

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

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FRANKLIN BENJAMIN, by and through :  
his next friend, Andréé Yock; RICHARD :  
GROGG and FRANK EDGETT, by and :  
through their next friend, Joyce McCarthy; :  
WILSON SHEPPARD, by and through his :  
next friend, Pamela Zotynia; SYLVIA :  
BALDWIN, by and through her next friend, :  
Shirl Meyers; ANTHONY BEARD, by and :  
through his next friend, Nicole Turman, :  
on behalf of themselves and all others :  
similarly situated, :  
:  
Plaintiffs, : Filed via ECF System  
:  
v. : Civil Action No. \_\_\_\_\_  
:  
DEPARTMENT OF PUBLIC WELFARE : Class Action  
OF THE COMMONWEALTH OF :  
PENNSYLVANIA and :  
ESTELLE B. RICHMAN, in her official :  
capacity as Secretary of Public Welfare of :  
the Commonwealth of Pennsylvania, :  
:  
Defendants. :  
:  

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**COMPLAINT**

**I. Introduction**

1. Plaintiffs, individuals who are institutionalized in Pennsylvania's state-operated intermediate care facilities for persons with mental retardation (ICFs/MR), bring this lawsuit on behalf of themselves and others similarly situated to challenge

the Defendants' continuing failure to offer and provide them with the opportunity to receive services in integrated, community settings that are the most appropriate settings to meet their needs, resulting in their continued unnecessary segregation and institutionalization.

2. Despite the fact that Plaintiffs and many others in the state-operated ICFs/MR want to live in community settings and that the community is the most integrated setting appropriate to meet their needs, Defendants have not offered them any alternative to remaining institutionalized.

3. The costs of providing community services to Plaintiffs and putative class members would be far less than the costs of continuing to institutionalize them. The average annual cost of providing services in a state-operated ICF/MR is nearly \$228,000 per person, more than double the average per capita cost of providing community services (including residential services) to such an individual.

4. Defendants' failure to offer and provide community alternatives to Plaintiffs and other persons confined in ICFs/MR who are appropriate for and not opposed to discharge violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Plaintiffs seek appropriate declaratory and injunctive relief.

## **II. Jurisdiction and Venue**

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

6. Plaintiffs' claims are authorized by 42 U.S.C. §§ 1983 and 12133, 29 U.S.C. § 794a(a)(1), and 28 U.S.C. §§ 2201 and 2202.

7. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(b) since Defendants reside in this District.

## **III. Parties**

8. Plaintiff Franklin Benjamin is a 48-year-old resident of Philadelphia, Pennsylvania who has been institutionalized in a state-operated ICF/MR since 1966. He brings this lawsuit by and through his next friend, Andréé Yock, pursuant to Federal Rule of Civil Procedure 17(c).

9. Plaintiff Richard Grogg is a 45-year-old resident of York County, Pennsylvania who has been institutionalized in a state-operated ICF/MR since 1988. He brings this lawsuit by and through his next friend, Joyce McCarthy, pursuant to Federal Rule of Civil Procedure 17(c).

10. Plaintiff Frank Edgett is a nearly 51-year-old resident of Cumberland County, Pennsylvania who has been institutionalized in a state-operated ICF/MR

since 1987. He brings this lawsuit by and through his next friend, Joyce McCarthy, pursuant to Federal Rule of Civil Procedure 17(c).

11. Plaintiff Wilson Sheppard is a 46-year-old resident of Philadelphia, Pennsylvania who has been institutionalized in a state-operated ICF/MR since 1969. He brings this lawsuit by and through his next friend, Pamela Zotynia, pursuant to Federal Rule of Civil Procedure 17(c).

12. Plaintiff Sylvia Baldwin is a 33-year-old resident of Allegheny County, Pennsylvania who has been institutionalized in a state-operated ICF/MR almost continuously since 1990. She brings this lawsuit by and through her next friend, Shirl Meyers, pursuant to Federal Rule of Civil Procedure 17(c).

13. Plaintiff Anthony Beard is a 49-year-old resident of York County, Pennsylvania who has been institutionalized in a state-operated ICF/MR since 1967. He brings this lawsuit by and through his next friend, Nicole Turman, pursuant to Federal Rule of Civil Procedure 17(c).

14. Defendant Department of Public Welfare (DPW) is the Commonwealth agency that is responsible to provide services to Pennsylvanians with mental retardation, including Plaintiffs and putative class members, under the Mental Health and Mental Retardation Act of 1966, 50 P.S. § 4201(1). DPW operates five ICFs/MR and funds numerous privately-operated ICFs/MR, most of which are large

institutions. DPW also arranges for and funds the provision of home and community-based mental retardation services so that people with mental retardation can live in the community with non-disabled persons.

15. Defendant Estelle B. Richman is the Secretary of Public Welfare for the Commonwealth of Pennsylvania. Defendant Richman is responsible to administer and oversee DPW. As such, Defendant Richman is responsible to administer and oversee DPW's mental retardation programs, including state and private ICFs/MR and community-based mental retardation services. Defendant Richman also is responsible to assure that DPW's programs and services comply with relevant federal laws, including the Americans with Disabilities Act and Rehabilitation Act.

#### **IV. Class Action Allegations**

16. Plaintiffs Benjamin, Grogg, Edgett, Sheppard, Baldwin, and Beard, by and through their next friends, bring this lawsuit on behalf of themselves and all other persons who: (1) currently or in the future will reside in one of Pennsylvania's state-operated intermediate care facilities for persons with mental retardation; (2) could reside in the community with appropriate services and supports; and (3) do not or would not oppose community placement.

17. The size of the class makes joinder impracticable. Currently, there are approximately 1,272 individuals who reside in Pennsylvania's five state-operated

ICFs/MR. The geographic dispersion of these individuals, their lack of resources, and their cognitive disabilities further render individual lawsuits impracticable.

18. There are questions of fact and law common to all class members, including, but not limited to: (a) whether Defendants' policies and practices effectively exclude class members from accessing the community mental retardation system; (b) whether Defendants' failure to offer and, if not opposed, provide services and supports in more integrated community settings to class members violates the integration mandates of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act; and (c) whether Defendants use methods of administration that have the effect of discriminating against individuals with disabilities.

19. The claims of the named Plaintiffs are typical of those of all putative class members.

20. The named Plaintiffs will adequately protect the interests of the class. They have no interests which conflict with other class members. Plaintiffs' counsel are experienced in litigating class actions, including enforcement of the civil rights of people with disabilities.

21. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

## V. **Facts**

### A. **Plaintiffs' Unnecessary Institutionalization**

22. Plaintiff Franklin Benjamin, a 49-year-old man with mental retardation and bipolar disorder, was admitted to Ebensburg Center in 1966 when he was six years old and where he remains institutionalized more than 40 years later.

23. Mr. Benjamin has difficulty communicating, using a few words, signs, as well as body language and facial expressions to communicate. Mr. Benjamin is extremely sensitive to light and noise. The congregate, institutional nature of Ebensburg Center exacerbates Mr. Benjamin's mental health issues and undermines his capacity to benefit from treatment.

24. Mr. Benjamin, with appropriate services and supports, can live in the community. Ebensburg Center is not the most integrated setting appropriate to meet his needs.

25. On information and belief, DPW's staff and agents have concluded that Mr. Benjamin is appropriate for discharge to the community, but he remains unnecessarily institutionalized.

26. Mr. Benjamin is not opposed to discharge from Ebensburg Center. His mother is willing to consider discharge to an appropriate, community placement.

27. Plaintiff Richard Grogg, a 45-year-old man with mental retardation, was involuntarily committed to Selinsgrove Center in 1988, more than 20 years ago. He remains involuntarily committed at Selinsgrove Center.

28. Mr. Grogg is extremely independent and sociable. He holds a number of jobs at Selinsgrove Center and in the community and is involved in his church.

29. Mr. Grogg is so capable of managing his own money that Defendants do not even require him to have a representative payee appointed to receive his Supplemental Security Income payments.

30. Mr. Grogg, with appropriate services and supports, can live in the community. Selinsgrove Center is not the most integrated setting appropriate to meet his needs.

31. On information and belief, DPW's staff and agents have concluded that Mr. Grogg is appropriate for discharge to the community, but he remains unnecessarily segregated in an institutional setting.

32. Mr. Grogg wants to be discharged from Selinsgrove Center and live in the community closer to his mother, who supports his choice.

33. Plaintiff Frank Edgett, a 51-year-old man with mental retardation, was involuntarily committed to Selinsgrove Center in 1987, more than 20 years ago. He remains involuntarily committed to Selinsgrove Center.



34. Mr. Edgett was previously admitted to Laurelton Center, a now-closed state-operated ICF/MR, in 1973 when he was 15 years old. He was discharged to a community residential mental retardation program in 1983. He was admitted to Harrisburg State Hospital in 1987 and then transferred to Selinsgrove Center where he remains.

35. Mr. Edgett is very social, engaging, and independent. He enjoys community trips.

36. Mr. Edgett, with appropriate services and supports, can live in the community. Selinsgrove Center is not the most integrated setting appropriate to meet his needs.

37. On information and belief, DPW's staff and agents have concluded that Mr. Edgett is appropriate for discharge to the community, but he remains unnecessarily segregated in an institutional setting.

38. Mr. Edgett wants to be discharged from Selinsgrove Center and live in the community. His sister supports his choice.

39. Plaintiff Wilson Sheppard, a 46-year-old man with mental retardation, was admitted to White Haven Center in 1969 when he was six years old. He remains at White Haven Center more than 40 years later.

40. Mr. Sheppard, although non-verbal, can use a simple augmentative communication device to help him communicate with others. Mr. Sheppard enjoys participating in group activities and eagerly anticipates off-grounds community activities and trips.

41. Mr. Sheppard, with appropriate services and supports, can live in the community. White Haven Center is not the most integrated setting appropriate to meet his needs.

42. On information and belief, DPW's staff and agents have concluded that Mr. Sheppard is appropriate for discharge to the community, but he remains unnecessarily segregated in an institutional setting.

43. Mr. Sheppard is not opposed to discharge from White Haven Center. His mother, who is no longer able to visit him at White Haven Center, is willing to consider community alternatives for Mr. Sheppard.

44. Plaintiff Sylvia Baldwin, a 33-year-old woman with mental retardation, bipolar disorder, and borderline personality disorder, was originally admitted to Polk Center in 1990 when she was 14 years old. Nearly 20 years later, Ms. Baldwin remains at Polk Center.

45. Ms. Baldwin was discharged twice to residential programs in the community in 1999 and 2001, but was returned to Polk Centers after relatively short time periods due to behavioral and mental health issues.

46. Ms. Baldwin is generally very independent at Polk Center, but she has challenging behavioral issues. Defendants' failure to develop and implement an appropriate behavioral support plan for Ms. Baldwin led Polk Center staff to use pepper spray on her in 2008 when she exhibited aggressive behavior.

47. Ms. Baldwin, with appropriate services and supports, can live in the community. Polk Center is not the most integrated setting appropriate to meet her needs.

48. On information and belief, Defendants' staff and agents have concluded that Ms. Baldwin is appropriate for discharge to the community, but she remains unnecessarily segregated in an institutional setting.

49. Ms. Baldwin wants to be discharged from Polk Center and live in the community. Her mother supports that choice.

50. Plaintiff Anthony Beard, a 49-year-old man with mental retardation, was admitted to Ebensburg Center in 1967 when he was seven years old. He remains at Ebensburg Center more than 40 years later.

51. Mr. Beard is blind and has significant bilateral hearing loss.

52. Mr. Beard, with appropriate services and supports, can live in the community. Ebensburg Center is not the most integrated setting appropriate to meet his needs.

53. On information and belief, DPW's staff and agents have concluded that Mr. Beard is appropriate for discharge to the community, but he remains unnecessarily segregated in an institutional setting.

54. Mr. Beard is not opposed to discharge from Ebensburg Center. Mr. Beard's mother is no longer able to travel from her home in York County to Ebensburg Center to visit Mr. Beard. She wants him to be discharged to a community placement closer to York County.

**B. Pennsylvania's Mental Retardation System**

55. The Mental Health and Mental Retardation Act of 1966 (MH/MR Act), 50 P.S. §§ 4101-4704, requires DPW "[t]o assure within the State the availability and equitable provision of adequate ... mental retardation services for all persons who need them ...." 50 P.S. § 4201(1).

56. The MH/MR Act requires DPW to operate any state facilities and to provide at least 90 percent of the funding for community-based mental retardation services. 50 P.S. §§ 4202(a), 4509(1).

57. The MH/MR Act also requires the establishment of county mental health and mental retardation programs that are responsible to administer community-based mental retardation programs. 50 P.S. § 4301. The county mental health and mental retardation programs act as the agents of DPW to conduct intake to assess service needs, to develop community services, and to arrange for funding for those services for individuals with mental retardation.

58. DPW implements its responsibility to provide mental retardation services to Pennsylvanians who need them in the following ways: (a) it directly operates five intermediate care facilities for persons with mental retardation (ICFs/MR); (b) it funds services in numerous privately-operated ICFs/MR; and (c) it funds the provision of community-based mental retardation services administered through its agents, the county mental health and mental retardation programs.

59. An ICF/MR is a type of licensed facility that is funded through the joint federal-state Medical Assistance program.

a. All ICFs/MR – whether private or state-operated -- must comply with detailed criteria established by federal regulations. 42 C.F.R. Pt. 483, Subpt. I.

b. As a Medical Assistance service, the federal government provides a funding match for the costs of ICF/MR services in Pennsylvania. With adjustments under the American Recovery and Reinvestment Act of 2009, the federal funding

match for Fiscal Year 2009 (October 1, 2008 to September 30, 2009) is approximately 63.1 percent.

60. DPW directly operates five ICFs/MR (which are also called “state centers”). These state-operated ICFs/MR are: (1) Ebensburg Center, located in Cambria County; (2) Hamburg Center, located in Berks County; (3) Polk Center, located in Venango County; (4) Selinsgrove Center, located in Snyder County; and (5) White Haven Center, located in Luzerne County.

61. As of July 2008, the five state-operated ICFs/MR housed a total of 1,272 individuals, ranging from 129 at Hamburg Center to 347 at Selinsgrove Center.

62. Between July 1, 2007 and December 31, 2008, 15 residents of state-operated ICFs/MR were discharged to community services, and five residents were admitted to those facilities. During that same time period, 57 residents died.

63. All of the state-operated ICFs/MR operate at significantly less than full capacity, with Hamburg operating at a little more than 50 percent capacity.

64. The Commonwealth’s allocation to fund services at the five state-operated ICFs/MR for Pennsylvania’s Fiscal Year 2008-2009 (July 1, 2008 to June 30, 2009) is nearly \$290 million, an average annual cost of nearly \$228,000 to provide services to each of the 1,272 residents.

65. The Governor's proposed budget for FY 2009-2010 will increase the allocation to fund services at the five state-operated ICFs/MR to approximately \$303 million, an increase of nearly 4.5 percent. With the projection that the number of individuals at the state-operated ICFs/MR will decrease to approximately 1,240 persons (primarily due to deaths), the average annual per capita cost to serve an individual in one of those facilities will increase to more than \$244,000.

66. DPW funds an array of home and community-based services for persons with mental retardation. The Medical Assistance program provides nearly 90 percent of the funding for these services through home and community-based services (HCBS) waivers, including the Consolidated Waiver, approved by the federal government pursuant to 42 U.S.C. § 1396n(c).

a. HCBS waivers allow states to include in their state plans as "Medical Assistance" home or community-based services for individuals who, without such care, would require institutionalization in an intermediate care facility for persons with mental retardation, nursing facility, or similar institution. 42 U.S.C. § 1396n(c).

b. Pursuant to HCBS waivers, states can provide an array of services, including services that cannot be funded as mandatory or optional services under

Title XIX, such as habilitation services, vocational services, and respite services for persons with mental retardation. 42 U.S.C. § 1396n(c)(4)(B); 42 C.F.R. § 440.180.

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

d. The Consolidated Waiver, established in 1986, is the largest HCB Waiver in the Commonwealth, both in terms of the number of individuals served and expenditures. Approximately 15,000 Pennsylvanians receive services under the Consolidated Waiver. The Consolidated Waiver is the primary funding source for community-based mental retardation services in Pennsylvania. 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; day habilitation; vocational services; environmental accessibility adaptations; and transportation. For individuals who participate 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.



e. Consolidated Waiver services are Medical Assistance services and, as such, the federal government provides a funding match for those services. Currently, the federal match is 63.1 percent.

67. The average annual cost of community-based residential services for an individual with mental retardation in Fiscal Year 2008-2009 is approximately \$80,200. The average annual cost of non-residential community-based services and supports for an individual with mental retardation in Fiscal Year 2008-2009 is approximately \$15,300. Accordingly, the average annual cost of community-based services for a person with mental retardation who receives residential and non-residential supports is less than \$100,000 -- less than one-half of the cost of comparable services in a state-operated ICF/MR.

68. There is a waiting list for community-based mental retardation services in Pennsylvania. Defendants divide individuals on the waiting list into three categories: "emergency" (i.e., those who need services immediately); "critical" (i.e., those who need services within two years); and "planning" (i.e., those who are anticipated to need services more than two but less than five years away).

69. Defendants require their agents to complete Prioritization of Urgency of Need for Services (PUNS) forms for each individual with mental retardation who

applies for community mental retardation services and are not fully served, including individuals who reside in the state-operated ICFs/MR.

70. Although Defendants require Supports Coordinators (i.e., case managers) to be provided to all individuals in the state-operated ICFs/MR, the ratio of Supports Coordinators to clients in those institutions is significantly lower than the ratio of Supports Coordinators to clients who live in the community since DPW does not pay for supports coordination services provided to residents of the state-operated ICFs/MR. The low ratio, combined with the distance between many Supports Coordinators and the clients living in isolated state-operated ICFs/MR, undermine the ability of Supports Coordinators to provide effective services to clients in those facilities.

**C. Defendants' Failure to Offer Community Alternatives to State-Operated ICF/MR Residents**

71. All persons with mental retardation who are institutionalized in state-operated ICFs/MR, with appropriate supports and services, could live in more integrated, community settings.

72. State-operated ICFs/MR are not the most integrated setting appropriate to the needs of any individual resident of those facilities.

73. The Commonwealth has embraced the principle of “normalization which defines the right of the individual with mental retardation to live a life which is as

close as possible in all aspects to the life which any member of the community might choose.” 55 Pa. Code § 64001.1.

74. Both the Secretary of Public Welfare, Defendant Richman, and the Deputy Secretary for the Office of Developmental Programs, Kevin Casey, do not dispute that people with mental retardation can reside in the community with appropriate community-based services and supports.

75. Many residents of state-operated ICFs/MR and their families are not opposed to discharge to the community as long as appropriate supports and services are in place.

76. Some residents of state-operated ICFs/MR or their families who might currently be opposed to discharge to the community may not be familiar with the types of community services and supports that could be provided and, if they were provided with information and education about such services and supports, they might not be opposed to discharge.

77. Many residents who had lived for many years in now-closed state-operated ICFs/MR and who were discharged to community-based placements despite initial opposition by them or their families now are satisfied with the community services and supports they receive.

78. Despite the fact that the named Plaintiffs and other state-operated ICF/MR residents are appropriate for and not opposed to discharge to the community with appropriate supports and services, Defendants have failed to offer them appropriate community alternatives.

79. Although Defendants have required PUNS forms to be completed for the named Plaintiffs and putative class members, they either are not on the waiting lists for services or are unlikely to be removed from the waiting lists despite their categorization of need.

a. Defendants' agents have never prepared a PUNS for Plaintiff Benjamin because they do not consider him to be on the waiting list for community services.

b. In July 2007, Defendants' agents prepared a PUNS for Plaintiff Grogg that removed him from the waiting list because "all [of his] needs [are] being met" and he has no need for community services and supports, even though he is extremely independent and capable of living in the community with appropriate services and supports. On information and belief, Defendants' agents do not currently consider Mr. Grogg to be in need of community services and has not made and will not make any efforts to offer or develop community alternatives to meet his needs.

c. Defendants' agents did not complete PUNS forms for Plaintiffs Edgett and Sheppard until 2008, at which time Defendants' agents identified their waiting list status as "planning." Given their status as persons who are unnecessarily institutionalized, Plaintiffs Edgett and Sheppard should have been placed on the "emergency" waiting list. Moreover, individuals who are in the "planning" group, such as Messrs. Edgett and Sheppard, are not likely to be removed from the waiting list within five years given the number of individuals on the emergency and critical waiting lists.

d. Defendants' agents completed a PUNS form for Plaintiff Baldwin in September 2008 that identified her waiting list status as "critical," and which indicates that community residential and other supports were first requested for Ms. Baldwin in December 2003.

e. Defendants' agents completed a PUNS form for Plaintiff Beard in May 2008 that identified his waiting list status as "emergency," and that indicates that community services and supports were first requested for Mr. Beard in March 2006.

f. State-operated ICF/MR residents who are on the emergency or critical waiting lists, such as Mr. Beard and Ms. Baldwin, are unlikely to receive services within two years since Defendants' agents give priority to persons living in

the community who are on the emergency and critical waiting lists over those who are institutionalized.

80. In at least the past five fiscal years, DPW has sought and received from the General Assembly funding for initiatives to provide community-based services for individuals with mental retardation who are on the waiting list for community services, including: more than 3,400 individuals in FY 2007-2008 and more than 1,300 individuals in FY 2008-2009. DPW has requested funding for FY 2009-2010 to provide community-based services to nearly 800 persons on the waiting list.

81. On information and belief, more than 1,000 of the approximately 5,500 persons who have received or will receive funding for community services under the waiting list initiatives between FY 2007-2008 and FY 2009-2010 will receive, *inter alia*, residential services and supports.

82. Only 15 residents of state-operated ICFs/MR have been provided with community-based services and supports through the waiting list initiatives since the beginning of Fiscal Year 2007-2008.

83. The costs to Defendants of providing Plaintiffs and putative class members with appropriate, community-based services, including residential services, would be less than 50 percent of the average costs Defendants currently pay to provide them with services in the state-operated ICFs/MR.

84. The costs to Defendants of providing community alternatives to state-operated ICF/MR residents could be further reduced if they implemented the “Money Follows the Person” (MFP) Rebalancing Demonstration Project. Under this Project, the federal government authorized Pennsylvania to receive an enhanced federal match of approximately 77 percent to provide community alternatives to 87 residents of state-operated ICFs/MR (30 in calendar year 2009 and 57 in calendar year 2010). Such an increased match would defray the costs involved in transitioning people from institutional to community services (including the costs of funding, for a short period of time, both institutional and community services for the individuals). Defendants, however, have not implemented and have no plans to implement this initiative for state-operated ICF/MR residents at this time.

85. DPW does not have an integration plan -- with specific time lines and discharge benchmarks -- to develop community alternatives for residents of state-operated ICFs/MR.

86. DPW does not have a waiting list to provide community alternatives to residents of state-operated ICFs/MR that moves at a reasonable pace.

**D. Irreparable Harm**

87. Plaintiffs and putative class members have suffered irreparable harm as a result of the Defendants’ actions and inactions in this case.

## **VI. Claims**

### **A. Violation of Title II of the Americans with Disabilities Act**

88. Paragraphs 1 through 87 are incorporated by reference. This Count is brought solely against Defendant Richman in her official capacity for acts and omissions under state law.

89. Plaintiffs and putative class members have mental retardation, an impairment that substantially limits 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).

90. Plaintiffs and putative class members are eligible for community-based mental retardation services and, as such, are qualified persons with disabilities. 42 U.S.C. § 12131(2).

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

92. Defendant Richman violates Title II of the ADA, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d), by unnecessarily segregating Plaintiffs and putative class members in institutions, by failing to offer them mental retardation services in the community, which is the most integrated setting appropriate to meet their needs, and



by failing to provide such services to Plaintiffs and those putative class members who are not opposed to discharge.

93. Defendant Richman 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 and putative class members to discrimination through continued unnecessary segregation and institutionalization, including, but not limited to:

a. failing to effectively assess all state-operated ICF/MR residents to determine what community supports and services they need;

b. allowing DPW's agents to completely remove state-operated ICF/MR residents from the waiting list for community mental retardation services, to improperly place them on the "planning" waiting list, and/or by not considering even those on the "emergency" waiting list as priorities;

c. not assuring that Plaintiffs and putative class members have access to effective Supports Coordination services to assist them in securing appropriate community services;

d. failing to provide ICF/MR residents and their families with adequate information about the community placements to enable them to make an informed choice if and when they are offered community services; and

e. failing to have a plan with specific and concrete benchmarks and timelines within which state-operated ICF/MR residents and their families will be offered and, if accepted, provided with community alternatives so that there is a waiting list that moves at a reasonable pace.

**B. Violation of Section 504 of the Rehabilitation Act**

94. Paragraphs 1 through 93 are incorporated by reference. This Count is brought solely against Defendant DPW.

95. Plaintiffs and putative class members have mental retardation, an impairment that substantially limits 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).

96. Plaintiffs and putative class members are eligible for community-based mental retardation services and, as such, are qualified persons with disabilities pursuant to Section 504 of the Rehabilitation Act.

97. 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).

98. Defendant DPW violates Section 504 of the RA, 29 U.S.C. § 794 and 28 C.F.R. § 41.51(d), by unnecessarily segregating Plaintiffs and putative class members

in institutions, by failing to offer them mental retardation services in the community, which is the most integrated setting appropriate to meet their needs, and by failing to provide such services to Plaintiffs and those putative class members who are not opposed to discharge.

99. 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 and putative class members to discrimination through continued unnecessary institutionalization, including, but not limited to:

a. failing to effectively assess all state-operated ICF/MR residents to determine what community supports and services they need;

b. allowing its agents to completely remove state-operated ICF/MR residents from the waiting list for community mental retardation services, to improperly place them on the “planning” waiting list, and/or by not considering even those on the “emergency” waiting list as priorities;

c. not assuring that Plaintiffs and putative class members have access to effective Supports Coordination services to assist them in securing appropriate community services;

d. failing to provide ICF/MR residents and their families with adequate information about the community placements to enable them to make an informed choice if and when they are offered community services; and

e. failing to have a plan with specific and concrete benchmarks and timelines within which state-operated ICF/MR residents and their families will be offered and, if accepted, provided with community alternatives so that there is a waiting list that moves at a reasonable pace.

## **VII. Relief**

100. Plaintiffs respectfully request that the Court award the following relief:

a. exercise jurisdiction over this action;

b. certify this case to proceed as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2);

c. issue appropriate declaratory relief and injunctive relief; and

d. grant such other relief as may be appropriate, including awarding reasonable attorneys' fees, litigation expenses, and costs pursuant to 42 U.S.C. §§ 1988, 12205 and 29 U.S.C. § 794a(b).

Respectfully submitted,

Dated: June 22, 2009

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