in which their residents live. They are not real homes or even home-like. They are segregated institutions housing large numbers of unrelated people, both elderly and non-elderly, in congregate settings. Many nursing facilities provide only beds, meals, and sparse rehabilitative services.

119. Many nursing facilities resemble hospitals and secure facilities. For example, Unique Residential is surrounded by a security fence with an electronic lock and requires most residents to have escorts and special permission to leave the facility even for brief periods of time. Some D.C. nursing facilities have curfews, and, at times, security guards posted to monitor people entering and leaving the facilities. Inside, many facilities have nurses' stations and are filled with the hard sterile surfaces normally found in medical facilities.

120. Often there is little, if any, privacy for nursing facility residents. Often residents must share rooms and bathrooms with other residents they did not know previously and with whom they did not choose to live; their beds are separated by only a curtain. In some facilities, such as Unique Residential, entire wards of individuals share bathrooms and shower facilities. Often residents have minimal space to call their own or to use to safeguard their personal belongings, and many residents report that their personal property has been stolen or damaged. Nursing facility residents often lack their own telephones and are frequently restricted in the use of the nursing facility telephones, which lack privacy. Medications are often dispensed publicly at specific times, with residents waiting in line.

121. Nursing facilities often place many limitations on residents' autonomy. In many facilities, residents are subjected to a highly regimented lifestyle characterized by restrictive rules and policies. Daily activities are often conducted in a central location in the facility, in the company of large numbers of other individuals with disabilities. Residents may sit idle for most of the day, with little or nothing to do. Many nursing facilities offer few places for residents to gather or meet with visitors.

122. Often residents have limited access to the community; it is difficult for most, and impossible for many, to participate in community activities offered by churches, clubs, or other organizations.

**Plaintiffs Desire and Are Able to Live in the Community**

123. The named plaintiffs identified above (the "Named Plaintiffs") and all class members (together with the Named Plaintiffs, the "Plaintiffs") prefer to live in the community with appropriate long-term care services, rather than reside in nursing facilities.

124. All Plaintiffs would prefer to live with family, in their own apartments or homes, or in permanent supported housing – which are all more integrated settings appropriate to their needs than the nursing facilities in which they currently reside.

125. The District of Columbia-based nursing facilities' self-reported Medicaid data reports that, in the third quarter of 2010, 526 D.C. nursing facility residents indicated that they wanted to live in the community instead of a nursing facility. In its Operational Protocol, the MFP Program acknowledges the demand by 580 people with physical disabilities in nursing facilities for community-based long-term care services.

126. This data vastly undercounts the preferences of nursing facility residents because of their lack of awareness of community-based long-term care options.

127. Many of the class members may need education and support in order to make an informed choice about whether to receive long-term care services in nursing facilities or in the community in more integrated settings.

128. All of the Plaintiffs could be served safely and appropriately in the community if Defendant facilitated their access to community-based, long-term care services and supports. These options would afford far more choice, freedom, and privacy, as well as the opportunity to maintain regular family relationships and interact with and form friendships with a variety of people. With appropriate supports and services, persons with disabilities of all ages and levels of disability can successfully move into and remain in the community and live more independently.

129. All of the Plaintiffs desire and are capable of living in a community-based setting with appropriate services and supports.

**Defendant Continues to Violate Title II of the ADA and *Olmstead***

130. Despite Plaintiffs' desire and ability to live independently in the community with the services they need, Defendant has failed to take any meaningful action to ensure that Plaintiffs receive services in the most integrated setting appropriate to their needs.

131. Fourteen years after the United States Supreme Court decision in *Olmstead*, the District of Columbia still does not have a comprehensive, effectively-working system through which it can implement the requirements described in that decision. The essential components of an effectively-working integration plan which are lacking in the District's plan are: targets for transitioning sufficient numbers of people with disabilities from nursing facilities within specified time frames; demonstrable progress toward meeting those transition targets; interagency coordination designed to facilitate transitions of people from nursing facilities, and

mechanisms for sustaining the transitions systems and community-based long-term care alternatives to nursing facility placement through resource allocation and systemic reform.

132. Instead of providing community-based long-term care services, Defendant relies heavily on nursing facilities to provide long-term care services to individuals with disabilities.

133. Defendant's services, programs, and activities for persons with physical disabilities that require assistance with activities of daily living leave many hundreds of people languishing and isolated in nursing facilities. Defendant's actions and inactions have resulted in the needless isolation, segregation, and institutionalization of individuals with disabilities in nursing facilities.

134. Many of the individuals to whom Defendant currently provides community-based long-term care services have physical conditions and functional capacities that are the same as, or are similar to, the class members currently living in nursing facilities.

**135. The District of Columbia has determined that all of the Plaintiffs are eligible for a nursing facility "level of care," which means that it has determined that their disabilities are significant enough to require the level of services provided in a nursing facility. The same "level of care" is used to determine eligibility for EPD waiver services and for participation in the MFP Program.**

**136. Some Plaintiffs may subsequently require a reduced level of service below the nursing facility level of care because their condition has improved, and those Plaintiffs typically are still eligible for long-term care assistance in the community through the District's State Plan Personal Care Assistance (PCA) program.**

137. The Medicaid-funded personal care services all Plaintiffs receive in nursing facilities could be provided in the community at the same or lower cost.

138. The District of Columbia's FY 2012 average annual expenditure for nursing facility care was more than \$65,000 per year per person, and the average annual cost per person in the EPD Waiver Program in the community is approximately \$23,000.

139. Among other things, Defendant fails to:

- i. Assure that individuals with physical disabilities receive long-term care services in the most integrated community-based setting appropriate to their needs;
- ii. Develop and implement a comprehensive and effectively working integration plan with measurable targets for transitioning sufficient numbers of Plaintiffs from nursing facilities to the community within specified time frames, demonstrate progress toward meeting those targets, and sustainability of the transition process and community-based service infrastructure through resource allocation and systemic reform that rebalances the long-term care service system. The integration plan must guide the District's inter-agency actions to: inform Plaintiffs about community-based alternatives, identifies Plaintiffs prefer to get their long-term care services in the community, and help them move to the community with the long-term care services and supports they need;
- iii. Ensure capacity in its Medicaid long-term care programs and services under the EPD Waiver Program, the State Plan Personal Care Assistance Program, Money Follows the Person Program, and programs for senior citizens and adults with physical disabilities to enable named Plaintiffs and class members to transition from nursing facilities to the community with these long-term care services and case management assistance;
- iv. Ensure sufficient staffing to inform individuals with physical disabilities in nursing facilities about available long-term care services in the community and assess the community eligibility of individuals with physical disabilities in nursing facilities and provide transition assistance, *i.e.*, assist named Plaintiffs and class members to obtain identification documents, complete housing applications, and arrange long-term care services upon discharge from the nursing facilities;
- v. Provide adequate and appropriate community-based long-term care services to assist Plaintiffs with their activities of daily living (bathing, dressing, mobility, toileting, eating) and instrumental activities of daily living (e.g., meal preparation, grocery shopping, laundry), and skilled nursing needs;
- vi. Assure that people with physical disabilities are not unnecessarily placed in nursing facilities by, for example, informing them prior to, and upon

admission of the availability of integrated, community-based options for long-term care services as an alternative to nursing facility placement, offering them a meaningful choice of community placement, or offering any assistance to those who seek to return to live in the community;

- vii. Assure that individuals with physical disabilities residing in nursing facilities are periodically asked about their interest in, assessed for, and where appropriate, transitioned from nursing facilities to community-based long-term care services;
- viii. Ensure that all nursing facilities that receive DC Medicaid funding inform individuals with physical disabilities about community-based alternatives and begin discharge planning upon admission to assist Plaintiffs to transition back to the community from nursing facilities;
- ix. Provide clear and accurate information to Plaintiffs regarding their eligibility for community-based long-term care services, the process for accessing these services, and assisting them to apply for the services;
- x. Provide information, transitional assistance, and referrals to facilitate Plaintiffs' access to supportive housing as necessary to enable Plaintiffs to no longer be unnecessarily segregated in nursing facilities; and
- xi. Take adequate steps to preserve Plaintiffs' existing community housing subsidies during periods of placement in nursing facilities so that people can maintain homes to which they may return.

**Defendant's Policies Undermine *Olmstead's* Requirements**

140. Defendant administers its Medicaid Program and services for adults with physical disabilities in a manner that perpetuates the segregation of persons with physical disabilities. All Named Plaintiffs and class members are subject to the District's policy and practice that determines their level-of-need for assistance with activities of daily living (e.g., bathing, dressing, toileting, mobility, eating) and instrumental activities of daily living (e.g., meal preparation, grocery shopping, laundry, housekeeping). The District's level-of-need determination qualifies all Plaintiffs to receive long-term care services either in nursing facilities or in the community under the Medicaid Waiver Program for People Who are Elderly and/or have Physical Disabilities (EPD Waiver). The District's methods of administration arbitrarily

limit access to integrated, long-term community support services by persons with physical disabilities in nursing facilities. As a result of the District's unbalanced long-term care system, community-based long-term care services are unavailable to many people with disabilities who need and want them, effectively compelling their institutionalization in nursing facilities.

141. In 2006, the District was approved to receive over \$26 million in federal funds through a five-year grant to support the transition of 1,100 people from nursing facilities and other institutions to the community to live independently with the services they need. The grant period was extended through 2016. Now in its seventh year of the grant period, the District has transitioned only a tiny fraction of the original targeted number of persons from nursing facilities under the grant.

142. *Olmstead*'s integration mandate may be excused only where a state demonstrates that compliance with the mandate would result in a "fundamental alteration" of the state's services and programs. *Olmstead*, 527 U.S. at 603. This defense is not available, however, to states that have not developed an effectively working plan to comply with the *Olmstead* mandate. *Frederick L. v. Dep't of Pub. Welfare*, 422 F.3d 151, 158-59 (3d Cir. 2005).

143. In 2007, Defendant began work on a written "Olmstead Plan" which was not released until 2012, thirteen years after the Supreme Court's landmark decision.

144. Defendant's plan is not a comprehensive or effectively working integration plan because, among other things, it fails to establish or implement inter-agency mechanisms to transition Plaintiffs from nursing facilities into more integrated community settings in sufficient numbers within specific time frames. The plan also lacks evidence of sustainability demonstrated through allocation of resources and system reform to rebalance the long-term care system away

from its reliance on institutional nursing facility care rather than community-based services. Furthermore, the plan contains no measurable objectives beyond 2012.

145. The fact that the District of Columbia's system of long-term care does not operate effectively to meet its obligations under *Olmstead* and the ADA is shown most dramatically by the Defendant's failure to make demonstrable progress toward meeting the very low numeric targets the agencies that serve people in nursing facilities have committed to meet.

146. The District of Columbia's Department of Health Care Finance Administration ("DHCF") is responsible for administering the District of Columbia's long-term care system for people with disabilities. *See* D.C. Code § 7-771.07(9). DHCF must "maximize federal assistance," "[c]oordinate with other District government agencies to ensure effective and efficient use of Medicaid dollars," and "ensure coordinated health-care access and delivery for publicly funded health-care services." D.C. Code § 7-771.07(3)-(5). DHCF also is "the single state agency" that administers the District of Columbia's Medicaid program. *See* 42 U.S.C. § 1396a(a)(5); D.C. Code § 7-771.07(1).

147. Defendant's violations of its federal obligations worsened in 2011 to 2012 due to DHCF's proposal to reduce home-based personal care aide services under the Medicaid State Plan from 1,040 hours per year per person, with additional hours available pursuant to physicians' orders and DHCF prior authorization, to 520 hours per year per person, with no provision for additional hours. As a result of these proposed cuts, the District advised approximately 2,900 Medicaid beneficiaries who had not previously been serviced under the EPD waiver to apply for slots under that waiver in order to maintain their services. The addition of several hundred Medicaid beneficiaries in the community to the EPD Waiver program exhausted the 4,000 allotted community-based EPD Waiver slots. In August 2011, the District

established a waiting list for participation in the EPD Waiver Program and Plaintiffs and other class members seeking placements out of nursing facilities are subject to this waiting list. But the District fails to inform or assist people with physical disabilities in nursing facilities to get on the EPD Waiver waiting list.

148. On May 7, 2010, counsel for Named Plaintiffs sent a letter to former District of Columbia Mayor Adrian Fenty and former Attorney General Peter Nickles detailing the violations of Plaintiffs' rights under the integration mandate of Title II of the ADA and the Supreme Court's ruling in *Olmstead*. The letter cited policies and practices such as the District's "failure to inform nursing home residents about the availability of integrated community-based options for mental health and other health care" and the lack of a "*comprehensive* and effective plan for identifying individuals with mental or physical disabilities who are needlessly in nursing facilities and for helping them move to more integrated settings." The letter urged former Mayor Fenty "to take strong and swift action to enable people with disabilities in nursing facilities to receive services in integrated settings."

149. Six months before the present lawsuit was filed, on July 13, 2010, and July 27, 2010, Plaintiffs' counsel met with former Mayor Fenty's designees, including former Attorney General Peter Nickles and designees from DMH, regarding Plaintiffs' May 7th letter.

150. During 2012, the parties engaged in mediation for over three months in an effort to negotiate a settlement.

151. Defendant has not resolved Plaintiffs' grievances.

**CLASS ACTION ALLEGATIONS**

152. Pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, and Local Rule 23.1, the Named Plaintiffs bring this action for prospective relief on behalf of themselves and all other persons similarly situated.

153. **The proposed class consists of:**

**All persons with physical disabilities who, now or during the pendency of this lawsuit: (1) receive DC Medicaid-funded long-term care services in a nursing facility for 90 or more consecutive days; (2) are eligible to live in the community; and (3) would live in the community instead of a nursing facility if the District of Columbia would provide transition assistance to facilitate their access to long-term care services in the community.**

154. **Numerosity**: The Plaintiff class is so numerous that joinder of all its members is impracticable. The exact number of individuals in the class is not known but is believed to be between 500 and 2,900 individuals.

155. Joinder is also impracticable because class members lack the knowledge and financial means to maintain individual actions.

156. **Commonality**: There are questions of law or fact that are common to all the Plaintiffs, including:

- a. Whether Defendant segregates Plaintiffs in nursing facilities in order to receive long-term care services, rather than providing those services in more integrated, community-based settings;
- b. Whether Defendant administers its long-term care services, programs, and activities in the most integrated setting appropriate to the needs of individuals with physical disabilities residing in nursing facilities;
- c. Whether Defendant fails to offer sufficient discharge planning to enable individuals with physical disabilities residing in nursing facilities to be served in more integrated, community-based settings;

- d. Whether Defendant fails to develop, fund, and effectively utilize existing long-term care community-based programs so that individuals with physical disabilities residing in nursing facilities may be placed in more integrated, community-based settings;
- e. Whether Defendant fails to establish and implement a comprehensive, effective working plan to place individuals with physical disabilities who reside in nursing facilities into more integrated, community-based settings;
- f. Whether Defendant fails to administer and implement federal programs such as EPD Medicaid Waiver long-term care services, Medicaid State Plan Personal Care Assistance Services, and Money Follows the Person to afford access to community-based long-term care service programs by people with physical disabilities in nursing facilities; and
- g. Whether Defendant fails to inform and provide Plaintiffs with meaningful choices of community-based long-term care alternatives to nursing facilities.

157. **Typicality:** The claims of the Named Plaintiffs are typical of the claims of the class as a whole in that both the Named Plaintiffs and the class members currently are unnecessarily isolated in nursing facilities and, based on their level of need, receiving long-term care services funded by the District of Columbia; they could live in more integrated settings with appropriate long-term care to assist with their activities of daily living (e.g., bathing, dressing, toileting, mobility, eating) and instrumental activities of daily living (e.g., grocery shopping, meal preparation, laundry, housekeeping), personal care assistance, and support services; and they desire to live in more integrated, community-based settings.

158. Named Plaintiffs' claims that Defendant has failed to administer its long-term care Medicaid programs to provide services in the most integrated setting appropriate to their needs are typical of the claims of the class.

159. **Adequate representation:** The Named Plaintiffs will fairly represent and adequately protect the interests of members of the class as a whole because they suffer from deprivations identical to those of the class members and have been denied the same federal rights

that they seek to enforce on behalf of the other class members, many of whom are unable to pursue claims on their own behalf as a result of their disabilities, their limited financial resources, and the actions of the Defendant to deprive them of their rights. The Named Plaintiffs' interests are consistent with and are not antagonistic to those of other class members. By filing this action, the Named Plaintiffs express their interest in vindicating their rights, as well as the rights of others who are similarly situated. The relief sought by the Named Plaintiffs will inure to the benefit of members of the class generally. The Named Plaintiffs are represented by counsel who are skilled and knowledgeable about civil rights litigation, disability discrimination, Medicaid law, practice and procedure in the federal courts, and the prosecution and management of class action litigation.

160. Defendant has acted or refused to act on grounds generally applicable to the class by unnecessarily segregating class members, thereby making final injunctive relief appropriate with respect to the class as a whole under Rule 23(b)(2) of the Federal Rules of Civil Procedure. For example, Defendant has failed to inform class members of their right to community services and failed to provide them with long-term care services in the most integrated setting appropriate to their needs. Although the specific disabilities of the class members vary, they also share a common need for Medicaid and locally-funded long-term care services. In addition, Plaintiffs are all subject to the District's policy and practice under which their level of need is determined which, in turn, qualifies them to receive long-term care services either in nursing facilities or in the community under the Medicaid EPD Waiver Program.

161. A class action is superior to individual lawsuits for resolving this controversy. Declaratory and injunctive relief with respect to the entire class is appropriate.

**COUNT 1**  
**AMERICANS WITH DISABILITIES ACT**

162. Paragraphs 1 through 161 are incorporated by reference.

163. Each Named Plaintiff and class member is an “individual with a disability” within the meaning of the ADA in that they have disabilities that substantially limit one or more major life activities, such as self-care and social interaction. They also have a history of such impairments and are regarded by Defendant as having such impairments.

164. Each Named Plaintiff and class member is a “[q]ualified individual with a disability” within the meaning of the ADA, 42 U.S.C. § 12131(2), because he or she is qualified to participate in Defendant’s more integrated, community-based programs and services.

165. Defendant District of Columbia is a public entity covered by Title II of the ADA. As such, the ADA prohibits Defendant from discriminating against individuals with disabilities in its programs and services. *See* 42 U.S.C. §§ 12131 and 12132.

166. Regulations implementing Title II of the ADA require that “[a] public entity 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).

167. The ADA’s implementing regulations further provide:

A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities.

28 C.F.R. § 35.130(b)(3)(i)-(ii).

168. Defendant has caused the Named Plaintiffs and class members to be confined unnecessarily in nursing facilities in order to obtain long-term care services, rather than facilitate their transition to the community with appropriate services and supports.

169. Defendant's actions violate Title II of the ADA.

**COUNT II**  
**REHABILITATION ACT**

170. Paragraphs 1 through 170 are incorporated by reference.

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

172. Defendant District of Columbia and its governmental agencies receive federal financial assistance within the meaning of Section 504.

173. Each Named Plaintiff and class member is an “individual with a disability” within the meaning of Section 504 because they have disabilities that substantially limit one or more major life activities, such as self-care, transferring to and from wheelchairs, and social interaction. They also have such impairments and are regarded by Defendant as having such impairments.

174. Each Named Plaintiff and class member is a “qualified person with disabilities” within the meaning of Section 504 because he or she is qualified to participate in Defendant's more integrated, community-based programs and services.

175. Regulations implementing Section 504 require that a public entity administer its services, programs, and activities in “the most integrated setting appropriate” to the needs of qualified individuals with disabilities. 28 C.F.R. § 41.51(d).

176. Regulations implementing Section 504 prohibit recipients of federal financial assistance from:

[U]tiliz[ing] criteria or methods of administration . . . (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient’s program with respect to handicapped persons.

45 C.F.R. § 84.4(b)(4)(i)-(ii); 28 C.F.R. § 41.51(b)(3)(i)-(ii).

177. Defendant’s actions violate Section 504 of the Rehabilitation Act.

### **REQUEST FOR RELIEF**

WHEREFORE, Named Plaintiffs and class members (together, “Plaintiffs”) respectfully request that this Court:

- a. Certify this action as a class action.
- b. Declare that Defendant’s failure to provide Plaintiffs with long-term care services in the most integrated setting appropriate to their needs violates Title II of the Americans with Disabilities Act.
- c. Declare that Defendant’s failure to provide Plaintiffs with long-term care services in the most integrated setting appropriate to their needs violates Section 504 of the Rehabilitation Act.
- d. Enter a permanent injunction requiring Defendant to promptly take the following steps that are necessary to serve Plaintiffs in the most integrated settings appropriate to their needs:

i) Develop and implement a working system of transition assistance for Plaintiffs whereby Defendant, at a minimum, (a) informs DC Medicaid-funded nursing facility residents, upon admission and at least every three months thereafter, about community-based long-term care alternatives to nursing facilities; (b) elicits DC Medicaid-funded nursing facility residents' preferences for community or nursing facility placement upon admission and at least every three months thereafter; (c) begins DC Medicaid-funded nursing facility residents' discharge planning upon admission and reviews at least every month the progress made on that plan; and (d) provides DC Medicaid-funded nursing facility residents who do not oppose living in the community with assistance accessing all appropriate resources available in the community.

ii) Ensure sufficient capacity of community-based long-term care services for Plaintiffs under the EPD, MFP, and PCA programs, and other long-term care service programs, to serve Plaintiffs in the most integrated setting appropriate to their needs, as measured by enrollment in these long-term care programs;

iii) Successfully transition Plaintiffs from nursing facilities to the community with the appropriate long-term care community-based services under the EPD, MFP, and PCA programs, and any other long-term care programs, with the following minimum numbers of transitions in each of the next four years:

80 class members in Year 1;

120 class members in Year 2;

200 class members in Year 3; and

200 class members in Year 4.

iv) Sustain the transition process and community-based long-term care service infrastructure to demonstrate the District's ongoing commitment to deinstitutionalization by, at a minimum, publicly reporting on at least a semi-annual basis the total number of DC Medicaid-funded nursing facility residents who do not oppose living in the community; the number of those individuals assisted by Defendant to transition to the community with long-term care services through each of the MFP, EPD, and PCA, and other long-term care programs; and the aggregate dollars Defendant saves (or fails to save) by serving individuals in the community rather than in nursing facilities.

e. Award Named Plaintiffs and class members their reasonable attorneys' fees, litigation expenses, and costs; and

f. Grant such other and further relief as this Court deems just and proper.

Dated: March 8, 2013

Respectfully submitted,

/s/ Brian D. Schneider

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