

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
MADELINE BUCCERI, PATRICIA TRUJILLO, :
and LOURDES LO, on behalf of themselves and all :
others similarly situated, :

16 Civ. 8274 (VSB)

Plaintiffs, :

-against- :

HOWARD ZUCKER, in his official capacity as :
Commissioner of the New York State Department :
of Health, HF MANAGEMENT SERVICES, LLC, :
SENIOR HEALTH PARTNERS, INC., HF :
ADMINISTRATIVE SERVICES, INC., :
HEALTHFIRST, INC. and HEALTHFIRST :
HEALTH PLAN, INC., :

Defendants. :

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

The three named Plaintiffs in this action, all elderly and medically frail Medicaid recipients, bring this motion for preliminary injunctive relief on their own behalf. They each face imminent irreparable harm, including physical injury, hospitalization, and unnecessary institutionalization due to the Defendants' failure to provide them home care services they need. Since they are likely to succeed on one or more of their claims under the Medicaid Act, the Americans with Disabilities Act (the "ADA"), Section 504 of the Federal Rehabilitation Act ("Section 504") and the Due Process Clause, preliminary relief is fully warranted.

Each Plaintiff receives Medicaid under New York's Medicaid program. And, because each Plaintiff needs assistance with the activities of daily living to remain at home, the Medicaid services each receives includes home care services, the essential function of which is to allow the recipients to remain in their home and community, instead of being consigned to an institutionalized setting, such as a nursing home.

Defendant Howard Zucker and his agency, the New York State Department of Health (collectively, "DOH") administer New York's Medicaid program. Over the past several years, DOH has delegated its responsibility to privately-owned-and-operated health care plans to provide home care services to most Medicaid recipients. Two of these health care plans – Senior Health Partners, Inc. ("SHP") and CompleteCare – operate within a "Healthfirst Enterprise," which includes defendants SHP, the entity that operates CompleteCare (Healthfirst Health Plan, Inc.), the entity that operates Healthfirst Health Plan, Inc. (Healthfirst, Inc.), and two for-profit entities that are affiliated with the two health care plans and sit atop the Healthfirst Enterprise, HF Management Services, LLC and HF Administrative Services, Inc. (collectively, "Defendants," for purposes of this motion).

Defendants want to slash the cost of the home care services that New York's Medicaid program is providing, at the expense of the State's Medicaid recipients. The Medicaid Act and its implementing regulations, however, make clear that the State's Medicaid recipients are the very persons that DOH and Defendants are meant to serve. Among the health care plans to which DOH has delegated the duty to provide home care services, SHP and CompleteCare are particularly "creative" in slashing program services. Defendants' "creativity" derives from their financial incentive to slash services and costs: they are basically paid a flat amount per recipient for the home care services they deliver.

Defendants' "creative" tactics include the following: (1) simply refusing to take a recipient's request for increased home care services; (2) doling out hours of home care services in small increments, insufficient to meet recipients' needs: "make 'em fight for every dollop of service," particularly since recipients are poor, frail and – best of all – usually unrepresented; (3) arbitrarily reducing hours as a "first offer" strategy and later agreeing to soften the blow by agreeing to reduce fewer hours than initially threatened; and (4) using an arbitrary task-based tool that employs fictions to reduce services being provided; for example, pretending that recipients need only two hours of services per day because the activity with which they need help with throughout the day, e.g., toileting, does not consume a *total of* more than two hours daily. If they never make such a decision, they may never have to provide the twenty-four hour care.

Plaintiffs are each suffering irreparable harm because the Defendants are not providing them the home care services they need. All are elderly, frail, and in poor health, but able to remain at home if provided the home care services they need. They are all falling, injuring themselves, being hospitalized and/or finding themselves unable to get or transfer themselves to

the toilet, among other indignities, when they are unattended due to Defendants' refusal to provide them with the services they need.

Plaintiffs need help and need it urgently. They ask the Court to grant them preliminary injunctive relief, ordering Defendants to provide them with the home care services they need. They should not face unnecessary injury, hospitalization, pain, indignities and possible institutionalization while having to wait until the conclusion of this litigation.

PLAINTIFFS' FACTS

A. Plaintiff Madeline Bucceri

1. Ms. Bucceri's Need for Increased Home Health Care Services

Ms. Bucceri is a ninety-three-year-old resident of Staten Island who suffers from a number of chronic conditions including osteoarthritis, heart disease, anxiety and depressive disorders, hypertension, spinal stenosis, and urinary incontinence. Bucceri Decl. ¶¶ 2, 4 (Garcia Ex. F).¹ In 2015, Ms. Bucceri's arthritis became so severe that it prevented her from walking, grooming, toileting, and taking medications without assistance. *Id.* ¶ 23. At this point, she began receiving home care services through SHP. *Id.* ¶ 5.

Ms. Bucceri lives alone and does not have friends or family that can assist her with her activities of daily living. *Id.* ¶ 23. Because she lacks sufficient home care hours, she fears that she will be forced to live in a nursing home. *Id.*

¹ Lexicon: "Garcia Decl." refers to the Declaration of Belkys Garcia, dated October 24, 2016. "Bucceri Decl." refers to the Declaration of plaintiff Madeline Bucceri, dated October 13, 2016. "Trujillo Decl." refers to the Declaration of plaintiff Patricia Trujillo, dated October 12, 2016. "Lo Decl." refers to the Declaration of plaintiff Lourdes Lo, dated October 13, 2016. "Mendez Decl." refers to the Declaration of Bill Mendez, dated October 17, 2016. These declarations are being filed in support of Plaintiffs' motion for preliminary injunction and accompanying motion for class certification. For ease of reference, citations to the Bucceri, Trujillo, Lo, and Mendez Declarations include their identification as exhibits to the Garcia Decl., e.g., Bucceri Decl. ¶ 1 (Garcia Ex. F).

Ms. Bucceri depends on her home care aide for bathing, shopping, cleaning, preparing meals, dressing, using the toilet, walking, and personal hygiene. *Id.* ¶ 6. She is unable to bend over to pick up anything or to put on her socks. *Id.* She needs help remembering to take her medication and opening her medicine bottles. *Id.* She is also sometimes incontinent of urine. *Id.* Before her aide leaves, currently at 1 p.m. or 2 p.m. depending on the day, she helps Ms. Bucceri change into pajamas because Ms. Bucceri is unable to change clothes on her own. *Id.*

On May 24, 2016, Ms. Bucceri contacted The Legal Aid Society to request assistance in obtaining increased home care hours, because she was becoming more unsteady and having trouble walking. *Id.* ¶ 7. During this time, Ms. Bucceri was receiving home care services five hours a day three days a week, and four hours a day four days a week. *Id.* Shortly thereafter, The Legal Aid Society contacted SHP on Ms. Bucceri's behalf to request more home care hours. *Id.*

On or about June 2, 2016, SHP contacted Ms. Bucceri by telephone. *Id.* ¶ 8. SHP did not visit Ms. Bucceri's home to assess her needs. *Id.* Based on this phone call alone, SHP denied Ms. Bucceri's request for increased home care hours. *Id.*

Four days after her request for home care hours was denied, Ms. Bucceri fell while unattended and trying to get to the bathroom. *Id.* ¶ 9. As a result, she had to be transported by ambulance to the emergency room and admitted to Staten Island University Hospital, where she was treated until June 10, 2016. *Id.* ¶¶ 9-10. Shortly after Ms. Bucceri was released from the hospital, SHP called to inform her that they would come to her house to evaluate her for more hours. *Id.* ¶ 11. Several days before this scheduled evaluation, however, Ms. Bucceri was once again admitted to the hospital, where she remained for three weeks. *Id.* ¶¶ 11-12.

The Case Management Nurse from the hospital called SHP to request that Ms. Bucceri receive increased home care services upon discharge. *Id.* ¶ 13. On July 12, 2016, two days before

Ms. Bucceri was discharged from the hospital, a nurse from SHP came to the hospital to assess Ms. Bucceri. *Id.* ¶ 14; Garcia Ex. G. SHP then denied Ms. Bucceri's request for an increase to ten hours of home care *per day*, and instead increased her home care services by only two hours *per week*. Bucceri Decl. ¶ 15 (Garcia Ex. F); Garcia Ex. I. On July 30, 2016, while unattended, Ms. Bucceri fell again. Bucceri Decl. ¶ 17 (Garcia Ex. F).

Ms. Bucceri's pain recently increased substantially. *Id.* ¶ 18. As a result, she was prescribed Codeine which can cause dizziness. *Id.* Ms. Bucceri is not taking her medication because she is alone so many hours of the day and does not want to become dizzy and fall while unattended. *Id.* The frequency of Ms. Bucceri's need to urinate has also recently increased. *Id.* ¶ 19. In September, counsel for Ms. Bucceri contacted SHP to request an increase in home care hours on an expedited basis, based on Ms. Bucceri's worsening condition, but SHP failed to honor this request for expedited consideration of additional hours. *Id.* ¶ 20, 22. On October 6, SHP denied Ms. Bucceri's request for an increase in home care hours. Garcia Decl. Ex. J.

2. The Imminent Harm Ms. Bucceri Faces

The thirty-three hours per week of home care services that SHP currently provides to Ms. Bucceri is inadequate and leaves her at serious risk of continuing to fall and suffer more injuries when she is without assistance. *Id.* ¶¶ 7, 15, 18. This takes an emotional toll on Ms. Bucceri, who worries not only about injuries to herself, but also about being forced to move out of her home and into a nursing facility. *Id.* ¶ 23. Ms. Bucceri needs at least seventy hours of home care services per week to prevent more falls and injuries. *Id.* Ms. Bucceri is currently enduring severe pain as a result of not taking her pain medication while she is alone because it makes her dizzy, which puts her at an increased risk of falls. *Id.* ¶ 18. Ms. Bucceri is adamant that she does not want to be institutionalized in a nursing home, but she fears she will have little other choice if she does not receive these additional hours of home care. *Id.* ¶ 23.

B. Plaintiff Patricia Trujillo

1. Ms. Trujillo's Need for Increased Home Health Care Services

Ms. Trujillo is a seventy-one-year-old resident of Manhattan who suffers from numerous chronic health problems, including osteoarthritis, gait abnormality, joint pain, lumbago, chronic migraines, cervical spondylosis (degeneration of the spine), bipolar disorder, depression, anxiety, memory loss, and peripheral retinal degeneration. Trujillo Decl. ¶¶ 2-3 (Garcia Ex. L). Several years ago, Ms. Trujillo's osteoarthritis worsened, preventing her from performing activities of daily living. *Id.* ¶ 9. She is enrolled in CompleteCare, operated by Healthfirst Health Plan, Inc. *Id.* ¶ 10.

Ms. Trujillo has lived alone since 2005, when her partner passed away. *Id.* ¶ 6. Due to her medical conditions, she needs assistance with many activities of daily living, including walking, bathing, personal hygiene, dressing, toilet transfer, and toilet use. *Id.* ¶¶ 3-4. She has no family or friends to help her with activities of daily living. *Id.* ¶ 7. Although she has siblings who live in New York City, they do not assist Ms. Trujillo with activities of daily living. *Id.* Ms. Trujillo is transgender, and her family has never been supportive of her gender identity. As a result, she rarely sees or speaks with her siblings. *Id.*

Ms. Trujillo has lived in her home for twenty-five years. *Id.* ¶ 6. Due to the lack of home care hours she receives from CompleteCare and its repeated refusal of her requests for additional services, Ms. Trujillo fears that she will be forced out of her long-time home and community and institutionalized in a nursing home. *Id.* ¶ 24. Ms. Trujillo currently receives forty hours of home care services per week: eight hours Monday through Friday. *Id.* ¶ 5. She does not receive any home care services on weekends. *Id.* Ms. Trujillo has repeatedly requested home care services on the weekends, but CompleteCare has refused to take or act upon her requests, essentially denying her requests for increased services. *Id.* ¶ 11.

Because CompleteCare has refused to provide Ms. Trujillo with home care services on weekends, her home care attendant calls Ms. Trujillo on weekends to remind her to take her medications; even though the attendant is off duty and not being paid for those services. *Id.* ¶ 12. While unattended, Ms. Trujillo has fallen in her home several times, but has not sought medical help. *Id.* ¶ 13. To survive in her home on the weekends, Ms. Trujillo reheats food prepared by her attendant during the week or asks a friend from church to bring her food. *Id.* ¶ 12.

Most recently, CompleteCare assessed Ms. Trujillo on April 1, 2016. *Id.* ¶ 14; Garcia Ex. L-1. At this time, Ms. Trujillo informed the assessor that she needed an increase in home care hours because she needed weekend hours. Trujillo Decl. ¶ 15 (Garcia Ex. L). The assessor responded by stating, “we’re not here for that.” *Id.* Even though the assessor did not ask Ms. Trujillo if she had fallen recently, the report from the April 1 assessment states that she had not had any recent falls. Trujillo Decl. ¶ 16 (Garcia Ex. L); Garcia Ex. L-1. The report also states that Ms. Trujillo has strong supportive relationships with her family and that her sister had provided informal help during the previous three days and was available to provide informal assistance on weekends. Trujillo Decl. ¶ 17 (Garcia Ex. L). These statements are false. *Id.* Ms. Trujillo has a strained relationship with her family, rarely sees her sister, and does not receive help from anyone in her family on the weekends. *Id.* ¶¶ 7, 17. Ms. Trujillo would have corrected these errors in the assessment had she been given an opportunity to do so; but, she was not given that opportunity.

Based on this flawed assessment and inaccurate report, and even though the report states there had been no change in Ms. Trujillo’s self-sufficiency or ability to perform activities of daily living, on April 26, 2016, CompleteCare sent her a notice informing her that they would be

cutting her home care hours in half. *Id.* ¶ 18; Garcia Ex. L-2. The notice claimed that her reduction in hours was to correct a previous mistake. *Id.*

In response, Ms. Trujillo requested an internal appeal and a fair hearing to challenge the decision to reduce her home care hours. Trujillo Decl. ¶ 19 (Garcia Ex. L). On June 21, 2016, CompleteCare offered to reduce her hours to thirty hours per week, rather than the twenty hours in the notice of reduction. *Id.* Ms. Trujillo did not accept this offer. *Id.*

On July 19, 2016, The Legal Aid Society represented Ms. Trujillo at her fair hearing to challenge the reduction in her home care hours. *Id.* ¶ 20. She has also received help from a social worker at SAGE, an organization that provides services and advocacy for gay, lesbian, bisexual, and transgender elders. *Id.* ¶ 8. On August 4, 2015, this social worker called CompleteCare on Ms. Trujillo's behalf to again ask that her home care hours be increased to provide weekend hours. Mendez Decl. ¶ 6 (Garcia Ex. M). On August 8, 2016, the social worker was informed that CompleteCare would not accept Ms. Trujillo's request for an increase in home care hours while a decision on her fair hearing was pending. *Id.* ¶ 7. CompleteCare did not send a written notice of its denial of Ms. Trujillo's request for additional home care hours. Trujillo Decl. ¶ 22 (Garcia Ex. L). On the same day, a decision was issued on Ms. Trujillo's fair hearing, ordering CompleteCare to continue providing her with forty hours of home care services per week. *Id.* ¶ 23; Garcia Ex. L-3.

2. The Harm Ms. Trujillo Faces

Ms. Trujillo needs fifty-six hours of home care services per week to continue residing safely in her home. Trujillo Decl. ¶ 24 (Garcia Ex. L). Currently, she is without any home care services on Saturdays and Sundays. *Id.* But Ms. Trujillo's need for assistance doesn't magically diminish on the weekends – she still needs help with her basic activities of daily living. *Id.* She is being denied care solely because the Defendants wrongly claim that someone is available to pick

up the slack they are burdening her with. *Id.* ¶ 17. Without home care services on the weekends, she is forced to live in fear of falling and hurting herself or being forced out of her home and community and into an institution, which exacerbates her anxiety and depression. *Id.* ¶ 24. Ms. Trujillo is adamant that she does not want to be institutionalized in a nursing home. *Id.*

C. Plaintiff Lourdes Lo

1. Ms. Lo's Need for Increased Home Health Care Services

Ms. Lo is a seventy-four-year-old Manhattan resident who suffers from Parkinson's disease, diabetes, neuropathy, osteoarthritis, urinary incontinence, anxiety disorder, and depression. Lo Decl. ¶¶ 3-4 (Garcia Ex. N). She also has tremors, an unsteady gait, and a history of falling. *Id.* ¶ 4. Ms. Lo has been enrolled with SHP since approximately 2014. *Id.* ¶ 5. She is currently receiving thirty-nine hours of home care services per week. *Id.*

On April 13, 2016, SHP conducted an assessment of Ms. Lo. *Id.* ¶ 10; Garcia Ex. N-2. SHP's assessment found that Ms. Lo needed help with bathing, personal hygiene, dressing, walking, toilet transfer, and toilet use. Lo Decl. ¶ 10. The report also states that, in February 2016, Ms. Lo lost her balance and fell when she was trying to go to the bathroom unattended. *Id.* As a result, Ms. Lo broke her left shoulder and had to be transported to the emergency room. *Id.* She was discharged from the hospital with pain medication and prescribed physical therapy three times a week to treat the injury. *Id.*

Despite having full knowledge of Ms. Lo's fall and subsequent injury, on May 4, 2016, SHP reduced her home care hours to twenty-eight hours per week. *Id.* ¶¶ 10-11. Ms. Lo requested a fair hearing to challenge this reduction. *Id.* ¶ 11. At the fair hearing, SHP offered to reduce Ms. Lo's hours to thirty-five hours per week, instead of twenty-eight. *Id.* ¶ 12. Because she was afraid of losing more hours if she did not take this offer, Ms. Lo accepted it and SHP reduced her home care hours to thirty-five hours per week. *Id.* Ms. Lo did not have an attorney to

represent her at the fair hearing and was afraid that she would not be able to successfully challenge SHP's May 4, 2016 reduction without counsel. *Id.*

Shortly after Ms. Lo's home care hours were reduced to thirty-five hours per week, she fell several more times while unattended at home. *Id.* ¶ 13. After these repeated falls, it became clear to Ms. Lo that thirty-five hours per week was not a sufficient level of services to ensure that she could reside safely in her home, and she contacted The Legal Aid Society for help. *Id.*

On July 20, 2016, Ms. Lo's attorney at The Legal Aid Society called SHP on her behalf to request additional home care hours. *Id.* ¶ 14. SHP informed Ms. Lo's attorney that it would not accept her request for increased hours because she had recently agreed to the decrease of thirty-five hours per week and there was no evidence that her condition had changed. Garcia Decl. ¶ 60. Ms. Lo's attorney later asked again if SHP would increase Ms. Lo's home care hours, and about one week later, SHP agreed to process her request. *Id.*

On August 4, 2016, SHP informed Ms. Lo that it was extending the deadline for its response to obtain more information. Lo Decl. ¶ 15 (Garcia Ex. N); Garcia Ex. N-3. On August 4, 2016, SHP did an assessment of Ms. Lo at her home. Lo Decl. ¶ 16 (Garcia Ex. N); Garcia Ex. N-4. The report from this assessment states that Ms. Lo needs help with activities of daily living for a number of reasons, including the limited range of motion in her shoulder caused by her fall in February 2016, osteoarthritis, pain, and fatigue relating to chronic illness. *Id.* The report further states that Ms. Lo has Parkinson's disease, hand tremors, muscle weakness, poor balance, difficulty walking, limited ability to elevate her arms, bend or stand up for long periods of time, and frequent bladder incontinence, and documents that she sustained four to five falls in the previous three months. *Id.* On August 15, 2016, SHP issued a decision stating it would increase

Ms. Lo's home care hours back to the thirty-nine hours per week she was previously receiving. Lo Decl. ¶ 17 (Garcia Ex. N); Garcia Ex. N-5.

On September 13, 2016, Ms. Lo was hospitalized and diagnosed with a pulmonary embolism. Lo Decl. ¶ 18 (Garcia Ex. N). After she was discharged from the hospital, she was prescribed weekly blood tests. *Id.* These weekly appointments have increased Ms. Lo's need for additional home care hours because she needs a home attendant to accompany her to her appointments because she need help walking and traveling. *Id.*

2. The Imminent Harm Ms. Lo Faces

Ms. Lo needs twelve hours of home care services seven days a week. *Id.* ¶ 19. Without this level of services to assist her with activities of daily living, such as toileting, walking, bathing, and dressing, Ms. Lo is at risk of falling and suffering additional injuries. *Id.* And, due to the insufficient level of home care services Ms. Lo is currently receiving, she constantly fears not only further injuring herself due to falls while being unattended, but also that she may be forced out of her home and community and into a nursing home or other institution. *Id.* Ms. Lo is adamant that she does not want to be institutionalized in a nursing home. *Id.*

ARGUMENT

I. Plaintiffs are Entitled to a Preliminary Injunction Requiring Defendants' MCOs to Approve Necessary Home Care Services Hours

A. The Standard for Granting Preliminary Relief

Plaintiffs satisfy the standard for granting a preliminary injunction since they demonstrate “(1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3) that the public's interest weighs in favor of granting an injunction.” *Bogoni v. Gomez*, 840 F. Supp. 2d 694, 697 (S.D.N.Y. 2011)

(quoting *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152, 156 (2d Cir. 2010) (citations and internal quotation marks omitted).

District Courts within the Second Circuit routinely grant preliminary injunctive relief where, as here, governmental actors or their delegates fail or unreasonably delay providing needed Medicaid and other critical public benefits to eligible individuals or fail to conform their practices to the requirements of the ADA and other disability discrimination laws. *Strouchler v. Shah*, 891 F. Supp. 2d 504 (S.D.N.Y. 2012) (granting preliminary injunction in case brought on behalf of home care recipients under Medicaid Act, due process and ADA); *Davis v. Shah*, 2012 WL 1574944, *6 (W.D.N.Y. 2012) (granting preliminary injunction in case brought under the ADA and Medicaid Act); *Lovely H. v. Eggleston*, 235 F.R.D. 248 (S.D.N.Y. 2005) (granting preliminary injunction against New York City in class action alleging disability-based discrimination in cash assistance program); *Martin v. Weiner*, No. 06-CV-0094E(SC), 2006 WL 435477, at *2-3 (W.D.N.Y. Feb. 21, 2006) (granting preliminary injunction against county for failure to provide food stamps); *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 439-40 (S.D.N.Y. 2006) (granting preliminary injunction against New York City for failure to provide federal benefits to eligible immigrants who were the victims of domestic abuse); *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 347-48 (S.D.N.Y. 1999) (granting preliminary injunction against New York City for failing to provide food stamps and emergency cash assistance); *Morel v. Giuliani*, 927 F. Supp. 622, 639-40 (S.D.N.Y. 1995) (granting preliminary injunction against state for failure to provide benefits to eligible families).

B. Plaintiffs Will Suffer Irreparable Injury as a Result of Defendants' Wrongful Denial of Medically Necessary Home Care Services

Each of the Plaintiffs in this case has shown she is likely to suffer irreparable injury, that is, "imminent harm for which a monetary award does not adequately compensate." *Wisdom Imp.*

Sales Co. v. Labatt Brewing Co., 339 F.3d 101, 113 (2d Cir. 2003). Defendants' refusals to provide sufficient home care services to Plaintiffs have caused them harm that easily meets this standard. "A lack of medical services is exactly the sort of irreparable harm that preliminary injunctions are designed to address." *Fishman v. Paolucci*, 628 F. App'x 797, 800 (2d Cir. 2015). Courts within this Circuit have affirmed this bedrock principle repeatedly. *See, e.g., LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 55 (2d Cir. 2004) ("[T]he termination of medical benefits will ground a claim of irreparable harm."); *Strouchler*, 891 F. Supp. 2d 504, 522 (S.D.N.Y. 2012) (granting preliminary injunction on a case involving reduction of home care hours) ("[L]oss of medical care, in contravention of federal law, constitutes irreparable injury."); *Reynolds*, 35 F. Supp. 2d at 339 (finding irreparable harm where plaintiffs were denied access to welfare and Medicaid benefits); *Caldwell v. Blum*, 621 F.2d 491, 498-99 (2d Cir. 1980), *aff'd*, 446 U.S. 1311 (1980) (recognizing sufficient threat of irreparable harm where Medicaid recipients "would, absent relief, be exposed to the hardship of being denied essential medical benefits").

Even the *threat* of the denial or termination of medical benefits constitutes irreparable harm, due to the stress that an individual invariably faces when she cannot obtain the medical care she needs for her serious medical conditions. *Strouchler*, 891 F. Supp. 2d at 522 (granting preliminary injunction curtailing New York City's ability to reduce or terminate home care services for Medicaid recipients) ("The mere *threat* of a loss in medical care, even if never realized, constitutes irreparable harm. . . . [A]nxiety exacerbates symptoms of mental illness and worsens pain. Thus, even home care recipients who do receive aid pending their fair hearing are likely to suffer irreparable harm as a result of the threatened reduction in their care."); *accord Whelan v. Colgan*, 602 F.2d 1060, 1062 (2d Cir. 1979) ("the threatened termination of benefits

such as medical coverage for workers and their families obviously raised the spectre of irreparable injury”); *LaForest*, 376 F.3d at 56. Defendants’ denial of the additional home care services that Plaintiffs desperately need to avoid further injuries and institutionalization is already imposing, no less threatening, irreparable harm, given the anxiety and powerlessness Plaintiffs face as they worry about taking further falls and suffering greater injuries while left unattended.

C. Plaintiffs are Likely to Succeed on the Merits of Their Claims²

1. Defendants are Violating the Medicaid Act’s Availability Requirement

Under the Medicaid Act, New York’s “plan for medical assistance must . . . provide . . . for making medical assistance available . . . to all [eligible] individuals.” 42 U.S.C. § 1396a(a)(10). The Act and its implementing regulations mandate that each covered service “be sufficient in amount, duration, and scope to reasonably achieve its purpose.”³ 42 U.S.C. §1396a(a)(10)(A); 42 C.F.R. § 440.230(b); *see also* 42 C.F.R. § 441.15 (“a State Plan must provide that . . . the [state Medicaid] agency provides home health services to . . . Categorically needy recipients age 21 and over”); 42 C.F.R. § 440.210 (“a State Plan must specify that, at a

² Because Plaintiffs are likely to succeed on the merits of each of their claims, they also easily meet the Second Circuit’s alternative and more lenient “serious question” standard. *See Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010) (holding that the Second Circuit’s longstanding, alternative “serious question” standard for preliminary injunctive relief remained viable following the decision of the U.S. Supreme Court in *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)).

³ The availability requirement confers a private right of action on those entitled to Medicaid benefits. *Blessing v. Freestone* sets forth the test of when federal statutes confer private rights of action, and, under that test, federal courts look for “individual-focused terminology” that “unambiguously confer[s]” an individual right under the law. 520 U.S. 329, 340 (1997); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84, 287 (2002). Statutes that confer private rights of action are enforceable under Section 1983. *Id.* at 284. Courts have uniformly spoken that the Medicaid Act’s availability requirement confers private rights of action. *See, e.g., Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 607 (7th Cir. 2012).

minimum, categorically needy recipients are furnished ... the services defined in ... 440.70.); 42 C.F.R. §440.210(a)(1). New York's plan provides coverage to eligible Medicaid beneficiaries for home care services. N.Y. Soc. Serv. L. § 365-a(2)(d) 18 N.Y.C.R.R. § 505.14(a)(1).

The purpose of New York's home care services program is to enable disabled and elderly individuals to remain in their home while receiving the support services needed to maintain their health and safety in the community. 18 N.Y.C.R.R. § 505.14(a)(1). Plaintiffs, as recipients under New York State's Medicaid plan, are thus entitled to home care services in "sufficient amount, duration, and scope" to allow them to remain in their homes without jeopardizing their health and safety. Plaintiffs may enforce their rights under the State's plan against Defendants, as Defendants are the entities with which the State has contracted to provide Medicaid services and thus the entities that, in accordance with federal regulations, must comply with all laws that apply to the State's plan. 42 C.F.R. § 438.210(a)(3)(i).

Defendants use policies and practices that deny Plaintiffs medically necessary services to which they are entitled under the Medicaid Act and New York State's Medicaid plan. *First*, Defendants refuse to take and summarily deny requests for additional hours of care. Bucceri Decl. ¶¶ 15, 21-22 (Garcia Ex. F); Trujillo Decl. ¶¶ 11, 15 (Garcia Ex. L). *Second*, Defendants thwart requests for increased hours of care by employing assessment systems that override evidence demonstrating Plaintiffs' specific need for additional hours of care and replacing it with arbitrary, one-size-fits-all limits on hours of care. Bucceri Decl. ¶ 15 (Garcia Ex. F). *Third*, Defendants employ procedures to thwart requests for additional care by failing to require verification of voluntary hours of care, permitting a false impression in the record that care is not needed. Trujillo Decl. ¶ 17 (Garcia Ex. L). *Fourth*, Defendants employ negotiating tactics to thwart requests for additional hours by threatening to not only deny requested increases, but also

to reduce current hours of care. Trujillo Decl. ¶¶ 16-21 (Garcia Ex. L); Lo Decl. ¶¶ 11-12 (Garcia Ex. N).

Despite Plaintiffs' repeated requests that Defendants provide them with home care services sufficient in amount, duration, and scope so as to reasonably achieve the purposes of the State's plan, Defendants have repeatedly refused to provide them with the level of services that would allow them to continue to live safely in their homes and communities. As a result, Plaintiffs have fallen while unattended, sustained injuries requiring hospitalization and further medical treatment, and have been forced to experience needless pain, suffering, anxiety and stress. Bucceri Decl. ¶¶ 17-19 (Garcia Ex. F); Trujillo Decl. ¶ 13 (Garcia Ex. L); Lo Decl. ¶ 13 (Garcia Ex. N). These episodes illustrate Plaintiffs' patent need for additional home care services hours and the risks to their health and safety created by Defendants' refusals to provide them with sufficient levels of service. Plaintiffs have made clear their desire to remain at home with their families and their communities. Bucceri Decl. ¶ 23 (Garcia Ex. F); Trujillo Decl. ¶ 24 (Garcia Ex. L); Lo Decl. ¶ 19 (Garcia Ex. N).

State regulations governing these home care services show that Plaintiffs are entitled to the level of care they are requesting. Under these regulations, Medicaid recipients are entitled to "assistance with nutritional and environmental support functions and personal care functions" that are "essential to the maintenance of the patient's health and safety in his or her own home." 18 N.Y.C.R.R. § 505.14(a)(1). Defendants' own assessments that Plaintiffs require assistance with all activities of daily living, and the repeated falls and related injuries Plaintiffs have suffered while left unattended, make clear that Plaintiffs are not receiving the level of assistance they need to maintain their health and safety in their own homes. *See, e.g.*, Bucceri Decl. ¶¶ 7, 9,

13, 17-23 (Garcia Ex. F); Trujillo Decl. ¶¶ 9, 11, 13-18, 24 (Garcia Ex. L); Lo Decl. ¶¶ 10-19 (Garcia Ex. N).

Defendants' refusals to provide Plaintiffs with home care services at a level sufficient to maintain their health and safety violate the Medicaid Act's availability requirement and thus Plaintiffs are likely to succeed on the merits of their claims under that provision. *See* 42 U.S.C. § 1396a(a)(10)(A); 42 C.F.R. § 440.230(b); 18 N.Y.C.R.R. § 505.14(a)(1).

2. Defendants are Violating the Medicaid Act's Reasonable Promptness Requirement

Defendants are using a combination of tactics to delay and deny the provision of sufficient home care services to Plaintiffs in violation of the Medicaid Act's Reasonable Promptness requirement, which mandates that all covered and medically necessary services "shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). The tactics being used by Defendants include: (1) refusing to take Plaintiffs' requests for an increase in home care hours (*see, e.g.*, Bucceri Decl. ¶ 21 (Garcia Ex. F); Trujillo Decl. ¶¶ 11, 15 (Garcia Ex. L)); (2) the parceling out of hours in small increments, insufficient to meet Plaintiffs' needs (*see, e.g.*, Bucceri Decl. ¶ 15 (Garcia Ex. F); Lo Decl. ¶ 17 (Garcia Ex. N)); and (3) arbitrarily reducing Plaintiffs' home care hours as a "first offer" strategy. *See, e.g.*, Trujillo Decl. ¶¶ 16-21 (Garcia Ex. L); Lo Decl. ¶¶ 10-12 (Garcia Ex. N). The delays, denials, and reductions Plaintiffs have encountered in trying to obtain a sufficient level of home care services is the antithesis of the "reasonably prompt" delivery of care that the Medicaid Act requires. *See Doe v. Chiles*, 136 F.3d 709, 717 (11th Cir. 1998); 42 U.S.C. § 1396a(a)(8). Here, each Plaintiff has endured unreasonable delays of at least three months for their desperately needed home care services. Ms. Bucceri has been waiting over five months since her original request to receive an increase in her home care hours. Bucceri Decl. ¶ 7 (Garcia Ex. F). Ms.

Trujillo has been waiting at least six months since her request for an increase in home care hours. Trujillo Decl. ¶ 14 (Garcia Ex. L). Ms. Lo has been waiting three months since her request for an increase in home care hours. Lo Decl. ¶ 14 (Garcia Ex. N).

The Medicaid Act mandates that all covered and medically necessary services “shall be furnished with reasonable promptness to all eligible individuals.” 42 U.S.C. § 1396a(a)(8). As noted, home care services are a covered service under the Act and New York’s plan. 42 U.S.C. § 1396a(a)(10)(D); 18 N.Y.C.R.R. § 505.14(a)(1). The Act’s implementing regulations refine the statutory right to reasonable promptness by requiring that a state “[f]urnish Medicaid promptly to [recipients] without any delay caused by the agency’s administrative procedures.”⁴ 42 C.F.R. § 435.930. State regulations define reasonable promptness as providing services no more than seven days after the completion of an assessment. 18 N.Y.C.R.R. § 505.14(b)(4)(iv). The contract between Defendants and New York State further mandates that plans issue decisions about service increase requests within a maximum of fourteen days of the request (but within one day of the receipt of necessary information). MLTC Model Contract, Appendix K, section. 3; MAP Model Contract, Appendix F, section 3. Defendants have subjected Plaintiffs to unreasonable delays in care that far surpass these timelines.

Defendants have violated the Medicaid Act’s mandate by grudgingly doling out home care services hours to Plaintiffs in bits and pieces, never providing anywhere near the amount of services they require to remain safely in their homes and communities (*see, e.g.*, Bucceri Decl. ¶15 (Garcia Ex. F); Lo Decl. ¶ 17 (Garcia Ex. N)), and by arbitrarily reducing their hours,

⁴ Because the Act’s reasonable promptness mandate “is clearly intended to benefit Medicaid-eligible individuals,” the requirement creates a private right of action enforceable under 42 U.S.C. § 1983. *Chiles*, 136 F.3d at 719; *see also Shakhnes v. Berlin*, 689 F.3d 244, 260 (2nd Cir. 2012) (finding the reasonable promptness requirement of 42 C.F.R. § 1396a(a)(3) privately enforceable); *Doe v. Kidd*, 501 F.3d 348, 355–57 (4th Cir. 2007).

forcing them to waste time and energy appealing these decisions and denying them the ability to request an increase in home care hours while a decision was pending. *See, e.g.*, Trujillo Decl. ¶¶ 16-21 (Garcia Ex. L); Lo Decl. ¶¶ 10-12 (Garcia Ex. N).

Plaintiffs are likely to succeed on the merits of this claim as each Plaintiff has been forced to endure delays that cannot be considered reasonable. Each has sustained injuries and each is at risk of institutionalization as a result. Each is experiencing needless stress and anxiety as a result of Defendants' procedures and practices. *See, e.g.*, Bucceri Decl. ¶¶ 17-19, 23 (Garcia Ex. F); Trujillo Decl. ¶¶ 13, 15-16, 24 (Garcia Ex. L); Lo Decl. ¶¶ 10, 16, 19 (Garcia Ex. N).

3. Defendants are Violating the ADA and Section 504

The tactics used by Defendants to delay and deny the provision of sufficient home care services to Plaintiffs also violate the civil rights guaranteed them by the ADA and Section 504. Defendants violate the mandates of these anti-discrimination laws in two ways. *First*, Defendants fail to provide adequate home care services to Plaintiffs, which places them at risk of being institutionalized in the more restrictive setting of nursing homes. *Second*, Defendants use methods of administration that deprive Plaintiffs of meaningful access to home care services – defeating the very purpose of the Managed Long Term Care Program.

Title II of the ADA, codified at 42 U.S.C. §§ 12101-12118, and Section 504, codified at 29 U.S.C. § 701, protect the rights of disabled persons who receive or are eligible for state-administered or -funded services. 42 U.S.C. § 12132 (ADA); 29 U.S.C. § 794(a) (Section 504). These laws are designed to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for each individual” with a disability. 42 U.S.C. § 12101(a)(7); 29 U.S.C. § 701(b)(1).

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the

services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Similarly, Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). Because the anti-discrimination standards imposed by Title II of the ADA and Section 504 “are generally equivalent,” courts “treat claims under the two statutes identically in most cases.” *Davis v. Shah*, 821 F.3d 231, 259 (2d Cir. 2016) (internal quotations omitted); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

The ADA defines an individual’s disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual,” which includes “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 28 C.F.R. § 35.104. To qualify as an individual with a disability under the ADA, a person must, “with or without reasonable modifications to rules, policies, or practices,” meet the “essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2). Section 504’s eligibility requirements are similar. *See* 28 C.F.R. § 41.32.

Each Plaintiff suffers from a number of chronic and acute health issues that substantially limits most, if not all, of her activities of daily living, including toileting, walking, speech, dressing, bathing, and feeding. *See, e.g.*, Bucceri Decl. ¶¶ 4-6 (Garcia Ex. F); Trujillo Decl. ¶¶ 3-4 (Garcia Ex. L); Lo Decl. ¶ 4 (Garcia Ex. N). They are also Medicaid recipients. Bucceri Decl. ¶ 3 (Garcia Ex. F); Trujillo Decl. ¶ 2 (Garcia Ex. L); Lo Decl. ¶ 2 (Garcia Ex. N). Plaintiffs are thus qualified persons with disabilities within the meaning of the ADA and Section 504.

a. The Defendants’ Denial of Plaintiffs’ Home Care Services Requests Places Them at Risk of Unnecessary Institutionalization in Violation of the ADA’s and Section 504’s Integration Mandates.

The ADA and Section 504 share a critical purpose – known as the “integration mandate” – of preventing disabled persons from being relegated to institutionalized settings such as nursing homes, where they will live only amongst other disabled individuals, effectively segregated on the basis of their disability. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 599-600 (1999). In *Olmstead*, the Supreme Court confirmed that the unjustified isolation of disabled persons in institutionalized care facilities constitutes discrimination on the basis of disability under the ADA (and, by extension, Section 504). *Id.* The Court explained that such unjustified isolation “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life” and “severely diminishes the everyday life activities of individuals, including family relations [and] social contacts.” *Olmstead*, 527 U.S. at 600-01. Thus, “the integration mandate . . . requires a state to provide community-based treatment” for persons with disabilities when (1) “the State’s treatment professionals determine that such placement is appropriate,” (2) “the affected persons do not oppose such treatment,” and (3) “the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with [similar] disabilities.” *Id.* at 607; *see also Davis*, 821 F.3d at 262.

Regulations promulgated under the ADA reflect this integration mandate, requiring state and local governments to provide their services, programs and activities in “the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). The “most integrated setting” means the “setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.” Statement of the Department of

Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, available at http://www.ada.gov/olmstead/q&a_olmstead.htm (citing 28 C.F.R. 35, App. A (2010)). When the policies of a state or its delegates discriminate against disabled individuals by creating unjustified isolation, the state must make “reasonable modifications in policies, practices, or procedures . . . unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).

The integration mandate applies to persons at serious risk of being segregated or institutionalized; they “need not wait until the harm of institutionalization or segregation occurs.” *Davis*, 821 F.3d at 262-63. (collecting cases from other jurisdictions and quoting the Department of Justice’s own guidance, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, available at https://www.ada.gov/olmstead/q&a_olmstead.htm (the “DOJ Olmstead Guidance”)).

Plaintiffs are likely to succeed on their *Olmstead* claim. The State’s professionals have already determined that the Plaintiffs can live in the community – that is the whole purpose of the home care services program. Plaintiffs clearly want to remain in the community. Bucceri Decl. ¶ 23 (Garcia Ex. F); Trujillo Decl. ¶ 24 (Garcia Ex. L); Lo Decl. ¶ 19 (Garcia Ex. N). And, under New York State’s Medicaid plan, home care services are to be provided based on need and are not to be arbitrarily limited because of the costs an MCO might incur.

Failing to provide a qualified disabled person access to necessary home care services is one of the clearest examples of the type of *Olmstead* violation that leads to a serious risk of institutionalization. *M.R. v. Dreyfus*, 697 F.3d 706, 720 (9th Cir. 2012) (reversing the denial of a preliminary injunction motion for increased home care hours, because the reduction in services

placed plaintiffs at serious risk of institutionalization); *see also Pashby v. Delia*, 709 F.3d 307, 324 (4th Cir. 2013) (finding that the district court did not abuse its discretion in preliminarily enjoining state actors, under both the ADA and Section 504, from implementing a change in eligibility requirements that made disabled persons ineligible for continuing home care services); *Haddad v. Arnold*, 784 F. Supp. 2d 1284 (M.D. Fla. 2010) (granting a preliminary injunction mandating the provision of home care services to disabled persons at risk of institutionalization); *Crowe v. Miss. Div. of Medicaid*, No. 3:11-CV-00366-CWR-LRA, 2012 WL 4062798, at *5 (S.D. Miss. Sept. 14, 2012) (denying State's motion to dismiss when plaintiff sued the State for failure to grant the requested increase in home care services); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1175 (N.D. Cal. Sept. 10, 2009) (granting a preliminary injunction to prevent a reduction in home care services and finding that the reduction likely violated the integration mandate); *Radaszewski v. Maram*, No. 01 C 9551, 2008 WL 2097382, at *15 (N.D. Ill. Mar. 26, 2008) (finding that the State was required to continue to provide plaintiff with the same level of home care services).

Here, Plaintiffs are at serious risk of institutionalization if they do not receive the increased level of home care services they have requested. While unattended, Plaintiffs have suffered repeated falls, resulting in injuries (and sometimes hospitalizations), that further exacerbate the pain and suffering that Plaintiffs experience on a daily basis. Bucceri Decl. ¶¶ 17-18 (Garcia Ex. F); Trujillo Decl. ¶ 13 (Garcia Ex. L); Lo Decl. ¶¶ 10, 13 (Garcia Ex. N). Plaintiffs are at severe risk of sustaining more falls, injuries, hospitalizations, and greater pain and suffering so long as Defendants do not provide them with sufficient hours of home care services. None of them have "voluntary" support that can replace their need for services. Plaintiffs require the increase in home care hours requested to avoid these risks and be able to

live in their homes and communities safely. Absent obtaining relief from this Court, Plaintiffs will likely be forced into nursing homes, resulting in isolation from their homes and communities.

b. Defendants Are Employing Methods of Administration that Have a Discriminatory Effect and Violate the ADA and Section 504 of the Rehab Act.

The Department of Justice regulations implementing Title II of the ADA provide that Defendants may not:

Directly or through contractual or other arrangements utilize ... methods of administration (i) [t]hat have the effect of subjecting qualified individuals with a disability to discrimination on the basis of disability; [and] (ii) [t]hat 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 disability.

28 C.F.R. § 35.130(b)(3). Section 504 contains similar requirements that prohibit methods of administration that result in disability-based discrimination. *See* 28 C.F.R. § 41.51(b)(3)(i); 45 C.F.R. § 84.4(b)(4).

Defendants employ various methods of administration by which Plaintiffs are forced to repeatedly make requests for adequate hours of care – even though each Plaintiff has disabilities that impede her ability to endure such a sustained and repeated process. *See, e.g.*, Bucceri Decl. ¶ 21 (Garcia Ex. F); Trujillo Decl. ¶¶ 11, 15 (Garcia Ex. L). Such discriminatory methods of administration defeat the very purpose of the MLTC program and prevent Plaintiffs from accessing the care to which they are entitled. Thus, Plaintiffs are thus likely to succeed on the merits of this claim. *See Brantley*, 656 F. Supp. 2d at 1175; *see also Conn. Office of Protection & Advocacy for Persons with Disabilities v. Conn.*, 706 F. Supp. 2d 266, 277-78 (D. Conn. 2010) (holding that plaintiffs stated valid method of administration claim where defendant “failed to

adequately assess and identify the long-term care needs of Plaintiffs and the Class they represent and to determine whether those needs could be appropriately met in integrated, community-based settings”).

Defendants’ methods of administration that violate the ADA and Section 504 take several forms. *First*, Defendants refuse to take Plaintiffs’ requests for additional hours of care and force them to navigate through a system requiring them to repeatedly make the same requests for additional hours of care, even though each Plaintiff has impairments that affect her stamina and ability to persist in such pursuits. Bucceri Decl. ¶ 21 (Garcia Ex. F); Trujillo Decl. ¶¶ 11, 15 (Garcia Ex. L). *Second*, Defendants thwart requests for increased hours of care by employing assessment systems that override evidence demonstrating Plaintiffs’ specific need for additional hours of care and replacing it with arbitrary, one-size-fits-all limits on hours of care. Bucceri Decl. ¶ 15 (Garcia Ex. F). *Third*, Defendants employ procedures to thwart requests for additional care by failing to require verification of voluntary hours of care, permitting a false impression in the record that care is not needed. In Ms. Trujillo’s case, the lack of an effective process to verify that she had voluntary care has left her completely without care on weekends based on a false assumption that a family member or friend was available. Trujillo Decl. ¶¶ 7, 17 (Garcia Ex. L).

Fourth, Defendants employ a variety of sharp negotiating tactics to thwart requests for additional hours by threatening to not only deny requested increases, but also to reduce current hours of care. Trujillo Decl. ¶¶ 16-21 (Garcia Ex. L); Lo Decl. ¶¶ 11-12 (Garcia Ex. N). Or, Defendants respond with arbitrarily small increments when their own assessments reveal a level of far greater need. Bucceri Decl. ¶ 15 (Garcia Ex. F).

The discriminatory methods Defendants use violate the ADA because they require Plaintiffs to navigate through a thicket in which they are forced to repeatedly make requests for

adequate hours of care. They have erected barriers requiring a degree of dogged persistence to penetrate – knowing, perhaps even banking on, the fact that each Plaintiff has disabilities that impede her ability to endure such a sustained and repeated process. Whether deliberate or not, Defendants’ policies have a discriminatory effect and thus violate the methods of administration requirements of the ADA and Section 504.

4. Plaintiffs Are Likely to Succeed on their Due Process Claims

Plaintiffs are likely to succeed on one or more of their Due Process claims. The *Mathews v. Eldridge* balancing test focuses on three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976).

Plaintiffs could not have a stronger personal interest in receiving the home care services that they desperately need and are entitled to receive: they depend on home care services for their health and safety and their ability to live in their own homes instead of being institutionalized. *Greenstein by Horowitz v. Bane*, 833 F. Supp. 1054, 1076 (S.D.N.Y. 1993) (plaintiffs have property interest in Medicaid benefits). As to the second factor, Defendants’ flawed assessment procedures create substantial risks that Plaintiffs will be deprived of their interests in receiving sufficient home care services under New York’s Medicaid program. Defendants fail to accurately assess the voluntary support that a recipient actually has that can be substituted for the care Defendants would otherwise provide (and pay for). Defendants’ mistaken reliance on voluntary care that is not actually available can have dire, if not catastrophic, consequences for Plaintiffs. Ms. Trujillo’s experience illustrates this serious risk of erroneous deprivations. She receives no services on the weekend because Defendants mistakenly claim she has family or

friends who are voluntarily providing services. Trujillo Ex. 1. But this simply is not true. Trujillo Decl. ¶¶ 7, 17 (Garcia Ex. L). And, Plaintiffs have taken falls and suffered injuries when left unattended. Bucceri Decl. ¶ 9 (Garcia Ex. F); Trujillo Decl. ¶ 13 (Garcia Ex. L); Lo Decl. ¶¶ 10-13 (Garcia Ex. N).

Some relatively simple procedures would reduce the risk of error from Defendants' flawed procedures. *First*, recipients should be informed that they are not required to obtain voluntary care providers. *Second*, prospective voluntary care providers should be informed that they are not required to provide informal care, that it is voluntary, that the medical needs assessment is objective, and that there are no arbitrary limits such that the recipient will not be penalized if she does not have family or friends who can step in. *Third*, the actual number of hours and schedule for when voluntary care will be provided should be presented to, and signed off by, the recipient and the voluntary care provider. Such a simple process would have resulted in Ms. Trujillo's receiving the hours of care she needs on the weekend. Trujillo Decl. ¶¶ 7, 17 (Garcia Ex. L). Defendants could not dispute her medical need for care on the weekends, as Ms. Trujillo's needs and limitations do not change on weekends, and no one would have voluntarily signed a document agreeing to provide her with that weekend care. *Id.*

The third *Mathews* factor, weighing of the public or government interest, tilts heavily in favor of the Plaintiffs. Procedural safeguards such as those suggested would impose a minimal burden on Defendants. The Defendants are already supposed to discuss the care to be provided with both the individual and the voluntary caregiver. *See, e.g.*, DOH Office of Health Insurance Programs, Administrative Directive, Apr. 9, 2012 (12 OHIP/ADM-1), *available at* https://www.health.ny.gov/health_care/medicaid/publications/adm/12adm1.htm. The additional steps would simply require a small degree of formalization to ensure there is no

misunderstanding as to the caregivers' availability and willingness to volunteer. There ADA reflects the strong public interest in the values that our society places on maintaining the dignity and independence of those with disabilities and protecting them against unnecessary institutionalization and isolation. *See* 42 U.S.C. §§ 12101(a)(b) (reciting Congressional findings and intent). Finally, erroneous decisions on home care services levels that lead to hospitalization or institutionalization of Medicaid recipients serve no legitimate public interest (*Strouchler*, 891 F. Supp. 2d at 525) and may ultimately impose tangible financial costs on the government.

Applying the *Mathews* balancing test, Plaintiffs are very likely to succeed on this Due Process claim that the Defendants lack adequate procedures to protect against their erroneous decisions relying on supposedly voluntary care.

Plaintiffs are also likely to prevail on their Due Process claim that Defendants are refusing to accept requests for additional care (and thus failing to issue decision notices on those requests) and misleading Plaintiffs as to the availability of additional hours of care. *See, e.g.*, Bucceri Decl. ¶¶15, 21-22 (Garcia Ex. F); Trujillo Decl. ¶¶11,15 (Garcia Ex. L); Lo Decl. ¶¶ 11-12 (Garcia Ex. N). These are procedural flaws that violate fundamental tenets of due process. For much the same reasons as stated above, weighing the risk of error, the consequences of such errors and the varying public interests, the resulting calculus militates strongly in Plaintiffs' favor as these overwhelm any administrative costs associated with implementing basic procedural safeguards such as ensuring requests are recorded and acted upon by providing recipients with tracking numbers or receipts whenever requests are made. *See Strouchler*, 891 F. Supp. 2d at 522-27 (granting preliminary injunction based on inadequate notices to home care recipients).

D. The Balance of Hardships Tips Decidedly in Plaintiffs' Favor

In preliminary injunction motions, courts routinely face the question of whether a balancing of the hardships favors a disabled person who is at risk of segregation and

institutionalization versus a state actor (or its delegate) that seeks to conserve resources by not providing the disabled person with the level of home care services needed to avoid such segregation and isolation. Courts speak uniformly and authoritatively in these situations: the balance of hardships tips decidedly in favor of the disabled persons. *See, e.g., M.R.*, 697 F.3d at 737-38 (holding, in analogous circumstances, that “the balance of the equities tips sharply in favor of Plaintiffs”); *see also Pashby*, 709 F.3d at 329 (same); *A.H.R. v. Wash. State Health Care Auth.*, No. C15-5701 (JLR), 2016 WL 98513, at *16-18 (W.D. Wash. Jan. 7, 2016) (where the balancing of hardships pits disabled plaintiffs at serious risk of institutionalization against the state’s budgetary considerations, “[the court] has little difficulty concluding that the balance of hardships tips decidedly in Plaintiff[s]’ favor”) (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)); *Haddad*, 784 F. Supp. 2d at 1307 (“the balance of harms clearly lies in Plaintiff’s favor” where she was at serious risk of institutionalization absent granting of injunction); *Brantley*, 656 F. Supp. 2d at 1177 (“where the issue concerns the proposed reduction in medical benefits to indigents due to budgetary concerns, the Ninth Circuit has recognized that both the balance of hardships and public interest favor plaintiffs”).

Within this Circuit, New York State did not even bother to contest the fact that the balancing of hardships tipped decidedly in plaintiffs’ favor when plaintiffs with disabilities, facing a serious risk of being placed into nursing homes, were seeking injunctive relief. *Davis*, 2012 WL 1574944, at *4, 6.

The balance of hardships tips even further in favor of granting the preliminary injunction where, as here, costs associated with emergency room visits, hospitalizations and institutionalization – the harm Plaintiffs seek to prevent – may well be costlier to the state than the relief sought, i.e., the state’s provision of appropriate levels of home care services. *See M.R.*,

697 F.3d at 737 (“Nor is it clear that the state, on balance, will save money by cutting the services at issue in this case, given the cost to the state in institutionalizing Plaintiffs.”); *see also* *A.H.R.*, 2016 WL 98513, at *18 (holding that balancing of hardships favors plaintiffs with disabilities even more clearly “in light of evidence in the record that suggests that [the action to be enjoined] may have an adverse, rather than beneficial, effect on the State’s budget”) (quoting *M.R.*, 697 F.3d at 738); *Radaszewski*, 2008 WL 2097382, at *14 (“Providing [plaintiff with] sixteen hours per day of skilled nursing care in his home and ancillary costs associated with this health care costs less than the cost of [his] health care if he was placed in a hospital.”).

E. The Public Interest Weighs Heavily in Favor of Issuing an Injunction

Just as the courts have spoken uniformly that a balancing of the hardships favors a disabled person over the state or its delegate when disabled persons face involuntary consignment to an institution such as a nursing home, so, too, have the courts spoken uniformly that the public interest weighs in favor of the disabled persons. This is true of the courts within this Circuit. *See, e.g., Strouchler*, 891 F. Supp. 2d at 525 (finding that the public interest weighed “heavily in favor” of injunctive relief requiring DOH to reinstate home care services); *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209, 2010 WL 933750, at *3 (E.D.N.Y. Mar. 11, 2010) (stating “the public has a strong interest in the prompt remediation of systemic discrimination against a vulnerable population”); *Olson v. Wing*, 281 F. Supp. 2d 476, 489 (E.D.N.Y. Feb. 14, 2003) (finding the grant of a preliminary injunction in favor of recipients of Disaster Relief Medicaid was in the public interest).

It is also true of the courts outside of this Circuit. *See, e.g., Bontrager*, 697 F.3d at 612 (“Although [in considering the public interest] we are mindful of potential budgetary concerns, these interests do not outweigh Medicaid recipients’ interests in access to medically necessary health care.”); *Indep. Living Ctr. of S. Cal. Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir.

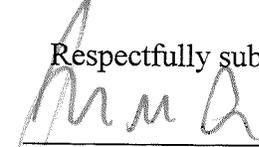
2009), *vacated and remanded on other grounds sub nom., Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (stating there is “a robust public interest in safeguarding access to health care for those eligible for Medicaid, whom Congress has recognized as ‘the most needy in the country’”) (citing *Schweiker v. Hogan*, 457 U.S. 569 (1982)); *Lopez*, 713 F.2d at 1437 (“It is not only the harm to the individuals involved that we must consider in assessing the public interest. Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges . . . even though the expenditure of governmental funds is required.”); *A.H.R.*, 2016 WL 98513, at *18 (finding that a robust public interest favors providing home care services to Medicaid recipients when needed to prevent institutionalization); *Ill. Hosp. Ass’n. v. Ill. Dep’t of Pub. Aid*, 576 F. Supp. 360, 371 (N.D. Ill. 1983) (“Once a state has voluntarily elected to participate in the Medicaid program, . . . [it cannot] characterize its duty to comply with the requirements of [the program] as constituting a hardship to its citizens.”).

CONCLUSION

Plaintiffs asks that the Court grant their requests for a preliminary injunction, requiring Defendants to provide Ms. Bucceri with seventy hours of home care services per week, Ms. Trujillo with fifty-six hours of home care services per week, and Ms. Lo with eighty-four hours of home care services per week.

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