

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
NORTHERN DISTRICT

SUPERIOR COURT

Case No. \_\_\_\_\_

**R. STUART WALLACE and ETHAN WALLACE ET AL.**  
*Plaintiffs*

v.

**STATE OF NEW HAMPSHIRE**  
**and the**  
**NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES**  
c/o Office of the Attorney General, 33 Capitol Street  
Concord, NH 03301-6397  
*Defendants*

**COMPLAINT**

**INDIVIDUAL PLAINTIFFS**

1. R. Stuart Wallace of 51 Merrill Street, Plymouth, NH 030264 and Ethan Wallace of 22B Old Ward Bridge Road, Plymouth, NH 03264, are father and son respectively. Ethan is a twenty-nine (29) year old man with autism. Ethan requires round-the-clock care and support and is dependent on his caregivers for feeding, shelter, dressing, and personal care needs in general. Ethan attended public schools in Plymouth and now resides in a community residence arranged and supported by Lakes Region Community Services, the Region III Area Agency. Stuart Wallace is the legal guardian of his son, Ethan, and since 2010 has served on the Board of Directors of the Region III Area Agency. He currently serves on the Executive Committee of the Area Agency Board as its Treasurer.

2. David Lowy is forty-one (41) years old. He experiences a moderate intellectual disability and resides at Woodberry Apartments - Great Bay Housing located at 2041 Woodbury Avenue in Newington, New Hampshire 03801-2804. David's father, John Lowy of 17

Thompson Lane, Durham, New Hampshire 03824-3022 is his legal guardian. David has been served and supported by Community Partners, the Region IX Area Agency since 1988, which is directly responsible for providing case management, residential care and supported employment services.

3. Michael Joseph Viens is fifty-four (54) years old and lives in a community residence located at 135 Beech Street in Newport, New Hampshire 03773 which is supported by Pathways of the River Valley, Inc., the Region II Area Agency. Michael is a former resident of the Laconia State School and Training Center ("LSS") and experiences significant developmental and behavioral disabilities requiring round-the-clock support and treatment. Michael is represented by his legal guardian, the Office of Public Guardian ("OPG") located at 2 Pillsbury Street, Suite 400, Concord, New Hampshire 03301.

4. Kathleen Lavery is fifty-five (55) years old and resides at 20 South Mammoth Road, Manchester, New Hampshire 03301. Kathy experiences profound mental retardation and physical limitations which, among other things, include osteoporosis and nutrition provided through a feeding or "GI" tube. Kathy requires supervision and support on a 24/7 basis. Kathy is a former resident of LSS and was moved from the state institution to a community residence in Manchester in the mid-1980s. All of Kathy's supports and services are arranged and provided by Moore Center Services, Inc., the Region VII Area Agency located at 195 McGregor Street, Unit 400, Manchester, NH 03102. Ms. Lavery is represented by her legal guardian, the Office of Public Guardian.

5. Daniel Ledoux is forty-eight (48) years old and currently lives with a home-care provider at 59 Bridge Street, Colebrook, New Hampshire arranged and supported by Northern New Hampshire Human Services, the Region I Area Agency. Daniel is diagnosed with severe

mental retardation, seizure disorder, communication disorder (non-verbal) and osteoporosis. He requires round-the-clock support and care. Daniel was placed at the LSS at the age of twenty-two (22) and lived there until 1985 when he was returned to his Colebrook, New Hampshire community. Daniel is represented by his legal guardian, the Office of Public Guardian.

6. Jonathan ("Jon") Luneau is forty-seven (47) years old and experiences severe mental retardation and spastic quadriparesis. He is completely dependent on his care providers for all basic activities of daily living, including feeding through a G-tube. Jon was originally placed at the LSS at the age of two (2) and has lived the last fourteen (14) years in a community home-provider residence in Center Barnstead, New Hampshire which is supported by Lakes Region Community Services, the Region III Area Agency. Jon is represented by his legal guardian, the Office of Public Guardian.

7. Richard ("Richie") Quinlan is fifty (50) years old and resides at Unit 2-49 Skyline Drive, Amherst, New Hampshire. Richie experiences significant intellectual disability, seizures and attendant behavioral challenges. He receives home-based residential and day support services from Gateways Community Services, the Region VI Area Agency. Richie is represented by his father and legal guardian, Richard Quinlan, who resides at 123 Spruce Lane, New London, New Hampshire 03257.

8. Erin Flynn is twenty-eight (28) years old and is severely developmentally disabled as a result of Mitochondrial Disease Complex 1. She has seizures and problems walking. She receives "around the clock" care and supervision which is provided primarily by her mother and legal guardian, Sherry Flynn, at their home located at 31 Crosby Street, Milford, New Hampshire 03055. Erin's father works two full-time jobs so that Sherry can stay home and care for their daughter. Sherry manages Erin's care and support under New Hampshire's

Medicaid Developmental Disabilities Waiver program administered by and through her local area agency, Gateways Community Services (Region VI).

9. Anne Guay is sixty-two (62) years old and lived at LSS between 1954 and 1981. She now resides in her own home at 26 Collins Drive, Marlborough, New Hampshire 03455. Anne is diagnosed with "PKU" and has a severe intellectual disorder and cerebral palsy. She has limited verbal communication and relies, in large part, on sensory feeling. For many years she has been supported by Monadnock Developmental Services, the Region V Area Agency which contracts with a vendor agency, Residential Resources, to provide virtually all of her residential and day-care services. She is represented by her legal guardian, the Office of Public Guardian.

10. Nathaniel Knight is twenty (20) years old and resides with his parents and legal guardians, Ronald and Robin Knight at 32 Giordani Lane, Sandown, New Hampshire 03873. Nathaniel has autism and receives "respite" services, family support and home modification assistance from Community Crossroads, Inc., the Region X Area Agency in Atkinson, New Hampshire.

11. Gertrude ("Gert") Currier is seventy (70) years old and is a former resident of the Laconia State School where she was admitted in 1947 at the age of five (5) and remained until 1986 when she was moved to a community residence in the Seacoast area. Ms. Currier experiences mental retardation and has numerous medical issues which cause her to be frail. One Sky Community Services, Inc., the Region VIII Area Agency, is responsible for arranging and coordinating all of her services and supports. Gertrude has lived with the same home provider, Gloria Peel, for over 17 years and remains close with her provider's (now grown) children and their families. Gertrude has a permanent residence of 130 Marshview Circle, Seabrook, NH 03874. The Office of Public Guardian is her legal representative.

12. Sarah Young is twenty-one (21) years old. She lives with her parents, John and Alice Young, at 7 Manchester Street, Pittsfield, New Hampshire 03263. She is an intelligent young woman with a severe disability resulting from autism. She is non-verbal and requires 24/7 care. She needs help with many Activities of Daily Living (ADLs), including proper bathing, medication, food, clothing and safety. Community Bridges, the Region IV Area Agency, supports Sarah through the Self Direct Services Program. This includes acquiring an annual budget and developing, implementing and monitoring her progress towards annual goals. Community Bridges hires and trains Sarah's educator and support person. Sarah has been a client of Community Bridges for over 17 years.

13. Garrett Young is nineteen (19) years old. He lives with his sister, Plaintiff Sarah Young, and their parents in Pittsfield, NH. Garrett's diagnosis is autism/PDD (Pervasive Development Disorder). Garrett can talk, but is not always able to communicate his wants and needs clearly, especially the more abstract ones. Garrett can attend to many of his personal care needs, for example, bathing, dressing and making simple meals. He requires daily assistance with medication, making and attending appointments, food shopping, telling time and managing money. Garrett has little to no concept of danger and needs 24/7 supervision. He requires an aide at school and church. Garrett has been supported for about 16 years by Community Bridges, the Region IV Area Agency.

#### **ORGANIZATIONAL & REPRESENTATIVE PLAINTIFFS**

14. Plaintiff Community Support Network, Inc. ("CSNI") is a recognized Section 501 (c)(3) tax-exempt organization located at 10 Ferry Street in Concord, New Hampshire which supports Area Agencies throughout the State of New Hampshire by providing financial services, establishing policy positions on legislative and regulatory issues, and managing grant programs

benefitting the constituencies of Area Agencies - primarily those with developmental disabilities and/or acquired brain disorders.

15. The Area Agencies are recognized 501(c)(3) tax-exempt non-profit organizations charged by New Hampshire law with carrying out the State's responsibilities to provide care and support to persons with developmental disabilities throughout the State of New Hampshire, pursuant to RSA 171-A:2 and federal court orders in the case of Garrity v. Gallen, 522 F. Supp. 171 (1981). The nine Area Agencies represented here are each responsible for a specific geographic region as detailed under state law and administrative rules promulgated by the New Hampshire Commissioner of Health & Human Services. See, generally, RSA 171-A:2, I-a; RSA 171-A:2, I-b and He-M 505.02 (c-d). The Area Agencies are governed by independent, volunteer Boards of Directors made up of individuals, family members, community members and business professionals. The Area Agencies are subject to re-designation and State certification every five (5) years. In total, the Area Agencies serve over twelve thousand (12,000) individuals with developmental disabilities and acquired brain disorders across New Hampshire.

16. Plaintiff Northern Human Services is the designated Area Agency for Region I, pursuant to RSA 171-A:18 and He-M 505.04. It provides Medicaid-funded services to the developmentally disabled in the North Country and White Mountains areas of New Hampshire. It is a NH non-profit corporation with a principal place of business at 87 Washington Street, Conway, NH.

17. Plaintiff Developmental Services of Sullivan County, d/b/a Pathways of the River Valley is the designated Area Agency for Region II, pursuant to RSA 171-A:18 and He-M 505.04. It provides Medicaid-funded services to the developmentally disabled in the Sullivan

County and Upper Valley areas of New Hampshire. It is a NH non-profit corporation with a principal place of business at 654 Main Street, Claremont, NH.

18. Plaintiff Lakes Region Community Services Council is the designated Area Agency for Region III, pursuant to RSA 171-A:18 and He-M 505.04. It provides Medicaid-funded services to the developmentally disabled in the Lakes Region area of New Hampshire. It is a NH non-profit corporation with a principal place of business at 719 North Main Street, Laconia, NH.

19. Plaintiff Community Bridges is the designated Area Agency for Region IV, pursuant to RSA 171-A:18 and He-M 505.04. It provides Medicaid-funded services to the developmentally disabled in the Merrimack County area of New Hampshire. It is a NH non-profit corporation with a principal place of business at 2 Whitney Road, Concord, NH.

20. Plaintiff Monadnock Developmental Services, Inc. is the designated Area Agency for Region V, pursuant to RSA 171-A:18 and He-M 505.04. It provides Medicaid-funded services to the developmentally disabled in the Monadnock region of New Hampshire. It is a NH non-profit corporation with a principal place of business at 121 Railroad Street, Keene, NH.

21. Plaintiff Area Agency of Greater Nashua, Inc. d/b/a Gateways Community Services is the designated Area Agency for Region VI, pursuant to RSA 171-A:18 and He-M 505.04. It provides Medicaid-funded services to the developmentally disabled in the Nashua area of New Hampshire. It is a NH non-profit corporation with a principal place of business at 144 Canal Street, Nashua, NH.

22. Plaintiff One Sky Community Services, Inc. is the designated Area Agency for Region VIII, pursuant to RSA 171-A:18 and He-M 505.04. It provides Medicaid-funded services to the developmentally disabled in the Portsmouth and Seacoast areas of New

Hampshire. It is a NH non-profit corporation with a principal place of business at 755 Banfield Road, Suite 3, Portsmouth, NH.

23. Plaintiff Community Partners of Strafford County is the designated Area Agency for Region IX, pursuant to RSA 171-A:18 and He-M 505.04. It provides Medicaid-funded services to the developmentally disabled in the Strafford County area of New Hampshire. It is a NH non-profit corporation with a principal place of business at Forum Court, 113 Crosby Road, Suite 1, Dover, NH.

24. Plaintiff Community Crossroads, Inc. is the designated Area Agency for Region X, pursuant to RSA 171-A:18 and He-M 505.04. It provides Medicaid-funded services to the developmentally disabled in the Salem area of New Hampshire. It is a NH non-profit corporation with a principal place of business at 8 Commerce Drive, Atkinson, NH.

#### **DEFENDANTS**

25. Defendant State of New Hampshire is the responsible entity for administering the New Hampshire Medicaid Program in cooperation with the federal government.

26. Defendant New Hampshire Department of Health and Human Services is the department of the executive branch, the State of New Hampshire, that is responsible for providing and administering the State's Medicaid program.

#### **JURISDICTION & VENUE**

27. The Superior Court has jurisdiction over the defendants State of New Hampshire ("State") and the New Hampshire Department of Health and Human Services ("HHS" or "DHHS"), as it is the Court of general jurisdiction in New Hampshire. RSA 491:7 and RSA 498:1.

28. Venue is proper in the Northern District of Hillsborough County, as that is where one of the plaintiffs, Kathleen Lavery, resides. See paragraph 4 above and RSA 507:9.



## **INTRODUCTION**

29. This is an action for a declaratory judgment, pursuant to RSA 491:22, I, seeking a judicial declaration by this Court that Senate Bill 147-FN (Chapter 125, Laws of 2011), which set up a capitation-based managed care program for the provision of Medicaid services to certain parts of the Medicaid population in New Hampshire, does not apply to the Medicaid long-term care services provided to the developmentally-disabled or those with acquired brain disorders.

30. Since it is these services that the Area Agencies for the developmentally disabled system provides pursuant to RSA Ch. 171-A, this action also seeks a judicial determination that none of the Area Agencies are required to enter into contracts for the provision of Medicaid long-term managed care services to their Medicaid populations with the “managed care organizations” (“MCOs”) that the State and DHHS have contracted with to put the Medicaid managed care system into effect.

## **STATEMENT OF FACTS**

31. The individual plaintiffs serviced by the Area Agencies have most of their services funded through the federal Medical Assistance Program (“Medicaid”). Medicaid is a cooperative state-federal program through which the federal government provides funds to the States to assist the poor, elderly, and disabled to receive medical care. Medicaid’s vendor payment program makes direct payment to providers of services on behalf of eligible individuals. The federal and state governments share the costs of the program. Medicaid is governed by Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* and its implementing regulations. See 42 C.F.R. Parts 431-498.

32. States that participate in Medicaid must adhere to certain federal requirements. The Medicaid Act and its implementing regulations explicitly require that Medicaid recipients

have free choice in obtaining services from any qualified provider who is willing to provide those services. See 42 U.S.C. § 1396a(a)(23)(A); and 42 C.F.R. § 431.51(b).

33. Each state participating in Medicaid must have a state plan for medical assistance (“State Plan”) that meets the requirements of both 42 U.S.C. §1396a and federal regulations. The State Plan lists the services that the State will provide to eligible recipients and details how the state will fulfill the Federal conditions set forth in the Medicaid Act and implementing regulations.

34. Certain Medicaid coverage is mandatory. Once a state, like New Hampshire, has chosen to participate in the Medicaid program, it must provide certain services, drugs and equipment to qualified Medicaid recipients. In addition, states can provide optional Medicaid services and they can apply for waivers from the standard Medicaid laws and regulations to provide different services or to provide services in a different manner. This is accomplished through amendments or waivers to the State Plan. The Medicaid long-term care services that the Area Agencies provide to their clients who are developmentally disabled or have an acquired brain disorder are optional, not mandatory, services. When the State Plan has been approved, the federal government reimburses the state for a portion of the costs it incurs in providing medical assistance. Under the New Hampshire State Plan, the federal reimbursement rate is 50%.

35. Defendant State of New Hampshire, Department of Health and Human Services is New Hampshire’s single state Medicaid agency responsible for receiving federal funding under the Medicaid Act and ensuring compliance with all provisions of the Medicaid Act. DHHS is also responsible for establishing, maintaining, implementing, and coordinating the system of services to the developmentally disabled and those with acquired brain disorders. See RSA Ch. 171-A:1 *et seq.* and Ch. 137-K:9.

36. The Area Agency system of care for the developmentally disabled was a direct result of consumer and family-driven efforts started in the 1970s to implement a community-based system of care for these individual throughout the State. One part of this effort was a federal class action lawsuit initiated by consumers and guardians in 1978 against the State. The litigation was brought by N.H. Legal Assistance. Undersigned counsel John MacIntosh was part of the Legal Assistance litigation team. This was the first effort in the United States to close down a state institution for the mentally retarded. Over time, the Laconia State School population was transferred to community-based settings within the Area Agency system. The LSS was ultimately closed in 1991.

37. The Garrity lawsuit brought by N.H. Legal Assistance resulted in a finding that the conditions of treatment and the inadequate care and rehabilitation at the School violated the plaintiffs' rights under the Federal Rehabilitation Act. Garrity v. Gallen, 522 F. Supp. 171, 205-222 (1981). One of the remedies ordered by Federal Judge Shane Devine was that the State must develop and maintain a system of community-based independent non-profit entities [the "Area Agencies"] that coordinate and/or provided care of the developmentally disabled in community-based settings in various geographic areas throughout the state.

38. To do so, the New Hampshire Legislature enacted RSA Ch. 171-A which set up a system of twelve Area Agencies to accomplish this community-based care system. Individuals with Acquired Brain Disorders ("ABD") were later added to this system. The number of Area Agencies was reduced from twelve to ten in 2006.

39. Area Agencies are consumer and family-centered. Their Boards of Directors must include such representatives and each Area Agencies also has a Family Support Council which provides input and guidance to the Area Agencies. New Hampshire's Area Agencies system has

become a national model for community-based care. It currently ranks fourth among all the states for the quality of care to its consumers.

40. Historically, the New Hampshire Legislature has not funded the Area Agency system to a level where it is able to provide needed services to all of its eligible consumers. This has resulted in a “waiting list” for new members of the developmentally disabled and ABD populations that have to wait for funding. This has also caused the Area Agencies to become very cost and efficiency-conscious. Typically, an annual budget for each consumer is developed through the required Individual Service Agreement (“ISA”) process, RSA 171-A:12. Most budgets depend to a significant extent on the provision of free care from the consumer’s family members to deliver necessary care and support. In these ways, the Area Agencies already carefully manage each of their consumer’s care.

41. The Area Agency system in New Hampshire is a leader in cost effectiveness in the provision of services. Other states spend an average of \$220,119 per person per year for institutional services. New Hampshire, with no institutional services, averages \$42,959 per person, per year. Spending by the State of New Hampshire for supported living, personal assistance, supported employment, and family support services is the lowest in New England, ranks 43rd nationally, and is only 38% of the national average. Moreover, about 83% of residential (24/7) services are furnished in family homes or adult foster care homes – the most cost effective settings. Only 17% of residential services are provided in staffed settings which tend to be more costly. At the same time, Area Agencies lead New England and rank second nationally, in the percent of children and adults that are living in their own family home. Cost effectiveness and quality outcomes are the hallmark of the Area Agency system.

42. In 2010, SB 343, titled "relative to Medicaid managed care" was presented in the State Senate. The legislation as introduced required DHHS to contract with MCOs for a Medicaid managed care program. At the bill's public hearing, DHHS' State Medicaid Director submitted written testimony to the Senate Health & Human Services committee stating: "the department appreciates the art, science and tools of managed care .... NH Medicaid already employs many of the tools of managed care including utilization management ... and pharmacy benefit management services." In addition, a report cited by DHHS at the hearing (Milliman, Inc. 2009) stated that because of NH's low provider reimbursement rates and low administrative cost at the state agency level, commercial Medicaid managed care would likely not be a benefit to the State of NH. The Senate amended the legislation to only require that DHHS prepare a Request for Information ("RFI") rather than a Request for Proposal ("RFP") because the Senate believed more information was required before ordering DHHS to move forward with a Medicaid managed care program. However, the House killed the bill outright in April of 2010. The House defeated the legislation on the grounds that the bill was not necessary since DHHS could have, and had, already started to develop the RFI without a change in state law. DHHS committed to the Legislature to continue the process even without legislation. Therefore, this bill was deemed an unnecessary duplication of a process that had already been identified and was being addressed.

43. In late 2010, DHHS markedly changed its view relative to Medicaid managed care due to the drastic change in the makeup of the NH Legislature following the November 2010 election. DHHS worked with the Governor's office and Senate leadership to draft SB 147. In addition, DHHS moved from a somewhat skeptical stance to a position of strongly supporting a Medicaid managed care program. When it was introduced in January 2011, the Fiscal Note to

SB 147 stated that: DHHS “issued a Request for Information in July 2010 to solicit ideas from the managed care industry. Twelve entities responded and none of the responses offered savings.” The Fiscal Note went on to say: “The New Hampshire Medicaid program currently utilizes most of the tools used in managed care including prior authorization, care management and pharmacy benefits management.”

44. SB 147 proposed a Medicaid Managed Care program for *mandatory* (but not optional or “waivered”) Medicaid services. Medicaid provides a broad range of services and care, including most types of *acute care* for its eligible populations. In contrast, the only mandatory *long-term care* required under the Medicaid program is nursing home care. Again, Medicaid long term care services to the developmentally disabled and ABD populations are optional services for any state and are provided under a waiver granted by the federal Center for Medicare and Medicaid Services (“CMS”) to the New Hampshire Medicaid State Plan.

45. The public hearings on SB 147 were conducted in the 2011 legislative session. The words “Area Agency” were never spoken at any public hearing on SB 147. The legislation was portrayed as reform to short term, acute care medical services. DHHS stated that the changes Medicaid managed care would bring to NH included: emergency room reform, eliminating duplication of medical tests and wellness programs such as regular checkups and flu shots for Medicaid recipients. The projected savings to the N.H. Medicaid program were only 16 million dollars over the two year biennium.

46. Senate Bill 147 required DHHS to issue RFPs to vendors to provide Medicaid managed care services for a five year period. It named a number of Medicaid programs included in this managed care services program, as well as “all mandatory Medicaid covered services.” Nowhere are developmentally disabled or ABD Medicaid consumers mentioned. It stated that

“all *eligible* Medicaid members” must be enrolled in this managed care program no later than 12 months “after the contract is awarded to ... the vendors of the managed care models,” called Managed Care Organizations (“MCOs”). In context, this quote demonstrates that the Legislature did not intend “*all* Medicaid members to be in managed care, only all *eligible* Medicaid members.” [emphasis supplied]

47. No effort was made in the SB 147 legislative process to amend or repeal RSA Ch. 171-A, the Area Agency statute. However, an amendment to HB 2, the budget trailer bill, to expressly add the developmentally disabled population “without limitation” to this Medicaid managed care program was introduced in amendment 2011-2404h. It was rejected, again indicating that the Legislature did not intend that long-term care services for the developmentally disabled and those with ABD should be forced into Medicaid managed care. The bill, as amended, passed both the Senate and the House of Representatives and was signed by the Governor, with an effective date of June 2, 2011. The law had a timetable for the selection of the MCOs by January 15, 2012 with contracts between the State and the three chosen MCOs submitted to the Governor and Executive Council for review and approval by March 15, 2012.

48. Following the bill’s passage, DHHS began to make it clear in its public hearings and communication with State government and Area Agencies that it believed that SB 147 allowed it to impose Medicaid managed care for all Medicaid services across the entire New Hampshire Medicaid population. DHHS wrote the contracts with the MCOs to implement the managed care program in three steps. Step 1 covers acute care, but also exempted from coverage, among other populations: Indians, members with VA benefits, and those also eligible for Medicare. Step 2 is for long-term care supports and services, chiefly for those in nursing homes, but also including such services for the developmentally disabled and ABD populations.

Step 3 was a place-holder for any election by New Hampshire of an expansion of the Medicaid population as allowed by the federal Patient Protection and Affordable Care Act (“PPACA”).

49. These MCO contracts said next to nothing about Step 2 and Step 3. Only one page of the 137 page contract signed by each of the three MCOs concerned Step 2. No specifics of the Step 2 plan or services are mentioned. The terms “developmentally disabled” and/or “acquired brain disorder” are absent. Instead, the entirety of Step 2 is put off to a planning process between DHHS and the MCOs during the first year of Step 1 implementation, that is supposed to establish the model for Step 2, “which shall be incorporated as an amendment to this Agreement.” The State awarded these contracts to three separate MCO entities on May 9, 2012. These were the largest contracts in State history, totaling 2.3 billion dollars over three years.

50. SB 147 called for the implementation of Step 1 by July 1, 2012. CMS, however, had many questions about DHHS’ State Plan amendment for Step 1. CMS approved that amendment, but not the beginning of Step 1 services, effective September 1, 2012. The approval had a number of conditions. These included monthly status reports by DHHS to CMS regarding each MCO’s recruitment of provider panels for hospitals, primary care physicians, pharmacies, etc. DHHS has issued these monthly reports sporadically. To date, no MCO’s network has been approved by CMS.

51. At present, the earliest possible implementation of Step 2 could be 2014, making the plaintiffs’ preferred relief of a permanent injunction unavailable at the present time. Nevertheless, the remedy of a declaratory judgment is available to all of the plaintiffs. DHHS continues to assert that it is planning for the implementation of Medicaid managed care to the developmentally disabled and ABD population in Step 2. It also wrongly continues to insist that



SB 147 allows it to impose its Medicaid managed care program on long-term care services for the developmentally disabled and ABD Medicaid population.

**COUNT I**

**DECLARATORY JUDGMENT**

52. Paragraphs 1 to 51 above are incorporated herein as though set forth in full.

53. As described and detailed above, SB 147, Laws of 2011, Ch. 125 allows the Defendants, State of New Hampshire and DHHS, to implement Medicaid managed care for only those Medicaid services that are mandatory services under the Medicaid Act.

54. Medicaid long term care services provided by the Area Agencies for the developmentally disabled and those with acquired brain disorders are *not* mandatory services. They are optional services that are provided under the authority of waivers to the New Hampshire State Medicaid Plan, when approved by CMS.

55. As a result, SB 147, Chapter 125, Laws of 2011, does not allow DHHS to plan for or attempt to force long-term care services for the developmentally disabled and acquired brain disorder population into any Medicaid managed care program.

56. The plaintiffs are entitled to a declaratory judgment from this Court to that effect, as stated in paragraph 55 above, and as authorized by RSA 498:1 and 491:22, I.

Respectfully submitted,

**ALL PLAINTIFFS**

By their attorneys,

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Date: 8/15/13


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