**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| **T.B.** by and through his parents THOMAS BOYCE and MARGARET BOYCE, **Q.G.** by and through his parents MICHAEL GOLDBERG and MAYUMI GOLDBERG, **M.K.** by and through her parents BRADLEY KISH and MARY KISH, **X.N.** by and through his parents FRANCISCO NEVAREZ and LISETTE NEVAREZ, **S.P.** by and through her parents FRANK PETERSON and CORELYN PETERSON, **O.W.** by and through his parents, JEFFREY WELLMAN and AMY WELLMAN, individually and on behalf of a class, | ) | |
| Plaintiffs, | ) | Judge: Robert W. Gettleman |
| vs. | ) | Magistrate: Sidney I. Schenkier |
| **JULIE HAMOS**, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, | ) | |
| Defendant. | ) | |

## PLAINTIFFS MOTION FOR CLASS CERTIFICATION

Now comes the Plaintiffs, by and through their attorneys, Robert H. Farley, Jr., Ltd., Cahill & Associates and Michelle N. Schneiderheinze and requests that this Court pursuant to Rule 23 of the F.R.C.P. to certify a class of Plaintiffs. In support of this motion, the Plaintiffs state as follows:

1. Plaintiffs seek certification of this action as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

2. The Class consists of the following:

> All medically fragile and technology dependent children who are either enrolled or seek enrollment in either the State of Illinois' Medically Fragile, Technology Dependent Medicaid Waiver (MF/TD) or who are either enrolled or seek enrollment under the State of Illinois Medicaid (Private Duty Nursing - "PDN") Services for children, who receive in-home services but do not meet the institutional level of care to qualify for services under the MF/TD Waiver.

3. The Class is so numerous that joinder of all persons is impracticable. The Defendant, the Illinois Department of Healthcare and Family Services has stated in June, 2012, the following:

> Currently, [Illinois] serves medically fragile and technology dependent children in two different ways: approximately 550 children are served by the Medically Fragile, Technology Dependent Waiver ("MFTD Waiver") and approximately 500 other technology dependent children under Medicaid, who receive in-home services but do not meet the institutional level of care to qualify for services under the MFTD Waiver.[1]

The Defendant has also prepared a "Fact Sheet" for both programs for fiscal year 2010 which reflects that 622 were enrolled in the MF/TD Waiver and 527 persons were enrolled in the Private Duty Nursing (PDN) Services for Children. See Exhibit "B" - www.hfs.illinois.gov/assets/ccmn_mftd_hcbs_factsheet.pdf and See Exhibit "C" - www.hfs.illinois.gov/assets/ccmn_pdnfactsheet.pdf

The class members have limited financial resources and are unlikely to institute individual actions.

4. The claims of the class members raise common questions of law and fact. These include:

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[1] See Exhibit "A" - HFS - "Questions and Answers on the Medicaid Program for Medically Fragile and Technology Dependent Children" at No. 2. (See: www2.illinois.gov/hfs/agency/Pages/MFTD.aspx )

(a) Whether the Defendant violated the ADA and Rehabilitation Act for medically fragile and technology dependent children by reducing the level of funding to a nursing facility level of care as opposed to a hospital level of care rate which places the Plaintiffs and Class at risk of institutionalization.

(b) Whether the Defendant violated the ADA and Rehabilitation Act for medically fragile and technology dependent children by reducing the level of funding to a nursing facility level of care as opposed to a hospital level of care rate and whether the reduction results in the denial of medically necessary services and a risk of institutionalization.

(c) Whether the Defendant violated the ADA and Rehabilitation Act for medically fragile and technology dependent children by excluding all medical fragile children with parental incomes exceeding 500% of the federal poverty rate for home and community-based services.

(d) Whether the ADA and Rehabilitation Act permits the Defendant to reduce the level of funding to a nursing facility level of care as opposed to a hospital level of care which results in a reduction of medical services for disabled persons even though there has been no change in their medical needs.

(c) Whether a fundamental alteration of the Illinois disability programs would occur if the Defendant provided funding to continue the same level of services for the Plaintiffs and the putative class.

(e) Whether the Illinois disability programs can reasonably accommodate a modification to their existing programs to allow the Plaintiff and putative class to continue to receive the same level of care in the community.

(f) Whether the Medicaid Act permits Illinois to impose cost sharing or co pays on

children with parental incomes exceeding 150% of the federal poverty rate for home and community-based services.

(g) Whether the Early and Periodic Screening, Diagnostic, and Treatment Services (EPSDT) provisions are mandated by a persons enrollment in the MF/TD Waiver and whether the EPSDT provisions require the furnishing of all medically necessary skilled nursing services irrespective of whether their is a cap or limit on skilled nursing services based on a nursing facility level of care.

The common questions of fact and law predominate over questions affecting only individual class members.

5. The Plaintiffs' claims are typical of the class members' claims because they are based on the same factual, legal and remedial theories as the claims of the Plaintiff Class. The Plaintiffs' and Class members are qualified persons with a disability under the ADA and Section 504 of the Rehabilitation Act.

6. The Plaintiffs' are adequate representatives of the class because they suffer from deprivations identical to those of the class members and has been denied the same federal rights that they seek to enforce on behalf of the other class members. The Plaintiffs' will fairly and adequately represent the interests of the other class members, many of whom are unable to pursue claims on their own behalf as the result of their disabilities. Plaintiffs' interest in obtaining injunctive relief for the violations of federal law are consistent with and not antagonistic to those of any person within the class. Plaintiffs' counsel are qualified, experienced and able to conduct the proposed litigation.

7. A class action is superior to other available methods for the fair and efficient adjudication of the controversy in that:

(i) A multiplicity of suits with consequent burden on the courts and defendants should be avoided.

(ii) It would be virtually impossible for all class members to intervene as parties-plaintiffs in this action.

8. This matter is brought as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure because the party opposing the class has acted or refused to act on grounds generally applicable to the class, making appropriate final injunctive relief. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

Wherefore, the Plaintiffs request that this Court enter an order certifying this action as a class action under Rule 23(b)(2).

Respectfully submitted,

*/s/ Robert H. Farley, Jr.*
One of the Attorneys for
the Plaintiffs

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## CERTIFICATE OF SERVICE

I, Robert H. Farley, Jr., one of the Attorneys for the Plaintiffs, deposes and states that he caused the foregoing Plaintiffs' Motion for Class Certification to be served by electronically filing said document with the Clerk of the Court using the CM/ECF system, this 9th day of July, 2012, and will cause the foregoing Plaintiffs'Motion for Class Certification, to be served on the named Defendant, by hand delivering a copy to the office of the Defendant, Julie Hamos at 401 S. Clinton, Chicago, Illinois on July 10, 2012.

*/s/ Robert H. Farley, Jr.*

# EXHIBIT "A"

# Questions and Answers on the Medicaid Program For Medically Fragile and Technology Dependent Children

We understand you have concerns regarding the restructuring of the program for medically fragile and technology dependent children. We will do our best to answer your questions, but some questions cannot be answered yet as we are still in the process of finalizing the program's restructuring. Please note that the state law and federal parameters under which the program will operate will not take effect until September 1, 2012.

Information is available on the fact sheet and in the question and answers below. The fact sheet can be found at HFS Budget Web site. As more details become final, we will post additional notifications on our Web site.

If you have additional questions, please e-mail them HFS.Director.MFTD@illinois.gov. We will compile these questions and post answers on our Web site to those questions to which we are able to respond. Please know that our staff will not be able to respond to verbal questions on the telephone. We ask for your patience and will make every effort to work with you in transitioning your child if your child will be affected by the restructuring.

*Select the Frequently Asked Question to view answer.*

1. **Why is this program changing?**
   The Medicaid program is on the brink of collapse. Changes were necessary to save the Medicaid program and these changes can be found in the SMART Act (Public Act 097-0689 pdf). One of the changes in the SMART Act was a modification to the program for medically fragile and technology dependent children, found on Pages 81 and 82. A copy of the SMART Act can be found on the HFS Budget Web site.
2. **Why do you call this a new program?**

   This is not a new program; rather, it is a restructuring of two existing programs.

   Currently, the state serves medically fragile and technology dependent children in two different ways: approximately 550 children are served by the Medically Fragile, Technology Dependent Waiver ("MFTD Waiver") and there are approximately 500 other medically fragile and technology dependent children under Medicaid who receive in-home services but do not meet the institutional level of care to qualify for services under the MFTD Waiver. The restructured program will use a consistent assessment and care coordination to assist children and their families. The restructured program will also incorporate a philosophy of consumer/family direction and shared financial responsibility, meaning that families will also have more flexibility in accessing and using services.
3. **I would like a copy of the proposed State Plan Amendment.**

   The state has not submitted a draft State Plan Amendment at this time. The state has submitted a waiver document, but this document is a draft and, therefore, not final. Draft documents are exempt from release under the Freedom of Information Act (5 ILCS 140/7). HFS will release these documents when they are finalized with the federal government. Please note that HFS had months of stakeholder input that we took into account when developing these documents (see #12).
4. **I would like to know the individual Medicaid costs for my client or child.**

   HFS would very much like to give you this. The total cost of Medicaid services is $187 million for both groups of medically fragile and technology dependent children. Individual cost data is protected by privacy laws. HFS wants to assure that these laws are followed when sharing protected health information. HFS will publicize the process to request this information on our Web site.
5. **How is the change of level of care to nursing facility in the waiver going to affect my child?**
   The change to nursing facility level of care in the waiver will not affect your child's eligibility for the program. Under a waiver, states are required to demonstrate cost-neutrality on an aggregate basis, not for each individual child. To establish the cost neutrality of the MFTD waiver, the costs of home and community-based services will be compared to the costs of nursing facility services for a population with similar needs as the MFTD population. Individual eligibility and the available services under the restructured MFTD program will be assessed individually, based on medical need, as described in #6 and #7 below.
6. **What is the Level of Care Tool for the restructured MFTD program?**

   The level of care tool will be the standardized assessment tool that determines eligibility and medical necessity for services available under the restructured MFTD program. The "level of care" in this context should not be confused with the level of care required by the federal government in waivers.
7. **How are the services changing?**

   Services provided through the program will continue to be based on medical necessity, which will be determined consistently through the level of care tool described above. In the context of this standardized assessment tool, "level of care" means the amounts and types of services necessary to meet the varied medical needs of individual children.

   Private duty nursing, the most widely used service by medically fragile and technology dependent children, including those children who currently use the MFTD Waiver, will continue to be available to all eligible children, when medically necessary, under the Early Periodic Screening, Diagnosis & Treatment (EPSDT) requirements.

   In fact, most of the medically necessary services to be provided by the restructured program will be available as a result of the State Plan and EPSDT requirements, not the MFTD Waiver. The only services remaining under the MFTD Waiver in its current draft form are home modifications, specialized medical equipment, nurse training, family training, placement maintenance counseling, and medically supervised day care. The most used of these services are the Environmental Accessibility Adaptations (EAA) and Specialized Medical Equipment and Supplies (SMES). These services will continue as waiver services, with limits. The total cost for purchase of all EAA and SMES purchases, rental, and repairs may not exceed $25,000 over five years. Respite has been eliminated as a waiver service, as families will have

more flexible use of nursing hours based on a monthly service allocation and creation of a flexible account that allows families to bank up to a week's worth of unused hours to be used for respite.

8. **What are my co-pays going to be?**

   The proposal is for families with income at or over 150% Federal Poverty Level to pay co-pays. The co-pays will be the maximum allowed by federal law, as required by the SMART Act. The amount of co-pay has not yet been finalized. Cost-sharing is an essential component in the SMART Act. With the Medicaid program on the brink of collapse, the legislature imposed co-pays for most, if not all, Medicaid services, to the extent permitted by law.

9. **Why was an income cap of 500% Federal Poverty Level imposed?**
   Because of the budget crisis, the legislature imposed income caps for this program. HFS estimates that 95% of families will continue to be eligible to receive services that are medically necessary. It is possible that there is legislative interest to raise this income cap, if additional revenues are identified. Due to the fiscal resources available to the state at this time, it is unlikely that this program will revert to a program for all families of all incomes.

10. **Will the proposed changes have a transition period for families who will not qualify? What is the transition plan?**
    Transition plans will be developed for children who no longer qualify. HFS will make every effort to work with families to make referrals to other programs and services for which your child may be eligible. If you receive a notification that your child is going to lose eligibility, you will also be informed of your right to request a fair hearing.

11. **Will the children currently in the waiver be eligible until their next renewal date, or are they going to be reevaluated on September 1, 2012?**
    Financial eligibility will be reviewed prior to September 1, 2012. However, a child's level of care eligibility will be determined at the time of the child's annual reassessment.

12. **How did the state include families in the decision-making process?**
    HFS engaged in meetings with families and other stakeholders, including doctors, therapists and other healthcare providers, for many months prior to and during the legislative session to brainstorm about ways to make this program more efficient and responsive to individual children and family needs. Many of the suggestions received by the department were incorporated into the proposed program redesign, including cost sharing, the flexibility to bank unused hours, and the use of paraprofessional staff to deliver care.

# EXHIBIT "B"

**FACT SHEET**

**Medically Fragile, Technology Dependent**
**Home and Community-Based Services (HCBS) Waiver for children under age 21**

**Program Overview:**

This program helps families care for children (birth up to age 21) who are medically fragile and technology dependent. The program offers care coordination and services to support the family by providing care for their child at home. In-home nursing services are available based on the medical needs of the child or youth. The Division of Specialized Care for Children (DSCC) manages the day to day operations of this program on behalf of the administering agency, Illinois Department of Healthcare and Family Services (HFS). The services are offered through a federal 1915(c) HCBS waiver. A waiver is a federally approved program that allows states the flexibility to design and cover services that may not otherwise be available under the state's Medical Programs to defined disability groups. The services must be designed to assist individuals to remain in their own home or live in a community setting rather than in an institution, such as a nursing facility or hospital. The cost of the services must be cost neutral to the state. The program is similar to the "Katie Beckett" waiver in other states, but this waiver is unique to Illinois.

**Expenditures for State Fiscal Year 2010:**
*Medicaid Liability*: $117,066,489
*Number enrolled*: 622
*Ave. cost pmpy**: $ 188,210
*Per Member Per Year

**Eligibility Criteria:**

- Children or youth ages birth to 21 years that meet the medical criteria, as determined by their health condition and technology needs, as evaluated by professionals(a minimum score of 50 on level of care screening assessment). The Department's eligibility criteria can be found under 89 Ill. Admin. Code 120.530.
- The family is willing and able to care for the child in their home to the fullest extent possible.
- The family is able to safely care for the child in the family's home.
- A determination is made that without the in-home support services provided through the waiver program, the child would be at risk to be in an institutionalization in a skilled nursing facility or a hospital.
- The estimated cost of the in-home support services is not greater than the cost of the institutional level of care appropriate to the child's medical need.
- Parental income is not considered, but the child's income is considered in the financial income requirements.

**Services:**

- All Medical services available under the Illinois Medicaid program such as hospitalizations, doctor visits, and medications are covered, unless the services are covered by the child's insurance.

- Services include shift nursing care in the home, provided by registered nurses, licensed practical nurses and certified nurse's aide from an approved nursing agency. The number of hours provided per week is determined by the assessment of the child's medical and nursing care needs.
- Medical equipment and supplies prescribed by the child's physician.
- Minor home modifications needed to provide access, accommodate needed medical equipment, or to assure the child's safe access and safety in the home.
- Family training that includes instruction about treatments and use of equipment as well as Cardiopulmonary Resuscitation (CPR).
- Respite (nursing) care in the child's home or in a designated community-setting to periodically relieve the family of care-giving responsibilities.
- Medically supervised day care offering technological support and nursing care provided in a licensed medical day care setting. (Currently there are no licensed providers in Illinois.)
- Placement maintenance counseling providing short-term, issue-specific family or individual counseling for the purpose of maintaining the child in the home placement.
- Nurse training to provide child specific training for the in-home nurses in the use of new or unique equipment or special needs of the child.

**Services Setting:**

- Individual homes
- Licensed Children's Community-Based Health Care Center
- Medically Supervised Day Care

**How to Access Services:**

*Point of Entry* – University of Illinois at Chicago, Division of Specialized Care for Children (DSCC) 13 Regional Offices or contact DSCC at 1-800-322-3722.

Additional information on this program can be found at http://www.uic.edu/hsc/dscc/ which includes:

- Application forms (print & mail)
- DSCC Regional Office locator (Zip code – maps)
- More information on the home care program

Medicaid Link and program information: **http://www.hfs.illinois.gov/hcbswaivers/tdmfc.html**

**Maximum Waiver Capacity:**

700

**Unduplicated Waiver Recipients:**

As of May 1, 2011, 565 children have been served in waiver year beginning 9/1/10 and ending 8/31/11. Of this number 498 are currently active.

**Initial Approval Date:**

July 1, 1985 Renewed: 09/01/2007–08/31/2012

# EXHIBIT "C"

# FACT Sheet
# Private Duty Nursing (PDN) Services for Children under Age 21

**Program Overview:**
Illinois Department of Healthcare and Family Services (HFS) Division of Medical Program provides services to children under age 21 who have been determined to have extensive medical needs, requiring ongoing skilled nursing in the home setting. Children must meet Medicaid eligibility and live in a private home. Children may be wards of the Department of Children and Family Services or served under the Adoption Assistance Program. Children receiving this PDN may not be concurrently served under the Medically Fragile, Technology Dependent (MFTD) Home and Community-Based Services (HCBS) waiver. Services are prior approved initially for 60 days with two 60-day renewal periods. After the first 180 days of service, cases are reviewed on 6-month or annual schedules depending on the medical stability of the child. Services are provided by approved Home Nursing Agencies licensed by the Department of Public Health.

**Expenditures for State Fiscal Year 2010**:
*Medicaid Liability*: $70,564,825
*Number enrolled*: 527
*Ave. cost pmpy**: $ 133,899
*Per Member Per Year

**Eligibility Criteria:**
- Children under the age of 21 who have extensive medical needs and require ongoing skilled nursing care as determined by the Department's prior approval process.
- U.S. Citizen or legal alien
- Be a resident of the State of Illinois
- Under age 21
- Eligible for the Medical Assistance Program
- Prior approved for services by the Department
- Physician order and justification for services

**Services:**
- **Skilled Nursing Services –** services are provided in a child's home by licensed nursing personnel (Registered Nurse or Licensed Practical Nurse) employed by an approved Home Nursing Agency. Services include initiation and implementation of restorative/palliative nursing procedures, coordination of plan of care and patient/family instruction.
- **Home Health Aide Services** – services are provided in a child's home by certified nurses' aides. Services include providing or assisting with personal care, bathing, mobility/transfers, and other Activities of Daily Living (ADLs).

**Services Setting:**
- Individual homes

**How to Access Services:**
*Point of Entry* –Physicians, hospital social workers or enrolled Home Nursing agencies may contact HFS at 877-782-5565.