

JHS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LYKEH MUMFORD, by and through his next friend,
Katherina Mach; and JOSEPH YALE, by and through
his next friend, Pamela Zotynia,

Plaintiffs,

v.

DEPARTMENT OF PUBLIC WELFARE OF THE
COMMONWEALTH OF PENNSYLVANIA; and
GARY ALEXANDER, in his official capacity as
Acting Secretary of Public Welfare of the
Commonwealth of Pennsylvania,

Defendants.

11 3312

Civil Action No. _____

COMPLAINT

I. Introduction

1. Plaintiffs are individuals with intellectual disabilities who are unnecessarily institutionalized in psychiatric hospitals, one of whom faces the imminent prospect of unnecessary commitment to a state mental retardation institution.

2. Plaintiffs are eligible for and enrolled in the Consolidated Waiver, a Medical Assistance home and community-based waiver administered by Defendant, Pennsylvania Department of Public Welfare (DPW). The Consolidated Waiver provides a full array of services for people with intellectual disabilities, including residential and non-residential supports that enable them to live in the community.

3. Due to their changing needs, the services most recently provided to the Plaintiffs under the Consolidated Waiver proved inadequate. This resulted in their psychiatric hospitalizations.

4. Although Plaintiffs' community service needs may have changed, the Consolidated Waiver offers the resources and services they now need to return to the community, and it is Defendants' responsibility to assure that they receive those services.

5. Defendants' policies and practices, however, have undermined the ability of Plaintiffs to receive the Consolidated Waiver services they need to promptly return to and remain in their communities.

6. Defendants' policies and practices result in the unnecessary institutionalization of Plaintiffs in violation of the integration mandates of Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. In addition, Defendant Alexander's actions and inactions violate Title XIX of the Social Security Act, the federal Medical Assistance statute, by denying Plaintiffs services to which they are entitled, failing to provide those services with reasonable promptness, and failing to protect their health and welfare, to make available feasible alternatives, and to allow Plaintiffs to choose between institutional and community services. Plaintiffs seek declaratory and injunctive relief.

II. Jurisdiction and Venue

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

8. Plaintiffs' claims are authorized by 42 U.S.C. §§ 1396, 1983, 12133, 29 U.S.C. § 794, and 28 U.S.C. §§ 2201 and 2202.

9. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(b) since a substantial part of the events that gave rise to these claims arose in this District.

III. Parties

10. Plaintiff Lykeh Mumford is a 32-year-old resident of Philadelphia, Pennsylvania who has an intellectual disability and a diagnosis of intermittent explosive disorder. Mr. Mumford brings this lawsuit by and through his next friend, Katherina Mach.

11. Plaintiff Joseph Yale is a 26-year-old resident of Luzerne County, Pennsylvania who has an intellectual disability and has been diagnosed with schizoaffective disorder. Mr. Yale brings this lawsuit by and through his next friend, Pamela Zotynia.

12. Defendant Department of Public Welfare is the Commonwealth agency that is responsible to provide services to Pennsylvanians with intellectual disabilities under the Mental Health and Mental Retardation Act of 1966, 50 P.S. § 4201(1). DPW also arranges for and funds the provision of home and community-based mental retardation services so that people with intellectual disabilities can live in the community with non-disabled persons. In addition, DPW is the single state agency that has responsibility to implement Pennsylvania's Medical Assistance Program, including services provided to individuals with intellectual disabilities. 42 U.S.C. § 1396a(a)(5); 55 Pa. Code § 101.1(e).

13. Defendant Gary Alexander is the Acting Secretary of Public Welfare of the Commonwealth of Pennsylvania. Mr. Alexander administers DPW and, as such, he is responsible to assure that Pennsylvania's Medical Assistance program is operated in compliance with federal law. Mr. Alexander is sued in his official capacity only for actions and omissions under color of state law.

IV. Factual Background

A. Medical Assistance, HCBS Waivers, and the Consolidated Waiver

14. Title XIX of the Social Security Act (Title XIX), 42 U.S.C. § 1396 *et seq.*, establishes the federal Medical Assistance program.

15. Medical Assistance is a cost-sharing arrangement under which the federal government reimburses more than 50 percent of the expenditures incurred by states that elect to furnish Medical Assistance to individuals whose income and resources are insufficient to cover the costs of their medical care.

16. The purpose of Medical Assistance is to provide medical services to eligible individuals, including services to help such individuals "attain or retain capability for independence or self-care" 42 U.S.C. § 1396.

17. States are not required to participate in the Medical Assistance program, but, if they choose to do so, they must adopt a "state plan" that delineates the standards for determining eligibility and identifies the extent of Medical Assistance benefits.

18. Pennsylvania has chosen to participate in the Medical Assistance program and has adopted a State Medical Assistance Plan.

19. Title XIX delineates the types of medical services that can be funded under a state's Medical Assistance plan. *See* 42 U.S.C. § 1396d. Certain types of services are mandatory (*e.g.*, inpatient hospital services, physicians' services, and nursing facilities) and must be included in every state's Medical Assistance plan. Other types of services are optional (*e.g.*, hospice care, dental care, and medications), and each state has discretion to choose whether to cover any particular optional service.

20. Many home and community-based services for people with disabilities (such as habilitation for individuals with intellectual disabilities, behavioral therapy, vocational supports, and community integration services) cannot be covered either as mandatory or optional services under Title XIX.

21. Title XIX permits a state to obtain a home and community-based services (HCBS) waiver from the Centers for Medicare and Medicaid Services (CMS). 42 U.S.C. § 1396n(c). HCBS waivers allow states to include in their state plans as "Medical Assistance" home and community-based services for individuals who, without such care, would require institutionalization in an intermediate care facility for persons with mental retardation, nursing facilities, or hospitals.

22. HCBS waivers allow states to "waive" three specific Title XIX requirements that apply to mandatory and optional services -- the statewideness requirement (which requires the state to assure the availability of services in all geographic areas); the comparability requirement (which requires the state to assure that all eligible persons have access to services in the same amount, duration, and scope); and income and resource rules. 42 U.S.C. § 1396n(c)(3).

23. By waiving the "comparability" requirement, states can limit the number of persons who will be allowed to participate in an HCBS waiver and can establish qualifications for eligibility based on age, disability, or other criteria. Waiver of the comparability requirement also allows states to provide Medical Assistance services to HCBS waiver participants in a different amount, duration, or scope than is available to other Medical Assistance participants.

24. A state can provide services in HCBS waivers that are not identified in Title XIX as approved mandatory or optional services (*e.g.*, habilitation, respite care, home and vehicle modifications, and vocational supports). 42 U.S.C. § 1396n(c)(4)(B); 42 C.F.R. § 440.180.

25. In sum, the purpose of Title XIX's HCBS waivers is to encourage states to provide services to assist individuals with disabilities to avoid institutionalization. 42 C.F.R. § 441.300. As long as community-based services vis-à-vis institutional services are cost-neutral, *see* 42 U.S.C. § 1396n(c)(2)(D), the preference is to provide services in the community.

26. Pennsylvania has received approval from CMS to operate multiple HCBS Waivers, including the Consolidated Waiver for individuals with intellectual disabilities.

27. DPW, the single state agency designated by Pennsylvania to administer its Medical Assistance program, has delegated responsibility to administer the Consolidated Waiver to its Office of Developmental Programs (ODP).

28. The Consolidated Waiver, established in 1986, provides services to Pennsylvanians with intellectual disabilities age 3 and older.

29. The Consolidated Waiver is the largest HCBS Waiver in the Commonwealth, both in terms of the number of individuals served and expenditures.

30. The Consolidated Waiver limits the number of individuals who can receive services. Currently, the limit is approximately 17,000 persons.

31. The Consolidated Waiver is the primary funding source for community-based mental retardation services in Pennsylvania.

32. The Consolidated Waiver offers a broad range of community-based mental retardation services, depending on the participant's needs, including: residential habilitation; home and community-based habilitation; licensed day habilitation; supported employment, prevocational, and transitional work services; behavioral supports; respite; homemaker/chore services; home and vehicle accessibility adaptations; supports coordination; nursing services; and transportation.

33. DPW contracts with local Administrative Entities (AEs) to perform operational and administrative functions to implement the Consolidated Waiver. In most instances, the AEs are the County Mental Health/Mental Retardation (MH/MR) Programs.

34. Once an individual is approved to participate in the Consolidated Waiver, he or she and his or her Support Team (including involved family or guardian and Supports Coordinator) work to develop an Individual Support Plan (ISP) to identify the supports and services the individual needs to live in the community.

35. The ISP, which must be approved by the AE, is the document that authorizes the home and community-based services that the individual will receive under the Consolidated Waiver.

36. The services and supports identified in an ISP are based on the individual's current clinical and medical needs assessed pursuant to the ODP-approved needs assessment instrument.

37. When an individual's service needs change (*e.g.*, he or she needs a different type of service, more of a service, or less of a service), his or her ISP is amended to reflect the change and the AE authorizes the new or different services.

38. For individuals who are enrolled in the Consolidated Waiver, there is no monetary cap on services. Participants are entitled to receive any services they need that are available under the Waiver and that are necessary for their health and welfare.

39. Consolidated Waiver participants who are institutionalized are at risk of termination from the Waiver if they do not receive any services funded by the Waiver for a certain time period. Once a person is terminated from the Consolidated Waiver, he or she must reapply and will be placed on a waiting list for services. Currently, there are thousands of Pennsylvanians on the "emergency" waiting list for Waiver services, and, as a result, a person who is terminated from the Consolidated Waiver may have to wait years to be re-enrolled.

40. DPW's ODP has recently implemented policies and practices that have the effect of denying Consolidated Waiver participants prompt access to the services they need for their health and welfare.

41. ODP requires that its Central Office approve development of any new one-person residential programs. Recently, however, multiple requests submitted to ODP's Central Office for development of such programs have neither been approved nor disapproved, and no one at ODP has been willing to make such decisions. This has resulted in delays in approval for new programs.

42. DPW is not paying adequate rates for ineligible expenses incurred in residential habilitation programs.

a. Title XIX does not allow federal reimbursement for room and board costs for residential programs (such as mortgage payments, home insurance, and food).

b. Historically, DPW has used state funds to allow residential providers to finance those expenses. These are called "ineligible expenses."

c. The ineligible expenses paid by the state, together with payment by residents of a portion of their Supplemental Security Income or Social Security disability benefits, had been sufficient to allow providers to fund those ineligible costs.

d. Recently, DPW expanded the definition of ineligible expenses, shifting many costs from those formerly eligible for Medical Assistance matching funds to ineligible costs. This includes, for example, the time spent by staff in the residential home preparing meals.

e. ODP has not increased its payments to providers for the expanded ineligible expenses while it has reduced the providers' eligible expenses to reflect the unavailability of Medical Assistance matching funds to pay certain previously eligible expenses.

f. At the same time, ODP concluded that it was overpaying providers of residential habilitation services for ineligible expenses, proposing to reduce those costs by \$27 million annually.

g. This proposed reduction, together with the already inadequate payments for ineligible costs, has made providers reluctant to develop new residential programs.

43. Providers' hesitation in developing new programs has been compounded by the inadequate and unstable rates for programs that serve people with more challenging needs. On information and belief, ODP has implemented a "high cost rate development policy" by which ODP determines rates for new residential programs that are "high cost." In addition, ODP has implemented an "outlier rate adjustment policy" by which ODP has reduced rates for existing high-cost programs after those rates were negotiated by providers. Neither of these policies is written, and ODP has not informed the providers or the public as to the standards that are used in setting high cost rates for new programs or reducing rates for existing high cost programs. These policies have effectively narrowed rate ranges, minimizing incentives for providers to serve individuals with complex needs.

44. On information and belief, ODP has not increased its rates for residential habilitation services sufficient to cover the cost increases for those services for many years. As providers' costs go up and rates do not, providers have made cuts in their programs. There are many fixed costs that the providers cannot reduce. Providers also cannot reduce costs for direct care staff that are required by the individuals' ISPs. As a

result, many providers have cut clinical staff who had expertise to address clients in the providers' programs with challenging behavioral issues. Clinical staff can be an important resource for direct care staff to consult when issues arise. As clinical staff have been terminated by providers due to costs constraints, direct care staff do not have access to the expertise they need to assist them to provide appropriate care for these individuals in their homes and communities.

45. People with intellectual disabilities who also have diagnoses of mental illness, including the Plaintiffs, need services for both of their disabilities. DPW separates the provision of these services between ODP and DPW's Office of Mental Health and Substance Abuse Services (OMHSAS). There is a lack of coordination between ODP and OMHSAS, resulting in barriers to accessing the services the Plaintiffs need from both systems.

B. Plaintiffs' Unmet Service Needs and Unnecessary Institutionalization

46. Plaintiff Lykeh Mumford has an intellectual disability and has been diagnosed with pervasive developmental disorder and impulse control disorder.

47. Mr. Mumford has been enrolled in the Consolidated Waiver since 2008.

48. Until January 2011, Mr. Mumford lived in the community in the homes of his mother and grandmother. Mr. Mumford received 14.5 hours daily of home and community habilitation services during weekdays and 12 hours daily during weekends.

49. While living in the community, Mr. Mumford enjoyed participating in community activities, including taking walks, swimming, bike riding, playing basketball,

skating, and table hockey. He also enjoyed having morning coffee in the park and going to the community center and the library.

50. Mr. Mumford has had instances of aggressiveness toward his family and self-injurious behaviors stemming from his disabilities.

51. Mr. Mumford's grandmother, due to her advancing age, can no longer support him in her home. Mr. Mumford's mother cannot handle his behavioral issues.

52. In January 2011, Mr. Mumford was admitted to a private psychiatric hospital. Mr. Mumford's treating professionals at the psychiatric hospital have determined that he no longer needs hospitalization, but he cannot return to live with his family.

53. On information and belief, DPW's Medical Assistance program has paid for Mr. Mumford's institutionalization at the psychiatric hospital.

54. The private psychiatric hospital has filed a petition to involuntarily commit Mr. Mumford to a state mental retardation institution since his treating professionals at the hospital concluded that he does not need psychiatric treatment or medication.

55. It is medically necessary for Mr. Mumford to receive habilitation services in a structured residential community placement, but DPW has failed to provide him with those services.

56. Mr. Mumford's AE currently provides 1:1 staff support for Mr. Mumford at the inpatient psychiatric hospital.

57. Mr. Mumford's AE, which contracts with DPW to arrange for services, has only sought to place Mr. Mumford in an existing program. Those efforts have proven unsuccessful because providers either are unable to meet his needs or because providers

have no appropriate vacancies. To date, DPW has not authorized the AE to request that providers develop a new program that is designed specifically to meet his unique needs.

58. Mr. Mumford is unnecessarily institutionalized in a private psychiatric hospital and is at risk of extended unnecessary institutionalization in a state mental retardation institution. Mr. Mumford receives inadequate habilitation services at the psychiatric hospital, which are necessary due to his intellectual disability to assist him to acquire, retain, and improve his communication, personal adjustment, relationship development, socialization, and adaptive skills needed to enable him to live in the community. As a result of his unnecessary institutionalization, Mr. Mumford is segregated from community life and is at risk of termination from the Consolidated Waiver.

59. Plaintiff Joseph Yale has an intellectual disability and a diagnosis of schizoaffective disorder.

60. Mr. Yale has been enrolled in the Consolidated Waiver since May 2010.

61. Mr. Yale has been admitted to private and state psychiatric hospitals nearly 20 times. Hospitalizations are not unusual for individuals with dual diagnoses of intellectual disabilities and mental illness, particularly where the individual does not have access to an array of community supports and services.

62. Until August 2010, Mr. Yale lived with family in the community in between his frequent hospitalizations.

63. After he was enrolled in the Consolidated Waiver, Mr. Yale was placed in a residential habilitation program in an apartment with 1:1 staffing for approximately six weeks between August and October 2010.

64. In or around October 2010, Mr. Yale was involuntarily committed to a private psychiatric hospital after incidents of self-injurious behavior, aggression, and property damage. This was not intended to be a permanent placement.

65. It is medically necessary for Mr. Yale to receive residential habilitation services in the community in a highly structured setting.

66. On information and belief, DPW's Medical Assistance program has paid for Mr. Yale's institutionalization at the psychiatric hospital.

67. A provider, Resources for Human Development (RHD), has submitted a budget to serve Mr. Yale and the budget was reviewed by the former Deputy Secretary of ODP in March 2011. ODP rejected the budget. A meeting was held between RHD and ODP staff on March 23, 2011. On April 8, 2011, RHD submitted answers to ODP's follow-up questions. RHD made several attempts since then to schedule another meeting to review its new budget submissions for Mr. Yale, but received no response.

68. While living in the community, Mr. Yale enjoyed going to the movies, playing sports, weightlifting, and shopping.

69. Mr. Yale has been institutionalized and segregated from society for more than seven months as he awaits development of a residential habilitation program. Mr. Yale receives no habilitation services at the psychiatric hospital, which are necessary due to his intellectual disability to assist him to acquire, retain, and improve his

communication, personal adjustment, relationship development, socialization, and adaptive skills needed to enable him to live in the community. He is at risk of institutionalization in a state mental retardation institution and termination from the Consolidated Waiver.

C. Irreparable Harm

70. Plaintiffs have suffered irreparable harm as a result of Defendant's actions and inactions that give rise to this case.

71. Plaintiffs are unnecessarily institutionalized and segregated from the community.

72. Plaintiffs are at risk of losing their eligibility for the Consolidated Waiver and their entitlement to community mental retardation services available under that Waiver if they continue to be institutionalized.

V. Claims

A. Count I -- Americans with Disabilities Act

73. Paragraphs 1 through 72 are incorporated by reference as if fully set forth herein. This Count is brought solely against Defendant Alexander in his official capacity for acts and omissions under color of state law.

74. Plaintiffs have intellectual disabilities, impairments that substantially limit one or more major life activities, including but not limited to, caring for themselves, learning, concentrating, and thinking. As such, they are persons with disabilities protected by the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12102(1)(A), 12102(2)(A).

75. Plaintiffs are eligible for community-based mental retardation services, including services under the Consolidated Waiver, and, as such, are qualified persons with disabilities. 42 U.S.C. § 12131(2).

76. DPW, operated and administered by Defendant Alexander, is a public entity subject to the requirements of Title II of the ADA. 42 U.S.C. § 12131(1)(B).

77. Defendant Alexander violates the integration mandate of Title II of the ADA, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d). Plaintiffs want community mental retardation services and the community is the most integrated setting appropriate to meet their needs. Yet, Defendant has failed to provide them with mental retardation services in the community. As a result, Plaintiffs are unnecessarily segregated in psychiatric institutions and are at risk of continued unnecessary institutionalization in those institutions or in state mental retardation institutions.

78. The provision of community residential habilitation services to Plaintiffs will not fundamentally alter Defendant's programs, services or activities. As enrollees in the Consolidated Waiver, Plaintiffs currently have an entitlement to those services. As such, providing them with those services will not result in displacement of others from services or their jumping ahead of others on a waiting list.

79. Defendant Alexander violates Title II of the ADA, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(b)(3), by using methods of administration that subject Plaintiffs to discrimination through unnecessary segregation and institutionalization, including, but not limited to: (a) failing to streamline the approval process for development of new programs; (b) failing to develop a rate structure that is sufficient and stable to enable

providers to develop new programs; and (c) failing to effectively coordinate mental health services for individuals with dual diagnoses of mental illness and mental retardation.

B. Count II -- Rehabilitation Act

80. Paragraphs 1 through 79 are incorporated by reference as if fully set forth herein. This Count is brought solely against Defendant DPW.

81. Plaintiffs have intellectual disabilities, impairments that substantially limit one or more major life activities, including but not limited to, caring for themselves, learning, concentrating, and thinking. As such, they are persons with disabilities protected by Section 504 of the Rehabilitation Act. 29 U.S.C. § 705(20)(B).

82. Plaintiffs are eligible for community-based mental retardation services, including services under the Consolidated Waiver, and, as such, are qualified persons with disabilities pursuant to Section 504 of the Rehabilitation Act.

83. DPW is a recipient of federal financial assistance and, as such, is subject to the requirements of Section 504 of the RA. 29 U.S.C. § 794(b).

84. Defendant DPW violates the integration mandate of Section 504 of the RA, 29 U.S.C. § 794 and 28 C.F.R. § 41.51(d). Plaintiffs want community mental retardation services and the community is the most integrated setting appropriate to meet their needs. Yet, DPW has failed to provide them with mental retardation services in the community. As a result, Plaintiffs are unnecessarily segregated in psychiatric institutions and are at risk of continued unnecessary institutionalization in those institutions or in state mental retardation institutions.

85. The provision of community residential habilitation services to Plaintiffs will not fundamentally alter Defendant's programs, services or activities. As enrollees in the Consolidated Waiver, Plaintiffs currently have an entitlement to those services. As such, providing them with those services will not result in displacement of others from services or their jumping ahead of others on a waiting list.

86. Defendant DPW violates Section 504 of the RA, 29 U.S.C. § 794 and 28 C.F.R. § 41.51(b)(3), by using methods of administration that subject Plaintiffs to discrimination through unnecessary segregation and institutionalization, including, but not limited to: (a) failing to streamline the approval process for development of new programs; (b) failing to develop a rate structure that is sufficient and stable to enable providers to develop new programs; and (c) failing to effectively coordinate mental health services for individuals with dual diagnoses of mental illness and mental retardation.

C. Count III -- Title XIX: 42 U.S.C. §§ 1396a(a)(10)(A) and 1983

87. Paragraphs 1 through 86 are incorporated by reference as if fully set forth herein. This Count is brought solely against Defendant Alexander for acts and omissions in his official capacity under color of state law.

88. Under Title XIX, states that participate in the Medical Assistance program must make Medical Assistance benefits available to eligible persons. 42 U.S.C. § 1396a(a)(10)(A).

89. "Medical Assistance" benefits include, at the option of the state, HCBS Waiver services. 42 U.S.C. § 1396n(c)(1).

90. Pennsylvania participates in the Medical Assistance program and has chosen in its State Plan to cover HCBS Waiver services approved by CMS, including the Consolidated Waiver.

91. Plaintiffs are eligible for Medical Assistance benefits and are enrolled in the Consolidated Waiver.

92. Plaintiffs are entitled to receive all services under the Consolidated Waiver which they need, including residential habilitation services.

93. It is clinically and medically necessary for Plaintiffs to receive appropriate residential habilitation services. Defendant Alexander has failed to provide Plaintiffs with those services and, instead, they are unnecessarily institutionalized.

94. Defendant's policies and practices have impeded the prompt provision of appropriate community services to Plaintiffs, including residential habilitation services.

95. Defendant's policies and practices are intended solely to reduce expenditures for services provided to individuals, like Plaintiffs, with complex needs, regardless of their clinical and medical needs.

96. Defendant has failed to assure that Plaintiffs receive appropriate services under the Consolidated Waiver to enable them to live in the community.

97. Defendant Alexander's acts and omissions under color of state law violate 42 U.S.C. §§ 1396a(a)(10)(A) and 1983.

D. Count IV -- Title XIX: 42 U.S.C. §§ 1396a(a)(8) and 1983

98. Paragraphs 1 through 97 are incorporated by reference as if fully set forth herein. This Count is brought solely against Defendant Alexander for acts and omissions in his official capacity under color of state law.

99. Title XIX mandates that states which participate in the Medical Assistance program must "provide that all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so, and that all such assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8).

100. Title XIX requires states to adopt time standards for the provision of services to avoid unreasonable delays. In addition, Title XIX does not permit states to delay furnishing Medical Assistance due to the state agency's administrative procedures. 42 C.F.R. § 435.930(a).

101. Defendant Alexander has established no timelines for the provision of residential habilitation services under the Consolidated Waiver.

102. Defendant Alexander has violated Plaintiffs' right to receive residential habilitation services under the Consolidated Waiver with reasonable promptness, as the Plaintiffs have been institutionalized and awaiting such community services for periods ranging from two to seven months with no end in sight.

103. Defendant Alexander's acts and omissions under color of state law violate 42 U.S.C. §§ 1396a(a)(8) and 1983.

E. Count V -- Title XIX: 42 U.S.C. §§ 1396n(c) and 1983

104. Paragraphs 1 through 103 are incorporated by reference as if fully set forth herein. This Count is brought solely against Defendant Alexander for acts and omissions in his official capacity under color of state law.

105. Title XIX requires that each HCBS Waiver must include "necessary safeguards (including adequate standards for provider participation) ... to protect the health and welfare of individuals provided services under the [W]aiver ..." 42 U.S.C. § 1396n(c)(2)(A). This requires a state "to provide all people enrolled in the [W]aiver with the opportunity for access to all needed services covered by the [W]aiver and under the Medicaid State plan. ... The opportunity for access pertains to all services available under the [W]aiver that an enrollee is determined to need on the basis of an assessment and a written plan of care/support." CMS, *Olmstead Update No. 4* (Jan. 10, 2001). "Once in the [W]aiver, an enrolled individual enjoys protection against arbitrary or inappropriate restrictions, and the State assumes an obligation to assure the individual's health and welfare." *Id.*

106. Plaintiff's health and welfare has been jeopardized by Defendant's implementation of the Consolidated Waiver. As enrollees in the Consolidated Waiver, Plaintiffs are entitled to receive residential habilitation services, and Defendant has determined that they need those services. Yet, Defendant has imposed arbitrary and inappropriate restrictions on access to those services, which has resulted in their inability to receive appropriate community residential habilitation services and their unnecessary institutionalization.

107. Title XIX also requires states to inform individuals eligible for HCBS Waiver services of their feasible alternatives available under the Waiver so that they can choose both among such available services and between HCBS Waiver services and institutionalization. 42 U.S.C. § 1396n(c)(2)(C).

108. Defendant has violated Title XIX by failing to allow Plaintiffs to choose among available feasible alternatives and to choose between Consolidated Waiver services and institutionalization. Defendant's policies and practices have made community residential habilitation services effectively unavailable to Plaintiffs, forcing them to be institutionalized.

109. Defendant Alexander's acts and omissions under color of state law violate 42 U.S.C. §§ 1396n(c) and 1983.

VI. Relief Requested

110. Plaintiffs respectfully request that the Court:

- a. retain jurisdiction over this action;
- b. declare that Defendants' actions and inactions violate the ADA and RA, Title XIX, and 42 U.S.C. § 1983;
- c. issue appropriate injunctive relief to enjoin Defendants from continuing to violate Plaintiffs' rights under the ADA, RA, Title XIX, and 42 U.S.C. § 1983, and to take appropriate steps to remedy those violations;
- d. issue such other relief as may be just, equitable, and appropriate, including an award of reasonable attorneys' fees, litigation expenses, and costs as available pursuant to 42 U.S.C. §§ 1988 and 12205 and 29 U.S.C. § 794a(b).

Respectfully submitted,

Dated: May 20, 2011

By:

A handwritten signature in black ink, appearing to read "Robert W. Meek", written over a horizontal line.

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