

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF PENNSYLVANIA

05-419J

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LINDA ALEXANDER by her guardians and next friends  
FRANCES ALEXANDER AND MARY ALEXANDER; KATHIE  
CENTI by her guardians and next friends AUGUST CENTI AND  
WINIFRED CENTI; RICHARD EMERICK by his guardians and  
next friends DEWEY EMERICK, VIRGINIA MERRITT  
(Guardianship in process.); CONSTANCE FOX by her  
guardian and next friend NATALIE FOX; MARY JANE KIES  
by her guardian and next friend FRANCES IRVIN (Guardianship  
in process.); ROBERT LUCIANO by his guardian and next friend  
FRANK LUCIANO; MARY ELLEN MARTIN by her  
guardian and next friend CLARA LINDSEY; MICHAEL  
MASSIMO by his guardians and next friends JO-ANNE  
OVERDORF AND RICHARD OVERDORF; ROBERT MINOR  
by his guardian and next friend DIANNE FOX; GERTRUDE  
MILLS by her guardian and next friend WILLIAM MILLS;  
KATHLEEN MONTGOMERY by her guardian and next friend  
WILLIAM V. MONTGOMERY, JR.; RONALD REPLOGLE by  
his guardian and next friend BONNIE WOOD (Guardianship in  
process.); JOHN SHEA by his guardian and next friend MARY  
ANN BOYLAN (Guardianship in process.); MARGIE SPORY by  
her guardian and next friend HATTIE WILLIAMS; ROBYNE  
WHEELER by her guardian and next friend BEVERLY  
WHEELER; MARGARET WYLAND by her guardians and next  
friends EDWARD WYLAND AND MARIAN WYLAND;  
RICHARD BARTLEBAUGH by his sister and next friend RENEE  
HOOVER; MELISSA BROADBENT by her father and next friend  
LARRY R. BROADBENT; LINDA BRONDER by her next friend  
KENNETH BRONDER; BARBARA DEBELLO by her next friend  
JULIO DEBELLO; PATRICK GAVIGAN by his next friend ANN  
LANDEFELD; GARY GOSNELL by his father and next friend  
GARY GOSNELL; EDWARD HAMPTON by his next friends  
DORA HAMPTON AND LLOYD HAMPTON; SHARON  
HARRISON by her next friend FRED HARRISON; PEGGY  
KELLY by her next friend LARRY KELLY; JACK  
KIRSCHBAUM by his next friend DARLENE SALTSGIVER;  
LORNA KUHN by her next friend ARLENE DEARMENT; ROSE  
LONG by her next friend MARY JONES; ROGER LOSEY by his  
next friend RODNEY LOSEY; PHILIP MCGANN by his next

COMPLAINT

friends PAUL MCGANN AND MARY JANE MCGANN;  
FRANCESNEIBURG by her next friend ESTHER GORDON;  
WANDA PABIAN by her next friend LOUISE PABIAN; JOHN  
SHEA by his sister and next friend MARY ANNE SHEA  
BOYLAN; DORIS STEWART by her next friend JOSEPH  
STEWART; LEE ANN STIFFLER by her next friend LORNA  
CLARK; VADA STRAIT by her next friend LYNN STRAIT;  
RONALD LEE SVEDA by his next friend JOSEPH SVEDA, JR.;  
ED THEARLE by his next friend DAVID R. THEARLE;  
GEORGE WILLIAMS, JR. by his next friend BETTY SMITH;  
DARREN WINELAND by his next friends DAVID WINELAND  
AND ALTA WINELAND; DIANNE ZVONKOVICH by her next  
friend DOROTHY ZVONKOVICH; on behalf of themselves and  
all others similarly situated,

Plaintiffs,

- against -

EDWARD G. RENDELL, as Governor of the Commonwealth of  
Pennsylvania; DEPARTMENT OF PUBLIC WELFARE OF  
THE COMMONWEALTH OF PENNSYLVANIA; ESTELLE  
B.RICHMAN, as Secretary of the Department of Public Welfare  
of the Commonwealth of Pennsylvania; and KEVIN T. CASEY,  
as Deputy Secretary of the Pennsylvania Office of Mental  
Retardation.

Defendants.

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Plaintiffs, by their undersigned attorneys, upon information and belief, allege as follows for their Complaint herein:

I. JURISDICTION AND VENUE

1. This is an action for harm about to be inflicted on plaintiffs by state defendants, under color of law, occurring as a result of defendants' decision to close the Altonna

Center, a state-run institutional interim care facility for the mentally retarded (“ICF/MR”), announced 22 December 2004 and effective, on information and belief, on or about 1 July 2005. It arises under:

- (a) the Civil Rights Act, 42 USC § 1983;
  - (b) the Americans with Disabilities Act (“ADA”), 42 USC § 12132;
  - (c) § 504 of the Rehabilitation Act, 29 USC § 794 (“§ 504”), and the waiver of state sovereign immunity enacted in 42 USC § 2000d-7(a)(1), and
  - (d) various Medicaid federal statutes and regulations incorporated into Pennsylvania law.
2. By virtue of the foregoing, this Court enjoys subject matter jurisdiction under 28 USC §§ 1331; 1343(a)(3), and 1367(a).
  3. All defendants are sued in the venue of Altoona Center, where a substantial part of defendants’ activities giving rise to the claims alleged herein occurred.
  4. By virtue of the foregoing, venue is properly placed in this District pursuant to 28 USC § 1391(b)(1-2).

## II. THE PARTIES

5. All named plaintiffs are residents of the Altoona Center who appear by their guardians; statutory decision makers, or family member/next friends.
6. Ten plaintiffs were transferred to Altoona from Ebensberg Center, and wish to

remain at Altoona Center (the "Ebensberg Plaintiffs"). They are:

<u>Individual</u>	<u>Representative(s)</u>
(a) Kathleen Montgomery	William V. Montgomery, Jr.
(b) Ed Thearle	David R. Thearle
(c) Patrick Gavigan	Ann M. Landefeld
(d) Michael Massimo	Jo-Anne Overdorf; Richard Overdorf
(e) Darren Wineland	David Wineland; Alta Wineland
(f) Lorna Kuhn	Arlene DeArment
(g) Philip McGann	Paul McGann; Mary Jane McGann
(h) George Williams, Jr.	Betty Smith
(i) Ronald Lee Sveda	Joseph Sveda, Jr.

7. Other plaintiffs are residents of Altoona Center, and have communicated a wish to remain there. They are:

<u>Individual</u>	<u>Representative(s)</u>
(a) Robyne Wheeler	Beverly Wheeler
(b) Constance Fox	Natalie Fox
(c) Edward Hampton	Dora Hampton; Lloyd Hampton
(d) Linda Alexander	Frances Alexander, Mary Alexander

(e)	Elizabeth Babcock	Raymond Babcock, Virginia Babcock
(f)	Paul Carroll	Catherine Carroll
(g)	Kathie Centi	August Centi, Winifred Centi
(h)	Helen Ruth Clark	Gertrude Schreyer
(i)	Stacy Dodson	Annetta Gonsman
(j)	Richard Emerick	Dewey Emerick, Virginia Merritt
(k)	Glenna Fishel	Darwin Fishel
(l)	Gary Gosnell	Gary Gosnell
(m)	Nancy Gustafson	Susan Starr
(n)	Sharon Harrison	Fred Harrison
(o)	Peggy Kelly	Larry Kelly
(p)	Mary Jane Kies	Frances Irvin
(q)	Jack Kirschbaum	Darlene Saltsgiver
(r)	Rose Long	Mary Jones
(s)	Roger Losey	Rodney Losey
(t)	Robert Luciano	Frank Luciano
(u)	Marianne Marino	Elizabeth Marino
(v)	Mary Ellen Martin	Clara Lindsey
(w)	Edmond McAlee	Rosamund McAlee
(x)	Charles McConnell	Richard McConnell, Barbara

	McConnell
(y) Robert Minor	Dianne Fox
(z) Gertrude Mills	William Mills
(aa) Frances Neiburg	Esther Gordon
(bb) Wanda Pabian	Louise Pabian
(cc) Kathy Jo Quinn	Kathryn Quinn
(dd) Ronald Replogle	Bonnie Wood
(ee) Curtis Rheam	Betty Heimbaugh
(ff) Dean Santella	Barry Singleton
(gg) Kimberly Schweitzer	Elsie Kotapish
(hh) John Shea	Mary Ann Boylan
(ii) Jeane Slaven	James Slaven
(jj) Philip Smith	Nancy Hohl
(kk) Sylvia Smith	Lillian Smith
(ll) Margie Spory	Hattie Williams
(mm) John Stevens	Mary Stevens
(nn) Doris Stewart	Joseph Stewart
(oo) Ronald Stewart	Rick Stewart
(pp) Vada Strait	Lynn Strait
(qq) Margaret Wyland	Edward Wyland, Marian Wyland (G)

(rr) Dianne Zvonkovich Dorothy Zvonkovich

8. A number of other Class Member plaintiffs have no guardians or family members/next friends to represent their interests.

- a. Jeffrey Baldi
- b. Helen Brown
- c. Catherine Clark
- d. Jerome Crawford
- e. John Davis
- f. Anita DePeter
- g. Bernadette Ford
- h. Michael Harris
- i. Luberta Hill
- j. Anthony Johnson
- k. Michael Lee
- l. Norma Mumford
- m. Peter Proper
- n. Terry Smothers

9. The following are named as defendants herein:

(a) Edward G. Rendell is Governor of the Commonwealth of Pennsylvania Governor Rendell is sued in his official capacity only.

(b) The Department of Public Welfare of the Commonwealth of Pennsylvania (“DPW”). It receives federal funds under § 504 of the Rehabilitation Act, 29 USC § 794.

(c) Estelle B. Richman is Secretary of DPW. Estelle Richman is sued in her official capacity only.

(d) Kevin T. Casey is Deputy Secretary of DPW for Mental Retardation. Kevin Casey is sued in his official capacity only.

### III. CLASS ACTION ALLEGATIONS.

10. Plaintiffs bring this action pursuant to the Civil Rights Act, 42 USC § 1983; the Americans with Disabilities Act (“ADA”), 42 USC § 12132; § 504 of the Rehabilitation Act, 29 USC § 794 (“§ 504”), and the waiver of state sovereign immunity enacted in 42 USC § 2000d-7(a)(1), various Medicaid federal statutes and regulations incorporated into Pennsylvania law and the Constitution of the United States, on behalf of a Class consisting of themselves and all other persons who are residents of the Altoona Center as of November 1, 2005.
11. Joinder of the entire Class is impracticable because the Class Members are severely or profoundly retarded persons unable to give their consent except through guardians or family members, and several of the Class Members have no known guardians or family members and hence can not consent to being individually joined (The plaintiffs seek appointment of guardians for all such class members.)



12. Plaintiffs' claims are typical of the claims asserted on behalf of the Class.
13. Plaintiffs do not have any interests that are adverse or antagonistic to those of the Class.
14. Plaintiffs will fairly and adequately protect the interests of the members of the Class. Plaintiffs are committed to the vigorous prosecution of this action and has retained counsel competent and experienced in this type of litigation.
15. Plaintiffs do not seek damages and hence, the burden and expense of prosecuting litigation of this nature makes it unlikely that members of the Class would prosecute individual actions. And if they did, such individual prosecution would be impracticable as well as inefficient.
16. Plaintiffs are not aware of any pending litigation concerning the claims herein.
17. This Court is the most appropriate forum for adjudicating the claims at issue, which arise under federal law.
18. Plaintiffs do not anticipate any difficulty in the management of this action as a Class action.
19. There are many questions of law and fact common to the Class which predominate over any questions which may affect individual members. The predominant common questions of law and fact include, among others:
  - (a). Whether Defendants are liable for violation of the Civil Rights Act, 42 USC § 1983;

(b) Whether Defendants are liable for violation of the Americans with Disabilities Act (“ADA”), 42 USC § 12132;

(c) Whether Defendants are liable for violation of § 504 of the Rehabilitation Act, 29 USC § 794 (“§ 504”), and the waiver of state sovereign immunity enacted in 42 USC § 2000d-7(a)(1);

(d) Whether Defendants are liable for violation of various Medicaid federal statutes and regulations incorporated into Pennsylvania law;

(e) Whether Defendants are liable for violation of the Constitution of the United States; and

(f) Whether Plaintiffs and the Class members are entitled to equitable and injunctive relief.

20. A Class action is superior to all other available methods for the fair and efficient adjudication of this controversy.

21. Plaintiffs seeks declaratory and injunctive relief, attorneys' fees and expenses as permitted by law, on behalf of themselves and the Class.

#### IV. COMMON FACTUAL ALLEGATIONS.

22. All plaintiffs reside at the Altoona Center or resided there as of October 1, 2005.

23. The Altoona Center is an Intermediate Care Facility for the Mentally Retarded

("ICF/MR") operated by the Commonwealth of Pennsylvania. It is authorized to serve 120 Residents, though its current occupancy is approximately 88. The Altoona Center is the newest of Pennsylvania's ICF/MR facilities. The Altoona Center also has the lowest per capita operating cost of any Pennsylvania ICF/MR.

24. All plaintiffs are appropriately designated eligible for state run ICF/MR institutional level of care.
25. All plaintiffs are unwilling to be transferred to community placements of any type.
26. All plaintiffs are diagnosed as in need of state-run ICF/MR institutional care.
27. All plaintiffs are medically and developmentally inappropriate for community placement.
28. All plaintiffs are medically and emotionally fragile and inappropriate for transfer to community placement.
29. All plaintiffs are in need of continuous care by multi-disciplinary on-site staff.
30. All of the plaintiffs is severely or profoundly mentally retarded. In addition each of them has various other serious health problems which require constant monitoring and frequent attention. Specifically their average mental age is somewhere between 1.5 and 1.8 years. Of the 89 residents only 12 can walk by themselves. Only one can full speak. Only 12 can speak at all. 11 of them receive all their nourishment from tubes directly into their stomachs. 70 are completely dependent on others for all their care.

30. All of the plaintiffs have been evaluated by their treating professionals within the last year and determined to be in need of ICF/MR treatment. None has been determined by their treating professionals as appropriate for community placement.
31. The guardians and/or family members of all plaintiffs who have such persons have not given their consent to moving them from the Altoona Center.
32. Fourteen Class Members have no known family members and the defendants regard Alan Bellomo, Director of the Ebensburg and Altoona Centers as their substitute decision maker.
33. Scientific research demonstrates that mentally retarded persons in community placement are at approximately 75% greater risk of dying than similar persons in institutional care.
34. The Auditor General of the Commonwealth of Pennsylvania has issued a report concluding the system of “community placements” that defendants seek to place plaintiffs and other class members in is seriously flawed; that employees of were woefully inadequate to ensure the health and safety of the residents, that DPW’s investigation and oversight of allegations of abuse and unexpected deaths of residents in community placements and “that DPW failed to ensure that services were provided in a way that enhanced the health and well-being of residents” and that some such homes were not clean and safe.
35. All plaintiffs receive at the Altoona Center a high level of access to the normal

activities of non institutionalized persons. All are given the opportunity to perform some sort of task that allows them to earn their own money, and have real, meaningful relationships with the community of Altoona. There are usually twice daily outings. Several plaintiffs have become members of area churches and participate in them. They regularly go shopping. Recently some of them visited the Humane Society and they go to baseball games at virtually every Altoona Curve home stand. The plaintiffs are also assisted and permitted to participate in various other community activities. Residents even participate in raising money for local charities for needy families. They recently had a week-long camping trip to a local state park.

36. On January 6, 2005 defendants Estelle Richman and DPW announced their decision to close the Altoona Center and transfer 45 plaintiffs to community placements and 45 plaintiffs to the Ebensburg Center, another state ICF facility located in remote Ebensburg Pennsylvania. At the same time defendants announce the closing of the Harrisburg State Hospital
37. The stated reasons for the closings were to “return the millions of dollars used to run more restrictive, costly services at the facilities to the community to develop and sustain support programs and continue to improve the mental health and disability service delivery system of the Commonwealth.” However the services to the plaintiffs at the Altoona Center are less restrictive than those they are likely to receive

elsewhere and providing service to them at Ebensburg or in so called community placements will be more expensive than providing them at the Altoona Center.

38. On or about January 6, 2005 defendant Kevin T. Casey wrote a letter discussing the closing of the Altoona Center. In which he stated that there were individuals and/or their families at the Altoona Center who have requested community placement He stated that the Office of Mental Retardation (OMR) plans to create community placement opportunities for those requesting placement from the Altoona and Ebensburg Centers.
39. A mere handful of residents or their families have voluntarily requested such community placements. However in contradiction to Mr. Casey's statement the defendants have ordered the placement of approximately 45 Altoona Center residents in community placements without their consent.
40. The defendants have also instructed various county Mental Health/Mental Retardation agencies to make placements of the 45 plaintiffs designated for placement in community settings. This decision was made without regard to the needs of the individual plaintiffs, their individual support plans or their rights to the least restrictive placements that their treating professionals find appropriate and the plaintiffs agree to.
41. All of the plaintiffs will in fact be forced into more restrictive placements as a result of defendants actions. None of the plaintiffs will have access to the same level of

regular community participation and integration if they are transferred to community placements or to Ebensburg.

42. Defendants know or should know of the medical and mental condition of each plaintiff.
43. Defendants know or should know of the Individual Support Plans and the needs of each plaintiff.
44. Defendants know or should know of the extent of community contact and integration of each plaintiff at Altoona Center.
45. Defendants know or should know that the extent of community contact and integration available to the plaintiffs in the various locations to which they seek to transfer them are not equal to that available to the plaintiffs at Altoona Center.
46. Defendants know or should know of the increased danger of death, abuse and neglect that the plaintiffs will be subjected to in a substantial number of community placements.
47. Defendants know or should know that some of the plaintiffs were transferred from Ebensburg Center because they were reportedly abused when they resided there in the past.

V. COMMON ALLEGATIONS OF RIGHTS AND DUTIES.

48. Each plaintiff has a constitutional right life and liberty interest in, and statutory entitlement to, the least restrictive placement, appropriate placement and appropriate

medical and therapeutic treatment from the Commonwealth of Pennsylvania.

49. Defendants are under a constitutional and statutory duty to:

- (a) effectuate the placement of plaintiffs in the " most integrated setting appropriate to the needs of qualified individuals with disabilities" a setting that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." (28 C.F.R. pt. 35 app. A.);
- (b) not place plaintiffs in more restrictive placements than they currently enjoy;
- (c) effectuate appropriate institutional placement for each plaintiff;
- (d) propose a community placement appropriate for the plaintiff only where medically and therapeutically appropriate upon an impartial multidisciplinary evaluation;
- (e) obtain the input and consent of plaintiff, plaintiff's guardian or plaintiff's family for such transfers;
- (f) propose an institutional placement appropriate for the plaintiff only where medically and therapeutically appropriate upon an impartial multidisciplinary evaluation;
- (g) obtain the input and consent of plaintiff, plaintiff's guardian or plaintiff's family for such transfers.

VI. FOR A FIRST CAUSE OF ACTION.



50. Plaintiffs repeat and reallege ¶¶ 1-49.

51. Because the placements being forced upon the plaintiffs are more restrictive of their ability to interact with non-disabled persons and the community and they are being made without the consent of the plaintiffs or their guardians or families and in spite of the fact that the treating professionals have not made individualized assessments that such placements would benefit the individual plaintiffs, such placements violate the Americans with Disabilities Act and the Rehabilitation Act.

52. The plaintiffs are therefore entitled to injunctive and declaratory relief providing that the defendants shall not transfer them without meeting the requirements that:

(a) such placements will be no more restrictive of their rights than their current placement;

(b) such placements will not be recommended unless the treating professionals conclude that such a placement is in the best interests of the individual plaintiffs;

(c) the plaintiffs by their guardians or families wish such transfers.

VII. FOR A SECOND CAUSE OF ACTION.

53. Plaintiffs repeat and reallege ¶¶ 1-52.

54. The Commonwealth of Pennsylvania has voluntarily assumed certain obligations under federal law in return for federal funding under the Medical Assistance Program authorized by 42 USC 1396, et seq.

Those obligations include:

- (a) choice of an ICF/MR institutional placement, subject to hearing, under 42 USC §1396n and 42 CFR § 441.302(d);
- (b) provision of ICF/MR services under 42 USC §§ 1396a(a)(10) and 1396d(a)(15);
- (c) competent evaluation for placement in an institutional ICF/MR facility under 42 CFR § 483.440(b)(3);
- (d) a continuous active treatment program as defined in 42 CFR §483.440(a)(1).

55. All plaintiffs receive assistance under the Medical Assistance Program and are owed the duties alleged in the preceding paragraph.

56. Defendants' are violating their duties to the plaintiffs under the Medical Assistance Program by their acts and omissions alleged at 22 to 51, above.

Plaintiffs are entitled to declaratory and injunctive relief:

- (a) directing that defendants abide by treatment plans in the required Multidisciplinary Evaluations ( known as Functional Assessments and Individual Support Plans at Altoona Center) previously performed on the plaintiffs until and unless such new Multidisciplinary Evaluations.

- (b) upon evaluations, permitting each plaintiff to choose:

- (i) to accept or reject the recommendation of the Multidisciplinary

Evaluation; and

(ii) to receive treatment in accord with the recommendations of the Multidisciplinary Evaluation either at a state-run ICF/MR or such other facility as the Multidisciplinary Evaluation and the plaintiff deem appropriate.

VIII. FOR A THIRD CAUSE OF ACTION.

57. Plaintiffs repeat and reallege ¶¶ 1-56.
58. The plaintiffs are all profoundly or severely retarded and have many other health problems. They are at the very low end of the spectrum of mentally ill and mentally retarded citizens. Their mental age averaged under two years. Very few of them can speak at all. They are unable to articulate and/or their medical and mental problems and needs. Most of them have very limited mobility, and some have none. They are unable to care for themselves in even the most basic ways. As a result they are very much at the mercy of the persons who provide them with care. They are defenseless against many forms of abuse and neglect which can lead to their injury or death.
59. Some of the plaintiffs were also previously transferred from Ebensburg because, as defendants employees indicated, there was at least a belief that they were being abused there.
60. Defendants know or should know that placing the plaintiffs in so called community placements will substantially increase their likelihood of injury and death from

neglect, error and other causes.

61. Such a situation implicates the plaintiffs' constitutional right not to be deprived of life or liberty without due process of law.

IX. FOR A FOURTH CAUSE OF ACTION.

62. Plaintiffs repeat and reallege ¶¶ 1-61.
63. By reason of their serious mental retardation all plaintiffs are incapable of giving or withholding their consent to the actions of the defendants except through a guardian or family member.
64. As to those individual plaintiff class members for whom defendants recognize no guardian or family member to speak on behalf of the plaintiffs, they have no ability to participate in decisions as to their placement or care, as required by federal law.
65. Plaintiffs therefore request the Court to appoint a guardian or guardians for them for purposes of participation in this action.

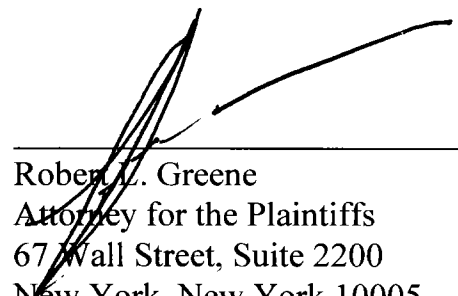
X. CONCLUSION.

WHEREFORE Plaintiffs seek:

- (a) declaratory and injunctive relief as set forth herein for themselves and all members of the class;
- (b) court appointment of a guardian or guardians for those class members for whom defendants recognize no guardian or family member to speak on behalf of said plaintiffs;

(d) such other and further interim and final relief as may be just.

Dated: November 2, 2005  
New York, New York



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(Admission to the Bar of the U.S.  
District Court for the Western District of  
Pennsylvania pending.)